Nos. 04-16688 & 04-16720

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, and EDITH ARANA

Plaintiffs/Appellees,

v.

WAL-MART STORES, INC.,

Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PLAINTIFFS' PETITION FOR PANEL REHEARING
Fed. R. App. P. 40

JOSEPH M. SELLERS
CHRISTINE E. WEBBER
JENNY R. YANG
COHEN, MILSTEIN, HAUSFELD & TOLL, PLLC
1100 New York Ave., #500
Washington, D.C. 20005-3964
(202) 408-4600

BRAD SELIGMAN
Counsel of Record
JOCELYN D. LARKIN
THE IMPACT FUND
125 University Avenue, Suite 102
Berkeley, CA 94710
(510) 845-3473

IRMA D. HERRERA
DEBRA A. SMITH
EQUAL RIGHTS ADVOCATES
1663 Mission Street, Suite 250
San Francisco, CA 94103
(415) 621-0672

STEPHEN TINKLER
THE TINKLER LAW FIRM
309 Johnson Street
Santa Fe, NM 87501
(505) 982-8533

SHEILA Y. THOMAS
5260 Proctor Avenue
Oakland, CA 94618
(510) 339-3739

DEBRA GARDNER
PUBLIC JUSTICE CENTER
500 East Lexington Street
Baltimore, MD 21202
(410) 625-9409

STEVE STEMERMAN
ELIZABETH A. LAWRENCE
DAVIS, COWELL & BOWE, LLP
595 Market Street, Suite 1400
San Francisco, California 94105
(415) 597-7200

SHAUNA MARSHALL
HASTINGS COLLEGE OF THE LAW
200 McAllister Street
San Francisco, CA 94102
(415) 565-4685

MERIT BENNETT
MERIT BENNETT, P.C.
460 St. Michaels Drive, Suite 703
Santa Fe, NM 87505
(505) 983-9834

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

I. Basis for Petition for Panel Rehearing

In its December 11, 2007 Order and Opinion, this Court addressed the "standing" of putative class members to seek injunctive and declaratory relief. It drew a distinction between those who *were not* employed on the date that the complaint was filed and those who *were*. Concluding that only the latter group had standing to seek injunctive relief, the Court affirmed that the Rule 23(b)(2) class could properly go forward on *their* behalf. It remanded the case to the district court to reconsider the scope of the class. *Dukes v. Wal-Mart, Inc.*, Nos. 04-16688 & 04-16720, slip op. at 16239-41 (9th Cir. Dec. 11, 2007) (the "Opinion").

The Court's discussion of class member standing is inconsistent with this Court's *en banc* decision in *Bates v. United Parcel Service, Inc.*, No. 04-17295, 2007 WL 4554016 (9th Cir. Dec. 28, 2007), issued 17 days after the decision in this case. Following Supreme Court precedent, the *en banc* Court in *Bates* held that, so long as "at least one named plaintiff" has standing to seek injunctive relief, the entire class has standing to seek injunctive relief. *Bates*, 2007 WL 4554016, at *4. Because two named plaintiffs in *Dukes* have standing to seek injunctive relief, the entire class -- not just those employed at filing -- has standing to seek injunctive relief.

It is particularly critical that the panel correct this error because the Opinion suggests that putative class members not employed on the date the complaint was filed should be *excluded* from the certified class. There is no valid basis to exclude these thousands of women – including the original charging party – who have timely claims for the same discriminatory conduct that the balance of the class also challenges. Excluding these class members would undermine the purposes of both Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* and Federal Rule of Civil Procedure 23.

While not relevant to standing or to the scope of the class, the number of former employees in a proposed class may be of limited relevance to the Rule 23(b)(2) predominance inquiry in appropriate cases. *See Molski v. Gleich*, 318 F.3d 937, 950 & n.15 (9th Cir. 2003). If proposed injunctive relief would benefit only a few class members, it might be considered insubstantial and fail to satisfy the predominance test. The district court never considered that argument, as Wal-Mart did not raise it below. Instead, based on the evidence that *was* presented, the district court made a finding that injunctive relief would "achieve very significant long-term relief" for "not only current class members, but all future female employees as well." ER 1190.

Accordingly, this Court should affirm the class certification order in full. Should the Court decide that remand is still necessary, the order should clarify that

class membership need not be redefined and the employment status of class members is relevant, if at all, only to Rule 23(b)(2) predominance.

II. This Court Should Conform the Opinion With the Holding In *Bates*

The Opinion concludes that "putative class members who were no longer Wal-Mart employees at the time Plaintiffs' complaint was filed do not have standing to pursue injunctive or declaratory relief." *Dukes*, slip op. at 16240. However, the Court held that the case can proceed on behalf of "[t]hose putative class members who were still Wal-Mart employees" on the date the complaint was filed as they "*do* have standing to seek the injunctive and declaratory relief." *Id.* The Court remanded the class certification order "for a determination of the appropriate scope of the class." *Id.* at 16241. The implication is that class members no longer employed when the complaint was filed should be excluded from the class.

This reasoning is at odds with Supreme Court precedent as well as *Bates*. The standing of the class to seek particular remedies is determined by the standing of the named plaintiffs to seek such relief. *Lewis v. Casey*, 518 U.S. 343, 357-58 (1996); *Blum v. Yaretsky*, 457 U.S. 991, 1000-01 & n.13 (1982). In *Bates,* this Court confirmed that if one named plaintiff has standing to seek the requested relief, the class has standing to seek the same relief. *Bates*, 2007 WL 4554016, at

*4. Once the class is certified, standing for "the entire . . . class" is established. *Id.* at *7. The panel's observations about standing should be conformed with the ruling in *Bates*.

Here, two named plaintiffs have standing to seek injunctive relief. Betty Dukes and Christine Kwapnoski were employed at Wal-Mart on the date the complaint was filed and are still employed at Wal-Mart. ER 9; SER 708. Consequently, they have standing to seek injunctive relief, and the class they represent also has standing to seek such relief. All of its members are eligible to participate in a class certified under Rule 23(b)(2).

III. Excluding Class Members Not Employed When the Case Was Filed Would Have Adverse Consequences In This and Future Title VII Class Actions

In most Title VII class actions, the class of victims affected by an alleged discriminatory practice will include both current and former employees. This is, of course, because employee turnover is common in the U.S. economy, particularly in the retail industry.[1] One would expect turnover to be even higher in a workplace where discrimination is prevalent.

---

[1] According to the U.S. Bureau of Labor Statistics, the turnover rate within the retail industry for 2006 was 55.6%. U.S. Dep't of Labor, Bureau of Labor Statistics, Job Openings and Labor Turnover Survey (2006), available at http://data.bls.gov/PDQ/outside.jsp?survey=jt (query: "total separations").

Title VII requires that a victim of discrimination file an administrative charge of discrimination with the Equal Employment Opportunity Commission (EEOC) before filing a lawsuit. 42 U.S.C. § 2000e-5(b). It is often many months or years between the time that the first charge is submitted to the EEOC and a federal lawsuit is filed.[2] Invariably, there will be employee turnover and a number of aggrieved workers will leave the workplace during that time period, all of whom the Opinion in its present form could exclude from a Rule 23(b)(2) class.

In this case, nearly two years elapsed between the filing of the earliest charge of discrimination and the filing of the class action complaint. Stephanie Odle filed the first charge in October 1999; Plaintiffs filed the First Amended Complaint, with class allegations, in June 2001. ER 21, 1262. Undoubtedly, many female workers left their employment at Wal-Mart during that 20-month time period. Under the Court's reasoning, none of these former employees would be eligible to participate in the class – including Stephanie Odle – even though they have *timely* claims of discrimination and were subjected to the same pattern and

---

[2] In 2006, "the average charge processing time was 193 days, up significantly from 171 days in FY 2005." *See* Performance and Accountability Report. http://www.eeoc.gov/abouteeoc/plan/par/2006/objective1.html#resolution. The investigation of charges of systemic discrimination can take considerably longer to complete. *See* Systemic Task Force Report to the Chair of the EEOC. http://www.eeoc.gov/abouteeoc/task_reports/systemic.html#IC (finding significant staffing challenges in the EEOC's investigation of systemic cases).

practice of discrimination.[3] This portion of the class would be deprived of the benefits of Title VII. *Cf. Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (emphasizing the court's duty "to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future").

Truncating the class to include only those employed on the complaint filing date would also undermine the EEOC administrative process in future cases. By providing an inexpensive method for investigating and conciliating potential claims of discrimination short of litigation, this administrative exhaustion requirement was designed to benefit both employers and employees. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (noting that Congress created the EEOC and established an administrative procedure to encourage cooperation and voluntary compliance with Title VII). Rather than supporting this process, the Court's decision creates an incentive for plaintiffs to conclude the administrative process and initiate litigation as soon as possible to minimize the exclusion of affected workers from the proposed class.

Equally troubling, the Opinion creates a "perverse incentive" for employers to fire employees who might initiate -- or simply be a member of -- a Title VII

---

[3] Class membership is based upon the date of the earliest charge of discrimination filed with the EEOC, not the date when the action is filed in court. *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 923 n.2 (9th Cir. 1982).

class action. *Cf. Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (concluding that similar concerns support protection of former as well as current employees under Title VII's anti-retaliation provision). An employer may calculate that firing a potential plaintiff or class members prior to the initiation of a lawsuit would deprive the class of a named plaintiff or limit the size of the class. *See Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 247 (3d Cir. 1975) (if former employee could not be a class representative for current employees, "employers would be encouraged to discharge those employees suspected as most likely to initiate a Title VII suit").

The Opinion also undermines the goals of Rule 23. Where a group of victims challenge the same discriminatory employment practice, Rule 23 provides an efficient and economical means of adjudicating these claims. *Cf. Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 349 (1983) (recognizing "the principal purposes of the class action procedure" are the "promotion of efficiency and economy of litigation"). Title VII class actions present an additional benefit to victims because a pattern or practice liability finding establishes the predicate for injunctive *and* monetary relief. *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 876 n.9 (1984); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 330 (1977). If victims no longer employed when the complaint is filed are ineligible for class

membership, they will have to proceed separately without these benefits of class litigation, promoting multiple actions challenging the same discriminatory conduct.

This Court should modify its Opinion to ensure that these unintended consequences do not follow from its erroneous interpretation of the law.

IV. While a District Court Could Consider the Employment Status of Class Members In Making Its Rule 23(b)(2) Determination Wal-Mart Failed to Make This Argument Below

Although not a question of standing, the employment status of class members may be of some relevance to the question whether certification under Rule 23(b)(2) is warranted. In this case, however, the presence of former employees in the class did not, and should not, affect the district court's finding that injunctive relief was the predominant form of relief sought.

In determining whether a class may be certified under Rule 23(b)(2), the district court must assess whether monetary relief predominates over the injunctive and declaratory relief sought. *Molski*, 318 F.3d at 950 & n.15; *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 164 (2d Cir. 2001). In making this assessment, the trial court must evaluate the significance of the injunctive relief sought and determine whether a "reasonable plaintiff" would have sought such relief in the absence of monetary claims. *Robinson*, 267 F.3d at 164.

In weighing the importance of the injunctive relief, plaintiffs need not show that every class member is entitled to -- or will benefit from -- the same relief. As long as a significant portion of the class may benefit from injunctive relief, Rule 23(b)(2) certification is available. *See In re Monumental Life Ins. Co.*, 365 F.3d 408, 416 (5th Cir. 2004) (The parties' "experts estimate that between one million and 4.5 million of 5.6 million issued policies remain in-force. . . . [T]he proportion is sufficient, absent contrary evidence from defendants, that the class as a whole is deemed properly to be seeking injunctive relief."); s*ee also Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998) ("Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate.")[4]

In an employment case, the number of former employees in the class might be a relevant factor in determining the relative importance of injunctive and monetary remedies. For example, where an employer has downsized its plant or eliminated particular job categories, there may be few class members who will benefit from future injunctive relief. In that case, the former employees' interest in compensation may be paramount. *See, e.g., Adams v. R.R. Donnelley & Sons*, 2001 WL 336830, at *18 (N.D. Ill. Apr. 6, 2001).

---

[4] The Advisory Committee recognized that Rule 23(b)(2) certification may be warranted where the "[a]ction or inaction is directed to a class. . . even *if it has taken effect or is threatened only as to one or a few members of the class,* provided it is based on grounds which have general application to the class." Rule 23(b)(2) 1966 Advisory Committee Notes (emphasis added).

In assessing the value of injunctive relief, however, the district court's analysis can never be reduced to a simple head count of current versus former employees; the analysis will necessarily be more nuanced. For example, some former employees may have an interest in injunctive relief, such as reinstatement rights available under Title VII. *Walsh v. Nev. Dep't of Human Resources*, 471 F.3d 1033, 1037 (9th Cir. 2006). Similarly, plaintiffs willing to return to the workplace once discriminatory conditions are eliminated may also have sufficient interest in the workplace to have standing to obtain injunctive relief *Cf. Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) (applicant denied admission to university and who expressed a desire to reapply may challenge freshman and transfer admission practices).[5]

In addition, the district court must assess the benefits of proposed injunctive relief to not only current but *future* employees. If a liability judgment results in a multi-year consent decree, the injunctive relief can greatly benefit the careers of future workers (who, of course, will have no claim for monetary relief). *Cf. Walters,* 145 F.3d at 1048 (explaining that injunctive relief is proper where legal remedies would not adequately compensate class members for their injuries).

---

[5] Plaintiffs presented testimony from former employees about their interest in returning to Wal-Mart if the company eliminated its discriminatory practices. SER 429, 584. Moreover, Wal-Mart has rehired some former employee class members. SER 544-45, 549, 576.

Indeed, in finding that the injunctive relief sought was substantial, the district court took into account the benefits to future employees:

> Plaintiffs' claims for injunctive and declaratory relief, if successful, would achieve very significant long-term relief in the form of fundamental changes to the manner in which Wal-Mart makes its pay and promotions decisions nationwide that would benefit not only current class members, but all future female employees as well.

ER 1190.

The district court fully complied with *Molski* when it found reasonable plaintiffs would have filed this action solely for injunctive relief. *See Molski*, 318 F.3d at 950 & n.15. While the district court might have properly considered the employment status of class member employees in making the Rule 23(b)(2) predominance determination, it did not do so because Wal-Mart did not make this argument below nor did it offer evidence about the number of former employees in the class. *See Defendant Wal-Mart Stores Inc.'s Opposition to Plaintiffs' Motion for Class Certification,* at 44 – 50. Having failed to raise the argument below, it is waived. *Janes v. Wal-Mart Stores,* 279 F.3d 883, 887 (9th Cir. 2002).[6]

---

[6] Wal-Mart raised the argument for the first time before this Court. *See Principal Brief for Wal-Mart Stores, Inc.* at 52. An issue of Article III standing may be raised for the first time on appeal. *United States v. Hays*, 515 U.S. 737, 742 (1995)("The question of standing is not subject to waiver. . . ."). However, when properly understood as a Rule 23 factor rather than a standing issue, Wal-Mart's argument must be deemed waived because it was not raised below.

Should the Court determine that the trial judge must nonetheless revisit the class certification order on this issue, the remand instructions should clarify that the employment status of class members is not a standing issue, requiring a reassessment of the scope of the class. Instead, any evidence of the number of former employees in the class at the time that the complaint was filed could, if appropriate, be considered as part of the Rule 23(b)(2) predominance determination. The trial court would retain its broad discretion to consider alternative certification under Rule 23(b)(3) or 23(c)(4) as well. *Lemon v. Int'l Union of Operating Eng'rs Local No. 139,* 216 F.3d 577, 581-82 (7th Cir. 2000).

V. Conclusion

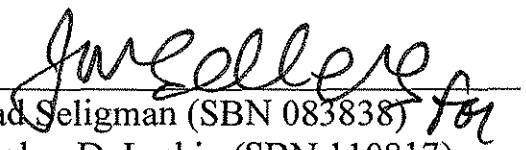
This Court should reconcile its opinion with the holding in *Bates* concerning the determination of standing in a class action. Because Wal-Mart has waived any

argument about the employment status of the class members, the class certification order should be affirmed.

Dated: January 8, 2008

Respectfully submitted,

Joseph M. Sellers
Christine E. Webber
Jenny R. Yang
COHEN, MILSTEIN,
HAUSFELD & TOLL, PLLC
1100 New York Avenue, Suite 500
Washington, DC 20005
Telephone: (202) 408-4600
Facsimile: (202) 408-4699

By: 

Brad Seligman (SBN 083838)
Jocelyn D. Larkin (SBN 110817)
THE IMPACT FUND
125 University Avenue, Suite 102
Berkeley, CA 94710
Telephone: (510) 845-3473
Facsimile: (510) 845-3654

Form 11

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached Petition for Panel Rehearing is

____ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (Petitions and answers must not exceed 4,200 words).

or

____ Monospaced, has 10.5 or fewer characters per inch and contains ____ words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text.

or

X In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

Joseph M. Sellers
Christine E. Webber
Jenny R. Yang
COHEN, MILSTEIN,
HAUSFELD & TOLL, PLLC
1100 New York Avenue, Suite 500
Washington, DC 20005
Telephone: 202.408.4600
Facsimile: 202.408.4699

By: _____
Brad Seligman (SBN 083838)
Jocelyn D. Larkin (SBN 110817)
THE IMPACT FUND
125 University Avenue
Berkeley, CA 94710
Telephone: 510.845.3473
Facsimile: 510.845.3654

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 8th day of January 2008, I caused to be served a true and correct copy of the foregoing Plaintiffs' Petition for Panel Rehearing Fed. R. App. P. 40, via overnight mail on the following counsel of record:

Attorneys for Defendant Wal-Mart Stores, Inc.

Theodore J. Boutrous, Jr.
Gail E. Lees
GIBSON, DUNN & CRUTCHER
333 South Grand Avenue
Los Angeles, CA 90071

Mark A. Perry
Amanda M. Rose
Jaime D. Byrnes
GIBSON, DUNN & CRUTCHER, LLP
One Montgomery Street
San Francisco, CA 94104

Nancy L. Abell
PAUL, HASTINGS, JANOFSKY, & WALKER, LLP
Twenty-Fifth Floor
515 South Flower Street
Los Angeles, CA 90071-2228

Jenny R. Yang