

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

Eastern District of Kentucky
FILED

JUL 15 2009

AT FRANKFORT
LESLIE G. WHITMER, I
CLERK: U.S. DISTRICT COURT

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

PLAINTIFF

v.

WAL-MART STORES, INC.

DEFENDANT

CASE NO. 01-339

WAL-MART'S MOTION FOR SUMMARY JUDGMENT

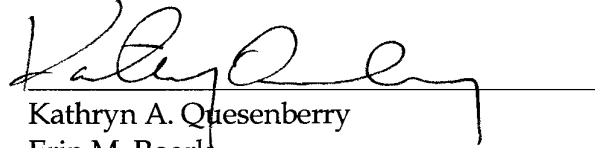
Defendant, Wal-Mart Stores, Inc, pursuant to Fed. R. Civ. P. 56(b), hereby moves the Court to enter summary judgment on all claims asserted in the Complaint of Plaintiff Equal Employment Opportunity Commission (EEOC). The EEOC cannot meet its burden of proving that Wal-Mart engaged in a standard and deliberate pattern or practice of intentional disparate treatment in hiring at Wal-Mart Distribution Center 6097 on the basis of gender. There is no genuine dispute of material fact that the EEOC does not present sufficient evidence to establish its required *prima facie* case of gender discrimination. Accordingly, the Court should grant Wal-Mart's Motion for Summary Judgment on the EEOC's claims in their entirety. A Memorandum of Law in support of this Motion is submitted herewith and a tendered Order attached hereto.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was served, via the method indicated below, to the following, on this the 15th day of July, 2009:

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**WAL-MART'S MEMORANDUM IN SUPPORT OF
ITS MOTION FOR SUMMARY JUDGMENT**

Defendant Wal-Mart Stores, Inc., by counsel, pursuant to Fed. R. Civ. P. 56, moves this Court to enter summary judgment, as a matter of law, for Wal-Mart on the Equal Employment Opportunity Commission's claims against it.

INTRODUCTION

To survive summary judgment, the EEOC must establish each essential element of its case and demonstrate that there is a genuine issue for trial. It cannot. For nearly eight years, the EEOC has searched for evidence to support its claim that Wal-Mart engaged in a pattern or practice of intentional gender discrimination at hiring at its Distribution Center No. 6097 (DC 6097) in London. Now, after Wal-Mart's production of hundreds of thousands of pages of job applications and interview notes, voluminous written discovery, and hundreds of depositions, the EEOC has no more proof than when it started. It cannot

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meet its “higher burden” of establishing a *prima facie* case that Wal-Mart’s “standard operating procedure” was to intentionally discriminate against female job applicants. See *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 (1977); *EEOC v. Jordan Graphics, Inc.*, 769 F. Supp. 1357, 1382 (W.D.N.C. 1991). First, the EEOC’s claims impermissibly exceed the scope of its investigation into gender discrimination in Wal-Mart employee transfers to the DC 6097 orderfiller job, thus depriving the Court of subject matter jurisdiction over all claims but those related to transfer applicants for the orderfiller position. Further, it is undisputed that the EEOC has no proof whatsoever that Wal-Mart knew, much less took into consideration, the gender of the vast majority of class members when it declined their application at the prescreening stage -- the most basic element of establishing its *prima facie* case of intentional gender discrimination.

Even if the EEOC could overcome this huge deficit, it is undisputed that the EEOC cannot otherwise raise an inference that Wal-Mart engaged in a pattern or practice of intentional gender discrimination. Its statistical evidence does not eliminate non-discriminatory explanations for alleged gender disparities in hiring at DC 6097. Indeed, the EEOC’s statistical expert admits that his purported disparity in male-female hiring rates at DC 6097 is either non-existent or inaccurate for the relevant time period. Moreover, both the EEOC and its statistical expert have admitted that the database upon which the so-called gender disparity derives is inaccurate because the expert ignored key variables that affect male-female offer rates and because the variables that the EEOC did attempt to capture are, by and large, erroneously collected and coded.

Even if the EEOC's statistical evidence were sufficient to establish a reliable and statistically significant disparity in hiring males and females at DC 6097, the EEOC presents no proof that the purported disparity is the result of deliberate, standardized gender discrimination by the more than 130 interviewers involved in hiring decisions at DC 6097 during the relevant time period. The EEOC's "social science" expert admits that he is unable to determine which DC 6097 employment decisions, if any, were based on gender bias; in fact, he concludes that unspecified gender stereotypes, if they exist, were unconscious and unintentional -- the polar opposite of purposeful and deliberate gender discrimination. Nor can the EEOC's largely inadmissible, unreliable and isolated anecdotal proof support its *prima facie* case.

The EEOC asks the Court to conclude, without evidentiary support, that because more men than women were hired as orderfillers at DC 6097, Wal-Mart must have engaged in a pattern or practice of purposeful gender discrimination in hiring. But its *prima facie* case is like a three-legged stool that ultimately has not a single leg to stand on. Thus, Wal-Mart's Motion for Summary Judgment should be granted.

STATEMENT OF UNDISPUTED FACTS

I. DC 6097 and the Orderfiller Job.

This lawsuit rests on an administrative charge filed by Janice Hagans Smith, a Wal-Mart employee at the retail store in London, who in October 1998 was denied a transfer to DC 6097 as a freezer department orderfiller. Ms. Smith filed a charge with the EEOC alleging that she had been discriminated against because of her gender when her transfer application was denied. (*See* EEOC Notice of Charge, attached as Ex. 1).

Like other Wal-Mart grocery distribution centers, DC 6097, located in London, receives, bundles and ships to Wal-Mart retail grocery stores bulk perishable and non-perishable food items, such as cereal, bottled juices and water, canned goods, produce, and frozen meats. DC 6097 stocks the inventory of Wal-Mart grocery stores in parts of Kentucky, Tennessee and Ohio.

Housed in an 864,000 square foot warehouse, DC 6097 comprises various departments, including non-perishable food storage, meat and produce storage, dairy/deli food storage, and shipping and receiving, as well as personnel, quality assurance, maintenance, data processing, asset protection, and transportation. (Barrett 1/7/08 Rep. at 9, Ex. A).

Most hiring at DC 6097 is for an entry-level job known as an "orderfiller." (Barnow 3/1/07 Rep. at 8, Ex. B). The strenuous nature of the job and its duties is undisputed. An orderfiller works shifts of 10 to 11 hours loading crates, bags, and boxes of bulk food items from the warehouse floor onto pallets, which rest on motorized pallet jacks. (Barrett 1/7/08 Rep. at 3, 7-8, 16). An orderfiller must stand, walk, stoop, bend, and routinely lift over 50 pounds, up to 100 pounds. (*Id.* at 3, 5-10). Significant upper body strength is essential to removing goods from storage locations on the warehouse floor, lifting them, and stacking them on the pallets over 6-feet high. (*Id.* at 5, 10). Orderfillers must work fast with the added pressure of required accuracy. (*Id.* at 6-7, 16-17).

Performing highly repetitive tasks, an orderfiller is randomly assigned "trips" by a computerized headset. (*Id.* at 4). Via headset, the orderfiller is directed to specific

areas of the warehouse and told to pull, lift, and stack a specific quantity of each item onto a pallet. Once an orderfiller stacks the specified quantity of the item, he or she pulls or pushes the motorized pallet jack as directed by the computer headset to the next designated slot, then pulls, lifts, and stacks the next item, continuing this process until the end of the trip order is complete. (See, EEOC DVD of orderfiller job, 9/26/02, attached as Ex. 2). One trip order typically fills two full pallets up to a height of six feet. (Barrett 1/7/08 Rep. at 5). The orderfiller then delivers the stacked goods to be shrink-wrapped by a machine as a "column" of crates and shipped by freight truck to retail stores. (*Id.* at 4-6). Orderfillers perform dozens of trips during each shift, requiring not only exceptional upper body strength, but also endurance and durability. (*Id.* at 3-4, 10, 13, 16-17). Because the goods are promptly shipped to stores awaiting merchandise, orderfillers must be accurate, fast and efficient. (*Id.* at 9-10, 16).

Orderfillers work in extreme environmental conditions. The non-perishable food area of the warehouse is not climate-controlled and, depending on outside temperatures, can range from cold to very hot. (*Id.* at 7, 9). The frozen food area involves working in extremely cold temperatures of 22° below zero. (*Id.* at 7). The remaining perishable food sections of the warehouse are cooled to approximately 55° F. (*Id.* at 7, 9).

Wal-Mart's grocery distribution system is a model of efficiency in the industry and it requires qualified, diligent workers.¹ DC 6097 is besieged by job applicants for a relatively small number of jobs. Within the six year time period studied by the EEOC's

¹ The EEOC's expert William Bielby acknowledged that "physical ability to lift heavy weights" is a valid job criterion for the orderfiller job, as are prior warehouse experience, prior heavy lifting work, stable work history, comfort in working in a warehouse environment, good attitude, team work and enthusiasm. (Bielby Dep. at 161, 167, 172-174).

statistical expert, DC 6097 received 24,949 job applications, only 1,512 of which resulted in job offers.² (Barnow 4/30/09 Supplemental Rep. Ex. B2 at 6-9, Ex. C). Fully 94 percent of all applications, from both males and females, were rejected. Further, as many as 82 percent of applications from females during the relevant time period were rejected in the pre-screening phase of the hiring process based on application alone, with no proof that Wal-Mart decision-makers knew the gender of the applicants or that there is a statistically significant disparity between males and females rejected at that stage. See discussion, *infra*, at Argument II.

II. Janice Smith's Charge and EEOC Investigation Into Transfer Process.

As a transfer applicant from the London store, Ms. Smith was interviewed in accordance with Wal-Mart's transfer policy; her application was denied after she told the interviewer that she was not "confident" she could work as an orderfiller in the freezer for the required six months before becoming eligible for internal transfer to another DC 6097 job. (See Janice Smith's Interview Comment Sheet, bates labeled WMJT9800189, attached as Ex. 3). Ms. Smith filed an administrative charge with the EEOC alleging gender discrimination in failing to hire her as a "Filler in the Freezer Department." (Charge, Ex. 1). Following its investigation into her charge, the EEOC issued a Determination stating that, "[e]vidence obtained during the investigation supports [Janice Smith's] allegations. Furthermore, there is evidence that females as a

² Pursuant to Magistrate Wier's January 18, 2007 Order (D. #129), the relevant time period of this case is 1998 to February 15, 2005; the EEOC has not contested that the temporal scope of such a suit is determined by the foundational charge, rendering the start of the relevant time April 18, 1998. See, *Marquis v. Tecumseh Products Co.*, 206 F.R.D. 132, 161 (E.D. Mich. 2002). Barnow declined to analyze the applications received from 1/1/05 to 2/15/05. (Barnow 3/1/07 Rep. at 2 fn. 3).

class were not hired as Order Fillers [sic] because of their sex in violation of Title VII.” (EEOC Determination, attached as Ex. 4). Conciliation efforts to resolve the allegation of gender discrimination in hiring orderfillers were unsuccessful. (Complaint ¶ 6, D. #1). This lawsuit followed.

III. EEOC’s Complaint Expands Beyond Smith’s EEOC Charge.

On August 24, 2001, the EEOC filed the Complaint on behalf of a class of women who were not hired “into vacant positions” at DC 6097. (Complaint ¶ 7). Although Ms. Smith’s administrative charge alleged only discrimination in the transfer process and although the EEOC Determination asserts that its investigation obtained evidence only of discrimination in hiring for the orderfiller position, the EEOC broadened its Complaint to allege gender discrimination in hiring for myriad “vacant positions” at DC 6097. (Complaint ¶7).

On September 20, 2001, Wal-Mart filed its Answer to the EEOC’s Complaint denying any and all allegations of discrimination. (Answer ¶¶ 3, 8-10, D. #3). Wal-Mart reiterated that “all employment decisions were made for legitimate non-discriminatory reasons” and that it “maintains strict policies prohibiting discrimination in any form, including on the basis of gender.” (Answer ¶¶ 18, 20). Discovery is now complete and, despite years of effort, the EEOC has been unable to develop proof to establish a *prima facie* case.

SUMMARY JUDGMENT STANDARD REQUIRES
SUMMARY JUDGMENT FOR WAL-MART

Summary judgment is appropriate where the record evidence shows that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The moving party “bears the burden of clearly and convincingly establishing the non-existence of any genuine issue of material fact, and the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion.” *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1133 (6th Cir. 1986). “The moving party can meet this burden by pointing out to the court that the respondents, having had sufficient opportunity for discovery, have no evidence to support an essential element of their case.” *EEOC v. Autozone, Inc.*, 2006 WL 2524093, *1 (W.D. Tenn. 2006) (citing *Street v. J. C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989)). The EEOC “must come forward with more persuasive evidence to support [its] claim than would otherwise be necessary” and must “do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986). Where the defendant demonstrates that after a reasonable period of discovery, the plaintiff is unable to produce sufficient evidence beyond the bare allegations of the Complaint to support an essential element of its case, summary judgment should be granted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

The burden of proof at this stage, as well as the ultimate burden of persuading the fact-finder that Wal-Mart engaged in a routine practice of intentional discrimination against the class of female applicants, rests squarely on the EEOC. *Texas Dep’t of*

Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Because the EEOC fails to establish a *prima facie* case of intentional discrimination, Wal-Mart is entitled to summary judgment.

ARGUMENT AND AUTHORITIES

I. The EEOC's Claims Impermissibly Exceed the Scope of Its Investigation, Thus Depriving the Court of Subject Matter Jurisdiction.

In filing this suit, the EEOC impermissibly expanded this litigation beyond the allegations in Ms. Smith's charge, its investigation, and its Determination. This expansion violates the procedural requirements of Title VII and deprives the Court of subject matter jurisdiction over the EEOC's claims that Wal-Mart discriminated against new hire applicants and applicants for "vacant positions" other than orderfiller.

The Sixth Circuit Court of Appeals has consistently held that "[t]he clearly stated rule in this Circuit is that the EEOC's complaint is 'limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination.'" *EEOC v. Bailey Co., Inc.*, 563 F.2d 439, 446 (6th Cir. 1977) (*disapproved of on other grounds, Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978)). The Court likened this "rule" to a due process right because it affords an employer "notice of the allegation, an opportunity to participate in a complete investigation of such allegation, and an opportunity to participate in meaningful conciliation discussions should reasonable cause be found following the EEOC investigation." *Id.* at 448, 450. "Claims that are not within the scope of the EEOC investigation *must* be dismissed for lack of subject matter jurisdiction." *Mohamed v. Air Serv Corp.*, 2005 WL 1868791, *3 (E.D. Ky. 2005) (emphasis added); *EEOC v. Allegheny Airlines*, 436 F. Supp. 1300, 1307 (W.D. Pa. 1977) (stating that

EEOC may not litigate an issue that was not investigated); *EEOC v. Brown Transp. Corp.*, 1976 WL 13236, * 3 (N.D. Ga. 1976) (granting partial motion for summary judgment and limiting scope of civil action to issues that were subject matter of conciliation efforts between EEOC and employer; “[i]t should be emphasized that the EEOC is not free to manipulate the scope of a case beyond the bounds herein expressed.”).

Section 706 of Title VII sets forth a series of procedural steps the EEOC must take before bringing a pattern or practice lawsuit. 42 U.S.C. § 2000e-5(b) (2000). These steps include, *inter alia*, (1) filing of charge; (2) notice to the respondent; (3) investigation of the charge; (4) a determination of reasonable cause; and (5) an unsuccessful attempt at conciliation with the employer. *Id.* These statutory steps are mandatory and must be followed prior to the EEOC’s initiation of a lawsuit. *EEOC v. Westvaco Corp.*, 372 F. Supp. 985, 992-994 (D. Md. 1974).

When the EEOC’s investigation uncovers discrimination unrelated to the original charge, the EEOC is required to comply with the procedural prerequisites of Section 706 by filing a commissioner charge. *Bailey Co., Inc.*, 563 F.2d at 448. *See also* 42 U.S.C. § 2000e-6(e); *EEOC v. United Airlines, Inc.*, 1975 WL 194, *2 (N.D. Ill. 1975) (stating that EEOC’s authority to initiate pattern or practice suit must “be exercised in accordance with procedures set forth in section 706(b), which includes efforts to conciliate with the respondent prior to the institution of suit”); *Westvaco Corp.*, 372 F. Supp. 985 at 994 (holding EEOC to higher standard than private litigant and granting summary judgment for employer where sex discrimination claim was not subject of reasonable cause finding or conciliation efforts).

The EEOC may not expand the scope of the litigation to include additional employment actions that are outside the scope of the underlying charge, the EEOC's investigation, or the EEOC's conciliation efforts. *See, e.g., Nelson v. General Elec. Co.*, 2 Fed. Appx. 425, 428 (6th Cir. 2001) (affirming summary judgment for employer on failure-to-promote claims not asserted in charge alleging discriminatory layoff); *Green v. Elixir Indus., Inc.*, 152 Fed. Appx. 838, 841 (11th Cir. 2005) (affirming summary judgment for employer on hostile work environment claim because plaintiff's charge was limited to claim of racially discriminatory termination).

Here, Ms. Smith's EEOC charge alleged that she was discriminated against in seeking a *job transfer* to an orderfiller position at DC 6097, and does not mention any allegation of discrimination in Wal-Mart's outside hiring procedures (Charge, Ex. 1). The EEOC's Complaint, however, seeks relief for new hire applicants who allegedly were discriminated against by Wal-Mart's hiring procedures for non-Wal-Mart employees at DC 6097. (Complaint ¶7). It is undisputed that Wal-Mart's criteria, process and procedures for considering, accepting and rejecting transfer applicants are completely different from those for new hire applicants. (See Wal-Mart Associate Transfer Policies, WMDP00067-71, WMDP00075-81, WMDP01340-WMDP01342, attached as Ex. 5).³

Furthermore, Ms. Smith applied for and interviewed exclusively for an *orderfilling* job at DC 6097. (See Janice Smith's Transfer Application, WMJT9800195, attached as Ex. G)

³ Because such policies are proprietary and were produced pursuant to the parties' Agreed Protective Order, Wal-Mart tenders a Motion to place this exhibit under seal.

(redacted pursuant to LR 5.7). Although the EEOC's Determination is limited to the hiring of "orderfillers," the Complaint seeks relief on behalf of applicants for all "vacant positions" at DC 6097. (Complaint ¶7).⁴ The EEOC's Determination does not assert allegations concerning positions other than the orderfiller position. Moreover, there was no investigation of alleged discrimination in hiring for positions other than orderfiller and the EEOC therefore made no conciliation efforts with respect to jobs other than orderfiller. (Complaint ¶6). Wal-Mart's first notice of allegations concerning vacant jobs other than orderfiller was its receipt of the Complaint.

Because the EEOC did not follow procedural mandates required by Title VII before asserting that Wal-Mart discriminated against new-hire applicants, as opposed to transfer applicants, and for "vacant jobs" other than orderfiller, the EEOC has deprived the Court of subject matter jurisdiction over those claims. They should be dismissed.

II. The EEOC Has No Proof of Discrimination for the Vast Majority of Class Members.

Even if the EEOC's claims were properly before the Court, they still fail because the EEOC cannot establish the most basic element of its proof -- that Wal-Mart knew the gender of the vast majority of the class members when it rejected them for hire. To establish a *prima facie* case of treatment, the plaintiff must show that the defendant had knowledge that the plaintiff belonged to a protected class. *See Johnson v. Northwest*

⁴ The EEOC has apparently recognized this overexpansion and has attempted to rein in its claims, now saying that its allegations focus on "entry-level warehouse positions," not all "vacant positions." (See EEOC Brief in Opposition to Wal-Mart's Motion to Exclude the Proposed Testimony of EEOC Expert Dr. William T. Bielby, D. # 361, at 19 fn. 13). But, this assertion does not cure the fact that the EEOC's Complaint far exceeds the scope "reasonably expected to grow out" of its investigation into Janice Smith's charge of discrimination as to transfer into an orderfiller position. *Bailey Co., Inc.*, 563 F.2d at 446.

Airlines, 53 F.3d 331, 1995 WL 242001, *3 (6th Cir. 1995) (affirming summary judgment for employer because “[a]n employer cannot intentionally discriminate against an individual on the basis of race if he is unaware of that individual’s race”); *Jackson v. Whitehouse*, 1993 WL 1624960, *6 (E.D. Mich. 1993) (court granted summary judgment for employer when plaintiffs failed to offer evidence that the employer knew their race). If a defendant does not know that a plaintiff is “different,” it is impossible to claim that defendant intentionally treated that individual differently. *Id.* See also *Robinson v. Adams*, 847 F.2d 1315, 1316 (9th Cir. 1987) (same); *Martin v. Citibank, N.A.*, 762 F.2d 212, 217-218 (2d Cir. 1985) (same); *Frazier v. USF Holland, Inc.* 2006 WL 2987737, *9 (E.D. Tenn. 2006).

The EEOC must come forward with evidence to support its claims, but presents no evidence that Wal-Mart knew the applicant gender for the vast majority of applications from women when it rejected them for employment. The first step in Wal-Mart’s new hire selection process is pre-screening by a personnel coordinator who determines based on the job application alone whether the applicant will be contacted for a telephone or in-person job interview. (See Wal-Mart Hiring Policies, WMDP00001–WMDP00012, WMDP00033–WMDP00046, attached as Ex. 7).⁵ Wal-Mart’s application does not include a question about or otherwise indicate the applicant’s gender. (Barnow 3/1/07 Rep. at 7). It is undisputed that applications not selected for a job interview are rejected for employment at this pre-screening stage, sight unseen, based on the application alone. (Hiring Policies, Ex. 7).

⁵ Because such policies are proprietary and were produced pursuant to the parties’ Agreed Protective Order, Wal-Mart tenders a Motion to Place this exhibit under seal.

According to the EEOC's statistical expert, from 1998 to 2001, 71 percent of applications from women were rejected at this prescreening stage; from 2002 to 2004, 82 percent of applications from women were rejected at the prescreening stage.⁶ (Barnow 4/30/09 Supp. Rep. Ex. B8 at 25-26, Ex. D). The EEOC presents no evidence whatsoever that the personnel coordinator knew that these applicants belonged to a protected class. This lack of evidence is fatal to the EEOC's assertion that Wal-Mart engaged in a "pattern or practice" of intentional discrimination, given that it cannot establish the most basic element of its *prima facie* case -- knowledge of protected class -- for as many as 82 percent of class member applications.⁷

Any speculative claim that Wal-Mart pre-screeners somehow "knew" applicant gender merely from the applicant's name is negated by Barnow's own class list, based on the same job applications examined by pre-screeners, which included males. (Barnow Dep. at 377-381) (collectively Ex. E). Barnow later amended his class list to exclude those erroneously listed men, but only after the EEOC consulted outside sources to determine the gender of the applicants. (*Id.*). The EEOC presents no evidence that Wal-Mart had or used such information at the time pre-screeners reviewed and rejected applications. The EEOC bears the burden of coming forward with evidence of its claim, but has no evidence, disputed or otherwise, that Wal-Mart had knowledge of

⁶ Because Barnow defined the class as all women who applied during the relevant time period except those who got job offers or took themselves out of consideration (Barnow 3/1/07 Rep. at 19), these percentages apply equally to the class itself.

⁷ The EEOC cannot even raise an inference of intentional discrimination against the vast majority of female applicants at the prescreening stage because its statistical expert did not control for variables or conduct a regression analysis to compare treatment of male and female applicants at the prescreening stage. (Barnow 3/1/07 Rep. at 19-20).

protected class status when it rejected the applications of a significant majority of the class (71%-82%). The EEOC thus cannot establish the required inference of intentional gender discrimination.

III. The EEOC Cannot Establish a *Prima Facie* Case of Gender Discrimination.

A. The EEOC Bears the Burden of Establishing a *Prima Facie* Case.

In asserting a “pattern or practice” of discrimination, the EEOC bears the initial burden to establish a *prima facie* case by demonstrating that intentional and deliberate discrimination has been the employer’s routine, regular, and standard procedure. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 (1977); *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984); *EEOC v. United Assoc. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry*, 235 F.3d 244, 251 (6th Cir. 2000) (a plaintiff must establish that “discrimination was the company’s standard operating procedure.”). It is not enough that the EEOC establish proof of “isolated or sporadic” discrimination. *Cooper*, 467 U.S. at 875-876. The EEOC must establish that Wal-Mart “regularly and purposefully” treated female applicants less favorably, and that the unlawful discrimination was Wal-Mart’s “standard operating procedure – the regular rather than the unusual.” *Int’l Bhd. of Teamsters*, 431 U.S. at 334-336; *Hunter v. Secretary of U.S. Army*, 565 F. 3d 986, 994 (6th Cir. 2009) (“[T]he preponderance of the evidence must establish ‘that some form of intentional discrimination against the class of which plaintiff was a member was the company’s standard operating procedure.’”).

Above all, the EEOC bears the heavy burden of proving that Wal-Mart intentionally engaged in a pattern or practice of discrimination. *See, Int'l Bhd. of Teamsters*, 431 U.S. at 335, n. 15.

The plaintiff in a pattern and practice case carries a much higher burden than in a disparate treatment case for an individual Claimant. The pattern and practice must be one based upon a specific intent to discriminate against an entire group. The greater intrinsic difficulty in establishing the existence and common reach of a subjectively based practice is obvious. Thus, there is a wide gap between an individual that demonstrates that he has been subjected to disparate treatment discrimination and the existence of a class of persons who have suffered the same injury as the individual.

EEOC v. Jordan Graphics, Inc., 769 F. Supp. 1357, 1382 (W.D.N.C. 1991) (citing to *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 274, n.10 (4th Cir. 1980) and *General Telephone Co. v. Falcon*, 457 U.S. 147, 157-158 (1982)); *Seils v. Rochester City Sch. Dist.*, 192 F. Supp. 2d 100, 119 (W.D.N.Y. 2002) ("Given the need to prove such pervasive, systematic discrimination, the standard of proof for a pattern or practice claim is higher than for a generic disparate treatment case.").

To meet its "much higher burden" of establishing a *prima facie* case here, the EEOC is required to present reliable and significant statistical evidence of disparities between male and female applicants who are otherwise similarly situated, buttressed by evidence of general policies and specific instances of discrimination, that is, anecdotal evidence to support the statistical proof. *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 951-952 (8th Cir. 1999); *Craik v. Minn. State Univ. Bd.*, 731 F.2d 465, 470 (8th Cir. 1984). Furthermore, the EEOC must eliminate the most common non-discriminatory explanations for any alleged

disparity in order to survive summary judgment. See *Hilbert v. Ohio Dep't of Rehabilitation and Corrections*, 121 Fed. Appx. 104, 110 (6th Cir. 2005); *EEOC v. United Assoc. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry*, 9 F. Supp. 2d 836, 844 (N.D. Ohio 1998).

The EEOC bears a heavy burden to establish its *prima facie* case, and courts readily grant summary judgment when, as here, the plaintiff has not met that burden. See, e.g., *EEOC v. McDonnell Douglas Corp.*, *supra*; *EEOC v. American Airlines, Inc.*, 48 F.3d 164 (5th Cir. 1995); *Morgan v. United Parcel Service of America, Inc.*, 380 F.3d 459 (8th Cir. 2004); *EEOC v. Autozone, Inc.*, 2006 WL 2524093 (W.D. Tenn. 2006); *EEOC v. Consolidated Services Systems*, 777 F. Supp. 599 (N.D. Ill. 1991); *EEOC v. CRST Van Expedited, Inc.*, 611 F. Supp. 2d 918 (N.D. Iowa 2009). Accord, *EEOC v. Jordan Graphics*, 769 F. Supp. 1357 (dismissing EEOC's claims following bench trial).

The EEOC can avoid summary judgment here only if the evidence considered in its entirety creates a reasonable inference that Wal-Mart engaged in a routine pattern or practice of discrimination against women in its hiring practices and the evidence eliminates non-discriminatory explanations. *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1274 (N.D. Ill. 1986); *McDonnell Douglas*, 17 F. Supp. 2d at 1051; *Celestine v. Petroleos de Venezuela SA*, 266 F.3d 343, 354 (5th Cir. 2001) ("In order to overcome a motion for summary judgment on a Title VII discrimination claim, the plaintiff must first establish, by a preponderance of the evidence, a *prima facie* case of discrimination."). Here, the EEOC presents no evidence to allow such an inference of an intentional, deliberate standard practice of gender discrimination, much less a jury finding.

B. The EEOC's Statistical Evidence Does Not Support a *Prima Facie* Case of Gender Discrimination.

The EEOC has built its entire case around the admittedly inaccurate and unreliable analyses and opinions of its statistical expert Burt S. Barnow. Even if Barnow's analyses were accurate, his opinions are far from sufficient to support the EEOC's *prima facie* case of intentional discrimination.⁸ In addition to being reliable, "[f]or plaintiff to use statistical evidence to create an inference of discrimination in his case, the evidence must therefore eliminate nondiscriminatory explanations for the discharge, such as lower proficiency or random chance." *Latosky v. Morrison-Knudsen Corp.*, 103 F.3d 129, 1996 WL 708346, *2 (6th Cir. 1996). See, e.g., *Morgan v. United Parcel Services of America, Inc.*, 380 F.3d 459, 463-464 (8th Cir. 2004) (statistical evidence "must show a disparity of treatment, eliminate the most common non-discriminatory explanations of the disparity, and thus permit the inference that, absent other explanation, the disparity more likely than not resulted from illegal discrimination."); *United Assoc. of Journeymen and Apprentices of the Plumbing & Pipefitting Indus.*, 9 F. Supp. 2d at 844, *affirmed in part and remanded in part on other grounds*, 235 F.3d 244 (6th Cir. 2000). Further,

Statistical evidence must not be accepted uncritically. Courts must guard against the use of statistical data which may have been fashioned to obtain a desired result. In no case should there be a blind adherence to the position that mere statistical imbalance equals discrimination. It has been said, statistics are

⁸ Wal-Mart has filed a motion to exclude Barnow's testimony, in part, due to the unreliability of his opinions. (D. #360). Even if the Court denies Wal-Mart's motion, the unreliability and inaccuracies in Barnow's opinions render them insufficient to support a *prima facie* case of discrimination and the Court should grant Wal-Mart summary judgment. *Conde v. Velsicol Chemical Corp.*, 24 F.3d 809, 813 (6th Cir. 1994) (relying on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, even if expert opinion is admissible, if "'insufficient to allow a reasonable juror to conclude that the position more likely than not is true,' it may be basis for ... a grant of summary judgment.>").

like a lamp post to a drunk – they provide support but furnish very little illumination.

Jordan Graphics, Inc., 769 F. Supp. at 1383 (internal citations omitted).

Barnow's statistics do not illuminate any element of the EEOC's required *prima facie* case, but in fact shine a bright light on its insufficiency. As one court has noted, a defendant's "[t]hree basic avenues of attack" on the plaintiff's statistics are to challenge their source, their accuracy, or their probative force. *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 159 (2d Cir. 2001) (analyzing class certification). Barnow's opinions are deficient in not one area, but in all three: he admits that his relied upon applicant database is incorrect and incomplete; he admits that a key component of his analyses is wrong, rendering his conclusions inaccurate; and, he admits that his opinions lack predictive and probative force.

1. **Barnow's Analyses Are Incorrect and Have No Probative Force.**

The EEOC's case is built upon its statistical expert's analyses that, he claims, establish a "statistically significant" gap between Wal-Mart's job offers to men and to women. Barnow, however, admits that his analyses cannot and do not rule out the possibility of random chance or other non-discriminatory reason for the alleged disparity. Barnow also admits that his analyses are flawed because they are based on missing variables or incorrectly captured variables. Barnow's analyses do not illuminate, much less support, the EEOC's *prima facie* case.

a. *The EEOC's Statistical Analyses Do Not Eliminate Non-Discriminatory Explanations for Alleged Gender Disparity in Hiring at DC 6097.*

To establish a *prima facie* case that withstands summary judgment, the EEOC must “**eliminate** the most common non-discriminatory explanations of the disparity” in treatment and establish that “the disparity **more likely than not** resulted from illegal discrimination.” *Morgan*, 380 F.3d at 463-64 (emphasis added). Random chance is a non-discriminatory explanation for any gender disparity. See *Latosky*, 1996 WL 708346 at *2. Barnow admits that he cannot eliminate “randomness” as an explanation for his asserted offer rates and the resulting gender disparity calculation. (Barnow Dep. at 343-345) (“...it could just be that there’s a lot of randomness in terms of how Wal-Mart decided which people to hire.”). While Barnow’s admission is specific to his analyses for 1998 to 2001, it negates the reliability of his conclusions as a whole, from which the EEOC attempts to infer a seven-year standardized practice of purposeful discrimination. Because the EEOC cannot eliminate any, much less the most common, non-discriminatory explanations for the asserted disparity, it cannot establish its *prima facie* case as a matter of law. Moreover, because random chance is just that -- random -- the EEOC cannot meet its burden to establish pervasive intentional discrimination.

b. *Barnow Admits That His Analyses Do Not Accurately Account for Applicants’ Probability of Hire, Which Determines Offer Rate Disparity.*

In addition to being unable to eliminate non-discriminatory reasons for an asserted offer disparity, Barnow admits that his analyses do not accurately show

applicants' probability of hire and, thus, cannot generate an accurate and reliable statistical disparity in offer rates by gender -- the heart of the EEOC's *prima facie* case.

Barnow performed a regression model, a statistical analysis that attempts to combine the values of independent variables in order to determine the expected values for other variables, known as dependent variables. (Barnow 3/1/07 Rep. at 13). The validity and reliability of a regression model like Barnow's "depends upon a showing that it predicts the variations in the dependent variable to some substantial degree." *McCleskey v. Zant*, 580 F. Supp. 338, 351 (N.D. Ga. 1984) *rev'd on other grounds*, *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985)). Barnow concedes that the "analyses of the probability of applications being offered a position at Wal-Mart are the **key analyses for drawing inferences of whether or not there is a statistical disparity in the hiring of men and women** after controlling for other relevant factors." (Barnow 3/1/07 Rep. at 3) (emphasis added).

Despite recognizing that predictive value is essential to determining whether there is a statistical disparity in hiring of men and women, Barnow admits that, for four of the seven relevant years he analyzed, 1998-2001, "one's estimated probability does a very poor job of predicting who will receive an offer." (*Id.* at 19) (*See also* Barnow Dep. at 340-341). Barnow gave three possible explanations for why his analysis is a poor predictor of whether an applicant would receive an offer:

- Q. But the probabilities as you've measured them, according to your report, are not a good predictor of whether somebody actually gets hired; is that right?

A. It's - there's - it's not - it's not a one-to-one. I mean, there could be better, yes...

Q. Or it could...also be that the variables that you are capturing are not being properly captured?

A. It's possible. I mean, I - there are a number of explanations as to what it could be. It could be missing variables, it could be that they're actually being used in different ways or it could just be that there's a lot of randomness in terms of how - how Wal-Mart decided which people to hire.

Q. **So it could be missing variables, it could be wrong variables or it could be randomness.**

A. **Yes. Could be anything.**

(Barnow Dep. at 344-345) (emphasis added). If, as Barnow states, his erroneous probability of hire statistics are attributed to missing variables or erroneous coding, then his analyses are unreliable and cannot create an inference of intentional discrimination. If, instead, his poor predictive value is due to random chance in hiring decisions, then Barnow's analyses likewise cannot possibly raise an inference of intentional discrimination. Under either of Barnow's admitted scenarios, the EEOC's *prima facie* case fails in its entirety because his flawed conclusions cannot support the EEOC's claim of a seven-year, routine practice of deliberate discrimination.

c. The EEOC's Statistical Analyses Do Not Show A Statistically Significant Disparity in Hiring.

Barnow further admits that his analyses did not generate any statistically significant difference in male/female offer rates for three of seven years. (Barnow 3/1/07 Report at 14; Barnow Dep. at 296-298). Recognizing that his analyses did not show any statistical disparity, Barnow instead aggregated the job offer rates for 2002, 2003, and 2004 and established statistical significance **where there is none**. (Barnow 3/1/07 Report at 14; Barnow Dep. at 296-298).

A. If you run the logit regression for each year separately, they're not statistically significant. If you run it for the combined period, as the report says, it is statistically significant.

Q. So if you lump them together, they're statistically significant; if you do them by individual year, they are not; is that right?

A. That's correct.

(Barnow Dep. at 298). Barnow testified that, based on the lack of statistical significance for each of these three years, he even considered removing from the class list all female applicants from 2002 to 2004 but "decided that was the wrong strategy." (Barnow Dep. at 301-302).

Barnow offered no scientific or statistical explanation for his decision to aggregate the data from these years and in fact does not assert that the number of hires during that period was insufficient to analyze on a year-by-year basis. (Barnow Dep. at 299-300). Conversely, Barnow declined to aggregate time periods when considering the tail end of the relevant time period from January 1, 2005 to February 15, 2005, and instead stated that he "was unable to analyze Wal-Mart's

hiring practices” because “there were too few observations.” (Barnow 3/1/07 Rep. at 2 fn. 3). See *Abram v. United Parcel Service of America, Inc.*, 200 F.R.D. 424, 431 (E.D. Wis. 2001) (“The plaintiffs’ somewhat tendentious reliance on aggregate data illustrates the perils and misuses of statistical analysis... The numbers do not reveal a ‘pattern or practice’ of discrimination (intentional or otherwise) that unites the class.”).

The EEOC’s statistical evidence is doomed because, as Barnow admits, it does not demonstrate a statistically significant offer disparity or accurately predict probability of hire. Therefore, his analyses cannot generate a reliable and statistically significant offer rate disparity based on gender for the relevant time period. Further, it cannot eliminate non-discriminatory explanations for the purported gender disparity. The EEOC’s *prima facie* case fails and Wal-Mart is entitled to summary judgment.

2. Barnow’s Reports and Conclusions Are a Moving Target.

The EEOC’s statistical evidence also fails because Barnow’s opinions are inherently unreliable, given that they have changed multiple times over the course of the litigation, up to and including his March 20, 2009 alleged “rebuttal” report, which is subject to Wal-Mart’s pending Motion to Strike.⁹ (D. #373).

First, this constant updating, shifting and “correcting” eliminates any chance that Barnow’s opinions could establish reliable and significant statistical proof to

⁹ Wal-Mart reserves the right to re-file its dispositive motion in the unlikely event Barnow’s “Rebuttal” Report is not stricken.

support the EEOC's *prima facie* case. Based on an EEOC-created database, Barnow concluded that there is a statistically significant disparity in the rates of making job offers to men and women for the periods of 1998-2001 and 2002-2004, with an asserted hiring shortfall of 236.1 women.¹⁰ (Barnow 3/1/07 Rep. at 4-5). Barnow also determined, again based on the EEOC-created database, the class membership criteria and identified 4,308 class members. (Barnow 3/1/07 Rep. at 18-19, Appx. E). Barnow's March 1, 2007 Report was not his first statistical analysis in this case, however. He filed his initial report on July 15, 2005. (Barnow Dep. at 125). Since his initial report, Barnow has changed, corrected, amended and supplemented his report 18 times. In his most recent report, dated March 20, 2009, Barnow acknowledges many fundamental flaws in his analyses (identified by Wal-Mart expert Professor James Freeman), purportedly corrects those errors, re-runs his analyses, re-defines the class membership rules, and issues a new class list.¹¹ (Barnow 3/20/09 Rebuttal Rep. at 3, 6-12, Ex. F). While the EEOC blindly adheres to its position that its statistics are reliable enough, Barnow's shifting analyses and conclusions are not sufficient to support the EEOC's *prima facie* case.

¹⁰ Even though Barnow did not have applications outside the relevant time period of April 18, 1998 to February 15, 2005, he nonetheless opines that there is a statistically significant offer gap from January 1, 1998 to April 17, 1998 and proffers a "rough estimate" of the hiring shortfall as 16.74 women. (Barnow 3/1/07 Rep. at 2, 5).

¹¹ As of his March 20, 2009 Report, Barnow's class now totals 4,101 women, with a hiring shortfall of 213.68. (Barnow 3/20/09 Rebuttal Rep. at 12).

3. **Both Barnow and the EEOC Have Admitted That the Database Upon Which Barnow Relied Is Inaccurate.**

It is no wonder that Barnow's opinions are constantly changing, because its source -- the EEOC-created database he relied upon -- is inaccurate, as both he and the EEOC admit.¹² Barnow's March 20, 2009 "rebuttal" report concedes many of the database errors identified by Professor Freeman and claims to have made belated efforts of "systemic quality control on the data base to improve its accuracy." (Barnow 3/20/09 Rebuttal Rep. at 3). Barnow also admits that his underlying data is incorrect because the database is replete with wrongly coded applicant variables like: Social Security numbers which serve as applicant identifiers, application dates, whether applications resulted in job offers, education level, educational history, felony convictions, previous Wal-Mart employment, prior terminations for cause, missing work history, employment gaps, age under 18, eligibility to work in the United States and excessive pay expectations. (Barnow 3/20/09 Rebuttal Rep. at 10-12). Barnow admits that he intended to capture and control for these key variables and that it was important to do so accurately. (Barnow Dep. at 173, 175-176). *See, e.g., EEOC v. McDonnell Douglas*, 191 F. 3d at 951-952 (EEOC must present statistical evidence of disparities between male and female applicants who are similarly situated, that is, controlled for variables other than gender). But, he concedes that his relied upon database is wrong in capturing all of these key variables. (Barnow 3/20/09 Rebuttal

¹² It is undisputed that the EEOC created the initial applicant database without Barnow's input and made significant alterations to the subsequent databases on which he relies. The EEOC has not met its burden of establishing that its database is not biased. *Nelson v. Tenn. Gas Pipeline Co.*, 243 F. 3d 244, 250-251 (6th Cir. 2001).

Rep. at 3, 6-12). Barnow's regression analyses and conclusions are premised upon his ability to accurately and reliably collect and code these critical variables, which he admits he did not do.

In *EEOC v. Autozone, Inc.*, the court granted summary judgment for the defendant on the EEOC's claims of a pattern or practice of race and gender discrimination based in part upon the court's rejection of Barnow's opinions due to nearly identical errors. 2006 WL 2524093 (W.D. Tenn. 2006). The court held that "the flaws in Barnow's promotion analyses do not merely raise questions of credibility, but of accuracy and relevance." *Id.* at *6 (emphasis added).

' [T]here may, of course, be some regressions so incomplete as to be inadmissible as irrelevant...' There may also be some regressions so flawed and methodologically unreliable as to be irrelevant. **Given the flaws in Barnow's promotion regression analyses, the court cannot consider them relevant evidence of the EEOC claims.**

Id. (internal citations omitted) (emphasis added). Similarly, in this case Barnow admits that his underlying data and analyses are riddled with errors, which render them irrelevant.

4. Barnow's Conclusions Are Inaccurate Because They Ignore Key Variables that Affect Offer Rates.

In addition to the numerous errors in Barnow's data, his analyses are incorrect because he ignored critical variables that he admits could affect applicant offer rates and demonstrate non-discriminatory reasons for hiring decisions. (Barnow Dep. at 126-128, 263-264). First, while included in his initial July 2005 Report, Barnow later changed his mind and decided to ignore all information disclosed by job applicants during any

of the three job interviews throughout the application process.¹³ Thus, his 2007 analyses eliminate vast amounts of directly relevant applicant information reflected only on interview notes and attached resumes -- work history, current job responsibilities, prior experience in a physically demanding job, pay expectations, problems working in hot or cold, current employment -- even when that information formed the basis of the hiring decision. (*Id.* at 121-123, 263-264). He even ignored job qualification information that could establish Wal-Mart's non-discriminatory hiring decisions:

Q. If someone said, well, you know, on my last job, I worked in a warehouse and that's not reflected on the application, that person may not be [in the database]?

A. Wow. Yes, if they left it off [the application], then it wouldn't be.

(*Id.* at 264). By ignoring the entire interview process, Barnow also disregarded information that could eliminate applicants from the class, such as lack of interest in or problems working in hot or cold. (Barnow Dep. at 159-161). Barnow's failure to consider this critical information renders his comparison of "similarly situated" applicants flawed and his opinions on offer rates inaccurate; his analyses are thus not sufficient to raise an inference of intentional gender discrimination.

Moreover, despite Janice Smith's status as an applicant for transfer from another Wal-Mart facility rather than an "off the street" applicant for employment, Barnow conducted **no** separate analysis for transfer applicants and offers **no** opinions on

¹³ Barnow testified that he opted to ignore applicant information other than that contained on the one-page, two-sided job application so that he could focus on job offer status, and in doing so, disregarded both variables he intended to capture and variables he elected not to consider. (Barnow Dep. at 128, 159-161, 264) (*Id.* at 126-128).

whether there is a statistically significant difference in male-female offer rates for transfers, the only group of orderfiller applicants for whom this Court has subject matter jurisdiction. (See discussion pp. 9-12, *infra*); Barnow 3/1/07 Report).

Barnow's failure to account for all these critical variables that admittedly affect hiring decisions and job offer rates negates the EEOC's *prima facie* case. See *EEOC v. Autozone*, 2006 WL 2524093 (granting partial summary judgment where Barnow's statistical analyses ignored variable and improperly expanded the analyzed group). Courts have rejected similar regression analyses because they do not account for "clearly major variables which have been omitted -- such as education and prior work experience." *Kroger v. Reno*, 98 F.3d 631, 637 (D.C. Cir. 1996). See also *Sheehan v. Purolator, Inc.*, 839 F.2d 99, 103 (2d Cir. 1988) (affirming denial of class certification and granting of summary judgment in gender discrimination case where plaintiffs' statistical analyses did not account for critical non-discriminatory factors).

The EEOC's statistical proof is incomplete, does not show an accurate and reliable disparity in male-female offer rates, and does not eliminate non-discriminatory explanations for the disparity. *Latosky*, 103 F. 3d 129, at *2. It cannot support a *prima facie* case and this Motion for Summary Judgment should be granted.

C. EEOC's "Social Science" Evidence Does Not Support the EEOC's Prima Facie Case of Gender Discrimination.

Realizing the blatant infirmities of Barnow's analysis and its inability to create an inference of intentional discrimination, the EEOC retained, well after its deadline for identification of primary expert witnesses, William Bielby, a sociologist and frequent

plaintiffs' expert.¹⁴ Bielby's opinions are of no use in this case, however, because he admits that he did not consider or eliminate alternative explanations before concluding that alleged gender stereotyping by Wal-Mart managers was a "compelling" explanation for Barnow's asserted statistical disparity.¹⁵ (Bielby Dep. at 109-110) (collectively Ex. 6). Thus, his opinions cannot raise an inference that a hiring disparity "more likely than not results from illegal discrimination." *Morgan*, 380 F.3d at 463-464. Moreover, Bielby admits that he cannot state whether bias existed and whether discrimination actually occurred at DC 6097.¹⁶ (Bielby Dep. at 126-127). In fact, his testimony undermines the EEOC's premise that Wal-Mart engaged in intentional discrimination.

First, Bielby's harshly criticized version of "social framework analysis" does not support the EEOC's *prima facie* case because he admits that his analysis cannot determine that gender discrimination existed at DC 6097 or that it affected even one hiring decision, much less that it did so on a routine, regular, and standard basis. (Bielby Dep. at 107-108, 127-128). Bielby further admits that he did not eliminate non-

¹⁴ The Court agreed that the EEOC's identification of Bielby was nearly two years late, but allowed his belated identification because at that time, no pre-trial deadlines had been set. (8/14/07 Comprehensive Discovery Order and Status Report at 3 D. #163 ("The EEOC's efforts to construe prior orders as making the disclosure timely [two years later] are not convincing.")).

¹⁵ Bielby admits that he relied upon and based this conclusion not on Barnow's purported offer rate disparity but on raw numerical data not controlled for any applicant variables, despite Barnow's admission that such raw data did not form the basis for his regression analysis or conclusions. (Bielby Dep. at 118-119).

¹⁶ Bielby's opinions are misleading, unscientific, unreliable, and inadmissible. (See, Wal-Mart's Motion to Exclude The Proposed Testimony of EEOC Expert William T. Bielby, D. #345). But, even if not excluded, his opinions cannot support a *prima facie* case. *Conde v. Velsicol Chemical Corp.*, 24 F.3d 809, 813 (6th Cir. 1994) (relying on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, even if expert opinion is admissible if "'insufficient to allow a reasonable juror to conclude that the position more likely than not is true,' it may be basis for ... a grant of summary judgment.").

discriminatory explanations for any difference in male-female offer rates because he did not examine the application rates of males and females, the applicant pool, or the turnover rate, despite admitting that each of these factors is critical to analyzing gender composition of a job. (Bielby Dep. at 115-116).

Bielby's own admissions about the value and limitations of his opinions demonstrate their inability to meet the EEOC's burden. In addition to ignoring possible non-discriminatory explanations, Bielby also admits he cannot determine whether gender stereotypes actually existed at DC 6097, what those stereotypes may be, and if or when those stereotypes operated to exclude women. (Bielby Dep. at 106-108, 202-203, 215-216). Bielby concedes that he:

- Cannot determine which Wal-Mart employment decisions, if any, were based on gender stereotyping;
- Cannot determine which Wal-Mart decision-makers, if any, hold specific gender stereotypes;
- Cannot determine which Wal-Mart decision-makers, if any, "activated" or used any gender stereotypes they may have held during the hiring process;
- Cannot determine which Wal-Mart decision-makers, if any, made a hiring decision on the basis of a gender stereotype; and,
- Cannot determine which applicants, male or female, were hired or not hired because of gender stereotyping.

(Bielby Dep. at 79-80, 106-108, 126-128, 203, 215-216). Bielby further testified that he cannot state whether any Wal-Mart hiring decision was gender-biased and that people cannot tell when they themselves have been influenced by stereotypes. (*Id.* at 126, 216).

Bielby's unfounded speculation is insufficient to establish that Wal-Mart engaged in a deliberate, consistent practice of gender discrimination.

Examining similar proof, the court in *Sperling v. Hoffmann-La Roche, Inc.*, granted summary judgment for the employer. 924 F. Supp. 1346 (D.N.J. 1996). In that age discrimination case, the court rejected plaintiffs' proffered theory that "vague, undefined and subjective criteria" for a reduction in force had created "fertile ground" for age bias and that "[i]t would be reasonable for a jury to infer that, if a manager has a great deal of discretion in determining which employees are to be fired, then that manager had the opportunity to exercise his discretion in a discriminatory fashion." 924 F. Supp. at 1380. The court specifically found that, "this alone does not constitute a pattern or practice of intentional discrimination." *Id.* at 1381. Rather,

Plaintiffs must demonstrate that the managers making the termination decisions *routinely took age into account* when deciding who would be fired in [the reduction of force], not that the managers had discretion to do so. In other words, plaintiffs must demonstrate that the managers making the decisions systematically used their discretion to purposefully treat employees over forty years of age less favorably, and, in addition, must demonstrate that such disparate treatment was regular enough, routine enough, or pervasive enough to justify the conclusion that it is more probable than not that [employer] discriminated against any employee fired in [the reduction in force] who was over forty years old. Therefore, without additional evidence, the decentralized, uncontrolled decisionmaking process used in [the reduction in force] is insufficient to support a finding that [the employer] engaged in a pattern or practice of discrimination.

Id. at 1381 (emphasis in original). See also *Westlake Vinyls, Inc. v. Goodrich Corp.*, 518 F. Supp. 2d 918, 934 (W.D. Ky. 2007) ("Mere speculation will not suffice to defeat a motion for summary judgment.").

The EEOC's proof here utterly fails because Bielby expressly admits that he cannot opine that Wal-Mart decision-makers "systematically" and "purposefully" discriminated against women. See *Sperling*, 924 F. Supp. at 1384 (plaintiffs' industrial/organizational psychologist's opinions were of "limited" value because he could not "'pass definitive judgment' on the possibility that the statistical disparity in terminations between older and younger workers...was the result of intentional discrimination."). As the *Sperling* court held, the EEOC must demonstrate that Wal-Mart actually and deliberately discriminated, not just that it may have had the opportunity to do so. Bielby admits that he cannot offer opinions on the former, and opines only on the latter. With no other evidence to offer on this element, the EEOC's *prima facie* case fails.

Not only is Bielby unable to fill the void in the EEOC's *prima facie* case, he in fact undermines its attempt to raise an inference of intentional discrimination. According to Bielby's opinions, the purported gender stereotypes, if they exist, were unconscious and unintentional. (Bielby Dep. at 212, 216; Bielby 3/1/07 Rep. at 11-14, Ex. H). He admits that if Wal-Mart managers had engaged in discrimination, they would likely be unaware that they had done so. (Bielby Dep. at 215-216). He expressly declines to opine that Wal-Mart hiring managers intentionally or consciously discriminated against female applicants. (Bielby Dep. at 106-108, 126-127, 203, 215-216). As Bielby admitted, "[e]veryone can be influenced by unconscious biases." (Bielby Dep. at 212). Yet he has no explanation for how or why Wal-Mart hired 60 female applicants as orderfillers during the relevant time period if such unconscious stereotypes existed and were relied

on by DC 6097 decision-makers. (Bielby Dep. at 203; Barnow 4/30/09 Supp. Rep., Ex. B6 at 21, 23, Ex. I).

The only reasonable inference from Bielby's opinions -- that any gender bias was not deliberate and intentional -- directly rebuts the EEOC's burden to create an inference that Wal-Mart engaged in an intentional, deliberate, routine practice of gender discrimination. *Silvera v. Orange County Sch. Bd.*, 244 F. 3d 1253, 1262 (11th Cir. 2001) ("Discrimination is about actual knowledge, and real intent, not constructive knowledge and assumed intent."); *Jackson v. Harvard Univ.*, 721 F. Supp. 1397, 1432 (D.Mass. 1989) (Title VII disparate treatment cases are "concerned with intentional discrimination, not subconscious attitudes.").

In an effort to avoid this dispositive evidentiary gap, the EEOC seems to assert that Wal-Mart engaged in a pattern or practice of intentional gender discrimination because it "encourage[ed] [gender] stereotyping by its failure to employ measures to minimize such stereotyping" at DC 6097. (EEOC's Response to Motion to Exclude EEOC Expert William T. Bielby at 5 fn. 5, D. #361). This assertion is no different than the arguments specifically rejected in *Sperling*, *Silvera*, and *Jackson*, *supra*. There is no more evidence that Wal-Mart had a conscious, deliberate intent to "encourage" gender stereotyping than there is evidence that any of its decision-makers harbored such stereotypes in the first place.

The EEOC can present no evidence Wal-Mart knew: that decision-makers had gender stereotypes in their minds; that decision-makers applied these unspecified stereotypes in making hiring decisions; that decision-makers did not hire female

applicants because of these stereotypes; or that Wal-Mart deliberately chose to establish or not to establish hiring policies, processes, and practices so as to allow gender discrimination to occur. The missing links in its proof are fatal to the EEOC's assertion that Wal-Mart somehow "knew" that, if a decentralized decisionmaking process was used, then DC 6097 decisionmakers would intentionally use that discretion to reject female job applicants. *See, e.g., Sperling*, 924 F. Supp. at 1381 ("[W]ithout additional evidence, the decentralized, uncontrolled decisionmaking process used [for reduction in force] is insufficient to support a finding that [employer] engaged in a pattern or practice of discrimination."); *Vitug v. Multistate Tax Comm'n*, 88 F. 3d 506, 514 (7th Cir. 1996) ("It is not enough for a plaintiff to demonstrate that an employment practice could theoretically be used to discriminate - Title VII does not forbid subjective selection processes."); *Ste. Marie v. Eastern R.R. Assoc.*, 650 F. 2d 395, 405 (2d Cir. 1981) ("But when, as here, relevant statistics are lacking...subjective decision-making methods are not sufficient to establish a pattern or practice of discrimination..."); *McDonnell Douglas*, 17 F. Supp. 2d at 1054-1055 ("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 systemic, company-wide policy of intentional discrimination."); *Abram v. United Parcel Service of America, Inc.*, 200 F.R.D. 424, 430 (E.D. Wis. 2001) ("...the Court will concede, for the sake of argument, that *some* managers allow racial bias to affect their performance evaluations. Such discrimination, if it occurs, is one step removed from UPS's decision to allow consideration of subjective factors is not, *in and of itself*, a discriminatory practice...") (emphasis in original).

The EEOC had the opportunity to depose not only DC 6097 managers and hiring decisionmakers, but also corporate representatives who establish hiring practices, policies and procedures. The EEOC failed to elicit evidence that Wal-Mart knew of the existence of or any reliance upon stereotypes, gender or otherwise, at DC 6097. It has no proof that Wal-Mart intentionally allowed, encouraged, or facilitated any alleged stereotypes. Bielby cannot connect these dots for the EEOC and the EEOC has no proof to imply, much less prove, that DC 6097 decision-makers or Wal-Mart engaged in a routine practice of intentional gender discrimination in hiring. The EEOC's failure requires summary judgment for Wal-Mart.

D. The EEOC's Weak and Unreliable Anecdotal Evidence Is Insufficient to Establish a *Prima Facie* Case.

In addition to Barnow's erroneous statistical analyses and Bielby's opinions rebutting any inference of intent, the EEOC relies on inadmissible, conclusory, speculative and stray anecdotal evidence. This evidence is also inadequate to meet the EEOC's "much higher burden." *Jordan Graphics*, 769 F. Supp. at 1382. Courts consistently hold that, to avoid summary judgment, the plaintiff must come forward with substantial anecdotal evidence of discrimination, particularly when its statistical proof is weak, unreliable or insignificant. *See EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 311-312 (7th Cir. 1988). Further, "anecdotal evidence may suffice to prove individual claims of discrimination, [but] rarely, if ever, can such evidence show a systemic pattern of discrimination." *Coral Const. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *Middleton v. City of Flint, Mich.*, 92 F.3d 396, 405 (6th Cir. 1996); *EEOC v. Autozone*, 2006 WL 2524093, *7 (W.D. Tenn. 2006).

Here, the EEOC fails to produce admissible anecdotal evidence proving that Wal-Mart discriminated against women in hiring. And, even if it had, such proof is not sufficient to establish “a systemic pattern of discrimination” required to withstand summary judgment. *Id.*

The Court required the EEOC to identify its Phase 1 liability witnesses and its class members who have “direct knowledge of gender animus.” (January 9, 2007 Court Order Regarding Pending Discovery Issues, D. #126). In response, the EEOC identified only 37 class members out of 4,012, less than 1% of the class, who allegedly have “direct knowledge of gender animus.”¹⁷ And, the majority of those 37 women admit that the extent of their “knowledge” is strictly speculation, conjecture, and/or hearsay -- evidence that is largely inadmissible and insufficient to support the EEOC’s *prima facie* case that Wal-Mart engaged in an ongoing, standard procedure of intentional discrimination. *Knox v. Neaton Auto Products Manuf., Inc.*, 375 F.3d 451, 457 (6th Cir. 2004). Such inadmissible evidence includes testimony that:

- an unknown employee of Manpower, a temporary employment agency not affiliated with Wal-Mart, said, “they [DC 6097] don’t hire women out there” (Rhonda Huber Dep. at 58-60);
- conversations “around town” suggested “that if you’re a woman, you’re better off applying for the cashier’s position at the Wal-Mart SuperCenter...” (Maria Malicoat Howe Dep. at 67);
- “my husband had told me, cause he worked there for a while [as an hourly employee] that when I had put in the application that I probably wouldn’t get that job because he had never seen a woman do it” (Teresa Mills Dep. at 83-84);
- a female orderfiller named Melanie (LNU) “in casual conversation . . . was telling me how hard it was and how hard they were making it on her” (Brenda Overbey Dep. at 69); and,

¹⁷ As of Barnow’s 4/30/09 Supplemental Report, Barnow’s identified class is 4,012. (Barnow 4/30/09 Supplemental Rep., See Ex. B12).

- “I was also informed by my ex-husband [who did not work at DC 6097 but “knew” unidentified people who did] that they don’t hire women there.” (Kimberly Vires Roark Dep. at 35, 47).

(collectively Ex. J).

A party cannot rely upon inadmissible hearsay to overcome a properly supported motion for summary judgment. *Knox*, 375 F.3d at 457; *Tinsley v. Gen. Motors Corp.*, 227 F.3d 700, 703 (6th Cir. 2000). Furthermore, mere speculation is insufficient to overcome summary judgment. *Westlake Vinyls*, 518 F. Supp. 2d at 934.

Aside from conclusory, inadmissible testimony, the EEOC presents only a handful of its “direct knowledge” witnesses who have testimony of alleged gender-related comments, although vigorously disputed, by the more than 130 interviewers involved in the hiring process. (See, e.g., Constantine Carnes Bargo Dep. at 108, unnamed male interviewer “stated something that we women needed to leave those jobs alone for men that had families to take care of”; Louise Hubbard Dep. at 23, unidentified “men workers there in the break room said that...women just could not handle the heavy work”; Kimberly Bebout Dep. at 17, unnamed male interviewer “said that they typically hired young men between the ages of 18 and 25, and he ended the interview”; Shannon Bowling Dep. at 49, unknown lady on the phone said “we don’t really hire women here except for office positions”; Laura Ludeman Campbell Dep. at 12-13, unknown interviewer said “they usually didn’t hire on the floor, that you had to lift 80 pounds over your head, and they didn’t have office jobs available”; Dorothy L. Harshman Dep. at 107, male interviewer “kept insinuating that I would use the girl card. ‘Well, there’s going to be some heavy lifting. Are you sure you are going to be able to do that?’”).

Courts routinely find such random and isolated anecdotal evidence insufficient to avoid summary judgment, given the EEOC's heavy burden to demonstrate that decision-makers "routinely took [gender] into account when deciding" who to hire. *Sperling*, 924 F. Supp. at 1381. "Evidence of mere isolated or accidental or sporadic discriminatory acts will not suffice to show a pattern or practice of discrimination." *Maddox v. Claytor*, 764 F.2d 1539, 1557 (affirming summary judgment where anecdotal evidence was "sparse," with "much of that...unpersuasive and conclusory"); *McDonnell Douglas*, 191 F. 3d at 952 ("As for the EEOC's anecdotal evidence, it demonstrates, at most, isolated discriminatory acts on the part of certain managers, rather than [defendant's] 'standard operating procedure.'"); *Metrocare v. Washington Metro. Area Transit Auth.*, 679 F. 2d 922, 929-930 (D.C. Cir. 1982) (dismissing class action race discrimination case because anecdotal evidence from six employees was insufficient to establish a *prima facie* case for entire class of 400); *Jordan Graphics, Inc.*, 769 F. Supp. at 1383 (dismissing EEOC's claims based on unreliable statistical proof, court "seriously doubts" that isolated anecdotal evidence would be sufficient to establish that defendant's standard operating procedure was intentional discrimination). It is undisputed that over 130 managers and hourly coaches were involved in the DC 6097 hiring process as interviewers throughout the relevant time period. (See Defendant's Supplemental Answers To Plaintiff's Second Set of Interrogatories, No. 1, dated 6/22/06; Defendant's Answers to Plaintiff EEOC's Tenth Set of Interrogatories, No. 2, dated 3/23/09, collectively Ex. K). Thus, even if taken as true, evidence of sporadic, isolated alleged discrimination is insufficient to meet the EEOC's burden of

demonstrating that Wal-Mart's routine, systematic and standard operating hiring procedure was intentional discrimination against women. Accordingly, the Court should grant summary judgment.

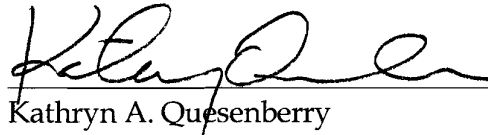
CONCLUSION

The EEOC has pursued this case unchecked for nearly eight years and has no more basis now than when it began for its claims that Wal-Mart engaged in a routine and standardized practice of purposeful gender discrimination in hiring at DC 6097. Its impermissible expansion of this litigation beyond the scope of its investigation deprives the Court of subject matter jurisdiction over all claims but those related to alleged gender discrimination against female Wal-Mart transfer applicants for the job of orderfiller.

Even if the bulk of the EEOC's claims were properly before this Court, the EEOC cannot establish a genuine issue of material fact regarding the most basic elements of its *prima facie* case. First, it has no evidence that Wal-Mart knew of the protected class status of between 71 and 82 percent of female applicants when they were rejected for employment at the prescreening stage. Similarly, the EEOC cannot prop up its *prima facie* case of intentional gender discrimination with its statistics, which are inaccurate, insignificant and inconclusive; its "social science" evidence, which in fact refutes any inference of deliberate discrimination; or its anecdotal evidence, which is at best inadmissible, unreliable, and random. Because there are no genuine issues of material fact in dispute, Wal-Mart is entitled to judgment as a matter of law and Wal-Mart's Motion for Summary Judgment should be granted.

Respectfully submitted,

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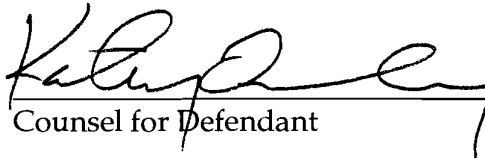
Counsel for Defendant, Wal-Mart Stores, Inc.

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was served, via the method indicated below, to the following, on this the 15th day of July, 2009:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

EQUAL EMPLOYMENT OPPORTUNITY	)	
COMMISSION	)	
	)	
PLAINTIFF	)	
	)	
v.	)	CASE NO. 01-339
	)	
WAL-MART STORES, INC.	)	
	)	
DEFENDANT	)	
_____	)	

ORDER

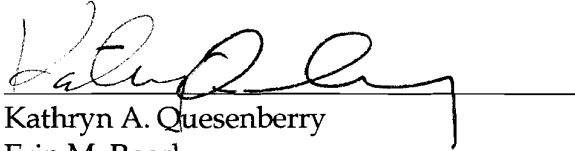
This matter having come before the Court on the Motion of Defendant Wal-Mart Stores, Inc. to grant Wal-Mart summary judgment on the claims asserted by Plaintiff Equal Employment Opportunity Commission ("EEOC") in its Complaint, the Court having heard the arguments of counsel and being otherwise sufficiently advised;

IT IS HEREBY ORDERED that Wal-Mart's Motion for Summary Judgment is GRANTED. There is no genuine dispute of material fact that the EEOC does not present sufficient evidence to establish a *prima facie* case that Wal-Mart engaged in a pattern or practice of intentional gender discrimination in hiring at its Distribution Center No. 6097. Accordingly, Wal-Mart is entitled to judgment as a matter of law and the EEOC's claims are hereby DISMISSED WITH PREJUDICE. This is a final and appealable Order, there being no just cause for delay.

JUDGE, UNITED STATES DISTRICT COURT

TENDERED BY:

WOODWARD, HOBSON & FULTON, L.L.P.

A handwritten signature in black ink, appearing to read 'Kathryn A. Quesenberry', is written over a horizontal line.

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