IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	**CIVIL ACTION NO. 01-339-KKC**
v.	)	
WAL-MART STORES, INC.	)	
Defendant.	)	

EEOC'S REPLY IN SUPPORT OF MOTION TO ENFORCE CONSENT DECREE

The EEOC's Motion to Enforce seeks the Court's assistance in interpreting and enforcing two Consent Decree provisions upon which the parties disagree: (1) Wal-Mart's obligation to "instate" or provide "rightful place hiring" for class members (Sections 301/302/303); and (2) Wal-Mart's obligation to allow EEOC inspections and/or provide documentary evidence upon "reasonable notice" (Section 901). Despite the limited nature of the relief sought by the EEOC, Wal-Mart's Response to the EEOC's Motion to Enforce addresses issues not properly before the Court such as: (1) whether Wal-Mart's current hiring process is "appropriate"[1] (Response at 12-13), and (2) whether Wal-Mart's Physical Abilities Test or Logistics Pre-Employment Assessment are properly validated [2] (Response at 5-6 and

1 The "appropriateness" of Wal-Mart's hiring process is not at issue. At issue is whether Wal-Mart is in violation of the Consent Decree and/or the intent thereof, by failing to instate the class members and instead inviting them to apply for employment.

2 Whether Wal-Mart's new Physical Abilities Test and/or its Logistics Pre-Employment Assessment are properly validated and/or have a disparate impact on women is currently the subject of several administrative charges that are being investigated by the EEOC's Louisville office. These charges are class charges that affect female applicants across the country. This issue will be ripe for litigation only if a "cause" Determination is issued and/or after the EEOC or a Charging Party files a lawsuit. Wal-Mart's attempt to bring the question of

Ex. 3). Because those issues are not properly before the Court the EEOC respectfully requests that the Court strike (or disregard) such briefing.

I. CURRENT STATUS OF INSTATEMENT

The EEOC has provided Wal-Mart with the names of 320 class members who indicated, via their claim forms, that they desired employment at DC 6097. On November 1, 2010, Wal-Mart reported job offers[3] to two of these women.[4] (Ex. 1.) As of this date, Wal-Mart has not reported job offers to the remaining 99.4% of those requesting instatement. Given that Wal-Mart: (1) invites the class members to apply and does not inform them of the instatement obligation; (2) subjects the class members to a far more rigorous hiring process than when they were discriminated against;[5] and (3) rejects nearly every woman who takes its Physical Abilities Test, it is not surprising that many women choose to abort the process, believing it to be continued discrimination by Wal-Mart.

II. ARGUMENT

A. EEOC's Motion for Enforcement is Ripe for Review.

On September 20, 2010, pursuant to Section 902 of the Consent Decree, the EEOC gave notice to Wal-Mart of a Section 302 violation with respect to the instatement of class members. (Motion, Ex. 5.) Although the EEOC advised Wal-Mart of the 45 day time period

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disparate impact into this Court under the guise of "Consent Decree enforcement" should be rejected.

3 Upon information and belief, the only shift Wal-Mart is offering to the class members (contingent upon passing every step of the hiring process) is a Friday through Sunday 5:00 a.m. to 4:30 p.m. 33 hour per week shift.

4 Wal-Mart accuses the EEOC of misrepresenting to the Court the number of offers. (Response, n.1.) Wal-Mart ignores the fact that the EEOC's Motion was filed on October 15, 2010, but Wal-Mart did not report the two offers until November 1, 2010. (Ex. 1.)

5 Wal-Mart asserts that the Physical Abilities Test gives the class members a realistic sense of the physical activity of the order filler job. (Response at 2.) However, orderfillers do not lie on the floor and do sit-ups as part of their jobs. Nevertheless, it appears that class members are being excluded because they cannot perform an unspecified number of sit-ups. See Physical Abilities Test results for select class members, collectively attached as Exhibit 2. See also, Exhibit 3, Physical Abilities Test results for Vikki Swartz, one of the two women who passed the test, apparently due to her ability to do sit-ups.

within which it could conduct an investigation and offer a response, Wal-Mart made clear that it did not intend to use the 45 day period to conduct an investigation and finalize its position on the instatement violation. (Motion, Ex. 6.) Indeed, Wal-Mart's current position on the instatement violation is the exact same position it asserted on September 24, 2010, in response to the EEOC's September 20, 2010 letter.

Likewise, Wal-Mart's position on the meaning of Section 901's "reasonable notice" provision has not changed. On September 20, 2010, the EEOC requested documentation pursuant to Section 901 of the Consent Decree. (Motion, Ex. 5.) On September 24 and September 30, 2010, Wal-Mart articulated the position that reasonable notice entitled it to a 45 day response period. (Motion, Exs. 6, 8.)

Given that: (1) the class members have waited up to ten years or more to obtain relief in this case, and (2) Wal-Mart articulated its position within days of the EEOC's September 20, 2010 letter, a 45 day delay would have served no purpose, nor would it have changed the need for the EEOC's motion. (See Response n.5.)

B. Wal-Mart's Distortion of its Section 302 Instatement Obligation to One of Inviting Class Members to Apply, Should be Rejected.

1. It was Intended that "Instatement" Mean Instatement.

The EEOC drafted the initial draft of Section 302 of the Consent Decree and specifically used the term "instatement." (Eisele Decl. ¶ 7.)[6] The EEOC routinely seeks instatement as part of the resolution of employment discrimination cases and fully intended that "instatement" would be given its normal meaning, as used in employment discrimination cases. (Id. at ¶ 8.) See also, 29 C.F.R. Section 1614.501(a)(3)(1993) ("When an agency, or the Commission, in an individual case of discrimination, finds that an applicant or employee

6 The Eisele Declaration is attached as Exhibit 4.

has been discriminated against, the agency shall provide full relief....which shall include....(3) an unconditional offer to each identified victim of discrimination of placement in the position the person would have occupied but for the discrimination suffered by that person..."); Cloke v. West Clermont School Dist. Bd. Of Education; 2006 WL 2873551 (S.D. Ohio 6/29/06) ("the presumptive equitable remedy in an employment discrimination case is reinstatement or instatement"); Bullen v. Chafinch, 336 F. Supp. 2d 357, 360 (D. Del. 2004) (because instatement is a remedy for illegal discrimination, there is the assumption that the aggrieved party is qualified for employment and so any attempt to subject the aggrieved party to new requirements or testing is rejected).

The EEOC's draft of Section 302, sent to Donald Livingston ("Livingston"), counsel for Wal-Mart, read, "subject to reference checks and drug testing which were employed during the relevant time period at DC 6097 for all new hires." (Eisele Decl. ¶ 9.) Because instatement by definition is unconditional, the EEOC's intent, as drafter, was to ensure that Wal-Mart would not be forced to hire persons who were otherwise non-hirable as employees. (Id.)

Livingston reviewed the EEOC's draft on February 24, 2010, and requested that the clause "subject to reference checks and drug testing which were employed during the relevant time period at DC 6097" be changed to "subject to criteria that is applicable for all new hires in the order filler position," the language currently in dispute. (Id. ¶ 10.) The EEOC agreed to the change, with the understanding that Wal-Mart would have the right to exclude class members who failed to meet uniformly enforced non-discriminatory screening criteria, for example: minimum age, legal right to work in the United States, those with problematic background checks or any other non-discriminatory uniformly enforced hiring

criteria. (Id.)

Contrary to Wal-Mart's suggestion (Response at 12), the parties did not and could not identify with specificity all of the minimum criteria for hires since Wal-Mart was to be given the right to add additional objective non-discriminatory uniformly enforced minimum criteria for hires; for example, not hiring those who had been previously terminated or those with negative references. (Id. at ¶ 11.) The EEOC did not intend that the "subject to" criteria include passing every stage of the normal hiring process, including subjective and unproven testing such as the Logistics Pre-Employment Assessment,[7] the Physical Abilities Test or employment interviews. (Id. at ¶ 12.) Had the parties intended that instatement mean simply an invitation to class members to apply for employment,[8] the parties would have used the language "subject to passing all stages of the normal hiring process." (Id.) Further, the terms "instatement" or "rightful place hiring" would have been replaced. (Id.)

2. To the Extent There is Any Ambiguity, the Consent Decree as a Whole, the Purposes of the Decree and Extrinsic Evidence Support the EEOC's Interpretation of Section 302.

Neither party believes that there is an ambiguity in Section 302 yet both parties interpret it differently. To the extent the Court determines that there is an ambiguity in interpreting the interplay between "instatement" and the "subject to" clauses, courts look to the conduct of the parties with respect to the agreement, the agreement as a whole, the purposes of the agreement and if all else fails, who drafted the provision in question. See A.L. Pickens Co., v. Youngstown Sheet & Tube Co., 650 F.2d 118, 120 (6th Cir.1981)

7 While Wal-Mart claims that the Logistics Pre-Employment Assessment is similar to the Orion Survey that it used in the past (Response at 6-7), the Orion Survey was only used to develop interview questions, not to exclude applicants. (See Reynolds Dep. at 56-64 and Earls Dep. at 97-100, collectively attached as Exhibit 5.)

8 The EEOC does not object to Wal-Mart collecting information from the class members as such a practice is necessary for the creation of a personnel file. See Response at 15. The EEOC does object, however, to correspondence sent to class members that simply invites them to apply for employment at Wal-Mart, adds brand new hurdles and does not advise them of the instatement obligation under the Consent Decree. (See Response, Ex. 1.)

(citing Billips v. Hughes, 259 S.W.2d 6, 7 (Ky.1953)) ("[t]he construction of the parties is best evidenced by their conduct with respect to the agreement"); Behr Systems Inc. v. Envirometric Controls Process Inc., 2003 WL 722176 (6th Cir. Feb. 28, 2003), citing Martin Oil & Gas v. Fyffe, 251 Ky. 517, 65 S.W.2d 6867 (1933) (Kentucky courts also "look to the entire instrument and deduce the intention of the parties from the language employed."); Warner v. DSM Pharma Chemicals North America Inc., 2010 WL 298307 (W.D. Mich. Jan. 19, 2010), citing 11 Williston, Contracts (4th Ed), § 30:7, pp 87-91) ("the fact finder must interpret the contract's terms, in light of the apparent purpose of the contract as a whole, the rules of contract construction, and extrinsic evidence of intent and meaning"); Theatre Realty Co. v. P.H. Meyer Co., 48 S.W.2d 1, 2 (Ky. App. 1932) (contractual provision to be construed against drafter).

a. Wal-Mart's Interpretation of Section 302 is Inconsistent With The Purpose of the Consent Decree.

The EEOC represents the public interest and files suit in the public interest, to remediate discrimination. In EEOC v. General Telephone Co. of the Northwest, Inc., 446 U.S. 318, 323-324 (1980), the Supreme Court specifically addressed the role of the EEOC as enforcer:

> Section 706(a) empowers the EEOC 'to prevent any person from engaging in any unlawful . . . practice' as set forth in the Title. Section706(f)(1) specifically authorizes the EEOC to bring a civil action against any respondent not a governmental entity upon failure to secure an acceptable conciliation agreement, **the purpose of the action being to terminate unlawful practices and to secure appropriate relief, including "reinstatement or hiring . . . , with or without back pay," for the victims of the discrimination.** See § 706(g). (emphasis added.)

Id. at 323-324.

As discussed below, the EEOC fully intended that class members be instated in

positions at DC 6097, in accordance with the EEOC's settlement procedures and practices. It would be inconsistent with the purposes of this litigation and of the Consent Decree, and the parties did not intend, a remedy which puts class members through continued hurdles to become employed at DC 6097 or one which subjects the class members to possible continued discrimination via subjective and unproven testing which may have a disparate impact on women. See Daubert transcript at 617[9] (re-direct by Quesenberry) ("Now, you are aware, aren't you, Dr. Bielby, that there had been a lot of complaints and in fact litigation brought in part by the EEOC alleging that strength testing creates an adverse impact against female applicants, aren't you?")

To the extent there is any question as to the meaning of Section 302, Wal-Mart's interpretation is contrary to the purposes of the Decree and must be rejected. Further, because this Court retained jurisdiction over the Decree, it has the power to enjoin Wal-Mart from using the Physical Abilities Test, the Pre-Employment Logistics Assessment and/or interviews to exclude class members from employment. See Brown v. Neeb, 644 F. 2d 551 (6th Cir. 1981) (court properly enjoined layoff which would be contrary to purposes of consent decree).

b. The Conduct of the Parties Supports the EEOC's Interpretation of Section 302.

Contrary to Wal-Mart's representation of lengthy negotiations (Response at 12), the Consent Decree for this case was drafted and negotiated over a period of four days, while trial counsel were preparing for trial.[10] (Eisele Decl. ¶ 6.) All negotiations were had between EEOC counsel and Donald Livingston, Esq. of the Akin Gump, Strauss Hauer & Feld, LLP

9 Cited portions of the Daubert Transcript are attached as Exhibit 6.
10 Had a trial date not been impending, the parties would have had more time to review and correct any possible ambiguities in the Decree.

law firm which had been retained by Wal-Mart to enter into settlement negotiations with the EEOC. (Id. ¶ 3.) Donald Livingston was former General Counsel for the EEOC and his job with the EEOC, which included settlement approval authority, required familiarity with the EEOC's settlement standards. (Id. ¶ 4.) In fact, after leaving the EEOC, based on his familiarity with the EEOC and its procedures, Livingston authored a book entitled EEOC Litigation and Charge Resolution (BNA 2004). An overview of the book by BNA notes that the book "also provides information on the EEOC's litigation and settlement practices. . ." (Ex. 7.) There can be no question that Livingston was aware of the EEOC's need to obtain instatement of the class members and that he knew what instatement meant in the context of employment discrimination litigation. (Eisele Decl. ¶ 8.)

During the negotiation process, neither Livingston nor anybody else from Wal-Mart ever questioned the interplay between the "instatement" and "subject to" clauses or requested clarification or removal of the term "instatement." (Eisele Decl. ¶ 13.) Nor did Wal-Mart indicate during the negotiations that it planned on implementing a Logistics Pre-Employment Assessment or Physical Abilities Test[11] to screen the class members. (Id. ¶ 14.) In fact, during Daubert hearings, shortly before the Consent Decree was drafted, Wal-Mart expressed the contrary view that physical abilities tests were not necessary and also indicated its awareness of the EEOC's belief that physical abilities tests had a disparate impact on women.[12] (Ex. 6.at 388, 404-405, 591, 616-617.)

There are only two possible interpretations of Wal-Mart's conduct with respect to the addition of the Physical Abilities Test and the Logistics Pre-Employment Assessment.

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11 The parties specifically addressed Wal-Mart's hiring process via Section 204 of the Decree. Section 204 states that "Wal-Mart will use validated interview questions for the order filler position." There is no mention of a Physical Abilities Test or Logistics Pre-Employment Assessment.

12 While Wal-Mart claims that its test is "validated," no such determination has been made and the issue of its validity is under review by the EEOC's investigative staff.

Neither benefits Wal-Mart. The first explanation is that Wal-Mart did not bring up the issue of these tests during settlement discussions because it did not interpret instatement as being subject to these tests. In that case, its current position is inconsistent with its conduct during negotiations. The second interpretation of Wal-Mart's conduct is that Wal-Mart committed a fraud by intentionally withholding critical information from the EEOC during settlement negotiations. If Wal-Mart truly believed that Section 302 permitted it to administer the Physical Abilities Test to the class members and it knew that: (1) the EEOC was concerned about the disparate impact of such testing; (2) such testing was in the works and would be implemented before or at the same time as class member instatement; and (3) the use of such testing was inconsistent with Wal-Mart's position on strength/physical abilities testing throughout this litigation, it had an obligation to disclose and is responsible for any resulting damages. See Sallee v. Fort Knox National Bank,N.A., 286 F.3d 878 (6th Cir. 2002) (fraudulent concealment by silence when previous incomplete or inaccurate representations made or if party has superior knowledge).

Thus Wal-Mart's conduct indicates that it either agreed with the EEOC's interpretation of Section 302 or it intended to deceive the EEOC in order to obtain a settlement and avoid its instatement obligation. Under either scenario, the EEOC's interpretation of Section 302 should be adopted and Wal-Mart should be enjoined from using the Physical Abilities Test, the Pre-Employment Logistics Assessment and/or interviews to exclude class members from employment.

c. The Consent Decree as a Whole Supports the EEOC's Interpretation of Section 302.

The Consent Decree references Wal-Mart's instatement obligation in three separate places. In addition to using the term "instatement" in Section 302, in Section 303, the EEOC

used "rightful place hiring," a synonym for instatement. In section 301, the EEOC again used the term "instatement." Nowhere in the Decree does it state that employment of the class members is subject to all steps of the normal hiring process. If the parties intended that instatement be subject to all steps of the normal hiring process, the parties would have stated so in the Consent Decree. (Eisele Decl. ¶ 12); Behr, 2003 WL 722176 * 15-16.

Wal-Mart asserts that "it is a well settled rule of construction that effect must be given to each word, and that each word must be presumed to have a purpose." (Response at 10.) Yet Wal-Mart disregards the terms "instatement" and "rightful place hiring" and focuses solely on the "subject to" clause. Wal-Mart further suggests that under the EEOC's construction, the "subject to" clause is superfluous because Section 402 identifies "eligible claimants." (Id.) Wal-Mart's assertion is erroneous: the EEOC agreed to the "subject to" clause in Section 302 to include drug testing and reference checks as well as to allow Wal-Mart the ability to use basic non-discriminatory uniformly enforced minimum hiring criteria beyond those specified by Dr. Barnow. (Eisele Decl. ¶¶ 10-11.) The EEOC never agreed or intended that the class members be subject to Wal-Mart's full application process.

Finally, Wal-Mart asserts that even though the parties used the terms "instatement" and "rightful place hiring," the parties really meant "preferential" hiring.[13] (Response at 14.) However "preferential hiring" is legally distinct from "instatement." "Preferential hiring" is a quota remedy that typically benefits non-class members, not class members. Schlei and Grossman, Employment Discrimination Law, Second Edition, Chapter 37 Section 4A. Since the parties are in agreement that the instatement remedy envisioned by the parties was to benefit the class members, it is clear that the parties did not intend that "instatement" mean

13 Wal-Mart even claims that "Wal-Mart is not requiring applicants to 'apply' for open order filler positions." (Response at 14). The letters and calls made to the class members contradict this assertion. (See Response, Ex. 1 and EEOC's Motion, Exs. 2 and 4.)

"preferential hiring."

d. Contract Construction Principles Require That the "Subject to" Provision be Construed Against Wal-Mart, the Party who Drafted the Provision.

In Kentucky, if courts are unable to construe a contract to effectuate the parties' intent, they then use default rules. William C. Roney Co. v. Federal Ins. Co., 674 F.2d 587 (6th Cir.1982). One of those rules is that "a contract is to be read liberally in favor of the person who accepts it rather than in favor of the person who draws it." Theatre Realty Co. v. P.H. Meyer Co., 48 S.W.2d 1, 2 (Ky. App. 1932). In this case, the "subject to" clause in question was drawn by Donald Livingston, counsel for Wal-Mart. (Eisele Decl. ¶ 10.) To the extent the Court is unable to resolve the correct interpretation of Section 302's "subject to" clause, the clause should be construed against Wal-Mart. "A person who accepts a contract is not bound beyond the fair meaning of the writing which he accepts." B. Perini & Sons v. Southern Ry. Co., 239 S.W. 2d 964, 966 (Ky. 1951). The fair meaning of the "subject to" clause was that it be read in conjunction with the term "instatement," not that it transform "instatement" into the opportunity to apply for employment subject to the normal hiring process.

C. Wal-Mart is Impeding the EEOC's Ability to Monitor Compliance With the Consent Decree by its Unreasonable Interpretation of Section 901's "Reasonable Notice" Provision.

1. The Issue of the Interpretation of Section 901's Reasonable Notice Provision is Not Moot.

Section 901 of the Consent Decree provides the EEOC with the ability to monitor compliance with the Consent Decree. It states that the EEOC "may inspect the premises, interview employees, and request, examine, and copy documents upon 'reasonable notice.'"

While Wal-Mart has finally produced most of the documents requested by the EEOC during September 2010, Wal-Mart's unreasonable interpretation of "reasonable notice" will affect the EEOC's ability to monitor compliance in the future. Wal-Mart's claimed entitlement to a 45 day period for any Section 901 requests made by the EEOC will impair the EEOC's ability to monitor the Decree, determine whether violations have occurred, and act upon violations in a timely manner. Thus the issue is not moot.

2. Wal-Mart's Unreasonable Interpretation of "Reasonable Notice" Should be Rejected.

Had the parties intended that Wal-Mart be given 45 days to respond to an EEOC Section 901 request, the parties would have used "45 days" in Section 901 rather than "reasonable notice." As Wal-Mart itself asserts, "a Consent Decree 'must be construed as it is written, and not as it might have been written." (Response at 9.) Moreover, as discussed below, Wal-Mart's interpretation of Section 901 is not only inconsistent with the text of the Consent Decree, it is contrary to the definition of "reasonable."

For purposes of construing Section 901, Wal-Mart proposes that Section 901 be construed with Section 902, a separate provision which does not mention or refer to "reasonable notice."[14] There is no principled reason to infer that Section 902's 45 day period to remedy/respond to a violation is the same amount of time required to allow access to persons, premises or documents. The term "reasonable" "is a generic and relative one and applies to that which is appropriate for a particular situation." www.thefreedictionary.com. "Reasonable" by definition, requires an assessment of the circumstances. See Western Kentucky Coca-Cola Bottling Co., Inc. v. Red Bull North America Inc., 2010 WL 65029* 6

14 On the other hand, with respect to its Section 302 assertions, Wal-Mart divorces "instatement" from the "subject to" clause contained in the very same section.

(W.D. Ky. 1/5/10) (factual circumstances and harm must be evaluated in determination of "reasonable notice.")

The fact that the EEOC used the same letter to notify Wal-Mart of a Section 902 breach and to request Section 901 information (for purposes of determining if any additional violations occurred), did not transform Section 901's "reasonable notice" provision into Section 902's 45 day provision. Wal-Mart's unreasonable interpretation should be rejected and Wal-Mart should be required to respond to Section 901 requests within 7 days or less, unless there are extraordinary circumstances.

D. Wal-Mart's Failure to Instate the Class Members and Fill Open Order Filler Positions Cannot be Attributed to Inaction or a Breach on the EEOC's Part.

Wal-Mart requests that the Court excuse it for breaches of Sections 302 and 901 on the grounds that the EEOC allegedly breached Section 301 of the Consent Decree by depriving Wal-Mart of order filler employees and/or providing inaccurate lists of class members interested in order filler positions. (Response at 15.) Wal-Mart's accusation is frivolous. As discussed below, not only has the EEOC followed the Consent Decree provisions in providing Wal-Mart with names of class members for instatement, it is readily apparent that Wal-Mart's own actions have resulted in its lack of order filler hires.

Pursuant to Section 301 of the Decree, the lists sent to Wal-Mart of class members seeking instatement included "all eligible claimants. . . who "indicate an interest in instatement in a claim form submitted to the Administrator." All names submitted to Wal-Mart came directly from the Settlement Administrator,[15] an entity that was chosen by and is

15 The information the Settlement Administrator provides comes directly from claim forms filed by potential class members. Obviously, it is likely that during the time between completing the claim form and being contacted by Wal-Mart, some of the class members obtained jobs and/or reconsidered their interest in employment with Wal-Mart.

paid by Wal-Mart. While Wal-Mart may be unhappy with the amount of time it has taken the Settlement Administrator ("Administrator") to process claim forms and/or the fact that women turn down the order filling job after learning instatement is not automatic, neither the slow pace of the Administrator nor the rejection of the invitation to apply for employment is a breach of the Decree. The Decree only required that the Commission provide its initial list to Wal-Mart "no later than 180 days after the effective date of the Consent Decree." It is undisputed that the EEOC met this obligation. Section 301 indicates that "**to the extent practicable**, there shall be at least 25 names on the list at all times." It is not "practicable" for the EEOC or the Administrator to provide Wal-Mart with additional names if there are no names to provide.

It is readily apparent that Wal-Mart's own actions have resulted in the quick exhaustion of names from the instatement list. Wal-Mart appears to be doing everything in its power to avoid its instatement obligation so it can resume hiring male applicants. Out of the first 157 class members, Wal-Mart has admitted to excluding 35, to date, because they did not achieve some undefined score on a fitness test. (Response at 4.) It has also admitted to excluding 5 additional women because they were "non-competitive" on a Logistics Pre-Employment Assessment. Id. Additional class members expressed an interest in instatement but aborted the process, likely upon learning of the hurdles that Wal-Mart was imposing. Id. Further evidence of Wal-Mart's intent can be discerned from the single shift offered to the class members. Clearly, an employer with dire needs for order fillers should be able to offer shifts other than a 33 hour Friday through Sunday 5:00 a.m. to 4:30 p.m. shift. As the EEOC advised Wal-Mart (Response, Ex. 5), if it truly needs to fill positions, it should evaluate its own actions, as there are class members both interested in and available for employment as

order fillers.

III. CONCLUSION

The Consent Decree in this case resolved nine years of protracted litigation. The Consent Decree was negotiated over a short period of time, immediately prior to the March 1 trial date, as the parties prepared for trial. While both the EEOC and counsel for Wal-Mart (who was not trial counsel) believed that Sections 302 and 901 were clear and unambiguous, it has nevertheless become necessary for the EEOC to seek the Court's assistance in interpreting those two provisions as intended by the parties. The EEOC respectfully requests that the Court: (1) enjoin Wal-Mart from using the Physical Abilities Test, Logistics Pre-Employment Assessment and/or employment interviews for class members seeking instatement, and (2) order Wal-Mart to respond to Section 901 requests within 7 days or less, absent extraordinary circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that true and accurate copies of EEOC's Reply in Support of Motion to Enforce Consent Decree was sent via first class mail on this 24th day of November, 2010 to:

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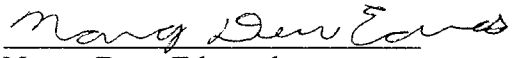

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