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

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

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

Defendant, Wal-Mart Stores, Inc., ("Defendant" or "Walmart"), by its attorneys, Drinker Biddle & Reath LLP, submits this memorandum in reply to Plaintiffs Roland Padron's, Bobirt R. Miranda's and Eusebio R. Calzada's (together, "Plaintiffs") response to Defendant's Motion for Partial Dismissal of the Class Action Complaint ("Plaintiffs' Response").

I. INTRODUCTION

In Plaintiffs' Response, Plaintiffs do not discuss or make any attempt to distinguish *any* of the cases cited by Defendant in support of its various arguments. Rather, Plaintiffs cite only a handful of cases, all of which are easily distinguishable factually and legally. Plaintiffs also admit that they "cannot provide more factual specificity at the pleading stage in this litigation." (Plaintiffs' Response at 3.) Indeed, they claim that "Plaintiffs could not ascertain the precise compensation policy and management level decision making necessary to plead with more factual specificity." *Id.* Nevertheless, with respect to their purported disparate impact claim, Plaintiffs now attempt to conjure up a purported facially neutral policy of "allowing store managers to subjectively set and adjust hourly employees' pay rates within a range" (Plaintiffs' Response at 3), which was not alleged in their EEOC Charges or in their Complaint in this

action. In any event, as explained below, this purported "policy" is not sufficient to sustain a disparate impact claim.

Acknowledging that they have no more factual specificity, Plaintiffs essentially ask this Court to ignore the governing pleading standards and hand them the keys to enormously expensive and burdensome class-based discovery because they *believe* such discovery *might* turn up sufficient facts to state a plausible claim for relief. Plaintiffs' attempt to put the "cart before the horse" is directly contrary to the admonitions of the U.S. Supreme Court and the Seventh Circuit, which require a complaint to include sufficient factual enhancement beyond conclusory allegations and thread-bare recitations of the Rule 23 class action elements to demonstrate that the plaintiff has a claim that is "plausible" and "probable."

As explained below, Plaintiffs' Complaint falls far short of the applicable pleading threshold in order to state a plausible class-based disparate treatment claim, and Plaintiffs' time-barred claims of pay discrimination—which are discrete acts—cannot be saved by the continuing violation doctrine. Further, Plaintiffs' purported Title VII race claim is not reasonably related to their EEOC Charges, and their claim of Cuban discrimination is not a cognizable race discrimination claim under Section 1981.[1]

II. REPLY ARGUMENT

A. Plaintiffs' Title VII Disparate Impact Claim (Count I) Should Be Dismissed Because Plaintiffs' EEOC Charges and the Complaint Fail to Identify a Specific Facially Neutral Policy

In Plaintiffs' Response, Plaintiffs make no attempt to distinguish *any* of the cases cited by Defendant that demonstrate that Plaintiffs' purported disparate impact claim should be

[1] Plaintiffs make the discourteous assertion that by simply defending itself, Defendant is engaged in "yet another attempt to avoid accountability for discrimination" against its Cuban employees. (Plaintiffs' Response at 2.) While Defendant indeed denies that it engaged in any discrimination against Plaintiffs or anyone in their purported class, Defendant has not moved to dismiss any of Plaintiffs' individual discrimination or retaliation claims in Counts IV through IX.

dismissed because (1) the claim is outside the scope of their EEOC Charges, and (2) in any event, the Complaint fails to identify any specific, facially neutral employment policy that allegedly caused the disparate impact. Rather, they simply contend that a disparate impact claim is within the scope of their EEOC Charges because the Charges are allegedly "silent on the issue of intent" (Plaintiffs' Response at 5), and further refer to a purported facially neutral policy that is not alleged anywhere in their EEOC Charges, the EEOC's Determinations or their Complaint.

Plaintiffs argue that because their EEOC Charges are allegedly "silent on the issue of intent," they should be excused from their admitted failure to identify or even allege anything suggesting that a facially neutral policy had a disparate impact on their pay. This contention contradicts the entire point of the "scope of the charge" rule. Indeed, the fact that a plaintiff is "silent" in a charge about a later claim that a facially neutral policy caused the alleged discrimination is precisely the reason courts have held disparate impact claims to be beyond the scope of the charge. *See, e.g., Noreuvil v. Peabody Coal Co.*, 96 F.3d 254, 258 (7th Cir. 1996); *Burton v. Illinois Educ. Assoc.*, 1997 WL 754142, *6 (N.D. Ill. Nov. 21, 1997) (dismissing disparate impact claim where plaintiff's EEOC charge "contains no hint whatsoever that she was complaining of one or more of defendant's policies"); *Welch v. Eli Lily and Co.*, 2009 WL 734711, *2 (S.D. Ind. Mar. 18, 2009) ("Indeed, the presence of a neutral employment practice is what separates a disparate impact claim from a disparate treatment claim. …Thus, courts have consistently required that an EEOC charge identify or describe the neutral employment practice which is alleged to disproportionately affect protected employees.") (internal citations omitted); *see also Remien v. EMC Corp.*, 2008 WL 821887, *5 (N.D. Ill. Mar. 26, 2008) ("While it is true that the law does not require a talismanic expression of a particular legal form

of grievance, there is a necessity for the EEOC charges to provide that a facially neutral policy or policies resulted in unintended but adverse consequences to the protected class.").

Moreover, Plaintiffs' Charges are not, in fact, "silent on intent." Rather, the Charges specifically attribute Defendant's alleged unlawful actions toward them to the fact that Plaintiffs are of Cuban national origin. This is the hallmark of intentional discrimination. Plaintiffs' Charges allege:

> I have been subjected to different terms and conditions than my non-Cuban co-workers such as a variable schedule, denial of make-up days, and lower wages. On various occasions, most recently in November, I complained internally regarding national origin discrimination. On November [], 2006, I was discharged. I believe I have been discriminated against *because of my national origin, Cuban*, and have been retaliated against in violation of Title VII of the Civil Rights Act of 1964, as amended.

(Compl., Ex. A.) (emphasis added). Regardless of how liberally read, Plaintiffs' Charges "allege nothing more than a disparate treatment. As such, one would not expect a disparate impact claim to 'grow out of an EEOC investigation' of the[se] charges." *Welch,* 2009 WL 734711, at *3 (internal citation omitted); s*ee also Jurszczak v. Bloomer Chocolate Co.*, 1999 WL 1011954, *4-5 (N.D. Ill. Sept. 24, 1997) (dismissing disparate impact claim where the EEOC charge contained "no indication whatsoever that Plaintiff was complaining of one of more of Defendant's policies"). Accordingly, Plaintiffs' disparate impact claim is barred.

Additionally, the cases cited by Plaintiffs in support of their "silent on intent" argument are easily distinguishable because in those cases, unlike the present case, the EEOC charges did allege a specific facially neutral policy that allegedly caused the discrimination. In *Watkins v. City of Chicago*, 992 F. Supp. 971 (N.D. Ill. 1998), the plaintiff's EEOC charge alleged that she was disqualified from employment based on an alleged city policy that excluded from hire individuals who have been arrested and charged with a felony. *Id.* at 973. In holding that the plaintiff could state a disparate impact claim in her lawsuit, the court noted that "[t]his

allegation [in the EEOC charge] sets forth a City policy which, if true, may have a disparate impact on African-Americans." *Id.* Likewise, in *Gomes v. Avco Corp.*, 964 F.2d 1330 (2d Cir. 1992), the EEOC charge alleged a specific facially neutral policy—the "eight year experience rule"—which the plaintiff contended disproportionately excluded Portuguese workers from skilled machinists positions. *Id.* at 1334. In the present case, unlike in *Watkins* and *Gomes*, Plaintiffs' EEOC Charges do not allege the existence of *any* specific policy—facially neutral or otherwise—that was the cause of the alleged discrimination. Thus, Plaintiffs' purported disparate impact claim in Count I is outside the scope of their EEOC Charges and should be dismissed.[2]

Recognizing that it is not enough to simply allege the "compensation policy" (Plaintiffs' Response at 6), Plaintiffs also try to save their disparate impact claim by conjuring up an alleged facially neutral employment policy. Plaintiffs contend that their "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." (Plaintiffs' Response at 5.) First, this so-called "policy" may not be considered on a motion to dismiss because it is not alleged anywhere in Plaintiffs' Charges or the Complaint, and Plaintiffs are not permitted to amend their Complaint through their brief. *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1430 & n.6 (7th Cir. 1996). Second, even if it could properly be considered, a so-called facially neutral policy that consists of the subjective,

[2] Without citation to any authority, Plaintiffs repeatedly suggest that the Court should be lenient in applying the "scope of the charge" rule because Plaintiffs were *pro se* when they filed their Charges. "Numerous courts in this district, however, have effectively rejected that argument." *Davis v. Central Can Co.*, 2006 WL 2255895, *5 (N.D. Ill. Aug. 4, 2006) (citing cases). In fact, the very reason courts have carved out the "like or reasonably related" exception to the rule that a court claim cannot go beyond the scope of a charge is because EEOC charges are usually completed *pro se*. *Id.*

discretionary decision-making of supervisors is not an adequate predicate to sustain a disparate impact claim. *See, e.g., Welch v. Eli Lilly & Co.,* 2009 WL 2461119 (S.D. Ind. Aug. 11, 2009); and *Combs v. Grand Victoria Casino & Resort*, 2008 WL 4452460 (S.D. Ind. Sept. 30, 2008).

In *Welch*, the court dismissed a purported class-wide Title VII disparate impact claim because both the plaintiffs' EEOC charges and their purported third amended complaint (the "TAC") were premised on subjective decision-making, and therefore failed to allege a specific, facially neutral policy that would support a disparate impact claim. The EEOC charges there alleged that "[p]redominantly white Lilly supervisors have unfettered discretion to rate employees on the reviews; these ratings dictate employee compensation and promotions. As a result this policy, even though not racist on its face, has a disparate impact on African Americans in pay and promotion opportunities, and has caused them to be historically considered second class employees at the Company." 2009 WL 2461119, at *6. In holding that these allegations were insufficient to support a disparate impact claim, and therefore denying the plaintiffs' motion for leave to file the TAC, the court stated:

> These allegations, like those alleged in the Second Amended Complaint, fail to identify a neutral employment practice. (*See* March 18, 2009 Entry at 14-16) (rejecting attempt to sweep a wide variety of decisions under the umbrella of subjective practices as stating disparate impact claim). Moreover, even if sufficiently specific to challenge some practices, these charges would not challenge (and thus could not preserve claims arising from) the tens if not hundreds of different kinds of pay and promotion decisions that are encompassed within the proposed TAC. Thus, they are inadequate to preserve class-wide disparate impact claims.
>
> *Id.*

Similarly, in *Combs*, the court granted the defendant's motion to dismiss a purported disparate impact age discrimination claim where the "specific employment practices Plaintiffs alleged had a disparate impact are Defendant's 'unreasonable and arbitrary methods and subjective practices of investigation and decision making concerning (a) terminations; (b)

alleged rule and policy violation; (c) alleged employee misconduct; and (d) disciplinary procedures.'" 2008 WL 4452460, at *2. In granting the motion to dismiss, the court noted that the plaintiffs "must identify the *specific* policy or practice that they allege is responsible for the disparate impact." *Id.* at 3 (emphasis in original).[3]

Accordingly, in the present case, even if Plaintiffs had alleged—in either their EEOC Charges or the Complaint—this so-called facially neutral compensation policy of allowing store managers to make subjective decisions on pay rates, such allegations would be insufficient to state a disparate impact claim. Since any amendment to assert such a "policy" would be futile, Count I should be dismissed with prejudice.

B. Plaintiffs Have Not Alleged a Plausible Class Disparate Treatment Claim in Counts I, II or III, and Therefore Should Not be Permitted to Commence Expensive and Burdensome Class-Based Discovery

Plaintiffs have filed a purported nationwide pay discrimination class action based on a Complaint in which they completely fail to allege how even their own compensation was determined at the particular store where they worked, let alone that Walmart uses some compensation practice or method that has general application throughout the United States or even beyond Plaintiffs' one store. Moreover, they admit that "Plaintiffs cannot provide more factual specificity at the pleading stage in this litigation." (Plaintiffs' Response at 3.) Resting on their thread-bare Complaint then, Plaintiffs essentially ask this Court to excuse them from federal pleading requirements because they *believe* they *might* have a claim if they are

[3] Defendant submits that acceptance of Plaintiffs' assertion that discretionary, subjective personnel decisions by a supervisor is sufficient to support a disparate impact claim would obliterate any rational distinction between disparate treatment and disparate impact claims. Given that virtually every employment action has an element of discretionary decision-making, virtually every discrimination claim could be converted into a disparate impact claim and even into a disparate impact class action simply by alleging that the employer has a "policy" of giving supervisors some discretion in making employment decisions. In such instances, however, it is the supervisor's intentional decisions that cause the discrimination (i.e., disparate treatment), not some "policy" of allowing them to make decisions.

permitted to take discovery. As noted below, however, federal courts have frequently warned against giving plaintiffs the keys to enormously costly and burdensome class-based discovery where a complaint, such as the one here, fails to cross the "plausibility" threshold.

In fact, in explaining the "plausibility" pleading standard it announced in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court discussed at length the Court's concerns with opening the doors to discovery to plaintiffs who have not alleged "something beyond the mere possibility" of a claim. *Id.* at 557. The Court noted that some threshold of plausibility must be crossed at the outset before a complex case "should be permitted to go into its inevitably costly and protracted discovery phase." *Id.* at 558, quoting *Asahi Glass Co. v. Pentech Pharm., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003). "Probably, then, it is only by taking care to require allegations that reach the level [of plausibility] that we can hope to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence'" to support the claim. *Id.* *See also Wheeler v. Pension Value Plan for Employees of the Boeing Co.*, 2007 WL 2608875, *2 (S.D. Ill. Sept. 6, 2007) ("[T]he price of entry, even to discovery, is for the plaintiff to allege a *factual* predicate concrete enough to warrant further proceedings, which may be costly and burdensome. Further, [c]onclusory allegations in a complaint, if they stand alone are a danger sign that the plaintiff is engaged in a fishing expedition."), quoting *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) (emphasis in original).

This case presents precisely the situation where Plaintiffs have slapped together a Complaint consisting of conclusory allegations unsupported by further factual enhancement and mere recitations of the Rule 23 class action standards. As Plaintiffs have not crossed the required threshold of plausibility with respect to a class-based claim, they should not be permitted to drag the Defendant or this Court through enormously costly and burdensome class-

based discovery.[4] Further, the Seventh Circuit's recent decision in *In re Text Messaging Antitrust Litigation*, ---F.3d----, 2010 WL 5367383 (7th Cir. Dec. 29, 2010), on which Plaintiffs rely, does not help their cause. There, the court allowed an interlocutory appeal concerning the adequacy of a complaint in a purported antitrust class action because, according to the Seventh Circuit, "[p]leading standards in federal litigation are in ferment after *Twombly* and *Iqbal*, and therefore an appeal seeking a clarifying decision that might head off protracted litigation is within the scope of section 1292(b)." 2010 WL 5367383, at *3. The Seventh Circuit then essentially reinforced the plausibility standard announced in *Twombly* and *Iqbal*, holding that 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.* at *6. Based on this standard, the Seventh Circuit concluded that the complaint at issue there contained sufficient factual allegations to plausibly state an antitrust conspiracy claim.[5]

Unlike the complaint in *Text Messaging,* Plaintiffs' allegations here do not come close to the sort of "factual enhancement" that is required to plausibly state a claim that Defendant has engaged in nationwide pay discrimination against Cuban "warehouse workers." Since

[4] Plaintiffs summarily contend that their Complaint must state a class-based claim because in its investigation, the EEOC "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." (Plaintiffs' Response at 2.) However, Plaintiffs cite no authority in support of this proposition, and Defendants submit that there is no basis for equating an EEOC administrative finding with federal court pleading standards.

[5] In *Text Messaging,* the Seventh Circuit pointed to substantial factual allegations in the complaint that, when read together, plausibly stated a claim that the defendants had conspired on price in violation of the antitrust laws. Those facts included allegations that defendants belonged to a trade association and exchanged price information directly at association meetings; the defendants met together as a "leadership council" whose stated mission was to urge its members to substitute "co-opetition" for competition; and "all at once defendants changed their pricing structures, which were heterogeneous and complex, to a uniform pricing structure, and then simultaneously jacked up their prices by a third." *Id.* at *4-5. Thus, the complaint at issue in *Text Messaging* contained far more factual content than Plaintiffs' Complaint here.

Plaintiffs have not established a "nonnegligible probability" that their purported class-based disparate treatment claims are valid, *Text Messaging,* 2010 WL 5367383, *6, Counts I, II and III should be dismissed.

C. Plaintiffs' Purported Title VII Race Discrimination Claims in Counts I and II Should be Dismissed Because They are not Reasonably Related to Their EEOC Charges

In support of Plaintiffs' contention that their EEOC Charges, which allege only national origin discrimination and retaliation, nevertheless permit them to file a Title VII race discrimination claim, Plaintiffs rely on a single case, *Torres v. City of Chicago*, 2000 WL 549588 (N.D. Ill. May 1, 2000), in which the court concluded that "Hispanic" was a race. In *Torres*, the plaintiffs did not check the "race' box on their EEOC charges, but alleged therein that they were discriminated against because they are Hispanic. In easily finding that Hispanic discrimination is both national origin and race discrimination, the court observed that "Hispanic persons and Indians, like blacks, have been traditional victims of group discrimination" who "are frequently and even commonly subject to a 'racial' identification as 'non-whites.'" 2000 WL 549588, *2. Continuing, the court noted that this "common use, or misuse, of the term [Hispanic] has blurred the line between race and national origin as it pertains to Hispanics. Consequently, the term 'Hispanic' is unique, encompassing the concepts of both race and national origin in a way the terms 'white,' 'black' and 'Asian' do not." The court concluded that because of this "dual understanding of the term Hispanic," the plaintiffs could assert both race and national origin discrimination claims. *Id.*

Obviously, *Torres* is easily distinguishable from the present case. Here, Plaintiffs are not alleging—either in their EEOC Charges or the Complaint—discrimination based on their status as Hispanics. Rather, Plaintiffs allege only discrimination against Cubans. Plaintiffs have cited to no authority holding that the term "Cuban," like "Hispanic," has a "dual

understanding" and is somehow "unique," encompassing both national origin and race.[6]

Plaintiffs also point to the fact that during the investigation of Plaintiffs' EEOC Charges, the EEOC made a request to Walmart for certain employee information including the "national origin/race" of certain employees. This purported "fact" does not compel a different result. First, the EEOC's request is not alleged in the Complaint, and therefore may not be considered on this motion to dismiss. *Car Carriers, Inc.*, 745 F.2d at 1107; *Travel All Over the World, Inc.*, 73 F.3d at 1430 & n.6. Additionally, Plaintiffs offer no legal authority supporting their contention that such a request by the EEOC entitles Plaintiffs to proceed with a race discrimination claim based on their status as Cubans. In fact, Defendant submits that the scope of the EEOC's request might just as well have been an attempt to investigate whether there was broader discrimination against Hispanics generally (Mexicans, Chileans, Argentineans, etc.) based on their Hispanic race, rather than just alleged discrimination against those of Cuban national origin. In any event, the Determinations issued by the EEOC clearly reflect a finding only with respect to national origin discrimination, and not race, as the EEOC found reasonable cause to believe there was discrimination "because of their national origin, Cuban, by paying them a lesser wage, in violation of Title VII." (Complaint Ex. B.) The Determinations do not mention race discrimination at all, nor is there any suggestion that discrimination based on Plaintiffs' status as Cubans would also be race discrimination.

Accordingly, Plaintiffs' purported race discrimination claims in Counts I and II should be dismissed because they are not like or reasonably related to their EEOC Charges, which allege only national origin discrimination and retaliation.

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[6] Plaintiffs purport to offer a history lesson on the travails of the Cuban people that has allegedly "led to a plurality in the meaning of 'Cuban.'" (Plaintiffs' Response at 10.) Respectfully, however, while one might agree that some Cubans have been discriminated against, Plaintiffs cite to no case law or other recognized authority indicating that the term "Cuban," like 'Hispanic," is unique and has a dual understanding, encompassing both race and national origin.

D. The "Continuing Violation Doctrine" Cannot Save Plaintiffs' Time-Barred Title VII and Section 1981 Claims

Plaintiffs attempt to rely on the "continuing violation doctrine" to save their otherwise time-barred allegations in their Complaint. Such an attempt is futile, however, as the continuing violation doctrine does not apply to independently actionable "discrete acts," such as the acts alleged here. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110-18 (2002) (distinguishing between discrete acts and acts contributing to a hostile work environment). With discrete acts, each act "starts a new clock for filing charges." S*ee Lucas v. Chicago Transit Auth.*, 367 F.3d 714, 723 (7th Cir. 2004). Accordingly, any "discrete discriminatory acts that fall outside the statute of limitations are time-barred even though they may relate to other discrete acts that fall within the statute of limitations." *Id.*; *see Hukic v. Aurora Loan Servs.*, 588 F.3d 420, 435 (7th Cir. 2009) (the continuing violation doctrine does not apply to "a series of discrete acts, each of which is independently actionable, even if those acts form an overall pattern of wrongdoing"). Discrete acts are "easy to identify" because "[e]ach incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" *Morgan,* 536 U.S. at 114. Examples of discrete acts include: "termination, failure to promote, denial of transfer or refusal to hire." *Id.* In addition, with respect to unequal pay claims, a discriminatory paycheck is its own separate discriminatory act that can give rise to an action. *Id.* at 111-12; *Hildebrandt v. Illinois Dep't of Natural Res.*, 347 F.3d 1014, 1027-28 (7th Cir. 2003) (holding that "repeated discriminatory paychecks constitute discrete acts" not subject to the continuing violation doctrine).[7]

[7] Plaintiffs spend multiple pages discussing the general principles of the continuing violation doctrine, but fail to cite any cases where the doctrine was held to apply to discriminatory pay claims, which are discrete acts not subject to the doctrine.

Here, Plaintiffs' Title VII and § 1981 claims are predicated on allegations that Plaintiffs experienced the following events because of their Cuban national origin: lower wages, denial of make-up days, a variable schedule and discharge. (Complaint, Ex. A.) Each of these events is an independently actionable discrete event, and as such, is not subject to the continuing violation doctrine. *See, e.g., Morgan,* 536 U.S. at 114; *Beasley v. Marshall & Ilsley Trust Co.*, 411 F.3d 854, 860 (7th Cir. 2005) (time-barred discrete acts included absence of a pay raise, assignment to the settlement desk, and absence of a performance review); *Hildebrandt*, 347 F.3d at 1027-28. Accordingly, any individual or class claims under Title VII based on alleged discrimination occurring before February 13, 2006 (300 days prior to the November 30, 2006 charge filing date) and any § 1981 class claims occurring before October 16, 2006 (four years prior to the October 15, 2010 Complaint filing date) are time-barred and should be dismissed.[8]

E. Count III Should Be Dismissed Because Plaintiffs' Cuban Discrimination Claim is not a Race Discrimination Claim Cognizable Under § 1981

Plaintiffs once again fail to make any attempt to distinguish the cases cited by Defendant in which courts have found that claims alleging Cuban discrimination do not amount to race discrimination claims cognizable under Section 1981. *See Quintana v. Byrd*, 669 F. Supp. 849, 850 (N.D. Ill. 1987) (denying motion to dismiss § 1981 claim where the plaintiff alleged that she was "discriminated against because she is Hispanic, not because her country of origin is Cuba."); *Torres v. Gianni Furniture Co.*, 1986 WL 6407, *1 (N.D. Ill. June 5, 1986)

[8] With respect to Plaintiffs' alleged pay discrimination claims under Title VII that may be governed by the Lilly Ledbetter Fair Pay Act of 2009 (the "FPA"), the FPA provides that each paycheck is a fresh act of discrimination, but the FPA still "limits recovery to paychecks paid within the 300-day statute of limitations." *Kent v. City of Chicago,* 2010 WL 1463486, *2 (N.D. Ill. April 8, 2010). Further, Plaintiffs did not respond to Defendant's argument that the FPA does not apply to their § 1981 claims, and thus that they must demonstrate that a discriminatory compensation *decision* was actually made (not just receipt of a paycheck) within the very narrow window between October 16, 2006 and their November 2006 employment termination dates. As Plaintiffs have alleged no facts plausibly demonstrating that any discriminatory pay decisions were made within this narrow limitations window, their § 1981 claims should be dismissed in their entirety on statute of limitations grounds.

(dismissing § 1981 claim as not alleging race discrimination where the plaintiff alleged that he "is a Cuban-American and as such is a member of a distinct minority."). Instead, Plaintiffs again cite to a wholly inapposite case, *Bisciglia v. Kenosha Unified School Dist. No. 1*, 45 F.3d 223 (7th Cir. 1995), where the court held that alleged discrimination against *Italians* may constitute race discrimination under § 1981.

In *Bisciglia*, relying on the reasoning of the Supreme Court in *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987), the court stated that "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.'" *Bisciglia*, 45 F.3d at 230 (citation omitted). In concluding that § 1981 did cover Italians, the court noted that, in fact, "the Supreme Court's historical research suggests that 'Italians' may have been considered an identifiable race." *Id.*, citing *Saint Francis College,* 481 U.S. at 611.

Plaintiffs, however, point to no authority for the proposition that Cubans, like Italians, similarly constituted a group of people that congress historically intended to protect when § 1981 was adopted.[9] Defendant submits that this is not surprising because Cuban people are members of many different races. According to the U.S. Department of State, the 2002 Cuba Census found that Cuba had a population of 11.2 million people, of whom 37% were white, 11% were black, 1% were Chinese, and 51% were of mixed race. *See* http://www.state.gov/r/pa/ei/bgn/2886.htm; and http://en.wikipedia.org/wiki/Cubans.[10]

[9] In fact, the Court in *Saint Francis College* found that, based on dictionary and encyclopedic sources as well as the legislative history of § 1981, certain enumerated groups of people, including Italians, may have been considered an identifiable race subject to protection under § 1981. Cubans were not among them. *Id.* at 611-12.

[10] Defendant respectfully submits that the Court may take judicial notice of this published Cuban census data.

Accordingly, Plaintiffs' claim that they were discriminated against because they are Cuban does not state a race discrimination claim cognizable under § 1981.

III. CONCLUSION

For all of the foregoing reasons and the additional reasons set forth in Defendant's original supporting Memorandum, Defendant Walmart respectfully submits that Counts I, II and III of the Complaint should be dismissed in their entirety with prejudice. Alternatively, Counts I, II and III should be dismissed to the extent they allege violations occurring outside of the applicable limitations periods, and Counts I and II should be dismissed to the extent they purport to state a claim of race discrimination. Additionally, Counts IV through IX should be dismissed to the extent they allege violations occurring outside of the applicable limitations period.

Dated: February 23, 2011

Respectfully submitted,

WAL-MART STORES, INC.

By: **s/ Alan S. King**

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