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## You Can't Get There From Here: Implications of the Walmart v. Dukes Decision for Addressing Second-Generation Discrimination

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# YOU CAN'T GET THERE FROM HERE: IMPLICATIONS OF THE *WALMART V. DUKES* DECISION FOR ADDRESSING SECOND- GENERATION DISCRIMINATION

Roger W. Reinsch\* & Sonia Goltz†

## ABSTRACT

*In Wal-Mart v. Dukes, the Supreme Court determined the plaintiffs had not shown, based on the evidence, that there were questions of law or fact common to the class. The allegedly discriminatory decisions had been made by individual supervisors at different stores who had been given discretion by Wal-Mart to make pay and promotion decisions. The Court stated the problem was that there was no specific evidence that all the discretionary decisions were made in a manner that reflected gender bias. This case not only reversed decades of court acceptance of social framework evidence in employment litigation but also insulates businesses from class action suits by imposing a huge barrier to class certification. This Article first reviews the Wal-Mart v. Dukes decision with respect to how it adversely affects the viability of class action suits that have historically provided recourse for individuals who are less able to pursue individual claims of discrimination. This Article then examines implications of Dukes and other decisions for the court's ability to address the problem of second-generation discrimination. In particular, we focus on the difficulties created by requiring the application of a clearly defined policy and practice to all cases involved. Finally, this Article suggests that given that policy and practice continue to be a requirement for class certification, one could meet this requirement by reframing classes using a theory analogous to the "fraud on the market" doctrine employed in securities cases. In other words, organizations that have a policy of nondiscrimination but allow individual managers to make*

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*employment decisions any way the managers please could be viewed as perpetuating a type of “fraud-on-the-employment market” in which plaintiffs have relied on a material misstatement of fact when accepting their positions.*

#### TABLE OF CONTENTS

INTRODUCTION .....	265
I. WAL-MART V. DUKES AND CLASS CERTIFICATION .....	267
A. Purposes of Class Action Discrimination Suits .....	267
B. <i>Dukes v. Wal-Mart</i> .....	268
C. Policy Implications of the <i>Dukes</i> Decision .....	275
II. IMPLICATIONS OF <i>DUKES</i> FOR ADDRESSING SECOND-GENERATION DISCRIMINATION.....	280
III. A “FRAUD-ON-THE-MARKET” APPROACH TO CLASS CERTIFICATION .....	289
A. Unresolved Issues Regarding Class Certification .....	289
B. Fraud-On-The-Market Doctrine .....	292
C. Framing Discrimination Cases Using a Fraud on the Employment Market Doctrine .....	299
CONCLUSION.....	300

#### INTRODUCTION

This Article looks at the impact *Wal-Mart Stores, Inc. v. Dukes*<sup>1</sup> has had on class action lawsuits involving claims of gender discrimination. *Dukes* involved a class action lawsuit filed against Wal-Mart by 1.5 million female employees claiming gender discrimination.<sup>2</sup> The United States Supreme Court refused to certify the class action based on the Court’s interpretation of the commonality requirement stated in Federal Rule of Civil Procedure 23.<sup>3</sup> Rule 23 is a procedural rule required for a lawsuit to be certified as a class action so that the substantive issues may be heard. The *Dukes* decision represents an example of the far-reaching power of procedural rules.

“[P]rocedure is power, whether in the hands of lawyers or judges.” . . . Procedural rules often have enormous influence on the outcome of a case and can effectively deny litigants the opportunity of reaching the merits. Nowhere, perhaps, is this more

<sup>1</sup> 131 S. Ct. 2541 (2011).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 2550-2551 (“[T]he crux of this case is commonality – the rule requiring a plaintiff to show that ‘there are questions of law or fact common to the class.’”) (quoting FED. R. CIV. P. 23(a)(2)).

evident than with class certifications, which require that plaintiffs seeking to sue as a group explicitly obtain approval from a court before their joint claims can go forward.<sup>4</sup>

Due to the fact that the plaintiffs in *Dukes* were denied class certification, there are some who view the *Dukes* decision as a victory for corporate America and believe that the plaintiffs' bar has to find new and creative ways to proceed with class action lawsuits.<sup>5</sup> In this Article, by focusing on the implications of the *Dukes* decision for future class actions, we intend to provide a novel approach to certifying class action discrimination cases. Part of our focus will be on what is called "second-generation discrimination,"<sup>6</sup> which we believe was the main type of gender discrimination present in *Dukes*. We will look at the purposes of class action discrimination suits, and how *Dukes* adversely affected an important mechanism in a class action for addressing second-generation discrimination cases. Then, we examine the implications of *Dukes* and similar cases to determine whether, in a post-*Dukes* world, the judiciary can adequately address second-generation discrimination while constrained by the Supreme Court's strict "policy and practice" requirement. Finally, we offer a suggestion for satisfying the policy and practice requirement for class certification by proposing that class certification could be framed using an approach analogous to the fraud-on-the-market doctrine found in securities cases. The fraud-on-the-employment-market approach we propose is consistent with research indicating that unconscious bias is pervasive, is linked to discriminatory behavior, and is more likely when employment criteria remain undefined and decision making is subjective,<sup>7</sup> as in

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<sup>4</sup> Julie Slater, *Reaping the Benefits of Class Certification: How and When Should "Significant Proof" Be Required Post-Dukes?*, 2011 BYU L. REV. 1259, 1259 (2011) (alteration in original) (quoting Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1292-93 (2000)).

<sup>5</sup> Sarah Kellogg, *Wal-Mart v. Dukes: The Implications*, 26 WASH. LAWYER 22, 29 (2011).

<sup>6</sup> See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) for a full description and analysis of what second-generation employment discrimination means; Sonia Goltz et al., *University Women's Experiences in Bringing Second Generation Sex Discrimination Claims: Further Support for Adoption of a Structural Approach*, 18 TEX. J. WOMEN & L. 145 (2009).

<sup>7</sup> See, e.g., Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 744 (2005) ("Claims of excessive subjectivity in decisionmaking can arise in individual cases challenging a particular employment decision, or in class action suits more broadly challenging an employer's policies and practices."); Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 487 (2005) ("The problem is even more severe when a diffuse and subjective evaluative process is coupled with the 'solo effect' that occurs in situations where minority and female employees are evaluated by mostly white peers or supervisors.").

Wal-Mart's policy of allowing local managers discretionary power in promotions and pay increase decisions.

## I. *WAL-MART V. DUKES* AND CLASS CERTIFICATION

### A. *Purposes of Class Action Discrimination Suits*

Class action discrimination suits provide multiple benefits: they provide an individual opportunity for justice, make the court system more efficient, and bolster society's ability to enforce laws.

An example illustrates these points: Mary Smith is a hypothetical Wal-Mart cashier who has worked for Wal-Mart for five years and has had excellent performance evaluations. However, she has only had three small raises and no promotion. John, who started as a cashier three years ago, has now been promoted to be Mary's supervisor. John was promoted instead of Mary, even though Mary met all of the qualifications for the promotion. Mary knows of other females in her store and in other Wal-Mart stores in the region who have been similarly passed over for a promotion. Mary and the other women believe that the reason they have not been promoted and have received lower pay increases is because they are female and that Wal-Mart's policy of allowing local managers to make those decisions without many clear guidelines or supervision creates these discriminatory decisions.

Mary could file a discrimination lawsuit against Wal-Mart herself. However, lawsuits are expensive, and Mary would be unable to afford it. Furthermore, Wal-Mart could easily defend an individual lawsuit. Instead, Mary and the other female employees would be best served by filing a class action lawsuit. A class action suit is the most viable method for individuals to take on a large corporation, such as Wal-Mart.

Mary's situation is typical of each of the individual plaintiffs in *Dukes*. In *Dukes*, each plaintiff had a relatively small claim and limited resources.<sup>8</sup> It would have been almost impossible for each of them to file a separate lawsuit against Wal-Mart. In these situations, absent the threat of a class action lawsuit, large employers may have financial incentives to violate the law in small but pervasive ways for two reasons: (1) small financial gains can add up quickly for a large company; and (2) most people like Mary are unable to afford to sue for small

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<sup>8</sup> See Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart* 106 NW. U. L. REV. COLLOQUY 34, 36-37, available at <http://www.law.northwestern.edu/lawreview/colloquy/2011/18/> ("For many employees and others, a class action is their only meaningful access to the courts. Those with small claims and limited resources are unlikely to challenge powerful corporations on their own....").

violations.<sup>9</sup> The complexity of discrimination suits and high attorneys' fees and expenses prevent most individuals from seeking relief in the courts.

Unlike single-plaintiff suits, class actions avoid the up-front expenses to individual plaintiffs because attorneys generally accept the suits on a contingency-fee basis. The attorney will front the costs of proceeding with the case, ensuring that the plaintiffs will get their day in court. Filing a class action suit was the most practical way for plaintiffs, like those in *Dukes*, to seek relief and force Wal-Mart to change its corporate policy.

Furthermore, class action lawsuits prevent the court system from being flooded with individual lawsuits and provide the judiciary with a more efficient tool, compared to requiring individual lawsuits against the same corporate defendant. Increased efficiency leads to greater impact. As Professors Catherine Fisk and Erwin Chemerinsky point out, the rise of large corporations in the early twentieth century was coupled with a rising need to protect individuals from exploitation.<sup>10</sup> As a result, the courts and legislatures developed the class action suit as a procedural device to prevent abuse.<sup>11</sup> The class action lawsuit provided an end-run around the problem of the prohibitively high cost of single-plaintiff suits by allowing a large number of individuals to sue a corporation in one lawsuit. The consolidation of suits not only made it economically feasible for low-income individuals to sue exploitative companies, but it also provided an incentive for companies to stop exploiting their employees in the first place.

Moreover, class actions also serve as a mechanism for judicial legal enforcement.<sup>12</sup> The class certification process provides courts broad oversight concerning key factual questions related to corporate behavior. This line of inquiry is particularly important because it provides a forum for broad analysis of corporate behavior that may not be blatant in an individual instance.

### B. *Dukes v. Wal-Mart*

*Dukes v. Wal-Mart* was filed in 2001.<sup>13</sup> It was one of the largest class action lawsuits filed against a private employer.<sup>14</sup> A group of female Wal-Mart

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<sup>9</sup> See Catherine Fisk & Erwin Chemerinsky, *The Failing Faith In Class Actions: Wal-Mart v. Dukes and AT&T Mobility v. Concepcion*, 7 DUKE J. CONST. LAW & PUB. POL'Y 73, 74-75 (2011).

<sup>10</sup> *Id.* at 74 (citations omitted).

<sup>11</sup> *Id.*

<sup>12</sup> See *id.* at 74-75.

<sup>13</sup> *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 137 (N.D. Cal. 2004), *aff'd*, 509 F.3d 1168 (9th Cir. 2007), *aff'd en banc*, 603 F.3d 571 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (2011).

<sup>14</sup> The plaintiffs, all female employees of Wal-Mart, totaled about 1.5 million. *Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2547 (2011). For additional demographic information, see Brief for Respondents at 20-21, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277):

employees filed the suit on behalf of “[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998 who have been or may be subjected to Wal-Mart’s challenged pay and management track promotions policy and practices.”<sup>15</sup> The plaintiffs alleged Wal-Mart made promotion decisions favoring men, and paid women less than men in comparable positions. The women alleged they were discriminated against because Wal-Mart had a corporate policy of allowing individual managers to make pay and promotion decisions “in a largely subjective manner.”<sup>16</sup> The female employees claimed that

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The district court found that “roughly 65 percent of hourly employees are women, while roughly 33 percent of management employees are women.” . . . When Wal-Mart’s proportion of women in management was compared to that of its 20 largest competitors, 80% of its stores had significantly fewer female managers. The district court credited plaintiffs’ proof that . . . “a statistically significant shortfall of women [were] being promoted into each of the in-store management classifications over the entire class period.” This shortfall was “consistent in nearly every geographic region at Wal-Mart.” Women also consistently took longer than men to advance to management positions. . . . These differences existed even though female employees at Wal-Mart generally have more seniority and better performance ratings than male employees. . . . Plaintiffs’ statistical regressions for hourly and salaried employees showed that . . . women were paid significantly less than men, and this pay gap increased each year. This pattern was consistent for all store classifications even when seniority, turnover, store, job performance, job position, part-time or full-time status, and other relevant factors were taken into account.

*Id.* (citations omitted).

<sup>15</sup> *Wal-Mart*, 222 F.R.D. at 141-42.

<sup>16</sup> *Id.* at 145;

All hourly employees at every Wal-Mart store are compensated pursuant to the same general pay structure. Each store has a minimum starting wage for each class of hourly jobs that is set by the Wal-Mart Home Office in Arkansas. Beyond that, Store Managers are granted substantial discretion in making salary decisions for hourly employees in their respective stores. Specifically, they are allowed to depart from the minimum start rates, within a two dollar per hour range, without being constrained by objective criteria and with limited oversight. . . . As with salary decisions, the parties agree that subjectivity is a primary feature of promotion decisions for in-store employees. In the words of Wal-Mart President and CEO Thomas Coughlin, “We push down to the manager of the facility level, [*sic.*] the responsibility to run those stores right.”

these discretionary policies shaped a corporate culture that allowed discriminatory practices to flourish.<sup>17</sup>

The plaintiffs alleged,

[W]omen at Wal-Mart stores had been paid less than their male counterparts every year and in every Wal-Mart region. Plaintiffs' evidence showed that women in hourly positions made, on average, \$1,100 per year less than men. In salaried management positions, the average difference was \$14,500. This inequity had developed even though the women had, on average, greater seniority and higher performance ratings. The plaintiffs further alleged that Wal-Mart's female employees had been promoted to management less often than comparable male employees, and that those women who were promoted had to wait longer for promotion than their male peers. The evidence they presented showed that, in 2001, 67% of all hourly workers and 78% of hourly department managers were women. By contrast, only 35.7% of assistant managers, 14.3% of store managers, and 9.8% of district managers were female.<sup>18</sup>

Anecdotal evidence supported the statistical findings.<sup>19</sup> For example, a male store manager was quoted as saying, "Men are here to make a career and women aren't. Retail is for house-wives who just need to earn extra money." Another male support manager stated: "We need you in toys . . . you're a girl, why do you want to be in hardware?"<sup>20</sup> Male managers were not the only staff members guilty of such comments. "A female store manager gave a sporting goods position to a male employee because she 'needed a man in the job.'"<sup>21</sup> The

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*Id.* at 146-48 (alteration in original) (citations omitted).

<sup>17</sup> *Id.*

<sup>18</sup> Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 48 *FORDHAM L. REV.* 37, 48-49 (2009); accord *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553 (2011); Deborah Thompson Eisenberg, *Wal-Mart Stores v. Dukes: Lessons for the Legal Quest for Equal Pay*, 46 *NEW ENG. L. REV.* 229, 240-43 (2012).

<sup>19</sup> See *Dukes*, 131 S. Ct. at 2548; Eisenberg, *supra* note 18, at 244-55. See generally *Wal-Mart v. Dukes: Is 1.6 Million Women 0.6 Too Many?* 2 *AM. U. LAB. & EMP. L.F.* 151 (2012).

<sup>20</sup> Kathryn Smith, *What Do 1.5 Million Wal-Mart Women Have in Common?: Dukes v. Wal-Mart Class Action Certification*, 52 *B.C. L. REV. E. SUPP.* 149, 154 (2011) (alteration in original) (quoting *Dukes*, 222 F.R.D. at 166).

<sup>21</sup> *Id.* (quoting *Dukes*, 222 F.R.D. at 166). For other comments alleged by the plaintiffs see *Wal-Mart v. Dukes - Why the Supreme Court Should Stand with Working Women*, NAT'L WOMEN'S L.



anecdotal and statistical evidence strongly suggested that Wal-Mart's workplace culture cultivated both intentional and unintentional discrimination against women.

According to Wal-Mart, the statistical and anecdotal evidence did not show questions of law or fact common to the class, a requirement under the Federal Rules of Civil Procedure. In order to proceed with the class action, Rule 23 requires the court to certify the class. Rule 23(a) provides four requirements that must be met for a class action to be certified; the plaintiffs have the burden to prove that all four requirements have been met.<sup>22</sup> Rule 23(a) authorizes class action certification only when:

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CENTER (Mar. 1, 2011), <http://www.nwlc.org/resource/wal-mart-v-dukes-why-supreme-court-should-stand-working-women#9>:

Men alone are breadwinners, "working as the heads of their households, while women are just working for the sake of working." . . . Another female worker was told that "men need to be paid more because they have families to support." A male employee was selected for a position over an (unmarried) female employee because he "deserved the position" as "the head of household"—but she "did not 'need' the position." Women's family responsibilities interfere with work responsibilities; they "should be at home with a bun in the oven" instead of working. One male manager opined that "women should be home barefoot and pregnant." A manager told one woman she could not take an overnight supervisor position because she had children. One female employee was told to resign and "find a husband to settle down with and have children"—and another female employee was told, "you should raise a family and stay in the kitchen." A supervisor asked the only female store manager in her district to resign because she "needed to be home raising [her] daughter" instead of running a store. Women can't handle certain jobs—and can't work in certain "traditionally male" departments—because those positions are "a man's job" or "need[ ] a man." One woman employee was told, "You're a girl, why do you want to work in Hardware?" Women were "required to clean and stock," while men who worked with them were not. One woman who applied to work in the Sporting Goods department was told, "'You don't want to work with guns.'" . . . A senior vice president told a woman employee that she would not advance because she did not "hunt, fish, or do other typically-male activities" and was not "a part of the boys club." . . . A male manager said "women weren't qualified to be managers because men had an extra rib." Women were referred to by demeaning names—such as "girls," "Janie Qs," and "housewives"—and with degrading language—such as "squatter" or "someone who squats to pee." One manager commented that the role of female assistant managers was to give women associates someone to discuss their periods with.

*Id.*

<sup>22</sup> *Dukes*, 131 S. Ct. at 2548.

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.<sup>23</sup>

In an attempt to meet the commonality requirement of Rule 23(a)(2), Dr. William Bielby testified for the plaintiffs as to the social frame of reference in which employment decisions were made at Wal-Mart.<sup>24</sup>

Dr. Bielby provided testimony regarding social framework analysis. Laurens Walker and John Monahan first introduced the term “social framework” in a law journal article in 1987.<sup>25</sup> According to these authors, in social framework testimony, “general research results are used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case.”<sup>26</sup> The purpose of this type of testimony is to help the fact-finder evaluate the specific facts in the context of the setting. The expert’s testimony may help to identify particular employment policies that may be susceptible to stereotyping and bias. “[T]he expert’s role [is] identifying particular policies and practices of the employer that might tend to make decisions susceptible to stereotyping and bias[.]” “Social framework expert testimony essentially uses general social science research to help explain why the law should be applied in a particular way to the facts of a particular case.”<sup>27</sup>

Social framework testimony is used in many employment discrimination cases.<sup>28</sup> This type of evidence can further understanding as to why an individual held a belief and then acted due to that belief.<sup>29</sup> Therefore, the purpose of Dr. Bielby’s testimony concerning social framework evidence was to try to show that the subjective decision-making policy could lead to stereotyping and bias. Dr. Bielby’s expert report stated:

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<sup>23</sup> FED. R. CIV. P. 23(a). Note that in addition to Rule 23(a), plaintiffs seeking class certification must also satisfy Rule 23(b). However, the Court did not address that since the commonality requirement at issue was under Rule 23(a)(2). Therefore, this article does not elaborate on Rule 23(b).

<sup>24</sup> *Dukes*, 131 S. Ct. at 2549.

<sup>25</sup> See Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 559 (1987).

<sup>26</sup> *Id.*

<sup>27</sup> Hart & Secunda, *supra* note 18, at 44.

<sup>28</sup> See *id.* at 41.

<sup>29</sup> See, e.g., *id.* at 49-50.

Centralized coordination, reinforced by a strong organizational culture, creates and sustains uniformity in personnel policy and practice throughout the organizational units of Wal-Mart. Subjective and discretionary features of the company's personnel policy and practice make decisions about compensation and promotion vulnerable to gender bias. Finally, I have concluded that there are significant deficiencies in the company's policies and practices for identifying and eliminating barriers to equal employment opportunity at Wal-Mart.<sup>30</sup>

Dr. Bielby's testimony relied on social science literature that discusses organizational practices that allow widespread stereotyping to occur. Such organizational practices include decision-making structures in which individual actors are allotted a great deal of leeway, increasing the subjectivity of the decision. Dr. Bielby's testimony attempted to establish that the freedom given to individual supervisors resulted in a subjective decision-making process and ultimately was the proposed question of fact common to the class to satisfy Rule 23(a)(2).

Even though the district court and the Ninth Circuit agreed that this testimony was enough to establish a common question, the Supreme Court, in a 5-4 split, disagreed, finding that the requirements of Rule 23 were not met, noting that the plaintiffs did not show commonality under Rule 23(a)(2):

[The plaintiffs'] claims must depend upon 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.<sup>31</sup>

The Court cited *General Telephone Company of the Southwest v. Falcon*<sup>32</sup> for the proposition that there is a requirement to “probe behind the pleadings.”<sup>33</sup> In other words, simply alleging that a common question exists does not make it

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<sup>30</sup> WILLIAM T. BIELBY, EXPERT REPORT OF WILLIAM T. BIELBY, PH.D., BETTY DUKES, ET AL. V. WAL-MART STORES, INC. 5 (Feb. 3, 2003), available at [http://www2.law.columbia.edu/fagan/courses/law\\_socialscience/documents/Spring\\_2006/Class%2017-Gender%20Discrimination/BD\\_v\\_Walmart.pdf](http://www2.law.columbia.edu/fagan/courses/law_socialscience/documents/Spring_2006/Class%2017-Gender%20Discrimination/BD_v_Walmart.pdf).

<sup>31</sup> Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011).

<sup>32</sup> 457 U.S. 147 (1982).

<sup>33</sup> *Dukes*, 131 S. Ct. at 2551.

so. There has to be some substantive evidence to support a claim that a common question does exist, and if answered, would help resolve the legal issue for the entire class.<sup>34</sup> The Court decided,

Respondents have not identified a common mode of exercising discretion that pervades the entire company—aside from their reliance on Dr. Bielby’s social frameworks analysis that we have rejected. In a company of Wal-Mart’s size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction. Respondents attempt to make that showing by means of statistical and anecdotal evidence, but their evidence falls well short.<sup>35</sup>

Prior to *Dukes*, social framework testimony had been used in many types of discrimination cases,<sup>36</sup> and social science experts were key in providing evidence of commonality for class certification. The Supreme Court’s rejection of the social framework testimony was a big blow to the viability of class action discrimination suits.<sup>37</sup> After *Dukes*, courts are less likely to accept general evidence of bias as a basis for fulfilling the commonality requirement mandated in Rule 23(a)(2).<sup>38</sup>

This rejection also damages attempts to address what has been called structural or “second-generation” discrimination.<sup>39</sup> This type of discrimination refers to aspects of an organization’s structure that facilitate or enable unconscious discrimination. Given that many gender discrimination claims involve second-generation discrimination, the Court’s decision fundamentally changed the landscape for class action lawsuits involving gender discrimination claims:

[T]he Court clarified the scope of the class action “commonality” requirement. The majority found the *Dukes* evidence of a common

<sup>34</sup> See *id.* at 2553-57 for a complete discussion of the facts presented by the plaintiffs.

<sup>35</sup> *Id.* at 2554-55.

<sup>36</sup> Hart & Secunda, *supra* note 18, at 50.

<sup>37</sup> See Fisk & Chemerinsky, *supra* note 9, at 96-97; Allan G. King & Carole F. Wilder, *Dukes v. Wal-Mart: Some Closed Doors and Open Issues*, LITTLER REPORT (Littler Mendelson, P.C.), Feb. 2012, at 1, available at <http://www.littler.com/files/press/pdf/TheLittlerReportDukesVsWalMartSomeClosedDoorsAndOpenIssues.pdf>.

<sup>38</sup> King & Wilder, *supra* note 37, at 5.

<sup>39</sup> See Goltz et al., *supra* note 6, at 147-151; Sturm, *supra* note 6, at 468-475; Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 8 (2006).

policy—statistical evidence, anecdotal statements, and an expert’s testimony—unconvincing, and noted that commonality exists where class members have suffered the same injury and not just where they have suffered a violation under the same law, such as Title VII. . . . the end result of *Dukes* may be its chilling effect on plaintiffs even attempting to sue corporations the size of Wal-Mart.<sup>40</sup>

### C. Policy Implications of the *Dukes* Decision

Federal laws are often broad statements of national policy, particularly in the area of employment law, in part because Congress can be purposefully ambiguous on polarizing issues in order to get bills passed.<sup>41</sup> Even though Congress created an agency, such as the Equal Employment Opportunity Commission (EEOC), to help with interpretations of these laws for employers, the judiciary, and particularly the Supreme Court, regularly interprets employment discrimination laws.<sup>42</sup>

This policy-setting by the Supreme Court is apparent in the *Dukes* decision. The primary policy issue in class actions is balancing the access of individuals to courts and the need for efficiency in the court system with the need to protect large businesses from frivolous class action suits. Most class actions that are certified go directly to settlement, rather than to trial, because a company’s loss at the class certification stage is tantamount to a loss on the merits.<sup>43</sup> Presumably,

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<sup>40</sup> Kellogg, *supra* note 5, at 26, 29.

<sup>41</sup> Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency’s Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 52-53 (1995).

<sup>42</sup> *Id.* at 54.

<sup>43</sup> According to Edward Sherman:

The class action is one of the most controversial procedural devices in the American legal system. In the years since an expanded class action rule was adopted in 1966, class actions have grown in scope and number . . . Business critics see this as enabling “lawyers [to] seek out opportunities to bring these large-scale suits in the expectation that they will receive large fees, whether or not the suit has underlying merit and whether or not the individuals on whose behalf the suit is brought benefit significantly from its resolution.”

Edward F. Sherman, *Consumer Class Actions: Who are the Real Winners?*, 56 ME. L. REV. 223, 223 (2004) (citation omitted); accord Eisenberg, *supra* note 18, at 254 (“Perhaps the majority’s bastardization of *Watson* and heightened focus on the dissimilarities among plaintiffs working in many stores across the nation boils down to the Court’s perception that mega-class actions are too unwieldy for employers to defend.”) (alteration in original) (citation omitted).

plaintiffs' attorneys pursue certification in the hope that it is granted so the defendant has a greater incentive to settle the case. The judiciary properly checks these types of coercive actions. However, while courts have a vested interest in preventing abuse of class action certification, courts also have a vested interest in preventing employee discrimination by large corporations.<sup>44</sup>

In part, *Dukes* represents a public policy decision by the Court to restrict the access of individuals with limited means to the courts, instead favoring large businesses. The *Dukes* decision was critical to companies that could face the same kind of class-action suits filed by female employees. Thirty-four large corporations and other interested groups, including the U.S. Chamber of Commerce, filed Amicus Briefs in support of Wal-Mart in the case.<sup>45</sup>

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<sup>44</sup> Edward Sherman describes the consumer advocate's argument well:

Consumer advocates, on the other hand, see it as providing "a means of bringing a legal action on behalf of a large number of consumers who may be harmed when corporations engage in wrongful behavior" that can "succeed in eliminating inappropriate business practices that would otherwise impose unwarranted costs on individuals."

Sherman, *supra* note 43, at 223 (citation omitted); see Kellogg, *supra* note 5, at 24 ("This will change the way employment discrimination cases are handled in this country permanently because it changes the incentives for bringing them.") (citation omitted); Malveaux, *supra* note 8, at 37 ("The *Dukes* class certification standard jeopardizes potentially meritorious challenges to systemic discrimination.");

The Chamber of Commerce immediately issued a press release declaring it "the most important class action case in more than a decade." By contrast, the Christian Science Monitor called the case "a major blow to working women" and a "sign that some of the esteemed judges on our nation's highest court need a primer in how contemporary discrimination functions." In an interview on National Public Radio, a prominent plaintiff's lawyer called the case "a disaster not only for civil rights litigations but for anyone who wants to bring a class action," and commented "[t]he five-male majority decision today represents a jaw-dropping form of judicial activism."

Elizabeth Tippet, *Robbing a Barren Vault: The Implications of Dukes v. Wal-Mart for Cases Challenging Subjective Employment Practices*, 29 HOFSTRA. LAB. & EMP. L.J. 433, 433-34 (2012).

<sup>45</sup> The following entities filed amicus briefs: Intel Corporation, The Association of Global Automakers, Inc., The Chamber of Commerce of the United States of America, Washington Legal Foundation, Retail Litigation Center, Inc., COSTCO Wholesale Corporation, Securities Industry and Financial Markets Association, Altria Group, Inc., Bank of America Corporation, CIGNA Corporation, Del Monte Foods Company, General Electric Company, Hewlett-Packard Company, Kimberly-Clark Corporation, McKesson Corporation, Microsoft Corporation, NYSE Euronext, PepsiCo, Inc., Tyson Foods, Inc., UnitedHealth Group, Inc., United Parcel Service, Inc., Walgreen Co., the Williams Companies, Inc., International Association of Defense Counsel, Society for

After the decision, the U.S. Chamber of Commerce issued a press release stating that this case was “the most important class action case in more than a decade.”<sup>46</sup> Howard Erichson, a professor at Fordham Law School in New York, said, “[t]his was absolutely a victory for business interests.”<sup>47</sup>

The *Dukes* decision means that large class action suits will be more difficult for plaintiffs to certify because demonstrated commonality will be more difficult to obtain. Now, class action lawsuits with much smaller classes will be most viable because the commonality issue will be easier to meet.<sup>48</sup> As a result of *Dukes*, the best route is to file several class action lawsuits on behalf of the female employees of Wal-Mart by specific regions or specific groups of females who have a more specific common injury. These types of lawsuits are already in motion against Wal-Mart.<sup>49</sup>

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Human Resource Management and HR Policy Association, DRI-The Voice of the Defense Bar, Atlantic Legal Foundation and New England Legal Foundation, Pacific Legal Foundation, California Employment Law Council, and the Washington Legal Foundation. *See Walmart v. Dukes*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/wal-mart-v-dukes> (last visited Aug. 27, 2014); *see also* Adam Liptak, *Justices Rules for Wal-Mart in Class-Action Bias Case*, N.Y. TIMES (June 20, 2011), [http://www.nytimes.com/2011/06/21/business/21bizcourt.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/06/21/business/21bizcourt.html?pagewanted=all&_r=0) (Wal-Mart’s attorney Theodore J. Boutsros Jr. noting the ruling was “an extremely important victory not just for Wal-Mart but for all companies who do business in the United States, large and small, and their employees, too.”) The sentiment was echoed by Robin Conrad of the U.S. Chamber of Commerce’s litigation arm, stating, “[t]his is without a doubt the most important class-action case in more than a decade”); Barry Bagnato, *Wal-Mart Victory in the Supreme Court Case Seen as Big Win for U.S. Businesses*, CBS NEWS (June 20, 2011, 2:13 PM), [http://www.cbsnews.com/8301-503544\\_162-20072645-503544.htm](http://www.cbsnews.com/8301-503544_162-20072645-503544.htm) (CBS News Senior Legal Analyst Andrew Cohen stated, “[i]t’s a win for the company, but also for other big companies who face potential class action cases like this one[.]”).

<sup>46</sup> Press Release, U.S Chamber of Commerce, *U.S. Chamber Applauds Supreme Court Ruling in Wal-Mart v. Dukes* (June 19, 2011), *available at* <http://www.uschamber.com/press/releases/2011/june/us-chamber-applauds-supreme-court-ruling-wal-mart-v-dukes>.

<sup>47</sup> Cezary Podkul, *Supreme Court Decision Could Pose Major Obstacle for Future Class-Action Claims*, WASH. POST (June 20, 2011), [http://www.washingtonpost.com/business/economy/experts-supreme-court-decision-could-pose-major-obstacle-for-future-class-action-claims/2011/06/20/AGNd1LdH\\_story.html](http://www.washingtonpost.com/business/economy/experts-supreme-court-decision-could-pose-major-obstacle-for-future-class-action-claims/2011/06/20/AGNd1LdH_story.html).

<sup>48</sup> Kellogg, *supra* note 5, at 28 (“Attorneys will file smaller and more creatively constructed class action suits, but those employment cases that are too broad in scale and geography have definitely been buried for good.”).

<sup>49</sup> *See Case Finder for Wal-Mart v. Dukes*, COHEN MILSTEIN, <http://www.cohenmilstein.com/cases/99/wal-mart> (last visited Aug. 29, 2014) (showing the following actions: 4/16/2013 California Wal-Mart Women File for Class Certification in Federal Court; 2/2013 Wal-Mart Women Represented By Cohen Milstein Sellers & Toll PLLC File Class Action Lawsuit in Wisconsin Federal Court; 10/4/2012, Wal-Mart Women Plaintiffs File Class Action Lawsuit in Florida Federal Court; 10/2/2012, Wal-Mart Women File Class Action Lawsuit

Although each of these filings represents a relatively large group of plaintiffs, smaller class actions, such as these, may not be able to generate a large enough judgment to financially justify the filing of a class action. Instead of one large class action filed in one federal court with all the associated costs, there will be many smaller class actions in several different federal courts with costs, such as expert witnesses, in each court. If the basis for the claim of discrimination is the broad subjective corporate policy at the macro level, like the policy at Wal-Mart, then the testimony by those experts and others will essentially be the same in each court; it would be much more efficient to do this one time, instead of five or more times.<sup>50</sup>

In addition to affecting the size of class action suits, *Dukes* will make “pattern or practice” discrimination claims more difficult to certify. As one author stated, the *Dukes* decision “can be expected to reduce the prospects of success for disparate impact and ‘pattern or practice’ discrimination claims, as well as the accompanying settlement value of such claims.”<sup>51</sup> This raises the question of whether the pendulum has swung too far in favor of large employers.

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in Tennessee Federal Court; 9/22/2012, Federal Court Gives Green Light to *Dukes v. Wal-Mart Gender Discrimination Case*; 6/6/2012, Nearly 2,000 Wal-Mart Women File EEOC Discrimination Charges Against Retailer; 2/2/2012, More Than 500 Wal-Mart Women File EEOC Discrimination Charges; 2012, Wal-Mart Women Plaintiffs File Expanded Class Action Lawsuit in Texas Federal Court; 10/27/2011, *Dukes v. Wal-Mart Plaintiffs File Amended Class Action Lawsuit in California Federal Court*).

<sup>50</sup> For example, the cost of taking on Wal-Mart to prove pattern or practice discrimination will be about the same whether it is the entire corporation or smaller local regions. Usually, the case will be taken on a contingency fee basis, which means the law firm will bear all of the costs of the lawsuit, in hopes of winning a large settlement and recouping that money plus their contingency fee. It is a business decision for law firms, and with smaller groups, the cost/benefit for the law firms may mean that they are not willing to pursue those claims. Therefore, regardless of what the Court said about being able to pursue individual claims, those types of claims are probably not realistic considering the costs involved.

<sup>51</sup> Tippett, *supra* note 44, at 444 (citation omitted); see *Supreme Court Places High Hurdle for Women to Overcome Pay Discrimination*, NAT’L WOMEN’S L. CENTER (June 20, 2011), <http://www.nwlc.org/press-release/supreme-court-places-high-hurdle-women-overcome-pay-discrimination>. In a statement by National Women’s Law Center Co-President Marcia D. Greenberger stated:

Today the Supreme Court issued a devastating decision undoing the rights of millions of women across the country to come together and hold their employers accountable for their discriminatory practices. The Court has told employers that they can rest easy, knowing that the bigger and more powerful they are, the less likely their employees will be able to come together to secure their rights. Women now have fewer rights to challenge discrimination than before today’s ruling . . . Today’s ruling undermines the very purposes of the class



Defendants argue that not all, or even most, employers discriminate, and easy class certification is an incentive for plaintiffs to file frivolous lawsuits with the hope that they will be certified and the case settled by the defendant because of the cost of litigation.<sup>52</sup> An overly-easy certification process would appear to a defendant as a great injustice.

Plaintiffs argue that some employers do discriminate and there should be a cost-effective method for forcing changes in those employment practices:

Pattern or practice claims present several advantages for plaintiffs over individual disparate treatment claims. First, plaintiffs enjoy a more favorable allocation of burdens of proof and stronger presumptions. Second, the pattern or practice claim is better suited to addressing unconscious or hidden biases. Third, it provides savings in litigation costs to plaintiffs, defendants, and courts.

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action mechanism and is tantamount to closing the courthouse door on millions of women who cannot vindicate their rights one person at a time. The women of Wal-Mart—and women everywhere—will now face a far steeper road to challenge and correct pay and other forms of discrimination in the workplace.

*Id.*; Bagnato, *supra* note 45 (“[T]he justices have delivered a huge victory to businesses trying to fend off costly class action lawsuit filed by employees.”); Greg Stohr, *Wal-Mart Class-Action Ruling Gives Employers Shield from High-Dollar Suits*, BLOOMBERG (June 20, 2011, 11:01 PM), <http://www.bloomberg.com/news/2011-06-21/wal-mart-ruling-gives-employers-shield-from-high-dollar-suits.html> (“The U.S. Supreme Court gave the country’s largest companies a new shield from multibillion-dollar lawsuits, as the justices rejected a bid to sue Wal-Mart Stores Inc. (WMT) on behalf of more than a million female workers.”);

You’ve heard about firms that are too big to fail. Now the Supreme Court has declared that some companies are too big to be sued for discrimination. . . . Given the current court’s enthusiastic deference to corporations, most observers expected Monday’s ruling. Still, the facts of the case were stark enough to create uncertainty.

Michelle Goldberg, *Women Lose in Walmart Suit Ruling*, DAILY BEAST (June 20, 2011 9:06 PM), <http://www.thedailybeast.com/articles/2011/06/20/walmart-discrimination-suit-supreme-court-ruling-hurts-all-women.html>; Lyle Denniston, *Opinion Analysis: Wal-Mart’s Two Messages*, SCOTUSBLOG (June 20, 2011 2:02 PM), <http://www.scotusblog.com/2011/06/opinion-analysis-wal-marts-two-messages/> (“For large companies in general, the ruling in *Wal-Mart Stores v. Dukes, et al.* (10-277) offered a second message: the bigger the company, the more varied and decentralized its job practices, the less likely it will have to face a class-action claim.”).

<sup>52</sup> See, e.g., Charles Silver, *“We’re Scared To Death”: Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1357-59 (2003).

Fourth, courts have greater flexibility at the remedial phase once a pattern or practice has been demonstrated. Finally, plaintiffs can seek broader discovery and relief by asserting a pattern or practice claim rather than an individual disparate treatment claim.<sup>53</sup>

Regardless, it appears that both defendants and plaintiffs can save costs in a class action lawsuit as compared with pursuing several individual lawsuits:

Litigating a case as a class action can provide savings to defendants, plaintiffs, and courts. For plaintiffs, bringing an action together as a class can reduce the information costs of bringing suit. Instead of hundreds or thousands of individual lawsuits all seeking similar information from the defendant in discovery, a class only needs to depose each witness once, pay once for counsel to review deposition transcripts and issue discovery requests, and can pay the associated costs jointly. It also may be the only way for many employees with smaller claims and limited resources to challenge systemic discrimination.<sup>54</sup>

While it is true that class certification is an incentive for the defendant to settle the claim, even claims that may be questionable, it is also true that a loss by the plaintiffs at the certification stage provides a great disincentive for a defendant to change its behavior. Making certification more difficult may lull employers into a false sense of security and cause them to feel as if key structural changes are unnecessary. There must be a balance between these two interests.

However, rather than achieving a balance, *Dukes* made equal rights second to the protection of business interests. *Dukes* forces us to ask what responsibility, if any, employers should take for gender stereotypes and biases that pervade American culture when those stereotypes and biases enter the workplace.<sup>55</sup>

## II. IMPLICATIONS OF *DUKES* FOR ADDRESSING SECOND-GENERATION DISCRIMINATION

*Dukes* fundamentally changed how courts address second-generation discrimination, which tends to be more built into societal structures and less

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<sup>53</sup> Angela D. Morrison, *Duke-ing Out Pattern Or Practice After Wal-Mart: The EEOC As Fist*, 63 AM. U. L. REV. 87, 94 (2013).

<sup>54</sup> *Id.* at 100-101 (internal citations omitted).

<sup>55</sup> Tippet, *supra* note 44, at 434 (citing Melissa Hart, *Learning from Wal-Mart 2-3* (U. COLO. L. SCH. LEGAL STUD. RES. PAPER SERIES, Working Paper No. 06-36, 2006)).

obvious than first-generation discrimination, which is more easily proven in courts.

First-generation discrimination involves easily recognizable, blatant discrimination, such as deliberate exclusion based on gender. First-generation discrimination cases deal mostly with proving specific facts that identify a form of discrimination generally accepted as violating the law.<sup>56</sup> “Employers handled first generation discrimination by putting policies and procedures in place that clearly stated that various forms of actual discrimination were prohibited.”<sup>57</sup> In fact, Justice Scalia referred to Wal-Mart’s first-generation discrimination policy.<sup>58</sup>

Second-generation discrimination is less blatant. Susan Sturm initially coined the phrase,<sup>59</sup> observing:

[T]he “wrong” of second generation discrimination cannot be reduced to a single, universal, or simple theory of discrimination. Second generation discrimination does not evoke the first generation’s clear and vivid moral imagery—the exclusionary sign on the door or the fire hose directed at schoolchildren. Instead, the applicable normative theories are plural, subtle, and, not surprisingly, more complex.<sup>60</sup>

Second-generation discrimination is subtler and involves patterns of interaction that exclude certain groups over time. Furthermore, second-generation discrimination undermines the stated end-goals of company policies created to combat its more blatant predecessor, first-generation discrimination. Second-generation discrimination is structural, situational, and hard to identify. Behaviors that form an accepted practice in workplace culture that may lead to biased results over time are classic examples of second-generation discrimination.<sup>61</sup>

Second-generation discrimination is ongoing in our society, existing along with the more blatant first-generation discrimination. To address it, courts can simply admit relevant second-generation discrimination evidence.

<sup>56</sup> Sturm, *supra* note 6, at 465-68.

<sup>57</sup> See Goltz et al., *supra* note 6, at 148; see also Sturm, *supra* note 6, at 467-68; Susan Bisom-Rapp, *Discerning Form from Substance: Understanding Employer Litigation Prevention Strategies*, 3 EMP. RTS. & EMP. POL’Y J. 1, 3-4 (1999).

<sup>58</sup> See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553 (2011).

<sup>59</sup> Sturm, *supra* note 6, at 460.

<sup>60</sup> *Id.* at 473.

<sup>61</sup> See *id.*; see also Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 96-99 (2003); Bagenstos, *supra* note 39, at 2; Goltz et al., *supra* note 6, at 148-51.

Because of the amorphous nature of second-generation discrimination, however, it is difficult to produce the “correct” type of evidence when the courts follow rules developed from first-generation discrimination cases.<sup>62</sup> To more adequately consider second-generation discrimination, the courts need to allow for different types of evidence.

Unconscious biases “sneak up” on a decision maker. They affect perceptions and evaluations of an employee in innumerable encounters that occur well before any discrete moment of work-assignment, promotion, or discharge. By the time the manager actually makes such a decision, the die may have already been cast by the earlier, biased perceptions. At that point, a supervisor—unaware of the degree to which the inputs to her decision are biased—can believe quite sincerely that she is making a “neutral” decision “on the merits.”<sup>63</sup>

The difficulty is coming up with specific evidence when the environment the discrimination is allowed to exist in is very complex and subtle.<sup>64</sup> The lack of equal treatment experienced in second-generation discrimination is not a discrete, intentional act, but is based on assumptions derived from membership in a certain group—such as women—and it is not consciously motivated. For example, when a person walks into an auto repair shop to make an appointment and sees five males and one female, that person may be more likely to walk up to the female to make the appointment (both males and females will do this), because females are usually receptionists and not mechanics.<sup>65</sup> The person who assumes the female is

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<sup>62</sup> For a complete discussion *see* Sturm, *supra* note 6, at 554; Goltz et al, *supra* note 6, at 148-49.

<sup>63</sup> Bagenstos, *supra* note 39, at 8 (citations omitted).

<sup>64</sup> *See generally* Goltz et al., *supra* note 6, at 149.

<sup>65</sup> The U.S. Department of Labor more fully describes the workplace percentage breakdowns:

The median percentage of women in craft jobs is 3.9 percent and in operative jobs is 7.8 percent. As an example of the relative underrepresentation of women in craft jobs in the electrical power generation, transmission, and distribution industry, the industry has 24.8 percent female employees and, of all craftworkers in the industry, 2.9 percent are women. Similarly, the building material and supplies dealers industry has 37.1 percent female employees and, of all operatives in the industry, 11.0 percent are women.

BLISS CARTWRIGHT, PATRICK RONALD EDWARDS, & QI WANG, JOB AND INDUSTRY GENDER SEGREGATION: NAICS CATEGORIES AND EEO-1 JOB GROUPS, (U.S. Dept. of Lab. 2011), available at <http://www.bls.gov/opub/mlr/2011/11/art3full.pdf>.

the receptionist is not consciously discriminating, but instead is acting on an assumption that is the result of cultural experience since receptionists are usually females and mechanics are usually males. This is an example of unconscious bias that could have been part of Wal-Mart's managers' decision-making when they followed a policy with undefined criteria in regard to promotions and pay increases. This type of bias cannot be captured when courts insist on clear evidence of bias in the specific decision that was made.

In *Dukes*, the majority decision wanted to have the first-generation discrimination-type evidence. However, Justice Ginsburg's dissent demonstrates a better understanding of the difference between first-generation and second-generation discrimination, and its amorphous nature:

The District Court's identification of a common question, whether Wal-Mart's pay and promotions policies gave rise to unlawful discrimination, was hardly infirm. The practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects. Managers, like all humankind, may be prey to biases of which they are unaware. The risk of discrimination is heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes. . . . It is hardly surprising that for many managers, the ideal candidate was someone with characteristics similar to their own.<sup>66</sup>

The *Dukes* majority perpetuates a legal system that deals poorly with second-generation discrimination. Justice Scalia's opinion reveals the Court's unfamiliarity with second-generation discrimination questions: according to the

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<sup>66</sup> Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2564 (2011) (Ginsburg, J., concurring in part and dissenting in part). Justice Ginsburg describes further:

We have held that "discretionary employment practices" can give rise to Title VII claims, not only when such practices are motivated by discriminatory intent but also when they produce discriminatory results. . . . Aware of "the problem of subconscious stereotypes and prejudices," we held that the employer's "undisciplined system of subjective decisionmaking" was an "employment practic[e]" that "may be analyzed under the disparate impact approach." (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988, 991 (1988)).

*Id.* at 2564-65 (Ginsburg, J., concurring in part and dissenting in part) (citations omitted).

opinion, because no first-generation questions exist, there is very little, if any, evidence of gender discrimination.<sup>67</sup>

Even though no specific U.S. Supreme Court case has addressed second-generation discrimination, one case provided a broad interpretation of the application of Title VII using a type of analysis that could have been utilized in *Dukes*. In *Oncale v. Sundowner Offshore Services, Inc.*, the first male-on-male sexual harassment case, the district court held that Mr. Oncale had no cause of action and granted summary judgment to Sundowner.<sup>68</sup> Ultimately, the Supreme Court reversed, stating:

Title VII of the Civil Rights Act of 1964 provides, in relevant part, that “[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.” We have held that this not only covers “terms” and “conditions” in the narrow contractual sense, but “evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.”<sup>69</sup>

Even though the case involved male-on-male sexual harassment in the workplace, the Court went on to state:

[A]ssuredly [this was] not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits “discriminat[ion] . . . because of . . . sex” in the “terms” or “conditions” of employment.<sup>70</sup>

The Court clearly found that it has the power to interpret the law as long as it falls within the purpose of the statute.<sup>71</sup> In this circumstance, the statute’s purpose was to prohibit sexual discrimination during employment.<sup>72</sup> In fact,

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<sup>67</sup> *Id.* at 2555.

<sup>68</sup> 523 U.S. 75, 77 (1998).

<sup>69</sup> *Id.* at 78 (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)) (alteration and omission in original).

<sup>70</sup> *Id.* at 79 (alteration and omissions in original).

<sup>71</sup> *See id.* at 81.

<sup>72</sup> *See id.*

Justice Scalia (who wrote the majority opinions in both *Dukes* and *Oncale*) said that statutes may be open to interpretation when the interpretation is in sync with the evil that Congress intended to prevent.<sup>73</sup> The Court could have applied this principle in *Dukes* because gender discrimination is an evil that Congress intended to prevent with Title VII. In *Oncale*, the Court did not “legislate” some new social policy; instead, the Court simply extended an existing rule of law to a new circumstance. This type of reasoning could have been used in *Dukes*.

Similarly, *Watson v. Fort Worth Bank Trust* addresses a subjective decision-making policy that could have resulted in gender discrimination, even though it did not deal with certification of a class action.<sup>74</sup> In *Watson*, the Court first recognized that courts must continue to understand that discrimination can be structural in nature.<sup>75</sup> Fort Worth Bank & Trust, which employed eighty individuals, had not developed precise and formal criteria for evaluating candidates for certain positions. The plaintiff, Clara Watson, a black female bank teller, applied for supervisory positions at the bank four times. In each instance, she was passed over in favor of a white applicant. All the supervisors involved in denying Watson the four promotions at issue were white. Because no formal criteria were used in the decision-making process, the decision makers relied on the subjective judgment of supervisors who were acquainted with the candidates and with the nature of the jobs to be filled.<sup>76</sup>

The Court’s analytic framework in *Watson* is directly transferrable to cases concerning sexual discrimination. The Court recognized that systemic factors in the decision-making process could result in discrimination, and, therefore, there was no need for specific evidence of discrimination. In *Watson*, the Court recognized that disparate impact analysis can be applied to subjective employment practices, including “an employer’s undisciplined system of subjective decisionmaking,”<sup>77</sup> similar to Wal-Mart’s policy in *Dukes*.

The *Watson* Court noted that the practice of delegating subjective decision-making authority was as susceptible to disparate impact analysis as an objective practice. *Watson* supports the argument that systemic factors in the decision-making process could result in discrimination, thusly there is no need for specific evidence of discrimination:

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<sup>73</sup> *Oncale*, 523 U.S. at 79.

<sup>74</sup> *See* 487 U.S. 977 (1988).

<sup>75</sup> In fact, in *Dukes*, Justice Ginsburg cited *Watson* for this proposition. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2564-65 (2011) (Ginsburg, J., concurring in part and dissenting in part).

<sup>76</sup> *Watson*, 487 U.S. at 982-85.

<sup>77</sup> *Id.* at 990.

[T]he problem of subconscious stereotypes and prejudices would remain. In this case, for example, petitioner was apparently told at one point that the teller position was a big responsibility with “a lot of money . . . for blacks to have to count.” Such remarks may not prove discriminatory intent, but they do suggest a lingering form of the problem that Title VII was enacted to combat. If an employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply.<sup>78</sup>

The Court in *Watson* again noted that the policy of Title VII was to combat discrimination in whatever form it may exist, simply an extension of an existing rule.<sup>79</sup>

Both the district court and the Ninth Circuit in *Dukes* certified the class based on the social framework evidence. However, the Supreme Court rejected class certification through the use of social framework testimony as evidence of discrimination. The Court viewed the social framework testimony as inadequate because it did not make it clear that the stated policy of subjective decision-making by Wal-Mart managers applied to all the class members. This demonstrates that the Court wanted “smoking gun” evidence, only relevant to first-generation discrimination cases. Given how difficult it is to prove second-generation discrimination by pointing to the application of a single explicit company policy, the Court's decision could be viewed as a rejection of the attempt to use the court system to address structural discrimination.

This apparent rejection by the Court does not reflect an awareness of the type of discrimination that is most prevalent today: second-generation discrimination. It also runs counter to the recent calls for structural change.<sup>80</sup> Effectively addressing second-generation discrimination requires a change from rules that focus on discrete events and actions to an approach that focuses on restructuring the entire workplace environment. This change in the type of evidence allowed in discrimination cases does not create a new policy; it simply changes what type of evidence is acceptable to prove discrimination. *Dukes* provided the opportunity to design a framework to address second-generation discrimination, but the Supreme Court failed to take advantage of that

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<sup>78</sup> *Id.* at 990-91.

<sup>79</sup> *Id.*

<sup>80</sup> *See, e.g.,* Goltz et al., *supra* note 6, at 185-88; *see also* Sturm, *supra* note 6, at 475-489; Green, *supra* note 61, at 147-48.



opportunity. Instead, *Dukes* continued a long tradition of courts failing to provide proper remedies for second-generation discrimination.

Alternatively, the Equal Employment Opportunity Commission (EEOC) could address this problem. The EEOC can file a class action lawsuit on behalf of plaintiffs without certification under Rule 23. Although the EEOC may provide an alternative to a traditional class action lawsuit, there are several reasons why it should not be the only option for recourse.

First, some cases may be better suited to the EEOC versus the traditional lawsuit. In the traditional class action lawsuit, the plaintiffs initiate the lawsuit. Comparatively, the EEOC process requires the plaintiffs to file a complaint with the EEOC. A complaint will only proceed if enough complaints are filed against a given employer, as determined by the EEOC. There is no way a plaintiff can “force” the agency to make that decision, it is up to the agency’s discretion.<sup>81</sup>

There are some other problems with the EEOC filing claims. As Angela Morrison points out, despite the investigative and litigation power of the EEOC, some courts have put limits on this power:

This treatment is demonstrated by recent decisions that dismiss the EEOC's pattern or practice claim and by decisions that significantly limit the EEOC's claim in terms of its scope or for whom the EEOC can seek relief. For example, some courts have equated the EEOC's right to seek relief to that of the individuals for whom the EEOC seeks the relief. In such instances, courts have held that because individuals must file their charges of discrimination within 180 days of the discriminatory act, the EEOC cannot seek relief for individuals against whom the discrimination occurred more than 180 days prior to the filing of the charge that triggered the EEOC's investigation.<sup>82</sup>

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<sup>81</sup> The following EEOC instruction indicates the agency’s broad discretion:

EEOC files employment discrimination lawsuits in select cases. When deciding whether to file a lawsuit, we consider several factors, including the seriousness of the violation, the type of legal issues in the case, and the wider impact the lawsuit could have on our efforts to combat workplace discrimination. Because of limited resources, EEOC cannot file a lawsuit in every case where discrimination has been found.

*Filing a Lawsuit*, U.S. EQUAL OPPORTUNITY EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/employees/lawsuit.cfm> (last visited Aug. 27, 2014).

<sup>82</sup> Morrison, *supra* note 53, at 128 (citations omitted).

In addition to that limitation, some courts have placed additional burdens on the EEOC. For example:

Some courts...have found that the EEOC may only bring a pattern or practice claim pursuant to section 707, and that the EEOC is therefore limited to declaratory, injunctive, and other equitable relief if it establishes a pattern or practice. To seek individual relief under this view, the EEOC must allege individual discrimination claims under section 706 and prove disparate treatment as to each aggrieved individual...the Eighth Circuit in *EEOC v. CRST Van Expedited, Inc.*, have found that to seek individual relief for persons harmed by the pattern or practice, the EEOC must have given the employer an opportunity to conciliate each aggrieved person's claim during the administrative processing.<sup>83</sup>

In another article, Elizabeth Tippett points to other issues with this type of claim and the EEOC:

My sample produced only four lawsuits brought by the EEOC. By contrast, the EEOC brought or intervened in 1,461 Title VII lawsuits between 2005 and 2010. The scarcity of EEOC claims challenging subjective practices suggests that such practices are not considered a priority by the Commission.<sup>84</sup>

However, she did go on to say, “[t]he Commission therefore may come under increasing pressure to pursue claims involving subjective practices post-*Wal-Mart*.”<sup>85</sup>

In addition, as argued in *Second Generation Employment Discrimination: A Structural Approach*, the EEOC has problems dealing with second-generation discrimination claims. The EEOC will “pre-judge” cases without examining all the evidence, causing about half the cases to receive a “no cause” determination.<sup>86</sup> In addition, EEOC attorneys tend to take cases that are relatively uncontroversial in order to help their careers.<sup>87</sup> The most common problem is poor service and delays.<sup>88</sup> Researchers, such as Michael Selmi, find that EEOC staff attorneys are concerned with advancing their careers, which means that they prefer to take on

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<sup>83</sup> *Id.* at 129 (citations omitted).

<sup>84</sup> Tippett, *supra* note 44, at 457 (citations omitted).

<sup>85</sup> *Id.*

<sup>86</sup> See Goltz et al., *supra* note 6, at 161.

<sup>87</sup> *Id.* at 161-162.

<sup>88</sup> *Id.* at 175.

cases that are not very controversial and will have a high probability of success.<sup>89</sup> “In fact, Selmi concludes that the agency finds merit in ‘an extraordinarily low percentage of filed claims, brings very few cases,’ and often pursues small easy cases.”<sup>90</sup>

This is consistent with Susan Bisom-Rapp's observation:

An EEOC investigator is unlikely to look beyond the information provided by an employer if it appears to provide a legitimate, non-discriminatory reason for the disputed employment action. The incentives, in fact, cut against searching review. This is due in part to a proliferation of charges filed with the agency and the failure of agency resources to keep pace with demand. . . . Moreover, pressure to reduce the EEOC's infamous case backlog remains keen, with the agency proudly announcing recently that reforms in charge handling procedures slashed the inventory of pending cases in half.<sup>91</sup>

Therefore, even though the EEOC may be an alternative, the agency has a history of problems in terms of its effectiveness. For that reason, it makes sense to preserve the courts as the primary source for individuals filing complaints in regard to discrimination claims.

Because *Dukes* has made it more difficult to address what is known as second-generation discrimination, the next section provides a novel approach: “fraud-on-the-employment market,” analogous to the “fraud-on-the-market” concept used to certify classes in securities cases.

This would be a court-created concept to be brought to employment law from securities law. The fraud-on-the-market concept allows plaintiffs to prove that the harm they suffered in the trading of securities existed in the environment they were operating in, but does not require them to prove how they were specifically harmed. That rule moves the focus on the harm done from the micro level—how each individual was treated, to the macro level—the environment to which all individuals were subjected.

### III. A “FRAUD-ON-THE-MARKET” APPROACH TO CLASS CERTIFICATION

#### A. *Unresolved Issues Regarding Class Certification*

<sup>89</sup> See *id.* at 177-178 (citations omitted).

<sup>90</sup> *Id.* (citations omitted).

<sup>91</sup> Bisom-Rapp, *supra* note 57, at 36-37.

As discussed, the key question is how to treat aggregate proof when it is used to establish commonality.<sup>92</sup> Aggregate proof is evidence that ties the “members of the proposed class as a cohesive unit—as the victims of the same wrong under governing law, rather than a series of individualized wrongs ill-suited for class treatment.”<sup>93</sup> As discussed, this was the problem the *Dukes* majority had with the class certification—determining whether all members of the proposed class suffered from a common wrong.

The courts find themselves in the position of having to respond to continuously changing societal conditions, such as evolving social norms and emerging scientific research, or just changed circumstances in society generally. In some ways, *Dukes* illustrates some of these changes in society because today the largest employers employ thousands of people.<sup>94</sup> The Court in *Dukes* was concerned about the large number of potential claims, which created the concern that each one of those plaintiffs might not have been a victim of the same wrong.<sup>95</sup>

Given that now many very large employers exist, underlying legal principles must be revisited. Courts also need to recognize that a larger proportion of women today are employed in areas other than the “traditional female jobs” as compared with the past.<sup>96</sup> This is particularly important given that discrimination can easily occur in jobs in which the employee’s gender is contrary to traditional sex-roles.<sup>97</sup> Research indicates that women are consistently underrated when doing what is considered to be men’s work.<sup>98</sup> Further, only 14.6% of executive

<sup>92</sup> For a complete discussion of aggregate proof, see Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 116 (2009).

<sup>93</sup> *Id.* at 101-02.

<sup>94</sup> Alexander E.M. Hess, *The 10 Largest Employers in America*, USA TODAY (Aug. 22, 2013, 7:48 AM), <http://www.usatoday.com/story/money/business/2013/08/22/ten-largest-employers/2680249/> (“Each of America’s 10 largest employers has a workforce of more than 300,000 people.”).

<sup>95</sup> See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 (2011) (“Here respondents wish to sue about literally millions of employment decisions at once.”).

<sup>96</sup> See *More Women Taking on Traditional Male Jobs*, MSN TODAY (July 4, 2012), <http://video.today.msnbc.msn.com/today/48070192#48070192>; see also Robert Longley, *Many U.S. Jobs Have Become Less Male-Dominated*, ABOUT.COM (Apr. 2005), <http://usgovinfo.about.com/od/censusandstatistics/a/menwomenjobs.htm>.

<sup>97</sup> See Madeline E. Heilman & Alice H. Eagly, *Gender Stereotypes are Alive, Well, and Busy Producing Workplace Discrimination*, 1 INDUS. & ORGANIZATIONAL PSYCHOL. 393, 394-95 (2008).

<sup>98</sup> See Madeline E. Heilman et al., *Penalties for Success: Reactions to Women Who Succeed at Male Gender-Typed Tasks*, 89 J. OF APPLIED PSYCHOL. 416 (2004); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); VIRGINIA VALIAN, *WHY SO SLOW?: THE ADVANCEMENT OF WOMEN* (M.I.T. PRESS, 1998).

officer positions in Fortune 500 companies are held by women, and this percentage has failed to increase in recent years.<sup>99</sup> Therefore, courts need to consider not only the existence of more large companies, but also the greater incidence of women facing discrimination in male sex-typed jobs. The application of the legal doctrine needs to be reframed to take into account both of these social changes.

In *Dukes*, the plaintiffs claimed that Wal-Mart's policy at the national level created the basis for the same wrong because it functioned as a "conduit"<sup>100</sup> or "nexus"<sup>101</sup> for discrimination by delegating pay and promotion decisions to its local managers on "excessively subjective" terms.<sup>102</sup> Even though the district court and the appellate court agreed with that claim, the Supreme Court reversed. The Court indicated that they believed there was a fundamental problem with making Wal-Mart's policy at the national level a conduit for local management decisions.<sup>103</sup> Specifically, even though the national policy of subjective decision-making could have been responsible for the fact that some local managers discriminated on the basis of gender, the Court did not agree that the national policy necessarily meant that all managers discriminated based on gender.<sup>104</sup> For the *Dukes*' majority, it simply made no sense that a national policy statement would automatically mean that every manager, at every level would follow it:

To be sure, we have recognized that, "in appropriate cases," 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." But the recognition that this type of Title VII claim "can" exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common.<sup>105</sup>

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<sup>99</sup> *Statistical Overview of Women in the Workplace*, CATALYST, INC. (Mar. 3, 2014), <http://www.catalyst.org/knowledge/statistical-overview-women-workplace>.

<sup>100</sup> *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 145, 152 (N.D. Cal. 2004), *aff'd*, 509 F.3d 1168 (9th Cir. 2007), *aff'd en banc*, 603 F.3d 571 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (2011).

<sup>101</sup> *Id.* at 150.

<sup>102</sup> *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 613 (9th Cir. 2010) (en banc), *rev'd*, 131 S. Ct. 2541 (2011).

<sup>103</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554-55 (2011).

<sup>104</sup> *Id.* at 2554.

<sup>105</sup> *Id.*

Simply put, the Supreme Court did not think that there was a common question of fact to satisfy the requirement of Rule 23(a)(2).<sup>106</sup> The Court reasoned that even though Wal-Mart's policy of allowing local discretion may have allowed some managers to discriminate on the basis of gender, in many instances, the reason for promotion and pay decisions may not have been gender-based. Therefore, the Court decided that there was no common wrong.<sup>107</sup>

### B. *Fraud-On-The-Market Doctrine*

The crucial question in class certification is commonality: whether the members of the proposed class are the victims of the same wrong and therefore, amenable to unitary adjudication. Given the Court's rejection of aggregate proof in *Dukes*, an analogous argument from securities fraud cases can be used to frame a discussion of commonality in employment discrimination cases. The relationship between class certification in securities fraud cases and those in discrimination cases was pointed out by Richard A. Nagareda, who noted that "the identification of the common wrong in both securities fraud class actions and pattern-or-practice employment discrimination class actions turns upon the triggering of a doctrine—respectively, fraud-on-the-market and an inference of discriminatory intent—that then situates class members as the victims of the same wrong."<sup>108</sup> This is not a novel observation, but one that was also made by Justice Scalia in *Dukes*:

Perhaps the most common example of considering a merits question at the Rule 23 stage arises in class-action suits for securities fraud. Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members" would often be an insuperable barrier to class certification, since each of the individual investors would have to prove reliance on the alleged misrepresentation. But the problem dissipates if the plaintiffs can establish the applicability of the so-called "fraud on the market" presumption, which says that all traders who purchase stock in an efficient market are presumed to have relied on the accuracy of a company's public statements.<sup>109</sup>

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<sup>106</sup> *Id.* at 2556-57.

<sup>107</sup> *Id.* at 2557.

<sup>108</sup> Nagareda, *supra* note 92, at 117-118.

<sup>109</sup> *Dukes*, 131 S. Ct. at 2552 n.6.

In *Dukes*, the “insuperable barrier to class certification” was the attempt to show that each female was specifically discriminated against due to the company policy of allowing local managers discretion. The problem in *Dukes* would dissipate if the plaintiffs could show a “fraud in employment” presumption.

In securities fraud cases, a plaintiff must show she relied on a misstatement of fact by the defendant.<sup>110</sup> In *Basic, Inc. v. Levinson*, the Supreme Court had to decide whether to accept a presumption of relying on the integrity of the marketplace.<sup>111</sup> In *Basic*, the officers and directors of Basic, Inc. had not been forthcoming about merger negotiations, and some investors traded on Basic shares of stock without full information.<sup>112</sup> For two years prior to a merger with Combustion Engineering, Inc., Basic made three public statements denying any merger talks were taking place or that they knew of any corporate developments that would account for the heavy trading in their stock.<sup>113</sup> Several shareholders sold their shares prior to the announcement of the merger.<sup>114</sup> These shareholders subsequently filed a class action suit against Basic and its directors, claiming a violation of Section 10(b) of the Securities Exchange Act of 1934 Act and of Rule 10b-5 due to the misleading public statements.<sup>115</sup>

The district court assumed a presumption of reliance by the investor class upon Basic’s public statements and concluded that the lack of disclosure of the merger talks had an effect on the market.<sup>116</sup> That effect-on-the-market was the basis for the common questions of fact or law and predominated over particular

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<sup>110</sup> To avoid the costs that would occur with individual cases:

[C]lass action plaintiffs began advocating a form of reliance defined by reliance on the integrity of the market price, rather than actual reliance on a misstatement or omission. This theory became known as fraud on the market, and it applies . . . because “most publicly available information is reflected in market price, an investor’s reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action.”

Andrew M. Erdlen, *Timing is Everything: Markets, Loss, and Proof of Causation in Fraud on the Market Actions*, 80 FORDHAM L. REV. 877, 894 (2011) (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 247 (1988)).

<sup>111</sup> *Basic*, 485 U.S. at 226 (“We must also determine whether a person who traded a corporation’s shares on a securities exchange after the issuance of a materially misleading statement by the corporation may invoke a rebuttable presumption that, in trading, he relied on the integrity of the price set by the market.”).

<sup>112</sup> *Id.* at 227-30.

<sup>113</sup> *Id.* at 227.

<sup>114</sup> *Id.* at 228.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

questions pertaining to specifically why individual plaintiffs sold their shares.<sup>117</sup> The Sixth Circuit affirmed the class action, but remanded on other grounds.<sup>118</sup> The Supreme Court granted certiorari to resolve a split among the circuit courts as to whether preliminary merger discussions were material and whether the lower courts applied the presumption of reliance properly instead of “requiring each class member to show direct reliance on Basic’s statements.”<sup>119</sup> The Court affirmed, stating:

Presumptions typically serve to assist courts in managing circumstances in which direct proof, for one reason or another, is rendered difficult. The courts below accepted a presumption, created by the fraud-on-the-market theory and subject to rebuttal by petitioners, that persons who had traded Basic shares had done so in reliance on the integrity of the price set by the market, but because of petitioners’ material misrepresentations that price had been fraudulently depressed. Requiring a plaintiff to show a speculative state of facts, i.e., how he would have acted if omitted material information had been disclosed, or if the misrepresentation had not been made, would place an unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff who has traded on an impersonal market.<sup>120</sup>

The presumption of reliance that the Court upheld is now known as fraud-on-the-market (FOTM). Logically, in a modern and transparent securities market, the available public information determines the price of stock and that information determines the market price regardless of whether an individual purchaser or seller actually relies on the information.<sup>121</sup> Therefore, proof of actual reliance is not needed.

The FOTM presumption makes sense from a factual point of view because the price of stock is determined by publicly available information. It also makes sense from a procedural point of view; to require proof of individualized reliance by each member of the class would have, in all likelihood, prevented those injured from proceeding with a class action suit because the individual issues would have overwhelmed the common issue. In effect, without this presumption the persons injured would have to show the impossible—that each one relied on the lack of

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<sup>117</sup> *Levinson v. Basic, Inc.*, No. C79-1220, 1984 WL 1152, at \*1 (N.D. Ohio Aug. 3, 1984), *rev’d*, 786 F.2d 741 (6th Cir. 1984), *vacated*, 485 U.S. 224 (1988).

<sup>118</sup> *Levinson v. Basic Inc.*, 786 F.2d 741, 751 (6th Cir. 1984), *vacated*, 485 U.S. 224 (1988).

<sup>119</sup> *Basic*, 485 U.S. at 230.

<sup>120</sup> *Id.* at 245 (citations omitted).

<sup>121</sup> *See id.* at 241-42.



the possible merger information. Essentially, the Court believed that such a presumption, besides providing judicial economy, was a fairness and public policy issue.<sup>122</sup> FOTM moves the wrong from the micro level of each individual investor having to prove that she was harmed by the lack of information, to the macro level, where the wrong is the environment that allows trading to occur without reflecting all of the facts. Therefore, the assessment of whether the wrong occurred is removed from the micro to the macro level—the trading environment.

The “individual issues overwhelming the common issue” was the central problem in *Dukes* because the Court thought it would be too hard to prove why each individual pay or promotion decision was made by the various local managers.<sup>123</sup> This is similar to the buying or selling of stock in *Basic* because each buyer or seller may have had a different reason for engaging in the stock transaction. In response, the Court stated that though there may have been a variety of reasons for the stock transactions, the publicly available information still set the market price.<sup>124</sup> Had the merger negotiation been public, the price for the shares of stock would have been different, arguably. The fact that the price did not reflect that information was the common injury to all who traded in the stock regardless of any other reasons for the transaction.<sup>125</sup>

A similar argument can be made for “fraud-on-the-employment market” (FOEM). If at the time the plaintiffs took their positions with Wal-Mart, the discretionary power of the local managers to make promotion and pay decisions with no defined criteria was not disclosed, then regardless of why the supervisors made the employment decisions for each employee, the common injury would be that at the time they agreed to take the position with Wal-Mart, they did not have all the relevant information about employment with Wal-Mart.

In *Basic*, the relevant information needed to be disclosed prior to the investors trading in those shares of stock. Learning about the information after they traded was considered to be too late, since the trading decision had already been made. However, the Court in *Basic* allowed a rebuttable presumption in regards to those who may have not only relied on the market price but also knew about the possible merger.<sup>126</sup> If an employer fully disclosed the promotion, pay increase, and other employment-related procedures to some of the potential employees prior to them taking the job, but not to all, then that disclosure would trigger the rebuttable presumption in regard to those employees.

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<sup>122</sup> *Id.* at 245.

<sup>123</sup> *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2555 (2011).

<sup>124</sup> *Basic*, 485 U.S. at 242.

<sup>125</sup> *Id.*

<sup>126</sup> *See id.* at 245 (discussing “fraud-on-the-market theory and subject to rebuttal”).

However, that would not affect the certification of the class because employees only need to prove that the company not have a standard procedure of full disclosure of relevant information about promotions, pay increases, and other important employment information before offering the position. As the Court later stated in *Basic*:

“Reliance,” we have explained, “is an essential element of the § 10(b) private cause of action” because “proof of reliance ensures that there is a proper connection between a defendant's misrepresentation and a plaintiff's injury.” “The traditional (and most direct) way” for a plaintiff to demonstrate reliance “is by showing that he was aware of a company's statement and engaged in a relevant transaction . . . based on that specific misrepresentation.” We have recognized, however, that requiring proof of direct reliance “would place an unnecessarily unrealistic evidentiary burden on [a] plaintiff who has traded on an impersonal market.” Accordingly, in *Basic* the Court endorsed the “fraud-on-the-market” theory, which permits certain Rule 10b-5 plaintiffs to invoke a rebuttable presumption of reliance on material misrepresentations aired to the general public.<sup>127</sup>

Lack of important information distorts the employment market. As in *Basic*, the lack of information distorts the securities market in which one is trading. Providing that information in an employee handbook or employee orientation after taking the job would not be sufficient because the person already changed her position, by taking the job, without full disclosure of all the relevant information. In order to certify the class, as in *Basic*, the plaintiff could be required to prove that material information was not publicly available, and that lack of information injured those who traded in that security. At trial, the defendant could then try to prove that some of those who traded actually did have knowledge of the information. Moving the common harm up to the macro level in order to certify the class removes the focus on the micro level, in regard to those who might not have been injured by the lack of information, but allows the defendant to rebut the presumption when possible.

In *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, the Court reaffirmed its decision in *Basic* with regard to fraud-on-the-market, including the issue of materiality of the missing information.<sup>128</sup> Connecticut Retirement Plans

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<sup>127</sup> *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1192 (2013) (citations omitted).

<sup>128</sup> *Id.* at 1203-04.

and Trust Funds filed a securities-fraud complaint against a biotechnology company, Amgen, Inc.; Connecticut sought class-action certification under Rule 23 and invoked the FOTM presumption for certification. In the case:

Amgen contend[ed] that to meet the predominance requirement, Connecticut Retirement must do more than plausibly *plead* that Amgen's alleged misrepresentations and misleading omissions materially affected Amgen's stock price. According to Amgen, certification must be denied unless Connecticut Retirement *proves* materiality, for immaterial misrepresentations or omissions, by definition, would have no impact on Amgen's stock price in an efficient market.<sup>129</sup>

The Court stated:

While Connecticut Retirement certainly must prove materiality to prevail on the merits, we hold that such proof is not a prerequisite to class certification. Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class. Because materiality is judged according to an objective standard, the materiality of Amgen's alleged misrepresentations and omissions is a question common to all members of the class Connecticut Retirement would represent.<sup>130</sup>

The Court went on:

Contrary to Amgen's argument, the key question in this case is not whether materiality is an essential predicate of the fraud-on-the-market theory; indisputably it is. Instead, the pivotal inquiry is whether proof of materiality is needed to ensure that the *questions* of law or fact common to the class will “predominate over any questions affecting only individual members” as the litigation progresses. For two reasons, the answer to this question is clearly “no”. . . . Therefore, under the plain language of Rule 23(b)(3), plaintiffs are not required to prove materiality at the class-certification stage. In other words, they need not, at that threshold,

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<sup>129</sup> *Id.* at 1191 (emphases in original).

<sup>130</sup> *Id.* (emphasis in original).

prove that the predominating question will be answered in their favor.<sup>131</sup>

The FOTM presumption eliminates the requirement to look at each individual manager's pay or promotion decisions, much like *Basic* eliminated the requirement to look at each investment decision. As a consequence, the common question of fact is moved up to a different decision-making level and is shifted to the "buyer" of the job—it is at the point when the employee makes the decision to take a job without full knowledge about pay and promotion policies, and not at the point when the local managers are making their promotion or pay decisions. That would mean that in a case such as *Dukes*, the decision to take the job without all the relevant information is the question of fact common to all the employees. At that point, if there was not full disclosure of the employer's policies, then the potential employee could not make an informed decision of whether to take the job. Therefore, an employer must make sure important information about a job, including the policies for promotion and pay increases, is fully disclosed prior to offering that position to the person. Without that information, it would be the same reasoning as in *Basic*.

The *Basic* Court correctly stated that the presumption of reliance is a rebuttable presumption in regard to those investors who actually knew of the merger talks. Therefore, if the plaintiff actually knew of Wal-Mart's pay and promotion policy and still took the job, she would not have a claim. Similarly, the FOTM presumption can be rebutted if the defendant can persuade a court that a person did not rely on the market to purchase or sell because she had accurate information from another source.<sup>132</sup>

The Supreme Court most recently addressed the FOTM presumption in *Erica P. John Fund, Inc. v. Halliburton Company*.<sup>133</sup> In *Halliburton*, the Fifth Circuit upheld the trial court's decision to deny class certification under Rule 23(b)(3).<sup>134</sup> In a unanimous decision, the Supreme Court overruled the Fifth Circuit. The Supreme Court held that *Basic* properly dictated the outcome of the case because it "permit[ed] plaintiffs to invoke a rebuttable presumption of reliance based on . . . 'fraud-on-the-market' theory."<sup>135</sup> *Basic* also made clear that an omission may create FOTM, stating "[a]s we clarify today, materiality depends

<sup>131</sup> *Id.* at 1195-96 (emphasis in original).

<sup>132</sup> *Basic Inc. v. Levinson*, 485 U.S. 224, 249 (1988).

<sup>133</sup> 131 S. Ct. 2179 (2011).

<sup>134</sup> *Id.* at 2184. "A class action may be maintained if Rule 23(a) is satisfied and if ' . . . the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'" FED. R. CIV. P. 23(b)(3).

<sup>135</sup> *Halliburton*, 131 S. Ct. at 2185.

on the significance the reasonable investor would place on the withheld or misrepresented information.”<sup>136</sup>

Reliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury, because requiring specific evidence “would place an unnecessarily unrealistic evidentiary burden on the . . . plaintiff[.]”<sup>137</sup> As we saw in *Dukes*, that “unnecessarily unrealistic evidentiary burden” proved fatal to the plaintiffs’ case.

The FOEM approach would allow plaintiffs to establish a class without a discussion of the possible merits of each individual claimant, compared to *Dukes*, where class certification posed a problem. Under a FOEM approach, the courts would assess the characteristics of the employment market to determine whether the proposed employee class is relevantly common as to warrant class certification.<sup>138</sup>

### *C. Framing Discrimination Cases Using a Fraud on the Employment Market Doctrine*

In the future, when faced with cases like *Dukes* in which millions of individuals seek certification as a class, the courts should adopt the FOEM framework. This would resolve some of the class certification and structural discrimination issues that the court has wrestled with in the past.

As discussed, the size of the class in *Dukes* was a problem. The Court concluded that it was not possible for all members of the proposed class to have been injured by the discretionary powers of the local managers.

Assuming the same facts present in the *Dukes* case, in a world dictated by the FOEM framework, a potential injury would occur when a female applies for a job at an organization in which, prior to offering a job, the organization fails to provide full disclosure of the process used for promotions and other employment decisions. FOEM would be triggered by this lack of information like FOTM is triggered by the lack of information available in the market, such as a false statement or omission of a material term by the seller of the security. FOTM does not focus on what happens after the misinformation is communicated to the unwitting victim, but rather focuses on the sale or purchase of a security. The FOTM doctrine assumes that uncorrected fraud is embedded in the market price and all who traded during the relevant time period relied on the integrity of the market to determine the market price.

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<sup>136</sup> *Basic*, 485 U.S. at 240.

<sup>137</sup> *Id.* at 245 (citation omitted).

<sup>138</sup> For a discussion, see Nagareda *supra* note 92, at 164-165.

FOEM would rely on a similar line of reasoning. In other words, the women who are unaware that the company employs practices that increase the likelihood of discrimination, such as providing local managers the discretionary power to make promotion or pay increase decisions, could be class certified. Employees may, like traders, presume integrity in the current market price (in this case, the pay being offered for the job)—i.e., that it reflects unbiased job relevant factors only—as well as integrity in terms of promotion procedures.

Simply put, such information, had it been known, would stop a female from applying for and then accepting that job being that other jobs in the employment market would not have the same potential for gender discrimination.

In *Dukes*, Wal-Mart's corporate policy gave local managers discretion that could result in sexist pay and promotion decisions in part because of the lack of defined criteria. Because female job applicants were not aware of the extent of the managers' discretion, female applicants' and employees' perceptions of the employment opportunities available to women at Wal-Mart were unfairly distorted. The proposed employee class—females who wanted to be employed at Wal-Mart—presumably relied on the fraud when they applied for the job. By using the nondisclosure of the subjective decision-making policy as the basis for the common question, the aggregate proof problem disappears.

#### CONCLUSION

Some commenters believe that *Dukes* provides a shield for large companies from class action lawsuits that claim discrimination. They argue that there needs to be some protection for businesses from easy class certification that could be used to “blackmail” companies into a large settlement. Still others argue that carte blanche should not be given to potential plaintiffs, the plaintiffs should have the ability to bring discrimination lawsuits that directly reflect the type of discriminatory practices that are occurring in today's society. *Dukes* demonstrates a lack of understanding by the Court regarding the now-subtler acts of discrimination. The type of discrimination that remains and predominates today is more structural in nature: second-generation discrimination.

The holding in *Dukes* should be reexamined in light of second-generation discrimination. The general, holistic evidence provided by the plaintiffs in *Dukes* should be more seriously considered as a reason for certifying the class because second-generation discrimination resulting from a single identifiable practice is unlikely. Effectively addressing this type of discrimination requires a different approach as compared to the discrete-events-approach the courts found useful for addressing first-generation discrimination.

However, given the direction of the Court with regard to this type of evidence, courts, when determining class certification of some types of

discrimination cases, could establish a doctrine similar to the fraud-on-the-market doctrine found in securities fraud cases. This approach would move proof of the harm to the macro level, instead of the micro level, and would ultimately require organizations not only to have nondiscrimination policies in place, but also to effectively implement them.