NO. 97-40652

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

v.

WAL-MART STORES, INC., doing business as
Wal-Mart Store #1296 - San Benito, Texas,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Texas, Brownsville Division
C.A. No. B-95-123

BRIEF OF APPELLANT, WAL-MART STORES, INC.

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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

A. Parties:

Plaintiff-Appellee: Equal Employment Opportunity Commission

Defendant-Appellant: Wal-Mart Stores, Inc.

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STATEMENT REGARDING ORAL ARGUMENT

The major issue in this appeal involves the sufficiency of the evidence to support a malice finding, and exemplary damages, in the context of a Title VII failure to hire/retaliation case. Wal-Mart believes that this Court's opinion in *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 941 (5th Cir. 1996), is dispositive on this topic, and thus oral argument would not necessarily be helpful; however, it requests oral argument to the extent necessary to answer any questions from the Court regarding the evidence. Additionally, oral argument is not necessary to understand that the $100,000 exemplary damage award in this case is grossly excessive, or that the $5,000 compensatory damage award has no support in the record. Wal-Mart requests oral argument in order to ensure sufficient discussion of the liability findings.

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STATEMENT OF JURISDICTION

Wal-Mart appeals a final judgment from the United States District Court for the Southern District of Texas, Brownsville Division. This Court has jurisdiction pursuant to Title 28 U.S.C. § 1291.

STATEMENT OF ISSUES

ISSUE 1: Whether the EEOC's evidence that Wal-Mart discriminated or retaliated against Brock, which is entirely circumstantial, by not rehiring her supports the jury's finding of malice or reckless disregard when there is no evidence that any Wal-Mart employee possessed an evil state of mind.

ISSUE 2: Whether the trial court abused its discretion in refusing Wal-Mart's request to define the term "malice" in the jury instructions.

ISSUE 3: Whether the $100,000 exemplary damage award is excessive in light of *BMW of N. Am., Inc. v. Gore*, ___ U.S. ___, 116 S. Ct. 1589, 1598-99, 134 L.Ed.2d 809 (1996), and *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 941 (5th Cir. 1996), considering that Brock was awarded merely $12,000 in back pay and $5,000 in compensatory damages.

ISSUE 4: Whether the jury's $5,000 compensatory damage award for emotional harm is supported by sufficient evidence when the

EEOC presented no medical testimony or other evidence that Brock suffered an identifiable emotional injury.

ISSUE 5: Whether there exists sufficient evidence to support the jury's finding that Wal-Mart retaliated against Brock by not rehiring her in light of the fact that no person who was involved in the hiring process possessed knowledge that Brock had ever previously complained of discrimination.

ISSUE 6: Whether the trial court abused its discretion in admitting evidence regarding the reasons for Irma Adkins' separation from Wal-Mart, which were irrelevant to Brock's claim of race discrimination and unfairly prejudicial to Wal-Mart.

ISSUE 7: Whether the jury's finding that Wal-Mart refused to rehire Brock was based on race is supported by sufficient evidence.

STATEMENT OF THE CASE

A. Course of proceedings and disposition in the court below.

On June 3, 1994, Brock filed a complaint with the EEOC charging that her April 20, 1994, termination violated Title VII because she believed she was discharged because of her race. (Plaintiff's Ex. 14). Brock amended her EEOC complaint on August 24, 1994, alleging that since her termination, she had submitted "several" applications and had not been rehired and she believed this was due to her race. (Plaintiff's Ex. 15). The EEOC filed this lawsuit on August 1, 1995, and a first amended petition on September 1, 1995, alleging only that Wal-Mart's San Benito, Texas, store failed to rehire Charlene Brock, or retaliated against her, on the basis of her race. (Doc. 2, p. 2). The EEOC abandoned Brock's earlier contention that her "reduction in force" termination from the San Benito store in April, 1994, was based on race. The EEOC alleged a cause of action under Title VII, 42 U.S.C. § 2000e-2(a)(1) and (3).

The trial began on September 9, 1996, before the Honorable Filemon B. Vela. (Doc. 25). Wal-Mart moved for directed verdict pursuant to Federal Rule of Civil Procedure 50 at the close of the EEOC's case and at the close of all the evidence. (Doc. 29; Tr. at 443). The trial court denied Wal-Mart's motion with respect to the claims of failure to hire and retaliation. (Tr. at 443). Wal-Mart also moved for judgment as a matter of law on the grounds that no evidence existed to support

submission of a question on malice or reckless disregard. (Tr. at 443). Although the trial court agreed, by commenting that he did not believe sufficient evidence existed to support a showing of malice, he reserved ruling on that aspect of Wal-Mart's motion. (Tr. at 443). Wal-Mart requested a "malice" definition to accompany the exemplary damage question, which the court refused. (Tr. at 445).[1]

The court later denied all additional requests for relief not included in the final judgment entered on May 5, 1997. (Docs. 40, 41). The judgment awarded $12,000 for lost wages, $5,000 for past and future compensatory damages, and $100,000 in exemplary damages. (Doc. 41). Wal-Mart filed its Notice of Appeal on May 28, 1997. (Doc. 45).

B. Statement of facts.

1. *Charlene Brock's first job with Wal-Mart.*

Charlene Brock graduated from San Benito High School in 1990. (Tr. at 43). After working briefly as a substitute teacher and as a part-time worker at K-Mart, Wal-Mart hired her as a part-time seasonal worker in December, 1992. (Tr. at 44-45). She worked as a part-time cashier at the San Benito, Texas, store. (Tr. at 46). On

[1] The jury was not asked to decide whether Wal-Mart's decision to not hire Brock was committed with malice or reckless indifference; the malice question (Question No. 6) only pertains to the EEOC's retaliation claim.

December 1, 1992, she signed an advisory acknowledging that a reduction in the workforce may be necessary after peak business seasons. (Plaintiff's Ex. 1). Brock also acknowledged that if she was terminated during a reduction in workforce (and was eligible for rehire) she was required to reapply, that Wal-Mart assumed no obligation to contact her for possible rehire, and that applications for employment are only valid for sixty days. (Plaintiff's Ex. 1).

Brock was released in February, 1993, during a reduction in force layoff due to low sales at the San Benito store. (Tr. at 47). Her work performance during that time period was satisfactory (e.g., a rating of 3 out of a possible 5). (Tr. at 50). Brock admitted that she had no complaints whatsoever associated with her employment with Wal-Mart from December, 1992, through February, 1993. She acknowledged that no one made any negative references to her race or color during that time period and that she was not treated poorly by anyone. Brock's February 23, 1993, exit interview notes that she was released due to a reduction in workforce and was eligible for rehire. (Tr. at 54; Plaintiff's Ex. 4). At all times during her employment with Wal-Mart, Brock was a part-time employee and worked an average of twenty-five hours per week. (Tr. at 91, 138).

2. *Brock's second job with Wal-Mart.*

Later in 1993, Brock learned that the San Benito store was rehiring and she reapplied in June, 1993. (Tr. at 56-58). Subsequently, Brock's mother, Linda Brock, made a personal visit to the store to lodge a complaint about the fact that her daughter had not been rehired. (Tr. at 320-34). She spoke with the store manager, Irma Adkins. (Tr. at 321-25). Adkins was Hispanic. During this discussion, Mrs. Brock told Adkins that her daughter had reapplied for a position "several times," and did not understand why she was not rehired. (Tr. at 323). Adkins informed Mrs. Brock that Wal-Mart does not discriminate in its hiring practices and told her she would look into Charlene's application. (Tr. at 324). Adkins called Brock at home two days later and asked her to come in for an interview. (Tr. at 325). Brock was hired. (Tr. at 325). This was in June, 1993. (Tr. at 58). As with her first employment, Brock was hired only as a part-time employee, and she worked in the electronics department. Later, she was voluntarily reassigned to a cashier position. (Tr. at 58).

After ninety days of employment, on September 26, 1993, Brock received an evaluation which rated her performance as "meeting requirements." (Plaintiff's Ex. 6; Tr. at 65). Wal-Mart evaluated Brock again on December 3, 1993, and her rating increased slightly. (Plaintiff's Ex. 6; Tr. at 65). Both evaluations noted positive and negative aspects of Brock's performance and Brock was not unhappy with either

evaluation. (Plaintiff's Ex. 6; Tr. at 68). Adkins was not involved in either evaluation. (Tr. at 68).

Brock continued as a part-time employee at the San Benito store until April 20, 1994, when her position was eliminated as part of another reduction in force. (Plaintiff's Ex. 7; Tr. at 68). Brock's exit interview form, which she refused to sign, noted that Brock was eligible for rehire. (Plaintiff's Ex. 7). Approximately thirty other part-time and full-time workers were laid off in April, 1994. (Tr. at 70). Brock testified that some individuals were retained who had less seniority than Brock, while others who were laid off performed jobs similar to hers. (Tr. at 71).[2] Brock admitted she got along well with associates and some supervisors at the store. (Tr. at 77). At the time of her second RIF release, Brock was making $4.85 an hour and working an average of 25 hours a week. (Tr. at 80).

This was Charlene Brock's second RIF release, and Mrs. Brock decided to complain. "After [praying] on it and [talking] with [her] attorney," she decided to write a letter. (Plaintiff's Ex. 8). On April 21, 1994, the day following her daughter's termination, she wrote and hand-delivered a letter to Adkins. (Plaintiff's Ex. 8; Tr. at

[2] The market in San Benito, Texas, required this particular Wal-Mart store to periodically reduce its workforce. During RIF periods, part-time workers, such as Brock, were the first employees released. (Tr. at 307). The EEOC does not dispute that the RIF in April, 1994, was necessary. (Tr. at 72).

73-74, 327). In the letter, Mrs. Brock noted how she had lived with discrimination all her life and that she believed her daughter was released because she was black. (Plaintiff's Ex. 8). Neither Brock nor her mother received any response to the letter from Adkins. (Tr. at 229). Eight days later, Mrs. Brock mailed a second letter to the president and CEO of Wal-Mart, David Glass. (Plaintiff's Ex. 9; Tr. at 76-77, 329-30). Mrs. Brock attached a copy of her previous letter to Adkins and informed Mr. Glass of her belief that her daughter had been terminated because she was black. Mrs. Brock received no response to Exhibit 9. Mrs. Brock testified that she placed Exhibit 9 into the regular mail from her home in San Benito.

3. *Brock applies for a third job*.

In May, 1994, the San Benito store gradually began rehiring people. After filing her EEOC charge in June, 1994, Brock reapplied for employment at the San Benito store, seeking a cashier (or any open position) on June 10, 1994, and August 17, 1994. (Plaintiff's Ex. 10).[3] After reapplying twice, and not being hired, Brock amended her EEOC complaint on August 24, 1994, alleging that since her termination, she had submitted "several" applications and had not been rehired and she believed this was due to her race. (Plaintiff's Ex. 15).

[3] Applications for employment are only valid for sixty days. (Plaintiff's Ex. 10).

On August 15, 1994, Adkins voluntarily resigned as store manager after admitting that she had falsified the store's payroll records. (Plaintiff's Ex. 24). As discussed later in the brief, the reasons for her separation from Wal-Mart are irrelevant to the issues presented in this appeal. The new store manager was Steve Estrada.

On September 13, 1994, Brock filed another application at the San Benito store and her mother drafted a letter to Estrada. (Plaintiff's Ex. 10, 13; Tr. at 82). Although Brock believed that her mother hand-delivered Exhibit 13 to the store, Mrs. Brock did not say whether she did or not, and Estrada did not recall ever receiving Exhibit 13. (Tr. at 387). Nonetheless, the September 13, 1994, letter to Estrada stated that Brock had previously worked at the San Benito store, that she had reapplied, and that she desired to be considered for a position. It made no mention of alleged discriminatory treatment. (Tr. at 423; Plaintiff's Ex. 13). Brock filed two more applications with the San Benito store, one on October 12, 1994, and her final application on November 1, 1994. (Plaintiff's Ex. 10). From June to December, 1994, the store hired nine people, some of whom were persons who had been RIFed previously. (Plaintiff's Ex. 31; Tr. at 81, 426-29). As of the time of trial, the store had hired two black employees since April, 1994. (Tr. at 424).

On October 20, 1994, Brock filed an application with the Wal-Mart store in Harlingen, Texas. (Plaintiff's Ex. 28; Tr. at 93). She was interviewed but did not receive a job. (Tr. at 93).

Estrada testified that the San Benito store receives approximately thirty applications per week. (Tr. at 428). However, San Benito has a very small African-American population and only about three applications per year are filed by black applicants. (Tr. at 305). San Benito is located in Cameron County, whose population is comprised of .3% African-Americans. TEXAS ALMANAC 150 (Mary G. Ramos & Robert Plocheck eds., 1996).[4]

4. *Wal-Mart policies*.

Wal-Mart's corporate philosophy is based on respect for the individual. This philosophy is promulgated to associates and management both in the associate handbook (Defendant's Ex. 6) and Wal-Mart's "computer-based learning" computer training modules. (Defendant's Exs. 1, 2). Specifically, Wal-Mart's associate handbook provides:

> Our commitment to equal opportunity for all associates is reinforced by policy and by actions. We do not tolerate discrimination of any kind. Not only is discrimination against our beliefs, it's against the law.

(Defendant's Ex. 6, p. 9). The computer-based learning modules, which all Wal-Mart employees must learn, reinforces its corporate policy by emphasizing that negative or stereotypical comments or action aimed at an individual's race are inappropriate at Wal-

[4] Wal-Mart requests the Court to take judicial notice of the Texas Almanac.

Mart. (Defendant's Ex. 1, p. 1-3). Further, it is Wal-Mart's policy to make hiring decisions based on nondiscriminatory factors. (Defendant's Ex. 2, pp. 3, 11-12).

Wal-Mart also has an "open door policy" regarding employee complaints about harassment:

> Wal-Mart's commitment is to maintain a work environment that is free of harassment and inappropriate behavior. In keeping with this commitment, harassment or inappropriate behavior directed at an associate by anyone, whether it's a member of management, a customer, or a vendor, will not be tolerated. If you feel you've been a victim of harassment, or if you have witnessed or have knowledge of behavior that violates Wal-Mart's policy, use the open door policy. **If your immediate supervisor is the problem, go to the next level of management. Be as specific about the incident as possible. . . . Remember, there will be no retaliation for reporting harassment or inappropriate conduct**. If you feel Wal-Mart has not properly addressed your claim, you have the right to file a complaint with your state's human rights commission or the Equal Employment Opportunity Commission (EEOC).

(Defendant's Ex. 1, pp. 6-7) (emphasis added). Brock acknowledged her awareness of this express procedure. (Tr. at 63, 359).

The jury was not asked to decide whether Brock's RIF discharge in April, 1994, was because of race discrimination. Rather, the EEOC only asked the jury to decide whether, during the period from June, 1994, through December 31, 1994, Wal-Mart failed to hire Brock because of her race (Question No. 1) and whether Wal-Mart's decision to not hire Brock during that time period was in retaliation for her or her mother's complaint of discrimination (Question No. 2). (Doc. 33). The jury responded

affirmatively to both questions. Thus, Wal-Mart's decision to release Brock in April, 1994, is not at issue on appeal.

SUMMARY OF ARGUMENT

The jury's conclusion that Wal-Mart retaliated against Brock with "malice" has absolutely no support in this record. The EEOC did not offer any direct evidence of discriminatory or racial animus on the part of any Wal-Mart employee to justify any award of exemplary damages. Further, the slim circumstantial evidence presented does not support a retaliation finding, much less "malicious" retaliation. The EEOC brought forth no evidence that any employees who participated in the challenged hiring decision had knowledge of Brock's EEOC complaints or otherwise acted with an evil motive. Thus, the exemplary damage award should be reversed completely. Alternatively, the $100,000 punitive award is excessive in light of *BMW*.

The trial court made it easier for the jury to reach its erroneous malice finding because it refused Wal-Mart's request to include a malice definition in the jury instructions. This was an abuse of discretion which resulted in an improper verdict.

With respect to the liability findings, Wal-Mart challenges the evidence to support the retaliation finding. Because no employee who participated in the hiring decisions knew about Brock's prior discrimination complaints, the decision not to hire Brock could not have been because of those complaints. Therefore, the evidence does not support causation. Additionally, the finding that Wal-Mart did not rehire Brock because of her race cannot stand because there is insufficient evidence of pretext and

the record does not support a reasonable inference that race was the real reason she was not hired.

Regarding damages, Brock's testimony that she lost sleep, gained weight, and suffered by having to look for a job does not meet the minimum requirements for recovery of Title VII anguish damages in this Circuit. If the Court does not reverse the entire judgment, the compensatory damages award should be deleted.

ARGUMENT AND AUTHORITIES

POINT OF ERROR ONE:

THERE EXISTS NO EVIDENCE THAT WAL-MART ACTED WITH MALICE OR RECKLESS INDIFFERENCE IN FAILING TO REHIRE CHARLENE BROCK. THEREFORE, THE JURY'S ANSWERS TO QUESTION NOS. 6 AND 7 CANNOT STAND.

A. Standard of review and applicable law.

In reviewing the denial of a motion for judgment, the court of appeals must determine whether the record contains evidence upon which a reasonable trier of fact could conclude as the jury did. *Molnar v. Ebasco Constr., Inc.*, 986 F.2d 115, 117 (5th Cir. 1993) (reversing and rendering jury verdict). The court uses the often quoted standard from *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969).[5]

In a failure to hire/race discrimination case, the plaintiff bears the burden of persuading the trier of fact that the defendant intentionally discriminated. In the absence of direct evidence of discrimination, which is the case here, the plaintiff must

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[5] "If the facts and inferences points so strongly and overwhelmingly in favor of one party that the court believes that reasonable persons could not arrive at a contrary verdict, granting [judgment as a matter of law] is proper. . . . the court should consider all of the evidence—not just that evidence which supports the nonmover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion [for judgment as a matter of law]." *Shipman*, 411 F.2d at 374.

make out a prima facie case in order to establish a rebuttable presumption of discrimination. *Grimes v. Texas Dep't of Mental Health & Mental Retardation*, 102 F.3d 137, 140 (5th Cir. 1996); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973). The plaintiff must show: (1) that she is a member of a protected class; (2) that she sought and was qualified for an available employment position; (3) that she was rejected for that position; and (4) that the employer continued to seek applicants with the plaintiff's qualifications. *Grimes*, 102 F.3d at 140. The burden of production then shifts to the defendant to articulate a legitimate reason for the adverse employment decision. *Id.*; *Molnar*, 986 F.2d at 118. To overcome judgment as a matter of law, the plaintiff then must establish sufficient evidence to (1) create a fact question as to whether each of the employer's stated reasons were pretextual, or were what actually motivated the employer, and (2) create a reasonable inference that race was a determinative factor in the action of which the plaintiff complains. *Ontiveros v. Asarco, Inc.*, 83 F.3d 732, 733 (5th Cir. 1996); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996) (en banc). A plaintiff may demonstrate pretext directly by showing that a discriminatory motive more likely motivated the employer or indirectly by showing that the employer's explanation is unworthy of credence. *Molnar*, 986 F.2d at 118.

However, when a case has been fully tried on the merits, the adequacy of a party's showing at any particular stage of the *McDonnell Douglas* framework is

unimportant. *Id.*; *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 122-23 (5th Cir. 1992). The court of appeals focuses its inquiry on whether the record contains evidence upon which a reasonable trier of fact could have concluded as the jury did. *Molnar*, 986 F.2d at 118. The Title VII plaintiff bears the burden to prove that the employer *intentionally* discriminated against *her* for an impermissible reason. *Walther v. Lone Star Gas Co.*, 977 F.2d 161, 162 (5th Cir. 1992).

Assuming for the purposes of this point of error that sufficient evidence exists of discrimination (which Wal-Mart challenges in Point of Error Five), the following additional principles apply to an evaluation of the evidence to support a malice finding. To support an award of exemplary damages, a Title VII plaintiff must show that the defendant engaged in a discriminatory practice or discriminatory practices with malice or reckless indifference to the federally protected rights of the plaintiff. 42 U.S.C. § 1981a(b)(1); *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 941 (5th Cir. 1996); *Jones v. Western Geophysical Co.*, 761 F.2d 1158, 1162 (5th Cir. 1985). Further, the Supreme Court has recognized that employers are not strictly liable for the acts of their employees and that agency principles apply under Title VII when attempting to hold an employer liable for those intentional wrongs of his employees that are committed in furtherance of the employment; the tortfeasing employee must think (however misguidedly) that he is doing the employer's business in committing the wrong. *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 392, 102 S. Ct. 3141,

3150-51, 73 L.Ed.2d 835 (1982); *Patterson*, 90 F.3d at 943. However, the imposition of exemplary damages require something more—malice or reckless indifference. *Patterson*, 90 F.3d at 944. Exemplary damages cannot survive when the record does not show that the corporate employer had knowledge of the employee's malicious or reckless conduct, or authorized, ratified, or approved the employee's actions. *Patterson*, 90 F.3d at 944 (citing *Fitzgerald v. Mountain States Tele. & Telegraph Co.*, 68 F.3d 1257, 1263 (10th Cir. 1995) (refusing to impose exemplary damages under § 1981 where employer took no part in the intentional discrimination)).

B. The EEOC failed to present sufficient evidence of malicious intent.

After Wal-Mart moved for directed verdict on the malice issue, the trial court agreed that there was no evidence of malice, and said so on the record.[6] The court was

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[6]

MS. GRAY: I would also like to, as mentioned in our motion, request that the Court -- it is our contention that there has been no showing of malice or reckless disregard.

THE COURT: I don't think so, either.

MS. GRAY: I don't think --

THE COURT: Quite frankly, quite frankly, when I came over to federal court, I came from state court, and I would not grant that, and then I found out

right. Nonetheless, he left the matter to the jury in spite of his better judgment. After the court submitted the malice question, the jury answered it affirmatively and awarded $100,000 in exemplary damages. (Doc. 33, p. 3).

1. *The jury did not receive adequate guidance*.

The jury was disadvantaged from the outset in its ability to accurately and fairly assess maliciousness because the trial court refused to define the term "malice" in the jury instructions. (Tr. at 445). Wal-Mart objected to the trial court's failure to include a definition of malice or reckless disregard. (Tr. at 445). Thus, error is preserved. FED. R. CIV. P. 51; *Delancey v. Motichek Towing Serv., Inc.*, 427 F.2d 897, 900-01

> that they give the -- I'll give it to you, but that's not to mean that if there's any -- are any punitive damages that I'm persuaded, but I'll give it. I'll give it to the jury. But I just simply carry along your motion.

(Tr. at 443). The court ultimately denied the motion. (Doc. 40).

(5th Cir. 1970) (objection to the court's failure to define "willful misconduct" sufficient to preserve error). *See also Solis v. Rio Grande City Mun. Dist.*, 734 F.2d 243, 248 n. 4 (5th Cir. 1994).

Although the district court has broad discretion with respect to jury instructions, *e.g.*, *Steine v. Marathon Oil Co.*, 976 F.2d 254, 259 (5th Cir. 1992), the failure of the jury instructions to contain a definition of malice, in light of the weak circumstantial evidence in this case, raises "substantial and ineradicable doubt as to whether the jury has been properly guided in its deliberation." *Palmer v. Lares*, 42 F.3d 975, 978 (5th Cir. 1995). A proper definition would have been one contained within the Fifth Circuit Pattern Jury Instructions which states: "one acts willfully or with reckless indifference to the rights of others when he acts in disregard of a high and excessive degree of danger about which he knows or which would be apparent to a reasonable person in his condition. If you determine that the defendant's conduct was so shocking and offensive as to justify an award of punitive damages, you may exercise your discretion to award those damages." FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS 15.13 (1995). As this Court has recently reiterated in *Patterson*, punitive damages are only intended to apply in Title VII cases to conduct amounting to more than intentional discrimination. *Patterson*, 90 F.3d at 943-44. Simply discriminating against someone is not enough to justify exemplary damages. "Malicious" conduct is conduct more reprehensible or abhorrent than just discrimination on the basis of race; it signifies an

evil motive concerning a federally protected right. Had the jury been advised of these guidelines, it is highly likely exemplary damages would not have been awarded. The jury was not sufficiently guided in its deliberations as to Question No. 6, therefore reversal is warranted on this issue alone.

2. *The EEOC did not present any evidence, or presented insufficient evidence, of evil intent or gross disregard for Brock's civil rights.*

a. The hiring process.

The hiring of hourly associates is generally left up to the store's personnel manager and the "hiring committee." (Tr. at 151). The hiring committee consisted of approximately three department managers. (Tr. at 194, 255).[7] The store manager, who is ultimately in charge of the operation of the store, is not part of the hiring committee. (Tr. at 151). The district manager over the district including the San Benito store, Glen Gibardi, testified that a store manager has the power to overrule committee decisions, but has never seen that done. (Tr. at 151).

Potential hirees fill out applications and leave them with the personnel manager at the store. (Tr. at 193-94). The San Benito store receives between fifteen (Tr. at 305) and thirty (Tr. at 428) applications per month; only about two or three applications are received from African-Americans each year. (Tr. at 305). Filed applications are organized by the month. (Tr. at 289). The applications do not indicate the race of the

[7] "Department managers" are paid by the hour. (Tr. at 255).

applicant. (Tr. at 308). When an opening arises, the first applications which are pulled and reviewed are those filed on the day the opening arises because the older the application is, the more likely it is the applicant has already found other employment. (Tr. at 241-42, 428). The personnel manager does not review the applications looking for people who worked at Wal-Mart before. (Tr. at 242). No preferences are given to those applicants who have prior Wal-Mart experience. (Tr. at 162, 222-23).

At the San Benito store, the personnel manager would tell the hiring committee about an opening and the committee reviewed the applications. (Tr. at 261). The hiring committee interviewed the applicants and made the final hiring decisions. (Tr. at 256, 258-59, 304). Adkins, the store manager, had no involvement in the hiring process. *Id*. Steve Estrada took over as manager of the San Benito store in September 1994. He testified that his hiring committee made recommendations to him regarding which applicants should be interviewed and he had the final say on which ones were called in for interviewing. (Tr. at 436). However, there is no evidence that Estrada actually made any hiring decisions.

Olivia Juarez was the personnel manager at the San Benito store from June, 1993, to April, 1994. (Tr. at 254). She testified that she was not aware of anyone on the hiring committee who referenced Brock as different or made adverse comments regarding her color. (Tr. at 269, 303). Additionally, she never heard any manager,

including Adkins, make any racial remark. (Tr. at 310, 311). Juarez treated Brock no differently than anyone else and was not aware of Brock's complaint. (Tr. at 269).

b. No evidence the hiring committee acted maliciously.

The record does not indicate which specific individual(s) were on the hiring committee and actually made the decision not to hire Brock from June, 1994, to December, 1994. The EEOC's evidence to support its malice theory was targeted at Adkins, not the hiring committee. There exists no evidence of any conduct by any hiring committee member to suggest the existence of any discriminatory motive, much less a malicious intent or reckless indifference toward Brock's rights. There is no evidence anyone on the hiring committee ever knew that Brock had filed an EEOC complaint, that her mother had delivered a letter to Adkins, or that her mother had mailed a letter to the president of Wal-Mart. The mere fact that Brock was not hired does not show malice.

This Court has rejected punitive damages in the face of much more egregious conduct than that involved in the instant case. *Patterson*, 90 F.3d at 944. In *Patterson*, two employees of P.H.P. Healthcare, Nicholas Brown (African-American) and Donna Patterson (Caucasian), sued P.H.P. Healthcare and a supervisor, Mark Kennedy, for discrimination and retaliation. Brown alleged that he was constructively discharged from his position because of his race and Patterson claimed that she was fired in retaliation for her opposition to Kennedy's discriminatory hiring practices and

discrimination against Brown. *Id*. at 930. The evidence showed that Kennedy threatened him with disciplinary action based on intentionally falsified memos and reports. Kennedy repeatedly used racial slurs in referring to Brown as well as other African-American employees. *Id*. at 932. When African-American employees were terminated or left the company's employ, Kennedy repeatedly filled their positions with Caucasian individuals. *Id*. Patterson had attempted to contact P.H.P. Healthcare's headquarters to complain about Kennedy's conduct. After her complaint, Kennedy informed Patterson that "not another nigger is to be hired." Subsequently, Patterson hired an African-American technician and was immediately terminated. After the termination, Kennedy prepared and back-dated a document purportedly outlining the reasons for Patterson's termination and further made misrepresentations to the Texas Employment Commission regarding his use of that document. The district court awarded $150,000 in punitive damages against P.H.P. Healthcare based on Patterson's Title VII and § 1981 claims. *Id*. at 933, 943.

Considering all of the evidence outlined above, this Court still considered Brown's claim as a "close case" and noted Kennedy's intentional falsification of documents "is the only finding made by the district court which meets the malicious or reckless indifference requirement for imposing punitive damages." *Id*. at 943. This Court held that the record supported a punitive damage award against Kennedy individually but reversed the punitive assessment against the corporate employer. *Id*.

In doing so, the court noted that employers are not strictly liable for the acts of their employees, but agency principles operate to attach liability for employees' intentional wrongs which are committed in furtherance of the employment and where the employee thinks that he is performing the employer's business in committing the wrong. *Id*. Moreover, evidence should exist to show that the employer knew of the malicious conduct or authorized or ratified the employee's discriminatory actions. *Id*. at 944.

Although Kennedy was a manager of P.H.P. Healthcare, the court concluded that all complained of discriminatory acts were solely his acts. P.H.P. Healthcare's handbook expressed the company's policy of non-discrimination and no evidence existed demonstrating that P.H.P. Healthcare participated in any discriminatory conduct, much less any malicious conduct. Further, the record did not show that P.H.P. Healthcare possessed any knowledge of Kennedy's malicious or reckless conduct, or authorized or ratified his actions. *Id*. at 944. Critically, the plaintiffs were aware of P.H.P.'s internal complaint procedures, but no evidence suggested that they followed those procedures in an attempt to notify the company of the complained of conduct. Without evidence showing that P.H.P. Healthcare knew or should have known of Kennedy's malicious or reckless conduct, no exemplary damages were recoverable. *Id*.

Patterson is controlling here. As in *Patterson*, Brock was well aware of Wal-Mart's very explicit procedure that when employees feel they are being discriminated

against by their immediate supervisor, they are to complain to the next level of management. (Tr. at 63, 359). Brock never did that. Neither did her mother. The next level of management was the district manager, Glen Gibardi. He never received a complaint from Brock and, had he received one, he would have investigated. (Tr. at 167). Gibardi had no knowledge regarding whether Adkins engaged in any discriminatory conduct (Tr. at 184) and he was aware of no complaints about Adkins from any associates. (Tr. at 188). Although Mrs. Brock mailed a letter to the president of Wal-Mart in April 1994, that letter mentioned only Brock's RIF discharge on April 20, 1994, *a matter not complained of in this lawsuit*. Moreover, Gibardi never received a copy of either the letter written to President Glass or the letter written to Adkins (Tr. at 167, 190, 206), and he would have expected Adkins to inform him of any potential claims against the store. (Tr. at 165). Gibardi added that he would not tolerate any retaliation against an employee who complained about discriminatory conduct. (Tr. at 189). Significantly, after Brock was RIFed the first time in February 1993, Mrs. Brock came to the store to talk with Adkins in June or July of 1993, complained about discrimination, *and Brock was hired two days later*. (Tr. at 338). Contrary to the EEOC's assertion in this lawsuit, the history of Brock's relationship with the San Benito store shows that the store did not retaliate against her when she complained of discrimination.

c. No evidence Steve Estrada acted maliciously.

There is no evidence in the record indicating that Estrada, when he became store manager, made the hiring decisions as to Brock, or any hiring decisions. His conduct cannot form the basis of punitive damages against Wal-Mart. Assuming Estrada made the decision not to hire Brock in late 1994, there is no evidence to indicate that he possessed an evil or malicious state of mind. He testified that if someone had made a complaint about discriminatory hiring practices, he would have made inquiries to the hiring committee. (Tr. at 436). Evidence as to Estrada's state of mind is completely lacking.

d. No evidence that Adkins acted maliciously.

The EEOC based its malice claim primarily, if not exclusively, on Adkins' conduct. However, the undisputed evidence shows that Adkins did not participate in the hiring process. (Tr. at 256, 259). It is also uncontroverted that at no time did Adkins make any racially derogatory remarks which would indicate overt racial bias. Instead, Brock's complaints were that, during her second period of employment, Adkins gave her the "cold shoulder," that Adkins made Brock clean gum off of the floor which she never saw any other cashiers doing, and that Brock was asked to work in the garden center while it was cold and rainy. (Tr. at 60-63). It is equally undisputed that Adkins was a first year store manager, encountered first year store manager problems, and needed improvement in the area of communication skills and rapport with associates. (Tr. at 148, 170-71). Also, at Wal-Mart all associates are expected to keep

the floors clean at all times and to adjust their duties as needed, especially part-time seasonal employees such as Brock. Indeed, Brock admitted that she was only asked to clean gum off the floor on one occasion. (Tr. at 133). Moreover, from July 1993 to April 1994, she only worked in the garden center two or three days, (Tr. at 134), and she was allowed to call her mother to bring her a coat. (Tr. at 135). Of course, the two or three days Brock worked in the garden center were not the only two or three days from July 1993 to April 1994 that it was cold or rainy—other employees worked in the garden center during inclement weather as well, more often than Brock. Brock's evidence against Adkins is insufficient to establish that Adkins was biased against African-Americans and by no stretch can support a finding that Adkins (who did not even participate in the hiring decisions between June and September 1994) maliciously or recklessly retaliated against Brock by failing to rehire her.

Further, the EEOC's weak circumstantial evidence cannot support a malice finding in light of the undisputed fact that Mrs. Brock had previously complained of discrimination to Adkins after Brock's first RIF layoff, which resulted in Brock's rehiring shortly thereafter.

e. The reasons for Adkins' separation are irrelevant and unfairly prejudicial.

By the time of trial, Adkins had not worked for Wal-Mart for two years and could not be located to testify. Thus, the jury was left with the above unrebutted

allegations about Adkins' conduct. Unrebutted as they are, they are insufficient to support a malice finding. In addition, the EEOC offered into evidence Adkins' exit interview which articulated the reasons for Adkins' separation from Wal-Mart. She voluntarily resigned because she was caught falsifying overtime data and misrepresenting sales receipts in an effort to manipulate her numbers to give the appearance that her store was improving under her new management. (Tr. at 199-200). Her separation from Wal-Mart had nothing to do with her relationships with her employees. (Tr. at 199). Wal-Mart objected to the admission of this evidence as irrelevant and unfairly prejudicial, and the court overruled the objection. (Tr. at 176). This was error because the reasons for Adkins' resignation bear no relation to Brock's claims of racial discrimination and retaliation. Moreover, the EEOC's live pleading complains only of the failure to rehire Brock, not of Adkin's conduct during Brock's second employment period, or of Brock's second RIF termination. Thus, the court abused its discretion in admitting the exit interview and allowing the jury to hear the reasons for Adkins' separation from Wal-Mart. Wal-Mart considered Adkins eligible for rehire and the fact that she voluntarily resigned for misrepresenting her financial data does not tend to support or refute a claim of race discrimination. Considering Adkins' absence from trial, Wal-Mart was unfairly prejudiced by the introduction of this testimony. Nonetheless, assuming it was properly admitted, Adkins' misrepresentations of internal financial data certainly cannot support a conclusion that she engaged in the

abhorrent and shocking type of racial discrimination sufficient to find exemplary damages.

If it is Adkins' conduct that forms the basis of the jury's malice finding, and it must be based on this record, and if Adkins had no participation in the decision to not rehire Brock, Wal-Mart is not liable. *Long v. Eastfield College*, 88 F.3d 300, 306-07 (5th Cir. 1996). *See Shager v. Upjohn Co.*, 913 F.2d 398, 404-06 (7th Cir. 1990).

For these reasons, there exists no evidence, or insufficient evidence, to support the jury's affirmative finding of malice or reckless disregard. Therefore, the exemplary damages award must be reversed.

3. *To the extent the non-hiring decisions were based on race, they violated express Wal-Mart corporate policy and were not made with the requisite corporate knowledge to impute malicious intent to the company*.

a. Wal-Mart policy expressly forbids discrimination.

As cited above in the statement of facts, Wal-Mart's corporate policy prohibits discrimination of any type. (Defendant's Ex. 6, p. 9). Wal-Mart also established a specific procedure for complaining about discriminatory conduct of an employee's immediate supervisor. As in *Patterson*, the existence of these policies of non-discrimination is "at least prima facie evidence of awareness on the part of [Wal-Mart] of the federally protected rights of [Brock]." *Patterson*, 90 F.3d at 944. Instead of complaining to the next level of management about what she perceived to be

discriminatory treatment by Adkins, her mother wrote a letter to Adkins herself. If it were true that Adkins harbored prejudicial feelings against Brock, and Adkins was the only person to know about the existence of the letter, Adkins might have been motivated to conceal the letter. In any event, the matters complained of in Mrs. Brock's letter to Adkins pre-date the events forming the basis of the jury's finding in the instant case and thus bear no relevance to this appeal. By the same token, Mrs. Brock's letter to David Glass, created nine days following her letter to Adkins, similarly complained of her April, 1994, discharge. Notably, Brock wrote another letter, this time to the new manager, Steve Estrada, on September 13, 1994, (subsequent to filing an original and amended EEOC complaint as well as reapplying twice at the San Benito store) *but made absolutely no mention that she believed she was not being rehired or was being retaliated against on the basis of her race or her prior complaints of discrimination*. What is not contained in the letter to Steve Estrada is telling.

After the EEOC complaints were filed, Wal-Mart corresponded with the EEOC and conducted its investigation from its home office in Bentonville, Arkansas.

b. Wal-Mart did not know of, authorize, or ratify any discriminatory conduct.

Also, to the extent the hiring committee members, although the record does not indicate who they were, based their decision to not rehire Brock on racial or retaliatory factors, the company, the district manager, even the store manager, would not have

known. Because the committee members made hiring decisions collectively, to discriminate, they would have to discriminate together. (Tr. at 436). There is no evidence that any upper level corporate employee knew of, authorized, or ratified any retaliatory conduct of the hiring committee.

Because there exists no evidence to support the malice finding, the $100,000 exemplary damage award should be reversed.

POINT OF ERROR TWO:

AS AN ALTERNATIVE TO REVERSAL OF THE EXEMPLARY DAMAGES IN THEIR ENTIRETY, THEY ARE CLEARLY EXCESSIVE AND THIS COURT SHOULD REMIT THEM OR REMAND FOR FURTHER CONSIDERATION CONSISTENT WITH *PATTERSON V. P.H.P. HEALTHCARE* AND *BMW*.

If this Court decides that the exemplary damage award should not be deleted in its entirety, then a substantial reduction is appropriate pursuant to *BMW of N. Am., Inc. v. Gore*, ___ U.S. ___, 116 S. Ct. 1589, 1598-99, 134 L.Ed.2d 809 (1996). In *Patterson*, this Court applied the standards pronounced in *BMW* in determining the reasonableness of the exemplary damage award in that case. *Patterson*, 90 F.3d at 943. In *BMW*, the Supreme Court held that three factors must be considered in determining whether an exemplary damage award is reasonable: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm suffered and the damage award; and (3) the difference between the damages awarded in this case and comparable cases. *BMW*, 116 S. Ct. at 1598-99; *Patterson*, 90 F.3d at 943. The punitive damage award in *Patterson* was $150,000 and this Court rejected that quantum on the grounds that it failed to meet any of the three *BMW* factors. *Patterson*, 90 F.3d at 943.

Patterson is again dispositive. First, *Patterson* noted that the plaintiff was not "personally subjected to verbal or physical abuse and no evidence suggests that

Kennedy's actions reflected a prevailing attitude of PHP Healthcare to warrant such a large punitive assessment." *Id*. at 943. The Court noted that Kennedy's intentional falsification and backdating of documents was the only evidence which met the stringent malicious requirement for imposing exemplary damages. *Id*. In the instant case, no direct evidence exists of intentional discriminatory conduct, unlike *Patterson*, and Brock was not subjected to verbal or physical abuse nor would Adkins' conduct toward Brock (if it were relevant) or any possible discriminatory conduct of the hiring committee be consistent in any way with Wal-Mart corporate policy.

Also, as in *Patterson*, the $100,000 exemplary damage award bears no reasonable relationship to the compensatory damage award in the instant case. Although Wal-Mart challenges the sufficiency of the evidence to support the compensatory damage award, basing an exemplary damage award on the underlying compensatory damages as given by the jury results in a ratio of punitive to compensatory damages of over five to one. A ratio of four to one is "close to the line" in terms of constitutional propriety. *BMW*, 116 S. Ct. at 1602.

Lastly, as of the *Patterson* decision, a $50,000 punitive damage award was the highest § 1981 award in the Fifth Circuit. *Patterson*, 90 F.3d at 943 (citing *Jett v. Dallas Indep. Sch. Dist.*, 798 F.2d 748, 762 (5th Cir. 1986), *aff'd in part and remanded in part*, 491 U.S. 701, 109 S. Ct. 2702, 105 L.Ed.2d 598 (1989)). Accordingly, as an alternative to Point of Error One, Wal-Mart requests this Court to

remit the exemplary damage award or remand to the district court for further consideration. *Id*. at 943.

POINT OF ERROR THREE:

ADDITIONALLY, THERE EXISTS INSUFFICIENT EVIDENCE THAT WAL-MART RETALIATED AGAINST BROCK BY NOT REHIRING HER AFTER SHE AND HER MOTHER COMPLAINED ABOUT DISCRIMINATION BECAUSE THERE IS NO CAUSAL LINK BETWEEN THEIR COMPLAINT AND WAL-MART'S DECISION.

To establish retaliation under Title VII, a plaintiff must establish a prima facie case consisting of three elements: (1) she participated in a statutorily protected activity; (2) she received an adverse employment action; and (3) a causal connection exists between the protected activity and the adverse action. *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1092 (5th Cir. 1995); *Armstrong v. City of Dallas*, 997 F.2d 62, 65 n. 3 (5th Cir. 1993). Because Brock filed an EEOC complaint and subsequently reapplied for employment but was not hired, the first two elements are not at issue in this case. However, the EEOC has not established substantial evidence of a causal connection between Brock's filing of a complaint and her subsequent non-rehiring. Demonstrating the requisite causal connection required the EEOC to show that "but for" Brock's protected activity, she would have been rehired in late 1994. *See Mayberry*, 55 F.3d at 1092; *Jack v. Texaco Research Ctr.*, 743 F.2d 1129, 1131 (5th Cir. 1984).

Brock filed her original EEOC complaint on June 3, 1994, (Plaintiff's Ex. 14) and an amended complaint on August 24, 1994. (Plaintiff's Ex. 15). Brock filed applications with the San Benito store on June 10, 1994, August 17, 1994, September

13, 1994, October 12, 1994, and November 1, 1994. (Plaintiff's Ex. 10). Additionally, Brock filed one application at the Wal-Mart Supercenter in Harlingen, Texas, on October 20, 1994, was interviewed and did not receive that job. (Tr. at 93).

An employer cannot be guilty of retaliation for an employee's opposition to discrimination unless the employer is aware of that opposition. *Corley v. Jackson Police Dep't*, 639 F.2d 1296, 1300 (5th Cir. [Unit A] 1981); *EEOC v. MCI Telecomm. Corp.*, 820 F. Supp. 300, 308 (S.D. Tex. 1993) (retaliation not possible if the decision-maker is unaware of any opposition). It was the EEOC's burden to show that Brock's complaints of discrimination were the motivating and determinative factors in the store's decision to not rehire her. *See Jack*, 743 F.2d at 1131. However, the EEOC has failed to show that any of the persons who were involved in the decision not to rehire Brock had any idea that Brock had previously filed an EEOC complaint or complained about discrimination to Adkins. In fact, the overwhelming evidence is to the contrary.

The relevant time period for purposes of the EEOC's retaliation claim is from June 20, 1994, through December 31, 1994, the period of time in which Brock filed five applications for employment at the San Benito store. Adkins' last day worked was August 15, 1994, and thus had left before Brock filed her second application. Additionally, Adkins took no part in the hiring process (Tr. at 256), notwithstanding the fact that she was store manager, as the hiring committee made final hiring decisions. Thus, assuming Adkins did possess a discriminatory attitude against Brock because

Brock had written a letter complaining of discrimination, Adkins' feelings were not injected into the hiring process. Moreover, there is no evidence that Adkins had any knowledge that Brock had filed an EEOC complaint.

There is no evidence that Estrada possessed any knowledge that Brock had filed an EEOC complaint or that Brock had written a letter complaining of discrimination to Adkins, or to President Glass. Further, the letter Mrs. Brock wrote to Estrada on September 13, 1994, (Plaintiff's Ex. 13), serves him with no notice that Brock was claiming her applications were being overlooked because of her race or because she had filed a discrimination complaint. Plus, Estrada did not make final hiring decisions either. Although he testified he liked to have input in the hiring process, he only made decisions as to which applicants would be interviewed by the hiring committee after the committee presented him with recommendations. (Tr. at 436). Moreover, there is no evidence that Estrada was ever presented with the opportunity to approve or reject any of Brock's applications filed in late 1994. This evidence cannot support a retaliation finding because it does not establish causation.

Although the hiring committee actually made the hiring decisions, there is no evidence as to who actually sat on the hiring committee nor did the EEOC present any evidence that any member of the hiring committee possessed knowledge that Brock had filed an EEOC complaint or complained of discrimination to Adkins in April, 1994. The EEOC's evidence consisted of the fact that Exhibit 8, Brock's April 21, 1994,

letter to Adkins, was present in Brock's personnel file, which indicated that Adkins probably received it. (Tr. at 295, 389). The former personnel manager at the San Benito store, Olivia Juarez, agreed that somebody looking in Brock's file would have access to that letter. (Tr. at 295). However, Juarez also stated that a previous employee's old file is not reviewed when considering them for rehiring. (Tr. at 295). Also, she was unaware whether the hiring committee actually checked old files. (Tr. at 297). Further, while Estrada stated that he liked to check past performance of former employees when considering rehiring people who were RIFed, (Tr. at 369), there is no evidence he did that to any of Brock's applications or that he knew she was reapplying for a position. (Tr. at 370-71). Initially, only the store manager, assistant managers, support team, and the personnel manager have access to personnel files at the San Benito store; no department managers had access to those files. (Tr. at 416). Further, the files of former employees were maintained separately from the files of current employees. (Tr. at 416).

The above evidence is insufficient to create a reasonable inference that Brock would have been rehired in late 1994 "but for" the fact that she had filed an EEOC complaint or written a letter to Adkins or written a letter to President Glass. There is no evidence that anybody on the hiring committee had access to Brock's old personnel file during late 1994 or, if they did have access, that someone on the hiring committee actually learned of Brock's prior complaint, advised the entire committee, and they

decided together to not hire her for that reason. Indeed, the committee system is structured to make it more objective and more difficult for people with hiring authority to violate Wal-Mart's corporate policy. The committee makes the decision collectively, making it less likely that a person with discriminatory views could inject those views into the hiring process. Additionally, the store selected persons who followed Wal-Mart's anti-discrimination policy to participate on the hiring committee. (Tr. at 386).

Finally, the evidence also indicated that Brock applied for a position at the Harlingen Wal-Mart store on October 20, 1994. Although she was interviewed, she was not hired. Her failure to be hired at the Harlingen store also cannot support a retaliation finding for at least two reasons. First, her live complaint was restricted to the hiring decisions occurring at the San Benito store and did not allege that she was retaliated or discriminated against at the Harlingen store. (Doc. 2). Second, the record is devoid of any evidence that the hiring committee at the Harlingen store had any knowledge that Brock had filed an EEOC complaint or that she had complained about the store manager at the San Benito store. The only employee from the Harlingen store to testify was the personnel manager, Janie Lopez. Part of the personnel manager's and store manager's duties at the Harlingen store was to oversee the hiring committee to make sure they remained objective. (Tr. at 225). Lopez never encountered a problem with the committee showing prejudices. (Tr. at 225). At no time, did Brock complain to the Harlingen store about her failure to be hired there. Nor did Brock complain to

the district manager about her failure to be hired at the Harlingen store. There is simply no evidence to support a causal link between Brock's complaints and her failure to be hired at the Harlingen store.

The EEOC's case is based primarily, and almost exclusively, on Brock's subjective belief, and the belief of her mother, that she was retaliated or discriminated against because of her race. However genuine their beliefs may be, they cannot serve as the basis for judicial relief. *Little v. Republic Ref. Co.*, 924 F.2d 93, 96 (5th Cir. 1991); *Sherrod v. Sears, Roebuck & Co.*, 785 F.2d 1312, 1316 (5th Cir. 1986). Title VII is designed to protect employees from racial discrimination; it does not require employers to afford minorities a special preference, or place upon employers an affirmative duty to accord minorities special treatment. *See Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943, 102 S. Ct. 1439, 71 L.Ed.2d 655 (1982). For all the above reasons, the retaliation finding should be reversed.

POINT OF ERROR FOUR:

THE JURY'S AWARD OF COMPENSATORY DAMAGES IS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

In response to Question No. 5, the jury awarded $5,000 for "pain and suffering and mental anguish that Charlene Brock suffered in the past and will suffer in all reasonable probability in the future." (Doc. 33, p. 2). This amount is not supported by sufficient evidence.

This Court has "set the bar high" with respect to the specificity of proof required to support an award of mental anguish damages in the context of Title VII. *Farpella-Crosby v. Horizon Healthcare*, 97 F.3d 803, 808 (5th Cir. 1996); *Patterson*, 90 F.3d at 937-41. To recover mental anguish damages, the claimant must satisfy the specificity requirements set out in *Carey v. Piphus*, 435 U.S. 247, 255-56, 98 S. Ct. 1042, 1048, 55 L.Ed.2d 252 (1978); *Farpella-Crosby*, 97 F.3d at 808. To meet this requirement, the plaintiff must show that the discriminatory treatment manifested some "specific discernible injury to the claimant's emotional state." *Farpella-Crosby*, 97 F.3d at 808. Notably, in *Patterson*, this Court vacated the mental anguish award citing certain defects in Patterson's proof, including the absence of expert medical or psychological evidence supporting the claim of emotional harm.

Brock's testimony does not rise to a compensable level according to the standards set by this Circuit. There is absolutely no evidence that she was actually

subjected to any type of hostile or discriminatory environment because of her race. Brock is merely guessing that is the case. She presented no expert or medical evidence to support her claim for emotional harm. Brock's testimony was that she suffered pain looking for a job. (Tr. at 104). However, it is difficult to understand why Brock should be entitled to compensation simply by looking for a job when she has an affirmative duty to do so. *Patterson,* 90 F.3d at 935-37 (Title VII plaintiff has the duty to mitigate damages). Additionally, Brock testified that she cried at night (Tr. at 104), that she gained more weight (Tr. at 105), and that her grades were affected. (Tr. at 105). Her mother testified similarly. (Tr. at 331).

The above evidence is simply insufficient to support any award of compensatory damages. *Patterson*, 90 F.3d at 937-41.

POINT OF ERROR FIVE:

THE TRIAL COURT ERRONEOUSLY DENIED WAL-MART'S MOTION FOR JUDGMENT AS A MATTER OF LAW BECAUSE THERE EXISTS NO EVIDENCE THAT CHARLENE BROCK'S RACE WAS A MOTIVATING FACTOR IN WAL-MART'S DECISION TO NOT REHIRE HER. ALTERNATIVELY, THE JURY'S FINDING IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

The jury answered Question Nos. 1 and 3 as follows:

QUESTION NO. 1:

Do you find that Charlene Brock's race, Black, was a motivating factor in Defendant's decision not to hire/rehire Charlene Brock?

Answer "Yes" or "No."

ANSWER: YES

QUESTION NO. 3:

Do you find from a preponderance of the evidence that Defendant would have made the same decision to not hire/rehire Charlene Brock regardless of Charlene Brock's race and/or Defendant's retaliation?

Answer "Yes" or "No."

ANSWER: No

(Doc. 33, pp. 1-2).

Wal-Mart incorporates the applicable principles and standards of review as discussed in Point of Error One and refers the Court to that case authority without restating them here. There exists two reasons that the jury's findings to Question Nos. 1 and 3 are not supported by sufficient evidence: (1) Brock's non-rehiring was not "because" of her race; and (2) there is insufficient evidence of pretext.

A. The EEOC offered insufficient evidence that Brock's non-rehiring was "because" of her race.

To reach the jury, the EEOC had to present sufficient evidence to both (1) create a fact question as to whether each of the employers stated reasons were what actually motivated the employer, and (2) create a reasonable inference that national origin was the real reason for the decision. *Ontiveros*, 83 F.3d at 733; *Rhodes*, 75 F.3d at 994.

Wal-Mart's hiring process was not based on race and the statistics introduced into evidence do not support an inference that the San Benito store, or Wal-Mart generally, discriminated against minorities. The evidence regarding Wal-Mart's hiring process at the San Benito store was uncontroverted. There is nothing discriminatory about the hiring process utilized, and in fact, as mentioned earlier, the use of a hiring committee tends to decrease the likelihood that any particular individual's biases would enter into the hiring process. The application itself does not inquire as to the applicant's

national origin, which is consistent with Wal-Mart's corporate policy prohibiting discrimination.

Moreover, the employment history of African-Americans at the San Benito store, including Brock, does not support an inference that Wal-Mart discriminated against blacks. Indeed, Brock herself was hired twice, the second time after her mother had complained to Adkins about discrimination. At the time of Brock's second RIF release, she was the only black employee in the store and was laid off along with approximately thirty other employees. The San Benito store is located in Cameron County whose ethnic population consists of .3% blacks. TEXAS ALMANAC 150 (Mary G. Ramos & Robert Plocheck eds., 1996). The San Benito store receives extremely few employment applications from African-Americans in a year's time. After April, 1994, and as of the time of trial, the San Benito store had hired two black associates, and one was a rehire. (Tr. at 425). Estrada testified that of the approximately thirty employees laid off in April, 1994, some had been rehired but he was not aware of how many. (Tr. at 430).

B. The EEOC offered insufficient evidence of pretext.

1. *Wal-Mart has discretion to choose among equally qualified applicants, and Brock was not "clearly better qualified" than the others hired in late 1994.*

Again, Wal-Mart was not required by Title VII to give Brock special treatment. *See Williams v. Hevi-Duty Elec. Co.*, 819 F.2d 620, 626 (6th Cir. 1987). Further,

Wal-Mart was not obligated to make special efforts to notify Brock, a repetitive applicant, that certain positions had become open. *Id.*

It is not this Court's station to sit as a "super personnel department" or second guess whether Wal-Mart exercised prudent business judgment. *Heerdink v. Amoco Oil Co.*, 919 F.2d 1256, 1260 (7th Cir. 1990), *cert. denied*, 501 U.S. 1217, 111 S. Ct. 2826, 115 L.Ed.2d 996 (1991); *Dudley v. Wal-Mart Stores, Inc.*, 931 F. Supp. 773, 801 (M.D. Ala. 1996). Discrimination laws are not intended to transform the courts into personnel managers. *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1507-08 (5th Cir. 1988). *See also Waggoner v. City of Garland*, 987 F.2d 1160, 1165 (5th Cir. 1993). "Thus the court should not, and will not, require Wal-Mart to adopt what it perceives to be the best promotion procedures. Wal-Mart can base its employment decisions on any considerations as long as they are not discriminatory. In other words, an employer may [choose not to hire] an employee for good reason, bad reason, reason based on erroneous facts, or for no reason at all, as long as its actions are not based on discriminatory purposes." *Dudley*, 931 F. Supp. at 801-02. The issue is not whether Wal-Mart made the best, or even a sound, business decision. *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 159 (7th Cir. 1996).

An employer has discretion to choose among equally qualified candidates. *Wright v. Western Elec. Co.*, 664 F.2d 959, 964 (5th Cir. 1981). For these reasons, it

follows that the EEOC should not be able to create a fact question absent evidence that Brock was *clearly better qualified* than the persons who were actually hired. *See Odom v. Frank*, 3 F.3d 839, 845-46 (5th Cir. 1993); *Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 814 (5th Cir. 1991); *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 42 (5th Cir. 1996). The evidence in the instant case does not indicate that Brock was "clearly better qualified" than the individuals hired in late 1994. Brock filed applications with the San Benito store on June 10, 1994, August 17, 1994, September 13, 1994, October 12, 1994, and November 1, 1994. From June to December, 1994, the store hired nine people. (Tr. at 428-30). Of those nine, Brock was qualified for four positions, and could have occupied a fifth with additional training. (Tr. at 428-30). Two individuals, Pete Cantu (shoe department) and Susan Tamez (cashier) were hired on August 8, 1994. (Defendant's Ex. 7). This was almost two months after Brock's most recent application and before she applied on August 17, 1994. The store also hired a jewelry department associate, Edith Medina, on November 17, 1994. (Tr. at 429; Defendant's Ex. 7). Two others, Alberto Martinez and Juan Hernandez, were hired for the shoe department on November 22, 1994, and December 8, 1994, respectively. (Defendant's Ex. 7). All of these jobs are low level positions that paid minimum wage. Like Brock, most of the people hired had some work experience, but Brock was not a "clearly better qualified" applicant than the individuals who were hired. Further, the fact that Brock encountered such difficulty in obtaining subsequent

employment indicates that she may not have been the best interviewer. Therefore, the EEOC's evidence is insufficient to establish pretext. Alternatively, assuming the evidence is sufficient to establish pretext, it is so weak that, by itself, it cannot support a further inference that Brock's race was the real reason she was not rehired. *Ontiveros*, 83 F.3d at 733-34.

Also, had the store disregarded its hiring system, that fact alone does not establish pretext. *EEOC v. Texas Instruments, Inc.* , 100 F.3d 1173, 1182 (5th Cir. 1996). Neither does Brock's satisfactory work record show, by itself, that Wal-Mart's actions are not worthy of credence. *See id.* at 1183.

2. *Adkin's conduct cannot support a reasonable inference of discrimination.*

To the extent Adkins' conduct can even be considered in support of the jury's discrimination findings (because she played no part in the decision not to hire Brock), Adkins' behavior toward Brock, which Mrs. Brock found to be "rude" but not discriminatory (Tr. at 342-43), supports nothing more than an inference that Adkins may have disliked Brock. However, evidence of mere dislike is not enough to prove pretext under Title VII. *Grimes*, 102 F.3d at 143.

PRAYER.

For all the above reasons, Appellant, Wal-Mart Stores, Inc., respectfully requests this Court to reverse the judgment of the trial court and render that the EEOC take nothing. Alternatively, Wal-Mart requests that the punitive award be deleted in its entirety, or remitted, or that the matter be remanded for further consideration as to the *BMW* factors. As a further alternative, Wal-Mart requests a new trial.

Respectfully submitted,

MAGENHEIM, BATEMAN, ROBINSON,
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF OF APPELLANT has been filed in the office of the Clerk for the United States Court of Appeals for the Fifth Circuit, and a true and correct copy of the same has been provided to counsel listed below in the manner indicated on this _____ day of November, 1997.

_____

J. Preston Wrotenbery

Via Certified Mail - R.R.R.
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