IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROLANDO PADRON, BOBIRT R. MIRANDA and EUSEBIO R. CALZADA, individually and on behalf of all others similarly situated,	)	**Case No. 10-CV-06656**
	)	**Judge Zagel**
Plaintiffs,	)	**Magistrate Judge Soat Brown**
v.	)	
WAL-MART STORES, INC., d/b/a WALMART,	)	
Defendant.	)	

PLAINTIFFS' RESPONSE TO WAL-MART'S
MOTION FOR PARTIAL DISMISSAL OF COMPLAINT

NOW COME PLAINTIFFS, Rolando Padron ("Padron"), Bobirt R. Miranda ("Miranda") and Eusebio R. Calzada ("Calzada"), hereinafter collectively referred to as Plaintiffs, by and through their undersigned counsel of record, and in Response to Defendant's Motion for Partial Dismissal of Complaint, respectfully request this Honorable Court deny the same, and in support thereof, state as follows:

INTRODUCTION

This is an important case to a class of Cuban warehouse employees of Walmart, who have been discriminated against and paid less than their similarly situated non-Cuban counterparts. In 2006, Plaintiffs, *pro se* Complainants at the time, despite speaking only broken English, spoke up courageously and sought help from an unfamiliar government and agency the Equal Employment Opportunity Commission ("EEOC"). Plaintiffs sought assistance in the face of almost certain retaliation despite desperately needing their employment to support their respective families. Each took a risk for more than just their own sake, they sought help from the EEOC for all Cuban workers because Walmart refused to investigate or address their repeated complaints of continued and pervasive mistreatment of Cuban warehouse workers. Plaintiffs have brought this action to secure equal treatment and wages for themselves, as well as similarly

situated Cuban co-workers who predominantly face similar language, educational, financial and cultural hurdles in pursuing equal rights in the workplace.

Certain language, educational, cultural and financial restraints caused Plaintiffs to seek assistance from the EEOC without hiring legal counsel. In filing their initial Charges of Discrimination, they were forced to rely on the EEOC because of their *pro se* status. The EEOC, not Plaintiffs, styled the language of their Charges of Discrimination. Despite the language, cultural and educational barriers, and despite lack of legal counsel, Plaintiffs were able to provide the EEOC with enough information that the EEOC styled the action as a "class" and found that the evidence supported a conclusion that Walmart discriminated against Plaintiffs and a class of similarly situated Cuban employees, by paying the lesser wages.

Now, in yet another attempt to avoid accountability for discrimination against their Cuban employees, Walmart asks this Honorable Court to strictly construe Plaintiffs' Charges of Discrimination and dismiss their disparate impact claims because, for instance, the phrase "disparate impact" is not found in their underlying *pro se* Charges of Discrimination. Further, despite the obvious informational asymmetry that exists at the inception of litigation, Walmart asks this Honorable Court to dismiss Plaintiffs individual and class claims regarding the pay disparity on the basis that the non-English speaking Plaintiffs were unable to adequately identify and plead with specificity, direct evidence of the specific compensation policy or decisions that led to the unequal pay for Cubans. Disturbingly, Walmart seeks dismissal at this early stage in the litigation (pre-discovery) despite the fact that the EEOC investigation of this very case resulted in a determination that Walmart discriminated against Plaintiffs and a class of Cuban employees by paying them lower wages than similarly situated non-Cuban employees.[1]

Just as *pro se* Plaintiffs in the EEOC stage are given leniency with regard to their underlying Charges of Discrimination at the Federal Court stage; non-English speaking, immigrant warehouse employees should not be held to the strictest possible construction or interpretation of the highest possible pleading standard, where there is obvious informational asymmetry between Plaintiffs and Walmart at the pleading stage. Walmart is one of the most sophisticated corporations in the world, it is in exclusive control of the data that will establish

[1] It is important to note that a large portion of the EEOC investigative file is redacted, so it is impossible at this pre-discovery stage in the litigation to provide greater factual specificity. Further, Walmart is in exclusive possession of the data that demonstrates disparate pay and Plaintiffs will be specifically seeking that data through discovery.

pay disparity for the class of Cuban warehouse employees alleged in this Complaint. Walmart cannot be permitted to ignore its Cuban employees' reports of discrimination, terminate those employees after reporting, refuse the EEOC assisted conciliation of Charges of Discrimination in which EEOC found evidence of discrimination, and then insulate itself from responsibility for damages caused by its unlawful employment policies because the non-English speaking Plaintiffs cannot provide more factual specificity at the pleading stage in this litigation.

Importantly, when Plaintiffs in this case inquired about the pay disparity, Walmart refused to give them requested information. When Plaintiffs persisted with their complaints of discrimination and requests for information, Walmart terminated their employment. Walmart has gone to great lengths to make sure Plaintiffs could not ascertain the precise compensation policy and management level decision making necessary to plead with more factual specificity. Requiring non-English speaking, immigrant Cuban warehouse employees to ascertain and plead with specificity the precise compensation policy and compensation decisions of an international corporate giant, like Walmart, would effectively insulate Walmart from class liability in circumstances were they violate the most basic employment rights of their most vulnerable category of employees, who have little to no opportunity to discover the details of their sophisticated employer's personnel policies and decision making processes, without the benefit of any discovery in litigation.

Plaintiffs have pled their claims with sufficient specificity. Defendant knows exactly what this case is about, it defended it without success at the EEOC, and is now attempting to obtain dismissal on inappropriate grounds. Walmart's Motion is not based on a genuine lack of understanding of the claims being brought against it, rather a desire to avoid responsibility for its unlawful employment practices by creating an unachievable pleading standard that would effectively preclude the majority of its workforce from accessing justice.

FACTUAL ALLEGATIONS

Plaintiffs hereby incorporate by reference and attachment hereto, all factual allegations of their Class Action Complaint. *See* Exhibit A.

PROCEDURAL STANDARD

In order to have a claim dismissed under Rule 12(b)(6), the moving party must meet a high standard. The purpose of a motion to dismiss is to test the sufficiency of the complaint, *not*

to decide the merits of the case. Under the "simplified notice pleading" of the Federal Rules of Civil Procedure, the complaint's allegations should be construed liberally, and "the complaint should not be dismissed for failure to state a claim unless it appears *beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief*." *Conley v. Gibson,* 355 U.S. 41, 46 (1957); *see also Hishon v. King & Spaulding,* 467 U.S. 69, 73 (1984).

When considering a defendant's motion to dismiss, the court must view the complaint's allegations in the light most favorable to the plaintiff. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974); *Conley,* 355 U.S. at 45. All well-pleaded facts and allegations in the plaintiff's complaint must be taken as true, *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.,* 805 F.2d 732, 733 (7th Cir. 1986), *cert. denied,* 482 U.S. 915 (1987), and the plaintiff is entitled to all reasonable inferences that can be drawn therefrom. *Ellsworth v. Racine,* 774 F.2d 182, 184 (7th Cir. 1985), *cert. denied,* 475 U.S. 1047 (1986).

ARGUMENT

A. Plaintiffs' Title VII Disparate Impact Claim Should Not Be Dismissed

1. The Disparate Impact Claim is Not Outside the Scope of Plaintiffs' Charges of Discrimination.

Walmart erroneously contends that Plaintiffs' disparate impact claims are outside the scope of their *pro se* EEOC charges. To the contrary, a simple reading of the underlying charges and the subsequent class determinations reveal that each of these documents are silent on the issue of intent, the distinguishing characteristic between disparate impact and disparate treatment claims. Because the underlying *pro se* Charges of Discrimination and the subsequent EEOC determinations are silent on the issue of intent, Walmart is not entitled to dismissal of the disparate impact claim on the theory that it is outside the scope of the EEOC charges. In their Charges of Discrimination, Plaintiffs clearly alleged that they were paid lower wages than non-Cuban employees of Walmart. However, Plaintiffs did not identify in their charges whether or not this was intentional or the result of Walmart's facially neutral compensation policy which allows store managers to subjectively set hourly employees pay rates within a range. Because of the informational asymmetry between Plaintiffs and Walmart, Plaintiffs are still maintaining alternate theories of liability by virtue of their disparate impact and disparate treatment claims.

The underlying *pro se* charges indicate that Plaintiffs were paid less than similarly situated non-Cubans. This raises the inference that Plaintiffs were not paid less than other Cubans. Moreover, Plaintiffs' Charges of Discrimination do not specifically allege class allegations. However, the class allegations were born out of the EEOCs subsequent investigation of the charges. Ultimately, the EEOC issued a class determination that Walmart discriminated against Plaintiffs and a class of Cuban employees by paying them lower wages than similarly situated non-Cuban counterparts. The EEOC determinations were also silent on the issue of intent. Importantly, the EEOC redacted the majority of its investigation file, including the investigative memorandum, statistical analysis and other key investigative material. Nevertheless, Plaintiffs' disparate impact claim is "reasonably related" to their underlying Charges of Discrimination. Courts have long held that plaintiffs need not specifically use phrases such as "disparate impact" in their underlying charge, to assert a disparate impact theory in Federal Court. *Watkins v. City of Chicago*, 992 F.Supp. 971, 973, N.D.Ill., 1998.; See also, *Gomes v. Avco Corp*., 964 F.2d 1330, C.A.2 (Conn.), 1992. The question becomes whether or not the disparate impact claim is reasonably related to the underlying charge. *Id*. In determining whether a particular claim is reasonably related to the underlying charge, courts look not merely to the four corners of the often inarticulately framed charge, but take into account the scope of the EEOC investigation which can reasonably be expected to grow out of the charge. *Id*. In this case, it is clear that the EEOC would reasonably have been expected to investigate both the corporate level compensation policy that allows store managers to subjectively set and adjust hourly employees' pay rates within a range, as well as any store-level decisions by Plaintiffs' specific managers. In fact, the two are so related that it defies common sense to think an EEOC investigator would not look to both the actions of the Plaintiffs' manager and the corporate level compensation policy which governs the manager's ability to set and adjust pay rates for hourly employees. One obvious inquiry would be whether or not the store manager was acting within the scope of Walmart's policies in setting Plaintiffs' and class members pay rates.

It is also relevant that Plaintiffs' alternate theories, disparate impact and disparate treatment are not mutually exclusive. Plaintiffs' disparate impact theory hinges on the specific, facially neutral compensation policy of allowing store managers to subjectively set and adjust hourly employees' pay rates within a range. This is a facially neutral policy which has a

disparate impact on Cuban employees at Walmart. However, Plaintiffs can still be subjected to intentional discrimination vis-à-vis the intentional or manager-specific implementation of the facially neutral policy allowing store managers to subjectively set and adjust hourly employees pay rates within a range. Quite simply, Plaintiffs could prevail under both theories because these are separate and distinct actions. The facially neutral policy may provide the mechanism by which store managers can intentionally discriminate against employees of their choosing.

Given the vanilla Charges of Discrimination (prepared by the EEOC for non-English speaking, immigrant Complainants), the reasonable relation between the underlying charges and the disparate impact claim, the incomplete investigative file ascertained pursuant to Plaintiffs' FOIA request, the informational asymmetry at this pleading stage, and the fact that all inferences must be drawn in their favor, Plaintiffs' respectfully request this Honorable Court deny Walmart's Motion to Dismiss Count I and allow this matter to proceed to discovery.

2. Plaintiffs Have Adequately Alleged a Facially Neutral Policy that Caused the Disparate Impact.

Walmart seeks dismissal of Plaintiffs' disparate impact claim on the basis that Plaintiffs have failed to adequately allege and identify the specific facially neutral policy that had a disparate impact on Plaintiffs and the class. Plaintiffs have alleged that Walmart's facially neutral "compensation policy" has had a disparate impact on Plaintiffs, Cuban warehouse employees and the Rule 23 class. Plaintiff did identify the specific policy, the "compensation policy," to the best of their ability given the informational asymmetry at this stage. More specifically, Plaintiffs contend that Walmart's facially neutral "compensation policy" of allowing store-level managers to subjectively set and adjust hourly employees' pay rates within a range has caused the disparate impact on Plaintiffs and the class. Alleging the specific "compensation policy" and the reasonable inferences drawn from all of the factual allegations in the Complaint are enough to satisfy Plaintiffs' burden of identifying the specific policy which caused the disparate impact. Therefore, Plaintiffs respectfully request this Honorable Court deny Walmart's Motion for Partial Dismissal in its entirety.

B. Count II Alleging Individual and Class Disparate Treatment Claims Under Title VII Should Not Be Dismissed.

1. Count II States a Claim for Class-Wide Relief.

Walmart's Motion for Partial Dismissal of Complaint relies heavily on *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007). However, as Judge Posner and the Seventh Circuit recently noted in *In re Text Messaging Antitrust Litigation* --- F.3d ---, 2010 WL 5367383 C.A.7 (Ill.), December 29, 2010:

> "*Twombly* is a recent decision, and its scope unsettled (especially in light of its successor, *Iqbal* – from which the author of the majority opinion in *Twombly* dissented; and two of the Justices who participated in those cases have since retired." *Id* at *3.

The Court went on to note that "Pleading standards in federal litigation are in ferment after *Twombly*." *Id.* At the complaint stage, the test for whether to dismiss a case turns on the complaint's "plausibility." *Id* at *6. With regard to the plausibility standard, the Seventh Circuit explained:

> "The Court said in *Iqbal* that the plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. 129 S.Ct. at 1949. This is a little unclear because plausibility, probability and possibility overlap. Probability runs the gamut from a zero likelihood to a certainty. What is impossible has a zero likelihood of occurring and what is plausible has a moderately high likelihood of occurring. The fact that the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed; the complaint must establish a nonnegligible probability that the claim is valid; but the probability need not be as great as such terms as "preponderance of the evidence" connote." *Id*. (emphasis added).

Ultimately, the Seventh Circuit, in ruling that the plaintiffs had met their pleading burden under *Twombly*, noted that despite the fact that plaintiffs' complaint did not allege any direct evidence of a price-fixing agreement, circumstantial evidence can establish an antitrust violation. *Id* at *5. Finally, the Court recognized the informational asymmetry at the pleading stage and noted:

> "The plaintiffs have conducted no discovery. Discovery may reveal the smoking gun or bring to light additional circumstantial evidence that further tilts the balance in favor of liability." *Id* at *6.

Like the antitrust claims in *In re Text Messaging Litigation*, Plaintiffs' Title VII allegations need not contain a smoking gun with respect to intentional, class-wide discrimination at this stage. Moreover, like the antitrust claims in *In re Text Messaging Litigation*, Plaintiffs' Title VII disparate treatment claims may be established by circumstantial evidence. The fact that the EEOC, the federal agency charged with investigating allegations of discrimination, conducted a four-year investigation, including redacted statistical analysis and issued a for cause determination that Walmart discriminated against Plaintiffs' and a class of Cubans by paying them lesser wages, establishes a "nonnegligible probability" that the claim is valid, thereby satisfying the requirements of *Twombly*, as interpreted by the Seventh Circuit. *Id*. Therefore, Walmart's Motion for Partial Dismissal should be denied.

2. Plaintiffs' Title VII Race Discrimination Claim in Counts I and II are Reasonably Related to the EEOC Charges.

Walmart argues that Plaintiffs' Title VII race discrimination claim in Counts I and II should be dismissed because they did not allege race discrimination in their underlying Charges of Discrimination. However, Plaintiffs clearly allege in their charges that they were discriminated against because they are Cuban. Significantly, "Cuban" is a national origin and a race. Judge Plunkett discussed this issue in *Torres v. City of Chicago*, 2000 WL 549588, N.D.Ill., (2000). In *Torres*, Defendant moved to dismiss the race discrimination allegations of plaintiff's complaint on the basis that Plaintiff failed to check the "race" box on the EEOC charge and merely stated that they were discriminated against "because of my national origin, Hispanic." *Id* at *1. In ruling that plaintiff's complaint, including race discrimination claims, was reasonably related to the underlying charge, which only identified national origin discrimination, Judge Plunkett explained the following:

> "In their amended complaint, plaintiffs allege that they have been discriminated against on the basis of their race and national origin. (Am. Compl., Count I ¶ 10; *id.,* Count II ¶ 12.) The City contends that the race claims must be dismissed because they are beyond the scope of plaintiffs' EEOC charges.[FN1] While it is true that Title VII plaintiffs can only sue on claims that were included in their EEOC charges, *Cheek v. Western & S. Life Ins. Co.,* 31 F .3d 497, 500 (7th Cir.1994), the term "included" is interpreted very broadly. Thus, a claim is included in a charge if it is "like or reasonably related to the allegations of the charge" or grows out of those allegations. *Id.* (internal quotation marks and citation omitted). Claims are alike or reasonably related if they "describe the same conduct and implicate the same individuals." *Id.* at 501.

> Plaintiffs' race discrimination claims easily satisfy that test. The discrimination claim Torres asserts in the amended complaint implicates the same conduct and individuals as that asserted in his EEOC charge. In both documents, he claims that the City discriminated against him by suspending him and requiring that he take a drug test because he had a verbal altercation with his District Chief. (*Compare* Am. Compl., Count I ¶¶ 7-11 *with id.,* Ex. B, Torres Charge of Discrimination.) The same is true for Vasquez's claims. In both the amended complaint and his EEOC charge, he alleges that the City discriminated against him when the Deputy Fire Commissioner disciplined and suspended him and the 7th District Chief subjected him to profanity and allegations of incompetency. (*Compare id.,* Count II ¶¶ 8, 12 *with id.,* Ex. C, Vasquez Charge of Discrimination.) The only difference between the charges and the amended complaint is that the former indicate that the discrimination was based solely on national origin while the latter alleges race and national origin discrimination.
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> Plaintiffs' failure to check the race discrimination box on their EEOC charges does not mandate dismissal of their race claims. Technically, the term "Hispanic" denotes an ethnic origin not a race. St. Francis College v. Al-Khazraji, 481 U.S. 604, 610 n. 4 (1987) (noting the "common popular understanding that there are three major human races-Caucasoid, Mongoloid, and Negroid."). Despite its denotation, as one court noted, "Hispanic" is often used as a racial classification:
>
> The terms "race" and "racial discrimination" may be of such doubtful sociological validity as to be scientifically meaningless, but these terms nonetheless are subject to a commonly-accepted, albeit sometimes vague, understanding.... On this admittedly unscientific basis, whites are plainly a "race" susceptible to "racial discrimination;" Hispanic persons and Indians, like blacks, have been traditional victims of group discrimination, and, however, inaccurately or stupidly, are frequently and even commonly subject to a "racial" identification as "non-whites." Budinsky v. Corning Glass Works, 425 F.Supp. 786, 788 (W.D.Pa.1977). This common use, or misuse, of the term has blurred the line between race and national origin discrimination as it pertains to Hispanics. Consequently, the term "Hispanic" is unique, encompassing the concepts of both race and national origin in a way that the terms "white," "black" and "Asian" do not. Alonzo v. Chase Manhattan Bank, N.A., 25 F.Supp.2d 455, 459 (S.D.N.Y.1998). This dual understanding of the term Hispanic "would reasonably cause the EEOC to investigate discrimination based both on national origin and race, thereby satisfying the 'reasonably related' requirement, even though [plaintiffs] only checked the box labeled 'national origin' on [their] EEOC charge[s]." *Id.* In short, plaintiffs' claims of race discrimination are included in their EEOC charges of national origin discrimination. The City's motion to dismiss these claims is, therefore, denied." *Id* at *1-3.

Here, as in *Torres*, the word "Cuban" connotes both race and national origin, sufficient to put Walmart on notice of both claims and which would reasonably cause the EEOC to investigate discrimination based on both race and national origin. In fact, Walmart, in both the

EEOC proceedings and here, has contended that it does not flush-out Cubans from other Hispanics for record keeping purposes or EEOC reports. From the limited data and information available from the EEOC investigative file, it is clear that in response to the EEOC's request for information, Walmart provided data on Hispanics generally. Significantly, the EEOC investigation included an investigation into race discrimination, as evidenced by the EEOC's request for information and subpoena to Walmart during the underlying investigation. *See* Exhibit B. The EEOC's subpoena requested:

> "All employees employed by Respondent at any time during the period from January 1, 2005 through the present, their names, **national origin/race**, date of hire, position title, starting pay rate, resume…" *See* Exhibit B.

Moreover, akin to the rationale in *Torres*, Cubans, much like Hispanics, Indians and Blacks, have been traditional victims of group discrimination. The Cuban Missile Crisis, the Bay of Pigs, the onslaught of Cuban political refugees in the United States since the early 1980s, the trade embargo, travel restrictions between the Countries and other political and governmental strife between the United States and Cuba, has led to a plurality in the meaning of "Cuban." However misguided, Cubans are commonly regarded as very separate and distinct from other Hispanics. Because "Cuban" connotes both race and national origin and because Plaintiffs alleged they were discriminated against by virtue of being Cuban, their underlying Charges of Discrimination sufficiently allege race discrimination. Moreover, because the EEOC investigated the potential race discrimination in the underlying investigation and because Walmart responded to the EEOC with information regarding Hispanics generally, they cannot now claim that the underlying investigation did not involve or put them on notice of claims of race discrimination. At a minimum, Plaintiffs' race discrimination claims are reasonably related to their underlying Charges because the EEOC investigated national origin and race data related to these charges. Therefore, Plaintiffs respectfully request this Honorable Court deny Walmart's Motion to Dismiss.

C. The Court Should Not Dismiss any of Plaintiffs' Otherwise Time Barred Allegations Pursuant to the Continuing Violations Doctrine.

Walmart argues that Plaintiffs' Title VII claims should be limited to conduct which occurred within 300 days of the filing of the Charges of Discrimination. Similarly, Walmart argues that Plaintiffs' §1981 claims should be limited to conduct which occurred within four

years of filing the Complaint. Walmart is not entitled to such a limitation at this early stage of the litigation.

It is true that a plaintiff in Illinois must file an EEOC charge within 300 days after the allegedly unlawful employment practice occurred. *Moore v. Allstate Ins. Co.,* 928 F.Supp. 744, 750 (N.D.Ill.1996) (citing *Koelsch v. Beltone Elec. Corp.,* 46 F.3d 705, 707 (7th Cir.1995)). What is also true, however, is that standard principles of limitations law, including the continuing violation theory, the discovery rule, equitable tolling, and equitable estoppel, apply to Title VII cases. *Galloway v. General Motors Serv. Parts Operations,* 78 F.3d 1164, 1166 (7th Cir.1996).

Contrary to Walmart's contention, Plaintiffs can base their claims on acts occurring prior to the otherwise applicable limitations periods, pursuant to the continuing violation doctrine. The continuing violation doctrine allows a plaintiff to base a claim on a time-barred act by linking the time-barred act with an act that is within the limitations period. *Moore,* 928 F.Supp. at 750. To succeed under the continuing violation theory, a plaintiff must show that the alleged acts of discrimination were part of an ongoing pattern of discrimination and that at least one of the alleged acts of discrimination occurred within the relevant limitations period. *Id.* (citing *Young v. Will County Dep't of Pub. Aid,* 882 F.2d 290, 292 (7th Cir.1989)). If the plaintiff makes such a showing, the court will treat the combination of the acts as one continuous act within the limitations period. *Id.* (citing *Selan v. Kiley,* 969 F.2d 560, 564 (7th Cir.1992)).

The continuing violations doctrine applies equally to § 1981 claims as it does Title VII claims. See *Patterson v. County of Cook*, WL 21428337 (N.D.Ill., 2003). The continuing violations doctrine is a doctrine governing accrual. *Heard v. Sheahan,* 253 F.3d 316, 318-19 (7th Cir.2001). To succeed under the continuing violation theory, a plaintiff must show that the alleged acts of discrimination were part of an ongoing pattern of discrimination and that at least one of the alleged acts of discrimination occurred within the relevant limitations period. *Id.* (citing *Young v. Will County Dep't of Pub. Aid,* 882 F.2d 290, 292 (7th Cir.1989)). If the plaintiff makes such a showing, the court will treat the combination of the acts as one continuous act within the limitations period. *Id.* (citing *Selan v. Kiley,* 969 F.2d 560, 564 (7th Cir.1992)). At the pleading stage, it cannot be said that Plaintiffs can prove no set of facts in support of their claim which would entitle them to relief for violations that occurred prior to the otherwise

applicable limitations periods. *Conley v. Gibson,* 355 U.S. 41, 46 (1957); *see also Hishon v. King & Spaulding,* 467 U.S. 69, 73 (1984). Quite simply, at the pleading stage, where there has been no discovery in this case, it is simply premature to set the applicable time period for which Plaintiffs are entitled to recover. Therefore, Walmart's Partial Motion to Dismiss should be denied to the extent it seeks to limit the allegations and inquiry to violations which occurred prior to the otherwise applicable limitation periods under Title VII and §1981.

D. Count III Alleging Individual and Class Disparate Treatment Claims Under §1981 Should Not Be Dismissed.

1. Count II States a Claim for Class-Wide Relief.

Walmart argues that Count III should be dismissed because it essentially relies on the same conclusory allegations as Counts I and II. For the reasons articulated in section B.1 above, Count III sufficiently alleges a plausible class claim. Therefore, Walmart's Motion for Partial Dismissal should be denied in this regard.

2. Plaintiffs' Claims in Count III Are Not Time Barred.

Walmart erroneously contends that Plaintiff's §1981 claims are time barred, despite the fact that Plaintiffs' claims were brought squarely within the applicable limitations period. Plaintiffs were employed by Walmart until various dates in November 2006. Plaintiffs filed their Complaint on October 16, 2010, within the four-year statute of limitations period for §1981 claims. In addition, the principles of the continuing violation doctrine may apply in this circumstance and it cannot be said at this point that Plaintiffs can prove no set of facts in support of their claim which would entitle them to relief for violations that occurred prior to the otherwise applicable limitations periods. *Conley v. Gibson,* 355 U.S. 41, 46 (1957); *see also Hishon v. King & Spaulding,* 467 U.S. 69, 73 (1984). Quite simply, at the pleading stage, where there has been no discovery in this case, it is simply premature to set the applicable time period for which Plaintiffs are entitled to recover. This is especially true where, as here, Plaintiffs' have brought their §1981 claims well within the applicable limitations period. Therefore, Walmart's Partial Motion to Dismiss should be denied

3. Walmart Erroneously Contends Plaintiffs' Disparate Impact Claims Should Be Dismissed Because §1981 Covers Only Discrimination Based on Race.

Walmart erroneously contends that Plaintiffs' §1981 claims should be dismissed because

§1981 only covers discrimination based on race. In support of this argument, Walmart relies on cases predating the Seventh Circuit's resolution of this issue in *Bisciglia v. Kenosha Unified School District No. 1*, 45 F.3d 223, C.A.7 (Wis.), 1995. In Bisciglia, the Seventh Circuit held:

> "As Bisciglia correctly notes, in rendering its decision, the district court relied on case law predating the Supreme Court's decision in *Saint Francis College v. Alkhazraji,* 481 U.S. 604, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987). In *Saint Francis College,* which involved a claim by a man born in Iraq, the Court held that a claim of discrimination based on ancestry or ethnic characteristics was actionable under Section 1981. Specifically, after reviewing the legislative history and the definitions of "race" applicable when Section 1981 passed, the Court determined that "Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." *Id.* at 612, 107 S.Ct. at 2027. In fact, the Court made clear:
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> The Court of Appeals was thus quite right in holding that §1981, "at a minimum," reaches discrimination against an individual "because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of homo sapiens." It is clear from our holding, however, that a distinctive physiognomy is not essential to ***230** qualify for §1981 protection. [FN10]
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> FN10. Since the Court expressly held that a distinctive "physiognomy" (i.e., apparent characteristics, outward features) is not required, we reject defendants' contention that "the discrimination must be based, at least in part, on physical characteristics associated with the ethnic group." (Appellees' Supp. Brief at 3). *Id.*
>
> Here, Bisciglia was not given leave to amend his complaint based upon the district court's erroneous belief that Section 1981 only applied to discrimination based upon "race." However, the proper inquiry here is "not whether [Italians] are considered to be a separate race by today's standards, but whether, at the time [Section 1981] was adopted, [Italians] constituted a group of people that Congress intended to protect." *Shaare Tefila Congregation v. Cobb,* 481 U.S. 615, 617, 107 S.Ct. 2019, 2022, 95 L.Ed.2d 594 (1987) (holding that Jews are not foreclosed from stating a claim under Section 1982 based upon the Court's reasoning in *Saint Francis College*). In fact, the Supreme Court's historical research suggests that "Italians" may have been considered an identifiable "race." *See Saint Francis College,* 481 U.S. at 611, 107 S.Ct. at 2027; *see also Benigni v. City of Hemet,* 879 F.2d 473, 477 (9th Cir.1988) (elements of discrimination claim present where plaintiff was singled out based on his Italian ancestry); *DeSalle v. Key Bank of Southern Maine,* 685 F.Supp. 282, 284 (D.Me.1988) ("Section 1981 was designed to protect identifiable classes of persons, such as Italo-Americans.") Therefore, on this record, it is not clear that Bisciglia can state no set of facts upon which relief can be granted under Section 1981.[FN11] The motion for leave to file this amended claim should have been granted." *Id*.

For the reasons set forth above, Plaintiffs' §1981 claims are actionable and Walmart's Motion for Partial Dismissal should be denied in this regard.

CONCLUSION

For all of the aforementioned reasons, Plaintiffs respectfully request this Honorable Court deny Walmart's Motion for Partial Dismissal of Complaint in its entirety. In the alternative, Plaintiffs respectfully request that any dismissal be without prejudice so as to allow Plaintiffs a reasonable opportunity to cure any purported defects.

Dated: February 9, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2011, I electronically filed the foregoing **PLAINTIFFS' RESPONSE TO WAL-MART'S MOTION FOR PARTIAL DISMISSAL OF COMPLAINT** with the clerk of court for the U. S. District Court, Northern District of Illinois, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

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