UNITED STATES DISTRICT COURT EASTERN DISTRICT OF KENTUCKY SOUTHERN DIVISION AT LONDON

) CIVIL ACTION NO. 01-339-KKC

WAL-MART'S RESPONSE TO EEOC'S MOTION TO ENFORCE CONSENT DECREE

Defendant Wal-Mart Stores, Inc. ("Wal-Mart"), by and through counsel, hereby files its Response to the EEOC's Motion to Enforce Consent Decree [Docket No. 670]. The EEOC's motion is without merit and certain portions are also premature and/or moot. Wal-Mart respectfully requests that the motion be denied.

I. INTRODUCTION

A Consent Decree was entered in this case on March 1, 2010 [Docket No. 669], resolving the EEOC's claim that Wal-Mart engaged in a pattern or practice of discrimination against female job applicants at its London, Kentucky Distribution Center ("DC 6097"). In Section 302 of the Consent Decree, Wal-Mart agreed to instate class members who met certain requirements, including that the class member meet the same hiring criteria applicable to all new hires in the orderfiller position. The EEOC now claims that Wal-Mart has not met its instatement obligations in that only two class members of the 157 on the EEOC's instatement list have

received offers of instatement thus far.¹ Faced with the reality that many of the class members either have no interest in working at DC 6097 or simply lack the qualifications for the orderfiller position, the EEOC asks the Court to reject the plain language of the Decree and order Wal-Mart to instate class members without regard to their qualifications. The EEOC's motion is without merit: Wal-Mart has fully complied with its instatement obligations under the Consent Decree and will continue to do so.

The EEOC further claims that Wal-Mart has not met its obligations to provide information demanded by the EEOC under the Consent Decree in a timely manner; this complaint about Wal-Mart's production of requested documents are similarly meritless. First, this issue is most because Wal-Mart has produced all of the documents the EEOC requested. Second, Wal-Mart produced these materials within the time frame set forth in the Consent Decree, whether the 45-day response period under Section 902 or the "reasonable notice" period under Section 901 is deemed to apply. Thus, the EEOC's claim that Wal-Mart is not in compliance with its Consent Decree obligations must be rejected.

Wal-Mart has fully complied with the letter and spirit of its obligations under the Consent Decree. Wal-Mart has made every effort to fill orderfiller job openings with class members and will continue to do so. As detailed below, its efforts to meet its instatement obligations have been hindered by the EEOC's non-compliance with its commitments. As the EEOC has failed to meet its burden of proving a breach of the Consent Decree, Wal-Mart respectfully requests that the Court deny the EEOC's Motion to Enforce the Consent Decree.

¹ The EEOC's allegation that "Wal-Mart, to date, has not instated a single class member," is demonstrably false. EEOC's Mot. To Enforce Consent Decree at 1. Two class members have received offers of instatement; one of them accepted the offer and began working at DC 6097 on October 7, 2010, a week before the EEOC filed its motion.

II. STATEMENT OF FACTS

A. Wal-Mart Made Diligent Efforts to Contact Class Members Regarding Available Positions.

On July 19, 2010, the EEOC submitted its first list of "157 class members who desired instatement" to Wal-Mart. See EEOC's Mot. To Enforce Consent Decree at 2. Prior to that time, DC 6097 had implemented a hiring freeze for external applicants for orderfiller positions to ensure that there would be positions available for class members when the EEOC presented its instatement list. Upon receipt on July 20, 2010 of the EEOC's instatement list, DC 6097 began the process of contacting the 157 class members listed. An overwhelming majority of the class members on the list – 107 of 157 – stated they were not interested in an orderfiller position, did not respond to Wal-Mart's communications, failed to appear for a scheduled appointment at DC 6097, or failed to call back as they had promised to set up an appointment. As DC 6097 is approaching the holiday season, its busiest time of the year, filling the available openings with qualified orderfillers is a high priority for Wal-Mart.

<u>DC 6097 Instatement Process</u>: DC 6097 has implemented a system for contacting class members on the instatement list. Using the information provided by the EEOC, DC 6097 human resources staff attempts to contact the class members by telephone to schedule appointments. If contact by phone is unsuccessful, DC 6097 sends emails and/or letters to the class members notifying them about available orderfiller positions. Consistent with DC 6097's general hiring practices, three attempts to contact the class member are made.

When the class member appears for her appointment at DC 6097, she is asked to complete an application so that Wal-Mart has the necessary data for opening a personnel file. The class member also takes the computerized Logistics Pre-Employment Assessment, , which evaluates work-related skills and competencies. If the class member receives a "competitive"

score on the Logistics Pre-Employment Assessment, then the Physical Abilities Test is explained and the class member given the choice of having the test administered in English or Spanish. The class member is then scheduled to return to DC 6097 to complete the Test. If the class member receives a "competitive" score on the Physical Abilities Test, a reference check is performed and the class member is scheduled to come back for an employment history review. At that time, the class member signs consent forms for a drug screen and a criminal background check. If the class member meets all requirements, she is then given a conditional job offer and, if she accepts, she completes a Fair Credit Reporting Act Disclosure and Authorization Form. Once the class member clears the criminal background check and drug screening test, she is scheduled for orientation and to begin work. 6097 Hiring Process Flowchart & Checklist (Exh. 1).

Status of the 157 Class Members: Pursuant to Section 804 of the Consent Decree, on September 23, October 21 and November 5, 2010, Wal-Mart submitted to the EEOC its report on instatement list class members who were rejected for employment. *See* 9/23/10, 10/21/10 and 11/5/10 Section 804 Emails and Reports (Exh. 2) (filed under seal). The latest status of the 157 class members on the EEOC's initial instatement list is:

Stated that they were not interested in the orderfiller position	68
Failed to appear for an appointment at DC 6097	30
Did not respond to DC 6097's communications	4
Could not be located	2
Received non-competitive score on Logistics Pre-Employment	5
Assessment	3
Received non-competitive score on Physical Abilities Test	35
Failed to call back after being contacted by DC 6097	5
Currently in the instatement process	6
Received an offer for an orderfiller position	2

See Exh. 2, 11/5/10 Section 804 Report. Of the two offers made to class members, one was declined and the other class member began work at DC 6097 on October 7, 2010.

B. The Physical Abilities Test Was Designed Prior to the Consent Decree and Has Been Properly Validated.

While the EEOC accuses Wal-Mart of implementing the Physical Abilities Test "shortly after receipt of the EEOC's reinstatement [sic] list" in order to exclude class members from employment, the Test was developed internally for several years before the Consent Decree was negotiated and was implemented nationwide at all Wal-Mart Grocery Distribution Centers, including DC 6097, in June 2010. In 2008, Wal-Mart retained an independent company, Applied Psychological Techniques, Inc., to perform a job analysis of multiple Wal-Mart jobs, including Grocery Orderfiller. This 2008 job analysis identified 65 tasks that were "essential to the Grocery Orderfiller position." Development and Validation of Physical Performance Tests for the Selection of WalMart Grocery Orderfillers at 2 (Feb. 2010) (Exh. 3) (filed under seal). The job analysis results were utilized by another independent company, Human Performance Systems, Inc. ("HPS"), to conduct a secondary job analysis for the orderfiller job and to create "an essential task list and identif[y]... the physical abilities associated with the essential tasks." Id. This secondary job analysis found that muscular strength, muscular endurance, explosive strength, trunk strength, aerobic capacity and flexibility are required physical abilities for the orderfiller job. *Id.* at 5-7.

After indentifying the required physical abilities to successfully perform the orderfiller job, HPS then conducted a detailed analysis "[t]o design a physical performance test battery that is a valid predictor of job performance and fair to protected groups." *Id.* at 8. HPS identified tests that assessed essential physical abilities for the orderfiller job. *Id.* The tests were then adapted to "assess capabilities highly related to the job." *Id.* After performing these steps, HPS was able to develop a Physical Abilities Test that is a "predictor[] of successful Grocery

Orderfiller physical job performance." *Id.* The Physical Abilities Test has the following three components:

- The Carton Lift Test -- This evaluates an individual's ability to manipulate and handle cases of varying weights (19-55 lbs.), similar to the items in the distribution center. The objective is to move as many cartons as possible in a set period of time. The applicant must lift each carton, carry it 15 feet and place it on the correct platform at different height levels.
- The Sit-Up Test -- This records how many sit-ups the individual can complete in one minute.
- Arm Endurance Test -- Individuals use their hands to rotate a handled crankshaft know as the "arm ergometer," which is similar to bicycle pedals. This test records the number of revolutions completed in a two minute period.

The candidate's scores are input into a computer program that calculates whether, when combining all test results, the individual is "competitive" or "non-competitive" for the orderfiller job. To ensure that there is no bias or manipulation, the Wal-Mart employees administering the tests do not know what scores will result in a competitive classification. *Id*.

C. Wal-Mart's Adoption of the Logistics Pre-Employment Assessment Does Not Violate the Consent Decree.

Similarly, Wal-Mart did not, as the EEOC asserts, adopt the Logistics Pre-Employment Assessment as an after-the-fact attempt to circumvent its instatement obligations. The Assessment is a test of a candidate's skills/competencies regarding work-related issues such as safety awareness, integrity, decision-making, quality orientation and communication and was implemented nationwide in Wal-Mart Distribution Centers in 2005. Throughout the litigation's relevant time period of 1998 to February 2005, Wal-Mart used a similar pre-employment assessment known as the ORION survey. ORION materials were produced during litigation to the EEOC, and Wal-Mart managers testified regarding its use in the hiring process. Dep. of Jeff Akers at 113-15 (excerpt attached as Exh. 4). The Logistics Pre-Employment Assessment is a similar, but updated, test. Like the Physical Abilities Test, the Logistics Pre-Employment

Assessment was validated and implemented well before Wal-Mart's receipt of the EEOC's first instatement list.

D. The EEOC Has Hindered Wal-Mart's Instatement Efforts.

As discussed above, Wal-Mart has exhausted the EEOC's July 20, 2010 instatement list of 157 class members. Pursuant to Section 301 of the Consent Decree, the EEOC must "on a rolling basis" provide an instatement list and, "[t]o the extent practicable, there shall be at least 25 names on the list at all times." Section 402 provides that it is the EEOC's responsibility to determine who are "Eligible Claimants" and only eligible claimants "who indicate an interest in instatement in a claim form submitted to the Administrator" shall be included on the instatement list. Consent Decree, Section 301. The EEOC has not followed the instatement procedures, with the result that Wal-Mart has been unable to fill the orderfiller openings it has held open for the class members.

On multiple occasions, Wal-Mart has requested that the EEOC supplement the instatement list with additional class members. The EEOC responded by stating that it is "not required to and is unable to provide [Wal-Mart] with additional class members at this time." 10/1/10 Correspondence from Nancy Edmonds (Exh. 5). In addition, the initial instatement list supplied by the EEOC did not meet the Consent Decree requirements in that a high proportion of the class members on the list were not interested in an orderfiller position. Of the 157 class members on the instatement list, 107 indicated they were not interested in the job, failed to appear for appointments, did not respond to Wal-Mart's communications, or failed to return calls to DC 6097 to schedule appointments, after promising to do so.

On November 4, 2010, over three months after providing the first list, the EEOC finally produced a second instatement list of 163 class members. This large list undermines the EEOC's

earlier contention that it was "unable to provide" Wal-Mart with additional class members for instatement in October. The EEOC is obligated to provide names on a rolling basis and it stands to reason that if the EEOC produced 163 names in early November, it could have provided at least some class members' names in October. This would have enabled Wal-Mart to contact, hire and train class members so they would be fully trained when the influx of holiday business arrives. (Wal-Mart's orderfiller training process takes up to five weeks.) Unfortunately, the EEOC's failure to provide class members' names on a rolling basis, as it is required to do, will prevent Wal-Mart from having trained and optimally productive orderfillers to handle the holiday rush.

III. ARGUMENT AND AUTHORITIES

- A. Wal-Mart Has Fully Complied with the Instatement Provisions in the Consent Decree.
 - 1. Wal-Mart's Use of the Physical Abilities Test and the Logistics Pre-Employment Assessment Is Consistent With the Consent Decree.

The EEOC's allegation that Wal-Mart has violated the Consent Decree ignores the plain language of the Decree expressly allowing use of such hiring criteria. Wal-Mart's instatement obligations are defined in Section 302, which provides that "Wal-Mart will fill the [openings for an orderfiller position] with an individual on the list provided by the EEOC (Section 301) subject to criteria that is applicable for all new hires in the orderfiller position." Consent Decree, Section 302 (emphasis added). The EEOC ignores the plain meaning of this "subject to" provision and argues that the parties intended this language to mean only that class members must be at least 18 years of age, have the legal right to work in the United States, must not have committed certain felonies, and must not have been terminated by their most recent employers. EEOC's Memorandum of Law at 2 [Docket No. 670-1]. The EEOC's argument about the parties' intent is contradicted by the unambiguous language of the Consent Decree. Specifically,

the Decree expressly states that in order for class members to be included on the instatement list, their applications must not have included "exclusionary criteria" as defined by EEOC expert Dr. Burt Barnow, which includes most, if not all, of the criteria described above. If the parties had truly intended that class members on the instatement list be subject only to "minimal criteria," as asserted by the EEOC, then Section 302's language is redundant; such "minimal criteria" is considered before a class member is placed on the instatement list. The result would be that every person on the instatement list must be offered a position, which is contrary to the plain language of the Consent Decree allowing Wal-Mart to consider "criteria that is applicable for all new hires."

Intent of the Parties Is Discerned from the Decree: Consent decrees have attributes of both contracts and judicial decrees. *Brown v. Neeb*, 644 F.2d 551, 557 (6th Cir. 1981). Thus, consent decrees must be interpreted in accordance with the rules of contractual construction. *Id.*With these principles in mind, a consent decree "must be construed as it is written, and not as it might have been written." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). "The scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties." *Id.* Thus, applying rules of contractual construction, when the language of a consent decree is clear and unambiguous, the intent of the parties is discerned from the words used in the decree, and those words should be enforced as written. *See Travelers' Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2204 (2009) (noting, *in dicta*, that "it is black-letter law that the terms of an unambiguous private contract must be enforced irrespective of the parties' subjective intent"); *see also Taggert v. United States*, 880 F.2d 867, 870 (6th Cir. 1989) (holding that unambiguous contractual terms must be enforced as written).

The language of Section 302 is clear and unambiguous: Wal-Mart's instatement obligation for class members is "subject to criteria that is applicable for all new hires in the orderfiller position." Under the plain meaning of this provision, Wal-Mart must offer orderfiller jobs to class members if those class members meet the same criteria applicable to all new hires in the orderfiller job. The EEOC complains that class members must pass a Physical Abilities Test and Logistics Pre-Employment Assessment prior to being hired, yet all applicants for orderfiller positions nationwide must pass those tests. The tests are no different than a drug screening or criminal background check, about which the EEOC does not complain. Class members are subject only to criteria that all new orderfiller hires must satisfy; thus, Wal-Mart's hiring policies meet the requirements of Section 302 and are compliant with the Consent Decree.

The EEOC's Interpretation Twists the Decree's Plain Language: The EEOC's argument ignores the fundamental rules of contract interpretation. The Court must give effect to every word of the Consent Decree and avoid "interpretation[s] that render[] part of it superfluous." *JSC Terminal, LLC v. Farris*, No. 5:10-CV-00040-R, 2010 U.S. Dist. LEXIS 52481, at *8 (W.D. Ky. May 27, 2010) ("An interpretation of a contract that gives meaning to all of its provisions is favored over an interpretation that renders part of it superfluous."); *see also American Cont'l Life Ins. Co. v. American Trust Co.*, 5 F.2d 71, 73 (6th Cir. 1925) ("[I]t 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."). The EEOC's construction of Section 302 would render the "subject to criteria" language superfluous. The list from which Wal-Mart must instate class members is governed by Section 301, which provides that "the list shall include all eligible claimants, as defined by Section 402." Section 402 in turn defines eligible claimants as females who applied during the relevant time period, were denied employment, and "whose applications

do not contain any exclusionary criteria as determined by EEOC expert Dr. Barnow." In his March 1, 2007 report, Dr. Barnow listed the following minimum criteria used to qualify individuals as class members:

- age 18 or over;
- permission to work in the United States;
- no felony conviction.

3/1/07 Expert Report of Burt Barnow at 19 n.15 (excerpt attached as Exh. 6). These are the same criteria that the EEOC argues are referred to in the "subject to criteria" language of Section 302. See EEOC Memorandum of Law at 2. However, in order to be "eligible claimants" for inclusion on the instatement list, the applicants must already meet these criteria pursuant to Section 402. Under the EEOC's construction, anyone on the instatement list would already meet the "criteria that is applicable for all new hires in the orderfiller position," thereby rendering this language meaningless, redundant and superfluous. Thus, the EEOC's new interpretation of Section 302 is impermissible under the rules of contractual construction.

Contract Interpretation Principles Apply: The EEOC relies upon a number of inapposite and distinguishable cases in support of its argument that instatement of class members must be "unconditional." EEOC Memorandum of Law at 5. These cases discuss the power of courts to award instatement as an equitable remedy. None of the cases discusses the enforcement of instatement provisions in consent decrees or other contractual arrangements, a key distinction. Here, instatement is a contractual remedy, not an equitable remedy. Here, the duty of instatement arises from the Consent Decree, not from the Court's equitable powers. Thus, because consent decrees are interpreted as contracts, the Court must interpret Wal-Mart's instatement obligations by examining the clear, unambiguous language within the four corners of the Consent Decree. See Armour & Co., 402 U.S. at 681-82.

After lengthy negotiations, the parties agreed in the Consent Decree that class members would be instated into orderfilling jobs "subject to criteria that is applicable for all new hires in the orderfiller position." Thus, the clear manifestation of the parties' intent is that class member instatement is conditional. If the EEOC truly believed that the "subject to" language referred to the class members' ages, felony convictions and ability to work in the United States, it should have negotiated for such explicit requirements in the Consent Decree. The EEOC cannot ask the Court to rewrite this section under the guise of enforcing the Consent Decree.

Wal-Mart's Hiring Process is Appropriate: Wal-Mart has the express right under the Consent Decree to require the instatement list class members to meet "criteria that is applicable for all new hires in the orderfiller position." It is undisputed that, like its drug screening and criminal background check, Wal-Mart's Physical Abilities Test and Logistics Pre-Employment Assessment apply to all new hires for the grocery orderfiller position – not just at DC 6097 – but nationwide. Applying the same criteria to the class members is consistent with the Consent Decree and the Court should reject the EEOC's arguments to the contrary.

Moreover, the EEOC has disingenuously argued that the Physical Abilities Test was instituted at DC 6097 solely as a means of excluding class members from orderfiller jobs, referring to the test as "Wal-Mart's latest tactic for excluding women." EEOC's Memorandum of Law at 3. Wal-Mart has demonstrated that the EEOC's argument is without merit. In addition, the EEOC's position is contrary to its own testifying experts' advocacy of a validated strength test based on a job analysis as a means of avoiding sex discrimination. "The absence of an objective measure of physical strength poses a significant obstacle to female job candidates at

² Assessing the class members' physical ability to perform the orderfiller job duties provides protection to the class members by ensuring that they are not placed in a position where they could suffer an on-the-job injury. In addition, it offers the person undergoing the test a realistic sense of the level of physical activity required by the job.

DC 6097." See 8/15/08 Expert Rebuttal Report of Richard Martell at 28 (excerpt attached as Exh. 7). Dr. Richard Martell further testified that Wal-Mart's prior hiring practices were deficient because "an objective valid measure of physical strength and ability were not included." Dep. of Dr. Martell at 267 (excerpt attached as Exh. 8). In response to a question about what was lacking in Wal-Mart's prior hiring procedures, Dr. Martell testified:

In addition, a job applicant's strength and lifting ability, apparently, is a really key element, a key criterion, if you will. And there is not a valid, that I've seen, a valid, objective measurement instrument in place to assess a candidate's strength, lifting ability.

Id. at 288. Dr. Martell further testified that Wal-Mart could improve its hiring policies by conducting a job analysis and including strength testing. Id. at 290. Now that Wal-Mart has conducted a job analysis and used that analysis to form a validated and objective strength test, the EEOC has changed its position, which is disingenuous at best.

Furthermore, there is nothing within the Consent Decree that prevents Wal-Mart from implementing new or different hiring processes, such as a physical abilities test, at any time during the duration of the Decree. Nowhere in Section 302 does it state that class members must be instated using only the criteria in place during the litigation's relevant time period, 1998 to 2005. It is unrealistic to believe that Wal-Mart's hiring processes were frozen in time from 2005 to entry of the Decree in 2010 and would remain so. Indeed, it has been the EEOC's position throughout this litigation that Wal-Mart must use a validated and objective test to measure applicants' strength. The EEOC can hardly argue that it did not contemplate that DC 6097 would begin using such a test when it was advocated by its own expert.

The express language of the Consent Decree, Section 302 allows Wal-Mart to use a physical abilities test and other criteria in determining whether class members on the instatement

list are eligible for employment as an orderfiller. Wal-Mart is following the procedures espoused by the EEOC's expert witnesses. The EEOC's motion is without merit.

2. Wal-Mart Is Not Forcing Class Members to "Apply" for Open Positions.

The EEOC further contends that Wal-Mart has violated the Consent Decree by forcing class members to "apply" for orderfiller positions, rather than simply instating them. Again, the EEOC's position ignores the plain language of Section 302 and the practical necessity of obtaining the information provided in a completed application. Asking class members to complete an application and provide their personal information is not the same as requiring them to apply and compete with other applicants for an open position. Again, the EEOC's allegation of non-compliance is without merit.

The EEOC's argument that class members are being forced to apply for jobs "like any other outside applicant" rather than being instated also ignores the key distinction between an external applicant applying for an orderfiller position and a class member being instated pursuant to the terms of Section 302 of the Consent Decree. If an external new hire applicant is competitive on the Physical Abilities Test and the Logistics Pre-Employment Assessment, that applicant may be hired by Wal-Mart, but Wal-Mart is not obligated to hire that applicant. If a class member, on the other hand, is competitive on these tests, that class member will receive a conditional offer of employment.³ Pursuant to Section 302, Wal-Mart is required to instate that class member. Thus, contrary to the EEOC's arguments, class members receive the intended preferential treatment over "other outside applicant[s]" and Wal-Mart is not requiring applicants to "apply" for open orderfiller positions.

³ The offer is conditioned on passing a drug screening test and criminal background check.

Asking the class members to provide the information and consents generally captured on an application form is a standard requirement during the hiring process. Wal-Mart uses the information to create the personnel file, and the application form is the vehicle by which Wal-Mart obtains the class member's consent for drug screening and the criminal background check. Suggesting that Wal-Mart should forego this step in the process is simply unreasonable and unrealistic. As with the Physical Abilities Test, the EEOC attempts to impugn Wal-Mart's motives without understanding the purpose behind the requirement and the manner in which it is carried out. Had the EEOC waited for Wal-Mart's production of information regarding the instatement process, it would have recognized that all of Wal-Mart's actions are complaint and well-documented.

3. The EEOC Has Not Complied With Its Consent Decree Obligations.

The EEOC has failed to comply with its obligations under the Consent Decree, namely: (1) providing a list of individuals for instatement on a rolling basis, with the goal of maintaining at least 25 names on the list at all times (Section 301); and (2) ensuring that the class members listed on the instatement list indicate their interest in instatement in writing (Section 301). The cumulative impact of the EEOC's non-compliance is that Wal-Mart has not received a sufficient number of eligible class members interested in instatement to enable Wal-Mart to meet its instatement obligations.

The EEOC appears to blame its failure to comply on the Administrator. See 9/28/10 Correspondence from Nancy Edmonds (Exh. 9). To be clear, under Section 301, the EEOC is ultimately responsible for compiling the instatement list. Moreover, the EEOC has the sole authority to hold the Administrator accountable for its duties. Pursuant to Section 501, "[i]f EEOC determines that the Administrator cannot perform its duties in a proficient, cost-effective manner, EEOC may file a motion with the Court for appointment of a new Administrator." The

EEOC has not sought appointment of a new Administrator and thus, cannot use the Administrator's asserted shortcomings as an excuse for its own non-performance.

Wal-Mart is completely dependent on the EEOC to provide an instatement list and cannot meet its instatement obligations unless the EEOC performs its obligations in conformance with the Consent Decree. A black-letter contract principle is that a material breach of contract by one party excuses performance by the other party. *See In re LWD, Inc.*, No. 5:06-CV-00206-TBR, 2009 U.S. Dist. LEXIS 119642, at **12-13 (W.D. Ky. Dec. 23, 2009). Here, the EEOC has failed to meet its obligations to provide an instatement list that conforms with the Consent Decree's requirements and cannot be heard to complain that Wal-Mart has not met its instatement obligations.

It has been over three months since the EEOC provided its first instatement list. Wal-Mart notified the EEOC when the list was exhausted. Despite multiple requests for a rolling instatement list of at least 25 names as required by the Decree, the EEOC has not complied with its obligation to provide a rolling instatement list, leaving DC 6097 in a very difficult situation and failing to act in the class members' interests. Only on November 4, 2010 did Wal-Mart receive a second instatement list from the EEOC, with 163 names. However, because the orderfiller position requires up to five weeks of training, this belated list does not help Wal-Mart's operations, nor does it cure the EEOC's lack of compliance. The holiday season is the busiest time of year for the Distribution Center and DC 6097 must have a full complement of trained orderfillers to handle this increased demand. DC 6097 is required to hire class members from the instatement list to fill these openings and, at this juncture, is not allowed to hire external candidates, necessitating the imposition of mandatory overtime for DC 6097 orderfillers. Mandatory overtime places a great burden – physically and personally – on current Associates.

Of critical importance to the instant motion, Wal-Mart is unable to instate waiting class members, who could number over 1200, because of the EEOC's failure to provide a rolling instatement list to Wal-Mart.

Moreover, the fact that so many class members have told DC 6097 that they have no interest in instatement further calls into question the EEOC's compliance with its obligation to confirm the class members' interest before including their names on an instatement list.⁴ The EEOC's own failure to comply with its Consent Decree obligations renders it powerless to claim that Wal-Mart is in breach.

B. Wal-Mart Has Complied with its Obligations to Provide Information.

1. The EEOC's Argument Regarding the Document Production Is Moot Because Wal-Mart Has Produced the Requested Documents.

Despite Wal-Mart's agreement to produce the requested materials, the EEOC prematurely moved the Court to compel "Wal-Mart to comply with Section 901 of the Decree's 'reasonable notice' provision by responding to requests made by the EEOC, within seven days." EEOC's Mot. to Enforce Consent Decree at 5. Wal-Mart has met its obligations to produce information in a timely manner. Regardless, the EEOC's request for relief is moot because Wal-Mart has already produced all of the information the EEOC requested in its September and October 2010 correspondence. As promised numerous times, this production was served on the EEOC by November 4, 2010.⁵

⁴ It appears that the EEOC has intentionally flooded Wal-Mart with a long list of names in order to claim a breach by Wal-Mart and seek the imposition of new requirements by the Court. In point of fact, the EEOC has provided Wal-Mart with only 48 names of class members who are interested in instatement. From this list, Wal-Mart has offered employment to two class members, one of whom rejected the offer.

⁵ Wal-Mart advised the EEOC that its provision of requested materials was not "ripe for judicial intervention" because Wal-Mart had not refused to provide the materials. Wal-Mart further submits that, had the EEOC waited to review the materials, it would have recognized that the complained-of tests were properly validated and implemented before Wal-Mart received the EEOC's instatement list. By prematurely filing this Motion, the EEOC engaged this Court's enforcement jurisdiction without any reason to do so.

While the EEOC's premature request is now moot, in the interest of fairness and in an effort to avoid similar disputes in the future, Wal-Mart will respond to the EEOC's arguments that Wal-Mart's production was untimely.

2. The EEOC's Request for Information Is Governed by Section 902.

Although the EEOC's Motion only mentions Section 901 of the Consent Decree, as it stated in its September 20, 2010 correspondence, this issue actually involves review of both Section 901 and Section 902. Section 901 provides in relevant part:

The EEOC may review compliance with this Decree. As part of such review, the EEOC may inspect the premises, interview employees, and request, examine, and copy documents upon reasonable notice.

Thus, under Section 901, upon reasonable notice, the EEOC may have access to certain information for the purpose of reviewing Wal-Mart's ongoing compliance with the Consent Decree. "Reasonable notice" is not defined in the Consent Decree.

Section 902, on the other hand, applies when the EEOC alleges that Wal-Mart has violated the Consent Decree, providing:

In the event that the EEOC alleges that a violation of this Decree has occurred, the EEOC shall give notice to Wal-Mart in writing specifically identifying the alleged violation. Wal-Mart will have (45) forty-five days in which to investigate and respond to the allegation.

Thus, under Section 902, when the EEOC alleges that Wal-Mart has violated the Consent Decree, Wal-Mart has 45 days to respond.

Although the EEOC has characterized its correspondence as a mere request for information under Section 901, the EEOC expressly gave notice of alleged violation under Section 902. The opening paragraph of the EEOC's September 20, 2010 correspondence states:

It has come to our attention that Wal-Mart is violating the intent of the Consent Decree by failing to offer instatement to the class members as envisioned by the parties at the time the Decree was drafted. Pursuant to Sections 901 and 902 of the Consent Decree, we are notifying you of the violation and are further

requesting the immediate production of documents relating to the newly instituted 'physical abilities test.'

See 9/20/10 Correspondence from Nancy Edmonds (Exh. 10). Thus, the purpose of the EEOC's letter was not to seek information to determine whether Wal-Mart was complying with the Decree; the EEOC had already "determined" that Wal-Mart had violated the Decree. Accordingly, under Section 902, Wal-Mart had 45 days to investigate and respond to the EEOC's allegation. The EEOC attempted to circumvent this 45 day response period by invoking Section 901, even though it had already determined that Wal-Mart had violated the Decree. This is exemplified by the EEOC's subsequent September 28, 2010 correspondence demanding that Wal-Mart respond to the EEOC's allegations that Wal-Mart violated the Decree by Thursday, September 30, 2010, a mere eight days after it first notified Wal-Mart of its alleged breach. See Exh. 9.

Wal-Mart has never refused to provide the requested information and, in fact, has steadfastly and repeatedly told the EEOC that, in compliance with its obligations under Section 902, it would produce the requested information on or before November 4, 2010, 45 days after the EEOC's first notice of violation. *See* 10/1/10 Correspondence from Kathryn Quesenberry (Exh. 11). The EEOC's demand that Wal-Mart produce the requested information prior to that date circumvents the Decree itself and violates the spirit and the letter of Section 902.

3. The EEOC's Demand that Wal-Mart Produce Information Is Not "Reasonable Notice."

Even if Section 901 did apply to the EEOC's demand for information, the EEOC did not provide Wal-Mart with "reasonable notice" by seeking a response in one calendar week. As the EEOC concedes, reasonable notice is not defined in the Consent Decree. This ambiguous phrase allows Wal-Mart sufficient time under the circumstances to gather the requested information. Given the voluminous materials demanded by the EEOC, 45 days to produce the requested

information is more than reasonable. This is especially true in light of the fact that the EEOC has not asked Wal-Mart to respond to just one set of requests, but rather three separate requests for documents. *See* 9/9/10, 9/20/10, 10/1/10 Correspondence from EEOC (Exh. 12). All told, Wal-Mart has produced 1,346 pages of documents, including a DVD, in response to EEOC's demand for information. This burden is further compounded by the fact that these requests for documents were issued at the same time Wal-Mart was preparing and compiling information for its first Section 803 Annual Report, comprised of 414 pages of material and due on November 1, 2010. With these considerations in mind, the EEOC's demand that Wal-Mart produce these materials within seven days was not "reasonable notice." Wal-Mart's 45-day response period was more than reasonable under the circumstances.

IV. CONCLUSION

Wal-Mart has worked diligently to comply with its obligations under the Consent Degree and instate class members in available orderfiller jobs. Contrary to the EEOC's arguments, Wal-Mart is not asking these individuals to "apply" for jobs, nor has Wal-Mart violated Section 302 of the Consent Decree by requiring them to pass a Physical Abilities Test, the Logistics Pre-Employment Assessment, drug screening or any other requirement generally applied to applicants for the orderfiller position. These tests are applied nationwide to all applicants for orderfiller positions and thus are expressly allowed by Section 302. The EEOC, however, has not met its obligations in identifying class members eligible for instatement, which has hindered Wal-Mart's ability to meet its instatement commitments. Finally, Wal-Mart has consistently complied with its production requirements under the Consent Decree.

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For all of the reasons set forth herein, Wal-Mart respectfully requests that the Court deny the EEOC's Motion to Enforce the Consent Decree.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served, via first-class mail, to the following attorneys of record, on the 8th day of November, 2010:

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