Appeal No. 04-____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, AND EDITH ARANA, on behalf of themselves and all other similarly situated, *Plaintiffs-Appellees*,

v.

WAL-MART STORES, INC., *Defendant-Appellant.*

On Petition for Interlocutory Review from the United States District Court
for the Northern District of California
Case No. C-01-02252 MJJ

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF DEFENDANT-APPELLANT WAL-MART STORES, INC. AND INTERLOCUTORY REVIEW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, *amicus* states as follows:

The Chamber of Commerce of the United States has no parent corporation, and no subsidiary corporation. No publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF INTEREST OF THE *AMICUS*

The Chamber of Commerce of the United States is the world's largest business federation, representing an underlying membership of more than three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing briefs in cases implicating issues of vital concern to the nation's business community. Many of the Chamber's members are employers subject to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §2000e (2003) *et seq.*, and other equal employment statutes and regulations. The Chamber's member companies routinely make and implement millions of employment decisions each year, including hires, promotions, transfers, compensation rates and structures, disciplinary actions, and terminations. They devote extensive resources to developing employment practices and procedures, and developing compliance programs designed to ensure that all of their employment actions are consistent with Title VII and other applicable legal requirements.

Despite these efforts, if the district court's Order stands, the Chamber's members are likely to face exposure to billions of dollars in new claims, without any guarantee of an opportunity to present fully the evidence in their own defense.

As a result, the Order creates perverse incentives, encouraging employers to forego defending their rights in court in favor of settlement, and to forestall these lawsuits altogether by adopting quota-like policies that are antithetical to the purposes and spirit of Title VII. The Chamber's interest in this case stems from the Order's potentially disruptive and destructive effect on the Chamber's members.

ARGUMENT

I. THIS COURT SHOULD REVIEW AND REVERSE THE DISTRICT COURT'S DECISION

The district court's opinion leaves employers in an untenable position. It adopts a sweeping standard for class certification that virtually *guarantees* that employers will face large-scale employment discrimination class actions, exposing them to billions of dollars in potential damages. Moreover, it purports to eliminate the fundamental employment-law right to present rebuttal evidence demonstrating that particular class members have not actually suffered from discrimination. The implications are overwhelming: the predictable effects of these holdings will be to force employers to settle these huge claims no matter what their merit, effectively depriving them of their right to trial, and to encourage employers to adopt the kinds of quota-like policies that Title VII was enacted to prevent. This Court should grant interlocutory review of, and reverse, the district court's erroneous and destructive Order.

A. The District Court's Order Creates Sweeping Exposure to Employment Class Actions

According to the district court, *both* the decentralized *and* the centralized features of an employer's decisionmaking practices can contribute to a finding of commonality under Rule 23. Thus, the court found that the "broad range of discretion" Wal-Mart confers on individual managers to make compensation and promotion decisions (Slip op. at 15) gives rise to a "common" issue of fact that supports certification of a company-wide class.[1] In practically the same breath, the court concluded that the *centralized* features of Wal-Mart's policies *also* support a finding of commonality under Rule 23, finding evidence of commonality in Wal-Mart's efforts to "develo[p] and continually reinforc[e] a strong, centralized corporate culture" that "promotes and sustains uniformity of operational and personnel practices," and "constrain[s]" and "guide[s] managers in the exercise of their discretion." (Slip op. at 20-21, 23.) In short, the court concluded that Rule 23's "commonalty requirement can be met where [a] company combines [a]

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[1] As Wal-Mart pointed out in the proceedings below, the putative class members were not all exposed to the subjective judgments of the same decisionmaker. Rather, they worked under thousands of *different* managers, who held different management positions in thousands of different stores across the country. (*See* slip op. at 19.) Nonetheless, the court decided that Wal-Mart's "deliberate and routine use of excessive subjectivity" *as such* constituted a *single*, common "employment practice" for purposes of Rule 23. (Slip op. at 18.)

subjective, decentralized system of decisionmaking with personnel policies that are uniform throughout the country." (Slip. op. at 24 (invoking and summarizing *Morgan v. United Parcel Serv., Inc.*, 169 F.R.D. 349 (E.D. Mo. 1996)) (internal quotation marks omitted).)

This holding is wildly expansive, reaching the employment policies and practices of virtually every employer. Any actual system of promotion and compensation is likely to be either completely subjective, completely objective, or—most likely—to involve a combination of centralized guidelines or criteria and reliance on the judgment of the managers who actually supervise employees. Under the court's opinion, *any* of these decisionmaking systems—subjective, objective, or something in between—would support a finding of commonality under Rule 23.[2]

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[2] In its discussion of *Donaldson v. Microsoft Corp.*, 205 F.R.D. 558 (W.D. Wash. 2001)—a case in which a court failed to find Rule 23 commonality—the district court states that "Wal-Mart's practices . . . are significantly more subjective than those described in *Donaldson*," because "Microsoft used a well-crafted combination of both objective and subjective measures, with features not present in Wal-Mart, such as bi-annual evaluations, advance mapping of goals and objectives, and an appeal process." (Slip. op. at 20 n.14.) It is impossible, on the court's analysis, to see why these differences are significant. As described by the court, Microsoft's policies appear to "combin[e] [a] 'subjective, decentralized system of decisionmaking' with personnel policies that are 'uniform throughout the country . . . .'" (Slip op. at 24 (citation omitted)). The district court offers *no* guidance as to why Microsoft's policies would not satisfy the commonality requirement as articulated in its opinion; and indeed, on their face, they do.

The court also adopts a disturbingly permissive view of the kind of statistical evidence sufficient to make a showing of class-wide discriminatory treatment. As set forth in its Petition for Permission to Appeal (the "Petition"), Wal-Mart submitted "unrebutted evidence that, on a store-by-store basis, there is no statistically significant evidence of discrimination against female employees at the vast majority of its stores." (Petition at 10.) Nonetheless, the district court accepted Plaintiffs' nationally or regionally aggregated data as sufficient to "create a common question as to the existence of a pattern and practice of gender discrimination at Wal-Mart." (Slip op. at 27.) Thus, under the district court's opinion, the mere presence of a statistical disparity at *some* level of aggregation—even if it is squarely contradicted by affirmative evidence of *non*-discrimination at the level at which decisions are actually made—is sufficient to certify a discriminatory treatment class.

In short, on the district court's analysis, both a "common" employment practice and statistical evidence of the practice's discriminatory effect are startlingly easy to find, and employers are almost guaranteed to face massive discrimination class actions.

B. The District Court's Order Would Expose Employers to Enormous Judgments While Depriving Them of the Fundamental Right to Present Key Rebuttal Evidence

The district court's opinion would also eliminate the basic right of employers to present evidence that their employment decisions were not discriminatory. Binding Supreme Court precedent establishes that, after a prima facie case of discrimination has been proffered, every employer is entitled to the opportunity to put on evidence showing that particular plaintiffs who claim they suffered from discrimination are in fact not entitled to relief, because those particular employees were "denied an employment opportunity for lawful reasons." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 362 (1977); *see also Reeves v. Sanderson Plumbing Prods. Inc.,* 530 U.S. 133, 148 (2000) ("an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision"). Indeed, the opportunity to present case-specific rebuttal evidence of the lawful basis for an employment action (such as job qualifications, work performance, misconduct, economic need, attendance, and others) has played a decisive role in myriad employment discrimination cases. *See, e.g., Coleman v. Quaker Oats Co., 232* F.3d 1271 (9th Cir. 2000); *EEOC v. Ins. Corp. of N. Am.,* 49 F.3d 1418 (9th Cir. 1995).

The district court's Order *flatly denies* Wal-Mart this fundamental opportunity to put on evidence in its own defense.[3] This ruling would dramatically skew the current balance created under prevailing employment law, which provides employees with legitimate discrimination claims an opportunity to have their day in court, while protecting employers from frivolous suits and permitting them to make employment decisions consistent with their business needs. Under the district court's ruling, employers would suddenly face liability for employment decisions that they could otherwise readily defend—such as selecting a more qualified applicant for a promotion, denying a raise to an employee based on misconduct, or terminating an employee for poor attendance—if the claims were brought in the context of an individual action.[4]

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[3] The district court recognizes that employers are ordinarily entitled to an opportunity to prove that class members were adversely treated for lawful reasons (*see* Slip op. at 62), but then suggests that "a lost pay remedy can manageably be afforded . . . through the use of a formula approach" (Slip op. at 63). This astounding statement completely misses the point: the formula approach the district court adopts gives Wal-Mart *no opportunity whatsoever* to demonstrate that it had lawful reasons for denying particular plaintiffs promotions or higher pay.

[4] The district court justifies this wholesale abandonment of fundamental principles of employment law by noting that holding individual hearings is "impractical on its face." (Slip op. at 63.) As Wal-Mart argues in its Petition, this decision to alter substantive rights based on manageability considerations squarely violates the Rules Enabling Act and Supreme Court precedent, and should not be tolerated. (*See* Petition at 5-7; 16-17.)

C. If Allowed To Stand, The District Court's Order Will Coerce Settlements And Subvert The Purposes of Title VII

The district court's Order will have two predictable effects. First, it will create strong pressures on employers to settle, even when the lawsuits they face lack merit. The potential liability in the present suit against Wal-Mart is in the *billions* of dollars. (*See* Petition at 15.) Many employers will simply not think it prudent or responsible to risk such liability by proceeding to trial. Courts have long recognized that class actions may unduly pressure a defendant to settle regardless of the suit's merits, and that the size of a class can exacerbate the coercive pressure to settle. (*See* Petition at 4-5 and n.1 (citing authority).) The kinds of lawsuits permitted by the Order—massive, company-wide discriminatory treatment actions—are a paradigm case of potentially coercive class actions.

Second, the district court's sweeping expansion of the standards for class certification will encourage employers to adopt the kinds of quota-like policies Title VII was adopted to prevent. Unable to alter their decisionmaking processes to avoid company-wide class certification, companies seeking to avoid liability will be forced to ensure that there is *no* way to produce *any* kind of statistical case—no matter how illogical—that their policies have a statistically disparate impact. However, as a plurality of the Supreme Court has observed,

> [i]t is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.

Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 992 (1988) (plurality op.) (internal quotation marks omitted). For this reason,

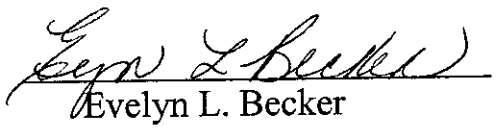
> the inevitable focus on statistics . . . could put undue pressure on employers to adopt inappropriate prophylactic measures. . . . Preferential treatment and the use of quotas by public employers can violate the Constitution, and it has long been recognized that legal rules leaving any class of employers with little choice but to adopt such measures would be far from the intent of Title VII. . . . [E]xtending disparate impact analysis to subjective employment practices [therefore] has the potential to create a Hobson's choice for employers and thus to lead in practice to perverse results. If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent . . . .

Id. at 992-93 (internal quotation marks and citations omitted). This is *precisely* what the district court's Order in this case does. Because the district court's opinion will generate perverse and destructive results, and because it is in no way authorized by law, this Court should grant interlocutory review (and reverse its certification order).

CONCLUSION

The court should grant interlocutory review of the class certification order.

Respectfully submitted,



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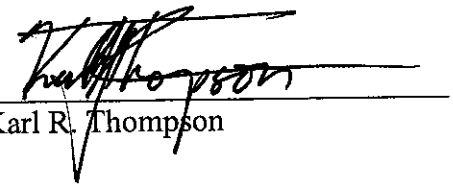

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