UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID GROGAN, HERMAN BREWER, and FAYETTE REID, *individually and on behalf of a class of all persons similarly situated,*	
and JAMES BROOKS, *individually,*	**Civil Action No. 08-1747 (BJR)**
Plaintiffs,	**MEMORANDUM ORDER**
v.	**DENYING DEFENDANT'S MOTION TO DISMISS**
ERIC H. HOLDER, United States Attorney General,	
Defendant.	

I. INTRODUCTION

Plaintiffs David Grogan, Herman Brewer, and Fayette Reid, individually and on behalf of a class of similarly situated individuals, commenced this suit against their employer, the United States Marshals Service ("USMS" or "Defendant").[1] Plaintiffs allege that USMS engaged in a pattern or practice of racial discrimination against them and other African-American Deputy United States Marshals in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq* ("Title VII"). Defendant seeks to dismiss or strike Plaintiffs' class claims based on the Supreme Court's decision in *Wal-mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) ("*Wal-mart*"), in which the Supreme Court denied class certification because the employees failed to offer significant proof that the employer operated under a general policy of discrimination. Plaintiffs oppose the motion to dismiss because, *inter alia*, they have not yet brought a motion for class certification. Because Plaintiffs have not yet proffered their evidence in support of class

[1] Plaintiff James Brooks brings only individual claims of racial discrimination under Title VII. "Plaintiffs" refers to the Class Plaintiffs throughout this memorandum opinion.

certification and because it is the Court's duty to conduct a rigorous analysis of such evidence before dismissing or striking Plaintiffs' class claims, the Court denies Defendant's motion to dismiss.

II. BACKGROUND

A. Factual Background[2]

Plaintiffs are all current USMS employees that have served as African American Deputy U.S. Marshals. Am. Compl. ¶¶ 19-22. Plaintiffs allege that the USMS has operated under a culture of the "good old boy network," a claim investigated as far back as 1992. *Id.* ¶ 30. According to Plaintiffs, USMS has failed to "revise[] its policies and practices" to "end the continuing pattern and practice of racial discrimination and remedy the effects of that discrimination," as "manifested by discriminatory employment practices with respect to promotions, transfers, assignments, training, awards, and the use of investigations." *Id.* ¶¶ 29, 34.

Plaintiffs challenge USMS's Merit Promotion System, alleging that the systems' features impede the promotion of African American Deputy U.S. Marshals. Specifically, Plaintiffs take issue with the following System features:

> (1) scoring, grading and ranking system where criteria are subjectively evaluated; (2) Merit Promotion graders who are predominately white peers of the candidates, who favor white candidates for promotions; (3) a merit promotion exam and essay test which favor white deputies and which are not justified by business necessity; (4) subjective and biased scoring of assignments; (5) scoring of awards, assignments, and trainings, which are discriminatorily denied to African Americans, and (6) a discriminatory three-tier ranking system, which includes re-ranking by the Chief Deputy or U.S. Marshal (recommending official"), the Career Board, and the Director and Deputy Director.

Id. ¶ 38. Plaintiffs offer anecdotal examples to support their allegations that these features result in the selection of white Marshals over proposed class members for promotions. Plaintiffs also

[2] The following factual summary assumes Plaintiffs' allegations to be true. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 589 (2007).

claim that USMS favors white Marshals for promotions by cancelling a position when there is not a qualified white applicant, transforming temporary positions into a permanent one to accommodate white deputies, and using "selective placement factors" to select particular white deputies for promotions. *Id.* ¶ 46.

Plaintiffs additionally challenge USMS's assignment and lateral transfer policies, practices, and procedures as "highly subjective," and allege "[t]he high degree of subjectivity in the assignment and lateral transfer process has a disparate impact on African American [Deputy U.S. Marshals]." *Id.* ¶ 55. Moreover, Plaintiffs allege that the discriminatory policies and practices with respect to assignment and the lateral transfer process "adversely affected the ability of African American [Deputy U.S. Marshals] to secure promotions or career enhancing opportunities and experiences." *Id.* ¶ 56. Specifically, Plaintiffs claim that they were discriminatorily denied assignments to warrant squads (an important experience to have when seeking promotions), to serve as an acting supervisors, to "career-enhancing headquarter assignments," and assignments to specialized task forces and details. *Id.* ¶ 57-61.

Plaintiffs maintain that they receive fewer career-enhancing training opportunities than their white counterparts because of "the high degree of subjectivity in how [Deputy U.S. Marshals] receive training." *Id.*¶ 65. Since training is critical to advancement, this too affects Plaintiffs' promotion opportunities. *Id.* ¶ 66. Plaintiffs again offer anecdotal support for these allegations. *Id.* ¶68-69.

Next, Plaintiffs claim they have been discriminated against with respect to the distribution of awards, again, an area that has a "high degree of subjectivity." *Id.* ¶ 71. According to Plaintiffs, African Americans receive awards less frequently than their white counterparts, and these awards are critical to advancement within the Marshals Service. *Id.* ¶ 73.

Again, Plaintiffs give examples from proposed class members' experiences to support their broad allegations. *Id.* ¶ 74.

Finally, Plaintiffs allege that African American Deputy U.S. Marshals are "targeted by their white co-workers and supervisors for investigation by [the Office of Internal Investigation] based on frivolous allegations or for conduct that would not result in an investigation if committed by a white deputy." *Id.* ¶ 79. Plaintiffs assert that the highly subjective nature of the policies, practices, and procedures controlling the investigations of allegations of misconduct adversely affect the ability of African American Deputies to secure promotions or access career-enhancing positions, and they again provide examples. *Id.* ¶¶ 75-81.

B. Procedural History

Plaintiffs brought this suit against USMS in 2008, and the case was assigned to Judge Henry Kennedy. After the resolution of initial motions, Judge Kennedy established deadlines for class certification discovery and a motion for class certification, but these dates were altered on several occasions to accommodate a pending motion to amend. In December 2011, the case was reassigned to this Court. Plaintiffs have yet to move for class certification, and Plaintiffs claim that they "have been denied the opportunity to conduct necessary discovery." Pls.' Opp'n at 4 n.3. The matter is now before the Court upon consideration of Defendant's motion to dismiss.

III. ANALYSIS

A. Legal Standards

1. Rule 12(b)(6) Motion to Dismiss

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may file a motion to dismiss to test "the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true." *In re Interbank Fund Corp. Sec. Litig.*, 668 F. Supp. 44, 47-48 (D.D.C. 2009) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)); *see also* FED. R. CIV. P.

12(b)(6). Ambiguities must be resolved in favor of the plaintiff, giving her the benefit of every reasonable inference drawn from the well-pleaded facts and allegations in the complaint. *See In re Interbank Fund Corp. Sec. Litig*., 668 F. Supp. at 47-48.

To survive a Rule 12(b)(6) motion, the complaint must plead sufficient facts that, taken as true, provide "plausible grounds" that discovery will reveal evidence to support the allegations. *Twombly*, 550 U.S. at 544. A claim has facial plausibility when Plaintiff pleads factual content that allows the court to draw the reasonable inference that Defendant is liable for the alleged misconduct. *Ashroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 570)). Moreover, "[a] pleading that offers 'labels and conclusions' or a formulaic recitation of the elements of a cause of action will not do. Nor does the complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (citation omitted).

B. The Court Denies Defendant's Motion to Dismiss

Defendant argues that Plaintiffs fail to state a claim because the Complaint "alleg[es] a theory of liability rejected by the Supreme Court" in *Wal-mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) ("*Wal-mart*"). Def.'s Mot. at 5. Defendant argues that Plaintiffs seek to prove discrimination by merely proving that the USMS's discretionary system had produced racial disparity, instead of challenging a specific employment policy or practice of Defendant. *Id.* According to Defendant, the Supreme Court's decision in *Wal-mart* specifically "disallows [these type of] class-wide 'delegated discretion' claims" because "[i]f the alleged disparity is the result of the individual decisions of different managers, then there is not one singular employment practice that leads to the disparity." *Id.* Simply stated, Defendants claims that *Wal-mart* "unambiguously [held] that claims based on 'excess discretion' do not pass muster under Title VII."

Plaintiffs maintain that *Wal-mart* "has no bearing on the question of whether a complaint states a claim for relief under Rule 12(b)(6)." Pl.'s Opp'n at 4. According to Plaintiff, "because *Wal-mart* was decided on a motion for certification and concerned issues relevant to whether a party presented evidence sufficient to satisfy Rule 23 standards, it is not relevant to Rule 12(b)(6) pleading standards." In reply, Defendant refine their prior arguments, stating that "[w]hile the Supreme Court indicated that claims based on delegated discretion may be possible, provided the right showings are made, Plaintiffs do not plead the facts necessary to demonstrate that such claims are plausible in this case." Def.'s Reply at 3.

The Court disagrees with Defendant's interpretation of *Wal-mart* and with what Defendant believes Plaintiffs' burden is at this procedural juncture. First, as Plaintiffs point out, *Wal-mart* explicitly reaffirmed that "giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory since an employer's undisciplined system of subjective decisionmaking can have precisely the same effects as a system pervaded by impermissible intentional discrimination." *Wal-mart*, 131 S. Ct. at 2554 (internal quotations and citations omitted). Indeed, District Judge Charles Breyer, upon remand of the *Wal-mart* case, recently rejected arguments similar to those made by Defendant here, explaining that "the Supreme Court's decision [in *Wal-mart*] rested not on a total rejection of plaintiffs' theories, but on the inadequacy of their proof." *Dukes v. Wal-mart*, Civ. No. 01-2252, Order Denying Motion to Dismiss (Sept. 21, 2012) at 8. Thus, Plaintiffs do not fail to state a claim simply because their Title VII class action is based on USMS's discretionary policies and practices.

It is true that in order to obtain class certification, Plaintiffs must identify and provide evidence in support of "a common mode of exercising discretion that pervades the entire [USMS]." *See Wal-mart*, 131 S. Ct. at 2555 (denying certification only after analyzing plaintiffs' evidence that purported to demonstrate that Wal-mart had a "strong corporate culture"

that made it "vulnerable" to "gender bias"). However, Plaintiffs have not yet moved for class certification. At this juncture, the Court cannot be expected to conduct the rigorous analysis required by Rule 23 and *Wal-mart*. *See Wal-mart*, 131 S. Ct. at 2551 ("We recognized in *Falcon* that 'sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,' and that certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160-61 (1982)). Plaintiffs must have an opportunity to set forth the facts that they have gleaned from class discovery in an appropriate motion for class certification.[3] *See Burton v. District of Columbia*, 277 F.R.D. 224 (D.D.C. 2011) (concluding that precertification discovery was necessary because *Wal-mart* "emphasizes that the district court's class certification determination must rest on a 'rigorous analysis' to ensure 'actual, not presumed, conformance' with Rule 23").

Accepting Plaintiffs' allegations as true, the Court cannot conclude that Plaintiffs have failed to state a plausible grounds for relief. *Winder v. Erste*, 566 F.3d 209, 213 (D.C. Cir. 2009) ("A court may dismiss under Rule 12(b)(6) if, accepting the allegations in the complaint as true, the plaintiff has nonetheless failed to state plausible grounds for relief" (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007))). As elaborated above, Plaintiffs challenge specific USMS policies and practices and use the real-life experiences of proposed class members to support allegations that the policies and practices are being implemented in a discriminatory fashion. *See supra* Part II.A. Assuming these factual allegations are true, the Amended Complaint plausibly states that there may be a common mode of exercising discretion that pervades USMS: a general policy of discrimination that stems from "the good old boy" social framework. Plaintiffs should be allowed to try to demonstrate the "significant proof" that USMS "operated under a general

[3] The deadline for this motion will be set in a forthcoming scheduling order.

policy of discrimination," be it through expert testimony, statistics, deposition testimony, reports, policy statements, *etc.* Moreover, the policies and practices that Plaintiffs challenge, like those controlling the Merits Promotion process and the process of referring someone to the Office of Internal Investigations, could conceivably be company-wide policies and practices. *See also Chen-Oster v. Goldman, Sachs & Co.*, 2012 U.S. Dist. LEXIS 99270 (S.D.N.Y. July 16, 2012) ("It is true that an individual manager's decision might be more or less discretionary, but this, as the Supreme Court made clear in [*Wal-mart*], does not doom a class, since this discretion would have been exercised under the rubric of a company-wide employment practice."). In sum, the fact that the challenged policies and practices are highly subjective does not immunize them under *Wal-mart* from being the target of a Title VII class action suit. Defendant's arguments are, therefore, premature.[4] *Johnson v. Flakeboard Am. Ltd*., 2012 U.S. Dist. LEXIS 83702 (D.S.C. Mar. 26, 2012) (recommending the denial of defendant's motion to dismiss and/or strike plaintiff's class claims under *Wal-mart*, because Plaintiff had not yet had moved for class certification or completed discovery), *recommendation adopted*, *Johnson v. Flakeboard Am. Ltd*., 2012 U.S. Dist. LEXIS 82940 (D.S.C. June 15, 2012); *Chen-Oster v. Goldman, Sachs & Co.*, 2012 U.S. Dist. LEXIS 99270 (S.D.N.Y. July 16, 2012) (declining to strike plaintiffs' class action because defendant had not shown that plaintiffs' claims were doomed as a matter of law under *Wal-mart* and plaintiffs might be able to demonstrate facts with the benefit of discovery that would distinguish the case from *Wal-mart*).

[4] For these same reasons, the Court denies Defendant's alternative motion to strike Plaintiffs' class claims under Rule 12(f) and Local Civil Rule 23.1(b). *See* FED. R. CIV. PROC. 12(f) ("The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."); LCvR 23.1(b) ("A defendant may move at any time to strike the class action allegations or to dismiss the complaint.").

IV. CONCLUSION

For the above stated reasons, it is this 27th day of September, 2012, hereby **ORDERED** that Defendant's Motion to Dismiss is **DENIED**.

September 27, 2012

Barbara J. Rothstein

BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE