NOTES & COMMENTS

More Decentralization, Less Liability: The Future of Systemic Disparate Treatment Claims in the Wake of *Wal-Mart v. Dukes*

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I. INTRODUCTION

What do 1.5 million women have in common? According to the Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes*,[1] very little. Despite allegations that Wal-Mart, one of the nation's largest retail corporations, engaged in a systematic pattern of discrimination resulting in the continuous marginalization of female employees, the Supreme Court reversed an order granting class certification to over 1.5 million female claimants.

Fifty-four-year old Wal-Mart greeter, Betty Dukes, had worked at the company for six years before realizing that she had not been given the same opportunities for promotion as her male colleagues.[2] Dukes was later demoted for misconduct after violating a store policy, an act

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1. 131 S. Ct. 2541 (2011).

2. Jeffrey Toobin, *Betty Dukes v. Wal-Mart*, NEW YORKER, June 20, 2011, http://www.newyorker.com/online/blogs/newsdesk/2011/06/betty-dukes-v-walmart.html.

she claimed was common practice among employees.[3] Believing that her demotion was motivated by prejudice, she filed suit against the company for discrimination under Title VII of the Civil Rights Act.[4] Once a part-time cashier earning minimum wage, Betty Dukes became the face of the largest gender discrimination class action lawsuit in this nation's history in a battle against the world's largest private employer.[5] Representing herself, and others similarly situated, Dukes alleged that Wal-Mart systemically perpetuates discrimination by paying its female employees less and giving them fewer promotions than men.[6] The fight for class certification that began over ten years ago finally came to an end, however, when Justice Scalia, along with the Court's more conservative justices, determined that the proposed class members had too little in common to meet the commonality requirement necessary for certification. While this result will surely have far-reaching consequences for future class action lawsuits, its effect on individual Title VII liability is also quite palpable.

Although the Supreme Court granted certiorari on the issue of class certification, it necessarily delved into the merits of the plaintiffs' cause of action and the sufficiency of the evidence presented. Consequently, its decision goes beyond the procedural requirements set forth in Rule 23 of the Federal Rules of Civil Procedure. It is a testament to the difficulty of future employment discrimination lawsuits for plaintiffs attempting to sue employers on a theory of systemic disparate treatment. The Court's skepticism of the *Dukes* plaintiffs' evidence indicates a willingness to give employers the benefit of the doubt absent overt discriminatory treatment.

In this Paper I focus on the effect that the Supreme Court's decision will have on plaintiffs asserting Title VII claims on an individual basis. The Court's holding undoubtedly speaks volumes on the future of class certification and the evidentiary burden required of potential class members. What is less certain, however, are the consequences it will have on employment discrimination claims as a whole.

In Part Two of this Note I discuss the *Dukes* decision in depth, looking at the majority's reasoning for its decision to deny class certification to over 1.5 million female Wal-Mart employees. Importantly, the majority analyzed the evidence supporting the plaintiffs' substantive claims, thus intertwining the class certification issue with the merits of

3. Paul Elias, *Betty Dukes, Wal-Mart Greeter, Leads Class Action Suit*, HUFFINGTON POST (May 1, 2010, 3:47 PM), http://www.huffingtonpost.com/2010/05/01/betty-dukes-walmart-greet_n_559892.html.

4. *Id.*

5. *Id.* (noting that many "have dubbed the legal battle 'Betty v. Goliath'").

6. *Id.*

their discrimination claims. Finding the evidence insufficient, the Court made a significant statement on the burden required of Title VII plaintiffs asserting claims of disparate treatment similar to those asserted by the *Dukes* class members.

Part Three looks at the nature of modern workplace discrimination and how it is has evolved from the days of overt employer bias. In today's society, employer discrimination very rarely manifests itself blatantly. On the contrary, overt discrimination has become more and more taboo, spurring most companies to create anti-discrimination policies and embrace diversity initiatives. This does not mean, however, that discrimination does not still run rampant in the employment context. Rather, employers discriminate against minority groups in subtle ways, resulting in the overall marginalization of these groups in terms of hiring, pay, and promotions.

In Part Four, I discuss how litigants pursue employment discrimination claims under Title VII. Title VII is often divided into two categories—disparate impact claims and disparate treatment claims. Disparate impact claims are based on neutral employment decisions that have a disproportionately adverse impact on a particular minority group. Conversely, disparate treatment claims are based on allegations that the employer's actions were motivated by discriminatory intent. Based on the current landscape of workplace discrimination, more and more plaintiffs—like those in *Dukes*—are seeking relief under a theory of *systemic* disparate treatment. Under this theory, the focus is not on the individual decisionmaker, but rather on how the structure and organization of the company as a whole make it susceptible to bias. In *Dukes*, the plaintiffs asserted that Wal-Mart had engaged in a pattern or practice of discrimination by giving local managers broad discretion over employment decisions. This discretion, in turn, allegedly resulted in biased decisionmaking that was left unchecked by Wal-Mart's corporate headquarters.

Finally, Part Five analyzes the interplay between the Supreme Court's denial of class certification in *Dukes* and the future of systemic disparate treatment claims. In support of their claims for disparate treatment, the *Dukes* plaintiffs relied on three types of evidence: social science testimony, statistical evidence, and anecdotal evidence. Despite the acceptance of such evidence by courts in the past, the majority rejected it as insufficient to create commonality as required under Rule 23 of the Federal Rules of Civil Procedure. Even more importantly, however, it highlighted the Court's skepticism of such evidence with respect to the merits of the plaintiffs' Title VII claims. Because the evidence relied upon by the *Dukes* class is representative of the evidence relied upon by

most litigants asserting liability under Title VII, the Court's opinion sheds light on the difficulty that disparate treatment claimants now face. As discriminatory decisionmaking in the workplace becomes more and more subtle, the victims of its aftermath will be less and less likely to succeed in obtaining relief in a legal forum.

II. BACKGROUND

A. *Factual History*

In June 2001, Betty Dukes, along with five other named plaintiffs, sought to represent nearly 1.5 million female Wal-Mart employees in an employment discrimination class action lawsuit against the retail conglomerate.[7] The plaintiffs alleged that the company discriminated against them on the basis of their gender by denying them equal pay and promotions in violation of Title VII of the 1964 Civil Rights Act.[8] Specifically, the plaintiffs claimed that women employed in Wal-Mart stores are paid less than men in comparable positions, receive fewer promotions to management positions, and must wait longer than male employees to advance.[9] The proposed class consisted of "all 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 policies and practices."[10] The plaintiffs sought both injunctive and declaratory relief, as well as an award of backpay.[11]

The crux of the *Dukes* plaintiffs' allegations concerned the broad discretion given to local store managers over pay and promotion decisions.[12] They did not allege that Wal-Mart had an explicit policy against the advancement of female employees. Rather, they claimed that the local managers' extensive discretion over employment decisions is exercised in a manner that disproportionately favors men, resulting in disparate treatment of female employees.[13] Local store managers may increase the wages of hourly employees with limited corporate oversight and may apply their own subjective criteria when choosing "support managers" and selecting candidates for management training.[14] Thus, the plaintiffs' theory of discrimination rested on a finding that Wal-

7. Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 141 (N.D. Cal. 2004), *aff'd* 603 F.3d 571 (9th Cir. 2010), *rev'd* 131 S. Ct. 2541 (2011).

8. *Id.*

9. *Id.*

10. *Id.* at 141–42.

11. *Id.* at 141.

12. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011).

13. *Id.* at 2548.

14. *Id.* at 2547.

Mart's "corporate culture" allows bias to penetrate the decision-making of local managers and, furthermore, that Wal-Mart was aware of the resulting discriminatory treatment of its female employees.[15]

In addition to Wal-Mart's decentralized management structure, the plaintiffs primarily relied on three sources of evidence in support of their motion for class certification—expert testimony concerning Wal-Mart's corporate culture, expert statistical evidence revealing disparities between male and female employees, and anecdotal evidence.[16]

Dr. William Bielby, a sociological expert, used a social framework analysis to examine Wal-Mart's policies and practices and evaluated them "against what social science shows to be factors that create and sustain bias and those that minimize bias."[17] He testified that "gender stereotypes are especially likely to influence personnel decisions when they are based on subjective factors, because substantial decisionmaker discretion tends to allow people to seek out and retain stereotyping-confirming information and ignore or minimize information that defies stereotypes."[18] Dr. Bielby ultimately concluded that Wal-Mart's personnel policies and strong corporate culture make pay and promotion decisions vulnerable to gender bias.[19]

The plaintiffs also submitted statistical evidence showing disparities in pay and promotion for men and women.[20] Dr. Richard Drogin, a statistician, ran regression analyses for each of the regions containing Wal-Mart stores.[21] Comparing the number of women promoted to management positions with the percentage of women in the pool of hourly workers, he concluded that there were "statistically significant disparities between men and women at Wal-Mart in terms of compensation and promotions, that these disparities are widespread across regions, and that they can be explained only by gender discrimination."[22] Dr. Marc Bendick, a labor economics expert, also concluded that Wal-Mart promotes a lower percentage of women than its competitors.[23]

Finally, the plaintiffs presented anecdotal evidence in the form of sworn declarations.[24] In their declarations, potential class members testified that they were denied promotions and paid less than male employ-

15. *Id.* at 2548.

16. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 600 (9th Cir. 2010), *rev'd* 131 S. Ct. 2541 (2011).

17. *Id.* at 601.

18. *Id.*

19. *Id.*

20. *Id.* at 603–04.

21. *Id.* at 604.

22. *Id.*

23. *Id.*

24. *Id.* at 610.

ees on account of their sex.[25] They also related specific accounts of discriminatory treatment at stores throughout the country. For example, female employees were regularly referred to as "girls" and as "little Janie Qs."[26] Others similarly testified that store managers discouraged them from applying for management positions, displayed outright favoritism toward male employees, and justified paying male employees more because they had families to support.[27]

B. *Procedural History*

The district court granted in part the plaintiffs' motion for class certification.[28] It found that the plaintiffs had met all of requirements set forth in Rule 23(a) of the Federal Rules of Civil Procedure[29] and that the class could be certified with respect to their equal pay claim and with respect to the issues of liability and injunctive and declaratory relief.[30] On rehearing en banc, the Ninth Circuit substantially affirmed the district court's certification order.[31] It concluded that the district court did not abuse its discretion in finding that the Rule 23(a) elements were satisfied.[32] With respect to certification under Rule 23(b)(2), the court held that the plaintiffs' backpay claims could be certified as a 23(b)(2) class because they did not predominate over the requests for declaratory and injunctive relief.[33] The circuit court additionally held that the class action could proceed in a manner both manageable and in accordance with due process.[34]

C. *The Supreme Court's Decision*

On June 20, 2011, the Supreme Court reversed the district court's certification order.[35] The Justices unanimously held that the class was improperly certified under Rule 23(b)(2).[36] The Court split five to four,

25. *Id.*

26. Motion for Certification at 13–14, Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004) (No. C-01-2253-MJJ).

27. *Id.*

28. Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 143 (N.D. Cal. 2004), *aff'd* 603 F.3d 571 (9th Cir. 2010), *rev'd* 131 S. Ct. 2541 (2011).

29. Fed. R. Civ. P. 23(a) lists four requirements for class certification: numerosity, commonality, typicality, and adequacy of representation.

30. *Dukes*, 222 F.R.D. at 143, 169. On grounds of unmanageability, the district court denied certification with respect to the plaintiffs' promotion claims for lost pay as to those class members for whom no such data was available.

31. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 577 (9th Cir. 2010).

32. *Id.* at 615.

33. *Id.* at 619–20.

34. *Id.* at 624.

35. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2541 (2011).

36. *Id.* at 2558.

however, in deciding the issue of commonality under Rule 23(a).[37] The majority ruled that the plaintiffs had not established the existence of a common question and therefore could not satisfy the certification requirement under Rule 23(a)(2).[38] Justice Scalia, writing for the majority, noted that the plaintiffs were seeking "to sue about literally millions of employment decisions at once" and that those reasons lacked "some glue" holding them together.[39] As a result, the plaintiffs' claims could not produce a common answer to the reason behind Wal-Mart's employment decisions.[40]

In deciding that the *Dukes* class members did not meet Rule 23's certification requirements, the Court delved into an analysis of the merits of the underlying claims.[41] The Court cited *General Telephone Co. v. Falcon*[42] for the proposition that a court may necessarily "probe behind the pleadings before coming to rest on the certification question."[43] Inevitably, the Court noted, issues of class certification often overlap with the factual and legal issues pertaining to the cause of action.[44] As a result, the majority analyzed the sufficiency of the plaintiffs' evidence of discrimination in determining the question of commonality.

Under *Falcon,* a proposed class must bridge the "conceptual gap" between an individual's claim of workplace discrimination and the existence of a class of persons suffering from the same injury.[45] The Court found that the plaintiffs could not bridge this gap because they had failed to show "significant proof" that Wal-Mart "operated under a general policy of discrimination."[46] Although the plaintiffs' sociological expert testified as to Wal-Mart's vulnerability to gender bias, the Court noted that he could not determine how stereotypes play a role in employment decisions with any specificity.[47] Because Dr. Bielby could not answer whether 0.5 percent or ninety-five percent of Wal-Mart's employment decisions might be determined by stereotyped thinking, the Court concluded that his testimony did nothing to advance the plaintiffs' case.[48]

The Court similarly found that the plaintiffs' statistical evidence

37. *Id.* at 2550–51.
38. *Id.* at 2552.
39. *Id.* at 2553.
40. *Id.*
41. *Id.*
42. 457 U.S. 147 (1982).
43. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2552 (2011).
44. *Id.*
45. *Id.* at 2553.
46. *Id.*
47. *Id.*
48. *Id.* at 2253–54.

was insufficient to create an inference of discriminatory treatment.[49] While the data indicated there were statistically significant gender disparities in pay and promotion, the Court agreed with the dissenting Ninth Circuit judges' determination that a regional pay disparity cannot establish disparities at individual stores or create an inference of a company-wide policy of discrimination.[50] The majority further noted that the statistical evidence was insufficient because the plaintiffs still had to identify a specific employment practice, rather than "merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity."[51]

Finally, the Court found that the plaintiffs' anecdotal evidence was "too weak to raise any inference that all individual, discretionary personnel decisions are discriminatory."[52] Distinguishing from its decision in *International Brotherhood of Teamsters v. United States*,[53] in which the government offered forty individual accounts of discrimination in a company of 6,472 employees, the Court found that the 120 affidavits offered by the *Dukes* plaintiffs were insufficient to show a general policy of discrimination given the significant number of Wal-Mart stores and employees.[54] Because the plaintiffs "provide[d] no convincing proof of a companywide discriminatory pay and promotion policy," the Court ultimately concluded that they did not establish the existence of a common question as required by Rule 23(a)(2).[55]

In Part III of the Court's opinion, all nine Justices agreed that the plaintiffs' claims for backpay were improperly certified under Rule 23(b)(2).[56] The Court held that claims for monetary relief cannot be certified under Rule 23(b)(2) where the monetary relief is not incidental to the requested injunctive or declaratory relief.[57] Because backpay is an individualized determination, rather than a formulaic one, the Court concluded that such monetary relief was non-incidental and therefore inappropriate for Rule 23(b)(2) certification.[58]

D. *Justice Ginsburg's Dissent*

The dissent, written by Justice Ginsburg and joined by Justices

49. *Id.* at 2555.
50. *Id.*
51. *Id.* at 2555–56.
52. *Id.*
53. 431 U.S. 324 (1977).
54. *Dukes*, 131 S. Ct. at 2556.
55. *Id.* at 2556–57.
56. *Id.* at 2557.
57. *Id.*
58. *Id.*

Breyer, Kagan, and Sotomayor, disagreed with the majority's analysis of Rule 23(a)'s commonality requirement.[59] According to the dissent, the majority erred in conflating Rule 23(a)(2)'s threshold criteria with Rule 23(b)(3)'s more demanding criteria.[60] In addition to Rule 23(a)'s requirement that there be questions of law and fact common to the class, certification under Rule 23(b)(3) requires an inquiry into whether common questions "predominate" over individual issues.[61] The dissent argued that "individual differences should not bar a Rule 23(b)(1) or Rule 23(b)(2) class, so long as the Rule 23(a) threshold is met."[62] In analyzing the issue of commonality, the majority focused solely on what distinguished individual class members, rather than on their similarities.[63] According to the majority, "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's."[64] The dissent noted, however, that because Wal-Mart had a uniform policy of delegating discretion, that discretion would inevitably be used by store managers in different ways.[65] The fact that each employee's experience would differ should not be a factor in the Rule 23(a)(2) determination.[66] The dissent found that the plaintiffs' allegations stated "claims of gender discrimination in the form of biased decision-making in both pay and promotions" and that the evidence "adequately demonstrated that resolving those claims would necessitate examination of particular policies and practices alleged to affect, adversely and globally, women employed at Wal-Mart stores."[67] The dissent argued that Rule 23(a)(2) requires nothing more, and thus the plaintiffs should have been able to meet the criteria necessary for commonality.[68]

III. *DUKES* AND THE NATURE OF MODERN DISCRIMINATION

A. *Initial Implications of the* Dukes *Holding*

The Supreme Court's decision in *Dukes* most obviously represents a significant blow to plaintiffs seeking to bring suit as a class action. The majority's holding has carved out a much narrower interpretation of Rule 23's commonality requirement, thus making it more difficult for a

59. *Id.* at 2562.
60. *Id.* at 2565.
61. *Id.*
62. *Id.* at 2566.
63. *Id.* at 2567.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 2555.
68. *Id.*

large class of plaintiffs to meet the threshold certification requirements. Rule 23(a)(2) requires that plaintiffs show that the proposed class members' claims share a common question of law or fact.[69] According to Justice Scalia, the plaintiffs had to do more than show that they suffered the same violation of Title VII.[70] Rather, they had to show that the class members' claims all depended upon a "common contention" capable of class-wide resolution.[71] What mattered was not whether the plaintiffs raised common questions, but whether a class action would generate common answers.[72] The Court found that class certification was inappropriate because the plaintiffs' claims involved employment decisions taken at numerous different stores and by numerous decisionmakers.[73] As a result, they could not show that their claims for relief would "produce a common answer" to the question of why they received unfavorable treatment.[74] This view of commonality consequently creates a higher standard necessary for class certification.

More interesting, however, is the effect that the Court's decision will have on *individual* Title VII claimants. While *Dukes* was decided at the class certification stage and was not technically decided on the merits, the majority significantly probed the substantive issues of the case, making an important statement on the current state of Title VII employment discrimination claims.

Class certification is governed by the requirements set forth in Rule 23 and is generally viewed as a mainly procedural threshold.[75] Nonetheless, in deciding the issue of commonality, the majority noted that an inquiry into the pleadings' substantive claims is often necessary. Under *General Telephone Co. v. Falcon*,[76] class certification is proper only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."[77] That "rigorous analysis" will often "entail some overlap with the merits of the plaintiff's underlying claim."[78] Thus, the appropriateness of certification is frequently intertwined with the factual and legal issues in dispute.[79] In *Dukes*, the plain-

69. Fed. R. Civ. P. 23(a)(2).

70. *Dukes*, 131 S. Ct. at 2551.

71. *Id.*

72. *Id.* (citing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 131–32 (2009)).

73. *Id.* at 2552.

74. *Id.*

75. *See, e.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1439, 1439 (2010) ("Rule 23 governs *procedural* aspects of class litigation . . . ." (emphasis added)).

76. 457 U.S. 147 (1982).

77. *Dukes*, 131 S. Ct. at 2551 (quoting *Falcon*, 457 U.S. at 161).

78. *Id.*

79. *Id.* at 2552.

tiffs' showing of commonality necessarily overlapped with the merits of the case—namely, whether Wal-Mart engaged in a pattern or practice of discrimination.[80] Accordingly, the Court analyzed the plaintiffs' contentions and weighed the substantive evidence in support of their claims.[81] Finding the evidence lacking, the Supreme Court denied certification.[82] The court's dismissal of the evidence presented, however, speaks not only to a showing of commonality at the certification stage, but also at proving Title VII liability in general. Non-class plaintiffs asserting claims of systemic disparate treatment will rely on substantially the same forms of evidence provided by the proposed class members in *Dukes*. Because the Supreme Court deemed that evidence insufficient, individual Title VII plaintiffs will likely face more difficulties in proving liability.

B. *The Subtle Nature of Modern Workplace Discrimination*

The *Dukes* plaintiffs' claims reflect the changing nature of modern discrimination in the workplace and the difficulty of proving that discrimination in a court of law. Discrimination in the workplace bears a markedly different appearance from the prejudice of the pre-Civil Rights era. In decades past, employers were more likely to manifest their prejudices overtly, blatantly discriminating against minority groups in their hiring and employment practices. Today, that discrimination has become more and more taboo. Indeed, with the advent of Title VII and other related legislation (in addition to increasing cultural pressures), employers are now much more likely to expressly embrace diversity and equality in the workplace.[83] That is not to say, however, that today's society has become more tolerant, that prejudice has dissipated from the work environment. Rather, it is still deeply entrenched in modern society, manifesting itself both subtly and covertly. It is "embedded in our structures, norms, policies, and day-to-day cultural practices."[84] As reflected in *Dukes*, many employment discrimination lawsuits today do not center on discriminatory company policies or rules but on corporate systems that promote subtle and widespread exclusion. Gender discrimination has become institutional, resulting in continued lower pay, fewer promotions, and fewer management opportunities for women and other

80. *Id.*

81. *Id.* at 2553–57.

82. *Id.* at 2557.

83. Tristin K. Green, *Insular Individualism: Employment Discrimination Law After* Ledbetter v. Goodyear, 43 HARV. C.R.-C.L. L. REV. 353, 358 (2008) (footnote omitted).

84. Nicole V. Benokraitis, *Sex Discrimination in the 21st Century*, *in* SUBTLE SEXISM: CURRENT PRACTICE AND PROSPECTS FOR CHANGE 5, 6 (Nicole V. Benokraitis ed., 1997).

minority groups on a systemic level.[85] Because of this shift, plaintiffs asserting employment discrimination claims are now challenging employers' overall policies and practices that have a tendency to subjugate women.[86] The breadth and complexity of such claims create a challenge for litigants claiming disparate treatment on a systemic level.[87]

This challenge is further heightened when dealing with large, national employers. Wal-Mart is the largest retail private employer in the United States, operating four types of retail stores throughout the country.[88] The stores are divided into seven divisions, comprised of forty-one regions with eighty to eighty-five stores apiece.[89] In total, Wal-Mart operates 3,400 stores and employs more than one million people.[90] Wal-Mart's size and scope mean that its employment practices affect over one percent of the American workforce.[91] As a large-scale corporation, Wal-Mart has created an embedded and defined corporate culture. Part of that culture involves giving broad discretion to local managers over certain employment decisions. Lower level store managers have discretion to determine starting salaries and exceptional performance raises for hourly employees, and higher level managers are able to determine the compensation structure for all in-store salaried management positions.[92] Promotions are also subject to discretion. Candidates need only satisfy certain minimal standards, standards that are easily met by most candidates.[93] Thus, managers are given substantial latitude in who they select for promotions. Furthermore, Wal-Mart did not require that its management positions be posted.[94] The plaintiffs in *Dukes* alleged that their male counterparts were able to learn about management opportunities though socializing and that manager's decisions were infused with partiality given the lack of monitoring by Wal-Mart's corporate headquarters.[95]

The substantial autonomy given local managers leaves Wal-Mart susceptible to biased decision-making, despite any official corporate policy it has to the contrary. Indeed, like most corporations today, Wal-

85. *Id.* at 24; *see also* NICOLE V. BENOKRAITIS & JOE R. FEAGIN, MODERN SEXISM: BLATANT, SUBTLE, AND COVERT DISCRIMINATION 1–5 (2d ed. 1995).

86. Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37, 67 (2009).

87. *Id.*

88. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011).

89. *Id.*

90. *Id.*

91. Lesley Wexler, *Wal-Mart Matters*, 46 WAKE FOREST L. REV. 95, 95 (2011).

92. *Id.* at 109.

93. *Id.*

94. *Id.*

95. *Id.*

Mart has an official anti-discrimination policy and outwardly promotes diversity in the workplace.[96] Nonetheless, when employment decisions are made by lower level supervisors and subject to little managerial oversight, the efficacy of such policies against bias diminishes significantly.

IV. TITLE VII AND SYSTEMIC DISPARATE TREATMENT

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, and national origin.[97] Since its enactment, the courts have recognized that Title VII prohibits all forms of discrimination, both overt and subtle.[98] Title VII jurisprudence is often divided into two categories: disparate impact theory and disparate treatment theory.[99]

Under disparate impact theory, plaintiffs may challenge an employer's facially neutral policy that has a "disproportionate effect on members of a protected class."[100] Thus, even if an employment practice is "fair in form," an employee may still have a cause of action if the practice is "discriminatory in operation."[101] Disparate treatment theory, on the other hand, requires a showing of intentional discrimination.[102] In other words, the plaintiff must show that the decisionmaker acted with discriminatory animus, "a conscious motivation to discriminate."[103] The *Dukes* plaintiffs brought suit under both theories of discrimination. According to the plaintiffs, Wal-Mart's policy of giving local managers broad discretion over pay and promotions disproportionately favored men and thus amounted to disparate impact.[104] Furthermore, the plaintiffs alleged that Wal-Mart was aware of the policy's effect on its female employees and failed to restrain misuse of its managers' discretionary authority, leading to disparate treatment of female employees.[105] The crux of the plaintiffs' allegations, however, rested with the latter theory. More specifically, they alleged disparate treatment on a systemic, rather than individual level. Their main argument was that Wal-Mart, as a cor-

96. Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 154 (N.D. Cal. 2004), *aff'd* 603 F.3d 571 (9th Cir 2010), *rev'd* 131 S. Ct. 2541 (2011).

97. 42 U.S.C. § 2000e-2 (2006).

98. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

99. Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 111 (2003).

100. Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 57 ALA. L. REV. 741, 750 (2005); *see also* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1973).

101. *Griggs*, 401 U.S. at 431.

102. Green, *supra* note 99, at 112.

103. *Id.*

104. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2548 (2011).

105. *Id.*

porate entity, knew that its employment practices were creating disparities among its male and female employees.[106]

In the traditional disparate treatment context, the focus is on the individual decisionmaker.[107] The plaintiff must establish a prima facie case and then show that the employer's reason for the adverse employment action is in fact pretext for discrimination.[108] Conversely, *systemic* disparate treatment focuses on the employer as an entity rather than on the individual decisionmaker.[109] It relies on the theory that disparate treatment is so widespread within the organization, that the entity itself should be directly liable, rather than vicariously liable for only individual instances of discrimination.[110] Under this model, the employer's responsibility does not depend upon identification of specific instances of discrimination but on its own role in *producing* disparate treatment.[111] Employers create the work environment, policies, and decisionmaking structures in which individual decisions are made.[112] Employers are thus active participants in the discrimination.[113] When disparate treatment "becomes the regular rather than unusual practice within an organization, then it is reasonable to infer that the entity is doing something to produce decisions based on race or sex within its organization."[114] In other words, under systemic disparate treatment theory, discriminatory treatment is not the result of "select rogue individuals" but is a product of organizational and cultural bias within the company.[115] In a claim of systemic disparate treatment, the plaintiff must show that the employer engaged in intentional discrimination, either expressly or through a "pattern or practice" of discrimination."[116] "Pattern or practice" cases require that there be significant disparities between "the makeup of the employer's workforce and the makeup of the pool from which the employer draw its employees."[117]

The most oft-cited case for systemic "pattern or practice" discrimination is *International Brotherhood of Teamsters v. United States*.[118] In

106. *Id.*

107. Green, *supra* note 99, at 112.

108. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972) (setting forth the burden-shifting framework for employment discrimination claims).

109. Green, *supra* note 99, at 119.

110. Tristin K. Green, *The Future of Disparate Treatment Law: After* Wal-Mart v. Dukes, 32 BERKELEY J. EMP. & LAB. L. 395, 400 (2011).

111. *Id.* at 439.

112. Green, *supra* note 83, at 380.

113. *Id.*

114. Green, *supra* note 110, at 439.

115. *Id.*

116. Green, *supra* note 99, at 119.

117. *Id.*

118. 431 U.S. 324 (1977).

Teamsters, the Federal Government brought a Title VII claim against a motor freight carrier company and a union representing its employees.[119] It alleged that the employer had engaged in a pattern and practice of employment discrimination against racial and ethnic minorities in both hiring and pay, and that the union's seniority system perpetuated this discrimination.[120] Because the Government contended that the defendant had engaged in a *system-wide* pattern or practice of discrimination, it had to "prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts."[121] The Supreme Court ultimately found that the Government had met that burden.[122] In support of its claims, the Government produced statistical evidence showing disparities between minority and white employees as well as testimony of specific instances of discrimination.[123] While the company argued that the Government could not rely on statistics alone to prove the existence of systemic discrimination, the Court held that the individual testimony "brought the cold numbers convincingly to life."[124] The Court nonetheless noted that the use of statistical proof is important in proving the existence of employment discrimination.[125] Agreeing with the district court and the court of appeals, the Supreme Court held that the Government had proved a prima facie case of systemic employment discrimination.[126]

By expressly approving of statistical evidence as proof of system-wide pattern or practice discrimination, the Supreme Court in *Teamsters* "opened the door for a structural account of disparate treatment."[127] In other words, it accepted analysis of an employer's institutional policies and practices rather than analysis of the employer's individual state of mind.[128] This inquiry, furthermore, relies significantly on statistical analyses, which the Court has consistently accepted as creating an inference of systemic disparate treatment since its decision in *Teamsters*.[129] This is because statistics showing disparities amongst minorities are often indicative of purposeful discrimination.[130] The *Teamsters* Court set out a two-phase burden-shifting framework for systemic disparate

119. *Id.* at 328.
120. *Id.* at 329.
121. *Id.* at 336.
122. *Id.* at 337.
123. *Id.* at 337–38.
124. *Id.* at 339.
125. *Id.*
126. *Id.* at 342.
127. Green, *supra* note 99, at 120.
128. *Id.*
129. Green, *supra* note 110, at 403.
130. Jason R. Bent, *The Telltale Sign of Discrimination: Probabilities, Information Asymmetries, and the Systemic Disparate Treatment Theory*, 44 U. MICH. J.L. REFORM 797, 798 (2011).

treatment cases.[131] First, the plaintiff must show that the employer engaged in a pattern or practice of discrimination.[132] If the plaintiff succeeds, it creates a rebuttable presumption that all individual employment decisions were discriminatory in nature.[133] The employer then bears the burden of rebutting that presumption.[134] This framework allows plaintiffs to create an inference of discriminatory intent, a necessary showing in all disparate treatment claims.[135]

V. THE EFFECT OF *DUKES* ON DISPARATE TREATMENT CLAIMS

The significance of the Supreme Court's decision in *Dukes* is its effect on plaintiffs' ability to prove systemic disparate treatment in the workplace. While the *Teamsters* decision represented an approval of statistical and anecdotal evidence in support of a showing of discrimination, the *Dukes* Court specifically distinguished *Teamsters* in rejecting the sufficiency of the proposed class members' evidence. In denying class certification, the Supreme Court held that the plaintiffs had failed to produce significant evidence proving the Wal-Mart had a general policy of discrimination.[136] The Court found that the plaintiffs' evidence was insufficient to establish a claim of discriminatory bias.[137] In support of their argument for commonality, the plaintiffs produced three types of evidence: statistical evidence showing gender disparities in pay and promotions; 120 affidavits from female employees detailing specific instances of discrimination; and testimony from an expert sociologist concerning Wal-Mart's vulnerability to gender bias.[138]

Despite *Teamster's* acceptance of statistical evidence, the Supreme Court in *Dukes* concluded that the statistics offered by the plaintiffs' expert did not reflect the storewide disparities necessary to prove commonality.[139] The majority agreed with Ninth Circuit Judge Ikuta's observation that "[i]nformation about disparities at the regional and national level does not establish the existence of disparities at individual stores, let alone raise the inference that company-wide policy of discrimination is implemented by discretionary decisions at the store and district level."[140] The Court further concluded that even if the statistical figures

131. *Id.* at 806.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 817.
136. Suzette M. Malveaux, *How Goliath Won: The Future Implications of* Dukes v. Wal-Mart, 106 NW. U. L. REV. COLLOQUY 34, 38 (2011).
137. *Id.*
138. *Id.* at 39.
139. *Id.* at 40.
140. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2555 (2011).

did establish a pay or promotion pattern different from the nationwide or regional figures in all Wal-Mart stores, the plaintiffs would still fail to prove commonality because each store manager would claim different reasons for the discrepancies.[141] Absent identification of a "specific employment practice," the Court found that evidence of statistical disparities among male and female employees were insufficient.[142] Precedent has established, however, that a policy giving unrestrained discretion to local managers is sufficient to make a disparate treatment claim.[143] In her dissent, Justice Ginsburg noted that an employer's "undisciplined system of subjective decisionmaking" is an "employment practice that may be analyzed under the disparate impact approach."[144] Nonetheless, the majority concluded that the evidence was insufficient to establish a claim a disparate treatment.

The Court found that the plaintiffs' anecdotal evidence was similarly inadequate. While the plaintiffs offered substantially the same forms of evidence offered by the plaintiffs in *Teamsters*, the Court distinguished that case based on the sheer number of plaintiffs in the purported class. In *Teamsters*, the plaintiffs produced forty affidavits from employees in support of their discrimination claims.[145] Because the company had 6,472 employees, of whom 571 were minorities, it amounted to approximately one anecdote for every eight class members.[146] The *Dukes* plaintiffs, on the other hand, produced 120 affidavits for a class of 1.5 million—about one for every 12,500 class members and relating to only a fraction of Wal-Mart stores.[147] Consequently, the Court found that the affidavits proffered by the plaintiffs were not sufficiently representative in scope. The Court's dismissal of this evidence is significant because plaintiffs attempting to sue large corporations such as Wal-Mart will face an incredible challenge producing a sufficient ratio of anecdotal evidence to number of employees. Had the *Dukes* plaintiffs produced the same ratio of affidavits as provided in *Teamsters*, they would have had to produce 187,500 affidavits for the 1.5 million member class.[148] Such a requirement would be staggeringly expensive and inefficient. The Court further found that even if all of the accounts of discrimination were true, they were still insufficient to demonstrate

141. *Id.*

142. *Id.*

143. Malveaux, *supra* note 136, at 40.

144. *Dukes*, 131 S. Ct. at 2565 (Ginsburg, J., dissenting) (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988)) (internal quotation marks omitted).

145. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 338 (1977).

146. *Dukes*, 131 S. Ct. at 2556.

147. *Id.*

148. Malveaux, *supra* note 136, at 41.

that the company "operates under a general policy of discrimination."[149] The higher evidentiary standard that the Court has set out will make proving disparate treatment, in addition to commonality, much more difficult for Title VII plaintiffs.

Finally, the Court rejected the testimony offered by the plaintiffs' sociological expert because he could not determine "whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking."[150] As noted by Professor Suzette Malveaux, however, the answer to that question "is not only unknown, but unknowable."[151] "Given the subtle, complex, and sometimes even unconscious nature of modern discrimination, it would be practically impossible to determine with any specificity how much gender bias infected the workplace."[152] Indeed, absent a facially discriminatory corporate policy, plaintiffs will now face an uphill battle to prove their disparate treatment claims given the Court's unwillingness to recognize these forms of evidence.

Given the nature of modern discrimination, the Court's rejection of the *Dukes* plaintiffs' evidence will not only have far-reaching consequences for plaintiffs seeking class certification, but also for individual plaintiffs seeking redress for employment discrimination under a theory of disparate treatment. Interestingly, many scholars discussing the *Dukes* decision have focused on its impact on Title VII liability rather than on the issue of class certification.[153] Although the Court's decision will not entirely prevent women from filing individual claims, "their ability to investigate a harmful pattern and practice of discrimination will be substantially hindered."[154] Furthermore, individual employees will be less likely to sue given the expense of litigation and the high evidentiary standard that the Court has set forth.[155]

More and more, individual plaintiffs are likely to rely on a theory of systemic disparate treatment as opposed to individual disparate treatment due to the changing nature of discrimination in the workplace.

149. *Dukes*, 131 S. Ct. at 2556.

150. *Id.* at 2553.

151. Malveaux, *supra* note 136, at 43.

152. *Id.*

153. *See Room for Debate: A Death Blow to Class Action?*, N.Y. TIMES, June 20, 2011, http://www.nytimes.com/roomfordebate/2011/06/20/a-death-blow-to-class-action (featuring a discussion of the Supreme Court's decision in *Dukes*).

154. Tanya Hernandez, *Far From Random Bias*, N.Y. TIMES, June 21, 2011, http://www.nytimes.com/roomfordebate/2011/06/20/a-death-blow-to-class-action/wal-mart-far-from-random-bias.

155. Ralph Richard Banks, *A Cruel Paradox*, N.Y. TIMES, June 30, 2011, http://www.nytimes.com/roomfordebate/2011/06/20/a-death-blow-to-class-action/the-cruel-irony-in-the-wal-mart-ruling.

Most instances of discriminatory treatment are the result of subtle, institutional deficiencies, rather than blatant prejudice against minority workers. Overt discrimination has become taboo in today's society, giving rise to corporate policies encouraging diversity in the workforce. In fact, the Supreme Court's skepticism in *Dukes* over the plaintiffs' evidence of disparate treatment was augmented by the fact that Wal-Mart has an official policy against gender discrimination.[156] But this places undue weight on the existence of such policies in combatting discrimination. A statement in an employee handbook says nothing about the actual absence of discriminatory employment practices. The "mere presence of a written anti-discrimination policy" should not be enough to shield an employer from Title VII liability.[157] Most employers today have anti-discrimination policies in place but this bears no indication of an actual lack of minority bias.[158] Rather, discrimination continues to occur in a subtle, pervasive manner.

Because of this subtlety, it is more difficult for disparate treatment plaintiffs to show discrimination on an individual basis.[159] "It occurs subtly, in day-to-day interactions, in decisions that do not lend easily to immediate comparison, in unstated judgments and perceptions of value and skills."[160] It is more easily identified in the aggregate, upon a showing that members of a group are treated less favorably in terms of pay and promotions.[161] It is also difficult to prove because employers are less likely to explicitly reveal any biases they may have when making employment decisions.[162] Thus, in alleging claims of disparate treatment, many individual Title VII plaintiffs will have to rely on evidence that reveals discrimination on system-wide, institutional level. A theory of systemic disparate treatment consequently allows plaintiffs to do this without having to necessarily identify specific, individual biases on the part of their employers. In proving that the entity itself is directly responsible for perpetuating disparate treatment, plaintiffs will most often rely on statistical evidence, anecdotal evidence, and social scientist testimony—the three main forms of evidence relied upon by the plaintiffs in *Dukes*.[163]

Statistical evidence is an important facet in systemic disparate treatment cases because it demonstrates proof of consistent and prevalent

156. Malveaux, *supra* note 136, at 43.
157. *Id.*
158. *Id.*
159. Green, *supra* note 110, at 433.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at 444.

discrimination.[164] In fact, the Court indicated in *Teamsters* that statistics alone may be sufficient to create an inference of disparate treatment.[165] Statistical evidence is used to show large-scale disparities between male and female employees, a necessary indication of company-wide discrimination. By controlling for external elements, expert statisticians can determine whether any statistically significant disparities are the product of discriminatory disparate treatment.[166] Plaintiffs also bolster statistical evidence with both anecdotal accounts and social science testimony.[167] Anecdotal evidence provides a stronger reason to believe that statistical disparities are caused by discriminatory practices, as opposed to other non-discriminatory factors.[168] Finally, social science testimony has become increasingly used by plaintiffs due the changing nature of discrimination.[169] Plaintiffs rely on this type of evidence, along with statistical evidence, to show that discrimination is caused by the employer's internal procedures.[170] Generally, social science testimony consists of an analysis of a company's decision-making criteria, demographic disparities, and corporate culture to determine whether they are likely to result in "biased employment decisions."[171]Dr. Bielby, for example, testified on behalf of the *Dukes* plaintiffs that Wal-Mart's corporate culture of giving discretion to local managers made it susceptible to discrimination.[172] According to his testimony, "social science research demonstrates that gender stereotypes are especially likely to influence personnel decisions when they are based on subjective factors, because substantial decisionmaker discretion tends to allow people to seek out and retain stereotyping-confirming information and ignore or minimize information that defies stereotypes."[173]

After the Supreme Court's rejection of this evidence in *Dukes*, it seems increasingly unlikely that plaintiffs asserting systemic employment discrimination claims will be able to meet the evidentiary threshold necessary to prove a pattern or practice of discrimination. This is especially true when dealing with large, nationwide corporations such as Wal-Mart that employ millions of people and who have a sizable influence on the American workforce. Showing that a company's internal

164. *Id.*

165. *Id.*; *see also* Intl Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977).

166. Green, *supra* note 110, at 444.

167. *Id.*

168. *Id.* at 444–45.

169. *Id.*at 445.

170. *Id.*

171. *Id.*

172. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 601 (9th Cir. 2010), *rev'd* 131 S. Ct. 2541 (2011).

173. *Id.*

organization perpetuates prejudice is an onerous task when having to prove it on such a large scale. A single employee is unlikely to be financially equipped to fund the extensive discovery necessary to establish her claim. And given the difficulty of proceeding as a class post-*Dukes*, many will likely be discouraged from filing legitimate claims.

The consequences of the *Dukes* holding reflect a pattern of procedural obstacles for Title VII plaintiffs. Employment discrimination plaintiffs already bear numerous burdens in federal court.[174] The statistics in these cases are indeed discouraging. Between 1988 and 2003, employment discrimination claims rose significantly but have concluded with much fewer resolutions.[175] According to a 2004 study on employment discrimination cases in federal court, plaintiffs win a lower proportion of cases during pretrial and trial and have a harder time upholding successful outcomes on appeal.[176] The statistics show that between 1979 and 2006, the plaintiff "win rate" in federal court for employment cases was fifteen percent as compared to fifty-one percent for non-employment cases.[177] Furthermore, employment discrimination plaintiffs won 3.59% of pretrial adjudications, while other plaintiffs won 21.05%.[178]

Many of these obstacles can be attributed to more stringent procedural requirements at the pleading and summary judgment phases, making it more difficult for plaintiffs to even get to trial. The Supreme Court's decisions in both *Bell Atlantic Corp. v. Twombly*[179]and *Ashcroft v. Iqbal*[180] have created a heightened pleading standard, requiring plaintiffs to plead their allegations with "plausibility." Moving away from the notice pleading standard set forth in Rule 8 of the Federal Rules of Civil Procedure and *Conley v. Gibson*,[181] federal courts now require plaintiffs to assert more at the pleading stage in order to avoid dismissal. The Court has similarly placed heavy burdens on plaintiffs at the summary judgment phase by requiring that parties opposing summary judgment motions come forward with specific facts showing a genuine issue of material fact, a showing that must be beyond a "metaphysical doubt."[182] These heightened standards have created more burdensome obstacles for

174. Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 520 (2010).

175. *Id.* at 524–25.

176. *Id.*; *see also* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 103 (2009).

177. Schneider, *supra* note 174, at 526.

178. *Id.*

179. 550 U.S. 544 (2007).

180. 556 U.S. 662 (2009).

181. 355 U.S. 41 (1957).

182. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

plaintiffs, obstacles that have been borne disproportionately by litigants pursuing discrimination claims. Federal Judicial Center studies of summary judgment practice, for example, have determined that seventy-seven percent of summary judgment motions in employment discrimination cases were granted, as compared with sixty-one percent of summary judgment motions in tort cases and fifty-nine percent of summary judgment motions in contracts cases.[183]

These procedural obstacles have only been intensified by the Supreme Court's decision in *Dukes.* By rejecting the plaintiffs' motion for class certification on commonality grounds, the Court has made it more difficult for plaintiffs asserting discrimination to proceed as a class. One may argue that this is only a minor setback because the denial of class certification is not fatal to a claim. The purported class members can merely proceed as individual claimants. This argument is misguided for several reasons. First, individual claimants are much less likely to be able to afford litigation against a national corporation with endless resources. Second, and more importantly, the Court's decision in *Dukes* indicates that individual plaintiffs are still likely to lose on the merits due to the Court's skepticism of their evidence. As Justice Scalia made clear, there is a strong interrelationship between procedure and substance. While the Court's decision was decidedly "procedural" in nature, its substantive impact cannot be ignored.

VI. Conclusion

The Supreme Court's reversal of class certification to the 1.5 million *Dukes* plaintiffs represents an additional hurdle to employment discrimination litigants. Given the subtle nature of discrimination in the modern workplace, it is becoming increasingly difficult for plaintiffs to hold companies liable for discriminatory practices. To hold employers liable, Title VII plaintiffs must establish that the employer's policies and practices create a culture that fosters discrimination on a systemic level. In order to prove this, plaintiffs have historically relied on expert and anecdotal evidence to demonstrate widespread discriminatory practices. By discounting that evidence in *Dukes*, the Court seems to have created a more stringent evidentiary threshold necessary to establish Title VII liability. Although the issue on appeal related to the procedural requirements for class certification under Rule 23(a), the Court's analysis of the merits of the plaintiffs' claims holds many implications for the future of Title VII litigation. Given the proof necessary to establish a claim of disparate treatment, individual litigants are less likely to succeed on their

183. Schneider, *supra* note 174, at 549.

substantive claims. Thus, large-scale employers such as Wal-Mart are much less likely to be held directly accountable for their institutional discriminatory practices and will have little incentive to create a corporate culture embracing diversity and equality in the workplace.