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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PAULA LANE, et al.,

Plaintiffs,

v.

JOHN KITZHABER, in his official capacity as the Governor of Oregon, et al.,

Defendants.

Case No. 3:12-cv-00138-ST

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I. INTRODUCTION

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517[1] in support of Plaintiffs' Motion for Class Certification (ECF Nos. 11-12). The United States' position is that the Supreme Court's decision in Wal-Mart v. Dukes, __ U.S. __, 131 S. Ct. 2541 (2011), does not preclude class certification in cases, including the instant case, in which a class of plaintiffs with disabilities is challenging State policies and practices that deny them community services on a system-wide basis, in violation of the integration mandate of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132.

This lawsuit alleges that the Defendants administer vocational and employment services for persons with intellectual and developmental disabilities in a manner that causes their unnecessary segregation in sheltered workshops, in violation of Title II of the ADA and

[1] Under 28 U.S.C. § 517, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

Olmstead v. L.C., 527 U.S. 581, 587 (1999). (See Am. Compl. ¶¶ 1-2, 8, ECF No. 43).[2] Specifically, Plaintiffs allege that Defendants have over-relied on sheltered workshops (id. ¶ 2) and have failed to provide, fund or make available integrated supported employment services to all persons who want and can benefit from such services. Id. at ¶¶ 6, 103. The complaint further alleges that since the mid-1990s, Oregon has "increase[ed] its reliance on segregated workshops while simultaneously decreasing its development and use of supported employment services." Id. at ¶ 97. Plaintiffs do not allege that they have been denied supported employment services based on individual determinations by case managers or personal agents; in fact, they allege that Defendants have failed to provide or make available supported employment services despite individual determinations that they can handle and benefit from such services. See id. at ¶¶ 1, 2, 109, 110. Plaintiffs have requested declaratory and injunctive relief requiring, inter alia, Defendants to "administer, fund, and operate its employment services system in a manner which does not relegate persons with intellectual and developmental disabilities to segregated workshops and which includes supported employment services that allow persons with disabilities the opportunity to work in integrated settings." See Am. Compl. § VII, ¶ 3a.

On March 6, 2012, Plaintiffs moved for class certification on behalf of themselves and all individuals with intellectual or developmental disabilities in Oregon who are in, or who have been referred to, sheltered workshops. (Mot. for Class Cert. ¶ 3, ECF No 11). Defendants deny that class certification is appropriate, arguing that under Wal-Mart, the individualized nature of the supported employment services each class member would need precludes a finding of "commonality" as required by Fed. R. Civ. P. 23(a)(2) and does not comply with Rule 23(b)(2). (See Defs.' Resp. to Mot. for Class Cert. ("Defs.' Resp.") at 8-16, 19-20, ECF No. 45).

[2] Plaintiffs have also raised parallel claims under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794a. (Am. Compl. ¶¶ 189-196)

The United States has important enforcement responsibilities under Title II of the ADA. See 42 U.S.C. § 12133 (incorporating remedies set forth under 42 U.S.C. § 2000d-1). Pursuant to this authority, the United States has filed numerous cases to enforce Title II's integration mandate on behalf of persons with disabilities who have been unnecessarily segregated in state programs and activities.[3] Private enforcement, including by a class of plaintiffs for injunctive and declaratory relief, is an important supplement to the United States' enforcement of Title II. Accordingly, the United States has an interest in ensuring the continued ability of persons with disabilities to enforce their right to be free from unnecessary segregation via a Rule 23 class action. As argued below, the proposed class meets the legal standard for class certification under Rule 23 as interpreted by the Supreme Court in Wal-Mart.

II. ARGUMENT

A. Wal-Mart v. Dukes Does Not Preclude a Finding of Commonality Because Plaintiffs Have Alleged a System-Wide Policy And Practice of Denying Integrated Supported Employment Services to Class Members

1. Courts Have Repeatedly Certified Classes under Rule 23 in Cases Challenging Systemic Denials of Community Services

It has long been understood and established that "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of appropriate class actions under Rule 23. Wal-Mart, 131 S. Ct. at 2557 (quoting Amchem Prods. v. Windsor, 521 U.S. 591, 614 (1997)). Numerous courts have therefore recognized that a Rule 23 class action for declaratory and injunctive relief is an appropriate vehicle for challenging, under Olmstead, systemic denials of community services to persons with disabilities. See, e.g., Townsend v. Quasim, 328 F.3d 511, 515 (9th Cir. 2003) ("Mr. Townsend filed suit on behalf of himself and a class of similarly situated Medicaid recipients certified by the district court, seeking to enjoin the

[3] See www.ada.gov.

requirement that he move to a nursing home as a condition of receiving needed, available Medicaid services."); Frederick L. v. Dep't of Publ. Welf., 364 F.3d 487, 498 (3d Cir. 2004) ("Appellants represent a class of mental health patients institutionalized … [and] who are qualified for and wish to be placed in a community-care setting."); Messier v. Southbury Training Sch., 562 F. Supp. 2d 294, 298 (D. Conn. 2008) (noting previous certification of "the plaintiff class to include all current STS residents, persons who might be placed at STS in the future, and persons who were transferred from STS but remain under the control of the STS Director."); Long v. Benson, No. 4:08cv26-RH/WCS, 2008 U.S. Dist. LEXIS 109917, *7 (N.D. Fla. Oct. 14, 2008) (certifying class of nursing home residents who "could and would reside in the community with appropriate community-based services."); Pitts v. Greenstein, No. 10-635-JJB-SR, 2011 U.S. Dist. LEXIS 60138, *8 (M.D. La. June 6, 2011) (certifying class of persons with disabilities challenging reductions to community services).

This has been the case even though services ultimately provided to class members as part of the relief in Olmstead cases varies from person to person in some respect. This fact has not defeated commonality under Rule 23(a), because the challenged common injury or contention – a system-wide denial of integrated community services – results not from an individualized determination that the class member is ineligible for services, but rather from the State's policies of failing to provide or fund such services as part of its administration of its disability services system. Indeed, courts in such cases have repeatedly recognized that they do not have to perform or review individual eligibility determinations to establish liability or grant relief to the class; instead, courts have enjoined States to conduct such determinations under their existing procedures and provide services consistent with the results of these determinations. See Ligas v. Maram, No. 05-C-4331, 2006 U.S. Dist. LEXIS 10856, *17 (N.D. Ill. Mar. 7, 2006) ("Because

the defendants would be evaluating based on their own criteria whether a potential class member would meet the state's requirements and thus the class definition, [the] court could order the defendants to engage in individual determinations should any relief be granted and not do so itself."); State Office of Prot. & Advocacy v. Connecticut, 706 F. Supp. 2d 266, 286 (D. Conn. 2010) (same); Colbert v. Blagojevich, No. 07-C-4737, 2008 U.S. Dist. LEXIS 75102, *10 (N.D. Ill. Sept. 29, 2008) ("Should plaintiffs ultimately succeed, defendants – not the court – will need to determine, based on reasonable assessments by their own state treatment professionals, what type of community-based long-term services it would be administratively feasible for the state to supply each class member.") (emphasis in original); Risinger v. Concannon, 201 F.R.D. 16, 18 (D. Me. 2001) ("[T]his lawsuit will not require the Court to make individualized determinations of eligibility or to evaluate the clinical appropriateness of individual class members' treatment plans.").[4]

Rule 23 class actions for declaratory and injunctive relief are a particularly appropriate tool for remedying systemic denials of community services. In the absence of a certified class, courts typically cannot order relief to all who have been injured or impacted by the State's discrimination. The Ninth Circuit confronted this very problem last year in M.R. v. Dreyfus, 663 F.3d 1100 (9th Cir. 2011), when it preliminarily enjoined a State from implementing a regulation that would have curtailed in-home services on grounds that it placed recipients of those services

[4] Likewise, in Fields v. Maram, No. 04-C-174, 2004 U.S. Dist. LEXIS 16291 (N.D. Ill. Aug. 16, 2004), which challenged, under Medicaid, the State's denial of medically-necessary motorized wheelchairs to nursing home residents, the State argued that class certification was inappropriate because the court would have to determine for each class member whether a motorized wheelchair was "medically necessary" as well the type of wheelchair each class member would need. The court squarely rejected this argument: "[G]iven that the Plaintiffs are not challenging how Defendant makes medical necessity determinations but are only seeking to ensure that such determinations are made for nursing home residents, the Court will not need to make plaintiff-by-plaintiff medical necessity inquiries and decisions in this case." Id. at *23 n. 8.

at risk of unnecessary institutionalization. Although the Ninth Circuit found that the challenged regulation would "obviously" justify system-wide injunctive relief, it nevertheless limited the scope of its injunction to the handful of plaintiffs who brought the lawsuit. This was because the district court had not yet certified a class[5] and "[w]ithout a properly certified class, a court cannot grant relief on a class-wide basis." Id. at 1120-21 (quoting Zepeda v. Immigration and Naturalization Serv., 753 F.2d 719, 728 n. 1 (9th Cir. 1984)). Thus, without a certified class, States may avoid providing community services to all who qualify for them, and each individual with a disability injured by the State's discriminatory practices would be required to bring his or her own lawsuit, often to challenge the legality of the exact same policy or practice. This is exactly the type of situation that Rule 23 was meant to address. See Fed. R. Civ. P. 23(b)(2) advisory committee's note ("Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.").

2. Wal-Mart's Analysis Does Not Apply Where the Challenged Discrimination Results from an Identified Systemic Policy or Practice And Not a Series of Discretionary Decisions

Wal-Mart v. Dukes did not alter the analysis that claims under Olmstead are capable of class-wide resolution. Wal-Mart, an employment discrimination case brought under Title VII of the 1964 Civil Rights Act, involved a unique and distinguishable set of facts involving "one of the most expansive class actions ever." 131 S. Ct. at 2547. Wal-Mart sought to certify a nationwide class of millions of female Wal-Mart employees who, plaintiffs contended, received unequal pay and promotions based on sex. However, it was undisputed that these challenged compensation and promotion decisions were "committed to local managers' broad discretion,

[5] The district court had stayed its ruling on class certification pending the Ninth Circuit's ruling. M.R., 663 F.3d at 1121.

which is exercised in a largely subjective manner." Id. (internal quotations omitted). Plaintiffs were unable to identify any specific policy or practice at the corporate level that was alleged to have caused these discriminatory decisions and could point only to an alleged "corporate culture" that, they claimed, authorized or condoned discrimination at the manager or store level. The only evidence of this "culture," however, was "statistical evidence of pay and promotion disparities between men and women at the company," anecdotal reports of discrimination from a small sample of employees, and the testimony of an outside expert, which the Court rejected as unreliable. See id. at 2549, 2553-54.

Given the lack of an identified corporate-wide discriminatory policy or practice alleged to have caused the discrepancy in pay and promotions, the Court found that the plaintiffs' proffered evidence could not establish commonality, nor overcome the fact that the pay and promotion decisions being challenged as discriminatory were made by store managers on an individual basis. See id. at 2552 ("Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question why was I disfavored.") (emphasis in original). To establish commonality, the Court held, the plaintiffs' claims must:

> depend on a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Id. at 2551. One example the Court cited as a "common contention" in a compensation discrimination case was if a company used "a biased testing procedure" to determine pay and promotions. Id. at 2553 (quoting Gen. Tel. Co. v. Falcon, 457 U.S. 147, 159 n. 15 (1982)). However, when the allegation is that the numerous subjective decisions of individual managers,

when viewed collectively, constitutes class-wide discrimination, establishing commonality requires "[s]ignificant proof that an employer operated under a general policy of discrimination …" Id. (quoting Falcon, 457 U.S.at 159 n. 15).

This case, as well as most other cases brought to enforce the ADA and Olmstead, presents an entirely different and distinguishable set of facts. Unlike in Wal-Mart, plaintiffs here are not challenging individual determinations on whether a person is eligible or the exact type of services a person would need to work in the community. Rather, plaintiffs challenge Defendants' denial or refusal to provide integrated supported employment services even when class members have been determined eligible for such services – a policy or practice that is wholly unrelated to the specific needs or abilities of each class member.[6] Defendants do not appear to dispute that they "administer, fund, manage, license and oversee the employment service system for individuals with intellectual and developmental disabilities in Oregon." (Am. Compl. ¶ 80; see also Decl. of Mary Lee Fay ¶¶ 5-10, ECF No. 47). Accordingly, the "common contention" required for commonality, see Wal-Mart, 131 S. Ct. at 2551, is as follows: Defendants' administrative and funding decisions concerning employment services, and specifically their decision to provide or fund segregated sheltered workshops instead of integrated supported employment, dictate whether individuals eligible for supported employment services will, in fact, receive such services. See Dreyfus, 663 F.3d at 1109-16 (challenging, under Olmstead, state cutbacks to community services for persons determined eligible for such services). This contention, in turn, is dispositive of whether Defendants are providing

[6] In this regard, the class claims exactly mirror the claims of the two individual plaintiffs in Olmstead, who were similarly not challenging the State of Georgia's determination of their capability to live in the community. Indeed, Georgia was denying the Olmstead plaintiffs community services even though it conceded the women could live in the community. 527 U.S. at 602-03.

employment and vocational services in "the most integrated setting appropriate to" class members' needs, as required by the ADA, see 28 C.F.R. § 35.130(d), and is therefore "central to the validity" of each class member's ADA claim. See Wal-Mart, 131 S. Ct. at 2551. Furthermore, unlike in Wal-Mart, because plaintiffs' alleged discrimination indisputably stems from an identified systemic discriminatory policy and practice, and not a series of individualized decisions, there is no need for a merits-based inquiry to determine whether this constitutes a "common contention" applicable to all class members' claims.[7]

Additionally, in delineating the State's affirmative defenses in an ADA integration case, the Olmstead Court eschewed the very individualized decision-making process that was central to the Wal-Mart Court's rejection of commonality in that case. The Olmstead Court held that "the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." 527 U.S. at 604. Were the State to meet this burden, it could then "demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its

[7] Although Wal-Mart held that class certification "will entail some overlap with the merits of the plaintiff's underlying claim," 131 S. Ct. at 2551, courts have not read this as authorizing an open-ended inquiry into the merits at the class certification stage. Wal-Mart stands for the proposition that courts "need not address at the class certification stage any merits inquiry that is unnecessary to the Rule 23 determination and … any findings made for class certification purposes do not bind the fact-finder on the merits." Glazer v. Whirlpool Corp., No. 10-4188, 2012 U.S. App. LEXIS 9002, *16 (6th Cir. May 3, 2012). See also Messner v. Northshore Univ. Health Sys., 669 F.3d 802, 811 (7th Cir. 2012) ("[T]he court should not turn the class certification proceedings into a dress rehearsal for the trial on the merits."); Behrend v. Comcast Corp., 655 F.3d 182, 190 (3d Cir. 2011) ("[A]t the class certification stage, we are precluded from addressing any merits inquiry unnecessary to making a Rule 23 determination").

institutions fully populated …" Id. at 605-06. Accordingly, were the State to raise this affirmative defense, the Court could not view relief for any individual class member or group of class members in isolation, but would have to consider the State's entire vocational and employment services system and the needs of all persons in this system. Whether the State can meet the burden of this defense is also a "common contention" that would "produce a common answer" as to whether Defendants have met their legal obligations to the class under the ADA. See Wal-Mart, 131 S. Ct at 2551, 2552.

3. Post-Wal-Mart, Courts Have Certified Classes in Civil Rights Cases Notwithstanding Differences in the Ultimate Relief to Each Class Member

Following Wal-Mart, numerous courts have certified or upheld classes in civil-rights cases challenging systemic discriminatory policies and practices against persons with disabilities or other similar classes, including cases where "each class members' [sic] skills, abilities, or interests is an individualized determination that will differ among class members." (Defs.' Resp. at 15) For example, in Connor B. v. Patrick, 278 F.R.D. 30 (D. Mass. 2011), State defendants sought to decertify, per Wal-Mart, a class of foster children who were challenging deficiencies in the State foster-care system. As in this case, the defendants argued that "the dissimilarities among the 8,500 class members in the case – including differences in social worker assignments, goals, physical and mental health needs, and length of stay in DCF custody – make class certification improper, because there is no common question that could generate a common answer to resolve a question central to the litigation." Id. at 33. The court rejected this claim and held that "Wal-Mart has no effect on" the court's earlier class certification decision:

> Unlike the plaintiffs in Wal-Mart, who did not allege any specific, overarching policy of discrimination, Plaintiffs have alleged specific and overarching systemic deficiencies within DCF that place children at risk of harm. These deficiencies, rather than the discretion exercised by individual case workers, are the alleged

> causes of class members' injuries, because they undermine DCF's ability to timely and effectively implement case workers' decisions. These systemic shortcomings provide the "glue" that unites Plaintiffs' claims.

Id. at 34.

Similarly, in Pashby v. Cansler, No. 5:11-CV-273, 2011 U.S. Dist. LEXIS 141497 (E.D.N.C. Dec. 8, 2011), the court certified a class of disabled plaintiffs who were challenging the State's termination of in-home personal care services via implementation of more restrictive eligibility rules. Id. at *2. Even though each class member may have required a different level of in-home services, the court held that, as required under Wal-Mart, plaintiffs had shown a "common contention" that "will resolve the claims of all potential plaintiffs, irrespective of their particular factual circumstances." Id. at *16 (emphasis added).

Finally, in DL v. Dist. of Columbia, 277 F.R.D. 38 (D.D.C. 2011), a class of students with disabilities challenged the District of Columbia's denial to them of a "free appropriate public education" as required by the Individuals with Disabilities Education Act (IDEA), 28 U.S.C. § 1412(a)(1)(A). Again, even though each student had differing levels of need, the court found that the plaintiffs had satisfied commonality because "[a]ll of the class members have suffered the same injury: denial of their statutory right to a free appropriate public education." 277 F. Supp. 2d at 45. The court further rejected the defendants' claim that each class member raised differing allegations as to how their rights had been violated, finding that "these differing allegations only represent the differing ways in which defendants have caused class members' common injury." Id.

Even in employment discrimination cases, courts have declined to apply Wal-Mart where plaintiffs have identified a systemic discriminatory or illegal policy or practice that affects all class members. Thus, in McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, 672 F.3d 482

(7th Cir. 2012), the Seventh Circuit found that class certification was appropriate to determine Defendants' liability for two specific employment practices alleged to discriminate against African-Americans. Id. at 488-90. As the Seventh Circuit recognized, Wal-Mart precludes class certification in an employment discrimination case only when there is "no company-wide policy to challenge" and therefore "no common issue to justify class treatment." Id. at 488.

Similarly, in Espinoza v. 953 Assocs. LLC, No. 10-civ-5517, 2011 U.S. Dist. LEXIS 132098 (S.D.N.Y. Nov. 16, 2011), the court held that Wal-Mart did not apply to a Fair Labor Standards Act case where plaintiffs had identified, and were challenging, specific illegal employment practices:

> The facts and circumstances of Wal-Mart are very different from the instant action. Here, Plaintiffs allege that Defendants failed to pay minimum wages and overtime compensation as a result of certain policies and practices. Although plaintiffs' claims may raise individualized questions regarding the number of hours worked and how much each employee was entitled to be paid, those differences go to the damages that each employee is owed, not to the common question of Defendants' liability. Plaintiffs have alleged a common injury that is capable of class-wide resolution without inquiry into multiple employment decisions applicable to individual class members. Accordingly, Wal-Mart is distinguishable and does not preclude class certification.

Id. at *45. See also Myles v. Prosperity Mortgage Co., Civil No. CCB-11-1234, 2012 U.S. Dist. LEXIS 75371, **18-19 (D. Md. May 31, 2012) ("The crux of the Court's problem in Dukes was that plaintiffs did not allege 'any express corporate policy' of discrimination. … Here, on the other hand, … no local management discretion is at issue and no individualized inquiry is necessary to determine why individual loan officers were disfavored.").

The two cases relied upon by Defendants, Jamie S. v. Milwaukee Public Schools, 668 F.3d 481 (7th Cir. 2012) and M.D. v. Perry, 675 F.3d 832 (5th Cir. 2012) (see Defs.' Resp. at 9-12) are distinguishable from the instant case on the same grounds: in neither case did the plaintiffs identify a clear system-wide policy or practice that caused or contributed to the

discrimination faced by the class. In Jamie S., the plaintiffs broadly challenged the "child find" process by which a public school system identified students with disabilities for evaluation and services under IDEA, but failed to identify any specific illegal policy the school district engaged in as part of this process. "As the Supreme Court noted in Wal-Mart, an illegal policy might provide the 'glue' necessary to litigate highly individualized claims as a class." Id. at 498 (emphasis in original). However, because none was identified, the Seventh Circuit declined to find commonality. Id. Furthermore, unlike in the instant case, the district court specifically contemplated engaging in "thousands of individual determinations of class membership, liability, and appropriate remedies." Id. at 499.[8]

M.D. v. Perry was a broad constitutional due process challenge to numerous differing aspects of a State foster care system. See 675 F.3d at 835. The Fifth Circuit found that the identified factual issues, which touched on numerous differing aspects of the foster care system, "attempt[ed] to aggregate several amorphous claims of systemic or widespread conduct into one 'super-claim.'" Id. at 844. Additionally, the Fifth Circuit found that the district court had failed to explain the link between the proffered common factual questions and the plaintiffs' constitutional claims, in other words "how the resolution of the alleged common question of fact would decide an issue that is central to the substantive due process claims of every class member at the same time." Id. at 841. Importantly, the Fifth Circuit did not hold that the individualized needs of class members would necessarily preclude` class certification, and noted that "[s]ome of the Plaintiffs' legal claims may depend on common contentions of law capable of classwide resolution, and some may not." Id. at 842; see also id. at 846 ("[S]ome of the proposed class'

[8] The Seventh Circuit also found that the class definition was overly indefinite, in that it included class members whose identifies could not be readily ascertained. Id. at 496-97. This basis for denying class certification is unrelated to Wal-Mart.

sub-claims could potentially be certified under Rule 23(b)(2) …"). The Fifth Circuit therefore remanded the case for further analysis to identify which common contentions would resolve some or all of the plaintiffs' substantive due process claims. See id. at 848-49.

The concerns in Jamie S. and M.D. are not present in the instant case. Plaintiffs have identified a discrete system-wide policy and practice – the failure to provide, fund, or make available integrated supported employment services for all persons who want and can benefit from them. Indeed, the State itself asserts that it "has been and is still a leader in the provision of supported employment services for individuals with I/DD," (Fay Decl. ¶ 8), thus indicating that the State's actions with regard to the provision of integrated employment services directly impact all class members and determine their ability to access integrated employment. This, in turn, will determine the ADA claims of the plaintiff class. While the ultimate relief to class members of supported employment services would be provided on an individualized basis, this is true in nearly every Olmstead case in which a group of individuals has been denied necessary services. Were such differences sufficient to defeat class certification, no class could ever be certified to enforce the ADA or Olmstead.[9]

Furthermore, unlike M.D., this case does not attempt to "aggregate several amorphous claims of systemic or widespread conduct." See 675 F.3d at 844. Plaintiffs here have

[9] Wal-Mart cannot be read to mean that any differences between class members in terms of the relief they receive destroys commonality. The Wal-Mart Court recognized that, had plaintiffs identified a company-wide policy that they claimed resulted in lower pay or benefits for women, such as a discriminatory testing procedure, such claims would have been appropriate for class-wide resolution. See 131 S. Ct. 2553. This would have been the case despite the fact that each class member's circumstances and relief still would have undoubtedly differed (e.g., job titles, lost compensation, lost promotions). The court in Espinoza rejected just such an argument: in that case, the defendant argued that an FLSA challenge to a policy of altering employees' clock-in and clock-out times would require the Court to determine the extent to which each employee was subject to this practice. This argument, the court held, "confuses liability with damages." 2011 U.S. Dist. LEXIS 132098, at *36.

challenged a discrete violation of the ADA's integration mandate – the State's overreliance on sheltered workshops, contrary to the needs, abilities and desires of persons with intellectual and developmental disabilities. This common contention is clearly "central to the validity" of Plaintiffs' legal claim under the ADA's integration mandate, and the connection to Plaintiffs' legal claims is clear.[10]

B. Typicality, Adequacy of Representation, and Class Definition

Defendants have challenged typicality and adequacy of the named Plaintiffs' representation of the class, based primarily on assertions that certain of the named Plaintiffs are already receiving supported employment services, are working in an integrated setting, have declined supported employment, or do not want to leave sheltered workshops. Plaintiffs have also challenged inclusion in the class of persons who work part-time in sheltered workshops and part-time in the community. (See Defs.' Resp. at 17-19)

The United States is unable to comment on the specific factual allegations concerning the named Plaintiffs and takes no position regarding these assertions. However, in evaluating these claims, the United States believes that the following information may be of assistance to the Court:

1. In determining whether a person's vocational or employment services are being provided in "the most integrated setting appropriate to their needs," 28 C.F.R. § 35.130(d), the

[10] Citing Wal-Mart, Defendants have also argued that certification under Rule 23(b)(2) is inappropriate, again due to the individualized nature of the supported employment services each class member would need. (Defs.' Resp. at 19-21) Wal-Mart, however, held only that it was inappropriate under Rule 23(b)(2) to include individualized relief – in that case, back pay, where the monetary awards would have to be separately calculated for each employee – with injunctive relief applicable to the entire class. No such issue exists here. The class-wide relief is the provision of supported employment services to qualified class members. The fact that such services may differ between class members no more constitutes "individualized" relief than would an injunction prohibiting race- or sex-based discrimination in employment case based on the allegation that all class members would benefit differently from such an injunction.

Court should consider whether the person is being provided the range of services necessary to find, support and maintain him or her in competitive employment. "Supported employment services" are more than a single or discrete service or activity. Under regulations implementing the Rehabilitation Act, 29 U.S.C. § 705(35) & (36), which governs federally-assisted vocational rehabilitation programs, supported employment is defined as "[c]ompetitive employment in an integrated setting with ongoing support services," which in turn means "services that are … needed to support and maintain an individual with the most severe disabilities in supported employment." 34 C.F.R. § 363.6(c)(2) & (3). These services consist of:

> (A) Any particularized assessment needed to supplement the comprehensive assessment of rehabilitation needs; (B) The provision of skilled job trainers who accompany the individual for intensive job skill training at the work site; (C) Job development and placement; (D) Social skills training; (E) Regular observation or supervision of the individual; (F) Follow-up services such as regular contact with the employers, the individuals, the parents, family members, guardians, advocates or authorized representatives of the individuals, and other suitable professional and informed advisors, in order to reinforce and stabilize the job placement; (G) Facilitation of natural supports at the worksite; (H) Any other service identified in the scope of rehabilitation services described in 34 CFR part 361; and (I) Any service similar to the foregoing services.

Id. § 363.6(3)(iii).

Likewise, the Centers for Medicare and Medicaid Services (CMS), which oversee Medicaid Home and Community Based Waiver programs that fund employment services, have defined supported employment services as including:

> any combination of the following services: vocational/job-related discovery or assessment, person-centered employment planning, job placement, job development, negotiation with prospective employers, job analysts, job carving, training and systemic instruction, job coaching, benefits support, training and planning, transportation, asset development and career advancement skills, and other workplace support services … that enable the waiver participant to be successful in integrating into the job setting.

CMCS Informational Bulletin 9 (Sept. 16, 2011), available at:

www.cms.gov/CMCSBulletins/download/CIB-9-16-11.pdf.

Accordingly, claims that any particular plaintiff or class member is already in supported employment, and therefore cannot state a claim, should be evaluated against the backdrop of these existing federal definitions of supported employment services.

2. In determining whether a person is currently "working in supported employment," (see Defs.' Resp. at 17), the Rehabilitation Act defines "supported employment" in relevant part as "competitive work in integrated work settings, or employment in integrated work settings in which individuals are working toward competitive work …" 29 U.S.C. § 705(35)(A). The regulations define "supported employment" as "competitive employment," which in turn means work "[i]n the competitive labor market that is performed on a full-time or part-time basis in an integrated setting; and … [f]or which an individual is compensated at or above the minimum wage, but not less than the customary or usual wage paid by the employer for the same or similar work performed by individuals who are not disabled." 34 C.F.R. § 363.6(c)(2). An "integrated setting" means "a setting typically found in the community in which an individual with the most severe disabilities interacts with non-disabled individuals, other than non-disabled individuals who are providing services to that individual, to the same extent that non-disabled individuals in comparable positions interact with other persons." Id. § 363.6(c)(2)(ii). CMS has adopted this definition for supported employment and has also stated that the outcome of supported employment services should be "sustained paid employment at or above the minimum wage in an integrated setting in the general workforce, in a job that meets personal and career goals." CMCS Informational Bulletin at 9. CMS further clarified that supported employment "does not

include facility-based, or other similar types of vocational services furnished in specialized facilities that are not part of the general workplace." Id. at 10.

3. Finally, as stated in the United States' Statement of Interest on Defendants' Motion to Dismiss, the ADA's "integration regulation," 28 C.F.R. § 35.130(d), covers sheltered workshop placements even if such placement is not full-time. (See U.S. Stmt. of Interest at 14-15, ECF No. 34) Accordingly, class members who work in both sheltered workshops and the community would be able to state a claim under the ADA if, due to their sheltered workshop placement, they were not interacting with non-disabled individuals "to the fullest extent possible." 28 C.F.R. Pt. 35, App. B at 673. Therefore, inclusion of such persons in the class definition would be appropriate.

III. CONCLUSION

For the reasons stated above, the United States submits that Wal-Mart v. Dukes should not preclude certification of the proposed class.

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