For Opinion See 603 F.3d 571 , 556 F.3d 919 , 509 F.3d 1168 , 474 F.3d 1214

United States Court of Appeals,
Ninth Circuit.

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.
Nos. 04-16688, 04-16720
November 29, 2004.

On Appeal from the United States District Court for the Northern District of California

Principal Brief for Wal-Mart Stores, Inc.

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CORPORATE DISCLOSURE STATEMENT

Wal-Mart Stores, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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Wal-Mart Stores, Inc. respectfully submits that the district court's order certifying the largest employment class action in history should be vacated. The district court recognized that "no court has ever confronted a motion for class certification in an employment case of this size - or anything close to it." ER 1193-1194. Contradicting Supreme Court precedent and decisions from inside and outside this Circuit, the court certified an elephantine class action that, if allowed to proceed, would strip both absent class members and Wal-Mart of basic due process rights. In violation of the Rules Enabling Act, the district court repeatedly, and expressly, altered substantive law in its effort to jam this case into the class action procedural device. Indeed, the court acknowledged that its approach - which it labeled "rough justice" - would allow persons who have suffered no injury to recover backpay and, potentially, punitive damages, while undercompensating others whose rights to sue individually could be foreclosed by the judgment. The district court's unprecedented, unworkable, unconstitutional, and unlawful certification order should be vacated forthwith.

STATEMENT OF JURISDICTION

The district court, which had jurisdiction over this Title VII action pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f)(3), entered its class certification order on June 21, 2004. Pursuant to Federal Rule of Civil Procedure 23(f), Wal-Mart petitioned for permission to appeal on July 6, 2004, and this Court granted the petition on August 13, 2004. This Court has jurisdiction under 28 U.S.C. § 1292(e).

STATEMENT OF ISSUES

1. Did the district court err in concluding that the divergent sex-discrimination claims of the six named plaintiffs are both common to and typical of all claims that might be asserted by more than 1.5 million absent class members challenging discretionary pay and promotion decisions made locally by tens of thousands of managers at approximately 3,400 stores nationwide?

2. Did the district court err in concluding that Wal-Mart is not entitled to mount an individualized defense at any stage of the contemplated class proceedings?

3. Did the district court err in concluding that plaintiffs' claims for monetary relief, which potentially amount to billions of dollars, do not predominate over their claims for injunctive or declaratory relief, which most of the putative class members lack standing even to seek?

STATEMENT OF THE CASE

The named plaintiffs, six current or former employees of Wal-Mart, sued under Title VII, alleging a pattern and practice of intentional discrimination against women with respect to pay and promotions. ER 7. Over Wal-Mart's objection, the district court certified a class consisting of more than 1.5 million members, defined to include "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices." ER 1220.

STATEMENT OF FACTS

1. Wal-Mart, the largest private employer in the world, operates approximately 3,400 retail stores in the United States and employs more than 1 million people. ER 1139. Wal-Mart's domestic stores, each of which includes as many as 53 departments and 170 job classifications, comprise 7 divisions, 41 regions, and more than 400 districts within those regions. ER 497-504. Wal-Mart has adopted and enforces company-wide equal employment opportunity policies to foster diversity, to ensure fair treatment for all employees, and to prohibit unlawful discrimination. ER 65 6-673.

It is undisputed that compensation and promotion decisions for hourly employees at Wal-Mart are made almost exclusively on a case-by-case, discretionary basis by local store managers in response to the particular needs of their individual stores and the vagaries of the local markets from which employees are drawn. ER 1146. As the district court explained, individual store managers "are granted substantial discretion in making salary decisions for hourly employees in their respec- tive stores" and, "[a]s with salary decisions, the parties agree that subjectivity is a primary feature of promotion decisions for in-store employees." ER 1149, 1151.

2. The named plaintiffs are four former and two current Wal-Mart employees. They worked at different stores, at different times, in different positions. They were promoted to (and demoted from) different job classifications, disciplined for different offenses, and paid different amounts for performing different jobs. They transferred to different stores and different positions within stores, applied for different management training opportunities, and quit (or were

fired) for different reasons. They claim to have been discriminated against on the basis of sex in different ways, by different managers, in different circumstances. These are their different stories:

Edith Arana worked at the Duarte, California store from 1995 to 2001. ER 313. She began as a personnel manager, and several months later, after receiving a mixed performance review, she moved to the position of test scanner. ER 322-327. In July 1997, she applied for and received a promotion to support manager, along with a raise. ER 315-316, 328-331, 341. In July 1998, she stepped down from the support manager position because she did not wish to work the required shifts. ER 332-336. Ms. Arana claims that she expressed interest in or applied for several positions but that men were hired instead. ER 317-319. She was fired in 2001 for falsifying her time records. ER 320, 337-340.

Betty Dukes was hired as a cashier in the Pittsburg, California store in 1994. ER 376. She sought a promotion to customer service manager in April 1996 and was promoted to that position in June 1997. ER 376, 377. A series of disciplinary infractions precluded further promotions and, ultimately, led to a demotion to cashier. ER 377-378, 383-387. In 2001, she was reassigned as a greeter because unspecified injuries prevented her from performing the cashier's job. ER 379. Ms. Dukes claims that two male greeters in the same store are paid higher wages than she is. ER380.

Deborah Gunter worked part-time at a Texas store in 1993 and full-time at three California stores from 1996 to 1999. ER 402. She requested and received transfers between departments, shifts, and stores to accommodate her circumstances. ER 403-404, 406, 408. She applied for a department manager position but was not selected; she also claims that two less-qualified men were promoted over her as support manager. ER 404-407. She also claims that a supervisor made sexually explicit comments that upset her. ER 406. Her store manager made clear to the alleged harasser that harassment would not be tolerated, and Ms. Gunter's request to transfer to another store was granted. ER 411-416. About three months later, she quit after complaining about her schedule. ER 417-418.

Christine Kwapnoski has "spent most of [her] adult life" working for SAM'S CLUB stores in Missouri and California. ER432. She began work in 1986 and was allegedly denied promotion into the team leader and other management positions on several occasions before June 2001, when she was made an area manager, and March 2003, when she began management training. ER 432-433, 435. She claims that one supervisor "screamed" at her and "other female employees, but seldom did he scream at men." ER 434. Ms. Kwapnoski also claims that some male co-workers were paid the same as she was despite her greater experience. ER435.

Cleo Page worked in 1997 and 1998 as a cashier in the Tulsa, Oklahoma store and at the return desk at the Union City and Livermore, California stores. ER 451-452. In December 1998, she "applied for and was promoted to" customer service manager; less than a year later, she was promoted to department manager. ER 452-453. A year later, she quit after being disciplined. ER 454-455. Ms. Page claims that she earned less than the male employee who managed the sporting goods department, a position for which she did not apply. ER 453-454.

Patricia Surgeson was hired as a cashier in the Vacaville, California store in 1997. ER 460. A male co-worker allegedly grabbed her buttocks and made inappropriate comments; when she complained to a supervisor, she was transferred to another department. ER 460. She sought a promotion to department manager in late 1998 and within six months was promoted to manager of the lay-away department. ER 461. Ms. Surgeson later moved to the Cash Office as a "step up," where she claims to have learned that the man who replaced her in lay-away earned more than she had in that job. ER 462. She quit in 2001 to take a new job. ER 465-467.

3. These named plaintiffs sued Wal-Mart on behalf of a putative class of female employees who allegedly were victims of sex discrimination during their various employments at approximately 3,400 Wal-Mart stores across the country. ER 1139. The class encompasses individuals ranging from part-time entry-level hourly employees to large-store salaried managers earning well above $100,000 per year. Notwithstanding the manifold differences between and among the named plaintiffs, the district court concluded that their pay and promotion claims were repre-

sentative of those that might be asserted under Title VII by each and every female Wal-Mart store employee in the United States over a six-year period (ER 1140-1142) - more than 1.5 million women, a group that outnumbers the active duty military personnel in the Army, Navy, Marine Corps, and Air Force *combined*. The size of the putative class exceeds the entire population of at least 12 of the 50 States.

a. Wal-Mart submitted unrebutted evidence that there was no statistically significant evidence of gender disparity at over 90% of the stores - which on average have approximately 500 to 1,000 current and former employees within the class definition, and where well over one million class members worked - and women came out slightly *ahead* of their male counterparts in approximately 35-40% of the stores, although not to a statistically significant degree in most. ER 473-656. Wal-Mart also showed that there is no discernible class-wide pattern of promotion decisions adverse to women. ER 473-656. Even though decentralized decisionmaking by definition leads to highly individualized pay and promotion determinations, the district court concluded that the six named plaintiffs' dissimilar experiences could be extrapolated to millions of women at thousands of facilities across the nation. Pointing to aggregated statistics that allegedly show statistically significant gender-based discrepancies in pay and promotion, a sociologist's "conjecture" that Wal-Mart is "vulnerable" to gender bias, and a relative handful of anecdotes regarding individual instances of purported discrimination, the court held that Rule 23(a)'s commonality and typicality requirements were satisfied. *See* ER 1218.

b. The court acknowledged that this class "dwarfs" any previous employment class action, and is "unique" and "historic" for this reason alone. ER 1140, 1141. Nevertheless, the court concluded that the trial would not be unmanageable because plaintiffs could try to establish liability on the basis of class-wide statistics, while the court would prohibit Wal-Mart from mounting an individualized defense on either liability or remedy. ER 1196. To reach this result, the court was forced to expressly do away with the individualized defense to which employers are entitled in sex-discrimination cases \{*see Teamsters* v. *United States*, 431 U.S. 324 (1977)) on the ground that it would be "infeasible," "virtually impossible" and "impractical on its face" given the magnitude of the class. ER 1199-1200.

c. Finally, although plaintiffs seek potentially billions of dollars in backpay and punitive damages, and more than half of the putative class is no longer employed at Wal-Mart, the district court certified the class Rule 23(b)(2) on the ground that the claims for monetary relief do not predominate over the injunctive or declaratory relief sought. ER 1191. The court recognized that, if liability were established, the case management plan contemplated in the certification order would undercompensate some plaintiffs and provide a "windfall" to others, and would punish Wal-Mart for conduct that violated no law. ER 1191-1192, 1200-1201. This, the court said, was "rough justice." ER1201.

SUMMARY OF ARGUMENT

The Rules Enabling Act precludes district courts from altering the substantive law in order to certify a class. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). In derogation of this fundamental principle, the court below repeatedly altered substantive law in order to force this case into the class procedural device.

I. The district court committed legal error when it failed to properly apply Rule 23(a)'s commonality and typicality requirements. *Gen. Tel. Co. of the Southwest* v. 457 U.S. 147 (1982).

A. According to the district court, the "common feature" binding the class members' claims was the delegation of discretion to individual store managers to make pay and promotion decisions. ER 1151. The Supreme Court, however, has explained that an employer's decision to delegate decisionmaking authority raises no inference of discriminatory conduct. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988). As a result, a plaintiff challenging the exercise of discretion must provide, *before* a class can be certified, "significant proof" that the company operated under a general policy of discrimination. Because decentralized decisionmaking cuts against a finding of commonality, courts routinely deny certification in cases such as this one. *E.g., Cooper v. Southern Co.*, - F.3d - , 2004 WL 2537436 (11th Cir. Nov. 10, 2004); *Stastny v. Southern Bell Tel & Tel Co.*, 628 F.2d 267 (4th Cir. 1980). In fact, it appears that no other

court has ever certified a class of employees who challenge the exercise of delegated discretion at multiple facilities where there is substantial evidence that a significant portion of the class has *not* been subjected to discrimination.

B. Plaintiffs' statistics, sociology, and anecdotes did not satisfy their heavy burden of establishing system-wide discrimination.

1. To establish commonality in a multiple-facility case, each decisionmaking unit *(e.g.*, each store) must display roughly the same statistical disparities. *Beck v. Boeing Co.*, 203 F.R.D. 459 (W.D. Wash. 2001), *affd in rele-vantpart*, 60 Fed. Appx. 38 (9th Cir. 2003). Wal-Mart's *unrebutted* evidence showed that more than 90% of the stores showed no statistically significant disparities in pay. The district court ignored this evidence on the ground that it went to the "merits," but courts may not ignore evidence that bears directly on the Rule 23 (a) requirements even though the evidence may also relate to the underlying merits of the case. *Hanon v. Dataproducts Corp.*, 976 F.2d 497 (9th Cir. 1992). Wal-Mart's store-by-store data bore directly on commonality because proof of discrimination in some districts and not others tends to defeat the argument that discrimination was the employer's nationwide standard operating procedure. *Morgan v. UPS*, 380 F.3d 459 (8th Cir. 2004). Thus, even if plaintiffs' statistics showed *some* discrimination in the system, they failed to establish that the class members suffered a *common* injury. *Hartman v. Duffey*, 19 F.3d 1459 (D.C. Cir. 1994).

2. Plaintiffs' sociologist opined that Wal-Mart was "vulnerable" to gender bias, although he "conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking." ER 1227. The district court erred in failing to recognize that plaintiffs' sociological conjectures, even if admissible, confirm the lack of commonality.

3. Plaintiffs produced 113 declarations regarding individual instances of alleged discrimination. This anecdotal evidence establishes, at most, one instance of discrimination for every 13,000 putative class members., and does not provide a predicate for finding a company-wide policy of discrimination. *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867 (1984).

II. To conclude that maintenance of this class action would not be unmanageable, the district court had to strip Wal-Mart of its right to present evidence showing no discrimination occurred at particular stores or against specific individual claimants, in violation of Title VII, the Rules Enabling Act, and due process.

A. The Supreme Court has long recognized that an employer is entitled to show that each challenged employment decision was not the product of discrimination. *Teamsters v. United States*, 431 U.S. 324 (1977). The 1991 amendments to Title VII reinforced this mandate. 42 U.S.C. § 2000e-5(g)(2)(B)(ii); *Costa v. Desert Palace, Inc., 299* F.3d 838 (9th Cir. 2002) (en bane), *aff'd*, 539 U.S. 90 (2003). The district court, however, erroneously eliminated this basic requirement, declaring that Wal-Mart "is not... entitled to circumvent or defeat the class nature of this proceeding by litigating whether every individual store discriminated against individual class members." ER 1196.

1. The court recognized that individualized *Teamsters* hearings would not be feasible and would render the class unmanageable, so it decided to do away with this requirement of substantive Title VII law for the sole purpose of certifying a class, in violation of the Rules Enabling Act. The so-called "formula" cases cited by the district court as authority for dispensing with *Teamsters* hearings in fact contemplated that such hearings would occur. *E. g., Domingo v. New England Fish Co.*, 727 F.2d 1429 (9th Cir. 1984).

2. Moreover, Wal-Mart has a due process and Seventh Amendment right to individualized determinations, particularly as to punitive damages. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

B. The district court was of the view that Title VII contains no "exception" for large employers such as Wal-Mart, but that is not the point. Large corporate defendants are just as entitled to the protections of substantive law, including due

process, as are other litigants. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). That is all Wal-Mart is seeking.

III. The district court certified this class under Rule 23(b)(2), which applies "only where the primary relief sought is declaratory or injunctive." *Zinser* v. *Ac-cufix Research Inst., Inc.*, 253 F.3d 1180, *amended*, 273 F.3d 1266 (9th Cir. 2001). Since plaintiffs seek potentially billions of dollars in backpay and punitive damages, (b)(2) certification was improper.

A. Rule 23(b)(2) applies only where the defendant has acted in a manner "generally applicable to the class." The evidence establishes that, if anything, any discrimination that may have occurred was *not* system-wide, and instead was sporadic and varied widely.

B. The Supreme Court has recognized the substantial possibility that actions seeking monetary damages are only certifiable under Rule 23(b)(3). *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994). The district court failed to heed the due process implications of its (b)(2) certification.

1. The district court characterized plaintiffs' backpay claims as "equitable," and on that basis reasoned that these claims "predominated" over the punitive damages claims. Rule 23(b)(2) does not, however, apply to all "equitable" relief; rather, it applies only to claims for "declaratory" or "injunctive" relief. Backpay is neither, but rather constitutes monetary relief that cuts against (b)(2) certification.

2. Plaintiffs' claim for punitive damages is also wholly inconsistent with (b)(2) certification. Both Title VII and due process require a fact-specific inquiry into the circumstances of each plaintiff before such punishment may be imposed. *State Farm, supra; see Lemon v. Operating Eng'rs*, 216 F.3d 577 (7th Cir. 2000); 42 U.S.C. § 1981a(b)(1).

STANDARD OF REVIEW

The district court's order presents issues of law subject to de novo review. *Schwarzschild v. Tse*, 69 F.3d 293, 295 (9th Cir. 1995) ("We review the district court's interpretation of [Rule 23] *de novo")*. While this Court "reviewfs] a district court's decision regarding class certification for an abuse of discretion" *(Lier- boe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 n.5 (9th Cir. 2003)), "[a] court abuses its discretion if its certification order is premised on legal error." *Hawkins* v. *Comparet-Cassani*, 251 F.3d 1230, 1237 (9th Cir. 2001).

ARGUMENT

The most fundamental principle of class-action litigation is that a court may not "abridge, enlarge, or modify any substantive right" in order to certify a class. 28 U.S.C. § 2072(b). The Supreme Court has repeatedly emphasized that this command of the Rules Enabling Act is a binding constraint on the purely procedural class action device. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997). Yet the district court repeatedly altered the substantive law - the express requirements of both Title VII and the Constitution, as authoritatively construed by the Supreme Court - solely for the purpose of certifying the largest employment class action in history.

I. The District Court Altered Substantive Law In Concluding That The Class Meets Rule 23(a)'s Commonality And Typicality Requirements

"[A] Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982). Because "actual, not presumed, conformance with Rule 23(a)" is an "indispensable" prerequisite to class certification, a district court commits re- versible error if it "fail [s] to evaluate carefully the legitimacy of

the named plaintiffs plea" that the Rule 23 (a) requirements are met. *Id*. at 160, The district court's order, albeit prolix, establishes that the court failed to engage in the "rigorous analysis" mandated by *Falcon* and Rule 23 by glossing over the widely divergent claims of the named plaintiffs and 1.5 million class members, altering the substantive law, and trampling on Wal-Mart's due process rights instead of recognizing the impossibility and unfairness of litigating these claims in a single, massive class action.

The core prerequisites to class certification imposed by Rule 23(a) are commonality and typicality, which "tend to merge." *Falcon*, 457 U.S. at 157 n.13. These requirements ensure that the class representatives possess the same interests, and have suffered the same alleged injuries, as the absent class members and thus are qualified to bring claims on behalf of the whole group. *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395,403 (1977). They are not mere technicalities, but rather ensure that a federal court has Article III jurisdiction to adjudicate the claims of absent parties. *See Cornett v. Donovan*, 51 F.3d 894, 897 n.2 (9th Cir. 1995). Here, the six named plaintiffs failed to establish that they can represent more than 1.5 million others.

A. Decentralized Decisionmaking Does Not Itself Give Rise To An Inference Of Company-Wide Discrimination And, In Fact, Cuts Directly Against Commonality

The district court accepted plaintiffs' theory that the millions of pay and promotion decisions made by tens of thousands of Wal-Mart managers were connected by the "common feature" of "a broad range of discretion." ER 1151. The court's decision contradicts both substantive Title VII law and Rule 23(a)'s commonality requirement.

The Supreme Court has stated that "an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988); *see also Sengupta v. Morrison-Knudsen Co*., 804 F.2d 1072, 1075 (9th Cir. 1986) ("the use of subjective employment criteria is not unlawful per se"); *Coleman v. Quaker Oats Co*., 232 F.3d 1271, 1285 (9th Cir. 2000) ("subjective evaluations are not unlawful per se and 'their relevance to proof of discriminatory intent is weak' ") (citations omitted); *Denney v. City of Albany*, 247 F.3d 1172, 1186 (11th Cir. 2001) ("an employer's use of subjective factors in making a hiring or promotion decision does not raise a red flag"); *Anderson v. Douglas &Lomason Co*., 26 F.3d 1277, 1284 (5th Cir. 1994) ("the use of subjective or discretionary decision-making does not itself create an inference of discriminatory conduct"). This is because it is often "quite reasonable" for a com- pany to delegate decisionmaking responsibility. *Watson*, 487 U.S. at 990. The discretion afforded to individual Wal-Mart store managers allows them to set wages at their respective stores in light of what other employers in the relevant labor markets offer similarly skilled workers. For example, if persons with specific knowledge and skills command a premium wage in particular markets, store managers in those markets have discretion to meet the competition. ER 570-576.

In light of these considerations, basing a class action on an alleged "practice" of decentralized, discretionary decisionmaking is difficult, and private plaintiffs asserting such a theory have a substantial evidentiary obstacle at the certification stage: "*Significant* proof that an employer operated under a general policy of discrimination *conceivably* could justify a class... if the discrimination *manifested itself in* hiring and promotion decisions in the same *general* fashion, such as through entirely subjective decisionmaking processes." *Falcon*, 457 U.S. at 159 n.15 (emphases added).[FN1] Plaintiffs thus bore the burden of adducing, *before* the class could be certified, "significant proof" that Wal-Mart used discretionary deci-sionmaking to further a corporate policy of sex discrimination. *Hartman v. Duf-fey*, 19 F.3d 1459, 1472 (D.C. Cir. 1994) (plaintiff must show that discrimination "pervaded all of the employer's challenged employment decisions"); *Cooper* v. *Southern Co.*, - F.3d -, 2004 WL 2537436, at *14 (11th Cir. Nov. 10, 2004) (plaintiffs must show that discrimination sustained was "part of an overarching pattern and practice of intentional discrimination"). Decentralized, discretionary decisionmaking is not inherently discriminatory, nor does it affect all employees in the same way.

> FN1. It is far from clear that the delegation of discretion to local managers to make pay and promotion decisions even constitutes a "practice" that may be challenged under Title VII. *See Watson*, 487 U.S. at 994

(plurality opinion) ("The plaintiff must begin by identifying the specific employment practice that is challenged," which may be "difficult when subjective selection criteria are used"); *cf.* *42* U.S.C. § 2000e-2(k). It is more logically viewed as a policy that permits many *different* practices at the local level. *See* Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. Chi. Legal F. 475, 508-09.

The district court was therefore plainly wrong when it said that "the fact that Wal-Mart's compensation and promotion policies consistently permit managers to utilize a great deal of subjectivity. *supports* a finding of commonality." ER 1154 (emphasis added). The delegation of discretion *itself is* insufficient to meet plaintiffs' burden of proof. *See Sperling v. Hoffman-LaRoche, Inc.*, 924 F. Supp. 1346, 1363 (D.N.J. 1996) ("a decision by a company to give managers the discretion to make employment decisions, and the subsequent exercise of that discretion by some managers in a discriminatory manner, is not tantamount to a decision by a company to pursue a systematic, companywide policy of intentional discrimination, i.e., a pattern or practice of discrimination"). On the contrary, decentralized decisionmaking "cuts against" an inference of commonality. *Stastny v. Southern Bell Tel Co.*, 428 F.2d 267, 279 (4th Cir. 1980); *see also, e.g., Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 670 (N.D. Ga. 2001) ("Plaintiffs' theory is that Defendants had a centralized policy of decentralization, which is insufficient on these facts to satisfy commonality or typicality with respect to Plaintiffs' proposed multi-facility classes").

It is undisputed that the pay and promotion decisions at issue are made by local managers exercising significant discretion and that one local manager's decisions will not affect employees in other stores or districts. Even within stores, there are many different departments, most if not all with their own local sub-market in terms of pay scale, competition, experience among employees, and levels of required expertise. ER 570-576. Plaintiffs failed to demonstrate that despite these overwhelming differences, the 1.5 million class members each shared a common experience of discrimination. *Bradford v. Sears, Roebuck & Co.*, 673 F.2d 792, 794-96 (5th Cir. 1982) (district court's failure to consider the defendant's evidence of different decisionmaking practices at different facilities was re- versible error). To the contrary, as shown below, the statistics here demonstrate that any pay disparity was localized in fewer than 10% of the stores nationally.

As the Eleventh Circuit recently recognized, "[w]here, as here, class certification was sought by employees working in widely diverse job types, spread throughout different facilities and geographic locations, courts have frequently declined to certify classes." *Cooper*, 2004 WL 2537436, at *13; *see also, e.g., Rhodes v. Cracker Barrel*, 2002 WL 32058462, at *58 (N.D. Ga. Dec. 31, 2002) (collecting 20 decisions denying certification where plaintiffs brought discrimination claims attacking decentralized decisionmaking), *report and recommendation adopted*, 213 F.R.D. 619 (N.D. Ga. 2003); *Webb v. Barnes Group, Inc.*, No. 3:02-CV-2716-R (N.D. Tex. July 7, 2004) (denying certification where salary decisions were "made by at least 75 supervisors and managers") (copy of decision included in appendix). *Cf. Staton v. Boeing Co.*, 327 F.3d 955 (9th Cir. 2003) (commonality is not defeated if there is some evidence of local discretion in otherwise centralized employment practices).

The district court tried to sidestep the obvious lack of commonality inherent in plaintiffs' theory of the case by stating that "the focal point will be the practice of utilizing excess subjectivity, rather than the facts concerning each individual decision." ER 1156. By definition, however, the so-called "practice" of "subjective" decisionmaking affects each individual differently, and undoubtedly bene- fited many individual class members whose managers exercised their discretion regarding pay and promotions based on wholly legitimate factors. Accordingly, Wal-Mart's delegation of discretion to local managers cannot establish, standing alone, that Wal-Mart engaged in an "employment pattern, practice or policy that demonstrably affects all members of a class in substantially, if not completely, comparable ways." *Stastny*, 628 F.2d at 273; *see also Cooper*, 2004 WL 2537436, at *14. The district court's contrary conclusion is literally unprecedented: This case marks the first time in history that a court has certified a class of employees who challenge the exercise of delegated discretion at multiple facilities where, as discussed in more detail below, there is substantial, unrebutted evidence that a significant number of class members at a significant number of facilities were not subject to discrimination.

B. Plaintiffs Did Not Adduce "Significant Proof" Of A Corporate Policy Of Discrimination

In an effort to carry their burden of establishing commonality, plaintiffs relied on three categories of "evidence": statistics, sociology, and anecdotes. The district court found this sufficient, stating that "where, as here, such subjectivity is part of a consistent corporate policy and supported by other evidence giving rise to an inference of discrimination... commonality is satisfied." ER 1154. The court was wrong.

1. Statistics

"[Statistical data showing comparable disparities in treatment experienced by protected employees at a sufficient number of the separate facilities" "might conceivably" lead to an "inference that it reflects a system-wide policy or practice." *Stastny*, 628 F.2d at 278. To establish commonality on a company-wide basis in a multiple-facility case, each decisionmaking unit - here, each Wal-Mart store or department - must exhibit comparable statistical disparities, and there certainly cannot be wide variations among the units. *Beck v. Boeing Co.*, 203 F.R.D. 459, 464 (W.D. Wash. 2001), *aff'd in relevant part*, 60 Fed. Appx. 38 (9th Cir. 2003); *Garcia v. Veneman*, 211 F.R.D. 15, 22 (D.D.C. 2002).

Even though their theory of the case attacks the delegation of discretion to local managers at the individual store level, plaintiffs' experts opined that, when aggregated to a regional or nationwide basis, sex-based disparities in pay and promotion were statistically significant. ER 70-161, 162-287. The court concluded that plaintiffs' aggregated data raised an "inference" of system-wide discrimination in pay and promotions. ER 1172.

Wal-Mart's expert opined that, when measured on a store-by-store basis, there was no statistically significant evidence of discrimination at the vast majority of stores. In particular, "more than 90% of the stores had no pay rate differences between men and women that were statistically significant." ER 473-655. The Supreme Court has cautioned courts in employment cases to focus on the statistically significant data. *See, e.g., Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-55 (1989). At the more than 90% of stores exhibiting no statistically significant gender disparities, the data do not show trends favoring either men or women on a consistent basis. ER 579-580. Female employees fared slightly better than their male counterparts at approximately 35-40% of Wal-Mart's stores, and males fared slightly better at approximately 53% of the stores, although these results are, in effect, within the statistical margin of error and thus do not indicate meaningful disparities in either direction. ER 579-580, 581-582.

Plaintiffs and their experts did *not rebut* Wal-Mart's showing that the disaggregated data establish that there is no statistically significant evidence of discrimination at the vast majority (more than 90%) of Wal-Mart stores. The district court, however, simply ignored this unrebutted evidence.

The court said that it would not resolve a "battle of the experts" or referee any "statistical dueling" between the parties' experts. ER 1144, 1163, 1168, 1170. Whatever the merits of that position in the abstract, it has no application in this case. *Cf. Cooper*, 2004 WL 2537436, at * 11 & n.l 1 ("the district court would have erred if it had certified a class without first determining that the named plaintiffs had claims common to those of the unnamed class members"). The record before the district court established, as a matter *of unrebutted fact*, that if the data are examined on a store-by-store basis - and these are large stores that provide an ample sample size - no statistically significant disparities exist at more than 90% of the locations. Plaintiffs' aggregated statistics attempted to obscure this fact, which is critical to the certification decision. *Cf. Abram v. UPS of Am., Inc.*, 200 F.R.D. 424, 431 (E.D. Wis. 2001) ("If Microsoft founder Bill Gates and nine monks are together in a room, it is accurate to say that on average the people in the room are *extremely* well-to-do, but this kind of aggregate analysis obscures the fact that 90% of the people in the room have taken a vow of poverty").

With respect to the statistical evidence of discrimination, the material dispute was not primarily factual (or statistical), but *legal*: Should the data be examined on an aggregated basis or not? That is a foundational question of law that the district court was obligated to answer before proceeding to decide the certification motion. In particular, this Court has made clear that the use of "aggregated statistical data" is appropriate *only* "where it is more probative than subdivided

data." *Paige v. California*, 291 F.3d 1141, 1148 (9th Cir. 2002), *cert, denied*, 537 U.S. 1189 (2003). Plaintiffs, as the proponents of the aggregated data, bore the burden of showing that it was more probative than the store-by-store data proffered by Wal-Mart. *Lott v. Westinghouse Savannah River Co*., 200 F.R.D. 539, 560-61 (D.S.C. 2000); *Abram*, 200 F.R.D. at 431. This they manifestly failed to do.

Moreover, Wal-Mart's expert *confirmed* that substantial variability among stores precludes aggregating at the nationwide level. She demonstrated that plaintiffs' evidence failed the Chow statistical test, which plaintiffs' expert inexplicably failed to apply and which in effect examines the sameness of data sets to determine whether they can properly be aggregated for analysis. ER 473-655, 1165; Gregory C. Chow, *Tests of Equality Between Sets of Coefficients in Two Linear Regressions*, Econometrica, vol. 28, no. 3, at 591 (1960); William H. Greene, *Econometric Analysis* 349 (3d ed. 1997). Even the statistics at the regional level did not show a consistent pattern. ER 1173. It is an error of law not to use the Chow test, or some other statistical test, where there is evidence that aggregation of statistics masks relevant dissimilarities.

The district court did not make the required finding that plaintiffs' aggregated statistics were more probative than Wal-Mart's store-by-store analysis. Rather, the court concluded that *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), precluded any examination of the "merits" at the certification stage, including Wal-Mart's challenge to plaintiffs' use of aggregated statistics. ER 1143, 1159-1160, 1163. That is clearly incorrect: The Supreme Court has declared that "[e] valuation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims." *Coopers & Ly- brand v. Livesay*, 437 U.S. 463, 469 n.12 (1978) (citation omitted); *see also Cooper*, 2004 WL 2537436, at *10.

Numerous decisions recognize that the commonality determination, in particular, requires careful evaluation of the evidence presented by *both* sides before a class can be certified. *See, e.g., Szabo v. Bridgeport Machs., Inc*., 249 F.3d 672, 674-77 (7th Cir. 2001); *Gariety v. Grant Thornton*, 368 F.3d 356, 365-67 (4th Cir. 2004); *Cooper*, 2004 WL 2537436, at *14 & n.11. As this Court has explained, "we are 'at liberty to consider evidence which goes to the requirements of Rule 23 even though the evidence may also relate to the underlying merits of the case.' "*Hanon v. Dataproducts Corp*., 976 F.2d 497, 509 (9th Cir. 1992) (citation omitted). Simply put, a court may not forego the "rigorous analysis" required by *Falcon* merely because some evidence that bears directly on that analysis also goes to the merits.

More fundamentally, the district court altered the substantive law by ignoring the store-by-store evidence of extensive non-discrimination. As the Eighth Circuit recently explained, "proof of discrimination in some districts and not others tends to *defeat* the argument that discrimination was [the employer's] nationwide standard operating procedure." *Morgan v. UPS*, 380 F.3d 459, 464 (8th Cir. 2004) (emphasis added). The Fourth Circuit has also confronted precisely this problem, and has explained that "[i]f facility concentrated discrimination" is the "reality behind the system-wide statistical disparities," then to infer system-wide discrimination "has the forbidden effect of using the procedural device of Rule 23 to abridge the defending party's substantive rights" because "the inferred commonality completely alters the proof burdens and indeed the very substantive elements of claim and defense that would apply" in individual actions. *Stastny*, 628 F.2d at 280 n.20. The district court's decision cannot be reconciled with this clear statement of established law, a rule the court simply overlooked.

The key point for purposes of class certification is that *even if* the statistical evidence proffered by plaintiffs would allow for an inference *of some* discrimination, it does not permit - let alone require - the additional inference that such discrimination was practiced uniformly and resulted in common injuries to over 1.5 million women throughout the Wal-Mart system. *Hartman*, 19 F.3d at 1472 (although "plaintiffs' statistics may have demonstrated that discrimination... was afoot, nothing in the record so far permits the additional inference that class members suffered a *common* injury"); *see also Donaldson v. Microsoft Corp*., 205 F.R.D. 558, 567 (W.D. Wash. 2001) ("The burden is on plaintiffs to establish a class-wide pattern of discrimination, and plaintiffs' own statistics belie the existence of such a pattern"); *Abram*, 200 F.R.D. at 431 ("The lack of any *consistent* pattern belies the notion that class members have been affected in common ways by the supposed 'practice' of 'subjective decision-making"'). As a matter of law, that additional

inference cannot be made in the face of Wal-Mart's store-by-store evidence.

2. Sociology

The district court asserted that Wal-Mart "relies on its strongly imbued culture to guide managers in the exercise of their discretion" - although the court was of the view that it "would be premature and inappropriate... to determine the precise degree to which the forms of centralized control at Wal-Mart keep managerial discretion in check." ER 1159. In this regard, the district court simply *ignored* Wal-Mart's *actual* company-wide policies, which prohibit discrimination and encourage equal opportunity. ER 1160-1161.

Unable to identify *any* discriminatory policy at Wal-Mart, plaintiffs put forth a sociologist, William Bielby, who opined that Wal-Mart "employees achieve a common understanding of the company's way of conducting business." ER 291. He could not say that this "way" was discriminatory, nor could he opine that this "common understanding" actually causes discrimination. Instead, Bielby's opinion was only that Wal-Mart is "vulnerable to" bias or gender stereotyping. ER 289, 293, 295, 296. Such vulnerability, it appears, is not unique to Wal-Mart, as Bielby has leveled the same charge against a host of other companies *(see* Justin Scheck, *Expert Witness*, The Recorder, Oct. 28, 2004, at 6) based on a simplistic assumption that all people are vulnerable to stereotyping to some unde- fined extent. Far from testifying that Wal-Mart's supposed "vulnerability" was common or typical, "Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking." ER 1227. Yet the district court said that his testimony was enough to "raise[] an inference of corporate uniformity and gender stereotyping that is common to all class members." ER 1162.

Wal-Mart moved to strike Bielby's declaration as not meeting the standards for expert testimony established by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and Federal Rule of Evidence 702. The court acknowledged that Bielby's opinions involve "conjecture" and do not result in "a quantifiable analysis," but dismissed those concerns as inherent in "the nature of this particular field of science." ER 1162. The court expressly refused to "apply the full *Daubert* 'gatekeeper' standard at this stage," concluding that "a lower *Daubert* standard should be employed." ER 1225.

The district court's refusal to apply *Daubert* was erroneous and stands as yet another example of the court's twisting the substantive law in furtherance of the procedural class action device. *Daubert* sets the standard for the *admissibility* of evidence in federal court. If Bielby's "opinion" is not admissible - and Wal-Mart submits that it is not - then it may not be relied upon to sustain a certification order. *See* Fed. R. Evid. 1101(b). In other words, if the jury would not be entitled to hear Bielby testify - again, as Wal-Mart submits that it would not - then his declaration is worthless to plaintiffs. The district court's failure to apply this elementary principle is grounds for reversal. *See Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001) ("A district court [deciding a class certification motion] must ensure that the basis of the expert opinion is not so flawed that it would be inadmissible as a matter of law"); *Cooper*, 2004 WL 2537436, at *10 ("before a district court determines the efficacy of class certification, it may be required to make an informed assessment of the parties' evidence"); *West* v. *Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) ("A district judge may not duck hard questions by observing that each side has some support, or that considerations relevant to class certification also may affect the merits. Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives.").

Moreover, even assuming *arguendo* that Bielby's opinion is admissible, the fact that Wal-Mart might be "vulnerable" to gender stereotypes does not answer the question of commonality. The question would remain how (if at all) and through whom (if anyone) that vulnerability manifested itself; Bielby's theories say nothing about these critical issues. Certainly, he did not attempt to overcome the unrebutted evidence that there is no statistically significant disparity at more than 90% of the stores. To the extent Bielby's testimony is informative at all, Wal-Mart's store-by-store evidence confirms that the supposed vulnerability resulted in actual discrimination, if at all, at only a small percentage of stores. This evidence, like the rest, cuts against commonality.

3. Anecdotes

The court also looked to plaintiffs' "anecdotal evidence" of discrimination, in the form of declarations from 113 class members. ER 1180-1181. The court said that these anecdotes further supported an inference that Wal-Mart's "policies and procedures have the effect of discriminating against Plaintiffs in a common manner." ER1181.

The court, however, cited just three declarations in support of its conclusion that the anecdotal evidence supported a commonality determination. Even if three managers allowed bias to infect their decisions, as these declarants allege, the resulting discrimination is one step removed from the company's decision to delegate discretion to those managers. *Abram*, 200 F.R.D. at 430. *None* of the declarations submitted by plaintiffs even attempts to establish a *common, company-wide* policy of discrimination as distinct from individualized allegations of purportedly (and almost entirely unsubstantiated) discriminatory acts. Wal-Mart submitted declarations from female employees that refute the notion of such a company-wide policy. ER 1095-1100, 1101-1105, 1106-1116, 1117-1123, 1124-1131, 1132-1136, 1088-1094.

In fact, a substantial number of the declarations submitted by plaintiffs, even if accepted as entirely truthful, fail to make out even a prima facie case of sex discrimination. *See, e.g.*, ER 297-208, 345-347, 351-370, 388-392, 393-400, 437-443, 444-449, 468-472. The remaining declarations depict a relative handful of widely divergent, and in many instances entirely unique, events that occurred in the context of billions of hours of workplace activity by millions of employees over several years across the nation. These declarations hardly can be deemed representative or probative of discrimination in pay or management-track promotion. *See, e.g.*, ER 456-458 (mentoring), 428-430 (quid pro quo sexual harassment), 424-426 (pregnancy discrimination), 343 (denial of departmental transfer), 349 (exclusion from operating forklifts), 420-421 (difficulty transferring to hardware department), 372-373 (assignment to undesirable location), 310-311 (assignment to undesirable shift). If anything, the limited number of disparate anecdotes adduced by the named plaintiffs establishes a *lack* of commonality among the putative class members' experiences and claims and defeats certification.

"[A] class plaintiff's attempt to prove the existence of a companywide policy, or even a consistent practice within a given department, may fail even though discrimination against one or two individuals has been proved." *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 878 (1984). In *Cooper*, the Court held that anecdotal evidence from three employees was not sufficient to support a claim of discrimination on behalf of a few hundred employees. Yet here, the district court cited just three anecdotal declarations to sustain a class of more than 1.5 *million* employees. In this regard as well, the district court's decision is literally unprecedented.

Plaintiffs' declarations, from 113 class members, represent less than *1/100th of one percent* of the class of at least 1.5 million women, and make anecdotal claims of discrimination in only about three percent of Wal-Mart's 3,400 stores. Plaintiffs' evidence, in other words, shows *at most* one instance of discrimination for every 13,000 class members - yet courts have routinely found a lack of commonality even with many more anecdotes as a percentage of the class. In *Mooney v. Aramco Services Co.*, 54 F.3d 1207 (5th Cir. 1995), for example, the court held that ten individualized instances of discrimination were insufficient to support a class of just 154 employees, because "[tjestimony of anecdotal witnesses with different supervisors, working in different parts of the company was simply too attenuated." *Id*. at 1221. *A fortiori*., the individualized instances of discrimination advanced by plaintiffs here establish at most "isolated, sporadic discrimination" and cannot suffice to establish commonality or typicality. *King v. Gen. Elec. Co.*, 960 F.2d 617, 625 (7th Cir. 1992); *see also, e.g., Ste. Marie v. Erie R.R. Ass'n*, 650 F.2d 395, 406 (2d Cir. 1981) (seven anecdotal instances insufficient to support pattern or practice claim in class of several hundred).

Like the rest of their evidence, plaintiffs' anecdotes establish no more than the possibility of discrimination at a limited number of individual stores - a possibility that exists in any institution of this size, no matter how hard it tries to prohibit discrimination. None of this evidence amounts to the "significant proof" of a company-wide policy that is an

absolute prerequisite, under both Rule 23 (a) and substantive Title VII law, to class certification. *Falcon*, 457 U.S. at 159 n.15.

II. The District Court Eliminated Wal-Mart's Defenses And Otherwise Altered Substantive Law In Concluding That The Class Is Manageable

The district court acknowledged that "no court has ever confronted a motion for class certification in an employment discrimination case of this size - or anything close to it." ER 1193-1194. The court nonetheless concluded that this action presents no problems of manageability. To do so, the court repeatedly denied Wal-Mart its substantive defenses - which, if employed, would concededly render the class unmanageable. ER 1205. It could not be more clear that the district court's certification violates the Rules Enabling Act's prohibition against "abridging], enlarging], or modify [ing] any substantive right." The court's remaking of substantive law in order to render this case manageable for class treatment mandates reversal. *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002) ("Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected").

A. Wal-Mart **Is** Entitled To Defend Itself

Under Title VII, it is an "unlawful employment practice" for an employer "to discriminate against any individual... because of such individual's... sex." 42 U.S.C. § 2000e-2(a)(l). An employee who has been discriminated against may obtain a declaration to that effect as well as an injunction against further discrimination. *Id*. § 2000e-5(g). An employee may also seek monetary relief, including compensatory damages and backpay, unless the employer demonstrates that it "would have taken the same action in the absence of the impermissible motivating factor." *Id*. § 2000e-5(g)(2)(B). Finally, an employee may seek punitive damages upon a showing that the employer acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." *Id*. § 1981a(b)(l).

A class action challenging a so-called "pattern or practice" of discrimination typically proceeds in two stages: At the first stage, the plaintiffs must prove that "discrimination was the company's standard operating procedure." *Teamsters*, 431 U.S. at 336. If the plaintiffs carry their burden at the first stage, a rebuttable presumption arises that each class member is entitled to appropriate relief. *Id*. at 361. During the second stage of a pattern or practice trial, "a district court must usually conduct additional proceedings... to determine the scope of individual relief by affording the employer the opportunity "to demonstrate that the individual... was denied an employment opportunity for lawful reasons." *Id*. at 361-62; *see, e.g., Cooper*, 467 U.S. at 876 (following a finding of pattern or practice discrimination "additional proceedings are ordinarily required to determine the scope of individual relief for the members of the class"); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 421 (5th Cir. 1998) ("The second stage of apattern or practice claim is essentially a series of individual lawsuits, except that there is a shift of the burden of proof in the plaintiff's favor").

Given the widely diverging experiences of the named plaintiffs, of the other declarants, and (presumably) of the 1.5 million absent class members, an individualized examination of a class member's individual employment experience is required before Wal-Mart can be adjudged to have discriminated against her and or-dered to pay damages. The Supreme Court recognized as much in *Teamsters*, and the 1991 amendments to Title VII codified this principle. 42 U.S.C. § 2000e-5(g)(2)(B)(ii) (precluding monetary relief or reinstatement for employee where employer demonstrates it would have taken same action in absence of impermissible motive). The district court recognized, however, that "holding individual hearings for the number of women potentially entitled to backpay in this case is impractical on its face, and thus the traditional *Teamsters* mini-hearing approach is not feasible here." ER 1199; *see* ER 1205 ("Plaintiffs concede [that] such additional proceedings would be unmanageable in this case"). Instead of denying certification, however, the court decided to strip Wal-Mart of its right to defend itself in order to serve the class action device.

The court said that plaintiffs' evidence "should properly focus on matters relevant to the class as a whole, such as statistical analysis and evidence of system-wide policies and practices," and that "defendants are expected to respond to plaintiffs' pattern and practice claim on a class-wide basis." ER 1195. Wal-Mart "is no more entitled to 3,244 individual store-by-store trials than it would be enti-tled to try each class member's individual claim in a case of smaller scope," the court maintained, adding that Wal-Mart "is not... entitled to circumvent the class nature of the proceeding by litigating whether every individual store discriminated against individual class members." ER 1196. The court decided that, if Wal-Mart were found liable for discriminating against the class based on the plaintiffs' aggregated statistics, the court could simply use a "formula" to determine the total amount of backpay and punitive damages (to be distributed pro rata in proportion to claimants' backpay awards) owed by Wal-Mart to the class as a whole, without regard to whether recipients were victims of discrimination. *See* ER 1199-1203. It then proposed appointing a special master to identify the actual or *potential* dis-criminatees, using "objective" evidence captured in Wal-Mart's personnel database (which, the court acknowledged, lacks relevant information such as prior experience, ER 1213), and to distribute monetary relief to those persons with "no need for the defendant to participate further in the issue of which class members are eligible to share in the award." ER 1203, 1211-1215.

The unprecedented procedures adopted by the district court, which would effectively deprive Wal-Mart of its right of defense, cannot be squared with governing substantive law, including the mandates of due process. The court erred in elevating the class procedure over Wal-Mart's substantive rights. "That this shortcut was necessary in order for this suit to proceed as a class action should have been a caution signal to the district court that class-wide proof of damages was impermissible." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998); *see also* *Beck*, 203 F.R.D. at 467 ("The Court is at a loss to fashion a method of arriving at [backpay] without individualized hearings into the specific circumstances of each person's employment").

1. Title VII

In dispensing with *Teamsters* hearings, the district court purported to rely on a handful of stale cases in which courts determined that when it is difficult to identify precisely which claimants would have been hired or promoted absent demonstrated discrimination, each class member's damages may be approximated using an appropriate formula. *See, e.g., Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 261-62 (5th Cir. 1974). None of these cases supports the district court's approach here.

Pettway addressed only the determination of a total backpay amount to be shared among actual victims of discrimination; the court "did not suggest that a class-wide procedure would eliminate the need for each class member to establish that she was a victim." Douglas L. Parker, *Escape From The Quagmire: A Reconsideration of the Role of Teamsters Hearings in Title VII Litigation*, 10 Indus. Rel. L.J. 171, *177* (1988). In fact, *Pettway* explicitly recognized that the employer would have an opportunity to challenge particular class members' entitlement to backpay. 494 F.2d at 259-60 (employer must be allowed to show "that other factors would have prevented his transfer regardless of the discriminatory employment practices"). Tellingly, the same court that decided *Pettway* has held that individualized hearings are a *requirement* in cases with punitive damages claims. *Allison*, 151 F.3d at 418. Other so-called "formula" cases cited by the district court as ostensible authority for dispensing with *Teamsters* hearings also provided that such hearings would, in fact, occur. *See, e.g., Hameed* v. *Bridge, Structural, & Ornamental Iron Workers*, 637 F.2d 506, 518-22 (8th Cir. 1980); *Stewart* v. *Gen. Motors Corp.*, 542 F.2d 445, 452-53 (7th Cir. 1976).

The district court's heavy reliance on *Shipes* v. *Trinity Industries*, 987 F.2d 311 (5th Cir. 1993), as support for the elimination of *Teamsters* hearings *(see* ER 1214), is revealing. In *Shipes*, the employer *waived* individualized hearings regarding liability or the amount of monetary relief, and in fact argued for "class- wide monetary relief and for each class member to receive a "*pro rata* share of a pre-determined total monetary award." 987 F.2d at 316. The plaintiffs in *Shipes*, on behalf of a class of approximately 350 employees from two interrelated facilities in the same city, likewise did not argue that there should be individualized *liability* determinations. Instead, they sought - and the district court there ordered - individualized evaluations regarding the amount of *monetary relief. Id*. at 315-16. The Fifth Circuit affirmed, and in doing so emphasized that "only those individuals who have suffered a loss of pay because of the

illegal discrimination are entitled to compensation" and that "Title VII does not require a remedy for those not discriminated against." *Id*. at 318. *Shipes* is thus contrary to the district court's ruling.

This Court's decision *in* *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1435 (9th Cir. 1984), also conflicts with the district court's approach. In *Domingo*, the Court found that the "lack of objective hiring criteria and use of word-of-mouth recruitment" made it difficult for individual class members to show eligibility and damages. Accordingly, *Domingo* stated in *dictum* that class-wide statistics could be used to show discrimination and that it would be sufficient for each individual class member to demonstrate eligibility by simply showing quali-fication. 727 F.2d at 1444. The Court made clear, however, that the use of a formula was only to facilitate the calculation of "the *measure* of backpay." *Id*. (quot- ing *Pettway*, 494 F.2d at 261) (emphasis added). The employer would then have "the burden of proving that the applicant was unqualified or showing some other valid reason why [a particular] claimant was not, or would not have been, acceptable." *Id*. at 1445 (citing *Teamsters*, 431 U.S. at 362).

The district court characterized *Domingo* as "binding precedent." ER 1202. When it came to *Domingo's* provision for *Teamsters* hearings, however, the district court reversed course and stated dismissively that *Domingo* had "simply imported this procedure from *Teamsters* without considering whether it was necessary." ER 1203. In dispensing with the "binding precedent" of this Court and the Supreme Court in this manner, the district court committed reversible error.

The district court also erred in supposing that the formula cases were authority for departing from ordinary Title VII requirements on account of the *size* of a putative class. The "formula" cases that the district court invoked to create this gargantuan class action typically involved a few hundred employees and only one or two facilities. *Domingo*, for instance, involved one facility and 124 claims. 727 F.2d at 1435. *Hameed* involved one facility, 202 class members, and three positions. 637 F.2d at 520; *see also, e.g.*, *EEOC v. O&G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 874 (7th Cir. 1994) (one facility, 17 positions, and 451 class members); *Shipes*, 987 F.2d at 315 (two related facilities in same city, although company had over 30 in 13 states); *EEOC* v. *Chicago Miniature Lamp Works*, 668 F. Supp. 1150, 1153-54 (N.D. 111. 1987) (one facility, 700 positions and 2,000 claimants); *Catlett v. Mo. Highway & Transp. Comm'n*, 828 F.2d 1260, 1268 (8th Cir. 1987) (one facility, 38 positions, and 150 class members); *Stewart*, 542 F.2d at 450 (one department within one facility).

In contrast, discrimination claims that span multiple facilities with many different decisionmakers, relying on different factors, and involving various job categories are often considered unmanageable. For example, in *Grosz v. Boeing Co*., 2003 U.S. Dist. LEXIS 25341 (C.D. Cal. Nov. 7, 2003), *permission to appeal granted*, No. 04-55428 (9th Cir. Mar. 11, 2004), the proposed plaintiff class spanned "the operations of different heritage companies, multiple physical locations, and countless localized compensation practices." *Id*. at *14. The court held that such a class was "unworkably diverse." *Id*. at *15. Citing the formula cases, the named plaintiffs requested that the court rely on a formulaic approach to determine eligibility and calculate their claimed backpay and punitive damages. *Id*. at *19. The court rejected their invitation and required a finding of individual harm to each class member before damages could be awarded. *Id*. at *20-21. Such an undertaking, with so many diverse plaintiffs from different facilities being rejected for various reasons, was simply unmanageable. *Id*. at *21. So, too, here.

Finally, the operative facts in the formula cases predate the 1991 amendments to the Civil Rights Act. Title VII now expressly bars a court from ordering

promotion, backpay, or damages if an individual was not the victim of discrimination, and prevents a court from ordering monetary relief if the employer can show it would have made the same decision in the absence of a discriminatory motive. 42 U.S.C. § 2000e-5(g)(2)(A), (B)(ii) (where the employer "demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor, the court... shall not award damages"). Contrary to the district court's unfounded assumption (ER 1215), this is an affirmative defense that may be asserted by the employer regardless of whether it is put in issue by the plaintiffs. *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 857 (9th

Cir. 2002) (en bane) (backpay and punitive damages unavailable where "the employer has proved the 'same decision' affirmative defense"), *aff'd*, 539 U.S. 90 (2003). Thus, even in class cases, individual relief can be provided only to those who were actually injured, and those injuries must be proven individually. *See* *Lewis v. Casey*, 518 U.S. 343, 349 (1996); *Mayweathers v. Newland*, 258 F.3d 930, 934 (9th Cir. 2001); *see also Grosz*, 2003 U.S. Dist. LEXIS 25341, at *20-21.[FN2]

> FN2. The "formula" cases are not authority for what the district court did here for an additional reason. Those cases typically were hiring and promotion cases with multiple minority applicants for each position. Since it would be a purely "hypothetical judgment" which of these applicants would have attained the position in the absence of discrimination, the courts typically assigned a monetary award to the position and then - after *Teamsters* hearings - divided the award among qualified applicants. *See, e.g., Domingo*, 727 F.2d at 1444; *Pettway*, 494 F.2d at 261. Plaintiffs' equal pay claim in this case does not present the same dilemma because actual victims and amounts (if any) can be identified, and the formula cases are to that extent wholly inapposite.

2. Due Process

In addition to being incompatible with Title VII and the *Teamsters* framework, the novel procedures the court adopted would also violate Wal-Mart's basic due process right to present a defense before being deprived of its property. *See, e.g., Degen v. United States*, 517 U.S. 820, 828 (1996); *Hovey v. Elliott*, 167 U.S. 409, 433 (1897). In *Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000), the Court explained that "[t]he Federal Rules of Civil Procedure are designed to further the due process of law that the Constitution guarantees." *Id*. at 465. The defendant in that case "was never afforded a proper opportunity to respond to the claim against him"; "[pjrocedure of this style," the Court wrote, "has been questioned even in systems... less concerned than ours with the right to due process." *Id*. at 468. The Third Circuit has explained that "while plaintiffs may make out a prima facie case under Title VII without introducing evidence on individual cases... defen-dants must be allowed to present any relevant rebuttal evidence they choose, including evidence that there was no discrimination against one or more members of the class"; "to deny [a defendant] the right to present a full defense on the issues would violate due process." *Western Elec. Co, v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976). Far from permitting Wal-Mart to present "any relevant rebuttal evidence [it] choose[s]," the district court has unabashedly denied Wal-Mart the opportunity to present *any* evidence *at all* - or otherwise to "participate further" (ER 1203) - during the second phase of the trial, in clear violation of due process.

The trial court's contemplated second phase of trial would also violate Wal-Mart's right under Title VII and the Seventh Amendment to have a jury resolve all factual issues relating to punitive damages. A special master's analysis of incomplete computer data is not a constitutionally acceptable substitute for a jury determination of the nature of the defendant's conduct as to each "aggrieved individual" and the alleged injury resulting therefrom. 42 U.S.C. § 1981a(b)(l); *see also Feltnerv. Columbia Pictures Television, Inc*., 523 U.S. 340, 355 (1998) (right to jury trial of damages includes right to have jury determine "all issues pertinent to" damages award); *Cimino v. Raymark Indus., Inc*., 151 F.3d 297, 312 (5th Cir. 1998) ("[T]his Court has long held that the applicability of the Seventh Amendment is not altered simply because the case is [a] class action").

Moreover, the assessment of class-wide punitive damages without regard to each claimant's actual injury violates the due process requirement that punitive damages must be calibrated to "the specific harm suffered by the plaintiff and the Supreme Court's edict that due process forbids the infliction of punitive damages to "punish and deter conduct that bore no relation to the [plaintiff's] harm." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003); *see also id*. at 423 (a "defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business"); *id*. at 422 (to be punishable, "conduct must have a nexus to the specific harm suffered by the plaintiff"); *id*. at 426 ("courts must ensure that the measure of punishment is both reasonable and proportionate to the amount *of harm to the plaintiff")* (emphasis added); *id*. at 425 ("The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff).

The Supreme Court has recognized that, in every case, "punitive damages pose an acute danger of arbitrary deprivation of property" *(State Farm*, 538 U.S. at 417 (quotation omitted)), and the district court's order magnifies that risk dramatically, and unconstitutionally, by allowing over 1.5 million class members to seek potentially billions of dollars in punitive damages, but absolving those plaintiffs of proving that Wal-Mart engaged in any wrongdoing directed at them that actually injured them. Indeed, since the court has barred Wal-Mart from proving that its store managers did not discriminate as to individual class members (ER 1195-1196), and since wmnjured class members would be allowed to collect lost pay - and punitive damages - under the court's trial plan (ER 1200-1201), the court's order necessarily exposes Wal-Mart to the threat of being punished, severely, for its *lawful* acts as to individual employees. "'To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.' "*White v. Ford Motor Co*., 312 F.3d 998, 1019 (9th Cir. 2002) *(quoting BMW of N. Am., Inc. v. Gore,5l7* U.S. 559, 573 n.19 (1996)); *State Farm*, 538 U.S. at 421 ("A State cannot punish a defendant for conduct that may have been lawful"). Quite simply, the court lacks power "[t]o allow recovery by persons who have not been injured or to allow recovery for an injury greater than that caused by the offending conduct." *Sikes v. Teleline, Inc*., 281 F.3d 1350, 1365 (11th Cir.), *cert, denied*, 537 U.S. 884 (2002).

Consistent with this constitutional mandate, the Fifth Circuit has ruled that individual hearings *must* be held where plaintiffs seek punitive damages. That court has held that punitive damages "must be determined after proof of liability to *individual plaintiffs* at the second stage of a pattern and practice case"; plaintiffs must prove "how discrimination was inflicted *on each plaintiff." Allison*, 151 F.3d at 417-18 (emphases added). This approach is also mandated by the plain text of Title VII. *See* 42 U.S.C. § 1981a(b)(l) ("A complaining party may recover punitive damages... if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved *individual")* (emphasis added).

In short, the district court's repeated disregard for governing substantive law compels reversal. The court's order would permit an award of backpay and punitive damages to a class member who did not suffer any discrimination (because, for example, she lacks key qualifications that her male counterparts possess and works at a store where she, and other, women are paid as much as or more than men). Wal-Mart would be forbidden from defending itself against the claims of such a class member. Neither Title VII nor due process permits such a fundamentally unfair result.

B. Wal-Mart Is Entitled To The Same Rights As Every Other Litigant

The district court responded to many of these objections with the statement that "Title VII... contains no exception for large employers." ER 1140. Plaintiffs can be expected to repeat the same mantra in this Court. Large corporate defendants are, however, just as entitled to due process, and the other protections of the substantive law, as are individuals. *BMW*, 517 U.S. at 585. The district court simply overlooked the corollary to its own principle: Neither Rule 23 nor the Rules Enabling Act permits *altering* the substantive law just because an employer is large.

The right answer is that plaintiffs can and should pursue discrimination claims at the decisionmaking level. As noted above, the certification record contains no evidence of discrimination at the vast majority of Wal-Mart stores. Since it is equally undisputed that the challenged hourly pay and management-track promotion decisions are made at the store level, that is the appropriate level for any class-based challenge to Wal-Mart's employment practices. A store-by-store action would have an average of 500 to 1,000 female current and former employees - still large by Title VII standards, but far more manageable than the 1.5-plus million member class erroneously certified by the district court. Store-by-store actions would be brought in the appropriate district to comply with Title VII's venue provision (42 U.S.C. § 2000e-5(f)(3)), and would distribute the burden across the judicial system. Thus, if plaintiffs can adduce competent evidence of discrimination and meet the requirements of Rule 23 at the individual store level, they can seek certification of appropriate classes on that basis under the ordinary substantive and procedural law.

III. The District Court Altered Substantive Law By Failing To Recognize That Monetary Relief Plainly Predominates And Concluding That The Class Meets The Requirements of Rule 23(b)(2)

Plaintiffs urged the district court to certify the class under Rule 23(b)(2), which "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Fed. R. Civ. P. 23, Adv. Comm. Notes to 1966 amend. This Court has therefore held that "[c]lass certification under Rule 23(b)(2) is appropriate *only* where the primary relief sought is declaratory or injunctive." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1195, *amended*, 273 F.3d 1266 (9th Cir. 2001) (emphasis added). Despite unrebutted evidence that the alleged discrimination did not occur at a majority of Wal-Mart stores, despite the fact that most of the putative class members lack standing to seek injunctive or declaratory relief, and despite plaintiffs' prayer for billions of dollars in backpay and punitive damages, the district court held that certification under (b)(2) was proper.

A. Rule 23(b)(2) Is Inapposite On Its Face

The district court failed even to *evaluate* the requirement that the challenged conduct be "generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b). The district court apparently believed Rule 23(b)'s requirements had been satisfied because "Plaintiffs *allege* Wal-Mart has acted or refused to act - through its discriminatory practices - on grounds generally applicable to the proposed class, which Plaintiffs seek to remedy through injunctive relief and the recovery of lost pay and punitive damages." ER 1188. This allegation, however, is flatly contradicted by the unrebutted evidence.

While Wal-Mart may have acted in a manner "generally applicable to the class" insofar as it permitted decentralized decisionmaking at local facilities across the country, such a delegation is actionable under Title VII, if at all, only if it is used as a mechanism for effectuating a general policy of discrimination. Wal-Mart's unrebutted statistics, improperly ignored by the district court, show that the vast majority of class members did *not* work at facilities where discretionary deci-sionmaking was used to discriminate, and its affirmative corporate policies prohibit discrimination, rendering injunctive relief for the "class as a whole" patently inappropriate and Rule 23(b)(2) inapposite on its face. *See Stastny*, 628 F.2d at 280 n.20 ("If facility concentrated discrimination be the reality behind the system-wide statistical disparities, then it is not the case, as contemplated by Rule 23(b)(2), that the party opposing the class 'has acted... on grounds generally applicable to the... class"').

Certification under Rule 23(b)(2) is improper unless reasonable plaintiffs would seek injunctive or declaratory relief "even in the absence of a possible monetary recovery." *Molski v. Gleich*, 318 F.3d 937, 950 & n.15 (9th Cir. 2003). Four of the six named plaintiffs, and a majority of the putative class members, no longer work for Wal-Mart and have no standing to seek anything *but* monetary relief. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *Faibisch v. Univ. ofMinn.*, 304 F.3d 797, 801 (8th Cir. 2002); *Jackson v. Motel 6Multipur- pose, Inc.*, 130 F.3d 999, 1007 (11th Cir. 1997). Thus, they not only would not, but *could not*, pursue this suit in the absence of any monetary relief; that fundamental principle of constitutional law cannot be ignored simply because this purports to be a class action. *Ortiz, 521* U.S. at 831 (Rule 23 "must be interpreted in keeping with Article III constraints") (quotation omitted); *see also O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

B. Substantial Monetary Relief Predominates

The district court recognized that "plaintiffs have foregone compensatory damages in this case," presumably because a request for such damages would have certainly rendered (b)(2) certification unavailable and made commonality and typicality even more far-fetched than they already are. ER 1189.[FN3] The court ruled, however, that plaintiffs' other monetary claims - which amount to billions of dollars - could be pursued in a (b)(2) action, even though the Supreme Court has recognized that "there is a 'substantial possibility' that actions seeking monetary damages are only certifiable under Rule 23(b)(3)." *Ticor Title Ins. Co. v. Brown, 5*11 U.S. 117, 121 (1994). The district court erred in failing to heed this admonition.

FN3. By eschewing compensatory damages, the named plaintiffs have placed themselves in conflict with any absent class members who might have claims for such damages, making them inadequate representatives. *See* Thompson v. Am. Tobacco Co., 189 F.R.D. 544, 550-51 (D. Minn. 1999); Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595, 606 (S.D.N.Y. 1982). For example, if a class member suffered injury for which compensatory damages would be available, that claim might be foreclosed. Numerous other intractable conflicts exist amongst the class members. As just one example, a significant fault line within the class is the presence of both alleged victims of discrimination and alleged discriminators, including more than 500 class members who are store managers and thus stand accused of discrimination. *SeeDonaldson* v. Microsoft Corp., 205 F.R.D. 558, 568 (W.D. Wash. 2001) (recognizing "insurmountable" conflict of class comprising decisionmakers and alleged discriminatees). Further conflicts include, among others, the presence of management and non-management employees. *See, e.g.,* Wagner v. Taylor, 836 F.2d 578, 595 (D.C. Cir. 1987). Given the "divergent aims" of the putative plaintiffs (Broussard, 155 F.3d at 339), these conflicts further support decertification of this sprawling class.

1. Backpay

The governing rule in this Circuit is that "[c]lass certification under Rule 23(b)(2) is appropriate *only* where the primary relief sought is *declaratory* or *in-junctive"* Zinser, 253 F.3d at 1195 (emphasis added). The district court paid lip service to this rule *(see* ER 1189), but then proceeded to apply a different test - *viz*., whether "the *equitable* relief sought predominates over the claim for punitive damages" (ER 1190) (emphasis added). The district court reasoned that "lost pay is recoverable as an equitable, make-whole remedy in employment class actions notwithstanding its monetary nature," and had "little difficulty concluding... that the equitable relief sought predominates over the claim for punitive damages." ER 1188, 1190.

Rule 23(b)(2) does not authorize class actions for *all* "equitable" relief; it applies "only where the primary relief sought is *declaratory* or *injunctive"* and backpay is neither. Zinser, 253 F.3d at 1195. Even if Rule 23(b)(2) required that the primary relief be "equitable," instead of declaratory or injunctive (as this Court has held), the district court nonetheless erred in weighing backpay as counting in *favor* of (b)(2) certification. "Congress 'treated [backpay] as equitable' in Title VII... only in the narrow sense that [Title VII] allow[s] backpay to be awarded *together with* equitable relief." Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 218 (2002). Outside the context of Title VII, backpay is considered a species of legal compensatory damages. *See* Millsap v. McDonnett Douglas Corp., 368 F.3d 1246 (10th Cir. 2004); Provencher v. CVS Pharm., 145 F.3d 5, 11 (1st Cir. 1998).

While a p rayer for backpay might not automatically preclude Rule 23(b)(2) certification *(e.g.,* Williams v. Owens-Illinois, Inc., 665 F.2d 918, 928-929 (9th Cir. 1982)), for purposes of the Rule 23 inquiry, backpay must be treated as a form *of monetary relief weighing against* - not *in favor* of - (b)(2) certification. Eubanks v. Billington, 110 F.3d 87, 95 (D.C. Cir. 1997) ("That backpay is characterized as a form of 'equitable relief in Title VII cases... does not undercut the fact that variations in individual class members' monetary claims may lead to divergences of interest that make unitary representation of a class problematic in the damages phase").

2. Punitive Damages

A prayer for punitive damages is wholly inconsistent with (b)(2) certification. As the Seventh Circuit has explained, "[a] suit for money damages, even if the plaintiffs seek uniform, class-wide equitable relief as well, jeopardizes [the] presumption of cohesion and homogeneity [underlying (b)(2) certification] because individual claims for compensatory or punitive damages typically require judicial inquiry into the particularized merits of each individual plaintiff's claim." Lemon v. OperatingEng'rs, 216 F.3d 577, 580 (7th Cir. 2000). "[T]o win punitive damages, an individual plaintiff must establish that the defendant possessed a r eckless indifference to the plaintiff's federal rights - a fact-specific inquiry into *that plaintiff's* circumstances." *Id*. at 581 (emphasis added); *see also* Allison, 151 F.3d at 417-18. Because punitive damages in employment discrimination cases are "uniquely dependent on the subjective and intangible differences of each class member's individual circumstances," the Fifth Circuit has held that such claims

cannot be certified under Rule 23(b)(2). *Id*. at 418.

This aspect *of Allison* is consonant with this Court's decision in *Molski*, which reversed the certification of a (b)(2) class asserting claims for treble dam- ages. 318 F.3d at 950-51. Before *Molski*, this Court had established that monetary relief is generally recoverable in Rule 23(b)(2) class actions only where it is "merely incidental to [the] primary claim for injunctive relief." *Probe v. State Teachers' Ret. Sys*., 780 F.2d 776, 780 (9th Cir. 1986); *see also Kanter v. Warner-Lambert Co*., 265 F.3d 853, 860 (9th Cir. 2001) (citing *Probe)*. While *Molski* held that there is no *bright-line rule* prohibiting certification of a 23(b)(2) class seeking non-incidental monetary damages, *Molski* should reasonably be read to create only a narrow exception to the "general" rule discussed in *Probe* and *Kanter*, an exception that merely allows Rule 23(b)(2) classes to proceed where the monetary damages, even if not technically "incidental," are nonetheless relatively insignificant and the requested injunctive relief is clearly predominant. Certainly, if the monetary relief sought threatens the "cohesion and homogeneity" Rule 23(b)(2) presupposes, certification must be denied. *Ticor, 5*11 U.S. at 121. This Court has never expressly permitted punitive damages in a (b)(2) class action and has indicated on at least two occasions that to do so would be improper. *See Williams*, 665 F.2d at 929; *Zinser*, 253 F.3d at 1195.

The district court took a radically different view, holding that "a claim for punitive damages does *not* detract from the homogeneity or cohesiveness of the class." ER 1191 (emphasis added). This stemmed from the court's belief that "a punitive damage claim focuses *not* on facts unique to each class member, but on the defendant's conduct toward the class as a whole." ER 1191 (quoting *Barefield* v. *Chevron*, 1988 WL 188433, at *3 (N.D. Cal. Dec. *6*, 1988)) (emphasis added). Title VII, however, requires proof of wrongdoing toward an "aggrieved *individual."* 42 U.S.C. § 1981a(b)(l) (emphasis added). As explained above, the Due Process Clause - as authoritatively construed in *State Farm* and *BMW* - precludes punishment of Wal-Mart for engaging in lawful activity, and thus demands individualized proof of discriminatory conduct and resulting injury to warrant any imposition of punitive damages.

Ultimately, the district court found this class to be certifiable only by devising an unprecedented process that will have the inevitable consequence of abridging Wal-Mart's substantive rights, running roughshod over basic concepts of fairness and due process, and compromising the rights and interests of absent class members. To put all of this in context, it is useful to consider what will happen in the event the certification order is sustained and plaintiffs prevail in a case conducted according to the procedures set forth in the certification order:

- Women who have never experienced any discrimination whatsoever will receive an award of backpay and possibly punitive damages;
- Women who were denied a promotion for legitimate reasons, such as misconduct or underperformance, will receive monetary relief; and
- Female managers who have never practiced discrimination will be found to have discriminated and be publicly identified as lawbreakers.

These are not mere hypotheticals. If the certification order is sustained and the plaintiffs prevail, each of these scenarios *will* come about under the district court's case management plan. Given the enormousness of the class, each will be repeated hundreds or thousands of times. Yet each and every one of these scenarios is directly and irrefutably contrary to Title VII, Supreme Court precedent, due process, the Seventh Amendment, the Rules Enabling Act, and common sense.

The substantive law provides that Wal-Mart may not be punished for obeying the law and that no employee may recover monetary relief unless she both suffered discrimination and would not have received the same treatment in the absence of such discrimination. The certification order simply dispenses with these principles. In the end, if class actions are to be certified based on statistics, and if employers are to be deprived of the opportunity to disprove discrimination as to individual employees, then the only option left for employers is to monitor and to eliminate all statistical disparities, even those that exist for nondiscriminatory reasons. The history of Title VII, including the 1991 amendments, demonstrates that Congress not only did not require such a system of management-by-quota, it affirmatively condemned it. *See also Watson*, 487 U.S. at 993 ("it has long been recognized that legal rules leaving any

class of employers with 'little choice' but to adopt [quotas] would be 'far from the intent of Title VIF") (citation omitted) (plurality opinion).

This Court has long recognized that "allowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights... [and] is clearly prohibited by the Enabling Act." *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974). Yet that is precisely what the certification order in this case proposes to do. Indeed, the district court recognized that the wholesale adjudication contemplated in its certification order would generate a "windfall" for some employees who had not actually been harmed while "under-compensating" others who had been. The court labeled this "rough justice" (ER 1200-1201), but in fact the court's repeated and express remaking of substantive law would work a gross and manifest injustice that should be corrected by this Court.

CONCLUSION

The class certification order should be vacated.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, I hereby certify that I know of no related cases pending in this Court.

Appendix not available.

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.
2004 WL 3080794 (C.A.9) (Appellate Brief)

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