I. EVIDENCE FROM THE NATIONWIDE *DUKES* LITIGATION AND THE INITIAL CLASS CERTIFICATION DECISION

Despite all of the procedural battles over the last 18 years, no court has ruled on the merits of the dispute over whether a pattern or practice of discrimination existed – and may still exist – in Walmart's stores. But we are not without evidence illuminating that issue, based upon over one hundred depositions, review of tens of thousands of documents, and multiple expert analyses of Walmart's personnel data. A summary of that evidence is set forth below: first for the period of 1998-2003, evidence from the original *Dukes* case; and then for the period of 1998-2009, evidence from one of the regional class cases, which includes much evidence of Walmart's corporate activities, not just region-specific evidence.

In his June 21, 2004 order, Judge Martin noted that, "Plaintiffs present largely uncontested descriptive statistics which show that women working at Wal-Mart stores are paid less than men in every region, that pay disparities exist in most job categories, that the salary gap widens over time, that women take longer to enter management positions, and that the higher one looks in the organization the lower the percentage of women." The Court in reviewing all of the evidence found that together the evidence presented by the plaintiffs, "raises an inference that Wal-Mart engages in discriminatory practices in compensation and promotion that affect all plaintiffs in a common manner."

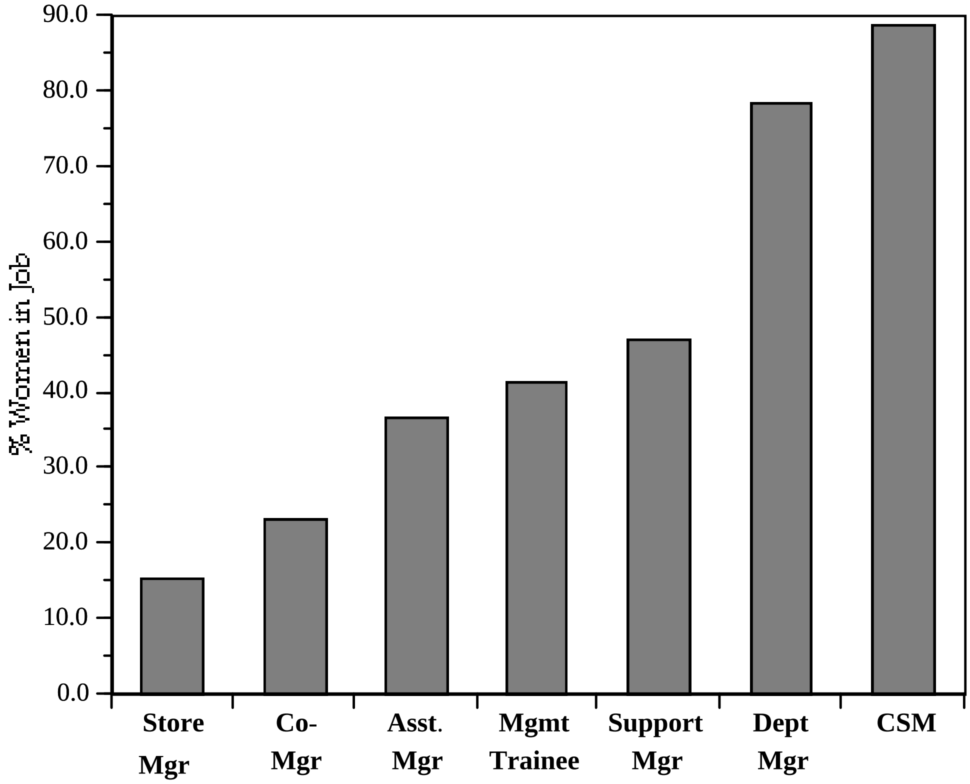
Plaintiffs' full brief in support of class certification can be found **here**. The expert report cited on statistical evidence can be found **here**. The exhibits cited in the brief can be found **here**. The District Court's ruling on class certification can be found **here**.

Excerpts from the brief summarizing key facts uncovered in discovery are set forth below. The class cert brief includes footnotes citing to the specific exhibits and deposition testimony supporting this factual summary.

A. Women are a significant majority of Walmart workers, but a tiny fraction of managers.

Women comprised 67% of all hourly workers and 78% of hourly Department Managers in the stores in 2001. In contrast, women made up only 35.7% of Assistant Managers, 23% of Co-Managers and 14.3% of Store Managers. At the district manager level, approximately 9.8% of the positions are held by women. Table 7 from the Drogin Declaration vividly portrays the steady disappearance of women as one ascends the corporate hierarchy:

PERCENTAGE OF WOMEN DECREASES
WITH EVERY STEP UP WAL-MART MANAGEMENT HIERARCHY



A. Wal-Mart's Culture Has Been Permeated By Stereotypes

Female managers have been required to go to Hooter's restaurants and strip clubs for lunch meetings or other business trips. Indeed, Executive Vice President for People Coleman Peterson defended this conduct, testifying that it was appropriate for a Wal-Mart district meeting to be held at a Hooter's restaurant, if it is considered to be the "restaurant du jour" and "one of the best places to meet and eat. . ." in the town. Numerous male Wal-Mart managers testified that they regularly go to strip clubs while attending the annual sales meetings.

Wal-Mart reinforced the stereotype that women are less assertive than men in training sessions given to store managers at the Walton Institute. Participants were told the reason that so few women had reached senior management at Wal-Mart was because "men have been more aggressive in achieving those levels of responsibility. . ." In defending the half-hearted efforts undertaken by Wal-Mart in the past to address under-representation of women, Divisional Vice President Larry Williams testified that Wal-Mart did not do more because there was "no forcing the issue." In his view, this would lead to promoting unqualified women. This same view – that additional efforts to promote women would lead to "lowering standards" and that better qualified white males would be passed over – has been echoed repeatedly by other managers at these Walton Institute meetings. Thus, from the senior executives down through store managers, the view that promoting women requires "lowering standards" is a frequently expressed belief at Wal-Mart.

Wal-Mart's own consultants and employee groups have highlighted for the company the challenges to women that some of Wal-Mart's traditions and its managers' stereotypes have erected. In 1998, Wal-Mart hired the consulting firm, Diversity Management Inc. (DMI), which conducted surveys of attitudes among groups of Wal-Mart managers about diversity. In one report of its results, it noted a wide range of "Diversity Challenges" which reflect the existence of entrenched stereotyped beliefs:

> Fact or perception that advancement is not sought by diverse associates: e.g. when women are unwilling to seek advancement because they see how a female store manager or DM is treated.
>
> The glass ceiling is perceived by many women and people of color at the assistant manager level. Many feel like they have to work harder than white men to advance. One stated: "I knew I would never be promoted to store manager under my DM, because I was a women and everyone knew he didn't think women could manage stores well. So I was aggressive about finding other opportunities."
>
> Some DMs [District Managers] who don't have any or very few female store managers don't seem personally comfortable with women in leadership roles;

Diversity Management, Inc. Memo. Although DMI recommended a detailed course of action to address those attitudes, Wal-Mart declined to proceed.

As early as 1992, a group of female Wal-Mart Home Office employees formed the Women in Leadership Group, which identified a number of concerns for women employees, some of which centered on the culture of Wal-Mart. Their concerns included: "[s]tereotypes limit the opportunities offered to women," "[c]areer decisions are made for associates based on gender," "aggressive women intimidate men," "men are interviewed as the replacements, women are viewed as support," and "[m]en's informal network overlooks women."

B. Female Employees Were Consistently Paid Less Than Their Male Employees in the Same Position Even Though They Have Higher Average Performance Evaluation Scores, More Seniority and Lower Turnover Rates

Dr. Richard Drogin, a statistician, analyzed Wal-Mart payroll and personnel data. He found that women at Wal-Mart earn less than men holding the same job, for nearly all jobs, in every year from 1996-2001. Among hourly workers, women earned about $1100 less than did men in 2001. For management employees, the gender pay gap was $14,500.

The differences in pay between men and women could not be explained by *seniority or turnover*. Women had longer average tenure (4.47 years) than do men (3.13 years) and lower turnover. The differences could not be explained by *performance*. Women in hourly positions on average had higher performance ratings (3.91) than did men (3.84).

Dr. Drogin also looked at the pay gap, over a five-year time period, for men and women hired in the *same* year into the *same* position. For employees hired into hourly positions in 1996, the average pay for men was $0.35 per hour more than for women. For those 1996 hires who stayed at Wal-Mart through 2001, the gap in pay for men and women increased to $1.16 per hour on average. In other words, with each additional compensation decision after hire, the average pay gap increased.

Dr. Drogin conducted numerous multiple regression analyses to determine whether other factors might explain these disparities in pay. His initial regression of total annual earnings controlled for seniority, weeks worked, part time status, and store location. The results showed that women are paid at least 9.3% less than similarly situated men in every year, and were highly statistically significant.

Dr. Drogin then ran a second set of analyses using hourly pay rate, in lieu of annual earnings, to take into account any possible effect from regular and overtime hours worked. The analysis controlled for seniority, whether hired within the year, part-time/full-time status, store, job position, whether the employee was ever hired into a retail store, management and gender. Again, women made less than men and the disparities were statistically significant. The disparities steadily widened from $.18 per hour to $.34 per hour from 1997 to 2001. Dr. Drogin then added performance rating as a control factor in the regression analysis, but only for 2001 when data was reasonably complete. Women were paid $.37 less than comparable men in 2001.

C. Female Employees in Wal-Mart Stores Are Far Less Likely to Be Promoted Than Their Male Counterparts and, When They Are Promoted, Women Take Longer Than Do Men

Wal-Mart boasts of a strong "promote from within" policy, with 72% of its salaried managers starting as hourly associates. Yet, women are disproportionately employed in lower-paying jobs. They hold about 65% of the hourly jobs, but only 33% of all management positions. Dr. Drogin found a consistent pattern of under-promotion of women into each of the higher-level jobs in the stores.

Support Manager – Dr. Drogin's analysis of promotions into support manager found that, between 1997 and early 2002, women received 2891 fewer promotions than would be expected from their representation in the feeder jobs. This result had a high degree of statistical significance.

Management Trainee – Dr. Drogin found that, for the same time period, women received 2952 fewer promotions into management training than would be expected, controlling for feeder job, district and year of move. Again, the results showed a statistically significant shortfall.

Co-Manager – Women received 346 fewer promotions than expected based on their representation in the feeder pool. The result was statistically significant.

Store Manager – The store manager positions are filled by co-managers and assistant managers. Obviously, as women have been under-promoted to the first-level management positions, their representation in the feeder pools for store manager is commensurately diminished. Despite their lower representation in the feeder pools, women still received 155 fewer promotions than would be expected from their availability, a statistically significant disparity.

Dr. Drogin also studied the time that it took employees to reach management positions. He found that, for the select group of women who do move up the ladder, it consistently takes them longer than comparable men. On average, it took women 4.38 years from date of hire to be promoted to assistant manager, while men took only 2.86 years. To reach Store Manager, women on average took 10.12 years from hire date, compared with 8.64 years from hire for male employees.

D. Wal-Mart Senior Management Has Been Aware of the Adverse Effects of Its Personnel Policies on Female Employees for Many Years But Has Failed to Take Effective Steps to Redress These Problems

Wal-Mart's People Division has annually prepared reports showing the percentage of women in management positions company-wide since at least 1993. The reports demonstrate that from 1998 to 2002, the percentage of women in management showed little improvement.

Wal-Mart has also conducted studies comparing the percentage of women in management at Wal-Mart to that of other retailers. As Coleman Peterson candidly put it four years ago, "we are behind the rest of the world." In a February 2001 memo to the Executive Committee, Peterson compared data from the "Catalyst Census of Women Corporate Officers" to Wal-Mart's senior corporate ranks. He noted that: "Wal-Mart is behind both the Fortune 500 and General Merchandisers in the development of women into Corporate Officers" and "Wal-Mart reported no women in the 'clout title.'"

Wal-Mart management has long been aware that its relocation requirement had an adverse impact on female employees seeking management promotions, and that the requirement led some managers to avoid considering women for management. Wal-Mart had a requirement that, to qualify for management positions, an employee had to be willing to move his or her residence at any time. "Traditionally, we've had this attitude that if you wanted to be a manager at Wal-Mart, you basically had to be willing to move on a moment's notice. . . . You just pack and go, then sometime later you worry about selling your house and moving your family." By at least 1992, Sam Walton had recognized that the relocation requirement was no longer justified by business needs and was creating a barrier to the advancement of women:

> Maybe that was necessary back in the old days, and maybe it was more rigid than it needed to be. . . . the old way really put good smart women at a disadvantage in our company because at that time they weren't as free to pick up and move as many men were. Now I've seen the light on the opportunities that we missed out on with women.

Many other internal Wal-Mart documents recognized that relocation is a barrier for the advancement of women into management positions. Notwithstanding the clear evidence of an adverse impact, Wal-Mart still required that assistant management candidates be willing to relocate as a prerequisite to promotion.

II. EVIDENCE FROM REGION 43, MOTION FOR CLASS CERTIFICATION

In Region 43, which is based in Tennessee, women comprised 64% of all hourly workers, and 80% of hourly Department Managers, but only 27.1% of MITs, 36.5% of Assistant Managers, 20.7% of Co-Managers, and 15.1% of Store Managers. At the district level, 94% of the time within the class period, districts in Region 43 were supervised by male District Managers. All RVPs during the class period were men.

Women were not only concentrated at the bottom of the store hierarchy, but in certain departments within the stores. The stores each contained many departments, some of which were highly gender segregated. For example, women made up over 90% of workers in the Infant/Toddlers, Health and Beauty Aids, Hosiery, and Men's Wear Departments. Bendick Decl. at C-8. In contrast, the Pets, Sporting Goods, and Horticulture (Lawn & Garden) Departments were between 26% and 33% female. *Id.* This gender segregation is significant because Wal-Mart chose to pay workers in some male-dominated departments at higher rates for the same job.

Plaintiffs' full brief in support of class certification can be found **here**. The expert report cited on statistical evidence can be found **here**. The exhibits cited in the brief can be found **here**. Excerpts of the brief summarizing key facts uncovered in discovery are set forth below. The class cert brief includes footnotes citing to the specific exhibits and deposition testimony supporting this factual summary.

A. Hourly Pay Was Set in a manner which caused gender disparities

Pursuant to Wal-Mart's guidelines, from 1998 to June 2004 Store Managers set starting pay for each hourly employee; the Store Manager could pay an individual up to $2 over the minimum amount Wal-Mart set for the job. Managers were only permitted to set starting pay above the minimum if the associate had "additional skills, abilities or education that would enhance their ability to perform the job." The statistical evidence reflects that this policy on starting pay—and the common mode of exercising discretion within this policy—resulted in men consistently being paid more at hire than similarly-situated women. Bendick Decl. at ¶¶ 52-56, C-12. Wal-Mart knew that the system it created to set starting pay was likely to cause inequity, at least by 2001. But Wal-Mart did not change this practice until June 2005.

In 2005, Wal-Mart adopted a system of credits based upon past work experience, formulated in a way which also had an adverse effect on women, thus causing systematic disparities in starting pay. Wal-Mart's policy dictated that the only way to be paid anything above the minimum start rate for the position was through earning a "credit." Pursuant to the policy—which applied to all hourly associates across the region and did not depend upon any Store Managers decisions – a credit was assigned for "each full year of retail experience or experience in a comparable position *during the past five years*." Women are more likely than men to have interruptions in their work history due to having children. Claudia Goldin & Joshua Mitchell, *The New Life Cycle of Women's Employment*, 31 Journal of Economic Perspectives, No. 1 (Winter 2017), 161, 163. Thus, a man and a woman who each have five years of total retail experience will receive different credits if the man's experience is five consecutive years prior to employment at Wal-Mart, and the woman's experience is five years total within the past six years, but with a 12-month gap in between. Not surprisingly, there continued to be statistically significant disparities in starting pay with this system. Bendick Decl. ¶ 56, C-12.

Not only did hourly women start at Wal-Mart with lower pay, but Wal-Mart's pay guidelines also created three ways to ensure they stayed at lower rates. Hourly workers could receive pay increases through performance increases, promotional increases and merit increases. These were awarded as percentage increases through 2004, which meant that employees with lower existing pay rates (largely women) would receive a smaller dollar increase than those with a higher base rate (predominantly men), thus maintaining or even increasing the difference between them despite identical performance. *Id.* So disparities in starting pay had a long-term impact, maintaining pay differences between women and comparable men. This is a phenomenon known as "start low, stay low." Wal-Mart's own internal analyses identified these practices as ones which contributed to pay inequity.

Performance Increases*:* Women received on average slightly higher ratings scores than men, however, Store Managers determined the amount of the accompanying pay increase, and could depart from Walmart's guidelines to give larger raises to men.

Promotional Increases: Similarly, promotional pay increases, awarded when an employee moved from a lower-level hourly position to a higher-level hourly position, were also computed on a percentage basis, through June 2004. The Store Manager had some discretion, but if he wanted to give an increase of more than 6%, District Manager approval was needed. Starting in June 2004, any promotional or demotional pay changes were handled automatically based on the change in level.

Merit Increases: Unlike performance evaluation increases, for which every employee is systematically considered each year, *see supra* at 12, the merit increase was an additional pay increase the Store Manager was authorized to award to an associate who "exhibits exceptional performance above job responsibilities," pursuant to Wal-Mart's compensation guidelines. As with performance and promotional increases, it was set as a percentage of the prior rate. *Id.*

Wal-Mart's compensation department acknowledged that merit increases were likely to give rise to inequity, and identified the specific practices that could give rise to this inequity: the Store Manager's discretion over who received a merit increase and the amount of the increase, and the fact that the system allowed managers to over-ride rules and give merit increases outside of the guidelines. While Wal-Mart considered eliminating merit increases in 2003 because of these concerns, it did not do so then. Finally, years after first considering eliminating merit increases, Wal-Mart did so in August 2006. This change was made to increase consistency in the awards made.

B. Wal-Mart Knew its Hourly Pay System Caused Gender Disparities

Wal-Mart had long been aware of problems with its hourly compensation system. In 2000, it identified several issues not addressed until 2004 or later:

- Ineffective pay administration in the field (*e.g.*, pay inequities between associates with comparable service and performance levels);

- Possible inappropriateness of merit/performance pay approach;
- Often start rate is based on what the applicant was earning and not on what job he or she will be performing.

Wal-Mart discussed its problems in even greater depth in June 2003, presenting the case for considering changes to its hourly pay practices by noting that the then-current system for setting start rates "allows for inequity in pay," that Store Manager ability to over-ride the amount of performance increases "lead[s] to pay inequities," and that merit increases were problematic because "Managers have discretion on amount of merit increase which may led to inequity of pay," and "Manager has discretion on Associates who receive merit increases which may lead to inconsistency of administration." The only inconsistency was between the way women and similarly-situated men were treated; these practices resulted in the inequity Wal-Mart predicted, and women were consistently paid less than their male counterparts. Despite these concerns with the use of merit increases, Wal-Mart continued the practice through 2006.

In 2004-06, Wal-Mart made a series of changes to its pay practices, intended to increase consistency in employee pay. However, these changes—all of which Wal-Mart could have made by 1998—merely substituted the pay disparities caused by the pre-2004 practices Wal-Mart identified and sought to change with new policies (job class assignment and starting pay credits) which caused continued, though slightly smaller, pay disparities. In sum, Wal-Mart never adopted a policy to eliminate the pay disparities.

C. Statistical Evidence Demonstrates Common Pattern of Pay Disparities

Plaintiffs challenge a series of practices which created hourly pay disparities through 2004: how starting pay was set, the use of percentage-based increases which exacerbated disparities, and the use of merit awards. While these practices were changed between 2004 and 2006, Wal-Mart introduced its new job class assignments in mid-2004, which itself created disparities that continued throughout the use of the new job class system. Thus, throughout the entire class period, Wal-Mart maintained one or more hourly pay practices giving rise to the disparities in pay discussed below.

Plaintiffs' statistical analysis of Wal-Mart's compensation confirms that there were indeed inequities in Wal-Mart's hourly compensation system, just as its own internal documents conceded. Dr. Bendick found statistically significant disparities in hourly pay rates for every single year in the class period. Bendick Decl., ¶¶ 20-41. Even considering the challenged use of department as a factor, the level of statistical significance ranged from 4.9 to 13.7 standard deviations in all but 2004, when the disparity still exceeded 2 standard deviations. His analyses controlled for available information about the employees (their years of experience with Wal-Mart, potential pre-Wal-Mart experience, and performance rating) and about the jobs worked (including whether the position was in a grocery or non-grocery department, job title, division, and individual store). *Id.* at ¶¶ 20-21. Dr. Bendick completed analyses both with and without the challenged variables of job class and department. *Id.* at ¶¶ 35-41. Either way, the results are highly statistically significant across Region 43.

The disparities are not limited to a few stores. Dr. Bendick did a further analysis separately by store. For each store he analyzed hourly pay during each year of the class period.

As described above, Plaintiffs' claims with respect to hourly pay turn on store-level decisions only through 2003, while there were region-wide practices implemented in mid-2004 and 2005 which adversely affected the entire class without any store-level input. Thus, with respect to store-level results, Dr. Bendick examined the pattern for 1998-2003. The results were striking: 97.2% of the store-years showed results adverse to women, and 92.3% of the store-years were adverse to women even when the challenged variable of department is included; 370 out of 497 store-years—74.4%—were both statistically significant and adverse to women, and that was true for 57.3% of those results even when department is added. Bendick Decl., ¶¶ 43, 45-48, C-9, C-11. These results show a region-wide pattern "beyond a shadow of a doubt." Bendick Decl., ¶ 46. As Dr. Bendick explains, in the absence of a pattern of treating women differently, one would find statistically significant results adverse to women in only 2.5% of the stores—not 57% or 74%. Bendick Decl., ¶ 48. Looking at the stores within Region 43 across this same 1998-2003 time period, 81.7% of stores paid women less than comparable men in every single year. Bendick Decl., ¶ 49.

As noted above, Plaintiffs challenge different practices after 2003: the change in assignment of jobs to different job classes in 2004 and the use of "credits" to set starting pay beginning in 2005. As neither practice was influenced by store-level decisions, the relevant analyses are done at the regional level. Dr. Bendick found highly statistically significant disparities in each year between 2004 and 2008, both as to total hourly compensation and as to starting pay. Bendick Decl. ¶¶ 27-28 51-56, C-2, C-3, C-12. Moreover, these disparities actually grew in magnitude from year to year. *Id.* Thus, Wal-Mart's change in practices in 2004-05 may have changed the mechanism through which it caused the pay disparity, but not the existence of the pay disparity.

Throughout the entire class period, Wal-Mart's practices operated to pay female hourly employees less than similar men, and these differences were meaningful to these low-wage workers. Depending on the year, and which analysis is used, women working full time lost a few hundred to a thousand dollars per year—a considerable sum for individuals who are only earning an average of $14,000 per year. Bendick Decl. C-2, C-3, C-7.

D. Promotions from Hourly to Management Positions Also Demonstrate Discrimination

Wal-Mart refused to post Manager-in-Training (MIT) positions prior to 2003, so that all Assistant Manager positions were filled through a tap-on-the-shoulder system, which is known to perpetuate bias. Indeed, in June 2002, when Wal-Mart first began working on a notice to hourly associates about "how to get promoted into the management training program," Wal-Mart's Senior Vice President for People acknowledged, "we do not have a poster, brochure, nothing that I am aware of." In addition, Wal-Mart's established criteria for the MIT program prior to 2003 included willingness to relocate. Willingness to relocate was a factor known to deter women from pursuing such positions and which executives acknowledged was not necessary.

Wal-Mart first experimented with posting in January 2003, introducing the Management Trainee Career Selection (MTCS) system. This system was used through 2006, and positions were posted for one week, a few times per year. When this posting system was introduced for the first time, it required candidates to agree to certain job conditions, including (1) assignment to a store up to a one-hour drive from home; (2) travel for up to six weeks; and (3) replacing the requirement that all candidates be willing to relocate with a statement that the greater geographic area an individual would move to, the more likely they would be promoted. All three factors would be more likely to discourage women than men, in a manner similar to the prior relocation requirement. Notably, testimony established that travel assignments were filled on a voluntary basis, so stating that six weeks of travel would be required was not a fair representation of the actual job requirements.

Starting in 2007, Wal-Mart began using the Career Preference system for all management promotions, including MIT. This system permitted employees to register in advance for the positions and geographic areas in which they were interested. Every vacancy was expected to be posted with a "requisition" which automatically applied the minimum qualifications Wal-Mart required for the position to the group of those who had expressed interest in the position, within that geographic area, and presented the hiring manager with a set of candidates. *Id.* at 028169.

Both before and after Wal-Mart posted MIT positions, the selection process involved screening by District Managers and approval of selections by the RPM. In 2003, in addition to posting, Wal-Mart adopted standardized interview questions, which it used through 2009.

Despite the tweaks to the MIT promotion process, two things remained consistent barriers to women: (a) a refusal to post or a system to circumvent the purpose of posting to choose a preferred candidate identified prior to posting ("pre-selection," *see infra* at 28-30); and (b) requiring candidates to be willing to relocate, or to accept comparable conditions on travel and commuting distance. In addition to challenging the disparate impact of these discrete practices, Plaintiffs challenge the exercise of discretion in selecting candidates for the MIT program. The District Managers who screened candidates and the RPM who had final approval on the selection decisions could, and did, apply a common mode of exercising discretion, including shared biases adverse to women in making the selections.

E. These Promotion Practices Had an Adverse Impact on Women

The statistical evidence demonstrates the results of these systemic barriers, as women were promoted from hourly to MIT/Assistant Manager positions at a rate far lower than expected given their qualifications. Women's rates of promotion were 25-35% of the rate of similarly qualified men, depending on the model used. Bendick Decl., ¶¶ 82-84, C-18. That means men were three to four times more likely to be promoted than comparable women—a result that was highly statistically significant. *Id.* Not surprisingly, Dr. Bendick documented that the representation of women in every level of management was far lower than would be expected given the large number of available, qualified women. Bendick Decl., ¶¶ 71-81, C-17. The differences are consistent over time. *Id.*

Nor can these disparities in promotion of women into management be explained by women being less qualified than their male peers, or being less interested in promotions. In addition to Dr. Bendick's analysis, which took into account qualifications, Wal-Mart managers repeatedly testified that they observed no difference in qualifications by gender, or in interest in advancing into management.

F. Wal-Mart Managers Shared Stereotypes About Women Employees

A 1998 survey of Wal-Mart managers revealed that there was a "good ol' boy philosophy" at Wal-Mart, that many managers were "close minded" about diversity in the workplace, and that some District Managers "don't seem personally comfortable with women in leadership roles." The findings of the 1998 survey echoed an earlier 1992 report by a group of female Wal-Mart management employees, who identified a number of concerns for women employees, including the following: "Stereotypes limit the opportunities offered to women," "[c]areer decisions are made for associates based on gender," "[a]ggressive women intimidate men," "men are interviewed as the replacements, women are viewed as support," and "[m]en's informal network overlooks women."

These attitudes were amply displayed in Region 43. Female employees were consistently told that they did not deserve the same treatment because of their gender. For example, putative class member Kimberly Wicks-Beason was told by her Store Manager in a Memphis-area store that "a woman has a choice: to have a career or kids. You can't have both." Wicks-Beason Decl. ¶ 3. Likewise, in 1999, putative class member Alissa Westmoreland asked her department manager in a Memphis Wal-Mart why a male co-worker with less experience was paid more than her, and was told that it was because he had a family to support, whereas Ms. Westmoreland had a husband to support her. Westmoreland Decl. ¶ 4-5. Putative class members Wendy Sims in Cookeville, TN, and Peggy Griffin in Jackson, TN were told the same thing when they inquired as to discrepancies in their pay. Sims Decl. ¶ 4; Griffin Decl. ¶ 5. Putative class member Patricia Hughes Miller was told the same thing by her Store Manager in Athens, TN, despite the fact that she was a single mother raising two children. Miller Decl. ¶ 3. *See also* Matlock Decl. ¶ 3 (Store Manager in a different Jackson, TN store frequently told female employees they should stay home and cook for their husbands); Johnson Decl. ¶ 4 (around 2007, she overheard managers in Tupelo, MS Wal-Mart saying that "women can't do a man's job"); Ryan Decl. ¶ 3 (around 2004, she was told by Store Manager in Franklin, TN that "women should be seen and not heard"); Strode Decl. ¶ 3 (overheard Co-Manager telling group of male employees that women cannot perform their duties as well as men).

Women were denied or steered away from positions and employment opportunities because of stereotypes as to what sorts of work women should perform, and what departments they should work in. For example, when named Plaintiff Cheryl Phipps started in the "tire, lube and express" department in 2006, the man in charge of training refused to train her, telling her that "no woman" was going to be trained in that department in his store. Phipps Dep. 161:1-7, Ex. 39. Likewise, named Plaintiff Shawn Gibbons was told by her Store Manager that she should not work in the garden center because it was hard work, and he didn't know if she'd be able to do it. Gibbons Dep. 55:16-56:5, Ex. 40. *See also* Tate Decl. ¶ 3 (told by Co-Manager in Kimball, TN that request to be assigned to furniture department was denied because it "was for men"); Parker Decl. ¶ 3 (told by Co-Manager in Memphis that she was being paid less for work in hardware department because hardware was "a man's job"; told around 2006-07 that she was not qualified for Assistant Manager position because she was female); Webb Decl. ¶ 2 (around 2007, women were not permitted in her Athens, TN store to use forklift or get license to operate forklift); Roberts Decl. ¶ 4 (between 2007 and 2009 she was told by Assistant Managers in Athens, TN that men could handle the pressures of selling mobile phones better than women could); Stallard Decl. ¶ 4 (heard multiple disparaging comments from Store Manager in Bartlett, TN in mid-2000s, including being told that "if you had muscles, you could do the job"); Yancey Decl. ¶ 3 (in Nashville, TN in around 1999, the District Manager told female loss prevention employees they were not allowed to handcuff men who did not want to be handcuffed, though men were allowed to do so).

G. Wal-Mart Knew its Practices Adversely Affected Women and Regional Managers Did Nothing to Change Until Three Years After the *Dukes* Case Was Filed, But Belated Efforts Only Underscore Common Control Over Uniform Practices

Wal-Mart's corporate offices regularly reviewed reports on the representation of women in retail management (*i.e*., Assistant, Co- and Store Managers as a group). Progress was slow: the proportion of retail managers who were women was approximately 29% in 1998, 30% in 1999, 31% in 2000 and 32% in 2001. *Id.* Significantly, however, Wal-Mart's numbers never approached the representation of women in management at other retailers. Internal reports showed that in 1997, women already represented 38.6% of retail managers nationwide, but only 31.25% of Wal-Mart store management in 2000. Ex. 117. *See also* Ex. 119 (June 2000 report concluded "Wal-Mart's women in management per cent (32.4%) is significantly behind several of the other retailers reporting (43.2% to 65.3%)."). This was particularly striking because Wal-Mart was drawing these managers largely from an hourly workforce which was 62.6% women, "among the highest" of the companies reporting. It was no overstatement, therefore, when Coleman Peterson, Senior Vice President of People, stated in 1999 that "[w]e're behind the rest of the world."

If Wal-Mart overall was behind the rest of the world, Region 43 was behind the rest of Wal-Mart. For example, from FYE 2002 to mid-2002, Wal-Mart retail management overall moved from 32.32 to 33.02% female. However, from FYE 2003 to mid-2003 in Region 43, the proportion of managers who were women only moved from 29.6% to 31.18%. Thus, even one year later, Region 43 was lagging behind the company-wide average. And, of course, it was even further behind "the rest of the world."

Wal-Mart's own reports also show that women managers on average were paid less than men holding the same positions. In 2000, Wal-Mart conducted a Minority/Gender Pay Analysis of retail store management positions, in which it concluded that "average salaries for female and minority males are below the overall average pay for most jobs," and "[a]verage pay increases for minority males and females are generally below overall average income ratio across most jobs." Specifically, Region 43 showed that the average non-minority female assistant manager salary, $36,200, was $1500 lower than the average non-minority male assistant manager salary of $37,700. *Id.*

Despite the well-known disparities, Regional managers took no discernable steps to monitor or protect against gender pay disparities in Region 43. Rinehart Dep. 168:17-169:4, Ex. 31 (he could not remember checking to see if there were pay disparities based on gender); Hostetler Dep. 27:9-17, 169:21-170:11, 178:22-179:2 (she did nothing to check to see that pay was being administered in conformity with policies), 179:8-15 (no action taken to protect against managers in Region 43 considering sex in setting pay rates), Ex. 32.

Finally, in 2004, three years after the *Dukes* case was filed, Wal-Mart began a new diversity effort. It created a diversity office and required diversity training. Ex. 104 at 2. Moreover, it established numerical goals for selection of MIT, Co-Managers and Store Managers on which the RVP and District Managers would be formally rated as part of their performance evaluations. Separately, these managers were rated on their "Good Faith Efforts" with respect to diversity. Ex. 107 at 5. In 2007, a portion of managers' incentive compensation was tied to achieving these goals. Because these goals were made such a significant part of each manager's performance rating, these goals became a topic of great concern among managers, who were sent regular updates and urged to ensure goals were met. The goals were set based on the number of women who made it through Wal-Mart's posting system, which had tended to discourage women. Thus, because the pool of candidates did not reflect the actual population of employees who would have sought these positions were it not for the policies discouraging female candidates, by and large the goals were met. And, notably, the diversity goals only addressed the proportion of women in management positions, and failed to address pay inequity for either hourly or management employees. As Wal-Mart officer Celia Swanson testified, "one of the things about our organization is what gets measured, gets done." Not surprisingly, therefore, the shortage of women in management was reduced in response to the close monitoring of promotions. Using an alternate approach, the neutralization payment in 2004, disparities in compensation at the hourly level were briefly reduced in magnitude, but immediately began to increase again after that one-time payment, under the influence of two new region-wide policies (pay level restructuring and the credit system). The disparities in management pay remained unabated. Thus, Wal-Mart was able to exercise control over policies and practices in order to achieve greater equity when it chose to do so.