

EASTERN DISTRICT OF KENTUCKY
TENDERED
 DATE: 9/14/09
 LESLIE G. WHITMER
 CLERK, U. S. DISTRICT COURT

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	)	
_____	)	

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

To survive summary judgment, the EEOC must prove each element of its *prima facie* case and demonstrate that there is a genuine issue for trial. It has not done so. The EEOC's Response instead concedes numerous holes in the EEOC's proof. As a result, the EEOC improperly attempts to shift its burden of proof to Wal-Mart. At this stage, however, it is the EEOC's "higher burden" to mount affirmative proof to show that Wal-Mart's "standard operating procedure" was intentionally to discriminate against female job applicants; it is not Wal-Mart's burden to prove that discrimination did not occur. The EEOC relies on insufficient statistics, on Wal-Mart's subjective but gender-neutral hiring process, and on gender-neutral, speculative and inadmissible anecdotal testimony. Under well-established precedent, this proof is insufficient to raise

an inference of an intentional pattern of gender discrimination. Wal-Mart's Motion for Summary Judgment should be granted.

ARGUMENT AND AUTHORITIES

I. EEOC's Claims Exceed the Scope of Its Investigation and Deprive the Court of Subject Matter Jurisdiction.

The EEOC argues that Title VII precedent allows it unfettered discretion to assert any type of discrimination on behalf of any class member if any level of administrative investigation took place, as if the charge or reasonable cause determinations are merely bothersome guidelines or unwarranted restrictions on the agency. Relying on a "single filing rule," unreferenced in any case cited in its Response, the EEOC claims that the "rule" allows "recovery by class members including those whose circumstances were not within the four corners of the charge." (Response at 67). *Chisholm v. United States Postal Serv.*, 665 F.2d 482 (4th Cir. 1981), does not support the EEOC's position. That class action race discrimination case was initiated by a class of African-Americans subject to the class certification requirements of Fed. R. Civ. P. 23. The protection inherent in the class certification process was critical to the Court's analysis in rejecting the Postal Service's argument that the claims in the suit were too broad. *Id.* at 491. In this case, however, the EEOC's claim is not subject to Rule 23 scrutiny or protections. As a result, *Chisholm* merely highlights the significance of the four corners of the charge and its own Reasonable Cause Determination. These two documents form the parameters of the unique animal which is an EEOC lawsuit under Title VII § 706. Otherwise, the statutory limitation to claims "reasonably related" to an investigation of the charge would be a meaningless standard.

The EEOC also claims that Wal-Mart makes an “artificial distinction” by arguing that the class must be limited to applicants for the orderfiller position. (Response at 69-70). Relying on *EEOC v. Temple Steel Co.*, 723 F. Supp. 1250 (N.D. Ill. 1989), the EEOC asserts that broader claims of discrimination in recruiting and hiring were proper as they reasonably arose from the administrative investigation into the Charge. (Response at 70). But, in *EEOC v. Temple Steel*, the court expressly recognized the inherent notice requirements contemplated by the investigation and the Reasonable Cause Determination. In fact, the opinion notes:

[T]he original charge is sufficient to support action by the EEOC as well as a civil suit under the Act for any discrimination stated in the charge itself or developed in the course of a reasonable investigation of that charge, **provided such discrimination was included in the reasonable cause determination of the EEOC and was followed by compliance with the conciliation procedures fixed in the Act.**

723 F. Supp. at 1252 (emphasis added). Review of the detailed Reasonable Cause Determinations in the cited case, as opposed to the cursory Determination in this case, demonstrates the significance of the statutory requirements to establish subject matter jurisdiction. In *Temple Steel Co.*, the Reasonable Cause Determination stated,

[l]ike and related to the issues raised in the charge, and growing out of the investigation of them ... indicates that there is reasonable cause to believe that Respondent has violated Title VII by engaging in hiring and recruiting policies and practices which exclude blacks as a class from factory positions. The evidence discloses gross disparities between black representations in Respondent's workforce and the number of qualified blacks available in Respondent's labor market.

723 F. Supp. at 1251. In contrast, the Reasonable Cause Determination in this case says only that Janice Smith “alleges she was denied a transfer because of her sex” and “there is evidence that females as a class were not hired as Orderfillers because of their sex....” (See Ex. 4 to Memo. in Support of MSJ). The EEOC’s overreaching expansion of the class and the claims is not supported by its administrative investigation of the Charge, its findings and conciliation following that investigation, or the EEOC’s own jurisprudence. See, e.g., *EEOC v. GMRI, Inc.*, 106 FEP Cases 1668 (N.D. Ohio 2009) (dismissing retaliation claim when the EEOC did not make a Reasonable Cause Determination on the claim). At its worst, there is no class at all but for Janice Smith and the five other individuals for whom the EEOC sought conciliation. (See Conciliation Agreement, attached to Response as Ex. 128). At its best, there is a class only of female applicants who sought to transfer or applied for the orderfiller position.

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

The EEOC points to no evidence, disputed or otherwise, that Wal-Mart knew the gender of between 71% and 82% of the class members at the time it rejected them for hire at the pre-screening stage. (Response at 64-66). As set forth in Wal-Mart’s Memorandum, knowledge is an essential element of a *prima facie* case of intentional discrimination, and the EEOC’s failure to offer any admissible evidence to establish this element of its *prima facie* case is fatal to its claim. (See Memo. in Support of MSJ at 12-13 and cases cited therein).

In the absence of any proof of knowledge, the EEOC asks the Court to assume and speculate that Wal-Mart must have known each applicant's gender because "gender in most cases is discernable." (Response at 64). Assumptions and speculation, however, will not defeat a properly pled motion for summary judgment. *See Lewis v. Philip Morris Inc.*, 355 F.3d 515, 533 (6th Cir. 2004) ("In order to survive a motion for summary judgment, the non-moving party must be able to show 'sufficient probative evidence [that] would permit a finding in [his] favor on more than mere speculation, conjecture, or fantasy."); *Noble v. Brinker Int'l, Inc.*, 391 F.3d 715, 724 (6th Cir. 2004) ("Although [the plaintiff] is certainly entitled to his opinion, mere speculation cannot satisfy his burden of proving that [the defendant] discharged him on account of his race."); *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1181 (11th Cir. 2005) ("Speculation does not create a genuine issue of fact; instead, it creates a false issue, the demolition of which is a primary goal of summary judgment.") (citation omitted).

The EEOC chose not to depose either of the two identified Wal-Mart Personnel Coordinators (both of whom are women) who determined, based on the paper application alone, whether an applicant would progress to an interview. Consequently, the EEOC presents no proof, disputed or otherwise, regarding what the Personnel Coordinators looked at or reviewed, whether they examined applicants' names, whether they knew or considered the class members' names as "common female names," or whether gender played any role in their pre-screening decisions. Instead, the EEOC resorts to an affidavit from an EEOC staff member who reviewed EEOC expert Barnow's class list and deems the list to include "common 'female' names" like Angela, Melissa, and Tammy. (Response

Ex. 137, Response at 65; *see* 10 n.19). This self-serving, inadmissible EEOC-generated affidavit demonstrates the absence of proof on this key element of the EEOC's *prima facie* case.

As essentially conceded in its Response, the EEOC has also failed to develop any statistical proof that male and female applicants were treated differently at the pre-screening stage. Its expert's statistical analysis did not examine or compare via a regression analysis the treatment of females versus males at the pre-screening stage. (Barnow 3/1/07 Rep. at 19-20, attached at Tab 1).

The EEOC argues that whether Wal-Mart knew an applicant's gender at the pre-screening stage is a "factual question" to be resolved in the EEOC's favor at the summary judgment stage. (Response at 65). Absent admissible evidence creating a factual dispute however, the EEOC's mere allegations are entitled to no weight. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) ("there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders other facts immaterial."); *State Mut. Life Assur. Co. of America v. Deer Creek Park*, 612 F.2d 259, 268 (6th Cir. 1979) (Plaintiff "could not rely solely upon its bare allegations in the pleadings, but was obliged to come forth with sufficient material evidence to raise a material issue of fact.").

Finally, recognizing that it lacks the necessary proof for its claim, the EEOC attempts to avoid summary judgment by shifting the burden to Wal-Mart to prove that it did not intentionally discriminate against female applicants at the initial hiring stage. (Response at 65). It is the EEOC, however, not Wal-Mart, that "must present affirmative

evidence in order to defeat a properly supported motion for summary judgment.” *Jackson v. Whitehouse*, 1993 WL 1624960, *3 (E.D. Mich. 1993). It is the EEOC’s burden, not Wal-Mart’s, to establish each element of its *prima facie* case of a pattern or practice of intentional hiring discrimination against females at DC 6097.¹ Because the EEOC fails to do so, Wal-Mart is entitled to summary judgment.

III. EEOC Cannot Prove a *Prima Facie* Case of Systematic, Intentional Gender Discrimination.

The EEOC’s own proof negates its *prima facie* case and establishes Wal-Mart’s subjective employment decisions, which cannot form the basis of a pattern or practice disparate treatment case. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 334, 336 (1977) (plaintiff must prove that “discrimination was the company’s standard operating procedure the regular rather than the unusual practice.”). Outlining its proof in detail, the EEOC attacks Wal-Mart for “not treat[ing] applicants in a uniform manner,” its “haphazard hiring process,” its “lack of consistency” and for “us[ing] virtually no hiring standards,” as well as for lack of uniformity in how Wal-Mart’s 130 interviewers conducted applicants’ interviews. (Response at 52, *see also*, pp. 13-14).

As compared to an individual disparate treatment case, here the EEOC has a much “higher burden” to establish that Wal-Mart had a “specific intent to discriminate against an entire group” on a pervasive, systematic, and standardized basis. *See EEOC v. Jordan Graphics, Inc.*, 769 F. Supp. 1357, 1382 (W.D. N.C. 1991); *Int’l Bhd. of Teamsters*,

¹ The lack of proof of knowledge for as many as 82% of the class members precludes an inference of a pattern of discrimination to the entire class, but, at a minimum, Wal-Mart is entitled to summary judgment as to the EEOC’s claims on behalf of class members who were rejected at the pre-screening stage.

431 U.S. at 336, 360. Subjective and “inconsistent” selection processes, by definition, cannot establish a pattern or practice of intentional discrimination. See *EEOC v. McDonnell Douglas Corp.*, 17 F. Supp. 2d 1048, 1054-1055 (E.D. Mo. 1998) (granting summary judgment to employer in pattern or practice age discrimination case, in part because “the decentralized and subjective nature of the decision making process undermines the claim that age discrimination was [the employer’s] ‘standard operating procedure.’”). See also *Sperling v. Hoffman-La Roche, Inc.*, 924 F. Supp. 1346, 1363 (D. N.J. 1993) (“... a decision by a company to give managerial 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.”). Wal-Mart’s subjective decision-making with “virtually no hiring standards” precludes the EEOC’s burden to prove an intentional, uniform, systematic “standard operating procedure” of discrimination.

While vigorously arguing that Wal-Mart’s hiring process was subjective, the EEOC offers no proof that Wal-Mart adopted its employment policies and practices with the intent that subjective decisions would result in gender discrimination. This absence of proof is fatal to the EEOC’s case. In *Abram v. United Parcel Service of America, Inc.*, 200 F.R.D. 424 (E.D. Wis. 2001), the plaintiff class alleged that UPS engaged in racial discrimination in determining supervisor pay by instituting “highly subjective performance rating and compensation systems” which resulted in lower pay for African-Americans. 200 F.R.D. at 425. Denying the plaintiffs’ motion for class

certification, the court noted that even if these subjective policies allowed local managers to discriminate, that discrimination would be driven by the biases of individual managers, not by UPS. *Id.* at 430. Such discrimination would be “one step removed” from UPS’s decision to implement the nationwide subjective policies. *Id.* Thus, there was insufficient evidence to hold UPS liable for the alleged discriminatory acts of individual managers.

By the same token, the EEOC’s disagreement with Wal-Mart’s hiring criteria cannot meet its burden of proof of a routine pattern of discrimination. The EEOC criticizes Wal-Mart’s interviewers for considering whether applicants had employment gaps, showed a “good attitude,” or were “motivated, self-driven, enthusiastic or eager.” (Response at 58). These criteria, whether good or bad, do not evidence intent to discriminate based on an applicant’s gender. Moreover, the Court should not act as a “super personnel department,” overseeing and second guessing employers’ business decisions.” *Bender v. Hecht’s Dep’t Stores*, 455 F.3d 612, 627 (6th Cir. 2006); *Denney v. City of Albany*, 247 F.3d 1172, 1186 n.8 (11th Cir. 2001) (noting that it is not the court’s role to “decide the wisdom” of an employer’s choice to focus on subjective criteria, as long as that choice is not discriminatory). The ultimate issue is whether Wal-Mart adopted its hiring policies in order to intentionally discriminate against women, not whether the EEOC believes they are the best, or even good, policies. *Bender*, 455 F.3d at 626.

Wal-Mart readily admits that some components of its hiring process rely upon the judgment of its manager/interviewers. As EEOC expert witness William Bielby admitted, Wal-Mart’s inherently subjective criteria, such as enthusiasm, “good attitude”

and team work, are valid criteria for making employment decisions. (Bielby Dep. at 172-174, attached at Tab 2). Title VII was intended to combat discrimination, not subjective decision-making:

It is inconceivable that Congress intended anti-discrimination statutes to deprive an employer of the ability to rely on important criteria in its employment decisions merely because those criteria are only capable of subjective evaluation.... Subjective reasons can be just as valid as objective reasons....

Denney, 247 F.3d at 1186 (quoting *Chapman v. A.I. Transport*, 229 F.3d 1012, 1033-1034 (11th Cir. 2000)). See also, *Serrano v. Cintas Corp.*, 2008 WL 4539339, *12 (E.D. Mich. 2008) (citing *Grano v. Dep't of Dev. of the City of Columbus*, 699 F.2d 836, 837 (6th Cir. 1983) adopting the reasoning in *Denney*). "Given that employers must have some flexibility in making decisions, it is incumbent upon Plaintiff to submit some evidence that [the employer's] use of subjective criteria was motivated by an intent to unlawfully discriminate." *Daniels v. Square D Co.*, 2006 WL 3761924, *6 (W.D. Tenn. 2006); see also *Grano*, 699 F.2d at 837 ("Subjective employment decisions, however, are not illegal per se.").

In order to overcome summary judgment, the EEOC must come forward with evidence that Wal-Mart adopted its subjective hiring criteria with "specific intent to discriminate against an entire group," not just that it employed subjective criteria. *Serrano*, 2008 WL 4539339 at *17. In fact, the EEOC's proof of the lack of a uniform, consistent process negates its claim of a deliberate standard operating procedure of gender discrimination.

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

Even if the EEOC could present proof of knowledge of protected class and of intent to discriminate, the EEOC must at the outset present accurate, reliable and relevant statistical evidence to establish its *prima facie* case. See *EEOC v. American Airlines, Inc.*, 48 F.3d 164, 172-173 (5th Cir. 1995); see also *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 158-159 (2nd Cir. 2001). Second, that evidence must show a significant statistical disparity between treatment of otherwise similarly situated male applicants and female applicants. *Morgan v. United Parcel Service of America, Inc.*, 380 F.3d 459, 463-464 (8th Cir. 2004); *EEOC v. United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Indus., Local 120*, 9 F. Supp. 2d 836, 844 (N.D. Ohio 1998). Third, the statistical proof must eliminate nondiscriminatory explanations for the disparity. *Latosky v. Morrison-Knudsen Corp.*, 103 F.3d 129, 1996 WL 708346, *3 (6th Cir. 1996). If the statistical evidence does not do all three things, it is not sufficient to create an inference of illegal discrimination. See *Morgan*, 380 F.3d at 463-464. These failures are not just matters for the jury to weigh, as the EEOC asserts. (Response at 42). Instead, they are critical to the EEOC's ability to withstand summary judgment; courts routinely dismiss claims because of insufficient statistical proof. See *EEOC v. Jordan Graphics*, 769 F. Supp. 1357 at 1382; *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999); *EEOC v. American Airlines*, 48 F.3d at 172-173.

Conceding the many deficiencies in Barnow's proof, the EEOC asserts that they are not enough to render Barnow's statistical evidence "unusable." Nevertheless, 1)

Barnow's proof is based on erroneous and/or missing data; 2) Barnow's proof does not show a legitimate statistically significant disparity in male-female job offer rates; and 3) Barnow's proof does not eliminate non-discriminatory explanations for any disparity. The EEOC's statistical proof is thus insufficient to raise any inference of a pattern of gender discrimination to meet its *prima facie* case.

A. EEOC Cannot Present Reliable Statistical Evidence.

1. Barnow Agrees That He Ignored Key Variables That Could Provide Non-Discriminatory Explanations for Hiring Decisions.

Recognizing its burden to present reliable and accurate statistics to prove its *prima facie* case, the EEOC argues that Barnow "controlled for nearly every piece of information Wal-Mart sought via its employment application." (Response at 45). However, both Barnow and the EEOC concede that he ignored interviewer notes² and applicants' statements about their present employment and job responsibilities, work history and responsibilities at prior jobs, goals of employment, whether applicants have ever worked in similar physically-demanding jobs, experience working with power equipment, difficulty working in extreme cold or heat, pay expectations, applicants' strengths and weaknesses and available start date, thus rendering his information inaccurate and incomplete. (Response at 9, 45, 46 n.32) (Barnow Dep. at 121-123, 157-161, 263-264, conceding that he did not account for any information about these

² Wal-Mart strongly denies the EEOC's allegation that Wal-Mart interviewers wrote "inaccurate information or comments" on female applicants' interviewer notes. (Response at 46). However, Barnow did not identify this concern as his basis for ignoring the interview information (Barnow Dep. at 126-128, attached at Tab 3) and the EEOC has no proof that notes for male applicants were more or less accurate than for female applicants. Thus, this assertion does not create a genuine issue of material fact that gives rise to an inference of discrimination and is immaterial for purposes of Wal-Mart's Motion for Summary Judgment.

variables that was written on interview comment sheets, attached at Tab 3). In addition to ignoring job qualification information, Barnow's database also includes incorrect information written on paper applications, but corrected during the interviews that Barnow ignored. For example, class member Rochelle Millsap told her interviewer that she had no interest in orderfilling, even though she stated on her application that she sought an orderfiller job. (Millsap Dep. 30-32, 35-36, attached at Tab 4) (Millsap also complains that she was offered an orderfiller job despite her lack of interest in the position). Yet, Millsap's withdrawal from consideration for an orderfiller job is not captured by Barnow's database or analysis. (*See also*, Response at 15, "[I]n some instances, managers permitted some applications the opportunity to fill in incomplete information during the interview process." (citing Karr Dep. at 36; Reeves Dep. at 53, collectively at Tab 5)). The EEOC and concedes that its expert ignored a raft of information despite its relevance.

Because of the crucial flaws in Barnow's statistical analyses, the EEOC again improperly attempts to shift its burden to Wal-Mart, arguing that Wal-Mart must show that the omissions from Barnow's analyses would have changed Barnow's results. (Response at 46-49). The Sixth Circuit Court of Appeals, however, has clearly stated that the proponent of expert testimony -- here the EEOC -- bears the burden of proving its admissibility by a preponderance of the evidence. *Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244, 251 (6th Cir. 2001) (excluding expert testimony where proffering party did not prove reliability and relevance). The only Sixth Circuit Court of Appeals case relied on by the EEOC does not address the exclusion of expert analyses like Barnow's on the

basis of flawed and inaccurate data but, rather, discusses the requirement of an actual, as opposed to a theoretical, deficiency in the expert analyses to warrant exclusion. *Barnes v. GenCorp, Inc.*, 896 F.2d 1457 (6th Cir. 1990). Here there exists an actual, admitted deficiency in Barnow's analyses. It is clear that "if the underlying data upon which the statistical analysis is based is incomplete or incorrect, the analysis itself will be inaccurate." *EEOC v. H.S. Camp & Sons, Inc.*, 542 F. Supp. 411, 443 (M.D. Fla. 1982) (employment discrimination case) (*See also* Memo. in Support of MSJ at 18-19, 21, 29 and cases cited therein).

The EEOC's citation to *Bazemore v. Friday*, 478 U.S. 385 (1986) is inapposite. Although the Supreme Court held that a regression analysis is not required to account for "all measurable variables" to be probative, the Court stated that an analysis that excludes major variables may be "so incomplete as to be inadmissible and irrelevant." *Id.* at 400, n.10. Barnow did not ignore insignificant variables. He ignored admittedly crucial information on which hiring decisions could turn, including non-discriminatory reasons for these decisions. His failure to capture these key variables renders his regression analyses unreliable and insufficient to raise an inference of discrimination.

2. Barnow's Repeated Errors in His Database Render His Conclusions Inaccurate and Unreliable.

Not only does the EEOC concede that Barnow omitted important applicant information, it concedes that the data he did collect is erroneous, rendering his conclusions unreliable and insufficient to meet the EEOC's burden of proof. In effect admitting these mistakes, the EEOC instead argues that Barnow's analyses should be

weighed by the jury unless Wal-Mart can prove that “(1) the data is fundamentally flawed and (2) the flaws make a difference in statistical significance.” (Response at 48-49).

Again, the EEOC impermissibly tries to shift its burden of proof to Wal-Mart. As the proponent of expert testimony, however, the EEOC bears the burden of proving its admissibility by a preponderance of the evidence. *Nelson*, 243 F.3d at 251. Wal-Mart is not required to disprove the EEOC’s statistical evidence. *U.S. Info. Systems, Inc. v. Int’l Bhd. of Elec. Workers Local Union Number 3*, 313 F. Supp. 2d 213, 233, 235 (S.D.N.Y. 2004) (excluding expert’s testimony because “the plaintiffs are unable to establish that the data set utilized by [the expert] was unbiased.”). Even, the EEOC’s own cited authority does not require Wal-Mart to assume this burden. Rather, in *Barnes v. GenCorp*, the defendant argued that the sample size of the plaintiffs’ analysis was too small to yield reliable results, but provided no such evidence. 896 F.2d at 1467. The only rule to be gleaned from *Barnes* is that a defendant must have an evidentiary basis for its assertion that the plaintiff’s statistics are flawed. *Id.*

Unlike *Barnes*, Wal-Mart has strong evidentiary grounds for its concerns regarding the reliability of Barnow’s database and his analyses. Barnow admits that his database had a number of flaws due to numerous wrongly coded variables. (Barnow 3/20/09 Rebuttal Rep. at 9-12, attached at Tab 6). Barnow admits that he intended to capture these variables and that it was important to do so accurately. (Barnow Dep. at 173, 175-176, attached at Tab 3). Barnow corrected some of those errors only after

Wal-Mart's statistical expert identified some of them based on a random sample.³ Barnow's "Rebuttal" Report is essentially an admission that these errors (and others) existed in his database and consequently in his analyses.

The EEOC downplays the significance of Barnow's extensive errors, arguing that Barnow's results were "verified" by regression analyses on three databases not created for that purpose. (Response at 11, 48). One of the three databases was a sample database of 400 applications created by Wal-Mart expert Freeman in order to analyze Barnow's error rates; that sample database was in no way sufficient to support a regression analysis. (Freeman Dep. at 258, 383-384, attached at Tab 7). Similarly, because the other two applicant databases were created by Wal-Mart counsel's staff as a reference tool, they are not sufficiently accurate to support a regression analysis. (Freeman Dep. at 302-303, attached at Tab 7). Barnow's inappropriate comparison to each of Wal-Mart counsel's databases does not "verify" his results; it is merely a comparison of two unreliable databases. If anything, the alleged similarity of the results demonstrates how error-ridden Barnow's own database is.

Finally, despite the EEOC's attempt to minimize the effect of Barnow's flawed data, the admitted errors in his database altered his statistical conclusions. After correcting a multitude of errors in his Rebuttal Report, Barnow's calculated hiring shortfall for 1998-2001 changed by nearly 10% and his shortfall for 2002-2004 changed

³ Freeman's review did not cover Barnow's entire database; it was based on a random sample of applications (Freeman 4/7/08 Rep. at 14, attached at Tab 8). Thus, the errors that Freeman identified are only those contained in the sample and the EEOC has no proof that Barnow accurately fixed the Freeman-identified errors, much less that Barnow has identified and corrected all data errors such that his analyses are now reliable.

by more than 10%. (Barnow 3/20/09 Rebuttal Rep. at 12, attached at Tab 6; Barnow 3/1/07 Rep. at 5, attached at Tab 1). Barnow concedes that he could have taken steps to ensure the accuracy of his data, but did not do so. (Barnow Dep. at 217-218, 243-244, attached at Tab 3). His unreliable and incomplete data neither support the EEOC's *prima facie* case, nor meet its burden of proof.

B. EEOC Cannot Establish a Legitimate Statistically Significant Offer Disparity Between Male and Female Applicants.

Even if the EEOC could establish that Barnow's statistics are reliable, it cannot establish part two: that the statistical evidence shows a legitimate statistically significant disparity between Wal-Mart's treatment of otherwise similar male and female applicants.

First, the EEOC argues that even though Barnow's probability-of-hire figures are erroneous, his claimed hiring disparity is nonetheless statistically significant. The EEOC ignores the direct correlation between Barnow's assigned probability of hire for each applicant and a statistically significant male-female job offer disparity. (Response at 43). Because Barnow's calculation of probability of hire is admittedly "poor," then his resulting calculation of offer disparity is inaccurate. (Barnow 3/1/07 Rep. at 4, 17, 19, attached at Tab 1). The asserted offer disparity is derived directly from the assigned probability: in order to determine whether there is a statistically significant disparity in the hiring of men and women, Barnow must first accurately determine "the probability of applications [sic] being offered a position at Wal-Mart." (*Id.* at 3) (*See also* Barnow 3/1/07 Rep. at 4, 17, 19). Barnow concedes that the "analyses of the probability of

applications [sic] 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.” (*Id.* at 3) (emphasis added).

Case law supports Barnow’s acknowledgement. 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). Because Barnow cannot predict who will receive an offer, he cannot accurately generate a reliable disparity in hiring. Without a reliable foundation for his analysis, Barnow’s asserted statistical significance cannot raise an inference of intentional discrimination.

Second, Barnow’s asserted statistically significant disparity is the result of his improper aggregation of data and thus cannot create an inference of discrimination. Contrary to the EEOC’s contention, Wal-Mart does not suggest that it is never appropriate to aggregate data, nor does Wal-Mart dispute that a reliably calculated statistical probability of .05 may be statistically significant. (Response at 43-44, 49-51). Here, however, Barnow elected to aggregate dissimilar data to achieve what he deems a statistically significant result. *See Abram*, 200 F.R.D. at 431 (race discrimination case wherein the Court criticized the plaintiffs’ “somewhat tendentious reliance on aggregate data” because focusing on grouped data “mask[ed] differences” among individual segments of data). Although Barnow has not identified such factors as the basis of his aggregation of data, the EEOC argues after the fact that “Barnow analyzed

the 1998-2001 and 2002-2004 periods separately in order to analyze like periods together” based on: (a) the EEOC’s filing its lawsuit in late 2001; (b) Wal-Mart’s changing of its application process in or about 2002; and, (c) the “chang[ing]” of “male/female differential in hiring” beginning 2002. (Response at 49-50). None of these assertions is true and do not provide a basis for Barnow’s aggregation of data.

First, the EEOC filed this lawsuit in August 2001, not “late 2001,” so that Barnow’s 2002-2004 analysis excludes four “like” months, while his 1998-2001 analysis includes a third of an “unlike” calendar year. Second, it is undisputed that Wal-Mart changed its hiring process in October 2002, not “in or about” 2002. (Jeanneret 4/4/08 Rep. at 13, attached at Tab 9). Thus, Barnow’s 2002-2004 period contains at least nine months of data from Wal-Mart’s prior hiring process. Finally, Barnow’s own analyses show that he did not aggregate data according to when the “male/female differential in hiring changed.” (Barnow 4/30/09 Supp. Rep., Ex. B3, attached at Tab 10). In fact, Barnow’s data shows that the “differential in hiring” varied significantly and sporadically every year. For example, from 1998 to 1999, the offer rate for men decreased by over 3.5%, while the offer rate for women increased. (*Id.*). Conversely, comparing 1999 to 2000, the offer rate for men increased while it decreased for women. (*Id.*). Again, between 2000 and 2001, the offer rates for men and women were the inverse of each other; as one rate went up, the other went down. (*Id.*). Thus, there is no common trend binding 1998-2001. Similarly, for each year of 2002-2004, although offer rates increased for both men and women, the disparity in offer rate continued to fluctuate. (*Id.*). Barnow’s selected periods of 1998-2001 and 2002-2004 are not “like

periods” and the EEOC’s justifications for his aggregation are not true. Barnow’s artificially generated statistically significant disparity cannot meet the EEOC’s burden to establish its *prima facie* case.

Apparently seeing the fallacy of grouping the data as Barnow did, the EEOC retreats to a fall-back position that aggregation was necessary for at least the latter period because the sample sizes for the individual years during 2002-2004 were too small (Response at 50-51), albeit sufficient for Barnow to establish that there is no statistically significant disparity of each of those years. (Barnow Dep. at 298, attached at Tab 3). Barnow himself, however, never stated in any of his multiple reports that small sample size was the reason he aggregated 2002-2004. To the contrary, Barnow actually discounted this reason in his deposition. (Barnow Dep. at 299, attached at Tab 3).

Further, the EEOC’s justification for Barnow’s aggregation of data from 2002 to 2004 is contradicted by Barnow’s stated reason for not including data from January 1, 2005 until February 15, 2005, the conclusion of the relevant time period. Barnow stated that he did not include applications from this six-week period in his analysis because there was insufficient data from this time and the sample size was too small. (Barnow 3/1/07 Rep. at 2 n.3, attached at Tab 1). If small sample size were the true reason Barnow aggregated 2002-2004 data, then he would not have excluded January 1, 2005-February 15, 2005 data from this aggregation. Barnow’s decision to aggregate 2002 to 2004 data is nothing more than results-oriented statistical manipulation which cannot meet the EEOC’s burden.

To make its *prima facie* case, the EEOC must present reliable statistical evidence that shows a legitimate statistically significant disparity between the job offer rates of similarly situated male and female applicants. It cannot do so because Barnow's asserted disparity, first, is premised upon his admittedly faulty calculation of probability of hire and, second, results from invalid data aggregation and manipulation.

C. EEOC Cannot Eliminate Non-Discriminatory Reasons for the Asserted Disparity.

Lastly, the Sixth Circuit Court of Appeals has expressly held that if a statistical analysis cannot eliminate non-discriminatory explanations such as random chance, then it cannot generate an inference of intentional discrimination. *Latosky*, 103 F.3d 129, 1996 WL 708346, *3. **Barnow concedes that his analyses do not.** Barnow specifically testified that sheer "randomness" in Wal-Mart's hiring decisions could explain his analyses. (Barnow Dep. at 345, attached at Tab 3). This admission negates the EEOC's ability to eliminate non-discriminatory reasons -- precisely like random chance -- as required to withstand summary judgment.

IV. EEOC's Anecdotal Evidence Is Insufficient to Meet the EEOC's Burden of Establishing Its *Prima Facie* Case.

Given the insufficiencies of its statistical proof, the EEOC devotes the bulk of its Response to myriad anecdotal testimony in a last-ditch effort to establish its *prima facie* case. Despite conceding that "[t]he basis of this lawsuit is not individual acts of disparate treatment," the EEOC resorts to precisely such evidence. (Response at 72). But, the vast majority of anecdotal evidence presented by the EEOC is gender-neutral,

speculative, hearsay, or otherwise inadmissible.⁴ Excluding such inadmissible evidence, the EEOC is left with just a handful of (disputed) statements from over 4,000 class members and 130 Distribution Center managers -- isolated and random evidence that is insufficient to establish a *prima facie* case of a systematic pattern of intentional hiring discrimination engaged in by over 130 Wal-Mart interviewers.

"While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination." *Cole Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *Middleton v. City of Flint, Michigan*, 92 F.3d 396, 405 (6th Cir. 1996); *EEOC v. AutoZone*, 2006 WL 2524093, *7 (W.D. Tenn. 2006). "In a pattern or practice class action, the initial focus is on proving an employer-wide intentional discriminatory practice or policy, not individual incidents of discrimination." *Attenborough v. Constr. and Gen. Bldg. Laborers' Local 79*, 238 F.R.D. 82, 96 n.16 (S.D. N.Y. 2006). "[S]ingle, insignificant, isolated acts of discrimination by a single business would not justify a finding of a pattern or practice...." *Int'l Bhd. of Teamsters*, 431 U.S. at 336 n.16. Thus, the EEOC must prove more than the "mere occurrence of isolated or accidental or sporadic discriminatory acts." *Id.* at 336.

A. EEOC Relies On Gender-Neutral And Speculative Testimony.

Evidence of gender-neutral conduct is not sufficient to establish a *prima facie* case that can withstand a motion for summary judgment. *See Walk v. Rubbermaid, Inc.*, 913 F. Supp. 1023 (N.D. Ohio 1994) (plaintiff's conclusions that her treatment was gender-based

⁴ Wal-Mart does not waive any grounds for motions in limine or other objections as to such evidence.

insufficient to withstand a motion for summary judgment); *Thomas v. Machinecraft, Inc.*, 1992 WL 6876, *2 (D. Md. 1992) (“The fact that an individual against whom an employment action is taken happens to be female, without more, does not give rise to a claim for sexual discrimination.”). Similarly, a party may not rely upon inadmissible speculation to overcome a properly supported motion for summary judgment. *Noble*, 391 F.3d at 724 (“Although [the plaintiff] is certainly entitled to his opinion, mere speculation cannot satisfy his burden of proving that [the defendant] discharged him on account of his race.”). See also, *Westlake Vinyls, Inc. v. Goodrich Corp.*, 518 F. Supp. 2d 918, 934 (W.D. Ky. 2007); *Lewis*, 355 F.3d at 533; *Rao v. County of Cook, Ill.*, 2003 WL 22764588, *10 (N.D. Ill. 2003) (“A plaintiff ‘cannot thwart summary judgment by speculating as to an employer’s state of mind.’”). Despite such prohibitive precedent, the EEOC relies in large part on gender-neutral comments and speculation to support its *prima facie* case:

- Interviewer asked class member why she thought she could do job after she had asserted” she could do it (Smith-Hall Dep. at 71-72);
- Interviewer “kept asking [her] if [she] could lift.” (Brinson Dep. at 27-29);
- Interviewer talked with class member about how they “load with pallets [at DC 6097]” (Cox Dep. at 56);
- Interviewer asked about daycare arrangements and age and gender of children (Hammons Dep. at 26);
- Interviewer asked about childcare and transportation arrangements (Lawson Dep. at 27-28);
- Interviewer “kept asking if [she] could lift” (Vires Roark Dep. at 44);
- Interviewer asked marital and family status, availability to work and transportation (Overbey Dep. at 80);
- Interviewer asked about family status (Vaughn Dep. at 99).

(Response 25-26) (collectively attached at Tab 11). These questions and comments do not raise an inference of intentional gender discrimination simply because they were made to a female applicant. *See Machinecraft, Inc.*, 1992 WL 6876, at *2.

Further, the EEOC has no proof that male applicants were not asked the same questions. *See, e.g., Cameron v. Ohio*, 2009 WL 2610986, *3-4 (6th Cir. 2009) (affirming summary judgment for defendant because plaintiff failed to prove he was treated differently than similarly situated non-protected employees). To the contrary, there is record evidence that interviews for male applicants were conducted in the exact same way as interviews for female applicants. (*See e.g.*, male applicant William Carney was told orderfilling job was "hard work. . . . like cutting tobacco, it was wide open all the time, real fast-paced work, hard work.") (Carney Dep. at 22); (male applicant Scott Huff was asked "questions like with my past jobs or like if I could hold certain things, lift certain weights, or with -- if I could deal with cold or heat or such") (Huff Dep. at 23) (collectively Ex. A). (*See also*, Ex. B, Walter Hayes interview notes, "family here, wife retired"); (Ronnie Combs interview notes, "just got married, 2 kids"); (Kelvin Burdette interview notes, "single father"); (Shane Howard interview notes, "child, wants to be closer to home"); (Donald Neace interview notes, "going to school, living w/ wife.")

The EEOC also alleges that gender-neutral interview notes and interviewers' gender-neutral stated reasons for not hiring class members somehow support an inference of discrimination simply because the applicant is female:

- "Did not give specific answers to several questions. When I took her for a tour and showed her what an orderfiller can do she made the comment, 'I don't know if I can do that'"

- "Does not want orderfilling"
- "Called on 9/18/03 and was no longer interested"
- "Not interested anymore"
- "Number disconnected"
- "No show"
- "Not interested in third shift positions"
- "Wants a third shift job"
- "Cannot work available shifts."

(Response at 27-29). All of these alleged statements are indisputably gender-neutral yet the EEOC asks the Court to use these statements to infer discrimination simply because the applicant is female, again without any proof that male applicants were treated differently or more favorably.

Similarly, the EEOC asserts that a gender-neutral process of placing a job applicant on "hold" for consideration for other jobs is evidence of gender discrimination. (Response at 31-39). Wal-Mart's hiring process and application cover sheet give interviewers three options when interviewing applicants: "Yes," "No" and "Hold," designated as "Y," "N," or "H." (See Application Cover Sheet, Barnow Dep. Ex. 7, attached as Ex. C). Such a gender-neutral option cannot raise an inference of gender bias and there is no evidence that male applicants were treated differently. In fact, record evidence shows that male applicants were placed on "hold" as well. (See Ex. B). And, even if this gender-neutral process could generate an inference of discrimination, the EEOC identifies only 17 of 4,012 class members whose applications were placed on "hold" by two interviewers, Mike Giles and Jim Gulock, of 130 interviewers, hardly the evidence of systematic intentional discrimination needed to support a pattern or practice of discrimination.

The EEOC also relies upon conclusory and speculative testimony, again without proof that males experienced better or different treatment:

- Interviewer “would make expressions with his face like [Lawson] was lying to him” (Lawson Dep. at 107-108);
- Interviewer doubted her (Cox Dep. at 57-59);
- Interviewer “insinuate[ed] that [she] would use the girl card” (Harshman Dep. at 107-110);
- Interviewer acted like he did not “anticipate[] the interview process going any farther” (Nobles Dep. at 32-34);
- Interviewer acted like he “didn’t care about the interview,” and “didn’t think [she] could handle the job” and Asher felt she was “blown off” (Asher Dep. at 71); and
- Interviewer acted “like he was just reading off of a sheet of paper” and “he wasn’t interested in [her]” (Quarrels Dep. at 40-42).

(Response at 24-26) (collectively attached at Tab 12). Clearly inadequate to support its *prima facie* case, these gender-neutral and conclusory assertions cannot defeat summary judgment.

B. EEOC’s Anecdotal Evidence Is Inadmissible Hearsay, Stray Comments and/or Irrelevant.

1. *Most of the EEOC’s Proof Is Inadmissible Hearsay That May Not Be Considered By the Court.*

After eliminating inadmissible gender-neutral and speculative testimony, the vast majority of the remaining EEOC anecdotal “proof” is inadmissible hearsay that cannot overcome a properly supported motion for summary judgment. *See Knox v. Neaton Auto Products Mfg., Inc.*, 375 F.3d 451, 457 (6th Cir. 2004) (court cannot rely upon inadmissible hearsay in ruling on a motion for summary judgment). Attempting to render such proof admissible, the EEOC broadly mischaracterizes these out-of-court statements as “told by Wal-Mart employees, agents and/or supervisors,” and argues

that they are not hearsay as party-opponent admissions under Fed. R. Evid. 801(d)(2). (Response at 59-60, n.47). Analysis of the relied-upon testimony shows that it is indeed hearsay, not subject to any exception, and inadmissible to counter summary judgment.

An out-of-court statement is not hearsay if it is made "by the party's agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship." Fed. R. Evid. 801(d)(2)(D). The Sixth Circuit Court of Appeals has defined the application of this Rule in discrimination cases. *See, e.g., Barner v. Pilkington North America, Inc.*, 399 F.3d 745, 750 (6th Cir. 2005) ("Rule 801(d)(2)(D) is designed to bind the employer where one of its managerial employees makes a statement within the scope of the employee's duties as a manager."); *Liadis v. Sears, Roebuck and Co.*, 47 Fed. Appx. 295, 303 (6th Cir. 2002) ("Statements by employees are outside of the scope of an employee's employment, and therefore not subject to the party-admission rule, when they concern decisionmaking processes into which the employee has no input, or decisions to which they were not a party."); *Hill v. Spiegel, Inc.*, 708 F.2d 233, 237 (6th Cir. 1983) (mere fact that the declarant is a manager is insufficient to make the statement non-hearsay; only statements made by managers within the scope of manager's duties are non-hearsay).

Moreover, "statements by non-decisionmakers, or statements by decisionmakers unrelated to the decisional process itself cannot suffice to satisfy the plaintiff's burden of demonstrating [discriminatory] animus." *Bush v. Dictaphone Corp.*, 161 F.3d 363, 369 (6th Cir. 1998). Such "stray remarks" by nondecisionmakers or decisionmakers unrelated to the adverse employment decision cannot be considered as evidence of

discriminatory intent. *Tooson v. Roadway Express, Inc.*, 47 Fed. Appx. 370, 375 (6th Cir. 2002). “The party arguing for admission bears the burden of establishing the proper foundation for the admissibility of the statements.” *Liadis*, 47 Fed. Appx. at 303. Moreover, the Sixth Circuit Court of Appeals has held that it is reversible error for trial courts to admit such statements. *See Smith v. Leggett Wire Co.*, 220 F.3d 752, 760 (6th Cir. 2000).

Despite the EEOC’s attempt to shoehorn testimony into party-opponent admissions, most of the statements cited in the EEOC’s Response were made by non-employees, employees who were not involved in hiring decisions, or decision-making employees not acting within the scope of the employees’ duties:

- Comment by hourly unloader/slotter Rick Combs, not involved in hiring, that DC doesn’t hire women (Jane Smith Dep. at 22);
- Statement made by “a group of people” at the DC 6097 entrance and by a man who Malicoate speculates was a supervisor that DC 6097 did not hire women (Malicoate-Howe Dep. at 57-58);
- Comment made by Mike Giles, whom she saw in the hall and who was not involved in her hiring decision, that he didn’t think orderfilling was a good job for women because of heavy lifting and extreme temperatures (Moore Dep. at 41-42, 48-49);
- Statement by employee of Manpower temporary employment agency, a non-Wal-Mart employee, that DC 6097 would not hire women (Huber Dep. at 58);
- Statement made by DC 6097 female “front office” employee not involved in hiring that “women did not work in the warehouse” (Powell Dep. at 32-34);
- Male employees not involved in hiring overheard saying that Wal-Mart generally picks men over women (Hubbard Dep. at 23);
- Statement by female employee not involved in hiring that Wal-Mart will not hire a woman unless she “is like a man” (Botkins Dep. at 81);
- Statement by supervisor at the Job Shop temporary employment agency, a non-Wal-Mart employee, that women were not “allowed” to work at DC 6097; (Strunk Dep. at 27-28);
- Statements by two orderfillers and hourly employee Lonnie Marion, not involved in hiring, that they do not hire women (Strunk Dep. at 97-99);

- Statement by Wal-Mart hourly employee Tim Salmons, not involved in hiring, that the DC “wouldn’t hardly hire women” (Barrett Dep. at 24);
- Statement by former Wal-Mart hourly orderfiller, Dennis Miller, not involved in hiring, that DC 6097 “didn’t hire a lot of women” (Johnson-Walden Dep. at 82);
- Statement by an unknown female who answered the phone at DC 6097 that “we don’t really hire women here except for office positions” (Shannon Bowling Dep. at 49);
- Statements by unknown managers that women could not do orderfilling (Elliot Dep. at 19-21);
- Comments made by two DC 6097 coaches after work while eating in restaurants or playing golf that they preferred not to hire women (Riley Dep. at 28-29);
- Statements by unknown managers to a former female Wal-Mart manager not involved in the hiring process that DC 6097 needed some “strong young bucks” (Cobb Dep. at 27-28);
- Statement by a Wal-Mart supervisor in casual, off-the-job, personal conversation unrelated to hiring decision, that because of her build, personality and appearance she would not be hired because she would be a “distraction to the men” (Murray Dep. at 105, 114);
- Statement by Jimmy Lewis, supervisor at Wal-Mart retail store not involved in hiring at DC 6097, that she would stay at the retail store because she was “too pretty” to work at the DC and would “get in trouble there” (Smith Dep. at 121);
- Statement by Hammons’ husband, Brian Hammons, that Wal-Mart manager Jim Gulock told Brian that if Brian and Cassandra were not married, he would like to have her “legs wrapped around him” (Hammons Dep. at 42);
- Statement by husband, a former hourly employee not involved in hiring, that male employees dressed in women’s clothes for a Mardi Gras party (Branum Dep. at 70-71, 75);
- Comment made by Mike Giles, whom she saw in the hall and who was not involved in her hiring decision, that women “couldn’t do” orderfilling (Branum Dep. at 58-60);
- Statement by ex-husband, former hourly orderfiller, that DC held productivity contests and that losing male employees would shave their heads, dye their hair or wear women’s clothing (Stutler Dep. at 122);
- Statement by former supervisor not involved in hiring, Jason Andrews, that orderfilling was a “man’s job.” (Pence Decl. at ¶4, Response Ex. 130).

(Response at 17-21, 24) (collectively attached at Tab 13). As the proponent of this evidence, the EEOC bears the burden of proving that these statements are not hearsay. The EEOC cannot establish their admissibility because, even if true, they were made by non-employees, employees not involved in hiring decisions, or by decision-making

employees outside the scope of their duties in the hiring process. Such statements are hearsay and the Court should not consider them for purposes of summary judgment.

2. EEOC Impermissibly Relies Upon Other Irrelevant and Inadmissible Testimony.

The EEOC also relies upon testimony concerning alleged sexual comments and sexual harassment at DC 6097, arguing that evidence of workplace harassment is relevant and admissible here “to show a pattern or practice of gender discrimination present in a company’s policies and practices” and citing to a single case from the Tenth Circuit Court of Appeals for this proposition, *Pitre v. Western Elec. Co., Inc.*, 843 F.2d 1262 (10th Cir. 1988). (Response at 20-24, 62 n.49). But, *Pitre* involved allegations of gender discrimination against female employees in promotion and demotion decisions that resulted in “a clustering of women in the lower salary grades.” *Id.* at 1265. The Court permitted evidence that “management personnel, who made promotion and demotion decisions throughout the relevant period, held discriminatory attitudes toward women,” finding this evidence probative because it raised an inference that workplace decisionmakers discriminated against women in workplace promotions and demotions by acting upon those attitudes. *Id.* at 1270. *Pitre* does not stand for the general rule that all evidence of alleged workplace harassment is relevant to a hiring discrimination claim.

To the contrary, courts routinely hold that harassing or discriminatory conduct toward non-plaintiffs is irrelevant. In *Veliz v. City of Minneapolis*, 2008 WL 4544433 (D. Minn. 2008), the plaintiff police officer in a retaliation case sought to offer testimony

about a conversation among high-level decisionmakers regarding retaliation in considering the promotion of another officer. The court excluded the evidence, finding that it was irrelevant and unduly prejudicial. *Id.* at *1. The court found that under the circumstances, these discriminatory statements were inadmissible in part because the discriminatory statements were attributed to managers who played no role in the plaintiff's firing and because no discriminatory comments were attributed to the police chief who made the decision to fire the plaintiff. *Id.* Thus, the court found that this anecdotal testimony was irrelevant to the plaintiff's claims and that any slight probative value was outweighed by its prejudicial effect. *Id.*

Similarly, in *Allen v. City of Athens*, 937 F. Supp. 1531 (N.D. Ala. 1996), the plaintiff alleged that he was not hired for a position due to racial discrimination and sought to introduce testimony that various supervisors had told racial jokes and used derogatory racial slurs. The court found that this evidence was insufficient to support an inference of discrimination because there was no proof that such comments were in any way related to the decision not to hire the plaintiff. *Id.* at 1543. The court noted that this testimony could "permit an imaginative jury to infer that [the defendant] harbored discriminatory attitudes, but plaintiff has offered no evidence tending to show that those attitudes were a 'motivating factor' in [the defendant's] decision not to hire him." *Id.* at 1545-1546.

Here, the allegedly sexual statements relied upon by the EEOC are unrelated to the EEOC's allegations of hiring discrimination and there is no evidence that such statements played any role in hiring decisions. (Response at 20-24). This is not a sexual

harassment case. This is not a hostile work environment case. This is a gender discrimination in hiring case, and the ultimate issue is whether Wal-Mart intentionally discriminated against women in hiring, not whether Wal-Mart employees allegedly “harassed” female employees after they were hired. Thus, anecdotal testimony about female employees’ treatment in the workplace is inadmissible and not relevant to this hiring discrimination case and cannot be used to defeat Wal-Mart’s Motion for Summary Judgment.

C. The Remaining Anecdotal Evidence Is Insufficient to Establish a Standard Operating Procedure of Gender Discrimination in Hiring.

The EEOC’s remaining, arguably admissible evidence is insufficient to establish a *prima facie* case of intentional pattern or practice discrimination because it is, at best, proof of isolated and sporadic instances of bias from among over 4,000 class members.⁵ *United Assoc. of Journeymen*, 235 F.3d at 251 (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 v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 875-876 (1984).

The EEOC is left with just a handful of arguably admissible evidence of gender discrimination, which is insufficient to meet its burden to establish a *prima facie* case of systematic intentional discrimination: 12 class members: (Bebout, Bargo, Napier, Lawson, Ludeman, Vaughn, Long, Hammons, Stutler, Smith, Ramsey and Brinson) and three former managers (Van Jura, Jones, Sizemore). (Response at 17, 20, 21, 24-26). But,

⁵ Although Wal-Mart vigorously disputes this testimony, for purposes of its Motion for Summary Judgment only, Wal-Mart construes the testimony in the light most favorable to the EEOC. *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1133 (6th Cir. 1986).

the class members' 12 alleged discriminatory statements, ranging over a seven-plus-year period, are insufficient to establish a routine, standard operating procedure at DC 6097. Evidence of mere isolated or accidental or sporadic discriminatory acts will not suffice to show a pattern or practice of discrimination." *Maddox v. Claytor*, 767 F.2d at 1557 (affirming summary judgment where anecdotal evidence was "sparse," with "much of that.... unpersuasive and conclusory"). See also, *Metrocare v. Washington Metropolitan Area Transit Authority*, 679 F.2d 922, 929-930 (D.C. Cir. 1982) (dismissing class action race discrimination case because anecdotal evidence from six employees insufficient to establish a *prima facie* case for entire class of 400); *EEOC v. Jordan Graphics, Inc.*, 769 F.Supp.2d at 1383 (dismissing EEOC's pattern or practice claims based on unreliable statistical proof, court "seriously doubts" anecdotal evidence is sufficient to establish that defendant's standard operating procedure was intentional discrimination, *dicta*). Moreover, the testimony at most implicates 12 out of 130 interviewing managers.⁶ See *Sperling*, 924 F. Supp. at 1363 ("... the exercise by some managers of their discretion to discriminate would constitute 'the mere occurrence of isolated or accidental of (sic) sporadic discriminatory acts,' which is not a pattern or practice of discrimination."); *Abram v. UPS*, 200 F.R.D. at 430 (even if individual managers discriminated such action is "one step removed" from employer and sufficient to establish liability of employer).

A manager from 2001 to 2002, Tom Van Jura illustrates both the EEOC's misplaced reliance on these managers and its mischaracterization of record evidence.

⁶ Because several class members claim statements were made by unknown and unidentified interviewers, Wal-Mart construes their testimony in the light most favorable to the EEOC and assumes that no single interviewer made more than one statement, for a maximum of 12 individuals.

(Response at 19-20). Van Jura claims that he was told not to pass women along in the application process as an interviewer and that he never recommended a female applicant for an orderfiller job. (Van Jura Dep. at 19, attached at Tab 14). Yet, interview packets completed by Van Jura show that, during his 19-month employment at DC 6097, he in fact passed one-quarter of the 12 women he interviewed for continued consideration for the job. (See interview packets completed by Van Jura, attached as Ex. D). Yet even if such proof were reliable, it is still insufficient to create an inference of systematic, routine intentional gender discrimination.

The EEOC relies on gender-neutral proof and speculates about speakers' intent, with no proof that male applicants were treated differently. Its asserted "party-opponent admissions" do not pass muster for admissibility because they were hearsay statements made by non-employees, employees not involved in hiring, or employees outside the scope of hiring decisions. Further, the EEOC's proof of alleged sexual comments/conduct in the workplace is not admissible. All that remains of arguably admissible proof is about a dozen witnesses from among 4,012 class members and 130 interviewers - - clearly not sufficient to establish a deliberate institutional policy to exclude women from employment.

CONCLUSION

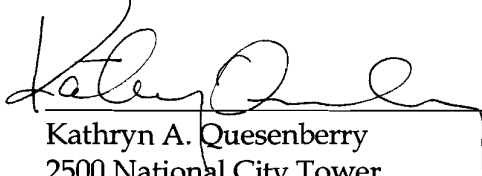
The EEOC cannot meet its "higher burden" to present affirmative proof that Wal-Mart engaged in a routine, intentional, standard procedure of discriminating against female job applicants. It has no proof that Wal-Mart knew the gender of the vast majority of class members when it denied them employment. And, the EEOC's proof of

Wal-Mart's "haphazard" and "inconsistent" hiring process negates any inference of a systematic practice of discrimination.

The EEOC's statistical proof fails to meet its requirements of reliability, a legitimate statistically significant disparity, and elimination of non-discriminatory explanations. And its attempt to fill the gap with gender-neutral, speculative, and inadmissible proof fails, leaving at best individualized testimony that "rarely if ever can" establish a routine systemic pattern of intentional discrimination to meet the EEOC *prima facie* burden. Accordingly, Wal-Mart's Motion for Summary Judgment should be granted.

Respectfully submitted,

DINSMORE & SHOHL LLP



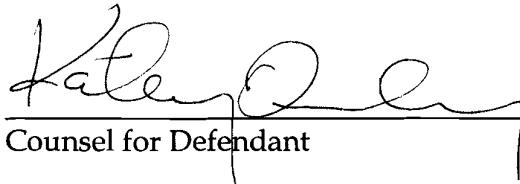
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CERTIFICATE OF SERVICE

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 14th day of September, 2009:

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