Case No. 10-1662

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TANESHA DAVIS,
Plaintiff-Appellant

v.

CINTAS CORPORATION
Defendant-Appellee

On Appeal from the United States District Court
For the Eastern District of Michigan
Case No. 06-12311

AMICUS BRIEF OF IMPACT FUND ET AL. IN SUPPORT OF PLAINTIFF-APPELLANT URGING REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 10-1662 Case Name: Tanesha Davis v. Cintas Corporation

Name of counsel: Jocelyn Larkin

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s/ Jocelyn Larkin

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6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 10-1662 Case Name: Tanesha Davis v. Cintas Corporation

Name of counsel: Ariela Migdal

Pursuant to 6th Cir. R. 26.1, American Civil Liberties Union Foundation, et al.
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s/ Ariela Migdal

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 10-1662 Case Name: Tanesha Davis v. Cintas Corporation

Name of counsel: Kary L. Moss

Pursuant to 6th Cir. R. 26.1, American Civil Liberties Union Fund of Michigan, et al.
Name of Party
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s/ Kary L. Moss

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

CONSENT TO FILE AMICUS BRIEF ix

INTEREST OF AMICI ix

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. The District Court Applied Erroneous Legal Standards In Concluding That Rule 23(A)(2) Had Not Been Satisfied 2

A. The District Court Failed to Apply the Legal Standards Applicable to Pattern-or-Practice Claims.................................. 2

B. The District Court Failed to Apply the Legal Standards Applicable to Disparate Impact Class Claims........................... 7

C. Subjective Hiring Practices Are Appropriately Challenged In Class Actions 9

D. Commonality Is Not Defeated By the Fact That the Challenged Practices Were Implemented By Many Managers at Different Facilities 12

II. The District Court Committed Legal Error When It Concluded, That Back Pay And Front Pay Were Inconsistent With Rule 23(b)(2) 14

CONCLUSION 19

TABLE OF AUTHORITIES

FEDERAL CASES

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 6

Alexander v. Aero Lodge No. 735,
565 F.2d 1364 (6th Cir. 1977)..14

Allison v. Citgo Petroleum,
151 F.3d 402 (5th Cir. 1998)...14, 15, 16

Amchem Prods. v. Windsor,
521 U.S. 591 (1997) 13

Anderson v. Boeing Co.,
222 F.R.D. 521 (N.D. Okla. 2004)..10

Anderson v. Douglas & Lomason Co.,
26 F.3d 1277 (5th Cir. 1994)...5, 6

Bacon v. Honda of Am. Mfg., Inc.
370 F.3d 565 (6th Cir. 2004)...3, 5, 6, 11

Bacon v. Honda of Am.Mfg., Inc.,
205 F.R.D. 466 (S.D. Ohio 2001) 4, 5, 6

Bazemore v. Friday,
478 U.S. 385 (1986) 12

Berger v. Iron Workers Reinforced Rodmen, Local 201,
170 F.3d 1111 (D.C. Cir. 1999) 4

Bert v. AK Steel Corp.,
No. 1:02-cv-467, 2006 WL 1071872 (S.D. Ohio April 24, 2006)...........16

Bert v. AK Steel Corp.,
No. 1:02-cv-467, 2007 WL 184746 (S.D. Ohio Jan. 19, 2007).................8

Boykin v. Georgia-Pac. Corp.,
706 F.2d 1384 (5th Cir. 1983)..........5

Brown v. Nucor Corp.,
576 F.3d 149 (4th Cir. 2009)..........9

Burlington Industrial v. Ellerth,
524 U.S. 742 (1998)..........4

Butler v. Home Depot, Inc.,
No. C-94-4335 SI, 1997 WL 605754 (N.D. Cal. Aug 29, 1997)..........6, 9

Butler v. Home Depot, Inc.,
No. C-94-4335 SI, 1996 WL 421436 (N.D. Cal. Jan. 25, 1996)..........6, 10

Card v. City of Cleveland,
No. 1:08-cv-2325, 2010 WL 3860986 16 (N.D. Ohio
Sept. 30, 2010)..........16

Caridad v. Metro-North Commuter R.R.,
191 F.3d 283 (2d Cir. 1999)..........10, 12

Coleman v. Gen. Motors Acceptance Corp.,
296 F.3d 443, 449-450 (6th Cir. 2002)..........15

Cooper v. Federal Reserve Bank of Richmond,
467 U.S. 867 (1984)..........4

Cooper v. Southern Co.,
390 F.3d 695 (11th Cir. 2004)..........16

Dukes v. Wal-Mart Stores, Inc.,
603 F.3d 571 (9th Cir. 2010)..........16

EEOC v. Shell Oil Co.,
466 U.S. 54 (1984)..........3
Ellis v. Costco Wholesale Corp.,
240 F.R.D. 627 (N.D. Cal. 2007)..........9

Eubanks v. Billington,
110 F.3d 87 (D.C. Cir. 1997) 16

Faragher v. Boca Raton,
522 U.S. 1105 (1998) 4

Franks v. Bowman Transp. Co.,
424 U.S. 747 (1976) 3, 5

Griggs v. Duke Power Co.,
401 U.S. 424 (1971) 7

Harris v. Forklift Systems, Inc.,
510 U.S. 17 (1993) 4

Hazelwood Sch. District v. United States,
433 U.S. 299 (1977) 6

Hnot v. Willis Group Holdings, Ltd.,
228 F.R.D. 476 (S.D.N.Y. 2005)..6

Hunter v. Sec'y of U.S. Army,
565 F.3d 986 (6th Cir. 2009)..4

In re Initial Pub. Offering Sec. Litig.,
471 F.3d 24, 39-42 (2d Cir. 2006)..10

Int'l Bhd. of Teamsters v. United States,
431 U.S. 324 (1977) 1, 3, 5, 6, 12

Jefferson v. Ingersoll Int'l Inc.,
195 F.3d 894 (7th Cir. 1999)..16

Kirby v. Colony Furniture Co., Inc.,
613 F.2d 696 (8th Cir. 1980)..14

Lewis v. City of Chicago, __U.S. __,
130 S. Ct. 2191 (2010) 7

McClain v. Lufkin Industries,
519 F.3d 264 (5th Cir. 2008)..10

McReynolds v. Sodexho Marriot Servs., Inc.,
208 F.R.D. 428 (D.D.C. 2002)..12, 13

Meritor Savings Bank, FSB v. Vinson,
477 U.S. 57 (1986) 4

In re Monumental Life Ins. Co.,
365 F.3d 408 (5th Cir. 2004)..18

Morgan v. United Parcel Serv., Inc.,
169 F.R.D. 349 (E.D. Mo. 1996)..10

Nelson v. Wal-Mart Stores, Inc.,
245 F.R.D. 358 (E.D. Ark. 2007)...11, 12

Parra v. Bashas', Inc.,
536 F.3d 975 (9th Cir. 2008)..17, 18

Pettway v. Am. Cast Iron Pipe,
494 F.2d 211 (5th Cir. 1974)..14

Pollard v. E.I. du Pont de Nemours & Co.,
532 U.S. 843 (2001) 14

Reeb v. Ohio Department of Rehabilitation & Correction,
435 F.3d 639 (6th Cir. 2006)...1, 15, 16

Robinson v. Lorillard Corp.,
444 F.2d 791 (4th Cir. 1971)..14, 17

Robinson v. Metro-North Commuter R.R. Co.,
267 F.3d 147 (2d Cir. 2001)..15, 16

Rosiles-Perez v. Superior Forestry Serv.,
250 F.R.D. 332 (M.D. Tenn. 2008) 16

Senter v. Gen. Motors Corp.,
532 F.2d 511 (6th Cir. 1976) 4, 13, 14, 17

Shipes v. Trinity Indus.,
987 F.2d 311 (5th Cir. 1993) 12

Staton v. The Boeing Co.,
327 F.3d 938 (9th Cir. 2003) 13

Stender v. Lucky Stores, Inc.,
803 F. Supp. 259 (N.D. Cal. 1992)..6, 9

Thiessen v. General Elec. Capital Corp.,
267 F.3d 1095 (10th Cir. 2001) 7

Thompson v. Sawyer,
678 F.2d 257 (D.C. Cir. 1982) 14

Velez v. Novartis Pharmaceuticals Corp.,
244 F.R.D. 243 (S.D.N.Y. 2007)...6, 10, 12

Watson v. Fort Worth Bank and Trust,
487 U.S. at 977 (1988) 7

Zepeda v. INS,
753 F.2d 719 (9th Cir. 1985) 8

FEDERAL RULES & STATUTES

42 U.S.C.
§ 1981a(a)(1) 15
§ 1981a(b)(2) 17
§2000e-2(k) 1, 7
§2000e-5(g) 17

Federal Rule of Civil Procedure
23 .... *passim*

MISCELLANEOUS

Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 2870-83 & 2871 (4th ed. 2007) 17

H.R. Rep. No. 92-238, at 8, 14 (1971) 3

CONSENT TO FILE AMICUS BRIEF

Amici have consent from both parties to file this *amicus curiae* brief.

INTEREST OF AMICI

Amici Impact Fund, the American Civil Liberties Union, Equal Rights Advocates, Legal Aid Society – Employment Law Center, National Employment Lawyers Association, Tennessee Justice Center, National Women's Law Center, and the NAACP Legal Defense and Educational Fund, Inc. submit this joint *amicus curiae* brief in support of Plaintiff-Appellant urging reversal.

Amici curiae are nonprofit organizations dedicated to advancing and protecting the equal employment rights of women, minority groups, and other classes protected by anti-discrimination laws. *Amici* also have extensive litigation experience with the Rule 23 class certification issues raised in this case and are recognized for their expertise in the interpretation of both Rule 23 and federal employment discrimination statutes. Consequently, *amici* have a unique perspective on the use of class action procedures by Title VII claimants alleging a pattern-or-practice of disparate treatment, as well as a disparate impact theory of liability.

Statements of Interests of *Amici Curiae*

The Impact Fund is a non-profit foundation that provides funding, training, and co-counsel to public interest litigators across the country, assisting in civil

rights class action cases. It offers training programs, advice and counseling, and *amicus* representation regarding class action and related issues. The Impact Fund is lead counsel in *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), *petition for cert. filed*, 79 U.S.L.W. 3128 (U.S. Aug. 25, 2010)(No. 10-277), and other major class action lawsuits alleging discrimination under Title VII.

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization with more than 500,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. Through its Women's Rights Project and Racial Justice Program, the ACLU has long worked to counter unlawful discrimination against women and people of color in the workplace. The ACLU of Michigan is the ACLU's local affiliate in the state of Michigan, with more than 10,000 members. The ACLU has extensive experience litigating both Title VII employment discrimination cases and class action discrimination cases.

Equal Rights Advocates ("ERA") is a public interest law firm dedicated to protecting and securing equal rights and economic opportunities for women and girls through litigation and advocacy. Since its inception in 1974, ERA has undertaken difficult impact litigation that has resulted in establishing new law and provided significant benefits to large groups of women. ERA has extensive

experience litigating both Title VII employment discrimination cases and class action discrimination cases, including as co-counsel in *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), *petition for cert. filed*, 79 U.S.L.W. 3128 (U.S. Aug. 25, 2010)(No. 10-277). ERA has also appeared as *amicus curiae* in numerous Court of Appeal and Supreme Court cases involving the interpretation of Title VII including *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Faragher v. Boca Raton*, 522 U.S. 1105 (1998); and *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998).

The Legal Aid Society - Employment Law Center ("LAS-ELC") is a public interest legal organization that advocates to improve the working lives of disadvantaged people. Since 1970, The LAS-ELC has represented clients in cases covering a broad range of employment-related issues including discrimination on the basis of race, gender, age, disability, pregnancy, sexual orientation, and national origin.

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 state and local affiliates have a

membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity and protection for women in the workplace by supporting the full enforcement of anti-discrimination laws and other laws that protect employees. The availability of class actions is essential for the full enforcement of these laws. NWLC has prepared or participated in numerous *amicus* briefs filed with the Supreme Court and the Courts of Appeals in employment cases.

The Tennessee Justice Center ("TJC") is a non-profit public interest law firm established by Tennessee bar leaders and supported by the Tennessee Bar Foundation. TJC's mission is to advocate on behalf of disadvantaged Tennesseans in civil legal matters involving the necessities of life. TJC makes frequent use of

the class action procedural device to enforce the legal rights of low-income families who cannot afford other counsel, and who are too numerous for TJC to represent individually. Because of the importance of the class action to its ability to afford its clients equal access to the courts, TJC has a strong interest in the fair and practical interpretation of Federal Rule of Civil Procedure 23.

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit legal organization established to assist African Americans and other people of color in securing their civil and constitutional rights for more than six decades. In litigation before the Supreme Court and other courts, LDF has focused on matters of race discrimination in general, and employment discrimination in particular, including in *Lewis v. City of Chicago*, __U.S. __, 130 S. Ct. 2191 (2010); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); and *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). LDF has focused its employment discrimination work particularly upon class actions because of their effectiveness in securing systemic change

SUMMARY OF ARGUMENT

The district court's Rule 23 analysis treated the case as a collection of individual actions, disregarding precedent governing cases alleging a pattern-or-practice of intentional discrimination *and* cases challenging practices with a disparate impact, in violation of settled Title VII case law. Individualized inquiries are not required at the liability phase of a Title VII class case. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 343 n.24 (1977); 42 U.S.C. §2000e-2(k). This fundamental legal error, if left standing, has grave implications for the ability of employees to band together in class actions to challenge systemic sex, race, and other discrimination in the workplace, and it warrants reversal of the class certification order.

The district court also committed legal error when it held that back pay and front pay remedies are inconsistent with certification under Rule 23(b)(2). The court found that these equitable remedies were too "individualized" for class treatment. Opinion ("Op.") at 17. This conclusion squarely conflicts with 30 years of settled authority, including this Circuit's decision in *Reeb v. Ohio Department of Rehabilitation & Correction,* 435 F.3d 639, 650 (6th Cir. 2006), which permits back pay awards in Title VII injunctive relief class actions.

These errors are particularly troublesome – for this and future cases – because the court's analysis would preclude nearly every class action challenging employment discrimination. The class action device is critical for bringing pattern-or-practice claims, as well as disparate impact claims, which are expensive to litigate individually. Under the district court's erroneous ruling, even challenges seeking only injunctive relief and back pay may not be certifiable under Rule 23(b)(2).[1]

ARGUMENT

I. The District Court Applied Erroneous Legal Standards in Concluding that Rule 23(a)(2) Had Not Been Satisfied

A. The District Court Failed to Apply the Legal Standards Applicable to Pattern-or-Practice Claims.

The district court held that Rule 23(a)'s commonality requirement was not satisfied for the appellant's claim that Cintas engaged in a pattern-or-practice of intentional discrimination, because Cintas's hiring decisions were "made for a diverse range of reasons" depending on "differing circumstances," and because Cintas might be able to demonstrate that *particular* hiring decisions were not discriminatory. Op. 8-9 (noting that Cintas presented evidence that some individual class members were not

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[1] In this brief, *amici* focus only on the numerous reversible errors in the district court's class certification decision and do not address the flaws in its subsequent rejection of the appellant's individual claim of discrimination.

hired for legitimate reasons or were passed over for or by a woman). In so holding, the court misapplied Rule 23 and fundamentally misapprehended the nature of pattern-or-practice cases, which properly focuses on employers' discriminatory "standard operating procedure[s]," rather than "isolated … discriminatory acts," *Teamsters*, 431 U.S. at 336; *see also Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772 (1976); *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 575 (6th Cir. 2004) (explaining that "a pattern-or-practice claim is focused on establishing a policy of discrimination" and "does not address individual hiring decisions").

Facilitating the adjudication of "'broad-scale action against patterns or practices of discrimination'" is "essential" to the "purposes of Title VII." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 69 & n.22 (1984) (quoting H.R. Rep. No. 92-238, at 8, 14 (1971)). The class action mechanism allows plaintiffs to aggregate claims and collectively challenge far-reaching discriminatory practices that, otherwise, might go unaddressed. *See* Fed. R. Civ. P. 23(b)(1) and (b)(2) advisory committee's notes. Because widespread patterns of discrimination are often best challenged by more than one individual, it is unsurprising that many leading Title VII cases have been brought as class actions, *see*, *e.g.*, *Franks*, 424 U.S. at 750-51, or were brought by the Government on behalf of a class, *see*, *e.g.*, *Teamsters*, 431 U.S. at 328-32.

Because "pattern or practice" class actions challenge more than the circumstances surrounding an individual employment decision, plaintiffs in such cases rely on statistical and anecdotal evidence to show that, as its standard operating procedure, the employer treats the majority group better than plaintiffs. *See Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876-79 (1984). Courts properly treat such class actions differently from individual discrimination cases. *See Senter v. Gen. Motors Corp.*, 532 F.2d 511, 524 (6th Cir. 1976) (citations omitted) (where "class-wide discriminatory practices" are at issue, courts must "vindicate the policies of [Title VII] regardless of the position of the individual plaintiff"). The "crucial difference" is that "'[t]he inquiry regarding an individual's claim is the reason for a particular employment decision, while at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking.'" *Hunter v. Sec'y of U.S. Army*, 565 F.3d 986, 994 (6th Cir. 2009) (quoting *Cooper*, 467 U.S. at 876).

In recognition of this difference, a pattern-or-practice suit is divided into a liability phase and a remedial phase. *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 158 (2d Cir. 2001). The first phase focuses on "whether the employer is liable to the class because of a pattern

or practice of discrimination." *Berger v. Iron Workers Reinforced Rodmen, Local 201*, 170 F.3d 1111, 1124 (D.C. Cir. 1999) (*per curiam*) (citation omitted). Plaintiffs may present "statistics which show a gross disparity in the treatment of workers" based on the protected characteristic, *Bacon v. Honda of Am. Mfg., Inc.*, 205 F.R.D. 466, 474 (S.D. Ohio 2001), *aff'd*, 370 F.3d 565 (6th Cir. 2004), and can "bolster their case by introducing historical, individual, or circumstantial evidence," *Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277, 1285 (5th Cir. 1994), including anecdotal evidence of discrimination, *Teamsters*, 431 U.S. at 339. Defendants may rebut the plaintiffs' case "by showing that the plaintiffs' statistics are inaccurate or insignificant, or by providing a nondiscriminatory explanation for the apparent discrimination." *Bacon*, 205 F.R.D. at 474 (*citing Anderson*, 26 F.3d at 1285).

The focus on the employer's practices at the liability stage, rather than on individual hiring decisions, allows the court to identify an employer's discriminatory behavior.[2] It is not until the second, "individual relief" phase

[2] Defendants' "attempt[s] to combat a [statistical] *prima facie* case" by proffering "evidence about a handful of" individual employment decisions are therefore "doomed to failure because a *prima facie* case of class-wide discrimination is not met by [a] defendant's attempts to parry specific allegations of alleged discrimination." *Boykin v. Georgia-Pac. Corp.*, 706 F.2d 1384, 1393 (5th Cir. 1983) (internal quotation marks omitted); *accord Franks*, 424 U.S. at 772; *Teamsters*, 431 U.S. at 342 n.24 ("[I]ndividual

(continued . . .)

that the burden shifts to the employer to demonstrate that the individual was not subjected to unlawful discrimination, and courts will frequently "conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief." *Teamsters*, 431 U.S. at 361.

This two-phase method of proof is a critical mechanism for challenging systemic sex discrimination in the workplace. It has been used in a number of important class actions alleging a pattern of sex discrimination, including *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259 (N.D. Cal. Aug. 29, 1992) and *Butler v. Home Depot, Inc.*, No. C-94-4335 SI, 1997 WL 605754 (N.D. Cal. 1997). Plaintiffs may present "statistics which show a gross disparity in the treatment of workers" based on the protected characteristic, *Bacon v. Honda of Am. Mfg., Inc.*, 205 F.R.D. 466, 474 (S.D. Ohio 2001), *aff'd*, 370 F.3d 565 (6th Cir. 2004); *see also Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977), and can "bolster their case by introducing historical, individual, or circumstantial evidence," *Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277, 1285 (5th Cir. 1994), including anecdotal evidence of discrimination. *Teamsters*, 431

(continued …)
proof concerning each class member's specific injury [i]s appropriately left to proceedings to determine individual relief.").

U.S. at 339; *Velez v. Novartis Pharmaceuticals Corp.,* 244 F.R.D. 243 (S.D.N.Y. 2007); *Hnot v. Willis Group Holdings, Ltd.*, 228 F.R.D. 476 (S.D.N.Y. 2005). "[C]ourts have routinely certified classes in similar employment discrimination cases by separating the trials into two phases," leaving individual inquiries to the second phase. *Butler v. Home Depot, Inc.*, No. C-94-5335 SI, 1996 WL 421436, at *5 (N.D. Cal. Jan. 25, 1996) (citing *Teamsters* and other cases).

By focusing on the "diverse range of reasons" on which individual hiring decisions are based (Op. at 8), and on the fact that some hiring decisions may have been made for nondiscriminatory reasons, the district court failed to adhere to the two-phase order of proof appropriate in pattern-or-practice cases. *See Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1107 (10th Cir. 2001) (finding that the trial court improperly considered individual issues because of "its failure to recognize that plaintiffs were proceeding under a pattern-or-practice theory").

B. The District Court Failed to Apply the Legal Standards Applicable to Disparate Impact Class Claims

Title VII prohibits "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Lewis v. City of Chicago,* __ U.S. __, 130 S. Ct. 2191, 2197 (2010) (quoting *Griggs. v. Duke Power Co.,* 401 U.S. 424, 431 (1971)). A disparate impact case challenges

"facially neutral employment practices that have significant adverse effects on protected *groups* . . . without proof that the employer adopted those practices with a discriminatory intent." *Watson v. Fort Bank and Trust*, 487 U.S. at 977, 986-87 (1988).[3] The evidence "focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities." *Id.* at 987.

The district court's decision failed to address whether plaintiff's disparate impact claim satisfied Rule 23(a) or to apply the appropriate legal standard for disparate impact claims. *See* Op. at 8-9. Moreover, the district court's focus on individual employment decisions is at odds with the fundamental nature of a disparate impact claim, which addresses statistical disparities and possible justifications for the employment policy at issue.

This error is particularly troubling because disparate impact claims are, by their nature, group claims. Because of the need for complex and expensive statistical evidence, disparate impact cases often are brought as class actions. As one district court noted in its class certification order:

> disparate impact claims by necessity involve experts and complex statistical analysis and evidence, the costs of which may not be readily borne by individual plaintiffs. The

[3] Congress codified the burdens of proof for disparate impact claims in 1991. 42 U.S.C. §2000e-2(k).

> advantages of determining that threshold question in one proceeding seem obvious.

Bert v. AK Steel Corp., No. 1:02-cv-467, 2007 WL 184746, *5 (S.D. Ohio Jan. 19, 2007). In other words, the costs of bringing the suit often outweigh the monetary recovery that any individual might obtain. And, even if an individual plaintiff manages to bring and prove a disparate impact challenge, a district court may be limited in the scope of the injunctive relief it can award in an individual action. *Zepeda v. INS,* 753 F.2d 719, 727-28 (9th Cir. 1985). The court may not have the authority to issue the broad injunctive relief necessary to eliminate the effects of systemic discrimination.

C. Subjective Hiring Practices Are Appropriately Challenged In Class Actions

Subjective, decentralized, and informal decisionmaking processes tend to limit employment opportunities for women and other classes protected by Title VII by allowing biases to flourish within a corporate culture in which discrimination is pervasive. "'In the context of a male-dominated culture, relying on highly arbitrary assessments of subjective hiring criteria allows stereotypes to influence hiring decisions. Under such circumstances, there is likely to be a strong tendency for women to be considered unqualified or inappropriate for "men's work" in [certain] jobs, regardless of any individual female applicant's objective qualifications for

such positions.'" *Butler*, 1997 WL 605754, at *7; *see also Stender*, 803 F. Supp. at 331 (explaining that "ambiguous and subjective" employment practices "increase[] the likelihood that gender stereotypes will influence" employment decisions"). Statistical evidence of significant disparities, combined with evidence of a subjective employment process, can thus reveal "a common culture at [a company] which disadvantages women." *Ellis v. Costco Wholesale Corp.*, 240 F.R.D. 627, 639-40 (N.D. Cal. 2007) (certifying a nationwide class of women challenging subjective promotion practices).

Challenges to subjective, discretionary hiring criteria are amenable to class treatment. *See*, *e.g.*, *Brown v. Nucor Corp.*, 576 F.3d 149, 153 (4th Cir. 2009) ("[A] practice of disparate treatment in the exercise of unbridled discretion raises questions of law and fact common to all subject black employees.") (internal quotation marks and alterations omitted); *McClain v. Lufkin Industries,* 519 F.3d 264, 276-77 (5th Cir. 2008) (affirming class-wide liability for disparate impact based upon subjective practices); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2d Cir. 1999), overruled on other grounds by *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 39-42 (2d Cir. 2006) ("[D]elegation to supervisors, pursuant to company-wide

policies, of discretionary authority without sufficient oversight . . . gives rise to common questions of fact warranting certification.").

Courts have held that a policy of subjective decision-making creates a common question of law or fact under Rule 23(a)(2). *See Velez*, 244 F.R.D. at 258-67 (finding common questions in challenges to employment policies alleged to be "overly subjective and discriminatory"); *Butler*, No. C-94-4335 SI, 1996 WL 421436, at *2-3 (finding that challenges to subjective hiring and promotion practices, supported by statistical evidence common to the class, raised common questions for purposes of class certification); *Anderson v. Boeing Co.*, 222 F.R.D. 521, 537 (N.D. Okla. 2004) (finding common questions of fact regarding "statistically significant gender disparities" and "subjective decision-making"); *Morgan v. United Parcel Serv., Inc.*, 169 F.R.D. 349, 356 (E.D. Mo. 1996) (commonality requirement met where company combines "subjective, decentralized system of decisionmaking" with personnel policies that are "uniform throughout the country and are promulgated by the national corporate office").

Here, the district court failed to recognize that the discrimination that resulted from Cintas's policy of giving hiring managers practically unfettered discretion is a question common to the plaintiff class.

D. Commonality Is Not Defeated By the Fact That the Challenged Practices Were Implemented By Many Managers at Different Facilities

The district court erred in holding that commonality was not satisfied because the hiring process was conducted by "thousands of Cintas managers at hundreds of Cintas facilities." Op. at 8. First, where the challenged practices concern hiring for a single position, the fact that numerous facilities and managers are involved does not defeat commonality.[4] *See*, *e.g.*, *Nelson v. Wal-Mart Stores, Inc.*, 245 F.R.D. 358, 368 (E.D. Ark. 2007) (certifying a nationwide class action across numerous offices and managers where plaintiffs focused "specifically on the hiring policies for the single position of over-the-road truck driver in Wal-Mart's Transportation Division"). This case challenges the failure to hire into a single position, SSR.

More broadly, where common practices are challenged across facilities, there is a common question of law or fact. *See*, *e.g.*, *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993) (upholding commonality finding where all of company's plants "utilized the same subjective criteria

[4] *Bacon*, relied upon by the district court, is distinguishable precisely because in that case, commonality was denied on the ground that the class included "both workers and supervisors," "production-line workers and those in administrative positions." *Bacon*, 370 F.3d at 571.

in making personnel decisions"). In *Nelson*, for example, common practices included relying on current drivers to solicit applicants, entrusting interviews and hiring decisions to local managers, and few objective criteria beyond minimum qualifications. *Id.* at 368. The same are present here.

Pattern-or-practice and disparate impact cases frequently involve employees at multiple facilities. *See*, *e.g.*, *Bazemore v. Friday*, 478 U.S. 385, 389, 405-06 & n.17 (1986) (reversing failure to certify pay and promotion class of black employees of Extension Service with facilities in 100 counties); *Caridad*, 191 F.3d at 291-92 (certifying class of all African Americans employed throughout commuter railroad); *Velez*, 244 F.R.D. at 262-63 (certifying class challenging subjective practices used to manage national sales force in multiple sales positions); *McReynolds v. Sodexho Marriot Servs., Inc.*, 208 F.R.D. 428, 431 (D.D.C. 2002) (certifying class of African Americans challenging managerial promotion process across company with six divisions nationally and 5000 worksites). *See also Teamsters*, 431 U.S. at 337 & n.17 (analyzing treatment of the company's thousands of employees in the line driver position in facilities in eight major cities).

Moreover, limiting class certification to single facilities would have the effect of immunizing large employers from accountability under Title

VII. As courts have recognized, "[t]he unsurprising fact that some employment decisions are made locally does not allow a company to evade responsibility for its policies." *Staton v. The Boeing Co.*, 327 F.3d 938, 956 (9th Cir. 2003); *see also McReynolds*, 208 F.R.D. at 432 ("Sodexho is a corporate giant, and as a result, its personnel decisions are largely decentralized.").

II. The District Court Committed Legal Error When It Concluded, that Back Pay and Front Pay Were Inconsistent with Rule 23(b)(2)

The district court held that back pay and front pay were inconsistent with certification under Rule 23(b)(2) because they "would require individualized determinations for each class member." Op. at 17. This holding conflicts with the law in this and every other circuit.

Historically, the remedies available under Title VII were limited to injunctive and declaratory relief, back pay, and attorneys' fees. Title VII class actions were certified under Rule 23(b)(2) because they sought to enjoin unlawful, class-based discrimination. *Amchem Prods. v. Windsor,* 521 U.S. 591, 614 (1997); *Senter v. Gen. Motors Corp.,* 532 F.2d 511, 525 (6th Cir. 1976) ("Lawsuits alleging class-wide discrimination are particularly well suited for 23(b)(2) treatment since the common claim is susceptible to a single proof and . . . a single injunctive remedy.").

A request for back pay for the class, in addition to injunctive relief, has never precluded certification under Rule 23(b)(2). *Alexander v. Aero Lodge No. 735,* 565 F.2d 1364, 1372 (6th Cir. 1977); *Senter,* 532 F.2d at 525; *Pettway v. Am. Cast Iron Pipe,* 494 F.2d 211, 257-58 (5th Cir. 1974); *Robinson v. Lorillard Corp.,* 444 F.2d 791, 802 (4th Cir. 1971).[5] "The demand for back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy, to be determined through the exercise of the court's discretion . . . ." *Robinson,* 444 F.2d at 802 (internal quotation marks omitted). Importantly, this Court and other circuits have always permitted Rule 23(b)(2) certification of back pay claims even where the amount of individual back pay awards would vary among class members. *Kirby v. Colony Furniture Co., Inc.,* 613 F.2d 696, 700 (8th Cir. 1980); *Senter,* 532 F.2d at 525 n.33; *Pettway,* 494 F.2d at 257; *Robinson,* 444 F.2d at 802 n.14.

[5] Like back pay, front pay under Title VII is an equitable remedy. *Allison v. Citgo Petroleum,* 151 F.3d 402, 423 n.19 (5th Cir. 1998)*; see also Pollard v. E.I. du Pont de Nemours & Co.,* 532 U.S. 843, 850 (2001). Front pay is "money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement." *Pollard*, 532 U.S. at 846. In a class action, the front pay pool is "construct[ed] . . . as a continuation of the back pay pool." *Thompson v. Sawyer,* 678 F.2d 257, 292 (D.C. Cir. 1982). Because the equitable remedy of front pay is in effect the mirror image of back pay, they are treated the same for purposes of Rule 23(b) analysis.

In 1991, Congress amended Title VII to permit the award of compensatory and punitive damages for intentional discrimination claims. 42 U.S.C. § 1981a(a)(1). Courts then grappled with the question of whether the presence of compensatory and punitive damages prevented certification under Rule 23(b)(2); the circuits are split on the proper approach to this question. *Compare Allison,* 151 F.3d at 411 (5th Cir. 1998), *with Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 164 (2d Cir. 2001). Irrespective of the particular approach adopted for certification of legal damages, every court to consider the question has reaffirmed that back pay, an equitable remedy under Title VII, is compatible with Rule 23(b)(2) certification even after the 1991 Amendments. *See* cases cited *infra.*

In this Circuit, back pay remains consistent with (b)(2) certification. In *Reeb*, this Court concluded that individual *compensatory* damages under Title VII were *not* recoverable in a Rule 23(b)(2) class action. The *Reeb* decision expressly distinguished that holding from its prior precedents *allowing* back pay in a Rule 23(b)(2) class: "'back pay generally involves less complicated factual determinations and fewer individualized issues' than the computation of compensatory damages." *Reeb,* 435 F.3d at 650 (quoting *Coleman v. Gen. Motors Acceptance Corp.,* 296 F.3d 443, 449-450 (6th Cir. 2002)). *Reeb* also highlighted the equitable nature of the remedy.

"[B]ack pay is an equitable remedy that does not implicate the procedural and constitutional issues that a damage award does." *Id.* District courts in this Circuit interpret *Reeb* to permit back pay to be certified under Rule 23(b)(2).[6]

Other circuits have reached varying conclusions about the presence of compensatory and punitive damages in a Rule 23(b)(2) action but *all* have reaffirmed that back pay may still be certified as part of a (b)(2) class action. *Dukes v. Wal-Mart Stores*, 603 F.3d at 618-19; *Cooper v. Southern Co.,* 390 F.3d 695, 720 (11th Cir. 2004); *Robinson*, 267 F.3d at 159-60 (2d Cir. 2001); *Jefferson v. Ingersoll Int'l Inc.,* 195 F.3d 894, 896, 899 (7th Cir. 1999); *Allison*, 151 F.3d at 415 (5th Cir. 1998); *Eubanks v. Billington,* 110 F.3d 87, 92 (D.C. Cir. 1997). No circuit has held otherwise.[7]

Despite the uniformity of the case law on this point, the district court concluded certification under Rule 23(b)(2) was precluded by the fact that

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[6] *Card v. City of Cleveland,* No. 1:08-CV-2325, 2010 WL 3860986 *16 (N.D. Ohio Sept. 30, 2010)(gender discrimination class certifying back pay and damages under 23(b)(2)); *Rosiles-Perez v. Superior Forestry Serv.,* 250 F.R.D. 332 (M.D. Tenn. 2008) (in class action challenging wage and hour violations, back pay and statutory damages certified under (b)(2)); *Bert v. AK Steel Corp.,* No. 1:02-cv-467, 2006 WL 1071872 *11 (S.D. Ohio April 24, 2006) (back pay permissible in disparate impact class challenge to hiring test).

[7] In this case, plaintiff did not seek compensatory damages and sought certification for punitive damages only under Rule 23(b)(3); therefore the question of the appropriateness of punitive and compensatory damages in a Rule 23(b)(2) class action is not presented here.

"back pay and front pay would require individualized determinations for each member." Op. at 17. The court offered no explanation for its unprecedented conclusion and appears to have conflated individual compensatory damages with the equitable remedies of back pay and front pay. *See id.*[8]

Its conclusion is plainly wrong as a matter of law. Back pay awards in Title VII class actions have always varied among class members. *See generally* Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 2870-83 & 2871 (4th ed. 2007) ("back pay cannot be denied following a finding of class discrimination simply because back-pay determinations are . . . difficult"). This predictable variation among back pay awards has never been a basis for denying Rule 23(b)(2) certification. *Senter*, 532 F.2d at 525 n.33; *Robinson*, 444 F.2d at 802 n.14. The Ninth Circuit addressed this argument in an appeal of the class certification order in *Parra v. Bashas', Inc.*, 536 F.3d 975, 979 (9th Cir. 2008), an action alleging pay discrimination on behalf of Hispanic grocery workers.

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[8] When Congress amended Title VII in 1991 to add compensatory and punitive damage remedies, it left intact the equitable nature of back pay, explicitly excluding back pay from the definition of compensatory damages. *See* § 1981a(b)(2) ("Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under [42 U.S.C. § 2000e-5(g)].")

> [A]t oral argument, [the employer] argued that the difficulty in redressing the harm and calculating the various pay disparities for the different employment positions precludes class certification. We disagree. We have previously held that classes with far more complex remedies can seek redress in the form of a class action. The claimed difficulties in the calculations of damages, as they affected the various class members, do not preclude class certification.

Id. (internal citation omitted).[9] Variations in back pay awards were not a basis for denying class certification in that case, and should not preclude class certification here.

CONCLUSION

The class certification order should be reversed and remanded.

Dated: October 27, 2010 Respectfully Submitted,

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[9] The Fifth Circuit reached a similar conclusion in a class action challenging racially discriminatory insurance sales practices. *In re Monumental Life Ins. Co.,* 365 F.3d 408, 419 (5th Cir. 2004). The district court had denied class certification under Rule 23(b)(2) concluding that the calculation of individual relief would be too complex. Recognizing that class members were not entitled to a "one-size-fits-all refund," the appeals court reversed and held that class member awards could be calculated from objective information in defendant's business records. It concluded that Rule 23(b)(2) contained no "sweat-of-the-brow exception." *Id.* at 418-19.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached amicus is proportionally spaced, has a typeface of 14 points, and contains 4,159 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)

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CERTIFICATE OF SERVICE

I, Tony Dang, declare that:

I am employed at the Impact Fund, 125 University Avenue, Suite 102, Berkeley, California, 94710. I am over the age of 18 years and not a party to this action. I hereby certify that, on October 27, 2010, I electronically filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit, using the appellate CM/ECF system, a true and correct copy of the following document(s):

***AMICUS* BRIEF OF IMPACT FUND ET AL.
IN SUPPORT OF PLAINTIFF-APPELLANT URGING REVERSAL**

I certify that participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system via e-mail.

I further certify that there are no participants in the case who are not registered CM/ECF users.

DATED: October 27, 2010

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