

EASTERN DISTRICT OF KENTUCKY
TENDERED

DATE: 8/17/09
LESLIE G. WHITMER
CLERK U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

EQUAL EMPLOYMENT OPPORTUNITY)
COMMISSION,)

Plaintiff,)

v.)

WAL-MART STORES, INC.)

Defendant.)

CIVIL ACTION NO.
01-339-KKC

BRIEF IN OPPOSITION TO
WAL-MART'S MOTION FOR SUMMARY JUDGMENT

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,)	
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WAL-MART STORES, INC.)	
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**BRIEF IN OPPOSITION TO WAL-MART'S
MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION.

The Equal Employment Opportunity Commission (“EEOC”) opposes Wal-Mart Stores, Inc.’s (“Wal-Mart”) Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56 because there are genuine issues of material fact best left to a jury to resolve. The evidence in this discriminatory hiring case unequivocally shows that since at least January 1998, Wal-Mart has perpetrated a pattern or practice of sex discrimination against female job applicants at its Distribution Center 6097 in London, Kentucky in violation of Title VII of the Civil Rights Act of 1964, as amended (“Title VII”), 42 U.S.C. § 2000e et seq.

In its ill-fated quest for summary judgment, Wal-Mart ignores volumes of critical evidence, mischaracterizes the evidence it did cite, and relies on improper evidence.¹ Wal-Mart further misconstrues applicable law, and turns the summary judgment standard on its head. The

¹ The EEOC has moved contemporaneously with this opposition brief to exclude Wal-Mart’s designation of improper evidence in support of its summary judgment motion.

Court should decline Wal-Mart's invitation to accept largely disputed facts and improperly draw inferences in Wal-Mart's favor rather than the non-movant EEOC's favor.

The EEOC demonstrates three categories of disputed fact that bar summary judgment. First, the EEOC presents overwhelming statistical evidence showing a gender-based disparity in hiring. Second, the EEOC enhances its statistical evidence with compelling evidence of gender stereotyping and entirely subjective hiring processes used by Wal-Mart's interviewers. Third, the EEOC offers abundant anecdotal evidence demonstrating discriminatory hiring practices in the form of official admissions and testimony from female applicants and former employees. This evidence is more than sufficient prima facie evidence of a pattern or practice of disparate treatment discrimination. Both the applicable law and the evidence in this matter demonstrate that there are genuine issues of material fact for trial that preclude summary judgment in Wal-Mart's favor as a matter of law, and the EEOC respectfully requests that the Court deny Wal-Mart's motion.

II. SUMMARY JUDGMENT STANDARD.

Summary judgment is only appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Cox v. Kentucky DOT, 53 F.3d 146 (6th Cir. 1995) (citing Fed. R. Civ. P. 56(c)). It is incumbent upon the moving party "to show 'clearly and convincingly' the absence of any genuine issue of material fact." Sims v. Memphis Processors, Inc., 926 F.2d 524, 526 (6th Cir. 1991) (quoting Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986)). Summary judgment is not appropriate when such probative evidence "presents a sufficient disagreement to require submission to a jury." Nichols v. All Points Transport Corp. of Michigan, Inc., 364 F.

Supp. 2d 621, 624 (E.D. Mich. 2005) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)).

At this initial juncture of a Title VII pattern-or-practice case,² a court must “focus solely on whether there is sufficient evidence demonstrating that defendants had in place a pattern or practice of discrimination during the relevant time period.” See Thiessen v. GE Capital Corp., 267 F.3d 1095, 1106-1109 (10th Cir. 2001) (quoting Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 360 (1977)). In other words, plaintiffs “must establish through a common method of proof that the employer is liable to the class for the pattern or practice of discrimination. This is usually done with a combination of statistical evidence regarding the defendant’s treatment of the class as a whole and anecdotal testimony from individual class members regarding specific acts of discrimination.” Taylor v. D.C. Water & Sewer Auth., 205 F.R.D. 43, 46 (D.D.C. 2002) (citing Teamsters, 431 U.S. at 336). Irrespective of the underlying substantive claims, the Court must view the evidence in a light most favorable to the nonmovant, EEOC, as well as, draw all reasonable inference in the EEOC’s favor. See Bender v. Southland Corp., 749 F.2d 1205, 1210-11 (6th Cir. 1984); Cloke v. West Clermont Local School Dist. Bd. of Educ., 409 F. Supp. 2d 927, 932 (S.D. Ohio 2006) (“the district court may not weigh evidence or assess the credibility of witnesses in deciding the motion.”); and E.E.O.C. v. Burlington Medical Supplies, Inc. 536 F. Supp. 2d 647, 653 *1 (E.D. Va. 2008) (court applied “well-established” summary judgment principles to deny summary judgment motion in Title VII pattern or practice claim).

² Title VII pattern or practice analysis involves two phases: the initial phase, in which the court will focus its attention on whether unlawful discrimination “has been a regular procedure or policy followed by an employer or group of employers”; and a second phase during which the court determines appropriate individual remedies. Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 360-61 (1977); See also Thiessen v. GE Capital Corp., 267 F.3d 1095, 1106 (10th Cir. 2001).

III. STATEMENT OF MATERIAL FACTS RAISING GENUINE ISSUES.

A. Administrative Charge and Investigation.

On or about October 8, 1998, Janice Smith sought a transfer from Wal-Mart's London Kentucky Store to an order filler position at Wal-Mart's London Kentucky Distribution Center 6097 ("DC 6097"). (Janice Smith Application Packet attached as Exhibit 111.) Wal-Mart denied her request. (Id.) Frustrated by Wal-Mart's third denial and having witnessed the transfers of numerous less or equally qualified male co-workers (Smith Investigative File Statement attached as Exhibit 136), Smith filed a charge of discrimination with the EEOC on March 8, 1999, alleging that Wal-Mart had discriminated against her based upon sex by denying her transfer to DC 6097. (Smith Charge attached as Exhibit 135.) She alleged that: (1) the interviewer was disinterested and tried to discourage her; (2) she was falsely told that all "dry side" positions had been filled; and (3) no females work in the freezer department. (Id.; See also, Janice Smith Dep. at 209.)³ The EEOC provided notice of the charge to Wal-Mart on January 29, 1999, advising that Smith "contends she was not selected because of her sex, female, in violation of Title VII of the Civil Rights Act of 1964." (Notice of Charge attached as Exhibit 139.)

The EEOC conducted an investigation of Smith's allegations, obtained information on a class of hires and applicants, and concluded that Smith and a class of women had been denied employment as order fillers at DC 6097 because of their gender. (Determination attached as Exhibit 132.) Evidence gathered during the investigation revealed that despite Smith indicating a willingness to work in the freezer (See Smith Application Packet, Ex. 111, cover letter), her Wal-Mart interviewer wrote on her application "not completely confident that the job could be done

³ All cited deposition excerpts are designated in alphabetical order as Exhibits 1-95.

for a 6 month period.” (Ex. 111, third interview comment sheet.)⁴ Evidence also revealed that other female outside applicants who applied for employment at Wal-Mart were rejected in favor of male applicants. (Ex. 132.) The EEOC then attempted conciliation on behalf of Smith and five other identified outside applicant class members, Tina McKinley, Linda McMillion, Theresa Mills, Brenda McKinney, and Melanie Sexton who had sought “any position,” a “material handler position,” or a “distribution” position. (See Conciliation Agreement and application files collectively attached as Exhibit 128.) Wal-Mart, however, summarily rejected the opportunity to engage in the conciliation process. (Wal-Mart’s December 18, 2000 correspondence is attached as Exhibit 129.)

B. The EEOC’s Lawsuit.

After Wal-Mart declined to engage in conciliation, the EEOC filed suit on August 24, 2001, alleging that Wal-Mart engaged in disparate treatment based on sex and had failed to hire female applicants for vacant positions since at least January 1, 1998. (DE # 1.) Wal-Mart sought to limit the temporal scope of the EEOC’s suit to discrimination occurring prior to February 15, 2005. (DE # 119.) The Magistrate Judge recommended such a limitation and denied discovery post February 15, 2005. The EEOC’s Objection to this Recommendation is still pending. (See DE # 129 and 131.) Contrary to Wal-Mart’s suggestion (Defendant’s “D.’s” Memo at n. 2), however, no such limitation has been placed on the January 1, 1998, commencement date nor has the EEOC ever agreed to such a limitation. (See DE # 131 at n.1 and discussion in Section IV(F) below.)

C. Employment at DC 6097.

Throughout the relevant time period, Wal-Mart regularly advertised for and interviewed applicants for entry level warehouse positions at DC 6097. (See Reeves Dep. at 150-156, Glover

⁴ Smith vehemently denies such a conversation. (See Ex. 135 and J. Smith Dep. at 286-87.)

Dep. at 64-65; Sibert Dep. at 26, B. Sizemore Dep. at 15-16, T. Stutler Dep. at 24; S. Smith Dep. at 29; C. Bargo Dep. at 80-83; M. Asher Dep. at 46, 50; R. Carr Dep. at 19-21; J. Burton Dep. at 9, 14.) Both managers and non-managerial employees interviewed applicants for entry level positions. (Biondo Dep. at 101-02; Elliott Dep. at 17; Reynolds Dep. at 14-16; Karr Dep. at 34; M. Lawson Dep. at 28, 36-37; Reeves Dep. at 14-15, Sibert Dep. at 26-27.) Wal-Mart interviewers used a three interview process, and an applicant could be excluded at any stage. (Gulock Dep. at 52-56; Reeves Dep. at 14-15; and Rose Dep. at 29, 40, 53.) Wal-Mart revised its interview process in 2002, following the EEOC's lawsuit, but continued to use a three interview process. (Gulock Dep. at 87-89.) When Wal-Mart interviewers conducted interviews, they usually did not know what position they were interviewing for (Beshears Dep. at 23-24; Burke Dep. at 30; Earls Dep. at 57-58; Lawson Dep. at 42; Sibert Dep. at 27; B. Sizemore Dep. at 16) and all applicants/transfers⁵ were interviewed using the same interview forms (B. Sizemore Dep. at 16; Beshears Dep. at 24; Lawson Dep. at 43.) Regardless of the position applied for, applicants were interviewed for warehouse work, most commonly the order filler position.⁶ (See Application Packets of Carolyn Crook, Beverly Bowdler, Laura Scarce and Rosella Bowling, collectively attached as Exhibit 97.)

There are essentially no minimum requirements for positions at DC 6097 (Glover Dep. at 78-79, Gulock Dep. at 65-69) and no strength or physical abilities tests are administered to applicants (Gulock Dep. at 70-71, B. Sizemore Dep. at 22, Earls Dep. at 53-54). The order filler position "is not one that requires a lot of certain types of skills. It's an entry level . . ." position.

⁵ The "Third Interview" form was used for transfer applicants. See Janice Smith Application Packet, Ex. 111. See also, Rose Dep. at 218.

⁶ Human Resources Manager and former General Manager, Mike Giles, testified that 98% of the positions he filled from 1998 through 2001 were for the order filler positions. (Giles Dep. I at 33-37, 68.) Mr. Giles was deposed twice, first on December 12, 2006 and later on April 15, 2009. For ease of reference, Mr. Giles first deposition will be cited as "Dep. I" and his later deposition as "Dep. II."

(Glover Dep. at 78.) In fact, dependability is one of the key applicant characteristics considered for the position. (*Id.* at 78-80.) According to one previous area manager, Vincent Biondo, during the interview process, a former bank teller stood on equal footing with a former roofer. (Biondo Dep. at 72-73.) Wal-Mart looked for “happy people” with a “high energy level.” (*Id.* at 85-87.) New hires are extensively trained following hire, including training and certification in power equipment, if necessary. (Brewer Dep. at 43 and Brumley Dep. at 43-44. See also, Root Dep. at 34-35.)

Wal-Mart has never performed a job analysis on the order filler position other than the admittedly untimely limited analysis prepared by its expert, George Barrett in 2007 for litigation purposes.⁷ DC 6097 order fillers work in different areas, with the weight of the product varying considerably, by area. (Elliott Dep. at 48-52.) No minimum size or weight is necessary to perform the order filler position. (Giles Dep. I at 18, Beshears Dep. at 52-53, M. Lawson Dep. at 23-24.) Christina Shoemaker who is 5’5” and average framed currently order fills at DC 6097 and she testified that the average weight of items lifted by order fillers on the “dry” side was 20 pounds other than an occasional case of pickles or juice. (Shoemaker Dep. at 16, 25-26.) She indicated that the weight lifted by order fillers in other areas was similar. (*Id.* at 24.) Teresa Root, a current Wal-Mart manager who is 5’4” and small to medium framed and who, assisted in the dry order filling area as needed, testified that it did not take a particularly strong person to do the job and she thought that anybody could do the job. (Root Dep. at 32, 34.) Kathy Kimball Pence, a former order filler, weighed 92 pounds and was 5’2” but was nevertheless capable of performing the order filler position. (Pence Decl. Exhibit 135 at ¶ 1.) Order fillers assigned to the freezer area are given protective gear to wear, including bib, coat, gloves and face mask. (Shoemaker Dep. at 33-34.) Order fillers (and other warehouse employees) work either first,

⁷ See Exhibit 131, (D.’s Response to 7th RFP) at 6-7.

second or third shift weekdays or weekends. (Giles Dep. I at 108, 151-153.) Some employees work eight hour shifts five days a week and some choose to work longer shifts fewer days a week. (Giles Dep. I at 151-153.) See also examples of DC 6097 advertisements collectively attached as Ex. 133.

D. Statistical Evidence of Gender Discrimination at DC 6097.

During litigation, the EEOC retained renowned labor economist Dr. Burt Barnow. Dr. Barnow has a Ph.D. in economics and has taught,⁸ researched,⁹ consulted¹⁰ and testified¹¹ in the area of labor economics for more than thirty five years.

Dr. Barnow determined that from at least 1998 through at least 2004,¹² there was a statistically significant disparity in hiring by gender at DC 6097, after controlling for relevant variables via a regression analysis.¹³ (Barnow 4/30/09 Supp. Report at 1 and Barnow 3/20/09

⁸ Dr. Barnow is presently employed by Johns Hopkins University with a joint appointment to both its Institute for Policy Studies and its Department of Economics. He has been the Associate Director for Research since May 2000 and was Interim Associate Director for Research from 1998-2000. He teaches courses in program evaluation and labor economics. He has also taught graduate and undergraduate courses in labor economics at the University of Pittsburgh. (Barnow Resume at 1-2, attached as Exhibit 127.)

⁹ Dr. Barnow has written more than 70 articles/papers with additional papers forthcoming. (*Id.* at 16-23.)

¹⁰ Dr. Barnow was a consultant to the United States Department of Labor for nearly nine years and also consulted for the government of Australia. (*Id.* at 2.) For eight years, he served as a Vice President for the Lewin Consulting Group and was responsible for directing the research program in the fields of labor economics, evaluations of employment, training and social service programs, and education. (*Id.* at 1.)

¹¹ Since September 1, 1984, Barnow has been retained as an expert witness in more than 130 cases. (*Id.* at 24-25.)

¹² Dr. Barnow analyzed the 1998-2001 and 2002-2004 periods separately. (Barnow Dep. at 288-293.) He aggregated the data this way for three reasons: (1) the EEOC's lawsuit was filed in late 2001; (2) Wal-Mart changed its application process in or about 2002; and (3) the male/female differential in hiring changed beginning 2002. *Id.* He grouped the data in order to analyze like periods together. (*Id.* at 294-95.) He noted that breaking down data into one year periods has less statistical power and it would not be appropriate in this case to disaggregate the data in this manner and that his decision was supported by his past experience as well as authority in the field. (*Id.* at 299-301, 303, Barnow March 2007 Report at 4 and n.4.) Cited pages of the Barnow March 2007 Report ("Barnow Report") are attached as Exhibit 122.

¹³ Variables controlled for included previous Wal-Mart employment, employment gap, fired from previous job, transfer applicant, work permit, position applied for, education level, felony convictions, theft/fraud convictions, peak, full or temporary employment, shift availability, pay expectations, relative at Wal-Mart, missing work history, month and year of application, whether received interview(s), previous applications and previous work experience. (See Barnow Supp. Report Supp. Ex. B1, cited pages and exhibits attached as Exhibit 120.) Barnow structured his analysis based upon manager deposition testimony. (Barnow Dep. at 16-17.) All variables were discerned from the application itself. (See D.'s Memo at 28 in which Wal-Mart incorrectly suggests that Barnow did not capture work history, job responsibilities and pay expectation.)

Rebuttal Report at 12.¹⁴) Barnow did an application to offer analysis using the written information provided by each applicant to Wal-Mart.¹⁵ Due in substantial part to Wal-Mart's late and incomplete submission of applicant and hires related materials,¹⁶ Dr. Barnow retracted his July 2005 Report and submitted a March 2007 Report, a March 20, 2009 Rebuttal Report and an April 30, 2009 Supplemental Report, each incorporating late produced applicant materials and all concluding that there was a statistically significant disparity in hiring. Shortfall and class membership were determined based upon the regression analyses. (Barnow Report at 17-19, Barnow Rebuttal Report at 12 and Barnow Supplemental Report at 1.)

Dr. Barnow's analysis database was created from raw applicant materials¹⁷ provided by Wal-Mart.¹⁸ (Barnow Report at 7.) Dr. Barnow used both motor vehicle bureau and census name information to confirm the gender of applicants, performing additional work for the small

¹⁴ Cited pages of the Barnow March 20, 2009, Rebuttal Report are attached as Exhibit 121.

¹⁵ Each applicant, regardless of the stage advanced to during the hiring process, had an application designed by Wal-Mart which they filled out. Presumably, Wal-Mart included those criteria which it considered important for warehouse associates. (Barnow Dep. at 288.) Interview notes were not used by Dr. Barnow since all applicants did not have interview notes. (Barnow Dep. at 127-128.) Moreover, many were illegible and the documentation varied by interviewer. Furthermore, as discussed in Section IV(B) below, the notations placed by the interviewers on the applicant packets were in many cases incorrect and did not reflect the answers actually provided by the applicants or their true status. (See e.g., J. Smith Dep. at 286-87; Delph Dep. at 32; Y. Smith Dep. at 23.)

¹⁶ See DE # 399, at 3-4.

¹⁷ In response to the EEOC's February 8, 2002, request for applicant and hire records at DC 6097, Wal-Mart provided the EEOC, from 2002 through 2009, with hundreds of thousands of pages of handwritten and sometimes illegible and incomplete applicant materials, which did not contain applicant gender information.

¹⁸ Decisions concerning the construction of an applicant database from the voluminous, poor quality materials provided by Wal-Mart "were guided by practical considerations and [Barnow's] years of experience serving as a labor economist/statistician in similar cases and projects." (Barnow March 20, 2009, Rebuttal Report at 4.) Barnow indicated, "rather than paying me, a Ph.D. economist, to perform basic data entry functions, I concurred with the EEOC's decision that a contractor should be hired that specialized in data entry. The firm needed to be capable of performing a job of this size, have experience with large data entry jobs and be able to do the work at a competitive rate at a reasonable cost to the taxpayers." (*Id.* at 4-5.) The company selected, CompuPacific double key entered all data due to its poor quality. (*Id.* at 5.) After coding, the data, due to its voluminous nature, had to be placed into a data management system by Dr. Ibrahim Imam, a Ph.D. in mathematics and faculty member of the computer engineering and computer science department at the University of Louisville. (*Id.*) The Lewin Group, with whom Dr. Barnow was well acquainted and had worked with regularly in the past, then assisted Dr. Barnow by performing quality control work on the data and at Dr. Barnow's direction, constructing variables and converting the data to a format suitable for Dr. Barnow's use. (*Id.* and Barnow Report at 7-10, 13.) The Lewin Group also double key entered late produced applicant packets and "black book document information produced during 2006. (Barnow Dep. at 173-174.) The EEOC assisted both Dr. Barnow and the Lewin Group as requested, to locate gender, social security number, and miscellaneous other factual information to resolve ambiguous and/or incomplete data. (Barnow Report at 7-10 and Barnow Rebuttal Report at 5-6.)

number of applicants with conflicting gender information. (Barnow Report at 8, Barnow Rebuttal Report at n. 7, Barnow Dep. at 169-171.) The bulk of the applicant names, however, were common names highly associated with one particular gender.¹⁹ Dr. Barnow computed a shortfall in hiring females for the 1998 through 2004 time period of 229.46.²⁰ (Barnow Supplemental Report at 1 and Supp. Ex. B6.) More than 4000 female applicants were potentially affected by Wal-Mart's discriminatory hiring policies. A graphical depiction of the hiring at DC 6097 by year and gender reveals the gaping gender based hiring disparity. (Barnow Supp. Report at Supp. Ex. B3.) Women fared worse at every stage of the screening process. (Id. at Supp. Ex. B8.) Descriptive statistics over the seven year period show as follows:

The 1998 offer rate for male applicants was 10.73% but for females only .49%²¹. Id. at Supp. Ex. B2 Out of 333 new hires during 1998, only 5 were female.²² (Id.) For 1999, the offer rate for males was 7.15% but only 1.46% for females. (Id.) Out of 311 new hires during 1999, only 19 were female. (Id.) For 2000, the offer rate for males was 8.48% but only .33%

¹⁹ For example, Barnow's class list includes 79 class members with the first name of Angela, 69 class members with the first name of Melissa, 66 class members with the first name of Tammy, 63 class members with the first name of Mary, 61 class members with the first name of Jennifer, 60 class members with the first name of Donna, 57 class members with the first name of Lisa, 54 class members with the first name of Patricia, 51 class members with the first name of Brenda, 45 class members with the first name of Kathy, 44 class members with the first name of Teresa, 44 class members with the first name of Kimberly, 43 class members with the first name of Rebecca, 41 class members with the first name of Rhonda, 39 class members with the first name of Pamela, 39 class members with the first name of Crystal, 35 class members with the first name of Tina, 35 class members with the first name of Deborah, 35 class members with the first name of Amy, 33 class members with the first name of Sherry, 33 class members with the first name of Karen, 32 class members with the first name of Sharon, 32 class members with the first name of Barbara, 32 class members with the first name of Amanda, 31 class members with the first name of Michelle, 31 class members with the first name of Betty, 30 class members with the first name of Judy, 28 class members with the first name of Connie, 25 class members with the first name of Elizabeth, 25 class members with the first name of Bonnie. Other popular names include Carolyn, Tonya, Jessica, Debra, Sandra, Nancy, Misty, Sheila, Heather, Wanda, Susan, Shirley, Cynthia, Robin, Debbie, April, Peggy, Joyce, Christina, Paula, Melinda, Martha, Laura, Stephanie, Julie, Carol, Margaret, Janet, Christy, Vicki, Theresa, Samantha, Lori, Ruth, Regina, Penny, Helen, Cheryl, Beverly, Sarah and Loretta. (See Lindsay Williams Decl. ¶¶ 6-8, attached as Exhibit 137.)

²⁰ Barnow approximated shortfall for the period of January 1, 1998, through April 17, 1998 due to Wal-Mart's failure to provide applicant data for this period. Dr. Barnow was also unable to perform an analysis after 2004 due to Wal-Mart's failure to provide full data for 2005 or beyond and the Magistrate Judge's recommended determination limiting the temporal scope of this suit. (See Barnow Report at n. 2, 3, 5 and 14.)

²¹ Calculations were based upon incomplete 1998 materials produced by Wal-Mart.

²² See n.1.

for females. (Id.) Out of 294 new hires during 2000, only 3 were female. (Id.) For 2001, the offer rate for males was 7.18% but only .84% for females. (Id.) Out of 248 new hires during 2001, only 5 were female. (Id.) For 2002, the offer rate for males was 2.57% but only .53% for females. (Id.) Out of 64 new hires during 2002, only 2 were female. (Id.) For 2003, the offer rate for males was 3.97% but only 2.78% for females. (Id.) Out of 76 new hires during 2003, only 7 were female. (Id.) For 2004, the offer rate for males was 8.02% but only 6.43% for females. (Id.) Out of 186 new hires during 2004, only 22 were female. (Id.)

In response to Wal-Mart expert Mr. Freeman's Report, which asserted a small number of data errors and speculated about many more, Dr. Barnow reviewed each of Mr. Freeman's claims, making changes as necessary, to ensure that his database was as accurate as possible for his March 20, 2009 Rebuttal Report. (Barnow Rebuttal Report at 3, 6-12.) Many of the errors/claimed errors were due to problems with the applicant documentation collected and maintained by Wal-Mart. (Id. at 7-8 and n. 21, 22, 24, 25, 26, 30.) After making data corrections, Dr. Barnow reran *the same* analyses and still found a statistically significant disparity in hiring, by gender, at DC 6097 for the 1998 through 2004 time period. (Barnow Rebuttal Report at 12.) Dr. Barnow also verified his statistically significant results with three other Wal-Mart created databases: (1) a database of approximately 400 individuals prepared by Wal-Mart expert Mr. Freeman; (2) a database of more than 22,000 records prepared by the Woodward Hobson law firm; and (3) a database of approximately 4000 records also prepared by the Woodward Hobson law firm. (Barnow Rebuttal Report at 12-14.) In fact, the testing performed on Woodward Hobson's database of more than 22,000 records showed a tremendous disparity in the hiring of males vs. females, with the probability of obtaining such a disparity by chance alone at 1.736×10^{-67} , more than ten times less likely than being struck by lightning. (Id.

at 13 and n. 35.) Wal-Mart's 1998 through 2001 EEO-1 Reports also illustrate the gender based disparity.²³

In addition to finding a statistically significant disparity in hiring by gender, Dr. Barnow found that hiring was correlated with some,²⁴ but not all of the variables he controlled for. (See Barnow Supp. Report Supp. Exs. B4 and B5.) Dr. Barnow was not surprised by this result since his result was in accord with Wal-Mart manager testimony discussed in Section E below, concerning the high degree of discretion and the lack of strongly enforced rules in hiring. (Barnow 3/20/09 Rebuttal Report at 2 and Barnow Dep. at 256-57.)

E. Subjective Decision Making and Stereotyping at DC 6097.

The EEOC retained William T. Bielby, Ph.D. ("Dr. Bielby"), a highly respected sociologist and researcher with decades of expertise, to analyze whether findings from social science research could offer an explanation for the gender-based hiring disparity for entry-level positions at Wal-Mart's London, Kentucky Distribution Center No. 6097 ("DC 6097") during the relevant time period. (Bielby Report at 1.)²⁵ Dr. Bielby has a Ph.D. in sociology and has taught, researched and published peer-reviewed articles on gender stereotyping since the early 1980's. (Bielby Report, Exhibit B.)

After an extensive review of Wal-Mart manager deposition testimony, information produced in discovery and a wealth of scholarly publications (Bielby Report at 3-4, 7 and Ex. C),

²³ EEO-1 Reports bate stamp numbered WMDP 000089-000092 are attached as Exhibit 140.

²⁴ For example, during the 1998-2001 time period,, there was a statistically significant correlation (either positive or negative) between being a transfer, having an employment gap, being fired from a previous job, having less than a high school education, having college, availability evenings, availability Sunday, having a relative at Wal-Mart and previous months of work history. (Barnow 4/30/09 Supp. Report, Supp. Ex. B4.) During the 2002-2004 time period, there was a statistically significant correlation (either positive or negative) between previous Wal-Mart employment, employment gap, fired from a previous job, transfer, having less than a high school education, having college, availability Sunday, having a relative at Wal-Mart, missing work history and previous occupational group. (Barnow 4/30/09 Supp. Report, Supp. Ex. B5.)

²⁵ Cited Bielby Report excerpts are attached as Exhibit 124, and cited Bielby Rebuttal Report excerpts are attached as Exhibit 123.

Dr. Bielby opined that Wal-Mart's highly discretionary selection system with minimal oversight coupled with an overwhelmingly male workforce and the physical nature of warehouse jobs invites gender stereotyping and bias against female applicants. (Bielby Report at 17-27.) He also opined that Wal-Mart's EEO policies and practices and manager training were insufficient to minimize stereotyping and gender bias. (*Id.* at 27-32.) Dr. Bielby concluded that gender stereotyping offered a cogent explanation for the disparity in hiring between males and females at DC 6097 and that changes beginning in 2002, including changes in the hiring process and the filing of the EEOC's sex discrimination lawsuit resulted in a noticeable, but not complete, diminution in the gender-based hiring disparity. (*Id.* at 32-35 and Rebuttal Report at 30-36.)

1. Prior to 2002, Wal-Mart used an extremely subjective interviewing and hiring process and provided little guidance to its interviewers on selection decisions.

Prior to 2002, Wal-Mart managers and supervisors who conducted interviews for entry level positions received effectively no training on how to conduct an interview and objectively assess information solicited from applicants they interviewed. (Elliott Dep. at 18-19; Baker Dep. at 51-52; Burke Dep. at 27; Cobb Dep. at 19-20; Parmon Dep. at 31-32.) A majority of managers cite the only training they received was shadowing another manager a few times before conducting interviews themselves. (Beshears Dep. at 21; Dragoo Dep. at p. 23-24; Elliott Dep. at p. 18-19; Giles Dep. I at 149; Jones Dep. at 104-05; Mink Dep. at 8-9; Reynolds Dep. at 16-17; Van Jura Dep. at 13.) But, even so, Wal-Mart failed to train its managers to even record the reasons why a manager would not pass an applicant along during the interview process or why the candidate was rejected for hire. (Reynolds Dep. at 41-42.)

Wal-Mart did not provide its managers and supervisors with any guidelines for interviewing or exercising their discretion when making decisions to advance or reject applicants they interviewed. (Baker Dep. at 70-71; Beshears Dep. at 30; Burke Dep. at 26-27; Earls Dep. at

51-52, 170-71; Elliott Dep. at 21; Dragoo Dep. at 39; Glover Dep. at 29; Gulock Dep. at 33-34, 191; Jones Dep. at 105; Karr Dep. at 51, 64-65, 82-86; M. Lawson Dep. at 40-41, 79; Miller Dep. at 33-38; Mink Dep. at 34; Parmon Dep. at 25-29; Reeves Dep. at 37-38; Sibert Dep. at 24; Reynolds Dep. at 42; Riley Dep. at 20.) For instance, Vincent Biondo, Wal-Mart's general manager from approximately 1995-2000, explained that prior job "stability" was an important criteria that should be evaluated with each applicant but admitted that there was no measure or "blue print" he could give his managers to guide them in assessing "stability." (Biondo Dep. at 7, 98-100.) Wal-Mart neither reviewed interview sheets, evaluated interviewer skills or conduct during or after interviews, nor did it in any other way monitor or oversee the interview process during or after interviews were completed. (Beshears Dep. at 23; Biondo Dep. at 56-57, 84, 88-91; Burke Dep. at 29-30; Dragoo Dep. at 19-20, 22; Elliott Dep. at 26-27; Giles Dep. I at 81; Glover Dep. at 13-17, 29, 50; Hampton Dep. at p. 33; Karr Dep. at 51, 56-57; Mink Dep. at 11, 13; Parker Dep. at 29-30; Parmon Dep. at 21; Reeves Dep. at 217-18; Reynolds Dep. at 46; Riley Dep. at 19-20; Sibert Dep. at 45; B. Sizemore Dep. at 31, 38-39; and Van Jura Dep. at 18.)

2. *Prior to 2002, interviewers decisions were highly subjective and often employed gender stereotypes.*

With no meaningful training, oversight or evaluation, Wal-Mart interviewers relied on their own subjective discretion when determining which applicants would continue through the interview process and which ones would be rejected. Interviewers assessed applicants by "good attitude" (Baker Dep. at 59; Biondo Dep. at 85; Burke Dep. at 49-50; Van Jura Dep. at 18); "gaps in employment" (Earls Dep. at 147); whether they were "happy people" (Biondo Dep. at 85-86) motivated, self-driven, enthusiastic or eager (Dragoo Dep. at 36-37; Karr Dep. at 66, Riley Dep. at 21); or "the way . . . they looked at you and talked to you and acted" (Beshears Dep. at 31.) Some managers used their subjective interpretations of nonverbal body language to assess

interviewees. (Biondo Dep. at 86; Earls Dep. at 167-69; Giles Dep. I at 150-51; Reynolds Dep. at 26.) Another manager explained that making decisions about applicants during interviews, “it was a personal thing.” (Cobb Dep. at 21-22.) Yet another indicated that he “just sort of eyeballed it” (Holland Dep. at 120-21), and one agreed that he used his “own method” to determine when to pass an applicant along. (Parmon Dep. at 31.) Reeves succinctly concluded, “it’s a subjective decision” (Reeves Dep. at 37. See also, Biondo Dep. at 86; Cobb Dep. at 25-26; Earls Dep. at 170; Giles Dep. I at 140; Glover Dep. at 30-31; Karr Dep. at 69.) But, there was no information or answer to any interview question that would automatically exclude an applicant. (Karr Dep. at 62-67; Miller Dep. at 103-05; Reynolds Dep. at 102; Parmon Dep. at 26-32.) Moreover, in some instances, managers permitted some applicants the opportunity to fill in incomplete information during the interview process. (Karr Dep. at 36; Reeves Dep. at 53.) In other instances, Brian Elliott would also look at an applicant’s “physical characteristics” meaning whether they worked on the farm or played a lot of sports. (Elliott Dep. at 56. See also B. Sizemore Dep. at 37-38). Yet, Wal-Mart failed to use any sort of test to assess a candidate’s strength or physical abilities. (Giles Dep. I at 39; Karr Dep. at 66; Parmon Dep. at 10; B. Sizemore Dep. at 22; S. Campbell Dep. at 42; C. Tankersley Dep. at 57.)

Subjective decision making allowed gender stereotypes to permeate the Wal-Mart interviewers’ selection decisions during the interview process. Managers conducting interviews just assumed that women did not want the job (Baker Dep. at 73; Biondo Dep. at 31-32) or could not “cut it” to do the job (Elliott Dep. at 19; Van Jura Dep. at 21). And, young strong-looking men were the preferred ideal candidate. (Cobb Dep. at 26-27; Elliott Dep. at 22; Riley Dep. at 24-25; B. Sizemore Dep. at 37-38, 50-51; Van Jura Dep. at 22.) Jeff Akers, DC 6097’s general manager told Tom Van Jura, an Operations Manager from January 2001 to February 2002, not to

hire female order-fillers. (Van Jura Dep. at 19-21, 26-29.) In fact, Akers told him that “a lady is not going to be a good order filler” and yet another operations manager stated to Van Jura that they were looking for “young males who are fresh out of high school” (Van Jura Dep. at 7, 9, 20, 21, 27-29.) As a result, Van Jura did not recommend any female candidates to be hired as an order filler during his tenure interviewing candidates. (Van Jura Dep. at 20-21.)

Other managers allowed stereotypes to infect their decision making in more subtle ways including: giving preference to males who indicated involvement in sports (Parker Dep. at 44-45) or perceived the ideal candidate as eight feet tall with ten-foot-long arms (Beshears Dep. at 94; See also, Reynolds Dep. at 38). This subjective gender-stereotype driven interview process yielded a warehouse that was dominated by men. (Karr Dep. at 26-27; Reynolds Dep. at 70-72.)

3. In or about 2002, Wal-Mart improved its interview and training process but did not correct all deficiencies.

In 2002, Wal-Mart instituted a new “behavioral” model of interviewing applicants. (Elliott Dep. at 24; Giles Dep. II at 11-12.) The behavioral format of interviewing was designed to allow a more open ended questioning, which generated greater dialogue between interviewee and interviewer. (Karr Dep. at 44, 82-83; Parmon Dep. at 43.) This new behavioral model resulted in more successful interviewing of female candidates and more hiring of females into entry level positions in DC 6097. (Giles Dep. I at 69, 70, 73.) It remained open to, nevertheless, the subjective impressions of the interviewers. (Karr Dep. at 84-85.) In fact, Wal-Mart still did not give interviewers any guidance concerning how to rate answers to questions given during behavioral interviewing (Parmon Dep. at 38-40), managers also did not know what kind of a score was necessary for an applicant to be successfully passed on or hired (Parmon Dep. at 41-42) and Wal-Mart continued to select applicants for entry level warehouse positions without objectively assessing their strength and/or physical abilities. (Karr Dep. at 81-86;

Gulock Dep. at 89-90.)

F. Anecdotal Evidence of Gender Animus in Wal-Mart's Male Dominated Workplace.

1. *Wal-Mart's hesitancy to hire female applicants was both well known and clearly articulated.*

Wal-Mart employees and/or supervisors told numerous female applicants that women were generally not wanted for warehouse positions at DC 6097. Kimberly Bebout's interviewer told her the DC typically hires "young men between the ages of 18 and 25." (Bebout Dep. at 17, 71.) Constantine Bargo's interviewer asked "didn't [she] think [she] could find a job elsewhere as a cashier or a secretary?" (Constantine Bargo Dep. at 107-08.) He also stated women needed to "leave these jobs alone for men." (*Id.* at 108.) Barbara Napier was told during her interview "[w]e usually don't hire women for this kind of work." (Napier Dep. at 73.) Sue Lawson's interviewer told her that most of the time Wal-Mart does not hire women to work in the freezer. (Sue Lawson Dep. at 26, 106, 167.) Laura Ludeman's interviewer told her they usually did not hire women on the floor. (Ludeman Dep. at 78-79.) Jane Lee Smith was told by DC supervisor Rick Combs that the DC does not hire women. (Jane Smith Dep. at 22.) Shirley Vaughn's interviewer told her Wal-Mart was looking for "strong men" to do the job, and that he simply did not think she could do it. (Vaughn Dep. at 103-04.) When Maria Malicoat-Howe turned in her application at the DC's front office, she was told by several male employees, "we don't hire women here." (Malicoat-Howe Dep. at 57.) A man who appeared to be a supervisor laughed and agreed, "we don't hire women." (*Id.* at 58.) DC Manager Mike Giles told Carol Moore he did not think order filling was a good job for a woman because there is a lot of heavy lifting and the temperatures are extremely cold. (Moore Dep. at 41-42, 48.) Melinda Branum told Mike Giles she would do any job available, even order filling. Giles laughed at her and said the jobs that

they had there were not for women and a woman could not do it. (Branum Dep. at 60.)

Wal-Mart employees and agents likewise articulated Wal-Mart's hesitancy to hire female applicants. Ronda Huber was told by an employee of Manpower, a temporary employment agency, that DC 6097 would not hire women. (Huber Dep. at 58.) When Karen Powell handed in her application at the DC's front office, a female office employee told her that women do not work in the warehouse. (Karen Powell Dep. at 32-34.) Louise Hubbard overheard male employees comment at DC 6097, "women [cannot] handle the work" and "Wal-Mart generally picks the men...over the women." (Hubbard Dep. at 23.) Teresa Botkins spoke to a female Wal-Mart employee and was told they had received her application, but DC 6097 "[does not] hire women unless [they] are like a man." (Botkins Dep. at 81.) Kathy Strunk's supervisor through the Job Shop told her that "women wasn't[sic] allowed to work [at the DC]." (Strunk Dep. at 27-28.) She was also told by two Wal-Mart employees, including supervisor Lonnie Marion, that they do not hire women at the DC. (*Id.* at 97-99.) Kathy Barrett was told by DC employee Tim Salmons that the DC hardly ever hired women. (Kathy Barrett Dep. at 24.) Elizabeth Johnson-Walden was told by former order filler Dennis Miller that the DC did not hire a lot of women. (Johnson-Walden Dep. at 82.) Shannon Marie Bowling called the DC to see if there were any positions available and a woman who answered the phone told her "we don't really hire women here except for office positions." (Shannon Bowling Dep. at 49.)

2. *Wal-Mart supervisors/managers confirmed Wal-Mart's preference for male applicants.*

Former Wal-Mart managers confirm the strong preference at DC 6097 for male applicants. Marie Antoinette Jones Jackson was an Operations Manager trainee at DC 6097, visiting from another distribution center in Atlanta, Georgia, for six months in 1999 (Marie Jones Dep. 40-41, 61-63). Jones testified that she was instructed by fellow manager Donnie Caldwell

(See Id. at 97), that female applicants were only eligible to work in “certain areas” within DC 6097, such as receiving (Id. at 42), but they wanted males to work out on the dock and in shipping (Id. at 42, 97).

Annette Cobb recalls being told by management that they needed some “strong young bucks.” (Cobb Dep. at 27-28.) This sentiment was corroborated by B. Sizemore, who was a warehouse manager at DC 6097 from March 29, 1999, through October 25, 2001. (B. Sizemore Dep. at 12.) He conducted primarily first interviews, but also did some second interviews as well. (Id. at 15, 18.) He preferred to recommend young male applicants in “good shape,” who were “stout” and “muscular,” with no prior job experience because he thought they could do the work, especially order filling. (Id. at 37, 50.)

Bryan Elliott worked at DC 6097 from October 1995 to September 2006. (Elliott Dep. at 3.) Throughout his tenure at DC 6097, Elliott was an assistant coach and then a coach in various departments (See id. at 7-16), and he frequently conducted interviews (Id. at 17). He recalled some managers stating in meetings that they thought women could not do order filling. (Id. at 19-20.) In regard to hiring, he and others looked for “big, strong, young guys.” (Id. at 22.)

Eugene Riley worked at DC 6097 from 1995 through 1998. (Riley Dep. 6, 9.) He started as a Quality Assurance associate. (Id. at 6.) He was then promoted to coach on the perishable side of the warehouse (Id. at 7), and then to coach over the dry side shipping and receiving department (Id. at 8). He conducted first and second interviews (Id. at 10-11), and recalled how fellow coaches Jeffrey Henderson and Mike Maxey would not refer female applicants on in the process, preferring young male applicants, because they believed a man would do a better job at order filling than a woman (Id. at 24-25, 30-31).

Tom Van Jura was an Operations manager at DC 6097 from January 2001 through

February 2002. (Van Jura Dep. at 7-9.) As an Operations Manager, he was responsible for interviewing applicants, and he participated in all aspects of the hiring process, including making final hiring decisions. (*Id.* at 10-11.) In terms of whom to hire, he explained that Wal-Mart wanted to “get a young guy, fresh out of high school. Or if they have a young guy that’s just gotten married, something like that, has a responsibility, a mind that you can mold.” (*Id.* at 22.) Managers such as Jeff Akers, Jim Gulock, and Eugene Reynolds said not to hire women to order fill. (*Id.* at 21, 26-29.) Female applicants were steered toward positions other than order filling, such as quality assurance and receiving. (*Id.* at 20, 23, 26-28, 31-32, 36-39.)

Annette Cobb worked at DC 6097 from 1996 through 1998 as the IT Manager. (Cobb Dep. at 7-8.) She recalled upper male management stating they needed to hire “strong, young bucks” and “we need some strong, young boys.” (Cobb Dep. at 27- 28.) She understood this to mean in regard to hiring, that “if a very young - - a young, strong male came in, you know, that’s what we’re looking for.” (*Id.* at 28.)

3. *Wal-Mart’s exclusion of women who would distract its male workforce and its culture of sexual harassment and disrespect toward women at DC 6097.*

DC 6097 has an overwhelmingly male workforce. (Bielby Report at 17-32; Cobb Dep. at 16-17; Rose Dep. at 27; Van Jura Dep. at 19, Reynolds Dep. at 70-72, 96-97; Biondo Dep. at 31; Karr Dep. at 26-27.) Multiple class members testified that they were told by Wal-Mart supervisors and/or managers that their appearance would distract the men in the warehouse and lead to sexual harassment problems. Rebecca Forbes’s interviewer said, “if they put a woman that looks a certain way in with a bunch of men, that there could be problems.” (Forbes Dep. at 69.) Patricia Murray was told by a supervisor that based on her build, personality and appearance, she would not be hired at DC 6097 because she would be “a distraction to the men.” (Murray Dep. at 105, 114.) Jessica Long’s interviewer said, if he hired her, there would be

sexual harassment problems. (Long Dep. at 46-47.) Janice Smith was told by Jimmy Lewis at the Wal-Mart Supercenter that she was going to be kept at the retail store because she was “too pretty” to be at the DC and would “get into trouble” there. (Janice Smith Dep. at 121.)

Class member Cassandra Hammons testified that her interviewer, Jim Gulock, stared at her chest during her interview. (Hammons Dep. at 27.) Hammons was not hired and her husband, Brian, a current Wal-Mart employee, asked Jim Gulock why his wife was not hired. (Hammons Dep. at 41-42.) Gulock commented that if Brian and Cassandra were not married, he (Gulock) would have liked to have had Cassandra’s legs “wrapped around him.” (*Id.* at 42.)

Class member Melinda Branum’s husband, a former order filler, told her that some days male order fillers who had lost warehouse competitions had to come to work dressed like women. (Branum Dep. at 70-71.) He also told her coaches and order fillers would “joke and carry on” with female employees and “say stuff they shouldn’t say” - i.e., sexually harassing jokes and telling women that they dress sexy. (*Id.* at 71-72.) Similarly, applicant Theresa Stutler’s ex-husband told her that when he was an order filler they had contests in the warehouse where the losing male employees would have to “shave their hair, dye their hair, [or] wear women’s clothing.” (Stutler Dep. at 122.)

Kathy Kimball Pence was an order filler at Wal-Mart DC 6097 for approximately one year beginning in June 2004. (Pence Decl. at ¶ 1.) Pence is 5’2’ and at the time weighed 92 pounds. (*Id.*) She was primarily assigned to perishable order filling, but occasionally worked in the dry goods and frozen sections. (*Id.*) She recounted male co-workers making frequent sexual comments about female employees and that her supervisor, Jason Andrews, referred to order filling as a “man’s job.” (*Id.* at ¶ 4.) As compared to her male co-workers, Andrews also routinely assigned Pence especially difficult order filling tasks to be completed under

unreasonable time constraints. (Id. at ¶ 5.) At other times Andrews would require Pence to stay late and continue working when male order fillers were allowed to leave on time. (Id.)

Additionally, she was repeatedly passed over in favor of male co-workers who received special assignments to work at other distribution centers. (Id. at ¶ 6.)

Former DC 6097 employee Robin Rose was hired in 1995 as a Quality Assurance associate. (Rose Dep. at 5.) In 1997 she moved to customer service, and in 1999 to the human resources office as a hiring/payroll clerk. (Id. at 7-8.) While a Quality Assurance associate, she complained of being harassed by former manager Daryll Phillips. (Id. at 10-11.) At the time, he was a warehouse manager over dry order filling. (Id. at 10, 105.) Among other things, Phillips made inappropriate comments to Rose, stood uncomfortably close to her and followed her home. (Id. at 10-12.) Within a year of Rose's complaint about Phillips, he was promoted. (Id. at 13, 105) Male co-workers and managers frequently commented to Rose on her appearance, including the appearance of her backside (Id. at 14, 25-26), and "hint[ed] around to sexual things." (Id. at 18). Rose was told she looked "hot" and "sexy." (Id. at 112.) Such comments were made throughout her employment at DC 6097. (Id. at 112.) She was made to feel like she had to "do certain things to keep [her] job,"—i.e., put up with unwanted conduct, because "in this area honestly it's a good job. I mean, it's good pay, good benefits." (Id. at 113.) Inappropriate comments were made to Rose when she walked through the warehouse. (Id. at 21-23.) Rose also heard sexual comments made to female quality assurance co-workers, including blatant requests for sexual favors. (Id. at 15-16.)

Marie Antoinette Jones Jackson was an Operations Manager trainee at DC 6097, visiting from another distribution center in Atlanta, Georgia, for six months in 1999. (Marie Jones Dep. 40-41, 61-63.) She testified that her "treatment there was not good." (Id. at 30, 73.) She

described how she did not receive the same degree of training as male manager trainees and how, unlike them, she was often without an assigned mentor. (Id. at 30-33.) She was the only female manager trainee at DC 6097 at the time, and she was excluded from manager golf outings. (Id. at 74.) She was also excluded from some manager meetings and would hear about what occurred during the meetings from other male manager trainees after the fact. (Id. at 32-36.) Jim Gulock told Ms. Jones Jackson not to discipline any male subordinates, that he would handle such situations, even though at least one of the other two male manager trainees was allowed to discipline subordinates. (Id. at 37-39.) She was allowed to interview female applicants at DC 6097, but was only allowed to sit in the room with someone else when males were being interviewed. (Id. at 41.) She also did not see many females being hired and viewed the environment as a “good ole boy network.” (Id. at 45-46.)

Annette Cobb worked at DC 6097 from 1996 through 1998 as the IT Manager. (Cobb Dep. at 7-8.) At the time, she was 1 of 3 female managers out of a total of approximately 32 managers. (Id. at 8-9.) She felt female managers were treated differently than male managers. (Cobb Dep. at 12-13.) She thought male managers, including Plant Manager Vince Biondo, did not take female managers “seriously.” (Id. at 13-14.) She described the work environment as a “good old boy system.” (Id. at 14-15, 80.)

Brian Elliott confirmed that females were treated differently than males at DC 6097. He testified to observing General Manager Jeff Akers treating female manager Laurie Lane in a “disrespectful” way on the loading dock in front of other supervisors, something that for male managers would be done behind closed doors. (Id. at 28-30.) He also recalled male managers and employees commenting on the appearance and clothing of female employees. (Id. at 31-33, 77-79.)

Rose, Jones, Cobb and Pence were not the only female employees or applicants subjected to sex based differential treatment and/or sexual comments/actions. In or around 2004, Rose was present when female co-worker Kristen Sally received a lewd phone call in the office from the warehouse floor regarding Sally's breasts. (Rose Dep. at 216-217, 220-221; Kristen Sally Dep. at 26-29.) Also, class member Kassandra Hammons, while waiting for her husband outside the DC, heard male workers making vulgar remarks, such as what they would like to do to women. (Hammons Dep. at 116-17.)

Managers directly responsible for interviewing and hiring made comments and engaged in conduct that Robin Rose described as making her feel "uncomfortable." (Rose Dep. at 17-20.) Rose recalled feeling "uncomfortable" on a few occasions in particular with Mike Giles, and recounted an instance when she was alone with him in the office one weekend and he came up close behind her and told her she looked "really good" that day. (*Id.* at 19.) Giles was the Human Resources Manager at the time. (*Id.* at 19.) Other managers involved in interviewing and hiring made similar comments to Rose. (*Id.* at 21.)

4. *Wal-Mart managers summarily dismissed and ridiculed many female applicants and asked inappropriate and irrelevant personal questions.*

A number of female applicants testified to their male interviewers expressing disbelief when they asserted their ability to perform the duties of a warehouse position at DC 6097. Melinda Branum told Mike Giles she would do any job available, including order filling. (Branum Dep. at 60.) Giles laughed at her and said the jobs they had there were not for women and that a woman could not do the work. (*Id.* at 60.) When Sue Lawson explained the demanding farm work she performed on a regular basis, her interviewer laughed at her. (Sue Lawson Dep. at 97-98.) He also made facial expressions suggesting he thought she was lying and made sarcastic comments such as, "I'd like to see that," when she described the work she

performed. (*Id.* at 107-08.) Ellechelle Smith Hall felt “uncomfortable” when her interviewer asked her why she thought she could do the job after she had already asserted she could do it and explained her prior physical experience. (Smith Hall Dep. at 71-72.) Theresa Stutler told her male interviewer she thought she could perform the order filler job and he said, “I don’t think you can do it,” and laughed at her. (Stutler Dep. at 68.) Lesia Brinson’s interviewer kept asking her if she could lift, even though she stated she could lift over 50 lbs. (Brinson Dep. at 27-29.) Sabrina Michelle Smith’s interviewer told her that because she was a female, he did not think she could handle working there. (Sabrina Smith Dep. at 41, 61.) Kim Vires Roark’s interviewer kept asking if she could lift, even though she was certain she could and told him the same. (Roark Dep. at 44.) Jackie Cox’s interviewer talked about how they loaded pallets at DC 6097. (Cox Dep. at 56.) She responded that she loaded pallets the same way where she worked and that she did not have a problem with lifting them. (*Id.* at 56-58.) He doubted her and said the pallets were “heavy for women to lift.” (*Id.* at 57, 59.) Mary Ramsey’s interviewer similarly doubted her ability to lift, specifically telling her he did not think she could repeatedly lift 75 pounds because she is a woman. (Ramsey Dep. at 65-66.) Dorothy Harshman’s interviewer asked if she had a “problem” working with “a bunch of men” and repeatedly asked if she could lift, despite her assurances that she could, and insinuated she would “use the girl card.” (Harshman Dep. at 102-103, 107-10.)

A number of class members also testified that they were asked irrelevant, personal questions during their interviews. For example, Brenda Overbey was asked if she was married, had children and if she had ever had any problems with calling in to work due to her husband or child being ill. (Overbey Dep. at 80.) Cassandra Hammons was asked about her daycare arrangements and the ages and gender of her children. (Hammons Dep. at 26-27.) Myra Asher

was asked if she was married or had children. (Asher Dep. at 70-71.) Sue Lawson was asked about child care arrangements (Sue Lawson Dep. at 27-28) and questioned as to who would care for her children and disabled husband if either were ill and she was working (Id. at 101-03).

Shirley Vaughn was asked if she had children, and if so, how many. (Vaughn Dep. at 99.)

A number of female class members testified to their interviewer's dismissive attitudes and lack of interest in their experience and stated ability to perform warehouse work. Some women were even told they would be better suited to work in an office environment even though they had not applied for an office position. Cadi Nobles' interviewer did not follow up on her answers and left her with a "negative impression," as if the interview was "just a process that needed to be gotten through. And so it did not really seem like somebody, like they anticipated the interview process going any farther." (Nobles Dep. at 32-34.) Elizabeth Messer's interviewer told her "you really look like you belong in an office job" even though she was applying for fork lift driver and had not discussed her interest in any office job and had no prior office experience. (Messer Dep. at 29-30.) Myra Asher felt like she was being "blown off," "like the interviewer didn't care about the interview" and like he thought she could not handle the job. (Asher Dep. at 71-73.) Constantine Bargo's interviewer was "unprofessional" and did not pay her much attention. He did not sit down, but paced. (Constantine Bargo Dep. at 103-05.) Lesia Brinson's second interviewer told her, "A lot of women don't make it through the second interview." (Brinson Dep. at 67.) Maria Malicoat-Howe was told the DC was not hiring at the time she sought to apply, while a few moments later she watched a DC employee give an application to a man seeking a job. (Malicoat-Howe Dep. at 50-52.) Delana Quarrels' phone screen was extremely brief and the interviewer acted as if he was just reading off of a piece of paper and was not interested in her. (Quarrels Dep. 40-42.) He called her about an order filling position, which

she had applied for, but said she would probably be more comfortable in the office. (*Id.* at 42-43.)

5. Interviewers wrote untrue and/or unsubstantiated comments on female applicant packets to preclude them from employment at DC 6097.

Numerous class members testified to having inaccurate and/or untrue statements noted by interviewers on their interview comment sheets or applications. Class member Jennifer Burton's interview comment sheet notes, "Did not give specific answers to several questions. When I took her for a tour and showed her what an order filler did she made the comment, 'I don't know if I can do that.'" (Burton Interview Comment Sheet, Exhibit 117.) Burton, however, testified that she did not make any such comments to the interviewer while on the tour and insists she could have done any job there. (Burton Dep. at 35-37) Robin Carr disputes a notation on her application which says "does not want order filling." (Carr Application Packet, Exhibit 101 and Carr Dep. at 30-31.) A note on Tara Higgins's application said "called on 9/18/03 and was no longer interested." (Higgins Application Packet, Exhibit 103.) Higgins vigorously denies telling anyone at DC 6097 that she was no longer interested in a job there. (Higgins Dep. at 30.) Stephanie Smith disputes inaccurate notes on her interviewer's comment sheet regarding her ability to work in extreme conditions and shift preferences. (Stephanie Smith Dep. at 26-27, 32-34.) Penny Lynn Bargo recalls telling her interviewer the extreme temperatures would not bother her one way or the other, while her interviewer noted she was "not real sure" about hot or cold extremes. (Penny Bargo Interview Comment Sheet, Exhibit 116; Penny Bargo Dep. at 49.) Donna Bargo's interviewer wrote on her comment sheet that she only wanted a 3rd shift position as a second job, while Bargo testified she did not discuss the issue with the interviewer and that she was not even looking for a second job at the time. (Donna Bargo Interview Comment Sheet, Exhibit 115, and Donna Bargo Dep. at 50-51) Hazel Bowling

disputes writing on her application that she was seeking “cafeteria, office assistant” work. (H. Bowling Application Packet, Exhibit 98; H. Bowling Dep. at 24.) She testified to seeking any warehouse or cafeteria position, but not office work because she had no prior office work experience. (H. Bowling Dep. at 24.) Handwriting in the margin of Sarah Ann Boyce’s application says, “Not interested anymore.” (Boyce Application Packet, Exhibit 99.) But, Boyce does not recall having a conversation with anyone at the DC about no longer being interested and she went on to submit additional applications. (Boyce Dep. at 37-38.) On her second application, Boyce wrote that she wanted to be considered for an order filler position. (*Id.* at 45.) A notation on the application says, “[number] disconnected” and Boyce denies that her phone was ever disconnected. (*Id.* at 46-47.)

Jackie Cox disputes notes on her interview comment sheet which state, “lifting and so forth” as the reasons why she wanted to leave her job at the time. (Jackie Cox Interview Comment Sheet, Exhibit 118, Cox Dep. at 61-62.) She also disagrees with notes that say she only wanted a 1st or 3rd shift position. (*Id.* at 65-66.) While she preferred those shifts, she denies saying she could not work 2nd shift. (*Id.*) Melinda Moses disputes interviewer notes concerning her ability to perform the job, her prior work experience, power equipment experience and ability to work in extreme heat and cold. (Moses Dep. at 23, 25, 27.) “No Show” is written across the top of Gloria Ellenburg’s application, but she strongly denies that she failed to show for an interview, insisting no one ever called her regarding an interview. (Ellenburg Dep. at 54-57.) Interviewer notes state Delana Quarrels was “not interested in open positions” and “wants a 3rd shift job.” (Quarrels Interviewer Notes, Exhibit 119.) However, Ms. Quarrels says shifts were never discussed (Quarrels Dep. 39-40), and she would “have never took[sic] a 3rd shift job.” (*Id.* at 42.) Tammy Southerland Martin does not recall ever talking to anyone

from Wal-Mart even though someone wrote, "Cannot work available shifts" on her application. (Martin Application Packet, Exhibit 106; Martin Dep. at 28-29.) Tonya Klein Belt's interview packet cover sheet states "declined," but she insists she was never offered a second interview, let alone a job, which she could have declined. (Belt Dep. at 28-29.) Marsha Gwen Leabo's interviewer noted she had not done physical labor in the past and did not want to work in the freezer, but Leabo testified to having done similar work and recalls stating that while she preferred heat, she did not say she would not work in the freezer. (Leabo Dep. at 31-35.) Janice Smith denies telling her interviewer that she did not think she could stand working in the freezer for 6 months. (Janice Smith Dep. at 286-87.) She even submitted an introduction letter indicating a willingness to work in the freezer. (Exhibit 111.)

Wal-Mart managers likewise wrote reasons for exclusion of female applicants that were contrary to their testimony concerning hiring for DC 6097. James Gulock testified that one need not have any prior related job experience to be considered for employment at DC 6097. (Gulock Dep. at 105.) Yet, on interview comments for female applicants such as Maria Guzman, Katherine Johnson and Kimberly Dykes, Jim Gulock noted "no relevant job experience" and refused to recommend them for hire. (Gulock Dep. 241-250 and Giles Dep. I, Giles I Dep. Exs. 41, 42, 43.) At his deposition, Gulock was asked to compare the employment history of Katherine Johnson and Travis Wynn - a male whom he recommended for hire - and select the one with the most relevant job experience. (Gulock Dep. at 295-96, Dep. Ex. 42 and 45.) Gulock selected Katherine Johnson, and could not explain why he wrote "no relevant job experience" in her applicant packet, but not in Travis Wynn's applicant packet. (Id.)

Vernon Morris similarly testified that no prior warehouse or physical labor experience was needed for an applicant to be considered for employment at DC 6097. (Morris Dep. at 51.)

However, he did not pass on Nancy Brock because she had “no past experience in warehousing.” (Morris Dep. at 65-66 and Dep. Ex. 4.) Similarly, he failed to recommend Carla Luther, noting, “No experience in warehousing. Weak work history,” but he did not know what was weak about her history. (Morris Dep. at 70-71, Dep. Ex. 6.) For Judy Kelly he wrote, “I don’t think the applicant would fit as an order filler” and for Deborah Noe, “I don’t believe she would fit Wal-Mart culture.” (Morris Dep. at 67-69, 73 and Dep. Exs. 5, 8.) For Tina Campbell he noted, “Would not fit as an order filler.” (Morris Dep. at 72 and Dep. Ex. 7.) However, he was unable to explain what exactly he meant or why exactly he excluded the women, guessing that maybe the applicant said she did not want to order fill, even though that was not recorded in his notes. (Id. at 67-69, 70-71.)

Other interviewers similarly excluded female applicants for inexplicable reasons such as “not fitting into the Wal-Mart culture” and not having relevant prior experience when none was required. John Dragoo did not pass on Linda Hart, noting, “Do not feel could adapt to Wal-Mart culture,” yet he could not explain what he thought that meant at the time. (Dragoo Dep. at 41-42, Dep. Ex.1.) Dragoo excluded Sarah Franklin and Deborah Evans for the same nebulous reason. (Dragoo Dep. at 42-45, Dep. Exs. 3, 4.) Equally puzzling, Tim Beshears wrote, “No experience” for Dawn Carson and did not recommend her on in the hiring process, even though he also noted she had “unloaded trucks” in the past. (Beshears Dep. at 63-65, Dep. Ex. 3) He did not recommend Stephanie Hensley either, citing, “No experience, not flexible,” despite testifying that someone did not necessarily have to want to work every shift in order to be considered for employment. (Beshears Dep. at 66-68, 70-71, Dep. Ex. 4) Furthermore, Hensley merely indicated she preferred first shift on the weekend and 2nd during the week. (Id. at 70-71.) Beshears excluded other women for similar reasons related to alleged lack of experience and

“flexibility.” He excluded Linda Strange for “lack of experience” and one brief gap in employment. (Beshears Dep. at 71-74, Dep. Ex. 5.) He rejected Wanda Owens because, “not flexible, no experience” (Beshears Dep. at 74-76, Dep. Ex. 6.) He said Jaime Eldridge had “no experience” and “does not want to work 2nd shift” when she told him about experience and stated she merely preferred 3rd or 1st shift. (Beshears Dep. at 77-80, Dep. Ex. 7; See also Beshears Dep. at 80-90 discussing other women excluded for similar reasons.)

Marvin Lawson disqualified Kathleen Gienau, noting, “Not the best suitable for this job” even though he did not know what job he had interviewed her for and he could not explain what led him to believe she was unsuitable. (M. Lawson Dep. at 73-74, Dep. Ex. 6.) The same illogical exclusions occurred to Carolyn Dalhover and Rebecca Manning. (M. Lawson at Dep. 74-76, Dep. Exs. 7 and 8.)

6. *Wal-Mart managers placed well qualified female applicants on “hold” while hiring numerous, often less qualified, male applicants.*

Mike Giles was one of two managers responsible for conducting third interviews and making job offers from December 1998 through December 2001.²⁶ During the 1998 through 2001 time period, Giles does not recall any women working as order fillers. (Giles Dep. I at 63.) Consistent with his belief that women could not perform the order filling position, Giles placed numerous admittedly qualified women on “hold”, a category he stated was reserved for when there was no job available, when an orientation class had not been set or when the applicant was more suited for a job other than order filler.²⁷ (Id. at 40-42, 87, 93.) However, as discussed below, at the same time he placed female applicants on hold, he interviewed and hired less or

²⁶ As discussed above, Mike Giles told Carol Moore that he did not think the order filler job was a good job for a woman because there was a lot of heavy lifting and the temperatures were extremely cold. (Moore Dep. at 41-42, 48.) He told Melinda Branum, in response to her assertion that she was willing to accept any job, that the jobs that they had there were not for women to be doing and that a woman could not do it. (Branum Dep. at 59-60.)

²⁷ Giles acknowledged that positions other than order filler rarely opened and by placing the applicant on hold, her chances of obtaining employment were very small. (Giles Dep. I at 93.)

similarly qualified male applicants. (Id. at 91-93.) Plant manager Jeff Akers admitted that such a practice was improper and constituted stereotyping. (Akers Dep. at 69-71.) He acknowledged that Wal-Mart did nothing to check whether managers were placing female applicants on hold for less strenuous positions. (Id. at 70.)

Jennifer Osborne applied for any position available on June 17, 1999. (Giles Dep. at 89 and Ex. 4.) After being passed by two other interviewers, Mike Giles placed her on hold on June 29, 1999. (Giles Dep. I at 91.) He admitted Osborne had packing and receiving experience, had filled orders at her past job and had nothing in her interview packet to indicate that she couldn't do the order filler job. (Id. at 88, 92, 93.) Giles admitted that order filler positions were open at the time he placed Osborne in hold and that he knew that the likelihood of a position other than order filler opening up was very small. (Giles Dep. I at 93.) Approximately one week earlier, he interviewed and hired Michael Cox who was just out of high school and had no job experience. (Giles Dep. I at 95-96.) Giles also offered a position to Christopher Dixon on June 23, 1999. (Giles Dep. I at 99 and Dep. Ex. 7.) Giles offered a position to Johnny Farmer on June 24, 1999. (Id. at 101-102 and Dep. Ex. 8.) Giles interviewed and offered a position to Joshua Mounce on June 28, 1999. (Id. at 111-112 and Dep. Ex. 9.) Mounce had no previous work experience. (Id. at 112.) Giles interviewed and offered a position to Charles Smith on July 2, 1999. (Id. at 113 and Dep. Ex. 10.) Giles interviewed and offered a position to Johnny Harris on July 6, 1999, despite a negative reference and previous employment only as a cook. (Harris Dep. Ex. 7.) Giles interviewed and offered a position to Brian Clawson on July 27, 1999. (Giles Dep. at 114 and Dep. Ex. 11.) Giles interviewed and hired Jason Freeman on August 3, 1999. (Id. at 114-115 and Dep. Ex. 12.) Between June 28, 1999, and August 30, 1999, Wal-Mart hired at least²⁸ 90

²⁸ Wal-Mart's new hire logs do not reflect applicants who received offers and declined or whose offers were rescinded after drug testing.

male applicants but only two females, one as slotter and one as unloader. (New Hires Log at 00139-00150. New Hires Log excerpts are designated as Exhibit 138.)

Deanna Coil applied for “any” position on September 30, 1999. (Giles Dep. I Ex. 13.) She had order filling and case selecting experience. (Id.) After being passed on by two other interviewers, Giles interviewed her and placed her on hold for a “slotter” position on October 15, 1999. (Id. at 115.) However, Giles interviewed and hired Jason Monhollen on October 1, 1999. (Id. at 118.) Giles interviewed and hired Paul York on October 5, 1999. (Giles Dep. I at 118 and Dep. Ex. 15.) Giles interviewed and hired Ashley Hornsby on October 15, 1999. (Id. at 121 and Dep. Ex. 16.) Giles interviewed and hired Brett Ledford on October 26, 1999. (Id. at 122 and Dep. Ex. 17.)

Jennifer Brock applied for employment on January 9, 2000. (Brock Application Packet, Exhibit 100.) She had experience unloading trucks and a spouse working at DC 6097. (Id.) After being passed on by two other interviewers and by General Manager Jeff Akers, Giles interviewed her and placed her on hold for a “slotter” position on January 25, 2000. (Id.) However, between January 10, 2000 and March 13, 2000, Wal-Mart hired at least 25 male applicants as order fillers and only one female applicant as a slotter. (New Hires Log at 00178-00186.)

On March 30, 2000, Amanda Archer applied for order filling or “any available” position. (Archer Application Packet, Exhibit 96.) After being passed on by two interviewers, Mike Giles placed her on hold on April 26, 2000. However, on April 25, 2000, Giles made a job offer to Jeremy Martin. (Giles Dep. at 127 and Dep. Ex. 19.) Giles interviewed and hired Marvin Mills on April 29, 2000. (Id. at 127-28.) Giles interviewed and hired John Davis on May 26, 2000. (Id. at 128 and Dep. Ex. 21.) Giles interviewed and hired Roger Burton on June 1, 2000. (Id. at

128 and Dep. Ex. 22.) Giles interviewed and hired Brian Boggs on June 2, 2000. (Id. at 128 and Dep. Ex. 23.) On June 7, 2000, Giles interviewed and hired William Baird. (Id. at 129 and Dep. Ex. 24.) Baird had graduated from high school two weeks prior. (Id. at 131.) Giles interviewed and hired Steven Asher on June 15, 2000. (Id. at 133 and Dep. Ex. 25.) From April 24, 2000, through June 26, 2000, Wal-Mart hired at least 90 male applicants. (New Hire Log at 00194-00210.)

On April 13, 2000, Veronica Blair applied for “any” position. (Giles Dep. I at 123 and Dep. Ex. 18.) She had past order filling experience as well as pallet jack and forklift experience. (Giles Dep. I at Ex. 18.) After being passed on by two other interviewers, Giles interviewed her and placed her on hold on April 28, 2000, two days after placing Amanda Archer on hold and despite the availability of order filling jobs. (Id. at 123-126 and Dep. Ex. 18.) However, as discussed above, Giles made job offers to Jeremy Martin, Marvin Mills, John Davis, Roger Burton, Brian Boggs, William Baird and Steven Asher all in the same timeframe. (Id. at 127-133 and Dep. Ex. 19-25.) Also, as noted above, from April 24, 2000, through June 26, 2000, Wal-Mart hired at least 90 male applicants. (New Hire Log at 00194-00210.)

Tammy Jenkins applied for any position on December 6, 2000. (Jenkins’ Application Packet, Exhibit 105.) She had past construction and fork lift experience. (Id.) After being passed on by two other interviewers, Giles interviewed her and placed her on hold for a “receiving” position on January 22, 2001. (Id.) Jim Gulock interviewed Jenkins on March 13, 2001, took notes about Kelly’s daughter, but offered no job. (Id.) From January 22, 2001, through March 12, 2001, Wal-Mart hired at least 54 male applicants. (New Hires Log at 00233-00242.) One of the males interviewed and offered a job by Giles was Jamey Brewer. Brewer was hired on February 14, 2001, despite no previous similar physical or power equipment

experience. (Brewer Dep. Ex. 5.)

Kassandra Hammons applied for any position multiple times including an application on December 18, 2000. (Hammons Dep. Ex. 7.) Hammons has a spouse working at the Distribution Center. (Id. at 21.) After being passed on by two interviewers, Mike Giles placed her on hold on January 23, 2001, one day after placing Jenkins on hold. After being placed on hold by Giles, Jim Gulock interviewed Hammons on February 28, 2001. (Id. at 24.) After asking her about childcare and telling her husband that he (Gulock) would like to get her legs around him, Gulock did not offer a job to Hammons. (Hammons Dep. at 25-27.) As noted above, however, from January 22, 2001, through March 12, 2001, Wal-Mart hired at least 54 male applicants. (New Hire Log at 00233-00242.)

On January 17, 2001, Rebecca Northern Clark applied for a shipping, packing or inspecting job at DC 6097. (Northern Clark Application Packet, Exhibit 107.) Northern Clark had previous heavy lifting and pallet jack experience. (Id.) After being passed on by two interviewers, Mike Giles placed her on hold for “slotter, P.O. control, hauler, etc.” on February 16, 2001. (Id.) After being placed on hold by Giles, Jim Gulock interviewed Northern Clark on February 28, 2001. (Id.) Gulock failed to offer employment to Northern Clark. However, between February 19, 2001, and April 16, 2001, Wal-Mart hired at least 55 male applicants but only two female applicants, one as a slotter and one as a clerical. (New Hires Log at 00237-00246.)

On October 20, 2001, Sharon Radford applied for any position. (Radford Application Packet, Exhibit 109). Radford had previous physical and power equipment experience. (Id.) After being passed on by two interviewers and by General Manager Jeff Akers, Mike Giles interviewed her and placed her on hold on November 16, 2001. (Id.) However, between

November 26, 2001, and January 21, 2002, Wal-Mart hired at least 55 male applicants but only one female applicant, as a PO Clerk. (New Hire Log at 00279-00286.)

On October 16, 2001, Sabrina Howard applied for any position. (Howard Application Packet, Ex. 104.) Howard had a spouse working at the Distribution Center and also had previous order filling experience. (Id.) After being passed on by two interviewers and by General Manager Jeff Akers, Mike Giles interviewed her and placed her on hold on November 30, 2001, for “hauler,” “slotter,” “clerical” or “quality assistance.” (Id.) However, as noted above, between November 26, 2001, and January 21, 2002, Wal-Mart hired at least 55 male applicants but only one female applicant, as a PO Clerk. (New Hire Log at 00279-00286.)

Jim Gulock likewise placed qualified female applicants on hold following third interviews despite offering employment to male applicants. During the interviews he asked many of the female applicants about their families, children and childcare. (Gulock Dep. at 113-15.)

On January 18, 2000, Elizabeth Walden-Johnson applied for any position. (Walden-Johnson Dep. Ex. 1. Walden-Johnson Application Packet, Exhibit 114.) Johnson had past order filling experience. After being passed on by two interviewers and by General Manager Jeff Akers, Jim Gulock interviewed her and placed her on hold on February 2, 2000 for a “slotter” position. (Id.) However, as noted above, between February 7, 2000, and April 3, 2000, Wal-Mart hired at least 28 male applicants but no female applicants. (New Hire Log at 00182 - 00191.)

On January 3, 2000, Danica Thorne applied for any office or receiving position, but was told during her second interview, January 29, 2000, that she was being interviewed for the order filler job. (Thorne Application Packet, Exhibit 113.) After being passed on by two interviewers

and by General Manager Jeff Akers, Jim Gulock interviewed her and placed her on hold on February 3, 2000, for “unloader” or “slotter.” (Id.) Gulock’s interview notes indicate that Thorne was married and that she had a three year old daughter. (Id.) However between February 7, 2000, and April 3, 2000, Wal-Mart hired at least 28 male applicants but no female applicants. (New Hire Log at 00182 -00191.)

On June 5, 2000, Virginia Sallee applied for an order filling position. (Sallee Application Packet, Exhibit 110.) Sallee had stocking experience and experience unloading trucks. (Id.) After being passed on by two interviewers and by General Manager Jeff Akers, Jim Gulock interviewed her and placed her on hold on July 3, 2000. Gulock noted on his interview notes that Sallee was married and had a son. (Id.) Between July 10, 2000, and September 4, 2000, Wal-Mart hired at least 53 male applicants but only one female applicant (for a clerical position). (New Hire Log at 00212-00217.) One of the males hired by Gulock was Christopher Marcum. Marcum was offered an order filling position on August 11, 2000, despite a falsified application, inconsistent applications and no previous physical or power equipment experience. (Marcum Dep. at 42-45 and Ex. 7.) Gulock also hired Christopher Ginter on August 21, 2000, despite no previous physical or power equipment experience. (Ginter Dep. Ex. 4 and 5.)

Teresa Mills applied a number of times for employment at DC 6097 including an application on November 26, 1999, for any position, “slaughter” or order filler. (Mills Dep. Ex. 5. Mills Application Packet.) Mills had previous physical experience and a spouse at DC 6097. (Id.) After being passed on by two interviewers and by General Manager Jeff Akers, and having discussed and seen the order filling job, Wal-Mart manager Danny Ward interviewed her and placed her on hold on January 26, 2000 for “slotter” or “hauler.” (Mills Dep. at 57-60.) Six months later, on July 26, 2000, Mills was interviewed by Jim Gulock, who again placed her on

hold. (Id.) Gulock noted on his interview notes that Mills had two kids. (Id.) Between January 31, 2000, and August 7, 2000, at least 165 male applicants were hired but no female applicants. (New Hires Log at 00180-00215.)

Lisa Jill Harrison applied a number of times for employment at DC 6097 including an application on June 13, 2001, for “any” position. (Harrison Application Packet designated as Exhibit 102.) Harrison had unloading and load experience as well as experience with a hand jack. (Id.) After being passed on by two interviewers and by Danny Ward, Jim Gulock interviewed her and placed her on hold on July 13, 2001. Gulock’s notes indicate that Harrison had two children. (Id.) However between July 9, 2001 and September 3, 2001, Wal-Mart hired at least 51 male applicants but no female applicants. (New Hire Log at 00261-00270.)

On October 12, 2001, Myra Asher applied for any position. (Asher Dep. Dep. Ex. 1.) Asher had shipping and receiving, warehouse and pallet jack experience. (Id.) After being passed on by two interviewers and by General Manager Jeff Akers, Jim Gulock interviewed her and placed her on hold on October 25, 2001 for “receiving.” During the interview, Gulock asked Asher whether she was married and/or had children. (Asher Dep. at 70-71.) However between October 22, 2001, and December 26, 2001, Wal-Mart hired at least 46 male applicants but only three female applicants, one as a JT Clerk, one for PO Control and one as an order filler. (New Hire Log at 00275-00282.) One of the male applicants hired by Jim Gulock was Christopher Collins. Gulock interviewed and hired Collins on November 15, 2001. (Collins Dep. Exs. 9 and 10.) Collins’ stated work experience was limited to Wendy’s and less than a year as a car mechanic. (Id.)

On October 18, 2001, Julie Terrell applied for any position. (Terrell Dep. Dep. Ex. 2.) Terrell had warehouse, forklift and pallet jack experience. (Id.) After being passed on by two

interviewers and by General Manager Jeff Akers, Jim Gulock interviewed her and placed her on hold on December 7, 2001, for “lift driver.” However, between November 26, 2001, and February 4, 2002, Wal-Mart hired at least 64 male applicants but only one female applicant (for PO Control). (New Hire Log at 00279 -00288.)

7. *Despite passing their interviews, female applicants were excluded from employment.*

In addition to being placed on hold, female applicants were also excluded from employment after passing two interviews, receiving satisfactory reference checks, but prior to receiving a third interview. Angela Powell applied for employment on July 8, 1998 and provided Wal-Mart with a resume as well as a letter of reference. (Powell Application Packet, Exhibit 108.) Powell had order puller experience, was passed on by two interviewers and received satisfactory reference checks. (Id.) Her second interviewer advised her that she would be offered a position at Wal-Mart and she put down a deposit on a local apartment, as a result. (Powell Dep. at 23-24.) On or about July 30, 1998, however, personnel manager, Andy Glover²⁹ recommended that Powell not be considered for employment. (Glover Dep. at 42 and Dep. Exs. 5, 6.) Glover testified that he does not know why he removed Powell from consideration and that he was unable to find anything in her application packet that would preclude her from further consideration. (Glover Dep. at 43.) Yet between July 27, 1998 and July 29, 1998, Glover reviewed the application packets and reference checks for Joey Howard (a bank teller), David Grammer (a self employed painter with no outside work experience) and Henry Campbell (a former army driver with no other work experience). (Id. at 39-42, Dep. Exs. 2-4.) He recommended that each of these applicants continue on to a third interview. (Id.) Glover had no recollection of any sort of check list that was used to evaluate an applicant following their second

²⁹ Glover worked as personnel manager at DC 6097 from 3/01/97 to 8/28/98. (Glover Dep. at 51.) He does not believe that he had specific training on interviewing, discrimination or hiring practices during this time period. (Id.)

interview to determine whether or not they should go on in the process. (Glover Dep. at 47) and could not explain the disparate treatment of Powell and the male applicants. (*Id.* at 44-48.) The same month he rejected Angela Powell, Glover sent a rejection letter to Janet Gibson. (Glover Dep. at Ex. 7.) Gibson applied for employment on June 17, 1998, had forklift experience, stocking and loading experience, passed two interviews and had satisfactory reference checks. (Glover Dep. at Ex. 8.) General Manager Vince Biondo recommended that Gibson not be further considered for employment and Glover sent the rejection letter to Gibson without reviewing Biondo's decision or the application packet. (*Id.* at 48-50.)

IV. ARGUMENT.

A. Key Legal Tenets/Summary of Argument.

The EEOC may raise a triable issue of fact concerning the prima face elements of a Title VII pattern or practice claim through a "culmination of evidence, including statistics, patterns, practices, general policies, or specific instances of discrimination." Int'l Broth. of Teamsters v. United States, 431 U.S. 324, 339 (1977); Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08 (1977). Thus, the EEOC can demonstrate a genuine issue of material fact exists regarding a prima facie showing using either statistics, anecdotal evidence, or both. Pitre v. Western Electric Co., 843 F.2d 1262, 1267 (10th Cir. 1988); Ardrey v. United Parcel Service, 798 F.2d 679, 685 (4th Cir. 1986); see also Morgan v. United Parcel Service of America, Inc., 380 F.3d 459, 466 (8th Cir. 2004) (statistics not required to establish pattern or practice). As in any discrimination case, "direct evidence of an intent to discriminate" may also be used to establish a pattern or practice claim. Lujan v. Franklin Co. Bd. of Educ., 766 F.2d 917, 929 n.15 (6th Cir. 1985). While the EEOC need not produce both statistical and anecdotal evidence, a combination of both types of evidence is "potent" and brings "the cold numbers convincingly to

life.” Coral Const. Co. v. King County, 941 F.2d 910, 919 (9th Cir. 1991) (quoting Int’l Bhd. Of Teamsters v. United States, 431 U.S. 324, 339 (1977)).

Additionally, the EEOC does not have to prove that any particular applicant was discriminated against and thus a victim of the pattern or practice of discrimination. EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1286 (11th Cir. 2000). Rather, in determining whether a pattern or practice exists, the Court must assess "on a cumulative basis," all of the evidence tending to show a pattern or practice. Pitre, 843 F.2d 1262, 1268 (10th Cir. 1988) (quoting EEOC v. American Nat'l Bank, 652 F.2d 1176 (4th Cir. 1981), cert. denied, 459 U.S. 923 (1982)); see also Craik v. Minnesota State Univ. Bd., 731 F.2d 465, 471-2 (8th Cir. 1984) (reversing District Court's entry of judgment on behalf of the defendant finding that the Court improperly analyzed the individual claims of discrimination separately from the class allegations and statistics).

As set forth more fully below, the EEOC not only raises triable issues of fact, but readily meets its prima facie burden with three categories of evidence. First, the EEOC has overwhelming statistical evidence demonstrating a gender based disparity in offers to female applicants. Second, the statistical evidence is enhanced by compelling evidence of gender stereotyping by supervisors and managers, and an entirely subjective interview and hiring process. Third, there is abundance anecdotal evidence including admissions of discriminatory practices, and evidence that female applicants and/or employees were denied hire and/or otherwise treated less favorably than male applicants and employees. Furthermore, as discussed below, Wal-Mart’s ignorance of gender and scope arguments remains unavailing.

B. The EEOC's Statistical Evidence, Alone, Creates a Reasonable Inference that Wal-Mart Engaged in a Pattern and Practice of Hiring Discrimination.

“Statistical evidence is an important tool for placing seemingly in-offensive employment practices in their proper perspective.” Senter v. General Motors Corp., 532 F.2d 511, 527 (6th Cir. 1976). The highly significant statistical evidence in this case can independently establish a prima facie case of a pattern or practice of gender based hiring discrimination at DC 6097. See Hazelwood School District v. United States, 433 U.S. 299, 307-08 (1977) (“(w) here gross statistical disparities can be shown, they alone may . . . constitute prima facie proof of a pattern or practice of discrimination”); Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1259 n.7 (6th Cir. 1981) (“(s)tatistical evidence may establish a prima facie case of employment discrimination in an individual action as well as in a class action”); EEOC v. Akron National Bank and Trust Co., 497 F. Supp. 733 (N.D. Ohio 1980) (unexplained statistical proof of gender disparities is proof of discriminatory placement); Police Officers for Equal Rights v. City of Columbus, 644 F. Supp. 393, 402 (S.D. Ohio 1985) (“statistical evidence is typically used in class action lawsuits similar to the case at bar in an effort to establish a prima facie case of a pattern [or] practice of unlawful discrimination. . .”); Segar v. Smith, 738 F.2d at 1278 (plaintiffs may sustain their burden at the prima facie stage exclusively on statistical evidence).

“[S]tatistical evidence by its very nature deals with probabilities rather than certainties. All that can be required of methods employed in gathering such evidence is that they assure reasonably accurate findings. Absolute perfection usually is not attainable in this kind of endeavor.” Vulcan Society of N.Y.C.F.D. v. Civil Service Commission, 360 F.Supp. 1265, 1270 (S.D.N.Y.), aff'd, 490 F.2d 387 (2d Cir. 1973) (footnote omitted). That a plaintiff's evidence can be questioned does not justify summary judgment; defendants must show that the statistical evidence is so lacking in probative value that no reasonable jury could find for plaintiff. Gomes

v. Avco Corp., 816 F. Supp. 131, 136 (D. Conn. 1993), citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, (1986).

As discussed below, Wal-Mart incorrectly asserts that summary judgment is warranted because: (1) random chance cannot be ruled out as causing the gender disparity (D.'s Memo at 19-20); (2) missing variables account for the gender based disparity and/or make the analysis unusable (Id. at 2, 19, 27-29); (3) errors in the database make the analysis unusable (Id. at 2, 18-19, 26-27); (4) the aggregation of data makes the analysis unusable (Id. at 2, 23-24; (5) the inability to predict with certainty exactly which applicants will be hired makes the analysis unusable (Id. at 20-22); and (6) because Barnow made corrections and revisions to his report that his analyses should be disregarded (Id. at 24-25).

(1) *Wal-Mart's first incorrect assertion: random chance cannot be ruled out as causing the gender disparity.*

The gender based hiring disparity identified by Dr. Barnow is statistically significant with a likelihood of occurrence by chance of less than .05%. In fact, for the 1998 through 2001 time period, the chance of the gender disparity occurring by chance (with a two tailed test) was less than .0001 or one in ten thousand. (Barnow Supp. Report Supp. Ex. B4). For the 2002 through 2004 time period, the chance of the gender disparity occurring by chance (with a two tailed test) was .0058 or was roughly one in 500. (Id. at Supp. Ex. B5.)³⁰

Wal-Mart ignores the meaning of "statistical significance" and contends that Dr. Barnow is unable to rule out random chance as a cause for the disparity. (D.'s Memo at 20.) In claiming that the gender disparity could be due to random chance, Wal-Mart confuses Dr. Barnow's testimony concerning how well an applicant's traits **other than gender** predict whether the applicant will be hired (Barnow Dep. at 353-55) with his testimony that one's gender is a highly

statistically significant predictor of hire. As discussed in Section IV(B)(5), while Wal-Mart's haphazard and non-standardized hiring criteria result in difficulty in predicting exactly which applicants will be hired, **gender is a statistically significant predictor** of hire for the entire 1998 through 2004 period.

When a plaintiff demonstrates a significant statistical disparity "he or she has provided strong evidence that chance alone is not the cause. . ." Barnes v. Gencorp Inc., 896 F.2d 1457, 1466, 1469 (6th Cir. 1980.) See also, EEOC v. Atlas Paper Box Co., 868 F.2d 1487, n.11 (6th Cir. 1989) (prima facie case established when met .05 level of statistical significance); Police Officers for Equal Rights v. City of Columbus, 644 F. Supp. 393 (S.D. Ohio 1985) (adopting .05 level as statistically significant).

The notion of statistical significance addresses directly the question whether an inference of discrimination is warranted. Statistical significance is a measure of the probability that the outcome of a statistical analysis would have occurred by chance: The lower the probability that the observed outcome could have occurred by chance, the stronger the inference of discrimination that can be drawn from the data. For example, a finding that a study is significant at the .10 level indicates that the odds are one in ten that the result could have occurred by chance, and a finding of significance at the .05 level indicates that the odds are one in 20 that the result could have occurred by chance. Although the law has not set any precise level at which statistical significance can be said to be sufficient to permit an inference of discrimination, social scientists usually accept a study that achieves statistical significance at the .05 level. D. Baldus & J. Cole at 297, *cf.* F. MOSTELLER, R. ROURKE & G. THOMAS, PROBABILITY WITH STATISTICAL APPLICATIONS 310 (2d ed. 1970). In other words, a study is found significant-**and the hypothesis of chance is rejected-when there exists at most a one in 20 possibility that the observed result could have occurred by chance.** (emphasis added.)

Segar v. Smith, 738 F.2d 1249, 1282 (C.A.D.C. 1984). From both a social science perspective and a legal perspective, the likelihood of the gender-based hiring disparity occurring by chance at DC 6097 must be rejected. See Castaneda v. Partida, 430 U.S. 482, 497 n. 17 (1977) ("[a]s a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the

jury drawing was random would be suspect to a social scientist.”³¹

(2) ***Wal-Mart’s second incorrect assertion: missing variables account for the gender based disparity and/or make the analysis unusable.***

In performing his regression analysis, Dr. Barnow relied upon manager testimony (Barnow Dep. at 16-17) and controlled for nearly every piece of information Wal-Mart sought via its employment application, including previous Wal-Mart employment, employment gap, fired from previous job, transfer applicant, work permit, position applied for, education level, felony convictions, theft/fraud convictions, peak, full or temporary employment, shift availability, pay expectations, relative at Wal-Mart, missing work history, month and year of application, whether received interview(s), previous applications and previous work experience. (See Barnow Supp. Report Supp. Ex. B1.) A regression analysis which accounts for the major factors in an employment decision is acceptable evidence of discrimination, even if some variables have been omitted. Bazemore v. Friday, 478 U.S. 385, 399-400 (1986). Failure to include all variables affects the probative value of a regression analysis, not its admissibility. Id. at 400.

Under the law of this Circuit, statistically significant results which eliminate “the most common reasons for the disparity” create a prima facie case of discrimination. Barnes v. Gencorp Inc., 896 F.2d 1457, 1466 (6th Cir. 1980). “Not every conceivable factor relevant to a promotion decision must be included in the statistical presentation in order to make out a prima facie case.” McReynolds v. Sodexho Marriott Services, Inc., 349 F. Supp.2d 1, 13 (D.D.C. 2004). “Rather, what the case law means by ‘minimum objective qualifications’ are those objective qualifications that can be shown to be truly required to do the job at issue.” Id. “(T)he law is clear that a plaintiff’s proof must account for *objective* qualifications; exclusion of

³¹ A .05 chance corresponds to 2 standard deviations and a .001 chance corresponds to 3 standard deviations. Segar v. Smith, 738 F.2d 1249, n. 28 (D.C.C. 1984).

subjective requirements. . . is entirely proper.” Segar v. Smith, 738 F.2d 1249, 1276 (D.C.C. 1984).

Wal-Mart asserts that Dr. Barnow should have included interviewer notes³² and transfer status in his regression analysis. (D.’s Memo at 28.) In fact, Dr. Barnow did include transfer status as a variable in his regression analysis. (See Barnow Supp. Report Supp. Ex. B1.) Dr. Barnow did not include interview information because he did not have interview information for all applicants (Barnow Dep. at 127-28) and the applications presumably sought the information which Wal-Mart felt was most important in screening applicants (see Barnow Dep. at 288). Moreover, Dr. Barnow’s decision was a wise one given the grossly inaccurate information and comments placed by Wal-Mart interviewers on applications and application packets of female applicants. (See Section III(F)(5) above). More significantly, however, Wal-Mart must show (and it has not even attempted to do so) that the apparent gender disparity would in fact be reduced if these variables were taken into account. Bazemore, 478 U.S. 385, 403 n.14 (Respondents' strategy at trial was to declare simply that many factors go into making up an individual employee's salary; they made no attempt that we are aware of-statistical or otherwise-to demonstrate that when these factors were properly organized and accounted for there was no significant disparity between the salaries of blacks and whites); Sobel v. Yeshiva Univ., 839 F.2d 18 (2d Cir.1988) (University did not show that the apparent gender disparity would in fact be reduced if these variables were taken into account; University's experts criticized plaintiff's failure to include the variables, “offering no reason, in evidence or analysis, for concluding that they correlated with sex and therefore were likely to affect the sex coefficient”); McAlester v. United Airlines, Inc., 851 F.2d 1249, 1259 (10th Cir. 1988) (“United presented no expert

³² Wal-Mart incorrectly contends that because he failed to use interviewer notes, Barnow was unable to control for work history, current job responsibilities, prior job experience and pay expectations. (D.’s Memo at 28.) In fact, Dr. Barnow controlled for all of these factors. (See Barnow Supp. Report Supp. Ex. B1.)

testimony that the failure of McAlester's expert to consider these factors changed his statistical determination that the high rate of minority termination was not the result of chance. Although United developed through cross-examination that failure to consider these factors may result in skewed statistical results, the weight to be accorded this statistical evidence is the province of the jury.”); Catlett v. Missouri Highway and Transp. Comm'n, 828 F.2d 1260 (8th Cir.1987), *cert. denied*, 485 U.S. 1021, 1266 (1988) (“[w]hile Missouri argues that the class in defining the relevant work force failed to consider the actual interest of otherwise qualified men and women in maintenance work, Missouri bore the burden of introducing evidence to show this failure was significant”); Dobbs-Weinstein v. Vanderbilt University, 1 F. Supp. 2d 783, n.34 (M.D. Tenn. 1998) (“the Court believes that Defendant has not gone far enough to survive summary judgment in only pointing out the potential shortcomings in Plaintiff's calculations. The Supreme Court has held that a defendant must go beyond such criticism and actually demonstrate that its method of statistical analysis would yield statistics undermining the disparity shown by the plaintiff.”). Palmer v. Schultz, 815 F.2d 84,101 (D.C.C. 1987) (“(i)mplicit in the Bazemore holding is the principle that a mere conjecture or assertion on the defendant's part that some missing factor would explain the existing disparities between men and women generally cannot defeat the inference of discrimination created by plaintiffs' statistics.”); D. Baldus & J. Cole, Statistical Proof of Discrimination, vii (1987 Supp.) (when statistical evidence is challenged on methodological grounds, the burden should be on the challenger to present evidence that the statistics are defective and how that flaw biases the results).

(3) *Wal-Mart incorrect assertion no. 3: errors in his database render Dr. Barnow's analysis unusable.*

As the EEOC explained in response to Wal-Mart's Barnow-related Daubert motion,

which made nearly identical assertions,³³ “(a) heavy burden must be met before a party can justify the rejection in toto of any statistical analyses on grounds of errors or omissions in the data.” Vuyanich v. Republic Nat. Bank of Dallas, 505 F. Supp. 224, 256 (D.C. Tex. 1980), reversed on other grounds, 723 F.2d 1195 (C.A. Tex. 1984). Wal-Mart’s data challenges in this case go only to the weight of Dr. Barnow’s expert testimony, not its admissibility since Wal-Mart has not shown that (1) the data is *fundamentally flawed* **and** (2) *the flaws make a difference in the statistical significance*. See Barnes v. Gencorp Inc., 896 F.2d 1457, 1467 (6th Cir. 1990), citing Capaci v. Katz & Besthoff, Inc., 711 F.2d 647, 653-54 (5th Cir. 1983) (“[t]he defendant must do more than raise theoretical objections to the data or statistical approach taken; instead, the defendant should demonstrate how the errors affect the results”). Thus, Wal-Mart’s insistence upon rehashing its data challenges for summary judgment purposes is misplaced.

As the EEOC outlined in its Barnow Daubert Response, Wal-Mart is unable to show that Dr. Barnow’s data is fundamentally flawed or that the claimed flaws make a difference in the statistical significance since: (1) Mr. Freeman’s only systemic test of Dr. Barnow’s database showed a low error rate (EEOC’s Response to Wal-Mart’s Barnow Daubert Motion, DE # 386 at 17-20); (2) Dr. Barnow reran his analysis after making any warranted corrections and rechecking the key variables of gender and offer and reached the same statistically significant results (Id. at 14-15); (3) Dr. Barnow corroborated his results by statistical testing on three Wal-Mart generated databases (Id. at 15-17); and (4) Wal-Mart has produced no evidence that the asserted errors in

³³Wal-Mart not only rehashes its Daubert motion assertions, Wal-Mart now, for summary judgment purposes, makes liberal misrepresentations to the Court concerning Dr. Barnow’s database and analyses, without providing a single citation to the record. Dr. Barnow has not admitted that his analyses and opinions are inaccurate and unreliable. (D.’s Memo at 18.) He has not admitted that “his relied upon database is incorrect and incomplete.” (Id. at 19.) He has not admitted that “a key component of his analysis is wrong.” (Id.) He has not admitted that “his opinions lack predictive and probative force.” (Id.) He has not admitted that “his analyses are flawed because they are based on missing variables or incorrectly captured variables.” (Id.) He has not admitted that that “predictive value is essential to determining whether there is a statistical disparity in hiring men and women.” (Id. at 21.) Finally, Barnow did not use “an EEOC created database.” (Id. at 25-26.)

the database change the statistically significant results.

In the absence of a fundamental flaw that makes a difference in the statistically significant results, Wal-Mart's assertions concerning "mistakes" made by Dr. Barnow go to the weight of his analysis which must be determined by the jury. McAlester v. United Airlines, Inc., 851 F.2d 1249 (10th Cir. 1988) (asserted flaws properly left for cross examination); EEOC v. General Telephone Co. of Northwest, Inc., 885 F.2d 575, 580 (9th Cir. 1989) (under Bazemore a defendant cannot overcome a strong statistical showing of discrimination merely by making an unsubstantiated assertion of error; defendant required to produce credible evidence that curing the alleged flaws would also cure the statistical disparity); Gomes v. Avco Corp., 816 F. Supp. 131 (D. Conn. 1993) (statistical evidence, though flawed, sufficient to establish prima facie case and up to jury to determine its weight).

(4) *Wal-Mart's fourth incorrect assertion: the aggregation of data makes Dr. Barnow's analysis unusable.*

Dr. Barnow's decision to analyze Wal-Mart's 1998-2001 hiring and its 2002-2004 hiring as units, rather than by individual years, is supported both factually and legally and the propriety of doing so is not an appropriate matter for summary judgment. Ellis v. Costco, 240 F.R.D. 627, 638 (N.D. Cal. 2007); McReynolds v. Sodexo Marriott Services, Inc., 349 F. Supp. 2d 1, 13 (D.D.C. 2004). See also Paschal v. Flagstar Bank, 295 F.3d 565, 584 (6th Cir. 2002) (jury properly accepted aggregated data).

Dr. Barnow explained that breaking down data into one year periods has less statistical power and it would not be appropriate in this case to disaggregate the data into one year periods. (Barnow Report at 4 and n.4.) Barnow analyzed the 1998-2001 and 2002-2004 periods separately in order to analyze like periods together.³⁴ (Barnow Dep. at 294-295.) He aggregated

³⁴ Based upon the Magistrate Judge's Recommended Determination limiting the scope of this suit (DE # 129), Wal-

the data in this manner for three reasons: (1) the EEOC's lawsuit was filed in late 2001; (2) Wal-Mart changed its application process in or about 2002; and (3) the male/female differential in hiring changed beginning 2002.³⁵ (*Id.* at 288-93.) He indicated that his decision to aggregate was supported by his past experience as well as authority in the field. (Barnow Dep. at 299-301, 303, Barnow Report at 4 and n.4.) Wal-Mart chose, however, to ignore Dr. Barnow's explanation and instead erroneously contends that "Barnow offered no scientific or statistical explanation for his decision to aggregate the data." (D.'s Memo at 23.)

"It is a generally accepted principle that aggregated statistical data may be used where it is more probative than subdivided data." *Paige v. State of California*, 291 F.3d 1141 (9th Cir. 2002). "Such use is particularly appropriate where small sample size may distort the statistical analysis and may render any findings not statistically probative. *Id.* 1148 (internal citations omitted). Sufficient commonality bodes in favor of aggregation. *Id.* "The plaintiff should not be required to disaggregate the data into subgroups which are smaller than the groups which may be presumed to have been similarly situated and affected by common policies." *Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship and Training Comm.*, 833 F.2d 1334, 1340 n.8 (9th Cir. 1987)³⁶ (quoting D. Baldus & J. Cole, *Statistical Proof of Discrimination* § 7.0-7.2 (1980 & 1986 Supp.); See also *Kirkland v. New York State Dept. of Correctional Servs.*, 520

Mart provided 2005 applicant materials through only February 15, 2005, an insufficient number for Barnow to analyze for similarity between 2005 and the 2002 through 2004 period. To the extent the EEOC's Objection (DE # 131) is granted, Dr. Barnow will review the entire year of 2005 to determine whether aggregation of the 2005 data with the 2002-2004 data is appropriate. (See D.'s Memo at 23 which criticizes Barnow for not aggregating the 2005 data with the 2002 through 2004 data.)

³⁵ See also Robin Rose Dep. at 29, 59-63, Brian Elliott Dep. at 17 and Bielby Expert Report at 9, 15-16, 32-34 concerning change in the hiring process.

³⁶ The Court rejected Defendant's assertion that each year should be analyzed separately, following the Fourth Circuit in *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326 (4th Cir. 1983). In footnote 17 of the *Lilly* decision, the court noted, "If possible, it is highly preferable to examine the statistical data for the time period in combined form, rather than year by year. Combined data is more likely to demonstrate the 'pattern or practice' of defendant's policies, whether discriminatory or not. Moreover, by increasing the absolute numbers in the data, chance will more readily be excluded as a cause of any disparities found."

F.2d 420, 425 (2d Cir.1975) (focus of analysis depends on nature of defendant's employment practices).

Wal-Mart suggests that there was no statistically significant disparity in hiring during 2002, 2003 or 2004 individually, but that Dr. Barnow combined the three years solely to achieve statistical significance. (D.'s Memo at 23-24.) Not only does Dr. Barnow deny this erroneous assertion (Barnow Dep. at 298-300, 303), Wal-Mart's assertion must be rejected on two additional grounds. First, after Wal-Mart produced additional applicant packets, Dr. Barnow did find a statistically significant disparity in hiring for 2004 based on 186 hires with only 22 of them women. (Barnow Supp. Report Supp. Ex. B11.) Second, it is evident that the lack of a statistically significant disparity for the individual years of 2002 and 2003 is due solely to the small number of hires during those two years.³⁷ During 2002, there were only 64 hires and only 2 were women. (*Id.*) In 2003, there were only 76 hires and only 7 were women. (*Id.*) Thus, out of 140 hires during 2002 and 2003, only 9 were women. During 2004, however, a total of 186 hires with 22 women produced a statistically significant result, showing the fallacy of Wal-Mart's assertions since the proportion of females hired during 2002 and 2003 was actually lower than the proportion in 2004. As one court noted, an "employer's attempt to demonstrate there was no statistical significant evidence of discrimination when data was broken down by city or year or both was unfair and obvious attempt to disaggregate data to point where it was difficult to demonstrate statistical significance." Capaci v. Katz and Besthoff, Inc., 711 F.2d. 647, 654-655 (5th Cir. 1983).

³⁷ Wal-Mart incorrectly asserts that Barnow did not state that small sample size made aggregation appropriate. (D.'s Memo at 23.) In fact, during his deposition, Barnow discussed small sample size and the notion of statistical power, a concept related to sample size. (Barnow Dep. at 299.)

(5) ***Wal-Mart's fifth incorrect assertion: the inability to predict with certainty exactly which applicants will be hired makes the analysis unusable.***

The goal of Dr. Barnow's regression analysis was to determine, after controlling for relevant factors, *whether the gender based disparity in hiring at DC 6097 was unlikely due to chance.* (Rebuttal Report at 2.) (emphasis added.) "The purpose of developing a model in the context of this case [was] to determine if there is a gender disparity in offer rates between men and women after controlling for relevant factors." (*Id.*) Hence, Dr. Barnow's model predicts exactly what it was intended to predict—the affect of gender on being hired at DC 6097. "The overall explanatory power of the statistical model is irrelevant to making inferences on the impact of gender upon receiving an offer." (footnotes omitted). (*Id.*) Wal-Mart's suggestion that Dr. Barnow's model should be thrown out because it cannot predict exactly who will be hired by Wal-Mart is baseless and demonstrates a misunderstanding of basic statistical principles. (D's Memo at 20-22.)

As discussed in Section III(E) above, Wal-Mart used virtually no standards in its entirely subjective hiring process and interviewers did not treat applicants in a uniform manner. Dr. Barnow's findings that some variables made a difference in one's chance of being hired and some did not (See EEOC's Statement of Material Facts "SoMF" at 12) is completely consistent with the abundant testimony concerning Wal-Mart's haphazard hiring process and Dr. Barnow himself opined that based upon the manager depositions and applications he reviewed in this case, that the lack of consistency/lack of strongly enforced rules by Wal-Mart could explain the inability to predict all variables (other than gender/male) making hire likely. (Barnow Rebuttal Report at 2.) Wal-Mart appears to make the absurd suggestion that employers such as itself who use virtually no hiring standards and entirely subjective decisionmaking processes should be

exempt from discrimination lawsuits because the plaintiff cannot predict with certainty which applicants will be hired.³⁸

Wal-Mart's use of McCleskey v. Zant, 580 F. Supp. 338, 351 (N.D. Ga. 1984) does nothing to support its erroneous assertion that Dr. Barnow was required to create a model which predicts exactly which applicants will be hired when his goal was only to predict whether gender was a statistically significant factor in the hiring process at DC 6097. McCleskey was a *death sentence appeal* in which the court discussed regression analyses in general. Neither McCleskey nor any other case cited by Wal-Mart stands for the erroneous proposition that a plaintiff who shows a gender based disparity in hiring after controlling for relevant factors must also precisely predict which applicants will be hired. The plaintiff using statistical evidence to prove discrimination must only show protected class based statistical disparities, exactly what the EEOC (and Dr. Barnow) have done. Hazelwood School District, 433 U.S. at 307-08 (1977); International Broth. Of Teamsters v. U.S., 431 U.S. 324 (1977).

(6) *Wal-Mart's sixth incorrect assertion: because Dr. Barnow made corrections and revisions to his report, his analyses should be disregarded.*

Wal-Mart contends that Dr. Barnow's highly significant statistical results should be discarded because Dr. Barnow made corrections and **increased the reliability of his database³⁹ and analyses.** (D.'s Memo at 24.) The EEOC can make short work of this contention here. This is the identical argument made by Wal-Mart in its Barnow Daubert Motion and for which the EEOC provided extensive case law to the contrary. (See DE # 386 at 14-15.)

Contrary to Wal-Mart's suggestion, any and all changes to Dr. Barnow's database and or his analyses since 2007 *have not changed his statistically significant* results and have been due to

³⁸ In fact, use of a subjective decisionmaking making process has been recognized as providing further evidence of discrimination. (See Section C below).

³⁹ Wal-Mart incorrectly refers to the database as "an EEOC created database." (D.'s Memo at 25.)

either: (1) Wal-Mart's late production of applicant and hires information⁴⁰ or (2) in rebuttal to Mr. Freeman's Responsive Expert Report.⁴¹ See Wal-Mart v. Oore Inc., 2009 WL 224908, * 4 (N.D. Miss. Jan. 28, 2009) ("when a mistake is discovered and fixed it advances the cause of justice."). Dr. Barnow does not anticipate further reporting unless: (1) Wal-Mart produces additional delinquent applicant and/or hires information; (2) Wal-Mart's expert supplements his opinion or (3) the District Judge rejects the Magistrate Judge's proposed limitation on the temporal scope of this suit.

C. The EEOC's Evidence of Gender Stereotyping at DC 6097 Bolsters its Statistical Evidence and Precludes Summary Judgment.

The overwhelming evidence that Wal-Mart interviewers used subjective, decentralized decision-making and employed stereotypes when deciding whether to pass an applicant through the interview process or when making hiring decisions raises an inference of discrimination best left for a jury to resolve. Evidence of "entirely subjective decisionmaking processes" is the kind of convincing anecdotal evidence that coupled with strong statistical evidence can sustain a pattern or practice case such as this one. See e.g., McReynolds v. Sodexho, 349 S. Supp. 2d. 1, 20 (D.D.C. 2004); and Senter v. General Motors Corp. 532 F.2d 511, 530 at n.57 (6th Cir. 1976) ("[o]ther courts have found that selection procedures too heavily dependent on subjective evaluations violate Title VII.>").

In McReynolds, a discriminatory promotion practices case, the plaintiffs bolstered their

⁴⁰ Notably, Wal-Mart fails to mention its own delinquent production of applicant and hires related documentation which required multiple revisions by Dr. Barnow. Nor does it mention the poor quality of the documents it produced to the EEOC and its failure to produce summary and/or electronic documents for a number of years. See Mister v. Illinois Central Gulf Railway Co., 832 F.2d 1427, 1431 (7th Cir. 1987) ([t]he plaintiffs' expert used the best data available; that the data were not better is the ICG's fault, and we agree with the district court that the data at hand was good enough even though imperfect.). Wal-Mart's delinquent production is more fully addressed in the EEOC's Motion for Sanctions which is being filed contemporaneously with this Response.

⁴¹ As detailed in the EEOC's Response to Wal-Mart's Motion to Strike (DE # 373), Dr. Barnow's Rebuttal Report is entirely proper and the fact that it is harmful to Wal-Mart is not a valid ground for its exclusion. The EEOC firmly objects to Wal-Mart's reservation of the right to "re-file its dispositive motion" when the Court declines to strike Dr. Barnow's Rebuttal Report. (D.'s Memo at n.9.)

statistical evidence with among other types of anecdotal evidence, “the testimony of numerous company employees” who attested to a subjective unstructured promotion process lacking any centralized guidance as well as corroborating testimony from Sodexho’s Corporate Services Division Director. (*Id.* at 19.) The court deemed such “substantial testimony” and “mountain of evidence showing that Sodexho’s decision-makers exercised unfettered discretion in determining whom to interview and what questions to ask” adequate evidence to overcome Sodexho’s summary judgment motion. (*Id.* at 20.) See also, Payne v. Travenol Lab., Inc., 673 F.2d 798, 817 (5th Cir. 1982) (“hiring processes that rely heavily on subjective interviewing provide an opportunity for the intentional discrimination that lies at the heart of a disparate treatment case.”).

Here, in addition to the Expert Report of Dr. Bielby, the EEOC has proffered its own mountain of evidence that Wal-Mart employed a highly subjective interview and hire process and provided little guidance to its interviewers on selection decisions. Butler v. Home Depot, 1997 U.S. Dist. Lexis 16296, at *24 (N.D. Ca. 1997) (court denied motion for summary judgment where, in addition to statistical evidence, plaintiffs “presented sociological and anecdotal evidence” that included expert testimony on gender stereotyping, evidence that managers utilized stereotypes about women in hiring, and anecdotal testimony from woman who alleged “that they were denied employment on account of their gender or steered away from traditionally ‘male’ positions”).

Bielby analyzed whether findings from social science research could offer an explanation for the gender-based hiring disparity for entry-level positions at DC 6097 during the relevant time period. (Bielby Report at 1.) After an extensive review of relevant material, Dr. Bielby opined that Wal-Mart’s highly discretionary selection system with minimal oversight, coupled

with an overwhelmingly male workforce and the physical nature of warehouse jobs, invites gender stereotyping and bias against female applicants. (Bielby Report at 17-27.) He also opined that Wal-Mart's EEO policies and practices and manager training were insufficient to minimize stereotyping and gender bias. (*Id.* at 27-32.) Dr. Bielby concluded that gender stereotyping offered a cogent explanation for the disparity in hiring between males and females at DC 6097 and that changes beginning in 2002, including changes in the hiring process and the filing of the EEOC's sex discrimination lawsuit resulted in a noticeable, but not complete, diminution in the gender-based hiring disparity. (*Id.* at 32-35 and Rebuttal Report at 30-36.)

Wal-Mart attempts to dodge the EEOC's evidentiary deluge of bullets by jumping behind the same lackluster attacks it made against Bielby in its Daubert motion to exclude Bielby's testimony in this matter. (D.'s Memo at 29-36.) In doing so, Wal-Mart merely rehashes those arguments. But, the EEOC has soundly demonstrated why those arguments are untenable. (See DE # 361, Section C(2).) In summary, Wal-Mart's contentions that Dr. Bielby's opinions are speculation, he did not test alternative theories or consider key information, and his theories are not based on knowledge of the subject matter or fact to do entitle Wal-Mart to summary judgment and their only probative value is with respect to the weight of this evidence. The jury remains entitled to hear this evidence and make its own decisions regarding what weight it believes should be apportioned to Dr. Bielby's testimony.⁴²

It is most telling that the cases relied on by Wal-Mart entail situations where statistical support was non-existent or lacking. (See D.'s Memo at 32-36.) Wal-Mart does not cite to any authority granting summary judgment to a defendant in a Title VII pattern or practice case where a plaintiff had the significant statistical proof and formidable anecdotal subjective, stereotype

⁴² As demonstrated in the Daubert context, each of Wal-Mart's Bielby-based challenges has been rejected squarely by other courts that have considered such arguments. (DE #361, at 17-20.)

evidence present in this case. This is likely because none exist. In fact, the court in Sperling v. Hoffmann-LaRoche, Inc., 924 F. Supp. 1346, 1381 (D.N.J. 1996), placed great emphasis on the fact that plaintiffs *only* had evidence of a “decentralized, uncontrolled decisionmaking process. . . .” (emphasis added.) Other cases cited by Wal-Mart either have nothing to do with this type of case and/or the use of subjective decisionmaking and gender stereotype evidence⁴³ or merely recite well-understood Title VII principles.⁴⁴ The authority cited by Wal-Mart in no way diminishes the impact of the EEOC’s evidence that weighs against summary judgment.

The EEOC can further point to testimony from over twenty Wal-Mart supervisors and managers who detailed that they received no training on how to conduct an interview and objectively assess information solicited from applicants they interviewed (See SoMF at 13-14); no guidelines for interviewing or exercising their discretion when making decisions to advance or reject applicants they interviewed; (Id.); were given free reign to write down on interview sheets whatever they wanted about interviewees (Id.); generally were free to conduct interviews and make decisions any way they saw fit. (Id.)⁴⁵

⁴³ See e.g. Westlake Vinyls, Inc. v. Goodrick Corp., 518 F. Supp. 2d 918, 934 (W.D. Ky. 2007) (breach of contract case recounting universally understood summary judgment tenets), cited by Wal-Mart for the proposition that the EEOC has insufficient proof to overcome its summary judgment motion. (D.’s Memo at 32.)

⁴⁴ See e.g., Silvera v. Orange County Sch. Bd., 244 F.3d 1253, 1262 (11th Cir. 2001)(disparate treatment race case concerning insufficient evidence of pretext) cited by Wal-Mart for the proposition that “the only reasonable inference from Bielby’s opinions – that any gender bias was not deliberate and intentional – directly rebuts the EEOC’s burden to create an inference that Wal-Mart engaged in an intentional, deliberate, routine practice of gender discrimination. (D.’s Memo at 34.) Furthermore, Wal-Mart’s repeated and illogical insistence that gender stereotype evidence has no place in disparate treatment cases has consistently been rejected by other courts entertaining the same arguments. See Tuli v. Brigham & Women’s Hospital, Inc., 592 F. Supp. 2d 208, 214-15 (D. Mass. 2009) (court allowed gender stereotyping testimony); and EEOC v. Morgan Stanley, 324 F. Supp. 2d 451, 457-58 (S.D.N.Y. 2004) (same). See also, EEOC v. Joe’s Stone Crab, Inc., 220 F. 3d 1263, 1284 (11th Cir. 2000) (“if restaurant deliberately and systematically excluded women from food server positions based on a sexual stereotype. . . . it could then be found liable under Title VII for intentional discrimination.”).

⁴⁵ The EEOC’s evidence, likewise, shows that Wal-Mart’s behavioral interview process implemented in 2002 did not entirely remedy the previous subjective deficiencies that allowed gender discrimination to permeate its hiring. The new process remained at the mercy of the subjective impressions of the interviewers. (Karr Dep. at 84-85). Wal-Mart still did not give interviewers any guidance concerning how to rate answers to questions given during behavioral interviewing (Parmon Dep. at 38-40), managers also did not know what kind of a score was necessary for an applicant to be successfully passed on or hired (Parmon Dep. at 41-42) and Wal-Mart continued to select applicants for entry level warehouse positions without objectively assessing their strength and/or physical abilities.

As a result, the process was completely subjective. Most telling, Wal-Mart's interviewers plainly acknowledged that "it's a subjective decision" (EEOC's So MF at 15); "it was a personal thing" (Id.); they just "just sort of eyeballed it" (Id.); or used their "own method" to determine when to pass an applicant along (Id.) Some interviewers assessed applicants by "good attitude (EEOC's So MF at 14); "gaps in employment" (Id.); whether they were "happy people" (Id.) motivated, self-driven, enthusiastic or eager (Id.); or "the way . . . they looked at you and talked to you and acted" (EEOC's So MF, Id.); Some would look at an applicant's "physical characteristics" meaning whether they worked on the farm or played a lot of sports regardless of the lack objective strength assessment (EEOC's "SoMF" at 15.)

The EEOC's evidence concretely demonstrates how Wal-Mart's incredibly subjective interview and hire system allowed Wal-Mart interviewers to employ gender stereotypes when making their decisions. Managers conducting interviews just assumed that women did not want the job (EEOC's So MF at 15) or could not "cut it" to do the job (EEOC's So MF, Id.) And, young strong-looking men were the preferred ideal candidate. (EEOC's So MF, Id.) Jeff Akers, DC 6097's general manager told Tom Van Jura, an Operations Manager from January 2001 to February 2002, not to hire female order-fillers. (EEOC's So MF at 15-16.) In fact, Akers told him that "a lady is not going to be a good order filler" and yet another operations manager stated to Van Jura that they were looking for "young males who are fresh out of high school" (EEOC's So MF at 16.) As a result, Van Jura didn't recommend any female candidates to be hired as order fillers during his tenure interviewing candidates. (EEOC's So MF at 16.)

Other managers allowed stereotypes to infect their decision making in more subtle ways including: giving preference to males who indicated involvement in sports (EEOC's So MF at

(Karr Dep. at 81-86; Gulock Dep. at 89-90.)

Id.) or perceived the ideal candidate as eight feet tall with ten-foot-long arms (EEOC's So MF at Id.) This subjective gender-stereotype driven interview process yielded a warehouse that was dominated by men. (EEOC's So MF at Id.) At no time did Wal-Mart take adequate steps to remedy the gender discrimination perpetuated by its subjective hiring process. Consequently, the EEOC's considerable subjective and stereotyping evidence coupled with the statistical evidence thwarts Wal-Mart's summary judgment motion and the Court should allow the EEOC's discrimination claims to be tried by a jury. See Stender v. Lucky Stores, Inc., 803 F.Supp. 259, 331 (N.D. Ca. 1992) ("the potential for discriminatory abuse inherent in the ambiguous and subjective practices employed by defendant in making placement, promotion and training decisions is sufficiently high to infer the intent necessary to establish a claim for disparate treatment."); Pitre v. Western Electric Company, Inc., 843 F.2d 1262, 1272 (10th Cir. 1088) ("district court properly considered the company's reliance on subjective evaluation methods to be additional evidence of discrimination."); Howard v. Gutierrez, 571 F. Supp. 2d. 145, 161 (D.D.C. 2008) (court determined that anecdotal evidence, including evidence of subjective processes, together with statistical evidence was sufficient evidence to raise an inference of discrimination and overcome defendant's motion to dismiss).

D. The EEOC's Abundant Anecdotal Evidence Creates Genuine Issues of Material Fact that Preclude Summary Judgment.

The EEOC offers admissions by Wal-Mart managers and supervisors involved in the hiring process which indicate a pattern or practice of disparate treatment toward female applicants. And, "[a]ny direct evidence offered by the [EEOC] in response to a [Wal-Mart's] summary judgment motion must be accepted as true." Muhammad v. Close, 379 F.3d 413, 416 (6th Cir. 2004) (citing Adams v. Metiva, 31 F.3d 375, 382 (6th Cir.1994)). Rejected female applicants testify they were specifically told by Wal-Mart employees, agents and/or supervisors

that women were generally not wanted for warehouse positions at DC 6097, while some were specifically told they would not be hired because of their gender. Others were ridiculed and belittled. Even those that made it through one, two or three steps of the interview process ran into insurmountable discrimination from Wal-Mart that precluded their hire. Additionally, both female applicants and employees were subjected to sex based differential treatment. Such evidence provides "texture" to the EEOC's statistics, Robinson v. Metro-North Commuter R. R. Co., 267 F.3d 147, 168 (2d Cir. 2001), and easily overcomes Wal-Mart's motion for summary judgment.

Direct anecdotal evidence of discriminatory practices, including Wal-Mart's undeniably strong preference for male applicants, is found in the testimony of former managers.⁴⁶ Managers relegated female applicants to "certain areas" within DC 6097 and males to others (EEOC's SoMF at 17-18.) And others looked only for "big, strong, young guys." (EEOC's SoMF at 19.)⁴⁷ B. Sizemore, a warehouse manager at DC 6097 from March 29, 1999, through October 25, 2001, preferred young male applicants in "good shape," who were "stout" and "muscular," with no prior job experience because he thought they could do the work, especially order filling. (EEOC's SoMF at 19.) Eugene Riley, who worked at DC 6097 from 1995 through 1998,

⁴⁶ Direct evidence is "evidence that proves the existence of a fact without requiring any inferences." Rowan v. Lockheed Martin Energy Sys., Inc., 360 F.3d 544, 548 (6th Cir. 2004). Direct evidence requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions. Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 570 (6th Cir. 2003)(en banc). Direct evidence is highly probative of a pattern or practice of discrimination. See e.g., Holsey v. Armour & Co., 743 F.2d 199, 214 (4th Cir. 1984)(stating testimony showing discriminatory statements by management related to customers' perceived racial preferences and method of recruitment provided "substantial basis" for pattern or practice finding); EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1285-87 (11th Cir. 2000)(noting discriminatory admissions by owner and manages and stating, "[D]irect evidence of an intent to discriminate may be used to establish a pattern or practice claim.")(citations and internal quotations omitted).

⁴⁷ Testimony from former managers involved in the interviewing and hiring process at DC 6097 are admissible as a party admissions under Federal Rule of Evidence 801(d)(2) because the comments were made by supervisors and managers on matters within the scope of their employment (Wal-Mart's hiring practices), and are being offered against Wal-Mart. Federal Rule of Evidence 801(d)(2) provides: [a] statement is not hearsay if . . . [t]he statement is offered against the party and is . . . (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.

recalled how fellow coaches Jeffrey Henderson and Mike Maxey would not refer female applicants on in the process, preferring young male applicants, because they believed a man would do a better job at order filling than a woman (EEOC's SoMF at 19.) Another example of admitted discriminatory conduct towards female applicants, Tom Van Jura, operations manager at DC 6097 from January 2001 through February 2002, who participated in all aspects of the hiring process, including making final hiring decisions, explained that Wal-Mart wanted to "get a young guy, fresh out of high school. Or if they have a young guy that's just gotten married, something like that, has a responsibility, a mind that you can mold." (EEOC's SoMF, at 20.)

The EEOC also has compelling anecdotal direct evidence from numerous rejected female applicants who were told by Wal-Mart employees, agents and/or supervisors that women were generally not wanted for warehouse positions at DC 6097, or more specifically, that they would not be hired because of their gender. (EEOC's SoMF at 17-20.)⁴⁸

Adding to robust anecdotal evidence discussed above, the EEOC offers forceful additional evidence that female employees and applicants were treated less favorably than male

⁴⁸ Certainly not all of the applicants could identify by name or title the Wal-Mart hiring official to whom they spoke when interviewed, but that fact is of no moment. Whether a statement is offered under Fed. R. Evid. 801(d)(2)(D) as a statement concerning a matter within the scope of employment or agency or, in the alternative, under Fed. R. Evid. 801(d)(2)(c) as a statement concerning subject matter about which the speaker is authorized to speak, the statement of an unidentified declarant is admissible as a party admission if the circumstances allow a reasonable to conclude that the statement concerned a matter within the scope of the declarant's employment or agency or a matter about which he was authorized to speak. See e.g., United States v. Portsmouth Paving Corp., 694 F.2d 12, 321-22 (4th Cir. 1982); Pappas v. Middle Earth Condo. Ass'n, 936 F.2d 534, 537-38 (2nd Cir. 1992). The statements of Wal-Mart hiring officials revealed in applicants' testimony are admissible because, as the applicants' depositions indicate, the declarants were involved in screening and interviewing applicants, making it reasonable to conclude that Wal-Mart hiring practices were within the scope of the declarant's employment. Furthermore, discriminatory comments by managers, supervisors and hourly employees alike are admissible when not being offered to prove the truth of the matter asserted, but rather to demonstrate the company's discriminatory atmosphere. See e.g., Talley v. Bravo Pitino Rest., Ltd., 61 F.3d 1241, 1249 (6th Cir. 1995)(holding use of racial slurs by managers responsible for the decision regarding a plaintiff's termination constitutes direct evidence and are not hearsay because they were offered to demonstrate racial attitudes); EEOC v. Schott North America, Inc., 2009 US Dist LEXIS 8546 (M.D. PA Feb. 5, 2009)(noting "Courts have concluded that discriminatory remarks made about the suitability of particular employees which serve as circumstantial evidence of a discriminatory atmosphere in an employment discrimination suit are not hearsay, since "the statements were not offered to prove the truth of the matters asserted.") (internal cites omitted).

applicants and employees. For instance, female applicants were told that Wal-Mart feared they would distract the male workforce because of their appearance. (EEOC's SoMF at 20-22.) Female former employees shared additional testimony of sex harassment,⁴⁹ flagrant disrespect and being treated less favorably than male employees, including being subjected to sexual comments and excluded from management meetings, training opportunities and outings because of gender. (EEOC's SoMF at 21-24.) Applicants testified to sex harassment and instances of disrespect toward women as well. (Id.)

Male interviewers expressed disbelief, sarcasm and laughter when female applicants asserted their ability to perform the duties of a warehouse position at DC 6097, while others asked irrelevant, personal questions and/or expressed a dismissive attitude while interviewing female applicants. (EEOC's SoMF at 24-27.) Furthermore, numerous class members testified to having inaccurate and/or untrue statements noted by interviewers on their interview comment sheets or applications. (EEOC's SoMF at 27.) In many instances, Wal-Mart managers noted reasons for exclusion of female applicants that contradicted their testimony concerning hiring for DC 6097. (EEOC's SoMF at 27-31.) Other interviewers excluded female applicants for inexplicable reasons such as "not fitting into the Wal-Mart culture" and not having relevant prior experience when none was required. (EEOC's SoMF at 30.) Still others noted comments such as "Not the best suitable for this job" even when they did not know what job they were interviewing the candidate for. (EEOC's SoMF at 31.)

Anecdotal evidence concerning treatment of those female applicants who actually received multiple interviews provides another shield against Wal-Mart's quest for summary

⁴⁹ Evidence of sexual harassment is relevant to show the pattern or practice of gender discrimination present in a company's policies and practices. See Pitre, 843 F.2d, at 1270. ("Evidence of harassment, therefore, helps create an inference of discrimination in Western Electric's promotion and demotion practices.") In the present case, female employees were forced to work in a sex-based hostile work environment created by male co-workers, supervisors and managers.

judgment. In fact, despite knowing that such a practice was improper stereotyping, Wal-Mart managers, unchecked by any policy, placed well-qualified female applicants on “hold” while hiring numerous, often less qualified, male applicants. (EEOC’s SoMF at 31-39.)⁵⁰ In addition to being placed on hold, female applicants were also excluded from employment after passing two interviews, receiving satisfactory reference checks, but prior to receiving a third interview for no legitimate reason. (EEOC’s SoMF at 39-40.)

Contrary to Wal-Mart's argument, this evidence is not a mere smattering of speculative or stray instances of alleged discrimination. (D.’s Memo at 36.) Rather, the testimony of close to 50 class members and numerous former employees shows that women were systemically discriminated against at the interview and hiring phase at DC 6097 from 1998 through 2004. This is more than enough for the EEOC to survive summary judgment and present its claims to a jury. See e.g., Teamsters, 431 U.S. at 337 (Court held that statistical evidence with individual testimony recounting over forty specific instances of discrimination was sufficient to carry the government's burden of proof); Chisholm v. United States Postal Service, 665 F.2d 482, 495 (4th Cir. 1981) (twenty class members testified about individual discrimination to bolster the statistical evidence); EEOC v. Andersons Restaurant of Charlotte, 666 F. Supp. 821, 842 (W.D. NC. 1987) (court found the testimony of six claimants was sufficient to support a pattern and practice case).

Although Wal-Mart tries to convince the Court that the EEOC must have some magical amount of anecdotal testimony to raise an inference of discrimination and overcome a summary judgment motion, Wal-Mart is mistaken. (D.’s Memo at 36-38.) The EEOC is not required to present any specific amount of testimony to support its pattern or practice claims. In EEOC v.

⁵⁰ Wal-Mart’s new hire logs do not reflect applicants who received offers and declined or whose offers were rescinded after drug testing.

LA Weight Loss, 509 F. Supp. 2d 527, 533 (D. Md. 2007), the court concluded “[T]he testimonial evidence alone demonstrates genuine issues of material fact regarding the EEOC's pattern-or-practice claim.”) In that case, admissions by upper-level employees made within the scope of their employment indicated a practice of disparate treatment of male job applicants, and rejected male applicants were told by company officials they would not be hired because of their sex. Here, the EEOC has so much more. In this case, the EEOC has piles of anecdotal evidence from numerous class members, Wal-Mart managers, and other applicants, in addition to convincing statistical evidence. See EEOC v. O & G Spring and Wire Forms Specialty Co., 38 F.3d 872 (7th Cir. 1994), cert. denied, 513 U.S. 1198 (1995) (anecdotal evidence limited to a sampling of four disappointed applicants was relevant to demonstrating discriminatory conduct); Moze v. American Commercial Marine Serv. Co., 940 F.2d 1036 (7th Cir. 1991)(anecdotal evidence from five named plaintiffs sufficient, with statistical evidence, to support a pattern or practice claim), cert. denied, 506 U.S. 872 (1992); and Dukes v. Wal-Mart, 509 F.3d 1168 (9th Cir. 2007) (finding 120 declarations sufficient to represent class of 1.5 million in finding commonality sufficient to support class certification). Here, unequivocally, the EEOC has presented the requisite quantity and quality of direct and circumstantial evidence, as well as statistical disparities, in accord with Teamsters and its progeny, to overcome Wal-Mart's motion for summary judgment. Wal-Mart cannot escape the totality of the evidence against it.

E. Wal-Mart's Ignorance of Gender Argument Fails.

Wal-Mart's assertion that its officials could not possibly know the gender of rejected applicants is untenable. (See D.'s Memo at 12-15.) While one's race or national origin might not be readily apparent from an employment application,⁵¹ gender in most cases is discernable.

⁵¹ See race cases cited by Wal-Mart such as Johnson v. Northwest Airlines, Inc., 53 F.3d 331, 1995 WL 242001, *3 (6th Cir. 1995); Jackson v. Whitehouse, 1993 WL 1624960, *6 (E.D. Mich. 1993); Robinson v. Adams, 847 F.2d

A review of the class member list in this case creates a strong inference that Wal-Mart officials were able to recognize as female the large number of class members with common “female” names (See Williams Decl. ¶¶ 6, 7). Moreover, Wal-Mart is unable to account for the disparate treatment of female applicants who came face to face with interviewers⁵² or for the disparate treatment of female applicants who spoke with Wal-Mart personnel when they submitted their applications (Malicoat Howe Dep. at 50-58, Shannon Bowling Dep. at 49, Karen Powell Dep. at 32-34.)

Wal-Mart’s assertion that its interviewers would not recognize gender from names since Dr. Barnow had trouble doing so fares no better. (D.’s Memo at 14.) Dr. Barnow did not simply “eyeball” applications as the Wal-Mart interviewers/screeners did. Instead, he used a computerized method which first paired social security numbers with motor vehicle information and then compared the gender designation to a census gender program and raw applicant information as needed. (Barnow Report at 8, Barnow Rebuttal Report at n.7.) Illegible social security numbers resulted in incorrect gender designations which were ultimately corrected via further steps in the gender identification process. (Barnow Rebuttal Report at n.25.) Only a very small fraction of the class members had names that were actually gender ambiguous and/or atypical female names. (Williams Decl. ¶ 8.)

Wal-Mart has failed to present an iota of testimony supporting its tenuous position. At the very most, Wal-Mart’s suggestion that its interviewers/screeners would not associate gender with applicant names is an issue of material fact for the jury. At the summary judgment stage, factual questions such as this are to be resolved in favor of the EEOC, not Wal-Mart. U.S. v.

1315, 1316 (9th Cir. 1987); Martin v. Citibank, N.A., 762 F.2d 212, 217-18 (2d Cir. 1985); Frazier v. USF Holland, Inc., 2006 WL 2987737, *9 (E.D. Tenn. 2006).

⁵² Dr. Barnow’s analyses show gender based disparities at every stage of DC 6097’s hiring process (Barnow Supp. Report Supp Ex. B8), including the pre-interview stage. This pattern is consistent with the EEOC’s position that Wal-Mart interviewers, in most cases, were able to discern an applicant’s gender from their employment application.

Diebold, Inc., 369 U.S. 654, 655 (1962); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (internal citations omitted).

F. The Scope of the EEOC's Suit is Proper.

Wal-Mart misapprehends the nature of the EEOC's statutory authority to bring pattern or practice actions and misrepresents the permissible scope of the EEOC's lawsuit. (D.'s Memo at 9-12.) As explained more fully below: (1) the EEOC's lawsuit properly includes outside female applicants, as well as those requesting transfers to DC 6097; (2) the EEOC's lawsuit properly includes all entry level applicants at DC 6097; and (3) the temporal scope properly covers January 1, 1998, through the present.

1. The EEOC's lawsuit properly encompasses all hires, not just transfers.

It is well established that neither the scope of the EEOC's investigation nor the scope of its reasonable cause determination is limited to the four corners of the charge. See EEOC v. General Electric Co., 532 F.2d 359, 364 (4th Cir. 1979). The EEOC's authority under Title VII is not derivative of, or limited by, the rights, interests or limits applicable to the charging party or others for whom it seeks relief. "Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable." Id. at 331. As the General Electric Court explained:

If the EEOC uncovers during that investigation facts which support a charge of another discrimination than that in the filed charge, *it is neither obliged to cast a blind eye over such discrimination nor to sever those facts and discrimination so shown from the investigation in process and file a Commissioner's charge thereon*, thereby beginning again a repetitive investigation of the same facts already developed in the ongoing investigation. ...

Id. at 365 (*emphasis added*). Thus, the charge merely provides the EEOC with "a jurisdictional springboard" to investigate whether the employer is engaged in any discriminatory practices.

EEOC v. Huttig Sash & Door Co., 511 F.2d 453, 455 (5th Cir. 1975); see also Abeita v.

TransAmerica Mailings, Inc., 159 F.3d 246, 254 (6th Cir. 1998); Davis v. Sodexho, 157 F.3d 460, 463 (6th Cir. 1998). As long as a timely charge puts the defendant on notice of the administrative investigation that can reasonably be expected to follow, the single filing rule permits recovery by class members including those whose circumstances were not within the four corners of the charge.⁵³ See Chisholm, 665 F.2d at 490-91.

Here, Janice Smith filed her charge of discrimination alleging Wal-Mart discriminated against her based on her sex when it denied her an order filling position at DC 6097. (Ex. 3, Smith EEOC Charge.) Although Smith was a transfer applicant rather than an outside applicant, the EEOC neither limited its request for information nor did Wal-Mart constrain its document production during the investigation to transfer applicants. (See e.g. EEOC's SoMF at p. 4.)

Based on its investigation, the EEOC found that Wal-Mart rejected female applicants, whether outside applicants or transfers because of their sex in violation of Title VII. (EEOC'S SoMF, at 4-5.) As required, the EEOC attempted in good faith to conciliate on behalf of Smith and the five outside applicant class members, but Wal-Mart summarily rejected the Commission's invitation to conciliate. (Id.) Given that Wal-Mart's document production during the investigation was not limited to transfer applicants, and it was invited but declined to conciliate as to all class members, both transfers and outside applicants, Wal-Mart cannot now complain about the scope of the EEOC's lawsuit. See e.g., Murray v. Board of Educ. of City of

⁵³ Under the single filing rule, the original charge can support a subsequent lawsuit including class members whose circumstances were not within the four corners of the charge as long as the administrative investigation could reasonably be expected to include those claims. See Chisholm, 665 F.2d at 491. It was reasonable here to expect the EEOC would not turn a blind eye to Janice Smith's allegation that Wal-Mart discriminates against women and instead investigate the suggestion of a pattern or practice implicit in her allegation. See General Electric, 532 F.2d at 364; EEOC v. Dial Corp., 156 F. Supp. 2d 926, 936 & n.6 (N.D. Ill. 2001) (relying on Fourth Circuit's reasoning in General Electric to hold that individual sexual harassment charge supports EEOC suit for class of sexual harassment victims). In other words, Janice Smith's charge was sufficient to place a reasonable employer on notice of the likely scope of any subsequent litigation on the basis of gender and hiring, and all claimants in this case can piggyback on her timely-filed charge and are presumptively entitled to relief upon proof of a pattern or practice, per Teamsters, 431 U.S. at 362, including back pay dating two years prior to Smith's charge. See Chisholm, 665 F.2d at 490.

New York, 984 F.Supp. 169, 177 (S.D.N.Y. 1997) (noting that “primary purpose of the charge is to alert the EEOC to the discrimination of which the charging party complains;” court found that plaintiff’s initial discriminatory transfer allegations contained in her charge were sufficiently related to a discriminatory failure to promote claim made in her lawsuit because they arose “out of the same nucleus of operative fact”).

2. *The EEOC’s Suit Properly Includes all Entry Level Positions at DC 6097.*

Wal-Mart’s assertion that the EEOC’s suit should be limited to the entry level order filler position (D.’s Memo at 11-12) is not only legally incorrect, but as discussed below, a difference without distinction and a practical decision which is not prejudicial to Wal-Mart. Just as the EEOC investigated and attempted conciliation on behalf of outside applicants, the EEOC attempted to conciliate on behalf of applicants who sought entry level positions other than order filler. (EEOC’s SoMF at 4-5.)

Wal-Mart’s assertion that the EEOC’s suit should be limited to the order filler position ignores several practical realities. First, Wal-Mart managers, counsel and experts have consistently asserted throughout this litigation that nearly all or nearly all entry level positions filled at DC 6097 between 1998 and 2004 were for the order filler position. (See e.g., D.’s Memo at 4, DE # 346 at 2, DE # 361 at 9, Giles Dep. I at 33-37, 68, Rose Dep. at 50, Earls Dep. at 141, J. Baker Dep. at 54-5, Gulock Dep. at 48-49, Combs Expert Report at 6,⁵⁴ Freeman Expert Report at 1.) Wal-Mart’s assertion of a prejudicial “expansion” is at odds with its previous representations. To the extent there is any difference between the claims of discriminatory hiring in order filling versus all entry level positions, this difference is not sufficiently cognizable to push the latter beyond the scope of this lawsuit. See EEOC v. Newton Inn Assoc., Inc., 647 F.Supp. 957, 961 (E.D. Va. 1986) (Where the difference in claims is

⁵⁴ Cited pages of the Combs Expert Report are attached as Exhibit 125.

minimal, the ultimate complaint may still logically flow from the substance of the initial administrative charge and as such is properly before a court).

Wal-Mart ignores a second significant practical reality. The EEOC attempted conciliation on behalf of class members who sought jobs other than the order filler position. (EEOC SoMF at 5.) Although Wal-Mart had a full opportunity to conciliate on behalf of non-order filler applicants, it declined to do so. (*Id.*) Thus, Wal-Mart was not deprived of notice or the opportunity to conciliate as it contends. See EEOC v. Gardner Mgmt. Group, LLC., 2007 WL 1672820, at *2 (W.D. Ok. 2007) (in assessing whether the Commission has properly brought claims that were not explicitly articulated in the charge, the key determination is whether or not the claim was contemplated in the conciliation process. “If they were included then they may be presented to the jury regardless of their omission from the determination letters”). See also, EEOC v. Reichold Chemicals, Inc., 700 F. Supp. 524, 527 (N.D. Fla. 1988) (If the EEOC has investigated and attempted to conciliate a claim, “it has fulfilled its critical functions of investigation and conciliation, and has provided the employer with a chance to remedy the problem without litigation” and may properly bring that claim in a subsequent lawsuit).

Finally, a third practical reason for including entry level positions beyond the order filler position is a record showing that Wal-Mart managers treated applications similarly, regardless of position sought, making it impossible to distinguish between “order filler” applicants and applicants for jobs other than order filler. (EEOC’s SoMF at 5-6.) When hiring officials conducted interviews, they usually did not know what position they were interviewing for. (*Id.*) All applicants/transfers were interviewed using the same interview forms and that regardless of the position applied for, applicants were interviewed for warehouse work, most commonly the order filler position. (*Id.*) This is consistent with Wal-Mart’s non-differentiated treatment of

applicants during the EEOC investigation when it produced applicant packets, regardless of job applied for. Hence, there is no question that Wal-Mart recognized the lack of a clear distinction between order filler applicants and applicants for other positions and expected that the EEOC would treat them similarly.

One court's treatment of such artificial distinctions rings true in this case. In EEOC v. Temple Steel Co., 723 F.Supp. 1250 (N.D. Ill. 1989), the court determined that the Commission was not limited to the initial claim that a company discriminated against employees seeking rehire and in fact could bring a lawsuit including broader claims of discriminatory recruitment and hiring practices. (Id. at 1251-1253.) It found such because the latter claims "reasonably arose out of the investigation of [the] original claim . . .", "decisions to hire new employees or to rehire former employees are not so divorced from each other as to constitute distinct and unrelated employment practices . . ." and [t]he unlawful discrimination that might infect one decision cannot but accompany the other." (Id.) Moreover, the Court "decline[d] [the employer's] invitation to compartmentalize employment decisions in a way that would seriously impair the EEOC's power to investigate fully a claim challenging a factually-specific hiring or rehiring decision that implicates more generally the employer's overall practice of selecting persons for employment." (Id.) Likewise this Court should reject Wal-Mart's proposed compartmentalization of its employment processes and decisions.

Not only is the scope of the EEOC's lawsuit a reasonable legally proper practical decision, as discussed above, Wal-Mart's claimed prejudice is also illusory. Dr. Barnow credited Wal-Mart with making offers to 63 female applicants between 1998 and 2004. (Barnow Supp. Report Supp. Ex. B2.) However, because Wal-Mart steered females away from the order filler position at least a third of these offers were for positions other than the order filler position. (See

examples of female non order filler offer coversheets designated as Exhibit 134.) Therefore, Wal-Mart's liability would likely increase rather than decrease if this suit was limited to the order filler position as Wal-Mart suggests. Thus, the likelihood that Wal-Mart is prejudiced at all by the EEOC's claim in this lawsuit is specious at best. See e.g., EEOC v. Brookhaven Bank & Trust, 614 F.2d 1022, 1025 (5th Cir. 1980) ("In determining whether the EEOC has properly added new charges in the complaint filed with the court, two countervailing policies must be considered. The first is the policy to expedite the judicial process. To limit the EEOC to the precise charge filed would serve no purpose except to add greater delay and expense to the enforcement proceedings. The second is the policy that employers should have the opportunity to settle with the EEOC and all aggrieved parties before court action is initiated. If the employer has notice of the charge and has been offered an opportunity to remedy the problem without litigation, it should not be allowed to avoid enforcement of the law because the original charge filed with the EEOC by the aggrieved party is slightly different from the complaint filed in court by the EEOC."); and EEOC v. Cone Solvents, Inc., 2006 WL 1083406, at *7-9 (M.D. Tenn. 2006) (court rejected employer's failure to conciliate argument and found that the Commission's broader complaint did not "expose the Defendant to much greater liability than had been anticipated by the conciliation process").

3. *The temporal scope of the EEOC's suit is proper.*

While Wal-Mart asserts that the temporal scope of this lawsuit should be limited to April 1, 1998 through February 15, 2005.⁵⁵ (D's SJ Memo at n. 2; DE # 119), no limitation has been placed on the January 1, 1998, commencement date nor has the EEOC ever agreed to such a

⁵⁵ Furthermore, while the Magistrate Judge denied discovery post February 15, 2005, the EEOC's Objection to this Recommendation and extensive briefing on the issue is still pending. See DE # 129 and 131.

limitation.⁵⁶ (See DE # 131 at n.1.) Just as the EEOC's suit properly includes all outside entry level applicants, its temporal scope is proper. As discussed below, due to the continuing and ongoing nature of Wal-Mart's discriminatory practices, the EEOC's suit appropriately covers harm from January 1, 1998, through the present.

The basis of this lawsuit is not individual acts of disparate treatment, but rather disparate treatment stemming from an overarching discriminatory pattern or practice by many decision makers over an extended period of time. In such instances, the courts do not employ a 300-day statute of limitations to limit the temporal scope of the claim as Wal-Mart suggests. (D.'s Memo at 6, n.2.) See EEOC v. Mitsubishi Motor Mfg. of America, Inc., 990 F. Supp. 1059, 1084 (C.D. Ill. 1998) (an EEOC suit alleging a pattern or practice of discrimination "involves a continuing violation" that is "not amenable to a timeliness determination."); accord EEOC v. Scolari Warehouse Markets, Inc., 488 F. Supp. 2d 1117, 1136 (D. Nev. 2007).⁵⁷ This is so because "it is crucial that the [EEOC]'s ability to investigate charges of systematic discrimination not be impaired." Id. (quoting EEOC v. Shell Oil, 466 U.S. 54, 69(1984)). In fact, some courts have gone so far as to completely eliminate *any* limitations period for pattern or practice claims. "[T]he applicant of a limitations period in a [pattern or practice] action does not make intuitive or legal sense,' as an EEOC charge alleging a pattern or practice of discrimination 'involves a continuing violation' that is 'not amenable to a timeliness determination.'" EEOC v. LA Weight Loss, 509 F. Supp. 2d 527, 535 (D. Maryland 2007) (internal quotations omitted). As long as a

⁵⁶ As further proof that the EEOC has not agreed to the temporal limitations Wal-Mart seeks, Dr. Barnow's Report, Rebuttal Report and Supplemental Report all compute shortfall beginning at January 1, 1998.

⁵⁷ The Supreme Court decision in National Railway Passenger Corp. v. Morgan, 536 U.S. 101 (2002) did not alter the existing law on the application of the continuing violations theory to pattern or practice cases. As the Court specifically noted, "We have no occasion here to consider the timely filing question with respect to 'pattern or practice' claims..." Id. at 115, n.9. Moreover, Morgan did not implicate the category of continuing violations "involving long-standing and demonstrable policies of discrimination," such as the one at issue here. Reeb v. Ohio Dept. of Rehab. and Correction Belmont Correctional Inst., 221 F.R.D. 464, 471 (S.D. Ohio 2004) (citing Sharpe v. Cureton, 319 F.3d 259, 268 (6th Cir. 2003)).

timely charge puts the defendant on notice of the administrative investigation that can reasonably be expected to follow, the single filing rule permits recovery by class members who did not file timely charges including those whose circumstances were not within the four corners of the charge.⁵⁸ See Chisholm, 665 F.2d at 490-91 (4th Cir. 1981).

Since it began hiring in January 1998, Wal-Mart has continually engaged in a pattern or practice of discriminatory hiring at DC 6097. The evidence obtained in the administrative investigative stage, as well as through discovery, illuminates the ongoing nature of Wal-Mart's discriminatory hiring practices. Based on the continuing violation theory and the single filing rule, this lawsuit may properly encompass hiring beginning on January 1, 1998, which was after the discriminatory practices began, and continue through the present, as these discriminatory practices are ongoing.

V. CONCLUSION.

Wal-Mart's arguments in support of its Motion for Summary Judgment are contrary to law and the overwhelming evidence in this case. As discussed above, there are numerous genuine issues of fact for trial. Accordingly, the EEOC respectfully requests that the Court deny Wal-Mart's Motion.

⁵⁸ The only limitation on recovery is contained in Title VII §706(g), which precludes recovery of class members' backpay (but not other relief) which accrued more than two years prior to the date of the charge. See Chisholm, 665 F.2d. at 490. Given that the charge-filing period in Title VII is 180 days, or 300 days at most, see 42 U.S.C. §2000e-5(e)(1), the clear implication of the language is that the charge-filing period does not define the period within which harm must have occurred for purposes of liability. See Morgan, 536 U.S. at 119 ("If Congress intended to limit liability to conduct occurring in the period within which the party must file a charge, it seems unlikely that Congress would have allowed recovery for two years of backpay.").

Respectfully submitted,

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