IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 04-16688 & 04-16720

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

Plaintiffs/Appellees/Cross-Appellants,

v.

WAL-MART STORES, INC.,

Defendant/Appellant/Cross-Appellee.

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

REPLY BRIEF OF APPELLEES AND CROSS-APPELLANTS IN SUPPORT OF CROSS-APPEAL

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I. Introduction

The district court certified plaintiffs' class-wide promotion claim to permit them to seek injunctive and declaratory relief, but limited monetary relief to those class members for whom there was objective evidence of interest in promotion. Wal-Mart endorses the district court's interest prerequisite, but goes much further. It insists that each woman must prove she was qualified for and had an interest in promotion in a contested individual Stage II hearing which will attempt to recreate the decision-making process for each disputed promotion.

Women at Wal-Mart were denied promotions because Wal-Mart's selection system included no mechanism for women to express their interest in promotion, and Wal-Mart's managers were free to apply subjective, unwritten criteria to their selection decisions. Now Wal-Mart seeks to deny these women relief by exploiting the same flawed promotion process that, by Stage II, will have been proved unlawful. First, Wal-Mart uses its own failure to record employees' interest in promotion as a basis to deny relief because of the lack of contemporaneous, objective interest in a promotion. Second, Wal-Mart wants the opportunity to apply subjective criteria not shown to be job related to deny individual class members relief, even if the class is able to prove that Wal-Mart's use of subjective criteria had an unlawful disparate impact on the class.

As a matter of law, plaintiffs need not establish their interest in promotion if the employer's own promotion system did not require it. It is undisputed that Wal-Mart had no "expression of interest" requirement, nor did its system even allow employees to express interest in most promotions. Accordingly, Wal-Mart has no due process right to compel women to prove interest on an individual basis.

Indeed, Wal-Mart's *only* due process interest is in an accurate determination of its total monetary liability to the class. Due process is best served by whichever method of determining back pay is likely to be most accurate and fair. Determination of its aggregate liability at Stage I would be more accurate *and* would preserve the benefits of class treatment for thousands of women who will otherwise have no remedy in this action. If Wal-Mart chooses to argue that differences in interest between male and female workers explains promotion disparities, it may do so at Stage I. If its argument were accepted by the finder of fact at Stage I, Wal-Mart's aggregate back pay liability would be reduced or eliminated.

Wal-Mart's assertion that Stage II individual hearings will be a more accurate and effective means for determining aggregate liability does not withstand examination. Under the facts of this case, an individualized hearing process would be an entirely speculative endeavor, bearing *no* relationship to Wal-

Mart's actual promotion practices and shedding no light on whether, in a hypothetical non-discriminatory system, women would be less qualified or interested in promotion than men.

Wal-Mart blames any manageability problems at Stage II on plaintiffs for seeking a nationwide class. Yet, the intractably speculative nature of individual hearings in this case follows directly from Wal-Mart's use of a subjective process without written criteria or any application procedure. An individualized Stage II process would lead to a "quagmire of hypothetical judgments" even if this case were limited to a single store. Given Wal-Mart's business practices, there will be neither documents nor memory sufficient to recreate who would have been selected for a particular position in a hypothetical system free of discrimination. A process built on layer upon layer of guesswork is not due process.

Finally, Wal-Mart uses a footnote to launch a belated attack on the underlying certification of plaintiffs' class-wide promotion claim, alleging that promotion decisions were too decentralized to support Rule 23(a) commonality. The argument comes too late and, in any event, fails. The district court's determination was amply supported by the record.

II. Class Members Exposed to the Greatest Opportunities for Discrimination in Promotions Will Have No Remedy Under the District Court's Application-Only Formula or Wal-Mart's Individual Hearing Approach

The district court limited back pay relief for class members with promotion claims to the "subset of the class for whom objective applicant data exists." ER 1211. Wal-Mart's alternative formulation for Stage II remedial proceedings is even more restrictive, insisting that each individual promotion claim be re-litigated from scratch, including an individual showing of interest for each particular promotion. Reply at 57. Neither method satisfies the remedial purposes of Title VII and both will leave the class members who may have suffered the greatest losses – denial of lucrative promotional opportunities – with no remedy in this case.

The Supreme Court has mandated that victims must be *made whole* for the injuries they have suffered on account of unlawful employment discrimination. *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 421 (1975). The trial court has an obligation to fashion "the most complete relief possible." *Id.* Once a violation is found, there is a strong presumption in favor of awarding back pay. Back pay may be denied only in "exceptional circumstances," which are "exceedingly rare." *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983).

In calculating relief, "all doubts are to be resolved against the proven discriminator rather than the innocent employee." *MacKenzie v. Sawyer,* 684 F.2d 62, 77 (D.C. Cir. 1982).

In determining how to fulfill Title VII's mandate, the Supreme Court has directed courts to "fashion such relief as *the particular circumstances* may require to effect restitution." *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 364 (1977) (emphasis added). For this reason, it is important to focus on the undisputed evidence of Wal-Mart's actual promotion practices. The *only* established qualifications for promotion into in-store management positions were minimum corporate guidelines. ER 1152. These guidelines required that candidates have an "above average" evaluation, at least one year in their current position, be current on training, not be in a high shrink department or store, be on the company's "Rising Star" list, and be willing to relocate.[1] *Id.* Beyond these

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[1] Plaintiffs have alleged that the relocation requirement and Wal-Mart's use of subjective criteria, such as the Rising Star designation, both had a disparate impact on women. *See* Motion for Class Certification at 22:19-22, 32:20-34:1, 38:8-9, 41:14-42:2 (D.E. 99). Wal-Mart argues that the district court's decision did not certify plaintiffs' disparate impact claim. Reply at 47, n.15. Its contention is meritless. The court's opinion granted the certification requested by plaintiffs, except for the limitation on class members seeking back pay relief for promotion claims. ER 1219-20. The court did not distinguish between plaintiffs' disparate treatment and disparate impact theories and certainly expressed no intention to limit the substantive theories that plaintiffs could pursue.

minimum qualifications, promotion decisions were left to the subjective judgment of Regional and District Managers who could apply whatever unwritten factors they chose. ER 1152.

The qualifications for promotion did *not* include a requirement that candidates express an interest in promotion in order to be eligible for consideration. Wal-Mart even failed to provide a mechanism by which an employee could express interest in most promotions. Wal-Mart did not post job vacancies for nearly all promotions at issue in this case.[2] ER 1153. As the district court found, "Because most positions were not posted, class members had no ability to apply for, or otherwise formally express their interest in, openings as they arose." *Id.*

Because Wal-Mart neither required nor permitted employees to show an interest in most promotions, the district court's approach would provide no relief for those class members who have suffered the greatest injury. For almost the entire liability period, no applications for management promotions exist because Wal-Mart had no process within which to apply. Those women who were denied

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[2] As Wal-Mart's Senior Vice President Charlyn Jarrells-Porter candidly admitted in a June 2002 e-mail, Wal-Mart "[does] not have a poster, brochure, nothing that I am aware of" to inform hourly workers "how to get promoted into the management training program." ER 1152.

promotions under this indefensible system will not be entitled to back pay relief, solely because of the way Wal-Mart chose to structure its promotion process.[3] The district court's approach therefore rewards Wal-Mart for employing a promotion system that creates the greatest chance for bias.[4] The remedial purposes of Title VII are hardly served by this regime.

Wal-Mart's approach to Stage II promotion remedies ignores the "make whole" requirement of Title VII. Indeed, nowhere does Wal-Mart even address the Supreme Court's mandate to "fashion the most complete relief possible" based upon "the particular circumstances." *Albemarle*, 422 U.S. at 421.

III. Wal-Mart Has No Statutory or Due Process Right to Individualized Hearings at Stage II

A. Title VII Contains No Requirement that Interest in Promotions Be Demonstrated in All Cases

Wal-Mart erroneously asserts that plaintiffs must demonstrate interest in promotion as a mandatory element of proof required by Title VII. Reply at 57. Yet Title VII permits, and even encourages, courts to adjust the proof required to

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[3] The district court's approach would permit the award of back pay only to women who applied for management trainee positions after January 2003, when Wal-Mart first began to post management trainee vacancies, more than four years after the commencement of the liability period.

[4] As discussed in Plaintiffs' Opening at 14, 27 n.12, subjectivity – including lack of a formal application system – is conducive to discrimination.

the circumstances of each case. While Title VII prohibits discrimination in promotions, it does not specify the elements of proof required to establish liability or the right to relief. The statute plainly recognizes that discrimination may be proved by the alternative analytical models of disparate impact and disparate treatment, each of which has different elements of proof. Nothing in the statute requires proof of interest. *See* 42 U.S.C. § 2000e-2, *et. seq*.

Moreover, the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n.13 (1973), established the basic paradigm for proving intentional discrimination, but cautioned that its application must not "be rigid, mechanized or ritualistic." The Supreme Court has applied the same flexibility to class actions. In recognizing that the *McDonnell Douglas* formulation had to be adjusted to the proof of pattern or practice claims, the Court explained that "the importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden [of proof]." *Teamsters*, 431 U.S. at 358.

Consistent with these principles, this Court has relieved plaintiffs of any obligation to show that they applied for an available position where the employer failed to post the job opening or the promotion process was initiated by the employer, not the employee. *See, e.g., Reed v. Lockheed*, 613 F.2d 757, 761 (9th

Cir. 1980). Indeed, appellate courts have held in such cases that a plaintiff need not demonstrate interest in a job opening to establish a *prima facie* case. *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1133-34 (11th Cir. 1984) ("when an employer uses such informal methods it has a duty to consider all those who might reasonably be interested" without requiring plaintiff to show interest). Contrary to Wal-Mart's assertion, courts in class action cases have not required individualized showings of interest or application where the facts do not justify it. *See infra* at 14-16.

Wal-Mart's promotion system warrants the flexible treatment of interest that *Reed* and *Carmichael* endorse. By choosing to operate a "tap-on-the-shoulder" system, Wal-Mart waived any requirement that could have otherwise been imposed to show contemporaneous interest in a promotion. The district court ruled that a class member need not show interest to be qualified for promotion. ER 1206-07. Wal-Mart's mechanical invocation of the *McDonnell Douglas* paradigm does not warrant reversal of that determination.

B. Wal-Mart's Due Process Interest in the Determination of its Aggregate Liability is Fully Accommodated in Stage I Proceedings

The method for determining back pay liability should afford relief, wherever possible, to victims of the proven discrimination and protect the parties' right to an

accurate and fair determination of aggregate back pay. Thus, Wal-Mart's due process interest is protected by selecting the most accurate method of calculating its total back pay exposure. *See Connecticut v. Doehr*, 501 U.S. 1, 11 (1991) (due process evaluated based upon the "risk of erroneous deprivation through the procedures under attack and the probable value of additional safeguards."); *Hilao v. Estate of Marcos*, 103 F.3d 767, 786 (9th Cir. 1996); *Pettway v. American Cast Iron Pipe Co. (Pettway V)*, 681 F.2d 1259, 1266 (11th Cir. 1982) (rejecting a due process challenge to a class-wide calculation of lost wages where "the amount found due to the class does not exceed the amount which all members of the class together would have been entitled to receive under a correct hypothesis.").[5]

As the district court recognized, there is ample authority holding that in some circumstances a process which determines the total amount of back pay an employer owes to the class, and then allocates it among class members, is more accurate than individual hearings. ER 1199; *Domingo v. New England Fish Co.,* 727 F.2d 1429, 1443-45 (9th Cir. 1984); *Shipes v. Trinity Industries*, 987 F.2d 311, 316 (5th Cir. 1993); *Stewart v. Gen. Motors Corp.*, 542 F.2d 445, 452-53 (7th

[5] Wal-Mart apparently acknowledges this point, but demands two bites of the apple. Reply at 39. It wants to dispute aggregate liability at Stage I and then be permitted to further attack that aggregate liability at Stage II, thus rendering the Stage I determination superfluous.

Cir. 1976); *Hameed v. Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers*, 637 F.2d 506, 520 (8th Cir. 1980); *Pitre v. Western Elec. Co.,* 843 F.2d 1262, 1274 (10th Cir. 1988); *Pettway V*, 681 F.2d 1259, 1266 (11th Cir. 1982); *Segar v. Smith*, 738 F.2d 1249, 1289-91 (D.C. Cir. 1984). The Equal Employment Opportunity Commission has also endorsed using formulaic approaches to back pay in appropriate cases. *See Brief of the Equal Employment Opportunity Commission in Support of the Plaintiffs-Appellees, Beck v. The Boeing Co.*, No. 01-80241 (9th Cir.), SER 1048, 1058-59.[6]

Contrary to Wal-Mart's complaint, it will not be denied an opportunity to prove that its back pay exposure should be reduced because women were less interested in promotions. As explained below, the only appropriate phase of the case in which to address such a defense is the first stage of the action – during which liability, aggregate back pay and punitive damages will be resolved – not during Stage II.

In Stage I of a Title VII class action, the finder of fact determines whether there is a pattern or practice of discrimination in promotions, and whether there

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[6] This Court may give deference to an opinion of the EEOC construing Title VII, as set forth in an amicus brief. *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *Jones v. American Postal Workers Union,* 192 F.3d 417, 427 (4th Cir. 1999) (EEOC's interpretation of Title VII in an *amicus* brief was entitled to *Chevron* deference).

has been a disparate impact on the class. *Teamsters,* 431 U.S. at 336, 360; ER 1194-95. In reaching these issues, the finder of fact will determine the shortfall in promotions awarded to the class and the value of that shortfall in lost wages. Wal-Mart will be permitted to adduce evidence, *inter alia,* that disparities in promotions were attributable to factors other than discrimination, such as superior qualifications or stronger interest in advancement among male employees. *See Teamsters,* 431 U.S. at 340-41, 360; *Segar*, 738 F.2d at 1268. Such evidence may consist of workforce statistical analyses, other expert studies, or other probative materials of general application. *See, e.g., EEOC v. Sears*, 628 F. Supp. 1264, 1305-15 (N.D. Ill. 1986) (considering evidence on interest and finding no liability); *Stender v. Lucky Stores*, 803 F. Supp. 259, 303-14, 325-29 (N.D. Cal. 1992) (admitting evidence on interest to rebut statistical evidence on disparate impact claim, but finding it failed to undermine plaintiffs' liability showing). Plaintiffs, of course, may rebut any such showing.

Any consideration of interest must be based on a comparison of the relative levels of interest among similarly-situated men and women. It would not change the calculated shortfall to know that 30% of women were uninterested in promotion unless similar evidence showed that a significantly smaller percentage of men were uninterested in promotion. Individual hearings at which women were

asked about their interest in promotion would not provide the evidence needed to establish the relative levels of interest among men and women, since it would provide no information about the level of interest among similarly situated men. By contrast, evidence comparing the aggregate levels of interest for both men and women in Stage I contributes to an accurate calculation of the shortfall in promotions.

1. Workforce Data Will Yield a More Accurate Computation of Back Pay Owed by Wal-Mart Than Would Individual Class Member Hearings

The particular facts of this action strongly indicate that the determination of the promotion shortfall and corresponding calculation of back pay awardable to the class will ascertain Wal-Mart's economic exposure more accurately than would individual relief hearings. Courts have identified specific circumstances where the computation of back pay through use of workforce data, rather than through individual hearings, is warranted. These include situations where:

- promotions were based on unguided, subjective criteria, making it more difficult to determine how a candidate would have been evaluated in the absence of discrimination;
- discrimination has been pervasive and denial of lower level promotions or assignments prevented a class member from demonstrating qualifications

for higher level promotions;

- stated qualifications for positions at issue were minimal, making it harder to determine which of the many qualified applicants would have been selected in the absence of discrimination;
- the employer did not maintain records that could establish candidates' qualifications or interest; or
- many claimants would be vying for a relatively small number of openings, making determination of which candidate would have been selected for a particular vacancy very speculative.

See Segar, 738 F.2d at 1290-91; *EEOC v. Chicago Miniature Lamp Works,* 640 F. Supp. 1291, 1299 (N.D. Ill. 1986); *EEOC v. O & G Spring & Wire Forms Spec. Co.,* 38 F.3d 872, 879 n.9 (7th Cir. 1994); *Stewart*, 542 F.2d at 452; *Domingo*, 727 F.2d at 1444-45; *Kraszewski v. State Farm Gen. Ins. Co.*, No. C-70-1261 TEH, 1986 WL 11746, *1 (N.D. Cal. July 17, 1986); *Chewning v. Seamans*, 26 F.E.P. 731, 732-33 (D.D.C. 1979). In these circumstances, the use of workforce data to compute aggregate monetary relief "has more basis in reality . . . than an individual-by-individual approach." *Pettway v. American Cast Iron Pipe Co. (Pettway III),* 494 F.2d 211, 263 (5th Cir. 1974). *All* of these circumstances are present in this case and counsel in favor of computing back pay here through

analysis of workforce data.

2. Courts Endorsing the Use of Workforce Data to Determine Lost Earnings Have Not Required Individual Hearings

Wal-Mart contends that, even where workforce data has been used to compute lost earnings, courts have nonetheless required individual hearings to determine whether each class member was qualified for and interested in a promotion.

Contrary to Wal-Mart's assertion, courts have endorsed the use of workforce data to compute back pay in promotion and hiring cases without requiring individualized hearings to establish either the qualifications or interest of class members before allowing them to share in the back pay. *See, e.g., Segar*, 738 F.2d at 1289-91; *O & G Spring,* 38 F.3d at 876; *Chicago Miniature Lamp Works,* 640 F. Supp. at 1298-1300 and 668 F. Supp. 1150, 1151, 1153 n.7 (N.D. Ill. 1987). The Fifth Circuit and later the Eleventh Circuit in *Pettway* twice ruled that individual eligibility hearings were unnecessary. *See Pettway III,* 494 F.2d at 263 & n.154, and *Pettway V*, 681 F.2d 1259. *Pettway III* ordered the trial court to consider a class-wide calculation which would "possibly eliminat[e] the necessity of deciding which one of many employees would have obtained the position but for discrimination." *Id*. at 263 & n.154.

Teamsters, on which Wal-Mart primarily relies to contend that individual hearings are always required, does not support that proposition. *Teamsters* held only that "a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief." *Teamsters*, 431 U.S. at 361. Nothing in *Teamsters* requires that those proceedings must be separate, adversarial hearings for each class member.

In addition, the *Teamsters* decision acknowledged that interest might be established without contested, individual proceedings under certain circumstances. In *Teamsters*, the government argued that expressing a *current interest* in the positions at issue should suffice as a proxy for *interest at the time* the vacancy existed. *Teamsters*, 431 U.S. at 370. While the Court rejected that position, it did so solely because of concern that class members granted relief would receive retroactive seniority, and thus protection against layoffs, which they would not have had at the time these vacancies were filled. *Id.* at 371. The Court identified the difference in the risk of layoff as its sole reason for finding current expressions of interest an inadequate proxy. The threat to the interests of innocent employees, which supported an individualized claims process in *Teamsters,* does not apply here where no seniority or instatement relief is sought.

Wal-Mart likewise reads too much into *Domingo*, 727 F.2d at 1443-45.

There is no indication in that case that plaintiffs contested a Stage II interest requirement. Nevertheless, *Domingo* itself departed from the process described in *Teamsters*, recognizing the need to adapt Stage II procedures to the facts of that case.[7] Plaintiffs' Opening at 58.

C. Wal-Mart's Proposed Individualized Stage II Process Ignores the Effect of Stage I Findings and Would Rely on Speculation

Wal-Mart insists that the only way to determine back pay for class members is through Stage II mini-trials. At these hearings, Wal-Mart wants to "introduce evidence that it selected one person over another for a promotion because of a difference in interpersonal skills, or leadership potential, or product knowledge, or commitment to customer service." Reply at 37. Wal-Mart also insists that each class member would have to "prove up" interest, which it could contest. *Id.* at 57.

Wal-Mart's approach fails for several reasons. Once Stage I liability is established, Wal-Mart cannot defend Stage II claims based on criteria which have been found illegal in Stage I. Moreover, Wal-Mart will also be precluded from relying on criteria that were not used at the time of the actual decision. *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 773 n.32 (1976) (limiting criteria upon which employer could rely in Stage II to "nondiscriminatory standards *actually*

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[7] Moreover, unlike this case, in both *Teamsters* and *Domingo* there was an actual application process. See Plaintiffs' Opening at 57.

applied by [employer] to individuals who were in fact hired") (emphasis added).

Further, given the absence of records, individual hearings to reconstruct these decisions would be impermissibly permeated by *post hoc* speculation, and thus incompatible with due process. This failure of reliable proof could not be solved by having smaller class actions that adjudicate fewer decisions. Irrespective of the number of decisions at issue, the quagmire of hypotheticals is present in every one of these individual hearings.

1. Wal-Mart's Defenses in Stage II Will Be Limited by the Stage I Liability Finding

Wal-Mart proposes to litigate the Stage II proceedings as if the Stage I liability determination had never occurred. But, as the Supreme Court explained in *Teamsters*, the "force of [Stage I] proof does not dissipate at the remedial phase." *Teamsters*, 431 U.S. at 361-62. The issues that Wal-Mart proposes to argue at Stage II will already have been decided – and resolved against it – in the Stage I proceedings.

For example, Wal-Mart proposes to defend individual promotions decisions based upon precisely the kinds of unwritten, subjective promotion criteria (e.g. leadership potential) that plaintiffs claim were used to discriminate against female employees seeking promotion. Reply at 37. Should plaintiffs prove that Wal-

Mart's subjective promotion practices operated unlawfully at Stage I, then Wal-Mart would be precluded at the remedial stage from relying on such criteria. *See e.g. Teamsters*, 431 U.S. at 362 (employer must show "lawful reason" for decision to deny relief to class member in Stage II); *Hameed*, 637 F.2d at 520 n.17 (criteria that have not been validated in liability phase cannot be used to justify a particular selection decision in Stage II); *Baxter v. Savannah Sugar Ref. Corp.*, 495 F.2d 437, 444 (5th Cir. 1974) (Stage II could consider "only those qualifications possessed by white workers which are established by [employer] to be job related").

Similarly, plaintiffs contend that Wal-Mart's requirement that management candidates be willing to relocate their residence had an adverse effect on women. As plaintiffs' sociologist noted, "the company's practice of requiring relocation across stores for salaried managers, which generally creates a greater burden for women, makes the promotion process 'especially vulnerable to gender stereotyping.'" ER 1161. If plaintiffs are successful in demonstrating that the policy was discriminatory, then Wal-Mart cannot offer an unwillingness to relocate or a lack of interest in a distant promotion as a defense to a promotion

decision.[8]

Nor can Wal-Mart offer in defense of its promotion decisions factors that it did not require at the time the selections were made. Having claimed that it seeks to reconstruct the actual process employed in making discrete promotion selections, Wal-Mart may not add requirements for promotion at Stage II hearings that it foreswore when the actual selections were made. Wal-Mart had no requirement that an employee express interest in promotion as a prerequisite to selection. Accordingly, it cannot now insist that plaintiffs demonstrate, one by one, that they harbored an interest in promotion at the time the vacancies occurred.

2. Because of Wal-Mart's Practices, Individual Promotion Hearings Will Be Based on Rank Speculation

Wal-Mart's insistence on individual hearings relies upon the premise that an adversarial hearing devoted to a single selection is more likely to yield the truth than workforce data maintained contemporaneously. Wal-Mart's historical promotion practices have left little or no record from which to reconstruct the actual basis for any individual decision. Instead, managers, who oversaw thousands of employees over nearly a decade, would be left to rely more on

[8] Wal-Mart's store managers declarations, however flawed, confirm that the relocation requirement was a significant deterrent to women seeking management promotions. SER 754, 885; ER 395.

conjecture and *post hoc* rationalization than upon evidence reflecting actual deliberations at the time. A simple example of one management trainee position in 1999 illustrates why such hearings would be pointless.

Any hourly employee within the district in which the opening occurred, who met the minimum non-discriminatory promotion guidelines, would be eligible for that promotion. Accordingly, hundreds, if not thousands, of employees could be considered for *each* opening. SER 969, 972-73, 975-76. In order to defend this single hypothetical training vacancy, Wal-Mart claims it would call "the relevant decision-maker(s) to testify regarding the actual basis for the decision(s) at issue." Reply at 38. For selections into management trainee positions, the "relevant decision-makers" were individual District and Regional Managers. ER 1152. Each Wal-Mart District Manager manages six to eight stores; each store has a staff of 150-500 employees. ER 1208; SER 978, 1020. On any particular day, therefore, the District Manager has up to 4,000 hourly employees working in stores within his district. Given turnover and the length of the class period, if the mini-trial were held tomorrow, the District Manager who selected the candidate for the opening in 1999 could have had responsibility for 10,000 employees during

the relevant time period.[9]

In justifying the selection of a hypothetical management trainee in 1999, the District Manager would be expected to offer a rationale for: 1) the actual selection; and 2) non-discriminatory grounds for denying selection of likely many members of the class, who worked within the same district and possessed the requisite qualifications. Lacking any record of applications or record of grounds for selection, and having utilized no selection pool, the District Manager would have to depend on a memory of this event in order to offer a factual basis for the promotion decision. He would then have to speculate how the male actually selected would compare with any number of class members challenging that selection. The District Manager would, however, have been familiar with only a small fraction of the 10,000 hourly employees under his supervision. It is very unlikely that he would have knowledge or memory of specific work performance at the time sufficient to differentiate among the many candidates in the hypothetical pool.

The uncertainty of this process is particularly acute for class members who

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[9] The lack of familiarity with individual employees would be magnified ten fold for regional managers who supervise 80-85 stores at a time, or roughly 12,000-42,500 employees. ER 1147. Over the liability period, a Regional Manager could manage 100,000-200,000 employees.

were denied selection into entry level management positions, but who would likely have risen further in the ranks in a non-discriminatory system.[10] Their most significant back pay loss would be attributable not to the denial of the entry level position but from earnings lost in higher-level promotions. As a result of discrimination at the entry point, these women have no actual performance history in management positions to compare with that of the successful male candidates for these higher level management promotions. Class members would be at a significant disadvantage in a comparison of qualifications because of the discriminatory selection system, and the effort to reconstruct their career paths and hypothetical work histories would ultimately be sheer conjecture.[11]

Testimony about "interest" from class members would involve conjecture, and the rejoinder from Wal-Mart would be sheer speculation. Class members, under Wal-Mart's approach, would be required to prove that they would have been interested in a promotion in a system that never existed. The question is not

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[10] Management training lasts four to five months and is "a limbo phase between hourly and salaried ranks, although they are paid on an hourly basis." ER 1148. Support manager positions are likewise hourly positions which are "considered a feeder into the Management Trainee positions." *Id.*

[11] The absence of documentation and reliable memory would similarly undermine the integrity of individual hearings on the hundreds of thousands of pay decisions made over the past several years.

whether plaintiffs would have applied under the current promotion system, but whether they would have been interested, some time in the past, in a promotion in a non-discriminatory system. Such a neutral system *would* include open posting of vacancies and *would not* include a mandatory relocation requirement, managers actively discouraging women from seeking promotion, or selection decisions based upon subjective criteria not shown to be job related. Since the majority of challenged selections were into entry level positions, class members would then have to speculate whether they would have had an interest in higher management positions thereafter, without any experience actually working in management to guide their decision.

While class members might have some basis to hypothesize about their intentions in a past that never existed, Wal-Mart's rebuttal would be pure speculation. Reply at 57 ("Wal-Mart's defense would be...to contest the alleged showings of interest...."). Since Wal-Mart made promotions without ascertaining or recording candidate interest, management could offer little more than their assumptions about class member interest in a working environment free from discrimination. The inquiry about class member interest, conducted individual by individual, would pit a plaintiff's conjecture against her manager's assumptions and stereotypes, hardly a process that would more reliably lead to the truth than

the process that plaintiffs propose. To the contrary, such a process is likely simply to replicate the subjective, discriminatory practices it is supposed to remedy.[12]

Nothing about the quality of the available evidence improves if the hearings are conducted in smaller class actions, as Wal-Mart argues. A Stage II class limited to a particular store or district would require the use of the same hypothetical testimony reconstructing interest and qualifications in a non-discriminatory process as would a national class. In the hypothetical trainee opening discussed above, there were hundreds of possible candidates for just *one* promotion decision. These problems of proof, moreover, are entirely the result of Wal-Mart's practices and not the result of certifying a nation-wide class action.

The conduct of thousands of hearings simply to permit Wal-Mart to offer speculation and *post hoc* rationales for promotions that it chose not to post, or

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[12] To support its claim that women turned down promotions, Wal-Mart asserts that plaintiff Kwapnoski rejected an offered promotion because of her "personal circumstances." Reply at 57. Wal-Mart has its facts wrong but, more importantly, this incident with Ms. Kwapnoski perfectly illustrates the problems created by Wal-Mart's subjective promotion system. Plaintiff Kwapnoski did not reject an offer of promotion, as Wal-Mart suggests, but rejected a *lateral* move from receiving manager to front end manager. SER 1073. The District Manager claimed she should have experience as front end manager *before* she could be promoted into the management training program. *Id*. In fact, no such experience requirement existed. *Id.* When there are no established criteria for promotion, managers can, with impunity, erect whatever hurdles they choose to prevent women from advancing.

decisions it chose not to document, can only undermine due process rights.

D. At Stage II, Court in Equity May Use Any Reasonable Method of Allocation

Once the aggregate of lost wages has been determined, the court – sitting in equity – may use any reasonable method to allocate monetary relief among class members. *Segar*, 738 F.2d at 1292-1293. Because no method of allocation will be perfect, the district court may choose any equitable method, so long as it will achieve a just result. *Id.* Courts have long recognized that calculations of lost pay are invariably inexact to some degree. Courts nonetheless have a duty to make those awards, because an imperfect award is better justice for victims of discrimination than no award at all. *Shipes*, 987 F.2d at 316 ("unrealistic exactitude is not required and all doubts should be resolved against the discriminating employer."); *Domingo*, 727 F.2d at 1445.

> While such a method may generate a windfall for some employees who would have never been promoted had vacancies been filled on a nonracial basis and undercompensate the genuine victims of discrimination by forcing them to share the award with their undeserving brethren, it is the best that can be done under the circumstances. . . . Given a choice between no compensation for black employees who have been illegally denied promotions and an approximate measure of damages, we choose the latter.

Stewart, 542 F.2d at 452-53.

Wal-Mart repeatedly maligns the district court's use of the term "rough

justice," implying that the court would force Wal-Mart to pay lost wages based on an arbitrary assessment of its back pay liability. Reply at 46, 58. Wal-Mart again mischaracterizes the court's opinion. The district court used the phrase "rough justice," to refer to the justice *among* class members in distributing the total sum, *not* to the determination of the total amount Wal-Mart must pay. ER 1201. Specifically, the district court cited two cases in which aggregate back pay was spread over a much larger number of class members than available positions. *See O & G Spring,* 38 F. 3d at 879; *Hameed*, 637 F. 2d at 519-20. The court recognized the self-evident principle that, among class members, "'rough justice' is better than the alternative of no remedy at all for any class member." ER 1201.

The district court has broad discretion to decide which method it uses to allocate back pay. *Segar*, 738 F.2d at 1292-1293; *Pettway III*, 494 F.2d at 262-63; *Domingo*, 727 F.2d at 1444-45. In this case, there are manageable and equitable ways to discern which class members should receive a share of the relief and how much each should receive. The court could require class members to file verified claim forms to establish eligibility. The court could use Wal-Mart's database, or other documentary evidence, to compare potential victims to the men actually promoted and limit eligibility for relief to those class members with comparable or superior qualifications. Though these methods may be imperfect, Wal-Mart has

no basis to claim that class members would not prefer "rough justice" to no justice at all.

IV. Wal-Mart's Belated Attempt to Raise Commonality Arguments Against the Certification of Promotion Claims Should be Rejected

In its opening brief, Wal-Mart did not contest the district court's certification of the class promotion claims, focusing its argument solely on the certification of pay claims. Plaintiffs' Opening at 20 n.6. In a footnote in its reply, Wal-Mart asserts that it "now disputes on appeal, every aspect of plaintiffs' class certification evidence." Reply at 30, n.12. By failing to raise a specific challenge to the certification of the promotion claims in its opening brief, Wal-Mart has waived this claim. *Confederated Tribes of Umatilla Indian Reservation v. Bonneville Power Authority*, 342 F.3d 924, 933 (9th Cir. 2003) (argument raised in footnote in reply brief, rather than principal brief, will not be considered); *Hilao,* 103 F.3d at 778 n.4 (same). Even if considered, Wal-Mart's eleventh-hour challenge fails.

Wal-Mart asserts that its promotion decisions are "made in a highly decentralized manner" and thus cannot satisfy Rule 23(a) commonality. Reply at 7.[13] Wal-Mart's in-store promotion decisions are *not* highly decentralized and it

[13] Wal-Mart suggests that plaintiffs themselves argued below that its promotion processes were highly decentralized and that plaintiffs have "reversed

cites no admissible evidence to support that contention. To the contrary, the evidence submitted below is that Wal-Mart has uniform national policies and practices that govern in-store promotions and that these policies and practices have systematically disadvantaged female employees in every region of the country.

All salaried management promotions at issue here were made by, or in conjunction with, Home Office-based managers.[14] These centralized decision-makers use Wal-Mart's uniform minimum requirements for promotion into in-store management positions. ER 1152. The corporate guidelines also require that a candidate be on the company's "Rising Star" list. Wal-Mart posted the names of store employees designated "Rising Stars" on the "Rising Star Wall" in the

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course" on appeal, now claiming that Wal-Mart has highly centralized promotion policies. Reply at 6. To make this argument, Wal-Mart wrongly conflates plaintiffs' contention that promotion decisions are largely *subjective* – a contention plaintiffs do make – with the claim that promotion decisions are *highly decentralized*, a contention that plaintiffs have never made.

[14] The district court found that "[d]ecisions regarding advancement into the Management Training Program are made by District and Regional Managers." ER 1152. Regional Vice Presidents, also known as Regional Managers, are based in the Home Office as are Regional Personnel Managers. SER 979-981. The same District and Regional Managers fill openings for Assistant Manager and Co-Manager. SER 983-91. For store manager vacancies, Regional Vice Presidents are responsible for selections, with input from District Managers and Regional Personnel Managers. SER 992-99, 1001-02. Openings for hourly support manager positions are filled by store managers, based in the field. ER 1152.

Bentonville Home Office. These pre-selected "Stars" were given priority for promotion. SER 1003-18. This undisputed record of Home Office oversight and control of in-store management promotions entirely refutes Wal-Mart's decentralization claim.

Wal-Mart's challenge to the promotion statistics is limited to a string citation to pages from its expert's declaration, which is insufficient to resurrect the issue on appeal. Reply at 30 n.12; *Confederated Tribes,* 342 F.3d at 933. In any event, the statistical evidence, upon which the district court relied, fully supports its ruling. Within Wal-Mart's workforce, women make up 65% of hourly employees, but only 33% of management. ER 1148. Plaintiffs' statistician, analyzing Wal-Mart's own data, demonstrated a statistically significant shortfall of women promoted into each of the in-store management classifications; this pattern was consistent in nearly every geographic region. ER 1173.[15] On average, women took longer than men to be promoted to management positions, a fact undisputed by Wal-Mart. ER 1174. Plaintiffs' labor economist found that, in comparison to its competitors, Wal-Mart had significant shortfalls in female managers in 79.5%

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[15] Plaintiffs' statistical expert found the overall shortfalls amounted to many thousands of promotions denied to the class. ER 193 - 196 (shortfall of 2891 support managers, 2952 management trainees, 346 co-managers, 155 store managers). Plaintiffs' labor economist also found large promotion shortfalls (shortfall of 4004 to 5465 managers). SER 30-31.

of its stores. ER 1179.

The district court fully considered Wal-Mart's attack on plaintiffs' statistical evidence. Wal-Mart's principal claim was that plaintiffs' analyses should have relied upon "actual applicant flow data." ER 1174. The court rejected this argument, finding that such data was woefully incomplete for promotions challenged by the class.[16] Given the incomplete posting data, the court concluded that the methodology that plaintiffs' expert used was reasonable. ER 1174-78.

Even if timely raised, Wal-Mart's challenge to the underlying certification of promotion claims fails. The district court's findings, which are reviewed for abuse of discretion, were fully supported by the evidentiary record and should be affirmed.

CONCLUSION

The district court's certification of class-wide promotion claims should be affirmed, but its limitation of back pay relief to the subset of class members for whom Wal-Mart maintained application data should be reversed.

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[16] There was no application data for management trainee positions. For other positions below store manager, the postings covered from 1% to 20% of vacancies. ER 1153, 1175-76.

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CERTIFICATE OF COMPLIANCE PURSUANT WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(7)(B) because it contains 6994 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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PROOF OF SERVICE

I hereby certify that on this 11th day of February, 2005, I caused two copies of the reply brief for appellees and cross-appellants and one copy of further Supplemental Excerpts of Record to be served by UPS, overnight delivery, with a courtesy copy of the foregoing brief by electronic delivery, to:

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