IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

9/30/03
Luther D. Thomas, Clerk
By
Deputy Clerk

LISA SMITH MAULDIN,
Individually and on behalf of
all others similarly situated,

Plaintiff,

v.

WAL-MART STORES, INC.

Defendant.

CIVIL ACTION NO.
1:01-CV-2755-JEC

ORDER

This case is before the Court on defendant Wal-Mart's Motion for Reconsideration of the Court's August 23, 2002 Class Certification Order [40]; defendant Wal-Mart's Motion to Withdraw Counsel Theresa E. Yelton [44]; defendant Wal-Mart's Motion For Protective Order and to Compel Plaintiff to Provide Expert Disclosures [47-1 and 47-2]; plaintiff's Motion Pursuant to Rule 23(d)(2) to Serve Notice on the Class [57]; defendant Wal-Mart's Motion for Leave to File Additional Memorandum in Support of Motion for Reconsideration of the Court's August 23, 2002 Class Certification Order, With Incorporated Memorandum of Law [58]; and defendant Wal-Mart's Expedited Motion to Strike Portions of Plaintiff's Expert Reports [59]. The Court has reviewed the record and the arguments of the parties and, for the reasons set

forth below, concludes that defendant Wal-Mart's Motion for Reconsideration of the Court's August 23, 2002 Class Certification Order [40] should be **DENIED WITHOUT PREJUDICE**, defendant Wal-Mart's Motion to Withdraw Counsel Theresa E. Yelton [44] should be **GRANTED**, defendant Wal-Mart's Motion For Protective Order and to Compel Plaintiff to Provide Expert Disclosures [47-1 and 47-2] should be **DENIED as moot**, plaintiff's Motion Pursuant to Rule 23(d)(2) to Serve Notice on the Class [57] should be **DENIED WITHOUT PREJUDICE**, defendant Wal-Mart's Motion for Leave to File Additional Memorandum in Support of Motion for Reconsideration of the Court's August 23, 2002 Class Certification Order, With Incorporated Memorandum of Law [58] should be **GRANTED**, and defendant Wal-Mart's Expedited Motion to Strike Portions of Plaintiff's Expert Reports [59] should be **GRANTED in part and DENIED in part.**

BACKGROUND

Plaintiff, an employee of Wal-Mart Stores, Inc. ("Wal-Mart"), filed the instant action against Wal-Mart on October 16, 2001. Plaintiff alleges that Wal-Mart's policy of denying its employees health insurance coverage for prescription contraceptives discriminates against women, and thus violates Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-2(a), as

amended by the Pregnancy Discrimination Act ("PDA"), 42 U.S.C. § 2000e(k). She asserts a claim under Title VII and the PDA on behalf of herself and all others similarly situated, as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. Plaintiff seeks declaratory, injunctive, and equitable relief on behalf of herself and those similarly situated, including a declaratory judgment that defendant's exclusion of coverage for prescription contraceptives violates Title VII, an order requiring defendant to provide comprehensive health insurance coverage for prescription contraceptives, and equitable relief in the form of monetary compensation for the individual class members for the fringe benefits allegedly denied them by defendant when it refused to reimburse their out-of-pocket expenses related to prescription contraceptives.

In an Order [37] dated August 23, 2002, this Court partially granted plaintiff's Motion for Class Certification [13] and certified a class pursuant to Federal Rule of Civil Procedure 23(b)(2). The class definition "includes all female employees of Wal-Mart nationwide who are covered, or have been covered, by Wal-Mart's health insurance plan at any time after March 8, 2001, and who used prescription contraceptives during the relevant time period." (Order [37] at 46.)

DISCUSSION

I. Defendant Wal-Mart's Motion To Reconsider

Defendant Wal-Mart has moved this Court to reconsider its earlier Order certifying this action as a class action [40]. The Court has certified this case as a Rule 23(b)(2) class, which type of class typically invokes injunctive or declaratory relief, not monetary damages. Wal-Mart does not complain about certification of the class for purposes of injunctive relief and agrees that this Court's ruling should apply to members of the class. Wal-Mart argues, however, that the class should not be certified for purposes of awarding monetary damages to the plaintiff in the form of "back wages," which wages would consist of reimbursements for the cost of prescription contraceptives and for the doctor's visits that prescribed these contraceptives. Wal-Mart complains that, because plaintiff removed her claims for compensatory damages only in her reply brief in support of class certification, Wal-Mart was unable to explain that this deletion did not undo the continuing ramifications of the existence of a back pay claim. Wal-Mart has used the pending motion for reconsideration to reiterate to the Court that, notwithstanding a back pay claim's status as "equitable," not legal, relief, at bottom, plaintiff wants money and this money relief, and the attendant expense in calculating how much money should be awarded to each individual,

would quickly dominate the injunctive part of plaintiff's claim. In essence, Wal-Mart argues that because the calculation of any "back" insurance reimbursements would be so time-intensive--taking months, if not years to accomplish--and so expensive--given the numerous minute questions that would have to be answered as to each of the potentially hundreds of thousands of individual claims--litigation concerning these individual claims for monetary reimbursement would quickly dominate the injunctive aspect of the case. As a result, Wal-Mart argues, plaintiff's monetary claims should not be a part of any class certification, either as a Rule 23(b)(2) or 23(b)(3) class.

Wal-Mart's arguments are hardly frivolous, but then again obviously neither is plaintiff's argument, as this Court did initially rule for plaintiff and allow the class to be certified, monetary relief and all. Admittedly, though, this case does present a tougher practical question than is typical in such matters. That is, plaintiff's case does not present the need to decide Wal-Mart's liability, as an individual matter, for each particular member of the class. If Wal-Mart is liable to one plaintiff, it is liable to all; hence, the Court's decision to certify a 23(b)(2) class. As a result, this case is different from the typical race or sex discrimination case that cannot be certified as a class action because each individual discrimination

claim would depend on its own facts and have to be litigated separately; a class, in such circumstances, would quickly devolve into a series of unmanageable mini-trials on the question of liability. *See generally Cooper v. Southern Co.*, 205 F.R.D. 596, 627-31 (N.D.Ga. 2001)(Evans, J.) Not so here. Thus, Wal-Mart cannot argue that, as to liability, individual questions would dominate class questions.

Yet, this case also does not fit neatly into the typical Rule 23(b)(2) type class in which a plaintiff seeks both injunctive relief and back pay. In such cases, the plaintiff can proceed with a back pay claim because, even though such involves monetary relief, it is considered to be an equitable, not a legal, claim. *Cooper*, 205 F.R.D. at 627. Plaintiff argues that reimbursement of expenses incurred by female employees in purchasing prescription contraceptives is a form of back pay. Thus, as a category, this reimbursement can be fairly characterized as equitable, not legal, relief. Yet, Wal-Mart notes that figuring out how much reimbursement each of the thousands of members of the class might receive would be a daunting, time-consuming, expensive, and, most importantly for this analysis, very individualized task, not amenable to class treatment. Wal-Mart does argue persuasively that, unlike the typical back wages case, in which the parties and Court can know how much more money the plaintiffs would have

earned had they received a given promotion and can then calculate how much back pay the plaintiffs should receive, here the Court will not be starting with numbers that are so easy to ascertain. Wal-Mart argues that it and the plaintiff will have to undergo a laborious and expensive process to determine how much reimbursement each plaintiff should receive. Wal-Mart contends, therefore, that the class should not be certified as to any monetary claims, no matter how they are denominated.

Not surprisingly, plaintiff has argued that Wal-Mart exaggerates greatly the difficulties inherent in making these individualized calculations. The Court finds it difficult at this juncture to reach a firm grasp as to just how difficult these calculations will be, and it can discern sound reasons for each party's respective positions as to the class certifiability of the monetary relief portion of the claim. Yet, as there are no discernable negative ramifications to maintaining the class as certified--at least until summary judgment motions concerning liability are determined--the Court concludes that Wal-Mart's Motion For Reconsideration [40] should be denied at the present time, without prejudice to being refiled should the plaintiff survive a motion for summary judgment. On the merits, plaintiff has raised a novel claim that presents an issue of first impression in this circuit. Indeed, no federal circuit court

appears to have yet addressed this question.[1] It is, thus, far from certain that plaintiff will survive a summary judgment motion. Therefore, using the Court's scarce resources to figure out at this time exactly how individualized these calculations of "reimbursement" would be--which inquiry would be necessary before determining whether individualized damages determinations dominate the questions common to the class--could well turn out to be an unnecessary exercise. Accordingly, the Court **DENIES WITHOUT PREJUDICE** defendant Wal-Mart's Motion For Reconsideration [40]. It **GRANTS**, however, defendant Wal-Mart's Motion for Leave to File Additional Memorandum in Support of Motion for Reconsideration of the Court's August 23, 2002 Class Certification Order, With Incorporated Memorandum of Law [58].

II. Plaintiff's Motion to Serve Notice on the Class

Plaintiff argues that this Court should order notice of the instant class action to be served on the members of the class. Plaintiff asserts that "[p]rompt issuance of notice is

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[1] Two district courts, however, have agreed with plaintiff's contention that exclusion of prescription contraceptive drugs, in the particular employer-provided health insurance plans at issue, either violated Title VII or potentially violated Title VII, respectively. *See Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001); *Cooley v. DaimlerChrysler Corp.*, 2003 WL 21953901 (E.D.Mo., Mar. 28, 2003) (denied Wal-Mart's motion to dismiss).

particularly important in this case because class members need to be instructed to retain certain receipts and records that may be used in computing individual back pay awards." (Pl.'s Mem. of Law in Supp. of Mot. Pursuant to Rule 23(d)(2) to Serve Notice on the Class [hereinafter "Pl.'s Notice Mot."] [57] at 2.) Plaintiff argues that, if the class wins a judgment against Wal-Mart, and Wal-Mart is ordered to compensate the class members for their expenses related to the prescription and purchase of prescription contraceptives, many of the class will need to produce records to substantiate their entitlement to such compensation and to determine the amount of any such award. Plaintiff argues that because class members continue to incur these contraceptive-related expenses, they "must be informed immediately of the need to retain these records." (*Id.*)

In opposition, Wal-Mart argues that any notice to class members is inappropriate unless and until this Court rules that it has violated Title VII. (Opp'n to Pl.'s Mot. to Serve Notice on the Class Prior to a Finding of Liability [hereinafter "Def.'s Opp'n"] [62] at 1.) Wal-Mart asserts that the "weight of the law" is that notice should not be issued to a Rule 23(b)(2) class until Wal-Mart has been found to have violated the law. (*Id.* at 3.) Wal-Mart also argues that class notice at this stage of the litigation would prejudice it and would not benefit the class.

(*Id.* at 6.) In the alternative, should the Court decide to grant plaintiff's motion, Wal-Mart requests that the proposed class notice submitted by plaintiff be modified in nine ways. (*Id.* at 10-12.)

As a general matter, a Rule 23(b)(2) class does not require class-wide notice. *Doe v. Bush*, 261 F.3d 1037, 1049 (11th Cir. 2001), *cert. denied*, 534 U.S. 1104 (citation omitted). Although Rule 23(c)(2) requires that notice be given to members of classes certified under subsection 23(b)(3), the text of the Rule does not contain such a requirement for classes certified under subsection (b)(2). Rule 23(d)(2) does give the Court discretion to require that "for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action..." Fed. R. Civ. P. 23(d)(2). Subsection (d)(2) does not require notice at any particular stage of the litigation, but simply "calls attention to its availability and invokes the court's discretion." Fed. R. Civ. P. 23(d)(2) advisory committee's note. "In [sic] the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to a class will tend toward a minimum." *Id.*

The situation changes somewhat, however, when a Rule 23(b)(2)

class has been certified to seek both injunctive relief and some form of monetary compensation, as is the case here. Members of the class in the present action seek equitable relief in the form of compensation for expenses that they incurred related to the prescription and purchase of contraceptives. In a typical Rule 23(b)(2) class action, in which there is a cohesive plaintiffs' group seeking only declaratory or injunctive relief, the due process interests of absent class members will usually be safeguarded by adequate representation of the class alone. *Johnson v. General Motors Corp.*, 598 F.2d 432, 437 (5th Cir. 1979).[2] A 23(b)(2) class action in which individual monetary relief for class members is sought in addition to class-wide injunctive or declaratory relief, however, creates additional concerns with protecting "the due process rights of the individual class members to ensure they are aware of the opportunity to receive the monetary relief to which they are entitled." *Penson v. Terminal Transp. Co.*, 634 F.2d 989, 994 (5th Cir. Unit B Jan. 1981). Therefore, "where monetary relief is sought and is made available in a Rule 23(b)(2) class action, notice is no longer discretionary but is required at some stage in the proceedings."

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[2] Decisions of the "pre-split" Fifth Circuit handed down before the close of business on September 30, 1981, are binding as precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

Id. (citation omitted) (emphasis added). In these cases, it will not always be necessary that the notice given be equivalent to that required in Rule 23(b)(3) class actions.[3] *Johnson*, 598 F.2d at 438 (citation omitted). "In some cases it may be proper to delay notice until a more advanced stage of the litigation; for example, until after class-wide liability is proven." *Id.* (citation omitted).

Thus, it is clear that this Court must issue some form of notice to members of the class at some stage of the litigation, but it is not clear that the present, pre-summary judgment stage is necessarily the appropriate time. The Court thus has discretion as to what form of notice to issue and as to when this notice should be distributed.

Considering all the factors at play in this particular litigation, the Court declines to issue notice to the class at this stage in the litigation. Although the Court has denied Wal-Mart's Motion for Reconsideration of the Court's Class Certification Order [40], *supra*, it has done so without prejudice. Thus, if plaintiff survives a summary judgment motion, the Court

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[3] Rule 23(c)(2) requires that the court shall direct to (b)(3) class members "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2).

has reserved the right to revisit that part of its certification order granting class status on "back pay" claims. Indeed, Rule 23(c)(1) provides that a class certification order may be altered or amended at any time before a decision on the merits has been rendered. *See* Fed. R. Civ. P. 23(c)(1). It is therefore possible that the class definition could change before this Court renders a final judgment on the merits of plaintiff's complaint. Given that fact and the fact that it is not at all certain that plaintiff will prevail on her claim, the Court concludes that it would be highly wasteful of both party's resources to embark on the very expensive efforts to identify and notify the thousands of potential class members. Moreover, if the class definition were to change at a later point, any notice issued now could later become either over or under-inclusive.

Indeed, it seems to make good financial sense for both parties to delay the issuance of notice. Much of the cost and the burden of the issuance of class notice would fall on the shoulders of the representative plaintiff and her counsel. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 356-58 (1978) (holding that, even where a defendant has been ordered to perform a task necessary to send class notice, that the district court may exercise its discretion to place the cost of performing the ordered task on the representative plaintiff); *Eisen v. Carlisle*

& Jacquelin, 417 U.S. 156, 177-79 (1974) ("Where, as here, the relationship between the parties is truly adversary, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit."). Given that fact, it makes more sense for the plaintiff to wait until after there has been a final judgment on the merits to issue class notice. If class notice is issued now, and Wal-Mart prevails on the merits, then plaintiff will have paid for notice for nothing. Similarly, in that event, Wal-Mart would also have incurred unnecessary expenses in identifying the thousands of members of the class.

Further, the Court is not convinced that members of the plaintiff class will be prejudiced if they are not sent notice of the class action now. Assuming that the class prevails on the merits, members of the class should be able to obtain the documentation needed to claim any share of monetary relief to which they are entitled with a minimum amount of difficulty. As Wal-Mart points out, even if members of the class have misplaced their own records, most major pharmacies and doctors' offices keep records for a period of years and would be able to provide the necessary information.

In sum, the Court is fully cognizant of the necessity of

issuing class notice at some stage of the litigation.[4] The Court merely concludes that this stage is not the proper stage to do so. It will, of course, revisit this question if plaintiff survives a summary judgment motion. Therefore, the Court **DENIES WITHOUT PREJUDICE** plaintiff's current Motion Pursuant to Rule 23(d)(2) to Serve Notice on the Class [57].

II. Motion to Strike Portions of Plaintiff's Expert Reports

On October 25, 2002, plaintiff served three expert reports on Wal-Mart. These reports, prepared and signed by witnesses prepared to give expert testimony, are required disclosures under Federal Rule of Civil Procedure 26(a)(2)(B).[5] Wal-Mart

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[4] This assumes that the class definition remains unchanged. If the definition were to change so that the class were no longer allowed to seek monetary relief, class notice would of course become completely a matter of this Court's discretion, pursuant to Rule 23(d)(2).

[5] The Rule states, in pertinent part, that

> [t]he report shall contain a complete statement of all opinions to be expressed and the basis and reasons therfor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

subsequently filed a motion to strike portions of the expert reports, arguing that "the reports purport to offer into evidence extensive and mostly irrelevant testimony that would require the expenditure of considerable and unnecessary time and expense to rebut..." (Expedited Mot. to Strike Portions of Pl.'s Expert Reports With Incorporated Mem. of Law [59] at 1.) Wal-Mart argues that the experts' purported testimony that the Wal-Mart health plan covers drugs that treat medical conditions is irrelevant "because a person with high blood pressure or high cholesterol already has a medical condition, while a healthy, non-pregnant woman does not. Plaintiff does not allege she has a medical condition." (*Id.* at 3-4.) Wal-Mart also argues that the experts' intended testimony about the negative consequences of pregnancy and whether insurance coverage of prescription contraceptives would help solve the problem of unintended pregnancy is irrelevant. (*Id.* at 5.) "None of this testimony is relevant because it is evidence that compares a pregnancy to a medical illness or injury, while the only possible relevant comparison in this case is between healthy (and non-pregnant) women and other healthy persons." (*Id.*)

Plaintiff responds that all of the proposed expert testimony

Fed. R. Civ. P. 26(a)(2)(B).

is intended to refute the defenses Wal-Mart has raised and will likely raise in this case. (Pl.'s Am. Opp'n to Def.'s Expedited Mot. to Strike Portions of Pl.'s Expert Reports [hereinafter "Pl.'s Am. Opp'n"] [66] at 2.) Plaintiff asserts that she must be allowed to present expert testimony that will cause the trier of fact to conclude that pregnancy is a medical condition with adverse health effects to women. (*Id.* at 5.) Plaintiff also asserts that she is prepared to rebut Wal-Mart's assertion that its health plan covers no preventive treatments with expert testimony showing that many treatments covered by the plan are considered preventive in the medical community. (*Id.* at 5-6.) Finally, plaintiff argues that her proposed expert testimony will help to show that Wal-Mart plan's "Reproductive Services" exclusion is not a blanket exclusion and is not gender-neutral in that the plan actually covers several treatments for men that are related to reproductive functions. (*Id.* at 16.)

Motions to strike are generally disfavored when the objection is that the pleadings are irrelevant. *United States v. Georgia Dep't of Natural Res.*, 897 F. Supp. 1464, 1471 (N.D. Ga. 1995) (Forrester, J.) (citations omitted). The action of striking a pleading should be used sparingly by the courts. *Augustus v. Bd. of Pub. Instruction of Escambia County, Florida*, 306 F.2d 862, 868 (5th Cir. 1962) (quoting *Brown & Williamson Tobacco Corp. v. United*

States, 201 F.2d 819, 822 (6th Cir. 1953)). "It is a drastic remedy to be resorted to only when required for purposes of justice. ... The motion to strike should be granted only when the pleading to be stricken has no possible relation to the controversy." *Id.*

All relevant evidence is admissible, except as otherwise provided by the Constitution, federal law, or federal rules; evidence which is not relevant is not admissible. Fed. R. Evid. 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. "The Rule's basic standard of relevance thus is a liberal one." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587 (1993). The introduction of expert testimony adds to the basic relevance equation.

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. Rule 702 requires the court to examine the

relevance of any proposed expert testimony. *Daubert*, 509 U.S. at 591. "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Id.* (citations omitted). The generally liberal relevancy policy of Rules 401 and 402 is made somewhat more stringent in regard to expert testimony because of the potential impact of expert testimony on a jury. *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1310 (11th Cir. 1999). Even so, the Court will attempt to ensure that any error is made on the side of caution in evaluating the relevancy of this proposed testimony. *See Martinez v. United States Sugar Corp.*, 880 F. Supp. 773, 777 (M.D. Fl. 1995).

Even with the low relevance requirement of the Federal Rules, there are some portions of plaintiff's proposed expert testimony that are simply too far afield from anything the Court can envision of as being relevant to this litigation. While the Court could allow these reports and simply ignore the irrelevant parts, Wal-Mart argues that it would then be forced to expend unnecessary resources hiring expensive experts to counter or clarify facts that are totally irrelevant to this proceeding. Therefore, the Court **GRANTS** defendant Wal-Mart's motion as to those parts of the experts' testimony and it strikes such paragraphs of the respective reports, as discussed below.

The Court turns first to the proposed testimony of Dr. Roger

W. Rochat. The Court strikes Paragraph Number Five of his report as irrelevant. The number of children that the average woman might bear without birth control and the number that most women might deem to be optimal may constitute interesting statistics, but they are totally irrelevant to the narrow legal question at issue in this case. Plaintiff summarizes her claim against Wal-Mart as follows: "Wal-Mart's health plan is comprehensive, covering virtually all 'Legend Drugs', i.e., prescription drugs, while specifically excluding prescription contraceptives, which can only be used by women. Because only women can become pregnant and only women can use prescription contraceptives, such inequities are discriminatory on their face..." (Pl.'s Am. Opp'n [66] at 1-2.) Assuming plaintiff's statement of the issue in this case to be accurate for purposes of this discussion, the Court cannot see how the testimony in this paragraph would have any tendency to make any fact that is of consequence to the determination of this action more probable or less probable than it would be without the testimony. The fact that some women do, and some women do not, want to have children at all is obvious and has absolutely no bearing on whether Wal-Mart's health plan is comprehensive or whether it discriminates against women.

The Court also strikes Paragraphs Number Six and Seven of Dr. Rochat's report. These paragraphs deal with the attitudes of

Georgia women towards childbearing. Again, how many children the average Georgia woman would like to have is simply not relevant to any fact of consequence in this case. These statistics do not relate to any issue in the case and would not be helpful. For example, if 63.3% of married Georgia women wanted no more children, instead of the 53.3% figure cited in the report, or if 60% of women with no children wanted to have a child in the future, instead of the 70% figure cited, the Court cannot discern how these changes would either strengthen or weaken the plaintiff's case. Furthermore, the Court has certified a nationwide class of all female Wal-Mart employees who used prescription contraceptives during the class period. These proffered statistics purport to describe the attitudes of all women (not just female Wal-Mart associates) in Georgia (not the entire nation). The Court is not certain that these numbers may even be generalized to the class as a whole.

The Court also strikes Paragraphs Number 10 and 11 of Dr. Rochat's report. The issue in this case is whether Wal-Mart's decision not to cover prescription contraceptives under its health plan violates Title VII, not the consequences of unintended pregnancy. Again, it is obvious that a pregnancy, unintended or otherwise, may have negative financial and other consequences. Similarly, the number of women who experience unintended

pregnancies has nothing to do with the legal issues in this case. Thus, even though most reasonable people likely agree that intended pregnancies are preferable to unintended pregnancies, that conclusion would not influence a decision on whether Wal-Mart's choice not to cover prescription contraceptives violates Title VII or not.

The Court strikes Paragraph 13 of Dr. Rochat's report. The percentage of women in Georgia who have had sexual intercourse is not an issue in this case; this proposed testimony is therefore not helpful. The Court, however, takes judicial notice of the fact that preventing unintended pregnancy requires either sexual abstinence or effective contraception.[6] The Court also takes notice that many women choose not to abstain from sexual intercourse.

Finally, the Court strikes Paragraph 16 of Dr. Rochat's report. Dr. Rochat's opinion that women "must have" access to each of the prescription contraception methods again does not help this Court determine whether Wal-Mart's decision not to cover

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[6] "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). "A court may take judicial notice, whether requested or not." Fed. R. Evid. 201(c).

birth control pills constitutes a Title VII violation. Such testimony might be relevant in a Congressional hearing to determine whether the law should be explicitly amended to require insurers to cover contraceptives. It offers this Court no help, however, in deciding whether the current law, as written, compels that conclusion.

The Court now turns to the report of Dr. Philip D. Darney. First, the Court strikes Paragraph 16 of his report. This purported testimony is irrelevant for the same reasons that the purported testimony contained in Paragraph 10 of Dr. Rochat's report is irrelevant. Simply put, the risks and dangers of unintended pregnancies versus intended pregnancies are not at issue in this litigation.

Second, the Court strikes Paragraph 18 of Dr. Darney's report. Women who receive medical services related to prescription contraceptives likely have health insurance and so, of course, will be more likely to receive other kinds of medical treatment than the general population, which includes many women who have no health insurance. This fact does not relate to the issue in this case, which, again, is whether the Wal-Mart health plan's non-coverage of prescription contraceptives is discriminatory under Title VII.

Finally, the Court strikes Paragraph 21 of Dr. Darney's

report. The purported testimony contained in this paragraph constitutes a policy argument, not a piece of relevant evidence that would form part of the basis of a legal argument. The Court, however, takes judicial notice that poor women--and probably many non-poor women--are more likely to use something that is free (in this case, prescription contraceptives) than something for which they have to pay.

Last, the Court has considered the report of Dr. Zachary B. Gerbarg. Wal-Mart requested that this Court strike Paragraphs Five and Seven of the report. The Court declines to do so for the following reasons. Paragraph Five deals with the scope of the coverage of the Wal-Mart health plan, which is indisputably the subject of this litigation. The purported testimony in this paragraph is therefore relevant. Paragraph Seven is merely a list of the resources upon which Dr. Gerbarg may rely for his data. As all of the substantive testimony contained in the report is relevant, the list of sources from which this testimony may have been derived is relevant as well.

In short, the Court deems irrelevant statistics that address the attitudes of women toward pregnancy, sexual activity in the population, or the financial consequences of pregnancy. Again, while such data may assist a Congressional committee considering whether to explicitly amend Title VII or pertinent ERISA statutes

to require coverage of prescription contraceptives by employers and insurers, it is extraneous to the narrow legal issue under consideration by this Court. The Court views as highly relevant, however, expert testimony that helps the Court to understand comparisons between conditions or health concerns that are covered by Wal-Mart's plan and the extent to which differences in coverage may be fairly characterized as gender-related. In other words, expert testimony directed toward an interpretation of the particular health plan at issue would likely be helpful to the Court. In keeping with the above determination of relevancy, the Court strikes Paragraphs Five, Six, Ten, Eleven, Thirteen, and Sixteen of Dr. Rochat's report. The Court also strikes Paragraphs Sixteen, Eighteen, and Twenty-One of Dr. Darney's report. The Court declines to strike any of the paragraphs of Dr. Gerbarg's report. To the extent that this ruling has not addressed every sentence or phrase at issue in the proffered expert reports, the Court believes that counsel can be guided by the principles announced as to any further questions regarding the proper scope of expert testimony.

Therefore, Defendant Wal-Mart's Expedited Motion to Strike Portions of Plaintiff's Expert Reports [59] is therefore **GRANTED in part and DENIED in part.** The Court hastens to add, though, that these relevancy determinations are not set in stone. To the

extent that any of the information in the paragraphs of the reports struck by this Order becomes relevant as the litigation progresses, the plaintiff may move to re-open discovery to gather facts on those issues.

III. Motion for Protective Order and to Compel Expert Disclosures

Wal-Mart filed Defendant's Motion for Protective Order and to Compel Plaintiff to Provide Expert Disclosures [47-1 and 47-2]. The Court has previously ruled on this motion in its conference with the parties. In short, the Court deems irrelevant statistics that address birth and sexual activity data among women. The Court views as highly relevant, however, expert testimony that helps the Court understand comparisons between matters covered and those not covered by the policy--and the extent to which these differences might be gender-related.

Specifically, Wal-Mart sought a protective order from this Court in response to an interrogatory propounded by plaintiff in her First Set of Interrogatories. The interrogatory in question read as follows:

> Interrogatory No. 3: For each year during the Relevant Time Period, state: (a) Wal-Mart's actual cost for each Prescription Contraceptive identified in response to the above interrogatory; and (b) the price Wal-Mart charges for each Prescription Contraceptive identified in the

above interrogatory.[7]

(Def.'s Mot. for Protective Order and to Compel Pl. to Provide Expert Disclosures [47] at 2.) On October 7, 2002, plaintiff filed her Emergency Motion to Compel Documents and Answers to Interrogatories [45]. Plaintiff sought to compel Wal-Mart to answer Interrogatory No. 3, regarding Wal-Mart's cost for each prescription contraceptive that it sells and the price that it charges for each. (Pl.'s Mem. in Supp. of Emergency Mot. to Compel Docs. and Answers to Interrogatories [45] at 13-14.) At a motion hearing on October 11, 2002, the Court denied plaintiff's motion to compel Wal-Mart to answer the interrogatory stated above regarding the cost and price of prescription contraceptives. (Tr. of Mot. Hr'g [56] at 8-9.) As the Court has already orally ruled that Wal-Mart will not have to provide information about its cost for prescription contraceptives and the prices that it charges for them, there is no reason for the Court to act again by issuing a protective order on the same subject,[8] other than to confirm that

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[7] The "above interrogatory" requested Wal-Mart to identify "each Prescription Contraceptive that is, or has been, available for sale at any Wal-Mart store during the Relevant Time Period, including all brand and generic varieties of each Prescription Contraceptive." (Def.'s Mot. for Protective Order and to Compel Pl. to Provide Expert Disclosures [47] at 2 n.1.)

[8] Plaintiff agrees that, given the Court's previous ruling to deny its motion to compel Wal-Mart to disclose this information, this issue is no longer relevant. (Pl.'s Resp. to Def.'s Mot. to

it has granted Wal-Mart's motion [47-1].

Wal-Mart also asked this Court to "order plaintiff to disclose her experts, along with the report and information required by Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure, within five business days of the Court's ruling on this Motion, or be barred from using experts in this case." (Def.'s Mot. for Protective Order and to Compel Pl. to Provide Expert Disclosures [47] at 9.) As noted above, plaintiff served three expert reports on Wal-Mart on October 25, 2002. Wal-Mart agreed that plaintiff could produce the report of Dr. Zachary Gerbarg on this date and thereafter could produce supplemental reports after further discovery. (Def.'s Reply to Pl.'s October 21, 2002, Resp. to Mot. to Compel [55] at 1-2.) This apparently removed the last sticking point between the parties regarding disclosure of expert reports. (*See* Pl.'s Resp. to Def.'s Mot. to Compel Pl. to Provide Expert Disclosures [54] at 2.) As plaintiff has provided the expert reports requested by Wal-Mart, there is no need for the Court to order her to do so again. Defendant Wal-Mart's Motion to Compel Plaintiff to Provide Expert Disclosures [47-2] is therefore **DENIED as moot.**

Compel Pl. to Provide Expert Disclosures [54] at 2. n.1.)

CONCLUSION

For the foregoing reasons, the Court **DENIES WITHOUT PREJUDICE** defendant's Motion for Reconsideration of the Court's August 23, 2002 Class Certification Order [40]; the Court **GRANTS** defendant's Motion to Withdraw Counsel Theresa E. Yelton [44]; the Court **DENIES as moot** defendant's Motion For Protective Order and to Compel Plaintiff to Provide Expert Disclosures [47-1 and 47-2]; the Court **DENIES WITHOUT PREJUDICE** plaintiff's Motion Pursuant to Rule 23(d)(2) to Serve Notice on the Class [57]; the Court **GRANTS** defendant's Motion for Leave to File Additional Memorandum in Support of Motion for Reconsideration of the Court's August 23, 2002 Class Certification Order, With Incorporated Memorandum of Law [58]; and the Court **GRANTS in part and DENIES in part** defendant's Expedited Motion to Strike Portions of Plaintiff's Expert Reports [59].

SO ORDERED, this 30 day of September, 2003.

JULIE E. CARNES
UNITED STATES DISTRICT JUDGE