DUKES, THE CORPORATE SAVIOR: HOW THE *WAL-MART V. DUKES* DECISION REINFORCED THE CORPORATE DEFENSE ARSENAL

JORDAN ROSALES*

I. EXTRA, EXTRA! THE CLASS ACTION COLD WAR IS OVER!

Imagine that you own Radio House, a chain of electronics retail stores, throughout the Southern United States. You have approximately 1,500 stores spread across this region, each employing roughly 200 employees. Business is going good and you have thwarted competitors in every market that has been entered. Stephanie, an African-American cashier in Gainesville, Florida, has been working for Radio House for the last four years, while she studies at a nearby university. She hopes to graduate and continue working for Radio House in a management role. Upon graduation, Stephanie tells the general manager, Tim, that she would like to apply for a management position. Tim, however, tells Stephanie that she "couldn't handle" being a manager and that she "knows nothing about business." Instead, Tim gives the job to Albert, a white male and recent high school graduate, despite Stephanie being overly qualified for the management position. Stephanie, outraged by the general manager's treatment, files a lawsuit against Tim and Radio House alleging discrimination.

Alone, Stephanie has very limited resources to pursue a lawsuit against Radio House Corporation, which has unlimited resources and a very well equipped legal department. In this case, Stephanie —and her attorneys— really "can't handle" the full onslaught of a corporate legal defense. Litigating alone will only drain her bank account and likely secure a victory for your company. However, if Stephanie rallied the troops together against her common enemy, the possibility of victory becomes much more probable.

* Jordan Rosales, Juris Doctor Candidate, 2016 at St. Thomas University School of Law, *Journal of Complex Litigation*, Member-Candidate, 2014.

In the coming weeks, wind of Stephanie's lawsuit picks up throughout Radio House branches and several other African-American men and women allege the same discriminatory behavior at the hands of their managers. Together, they form a formidable foe capable of causing millions of dollars' worth of damage to your corporation. Stephanie, along with 4,000 other similarly situated members, file for certification of their class in the Federal District Court for the Northern District of Florida, which grants class certification. Upon certification, a corporation is likely to settle the dispute and cut their losses rather than litigate, despite the merits of the case.

Stephanie, along with the other class members, seeks to bring Radio House to justice for their discriminatory behavior by means of the class action. Nonetheless, this long-feared plaintiff weapon has become nothing more than a dull blade in the wake of *Wal-Mart Stores, Inc. v. Dukes*,[1] which narrowly defined the commonality requirement for class actions. This decision made it increasingly difficult for a class, such as Stephanie's, to become certified. Once upon a time, a situation such as this one, would have stricken any corporation with fear of bankruptcy and a diminished reputation due to the nature of the action. However, nowadays corporations can operate in an easiest way because they will continue to go unchecked. Therefore individuals, such as Stephanie, will likely receive no relief within a justice system that has turned its back on them and reinforced the corporate defense arsenal, not by giving it a weapon, but by taking their enemy's only weapon. *Dukes* ended the arduous cold war between plaintiffs and corporations. The days of corporate class action settlements are over and a new day has come where corporations thrive at the cost of the weak individual.

In the aftermath of the *Dukes* decision, corporations that once feared the class action, are treading in new waters and benefiting from a decision that severely diminished the plaintiff's class action. This comment proposes an alternative approach for the commonality requirement under Rule 23(a) that would reduce the heightened level of scrutiny placed upon the commonality requirement by the Court in *Dukes*, whilst still ensuring that the Court's rationale be implemented, to avoid mass litigation where there is no true common element in the class. This comment also proposes that the Supreme Court adopt an alternative approach, which would be a happy medium between the rigorous new interpretation adopted by the *Dukes* Court and the lax tests under the Rule prior to the decision.

Part II of this comment considers the history and background of the class action, including issues that have arisen throughout the ages from the perspectives of both: the corporations and the plaintiffs, who seek to use this weapon as a means for compensation or justice. Additionally, Part II considers the history of *Dukes* decision and its prominence, as one of the most influential decisions in the history of the class action. Part III considers how the *Dukes* decision altered the landscape of complex litigation, and the inadvertent effect it has had on corporations and plaintiffs. Part IV provides conclusive thoughts and arguments regarding *Dukes* decision and provides an alternative solution to the

[1] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

disparity between: (1) the lax and lenient Rule, and (2) the rigorous, yet impractical approach taken on by the Court in *Dukes*.

II. BACKGROUND

Historically and under modern jurisprudence, a class action is a nontraditional litigation procedural strategy that permits a representative with distinctive claims to sue on behalf of a class, establishing the prerequisites for class certification.[2] "Class actions were designed to give individual claimants with minor claims access to judicial relief that otherwise would be economically unavailable by individual litigation."[3] Additionally, "[c]lass actions have a particular utility in the civil rights arena, as they offer a vehicle for rectifying civil rights abuse."[4] Courts have found that class actions are more desirable than individual actions brought under Title VII of the Civil Rights Act of 1964.[5]

"The class action has long been a devastating weapon in the hands of plaintiffs' bar."[6] Rule 23 of the Federal Rules of Civil Procedure recognized collective action in the class action and is designed to encourage complex litigation cases through several liberal joinder provisions.[7] It was essentially promulgated to streamline certain cases that shared similar questions of law and fact, regarding a specific issue, that may affect a number of similarly situated plaintiffs.[8] Class actions were permitted if the issue was one of common or general interest to many persons constituting a class, that is so numerous as to make it impracticable to bring them all before the court in individual actions.[9]

---

[2] Scott S. Partridge & Kerry J. Miller, *Some Practical Considerations for Defending and Settling Products Liability and Consumer Class Actions*, 74 TUL. L. REV. 2125, 2128 (2000) (discussing the history and purpose of the class action).

[3] *Id.*

[4] Rachel Tallon Pickens, *Too Many Riches?* Dukes v. Wal-Mart *and the Efficacy of Monolithic Class Actions*, 83 U. DET. MERCY L. REV. 71, 74 (2006).

[5] *Id.*

[6] Matthew Grimsley, *What Effect Will* Wal-Mart v. Dukes *Have on Small Businesses?*, 8 OHIO ST. ENTREPREN. BUS. L. J. 99 (2013).

[7] Linda S. Mullenix, *Problems in Complex Litigation*, 10 REV. LITIG. 213, 215 (1991) (discussing a variety of topics in the field of complex litigation, particularly class action suits). *See also* Shipra Mehta, *Light at the End of the Narrow Tunnel*, 24 DEPAUL J. ART TECH. & INTELL. PROP. L. 425, 433 (2014) (defining joinder as allowing "unrelated persons to be joined in one action as defendants under special circumstances"). Under the Joinder Rule, Rule 20, joinder is allowed if one of two requirements are met: (1) if any right to relief is asserted against defendants jointly or severally or is based out of the same transaction or occurrence, or a series of transactions or occurrences; (2) if any question of law or fact common to all defendants will arise in the action. If either is met, unrelated defendants can be joined under one lawsuit. The purpose of this rule is to promote trial convenience and to help the judicial system resolve disputes faster, by preventing multiple lawsuits based on the same issue. *Id.* at 433–34.

[8] *See generally* John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323 (2005) (discussing the policy reasons for the class action).

[9] *Id.* at 329; *See also* FED. R. CIV. P. 23(a).

A. The Federal Rule for Class Actions

The Federal Rule of Civil Procedure governing class actions have far reaching effects within our legal system.[10] Under Rule 23, subsection (a), the class must satisfy some prerequisites.[11] In order to differentiate specific litigation as a collective class action suit, the claims of the class members must be incorporated by the claims of the named lead plaintiff.[12] To ensure this, the Rule provides four preliminary requirements that the plaintiffs must satisfy in order to go forward as a class: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation.[13] Once the potential class has overcome these prerequisites, the party seeking class certification must prove that the class falls within one of the three categories provided in subsection (b).[14]

A certified class may be established under Rule 23(b)(1) if an individual lawsuit, or lawsuits, might "create 'incompatible standards of conduct for the party opposing the class.'"[15] The second method for certificate a class is found under Rule 23(b)(2).[16] This type of certified class primarily seeks injunctive or declaratory relief as opposed to compensatory damages.[17] To become a (b)(2) class, the opposing party must have acted or refused to act on grounds that apply generally to the class.[18] "Rule 23(b)(2) usually applies to situations in which the defendant has treated the members of the class in an unlawful way so as to warrant an injunction or declaratory relief as a remedy."[19] Additionally, money damages may be awarded when they are incidental to such treatment.[20] For instance, an action stemming from a civil rights violation will usually fall within this category.[21] "If a group of plaintiffs cannot be certified as a (b)(1) or (b)(2) class, a judge may still certify the plaintiffs as a Rule 23(b)(3) class ((b)(3) class) if a class action is superior to other available methods of adjudication."[22]

---

[10] *See* Mullenix, *supra* note 7 (discussing instances where class actions have had a great impact in our legal system). "In the 1950s, the Federal Courts experienced the massive electronics antitrust litigation, and in the 1960s the judicial system experienced vigorous prosecution of civil-rights class actions and institutional-reform litigation." These instances of complex litigation revealed the judicial branch's weakness to fairly and efficiently adjudicate complex cases under the rules and procedures then governing the system. *Id.* at 215–16.

[11] Grimsley, *supra* note 6, at 101.

[12] *Id.*

[13] *Id.*

[14] *See* Laura J. Hines, *The Unruly Class Action*, 82 GEO. WASH. L. REV. 718, 732 (2014) (discussing the process of getting a class certified).

[15] Grimsley, *supra* note 6, at 102.

[16] *See* FED. R. CIV. P. 23(b)(2).

[17] *Id.*

[18] *Id.*

[19] Catherine R. Hecker, Wal-Mart Stores, Inc. v. Dukes*: Taming "Too Big To Fail" Classes in the Battle Against Blackmail Actions and Frivolous Litigation*, 7 LIBERTY U. L. REV. 49, 54 (2012).

[20] *Id.*

[21] Grimsley, *supra* note 6, at 102 (providing an example of a class usually seeking certification under this rule).

[22] *Id.*

B. Problems with the Class Action

Many agree that "a class action that aggregates the claims of aggrieved individuals against a common defendant would seem not only a prudent solution, but possibly even a necessary one."[23] This prevents "wasteful and repetitive litigation of similar issues, and the possibility of inconsistent results."[24] It "allows plaintiffs to pool resources against better-financed defendants."[25] Class action suits have evolved as an integral part of civil litigation, due to the influx of this type of litigation in recent years.[26] However, two more prominent issues have arisen with this type of complex litigation. First, despite the widespread increase in class action litigation throughout the United States, after *Dukes* it has become increasingly difficult to certify a class.[27] Second, class actions tend to be economically inequitable to both parties.[28] Class actions necessarily involve asymmetric stakes, which means that defendants are prepared to spend greater resources to litigate the action than plaintiffs, because the defendants have more at stake in the outcome of the action.[29] This is especially true with corporations and large retailers.[30]

1. From the Eyes of Goliath: The Corporate Perspective

"[I]n the eyes of many businesses, class actions can open the door to frivolous litigation and unjustified settlements."[31] Large corporations cast aside an ample number of resources for settlements and potential litigation.[32] Corporations, large retailers, and even smaller businesses often view class actions as "a dreadful scourge," prompting them to devote time and money to frivolous litigation or to settle meritless claims.[33] "Many believe class actions are unfair, particularly in situations in which defendants are forced to settle regardless of the claim's merits . . . ." The last in order to avoid the gamble, that is a trial and the potential threat of going bankrupt, should the corporation lose.[34] The Advisory

---

[23] Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L. J. 567 (2004) (discussing the benefits of the class action).
[24] *Id.*
[25] *Id.*
[26] *See* Partridge, *supra* note 2, at 2126.
[27] Grimsley, *supra* note 6, at 118.
[28] *See generally* John C. Coffee Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L. J 625 (1987) (discussing the financial realities of class actions and the disproportion of funds allocated by both parties in respect to attorney fees).
[29] *Id.* at 628.
[30] *See generally* Natalie Bucciarelli Pedersen, *The Impact of the* Dukes *Case on Retail Employers*, CORNELL HUM. RESOURCES REV. 1 (Sept. 7, 2012), http://www.cornellhrreview.org/wp-content/uploads/2012/09/Dukes-2012.pdf (discussing the far reaching effects a class action lawsuit has on a large retailer, specifically in discrimination cases where the stakes are considerably higher due to the potential effect it may have on the business' reputation).
[31] Grimsley, *supra* note 6.
[32] *Id.*
[33] *Id.* at 100.
[34] *Id. See also* Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 142 (1996) (discussing the

Committee, in one of its studies, found that under Rule 23 once a class action has been certified, even if the claims had little merit, it created unwarranted pressure to settle.[35] Allegedly, plaintiffs filed class actions for the sole purpose of pressuring defendants to quickly settle despite the merits of the case.[36] Defendants settled to avoid prolonged litigation and because they do not want to assume the risk of losing in trial.[37] Additionally, many corporate defendants opted to settle rather than risk ruining their companies through the outcome of a trial.[38] "Furthermore, even if a business litigates and wins, class action lawsuits can be extremely damaging to the business's finances and reputation."[39] For instance, "[l]arge retailers are certainly not unfamiliar with discrimination lawsuits."[40]

---

issue of whether class certifications induce a defendant to settle, even if the claims are borderline frivolous).

[35] *See* Rabiej, *supra* note 8, at 328 (presenting an in-depth study that the Advisory Committee commenced throughout a period of ten years beginning in 1991). "The committee concluded that Rule 23 should be improved to address problems with class actions that had emerged after the rule was last amended in 1966." Among the problems it recognized was the "(1) unwarranted pressure to settle once a class action has been certified, providing an unfair tactical advantage in cases in which a claim had little merit; (2) attorney fees out of proportion to individual class members' awards, which sometimes involved merely coupon settlements; and (3) language in opt-out and settlement notices that was often too complicated to understand." *Id.* 328–29; *See also* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099 (2002) (discussing the process of how a proposed rule becomes a Federal Rule of Civil Procedure). A proposed new rule or amendment to an existing Rule goes through seven stages of formal review throughout a process of review by five separate institutions: the Advisory Committee on Civil Rules, the Standing Committee on Rules of Practice and Procedure, the Judicial Conference of the United States, the Supreme Court, and Congress. Proposed alterations are reviewed by the Advisory Committee Reporter, who then submits any suggestions to the Advisory Committee along with a recommendation on the rule or amendment. *Id.* at 1103. The Committee then considers whether to accept, reject, or defer action on each suggestion made by the Advisory Committee Reporter. Were the Advisory Committee to accept the suggestion, it instructs the Reporter to create a draft of the rule or the amendment along with an explanatory note. The Advisory Committee would then vote on the proposed Rule or amendment and its explanatory note and, if approved, seeks permission from the Standing Committee to publish it. Once permission is received, the proposed rule or amendment, along with its explanatory note, are circulated to gauge the public. After the comment period, the Advisory Committee would then reconsider the proposal in light of the public opinion. Once the Advisory Committee approves the proposed amendment, it submits it to the Standing Committee. Were the Standing Committee to approve the proposal without substantial alterations, it submits the proposed amendment to the Judicial Conference. The Judicial Conference considers proposals forwarded by the Standing Committee once a year; if it approves a proposal, it submits it to the Supreme Court. If the Supreme Court approves the proposal, the Chief Justice forwards the amendment to Congress by May 1 of the year that the amendment is to take effect. If Congress does not take any action to the contrary of the amendment, the proposed amendment would then become effective on December 1. *Id.* at 1104.

[36] Rabiej, *supra* note 8, at 346 (discussing issues that arose from the class action that prompted a call for reform).

[37] *Id.* at 351 (describing one of the reasons why defendants are essentially coerced into settling for fear of losing and risking it all in trial).

[38] *Id.* at 354.

[39] Grimsley, *supra* note 6, at 100.

[40] Bucciarelli Pedersen, *supra* note 30, at 1. *See also* Ellis v. Costco Wholesale Corp., 657 F.3d 970, 974 (2011) (disputing a class action lawsuit brought by a female Costco assistant manager on behalf of herself and all current and former female Costco employees who have been subjected to

"[A]ny good human resources team seeks to avoid such suits as they can be costly, both in terms of money and reputational damages."[41]

"Class action discrimination lawsuits alleging systemic systemic discrimination are potentially even more damaging for the company."[42] "The very nature of such a suit —the fact that multiple employees are alleging discrimination by the company— makes them that much more powerful."[43] Large retailers —or small retailers, for that matter— do not want to face a suit alleging any type of discrimination by multiple former employees.[44] "Regardless of the merits of the case, in the court of public opinion, the existence of numerous plaintiffs is generally equated with wrongdoing on the part of the employer"[45], and "[w]hen that 'something wrong' is discrimination, the stakes are particularly high."[46] Wal-Mart Stores, Inc., for example, "is the largest corporation in the United States and the world's largest retailer."[47] However, "the industry leader has also been dubbed the 'discrimination leader'."[48]

2. From The Eyes of David: The Plaintiff's Perspective

Contrary to the corporate perspective of class action lawsuits, plaintiffs believe that "class actions is a way to achieve institutional reform and ensure that businesses behave ethically and comply with the law."[49] Class actions aggregate common claims that may otherwise have never been asserted individually, therefore creating economic and judicial efficiency for plaintiffs.[50] "[T]he plaintiff's attorney has to incur the costs of filing the class action lawsuit and has to invest a substantial amount of time that could potentially be wasted if the class is not certified."[51] However, if the class is certified, this will likely prompt

---

gender discrimination in promotion to assistant manager and general manager positions); Abigail Rubenstein, *Costco Agrees to Pay $8M to End Sex Bias Class Action*, *LAW360.COM*, (Dec. 18, 2013, 3:20 PM), http://www.law360.com/articles/496932/costco-agrees-to-pay-8m-to-end-sex-bias-class-action (detailing how Costco settled for $8 million, along with $4.3 million in attorney's fees and $300,000 for administering the settlement and fees for work done on the fee motion itself).

[41] Bucciarelli Pedersen, *supra* note 30, at 1 (discussing the effect *Dukes* has had on employers who have subsequently dealt with such class action claims that were ultimately decertified by the *Dukes* court).

[42] *Id.* (noting that discrimination class actions are potentially more damaging to a company than a products liability class action, for example).

[43] *Id.* (explaining that since an employee discrimination lawsuit comes from within the company, it tarnishes the name of the company and causes reputational damage, which is not easily recovered from, as opposed to financial damage).

[44] *Id.* at 2.

[45] *Id.*

[46] *Id.* (referring to employment discrimination as an issue where employers have a lot in stake in its outcome).

[47] Tallon Pickens, *supra* note 4, at 80 (providing the background on the *Dukes* case).

[48] *Id.* at 81.

[49] Grimsley, *supra* note 6, at 100 (discussing the plaintiff's perspective when it comes to the utility of the class action in their hands).

[50] Steven Bolaños, *Navigating Through The Aftermath of* Wal-Mart v. Dukes*: The Impact on Class Certification, and Options for Plaintiffs and Defendants*, 40 W. ST. U. L. REV. 179, 183 (2013).

[51] *Id.* at 183.

the defendant to settle or even lose the case if taken to trial.[52] Once a class is certified, this creates great pressure on the defendant to settle, in order to avoid a judgment of liability.[53] Therefore, due to the potentially destructive repercussions that an unfavorable judgment may have on a business, certification is the most important part of the case for the plaintiff, in order to reach this "guarantee" of settlement.[54] As mentioned above,[55] under the Rule, the plaintiff must "overcome a few hurdles before a group can achieve class certification and go forward with class action litigation"[56]—hurdles which became more difficult in the wake of *Dukes*.[57]

C. Preparing for Battle: The History of *Dukes*

The Supreme Court in *Dukes*[58] "addressed some of the inequity caused by large and expansive class actions."[59] The *Dukes* case is one of the most expansive and across the board class action lawsuits in United States history and it provided the Court with the perfect opportunity to address those issues.[60] This case involves a series of discrimination lawsuits filed against Wal-Mart Stores, Inc. by three former and current female employees.[61]

The case begins in 1994, when Betty Dukes began her employment at the Wal-Mart store in Pittsburg, California as a cashier.[62] Shortly after, Dukes received a promotion to customer service manager. However, "[a]fter a series of disciplinary violations [she] was demoted back to cashier and then to greeter."[63] Although Dukes concedes that she violated company policy, she contends that the disciplinary actions were retaliation for having filed an internal complaint, in which she argued that male employees had not been disciplined for similar infractions, including two male greeters that had received higher compensation.[64] Dukes ultimately exhausted her administrative remedies by filing charges with the California Department of Fair Employment and Housing, as well as with the United States Equal Employment Opportunity Commission.[65] Successively,

---

[52] *Id.* (detailing the financial tolls the plaintiff incurs in class actions).
[53] *Id.*
[54] *Id.*
[55] *See* FED. R. CIV. P. 23(b)(2) (providing the prerequisites to attain class certification).
[56] Grimsley, *supra* note 6, at 101.
[57] *See* Bolaños, *supra* note 51, at 184 (suggesting the impact the *Dukes* decision has had on the certification process of a class).
[58] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541 (2011).
[59] *See* Bolaños, *supra* note 51, at 184 (discussing the impact the *Dukes* decision has had on the inequities and problems of class actions described in the prior section).
[60] *Id.*
[61] Tallon Pickens, *supra* note 4, at 71 (providing background on the Wal-Mart Stores, Inc. v. Dukes case).
[62] *Dukes*, 131 S.Ct. at 2547.
[63] *Id.* at 2548.
[64] *Id.*
[65] Tallon Pickens, *supra* note 4, at 71 (presenting the factual history of the Wal-Mart Stores, Inc. v. Dukes case).

Dukes chose to take legal action against Wal-Mart, marking the first step in the largest employment discrimination lawsuit in United States history.[66]

Christine Kwapnoski, the second named plaintiff, worked at Sam's Club Stores in both Missouri and California for most of her adult life, where she held a number of positions, including a supervisory position.[67] Kwapnoski claimed that a male manager yelled at her frequently, screamed at female employees but not at male employees, and instructed her to "doll up" and dress better when coming to work.[68] Kwapnoski was also the only plaintiff to have held a managerial position.[69]

The third named plaintiff, Edith Arana, worked at a Wal-Mart store in Duarte, California for six years.[70] In 2000, she approached the store manager regarding management training, but was brushed off.[71] She initiated complaint procedures and was told to apply directly with the district manager if she thought her store manager was being unfair.[72] Arana decided against applying and was subsequently fired in 2001 for failing to comply with the store's timekeeping policy.[73] "[H]er store manager had said he 'did not want women'. She was later fired. Wal-Mart claimed she was stealing time."[74]

These plaintiffs "filed suit against Wal-Mart Stores, Inc., the largest private employer in the United States, alleging workplace bias."[75] Wal-Mart operates four types of retail stores throughout the country: (1) Discount Stores, (2) Supercenters, (3) Neighborhood Markets, and (4) Sam's Clubs.[76] They are divided into seven nationwide divisions, which are comprised of forty-one regions of eighty to eighty-five stores apiece and each individual store has between forty to fifty-three departments with eighty to five hundred staff positions.[77] In all, Wal-Mart operates approximately 3,400 stores and employs more than one million people.[78]

Dukes, Kwapnoski and Arana, as the named plaintiffs, "sought to represent a class of 'all women employed at any Wal-Mart domestic retail store at any time after December 26, 1998 who have been or may have been subjected to Wal-Mart's challenged pay and management track promotions and policies practices."[79] "Specifically, the plaintiffs alleged that women employed in Wal-Mart stores are paid less than men, even though the women have more seniority and higher performance ratings."[80] Most important, "discrimination claims did

---

[66] *Id.*
[67] *Dukes*, 131 S.Ct. at 2548.
[68] *Id.*
[69] Andrew J. Trask, *Wal-Mart v. Dukes: Class Actions and Legal Strategy*, 2010-2011 CATO SUP. CT. REV. 319, 329 (2011).
[70] *Dukes*, 131 S.Ct. at 2548.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] Trask, *supra* note 70.
[75] Tallon Pickens, *supra* note 4, at 71–72.
[76] *Dukes*, 131 S.Ct. at 2547.
[77] *Id.*
[78] *Id.*
[79] Bucciarelli Pedersen, *supra* note 30, at 2.
[80] *Id.*

not rest on any express policy of Wal-Mart, rather, they claimed that Wal-Mart delegated decision-making authority for pay and promotion decisions to local managers, who disproportionately used this discretion to favor men."[81]
The plaintiffs filed a motion for class certification before the United States District Court for the Northern District of California with a class that encompassed at least 1.5 million women who had been employed by Wal-Mart at approximately 3,400 store locations nationwide.[82] The plaintiffs brought this Title VII action against Wal-Mart, alleging sex discrimination seeking injunctive and declaratory relief, back pay and punitive damages.[83] "The District Court found that all four requirements of class certification pursuant to the Rule 23(a) —numerosity, commonality, typicality, and adequacy— were met."[84] Following the District Court's certification order, Wal-Mart sought review by the United States Court of Appeals for the Ninth Circuit, which granted certiorari and affirmed the District Court's order for certification.[85] "The Ninth Circuit majority opinion concluded that the plaintiffs had provided 'substantial evidence of Wal-Mart's centralized firm-wide culture and policies, thus providing a nexus between the subjective decision making and the considerable statistical evidence demonstrating a pattern of lower pay and fewer promotions for female employees'."[86] On appeal, "[t]he Supreme Court granted certiorari on the issue of whether 'claims for monetary relief can be certified under 23(b)(2)' and also asked the parties 'to argue the following question: Whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)'."[87]

D. The Battle that Started the War: The Decision of *Dukes*

The *Dukes* Court held that the certification of a class of female employees of Wal-Mart was inconsistent with Federal Rules, specifically Rules 23(a) and 23(b)(2).[88] "The issue before the Court was whether the certification requirements of Rule 23 [...], in particular commonality under Rule 23(a)(2), were in fact satisfied by the class."[89] The Court reversed the Ninth Circuit's decision to certify the class of Wal-Mart employees, and substantially raised the standard to meet the commonality requirement for class certification",[90] specifically, "the Court held in a 5–4 split that the plaintiffs had not met the requirements for

---

[81] *Id.* at 3.
[82] *Id.* (detailing the expansive nature of the *Dukes* class action).
[83] *Dukes*, 131 S.Ct. at 2547.
[84] Bucciarelli Pedersen, *supra* note 30, at 3 (providing the procedural history to the *Dukes* case, specifically the lower court's ruling on the class certification). *See also* FED. R. CIV. P. 23(a) (signaling the prerequisites to class certification: numerosity, commonality, typicality, and adequacy).
[85] Tallon Pickens, *supra* note 4, at 72.
[86] Julie Slater, *Reaping the Benefits of Class Certification: How and When Should "Significant Proof" be Required Post-*Dukes?, 2011 BYU L. REV. 1259, 1263 (2011).
[87] *Id.* at 1263–1264. *See also* Fed. R. Civ. P. 23(a), 23(b).
[88] *See generally Dukes*, 131 S.Ct. at 2550–2561.
[89] Bolaños, *supra* note 51, at 184.
[90] *Id.*

certification because they failed to establish commonality."[91] The Court held that commonality under Rule 23(a)(2) requires the plaintiffs to prove they have suffered the 'same injury' and that 'their claims must depend upon a common contention [...] that it is capable of classwide resolution."[92] In consideration of the commonality of the claims, the Court held that the use of statistical data to demonstrate a disparity between pay and promotions among men and women at Wal-Mart was insufficient to establish a common question among the class members.[93] Particularly, Scalia, who wrote the majority opinion, argued that the evidence presented by the members of a putative class did not significantly prove that Wal-Mart operated under a general policy of discrimination, as needed to satisfy the commonality requirement, thus permitting certification of the plaintiffs' class.[94]

The Court went on to say that proof of commonality necessarily overlaps with the plaintiffs' contention that Wal-Mart engages in a pattern or practice of discrimination.[95] The crux of Title VII inquiries is to determine the reasoning for a particular employment decision.[96] The plaintiffs in this case were suing for millions of employment decisions at once and, without some glue holding together the alleged reasons for those decisions, "it will be impossible to say that examination of all the class member's claims will produce a common answer to the crucial discrimination question."[97] To satisfy the commonality requirement, it is not sufficient that all class members have suffered a violation of the same provision of law.[98] "Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company."[99] The Court raised the commonality requirement by stipulating that their claims must depend upon a common contention, for example, the assertion of discriminatory bias on the part of the same supervisor and not just the company.[100] This notion of a heightened commonality requirement stems from *dicta* extracted from the *General Telephone Company of the Southwest v. Falcon*, which requires plaintiffs to demonstrate commonality with significant proof.[101] The Court in *Falcon*, by *dicta* in footnote fifteen, stated that just because an aggrieved plaintiff, such as a woman, may have experienced gender discrimination at work, does not mean that a class of women has experienced the same.[102] *Dukes* widened the gap, going beyond what other Title

---

[91] Slater, *supra* note 87, at 1264 (emphasizing how split the Court was in the *Dukes* decision and that, considering the conflicting principles adopted, there was barely a majority).
[92] Bolaños, *supra* note 51, at 184.
[93] *Id.*
[94] *Dukes*, 131 S.Ct. at 2553.
[95] *Id.* at 2552.
[96] *Id.*
[97] *Id.*
[98] *Id.* at 2551.
[99] *Id.*
[100] *Id.*
[101] *See generally* Gen. Tel. Co. of Sw. v. Falcon, 457 U.S 147 (1982).
[102] *Id.* at 159 n. 15.

VII class action courts have required and ignored the weight of many cases in other circuits that arrived at the same standard of class certifications.[103]

Other than the commonality issue, the Court also held, in a unanimous decision, that the back pay claims were improperly certified under Rule 23(b)(2).[104] The Court stated that claims for monetary relief may not be certified under this Rule, at least when the monetary relief is not incidental to the requested injunctive or declaratory relief being sought.[105] While the Court stated that Rule 23(b)(2) could not be used as an alternative method of certifying a monetary damages class, it did not address the broader question as to whether Rule 23(b)(2) could be extended past injunctive and declaratory relief.[106] However, despite not answering this, the Court's holding does limit the kinds of relief plaintiffs can seek under the section.[107] Plaintiffs, as well as several scholars, have argued that if there is any form of relief that would bridge the gap between injunctive and monetary relief, it would be back pay under Title VII, but the Court unanimously disagreed and disallowed back pay from being included in Rule 23(b)(2) classes.[108] In doing so, the Court surprised many by essentially reversing almost half-century of Title VII jurisprudence that has historically permitted back pay in such circumstances.[109] "Courts have regularly permitted back pay for civil rights cases under Rule 23(b)(2) on the grounds that this monetary relief is equitable and critical to Title VII's remedial scheme."[110] This unprecedented shift in the law is significant because the other alternative for class actions seeking monetary relief is under Rule 23(b)(3).[111] Which "is less cohesive and homogenous than one brought under Rule 23(b)(2),[112] class members must be provided notice of the class action and an opportunity to opt

---

[103] Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. REV. COLLOQUY. 34, 38 (2011) (suggesting that the *Dukes* decision's stringent interpretation of the commonality requirement essentially rebuts years of jurisprudence that has consistently applied a standard that had become the status quo). *See also* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 594–595 (9th Cir. 2010) (criticizing the dissenters for ignoring the weight of the many cases in other circuits arriving at the same standard this court adopted).

[104] *Dukes*, 131 S.Ct. at 2557. *See also* Slater, *supra* note 86, at 1264 (discussing the Court's decision to not consider back pay as a viable relief sought for a certified class under Rule 23(b)(2)).

[105] *Dukes*, 131 S.Ct. at 2557.

[106] Trask, *supra* note 70, at 344 (analyzing the *Dukes* decision and the Court's analysis of what types of relief could be sought under the specific class certification being sought).

[107] *Id.*

[108] *Id.* at 346 (referencing other scholars that have similarly argued that back pay should be considered an equitable relief because it puts the person back to a place where they were prior were it not for the discriminatory behavior). *See also* Malveux, *supra* note 103, at 46 (referring to back pay as an equitable remedy that is typically included as a remedy available to class members certified under Rule 23(b)(2)).

[109] Malveux, *supra* note 103, at 45 (discussing back pay as having been historically allowed as a remedy in discrimination cases).

[110] *Id.* at 46 (describing the equitable nature of Title VII discrimination claims and the remedy of back pay being an integral component of a merited plaintiff's relief).

[111] *Id.* at 47 (emphasizing the drastic shift in the *Dukes* decision to preclude back pay from Rule 23(b)(2) classes due to their only other alternative being a Rule 23(b)(3) class).

[112] *Id.* at 48 (explaining the obstacles a class will likely go through when suing under a class certified under Rule 23(b)(3)).

out of the action."[113] Since back pay is oft a remedy sought in employment discrimination claims, must be determined on an individualized basis, and Rule 23(b)(3) applies "if common issues predominate over individual ones," a Court might decline to certify a class on that basis.[114]

III. CASUALTIES OF WAR: THE EFFECTS OF *DUKES*

"In the past, the notion of a large class action discrimination suit against a national retailer has been viewed as a true threat—a tool in the arsenal of employees—to be feared by the employer."[115] With the Supreme Court decision in *Dukes*,[116] "that arsenal has been significantly depleted and the large retailer now treads on somewhat new ground when thinking about discrimination lawsuits."[117] Specifically, the *Dukes* decision "has assisted the defense bar by heightening the requirements that must be met for a group of plaintiffs to be certified as a class."[118]

Notwithstanding, "although these requirements may be beneficial to large corporate defendants, the same cannot be said for smaller businesses."[119] The *Dukes* decision "prompted a storm of media attention, with some predicting the end of large-scale class actions."[120] On the one-year anniversary of the *Dukes* decision, legislation was proposed to reverse the 'damage' done by *Dukes* the decision."[121] "The decision is still very much in the public's mind, and it is viewed as having damaged workers' ability to hold employers accountable for discriminatory employment policies."[122] Senator Patrick Leahy, Senate Judiciary Committee Chairman, expressed his concern about the pro-business views of the Court. Senator Leahy stated that: "The Supreme Court's recent decisions may make some wonder whether the Supreme Court has now decided that some corporations are too big to be held accountable. You get the unfortunate feeling that many of the Justices view plaintiffs as a mere nuisance to corporations."[123]

---

[113] *See* FED. R. CIV. P. 23(c)(2)(B) (laying out the requirements for a class to receive certification under this category).

[114] Malveux, *supra* note 103, at 48 (describing the impracticability of precluding back pay from Rule 23(b)(2) classes and placing them in Rule 23(b)(3) classes since these kinds of claims will likely be unable to be certified, thereby leaving plaintiffs with no remedy).

[115] Bucciarelli Pedersen, *supra* note 30, at 1.

[116] *Dukes*, 131 S.Ct. 2541.

[117] Bucciarelli Pedersen, *supra* note 30, at 1.

[118] Grimsley, *supra* note 6, at 99.

[119] *Id.*

[120] *See* Megan E. Barriger, *Due Process Limitations on Rule 23(b)(2) Monetary Remedies: Examining the Source of the Limitation in* Wal-Mart Stores, Inc. v. Dukes, 15 U. PA. J. CONST. L. 619 (2012).

[121] *Id.*

[122] *Id.*

[123] *Hearing on Barriers to Justice and Accountability: How the Supreme Courts Recent Rulings Will Affect Corporate Behavior*, 112th Cong. 2 (2011) (statement of Sen. Patrick Leahy, Chairman, S. Judiciary Comm.), https://www.judiciary.senate.gov/imo/media/doc/leahy_statement_06_29_11.pdf.

Presently, Courts have cited *Dukes* in hundreds of cases.[124] Specifically, over fifty cases have directly addressed employment-related class certification issues under Rule 23, or analogous state statutes, including cases involving claims of discrimination, wage, and ERISA actions.[125] Although the vast majority of the employment cases dealing with class certification issues arose in the context of a plaintiff's motion for class certification, a number of cases also arose from both an employer's motion to decertify a class that had been certified or a preemptive motion by an employer-defendant to deny class certification.[126] Most of the decisions have taken place at the trial court level. However, there have been a number of appellate court decisions that have addressed the issue —a number that is sure to increase as more trial courts decisions are appealed.[127]

In *Ellis v. Costco Wholesale Corporation*,[128] the Ninth Circuit was the first Federal Appellate Court to apply Rule 23(a) following the *Dukes* decision. The District Court had certified a nationwide class of female employees, who alleged gender discrimination in Costco's promotion and management practices.[129] On appeal, the Ninth Circuit considered the class certification and said that the District Court abused its discretion by failing to apply the "rigorous analysis" as prescribed in *Dukes*.[130] Specifically, the Court held, citing *Dukes*, that this "rigorous analysis" will inevitably seep into an examination of the merits of the plaintiff's underlying claim.[131] In determining this, the Court, quoting *Dukes*, stated that to show commonality it is insufficient to merely allege any common question, for example, "[w]ere [p]laintiff's passed over for promotion?"[132] Instead they must present "a question that will produce a common answer to the critical question of 'Why was I disfavored?'"[133] This, in turn, essentially means that plaintiffs must have a common question that will link many individual promotional decisions to their individual claim for relief.[134] On remand, the District Court granted a hybrid certification and, ultimately, the class settled

---

[124] Michael Reiss, Amy De Santis & Devin Smith, *Dukes v. Wal-Mart: The Opinion, Its Progeny and Its Impact on Class Litigation*, ABA SEC. OF LAB. & EMP. L. CONF. 1 (March 21–24, 2012), http://www.americanbar.org/content/dam/aba/events/labor_law/2012/03/national_conference_on_equal_employment_opportunity_law/mw2012eeo_reiss.authcheckdam.pdf (referencing several cases that have been influenced by the *Dukes* decision).

[125] *Id.* at 4 (providing an explanation of the influx of cases that have been influenced by the *Dukes* decision). *See also* Donald T. Bogan, *ERISA: State Regulation of Insured Plans After Davila*, 38 J. MARSHALL L. REV. 693 (2005) (defining ERISA). The Employee Retirement Income Security Act of 1974 regulates employment-provided fringe benefit plans, including both pension benefit plans and non-pension or welfare benefit plans. *Id.* at 694. ERISA plan sponsors often fund health care plans and disability plans through the purchase of insurance. *Id.* at 695.

[126] Reiss et al., *supra* note 124, at 4 (discussing the different contexts in which the *Dukes* decision has been applied across the country in various cases).

[127] *Id.* (expressing concern over the potential rise of appeals that will stem from the *Dukes* decision's application or misapplication).

[128] Ellis v. Costco Wholesale Corp., 657 F.3d 970 (9th Cir. 2011).

[129] *Id.* at 977.

[130] *Id.* at 980.

[131] *Id.*

[132] *Id.* at 981.

[133] *Id.*

[134] Reiss et al., *supra* note 124, at 5 (describing the commonality requirement in reference to the necessary nexus that the plaintiff in the *Dukes* case must show).

after nearly a decade-long litigation draining both parties financially.[135] The Eighth Circuit also denied class certification in *Thomasson v. GC Services Limited Partnership*[136] for failing to meet the heightened commonality requirement as prescribed by *Dukes*.

Another case where the Appellate Court denied class certification is *Bennett v. Nucor Corporation*.[137] The Eighth Circuit examined the case, in which a class of African Americans alleged that their former employer, Nucor, a national steel manufacturer, engaged in racial discrimination in regards to their hiring and promotion practices.[138] This Court, also citing *Dukes*, said that "all supervisors exercised their discretion in a common way."[139] The plaintiffs in this action alleged that Nucor had denied them promotions and training opportunities.[140] They mentioned various instances where white employees were favored for promotions and African American employees were consistently denied training in other areas of the plant.[141] The plaintiffs also presented evidence of a racially hostile work environment, where Nucor employees regularly used racial epithets, racial graffiti was displayed in the bathrooms, and Confederate flag patterned "do-rags" were sold in the on-site store for employees.[142] Notwithstanding, the Court said that these were purely the plaintiff's own declarations and that they worked exclusively in the roll mill department, so their observations are insufficient to advance a claim of commonality across the entire plant.[143] The Court concluded based on the rationale in *Dukes* that the majority of the affidavits were concentrated in only six states, while half of all states had only one or two anecdotes and fourteen states had no anecdotes at all.[144] Based on this reasoning, this class did not receive certification and was disbanded.[145] The Eighth Circuit similarly denied class action certification in *Luiken v. Domino's Pizza, LLC*,[146] holding that plaintiffs did not meet the heighted commonality requirement as prescribed in *Dukes*.

---

[135] See Rubenstein, *supra* note 41 *(*demonstrating that Costco eventually settled).
[136] Thomasson v. GC Servs. Ltd. P'ship, No. 11–56100, 2013 WL 4713560 at *809 (9th Cir. Sept. 3, 2013) (holding that the plaintiffs, 414 individuals whose telephone calls were monitored without consent, did not meet the commonality requirement under Rule 23(a)). The Court stated that it is insufficient to merely allege any common question. *Id.* at *810. The Court also stated that to satisfy the commonality requirement, there must be significant proof that the entire class suffered a common injury and the common injury must be connected to the specific claim for relief. *Id.*
[137] Bennett v. Nucor Corp., 656 F.3d 802 (8th Cir. 2011).
[138] *Id.* at 807.
[139] *Id.* at 815.
[140] *Id.* at 808.
[141] *Id.*
[142] *Id.*
[143] *Id.* at 816.
[144] *Id. See also Dukes*, 131 S.Ct. at 2556.
[145] *Bennett*, 656 F.3d at 816.
[146] Luiken v. Domino's Pizza, LLC, 705 F.3d 370 (8th Cir. 2013) (Pizza delivery drivers brought a putative class action against their employer alleging that a fixed charge customers paid for delivery service was gratuity that was wrongfully withheld from the drivers. *Id.* at 372. The Court, citing *Dukes*, stated that the plaintiffs must show a common mode of exercising discretion that pervades the entire company and the plaintiffs' claims must also depend on a common contention, which must be of such a nature that it is capable of class-wide resolution. *Id.* at 376).

Coming out of the Second Circuit, the Court in *Nationwide Life Insurance Company v. Haddock*[147] remanded the case to the District Court in light of the *Dukes* decision[148] and held that individualized money, such as back pay, must be considered in the context of a Rule 23(b)(3) class.[149] Additionally, the Fourth Circuit in *Scott v. Family Dollar Stores, Inc.*,[150] upheld the *Dukes* rationale and stated that to satisfy the commonality requirement, a plaintiff must demonstrate that the exercise of discretion of the employer is tied to a specific employment practice,[151] and that "the subjective practice at issue affected the class in a uniform manner."[152] In *Cortez v. Best Buy Stores, Inc.*,[153] plaintiffs brought suit claiming that they were all denied breaks while working at Best Buy.[154] The Court, citing *Dukes*, denied the Plaintiff's motion for class certification under 23(a)(2) for failure to meet the commonality requirement.[155] Another case, similar to *Dukes*, is *Bell v. Lockheed Martin Corporation*.[156] In *Bell*,

---

[147] Nationwide Life Ins. Co. v. Haddock, No. 10–4237–cv, 2012 WL 360633 at *26 (2d Cir. Feb. 6, 2012) (holding that a remand was required for reconsideration of plaintiff's motion for class certification in light of the *Dukes* decision). Trustees of employers sharing retirement plans brought a putative class action, encompassing over 24,000 alleged qualifying plans, against financial services provider under ERISA alleging that provider violated its fiduciary duties by collecting revenue sharing payments from mutual funds it offered to its annuity contract holders. *Id.* at *28. The court held, that in light of the *Dukes* decision, Rule 23(b)(2) does not authorize class certification when, despite the suitability of generalized injunctive or declaratory relief, each class member would also be entitled to individualized award of monetary damages. *Id.* at *29. Therefore, a class complaint alleging numerous individual claims for monetary relief may not be certified under Rule 23(b)(2), at least where the monetary relief is not incidental to the injunctive or declaratory relief, *id.*

[148] *Id.* at *29.

[149] *Id.*

[150] Scott v. Family Dollar Stores, Inc., 733 F.3d 105 (4th Cir. 2013) (upholding the *Dukes* rationale in the Fourth Circuit and heightening the standard for commonality as prescribed by *Dukes*). Plaintiffs brought a putative class action lawsuit against employer alleging discrimination against female store managers, in violation of Title VII and the Equal Pay Act. *Id.* at 108. The Court stated that, in order to prove commonality, the plaintiff must demonstrate that the behavior of the employer is linked to a specific employment practice and that the practice affected the entire class of persons seeking relief. *Id.* at 113.

[151] *Id.* at 113.

[152] Elizabeth Tippett, *Robbing a Barren Vault: The Implications of* Dukes v. Wal–Mart *for Cases Challenging Subjective Employment Practices*, 29 HOFSTRA LAB. & EMP. L. J. 433, 446 (2012) (discussing the additional barriers to certification that were imposed by the *Dukes* decision).

[153] Cortez v. Best Buy Stores, LP, No. CV 11–05053 SJO (FFMx), 2012 WL 255345 at *1 (C.D. Cal. Jan. 25, 2012) (denying plaintiff's motion for class certification). Plaintiffs brought a putative class action lawsuit against employer, alleging failure to pay wages and overtime, failure to pay minimum wages, failure to provide meal periods, failure to authorize and permit rest periods, among others. *Id.* at *3. The plaintiff seeks class certification on three subclasses, each for a different cause of action. *Id.* The Court held that it is insufficient for class certification for the claims of the individual class members to raise common questions, rather it must be shown that a class-wide proceeding could generate common answers. The contention that is common to the class must be of such nature that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. *Id.* at *6.

[154] *Id.* at *1.

[155] *Id.* at *6.

[156] Bell v. Lockheed Martin Corp., No. CIV. 08-6292 (RBK/AMD,) 2011 WL 6256978 at *1 (D.N.J. Dec. 14, 2011) (denying class certification). Plaintiffs brought a putative class action against employer for gender discrimination and retaliation under Title VII, claiming that defendant's

the plaintiffs, a class of female employees, brought forward a suit alleging gender discrimination under Title VII, due to Lockheed Martin Corporation's policies and practices having a disparate impact on female employees' compensation and advancement.[157] The Court, heavily relying on *Dukes*, denied certification of the class due to the individualized nature of the claims.[158]

IV. A FIGHTING CHANCE: DAVID V. GOLIATH, A FAIR FIGHT?

The majority in *Dukes*, disqualified the class at the starting gate by heightening the standards required for commonality.[159] Scalia's decision can be viewed as either a clarification on the commonality requirement or as a heightening of the standard. However, whichever way you interpret it, its rigorous nature is undisputed. In contrast, as Justice Ginsberg discusses in her dissent, Rule 23(a)(2) requires that "there are questions of law or fact common to the class" and, conversely, "does not require that all questions of law or fact raised in the litigation be common" to the class,[160] but that even a single common question of law or fact common to the class, will satisfy the requirement.[161] Nonetheless, the lax approach adopted by Ginsberg will only continue to serve as an indestructible weapon in the hands of plaintiffs suing only for the prospect of a corporate settlement, while the *Dukes* majority's ruthless and rigorous approach strips the plaintiffs of a fighting chance against these corporations. These two approaches are on opposite ends of the judicial spectrum, a win and take all scenario for either party. Thus, this comment serves to propose that the Supreme Court adopt a happy medium that limits the scope of the class action, but is not so severe as to hinder the purpose of the class action and deprive a class of retribution and relief for a corporation's wrong doing.

In *Falcon*, [162] a Mexican-American employee alleged a pattern of discrimination in the hiring and promotion practices of the employer.[163] The court stated that:

---

company-wide policies and practices have a disparate impact on female employee's compensation and advancement. *Id.* at *1. Plaintiffs seek certification under Rule 23(b)(2) for injunctive and declaratory relief, or in the alternative, certification under Rule 23(b)(3). *Id.* at *2. In addition, plaintiffs seek back pay, lost wages, and punitive damages. Defendant's claim that plaintiffs may not include claims for individualized monetary relief in their class certification, whereas plaintiffs argue that individualized monetary relief, including back pay, is available under Rule 23(b)(2), so long as the claims do not predominate over their requests for injunctive and declaratory relief. *Id.* The court held, citing *Dukes*, that plaintiff's claims for individualized monetary relief under Rule 23(b)(2) are barred as matter of law. *Id.* at *5. Additionally, the court also held that plaintiffs have failed to establish the existence of a common question because they did not identify a specific employment practice that is challenged. *Id.* at *6.

[157] *Id.* at *1.

[158] *Id.* at *8.

[159] *Dukes*, 131 S.Ct. at 2562 (Ginsburg. J., dissenting).

[160] *Id. See also* 1 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 3.10 (3d ed. 1992) (providing detailed explanations and interpretations on the class action).

[161] *Dukes*, 131 S.Ct. at 2562 (Ginsburg. J., dissenting). *See also* Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 176 (2003) (discussing the structure of the class action, specifically the principles of the rules itself).

[162] Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147 (1982).

> [C]onceptually, there is a wide gap between (a) an individual's claim that [s]he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual. So that the individual's and the class claim will share common questions of law or fact, and that the individual's claim will be typical of the class claims.[164]

The plaintiff had failed to make any factual allegations regarding the employer's hiring practices. However, as the Court suggests, for respondent to bridge the gap, he must prove much more than the validity of his own claim.[165] Even if evidence that he was passed over for promotion because of his national origin was presented, such evidence would not justify the additional inferences that this discriminatory treatment is typical of petitioner's promotion practices or that this policy of ethnic discrimination is reflected in petitioner's other employment practices, such as hiring. In the same way it is manifested in the promotion practices.[166]

By contrast, the Supreme Court's approach to commonality in *Dukes* is more demanding than even the most rigorous interpretations of *Falcon*. Under the *Falcon* approach, commonality could be established through evidence of an "entirely subjective" decision-making process.[167] However, under *Dukes*, such evidence no longer suffices. "[T]he plaintiff would also need to show that the discriminatory component of the subjective decision-making manifested itself uniformly throughout the class."[168]

This comment proposes that the Supreme Court find a medium between the *Falcon* approach and the *Dukes* approach. If an evidentiary burden is to be placed on plaintiffs during the certification phase of litigation, then the *Falcon* approach should be applied, which does not cause such a widespread preclusion of class actions entirely. This approach avoids the across-the-board class action, which *Falcon* and *Dukes* both attempt to avoid and deter. It also limits it by imposing an evidentiary standard for commonality, which would require substantial evidence of more than one common issue of law or fact to the class members, contrary to Ginsberg's dissent stating that even one issue of law or fact is sufficient.[169]

V. CONCLUSION

At the onset of the decision, *Dukes* was feared to have changed the landscape of the class action for good.[170] While it has not had the far-reaching

---

[163] *See generally id.* at 150.
[164] *Id.* at 157.
[165] *Id.* at 157–158.
[166] *Id.* at 158.
[167] *Id.* at 159 n. 15.
[168] Tippett, *supra* note 153, at 448 (discussing the new, more stringent requirements stemming from the *Falcon* decision).
[169] *Dukes*, 131 S.Ct. at 2562 (Ginsburg. J., dissenting).
[170] Daniel R. Lazaro, *The Death of Large Class Action Lawsuits—Not So Fast! A survey of cases in*

effects that most feared, it has made it significantly more difficult for a class to be certified and, although the body of law that follows *Dukes* will take several years to fully develop.[171] There are several instances, as seen above, where many corporations have won the battle in the early stages. *Dukes* has strengthened Goliath by taking away David's slingshot and, in order to give David a fighting chance in years to come, we must form a mechanism to hold Goliath accountable.

The Supreme Court's answer to these class action problems was a major setback to plaintiffs and a win-win situation for corporations that no longer need to fear the consequences that come with a class action lawsuit. After *Dukes*, even a system of delegated decision-making that produces large statistical disparities, cannot furnish the requisite commonality to support a class action, including where the corporate culture is infected by gender stereotypes.[172]

The plaintiffs' powerful weapon, that once was the class action suit, has unquestionably been diminished by the *Dukes* decision. As such, the corporations that have dodged the class action bullet will ultimately be the beneficiaries of the *Dukes* decision. Plaintiffs, that could rally together against a common enemy and hold these corporations accountable, are now left with little alternatives, and the cost of pursuing an individual lawsuit provides the alleged victims with no relief from a corporation's wrongdoing.

Lastly, the "*Dukes* has redefined the class certification requirements for Title VII cases in ways that jeopardize potentially meritorious challenges to systemic employment discrimination."[173] Although the ultimate effects of *Dukes* have yet to be seen, at the onset of the decision, it can be clearly seen that Goliath has won the war and tipped the scales of justice in favor of corporations over their employees.[174] To avoid this widespread inequality and stray away from the presumed pro-business stance the Supreme Court has taken, Courts should begin to look alternatives, such as adopting the stringent, albeit fair approach under *Falcon*. Also to avoid this unprecedented disparity and allow these cases, as Ginsberg states, to get past the starting gate.[175]

Florida federal courts following Wal-Mart Stores, Inc. v. Dukes, 32 TRIAL ADVOC. Q. 28 (2013), http://www.fdla.org/Scripts/Members/TAQ/TAQ%20Winter%202013.pdf.

[171] *Id.* at 30.

[172] Tippett, *supra* note 153, at 434 (providing an example of even a clear-cut class that would have normally satisfied the commonality requirement, but as a result of *Dukes*, will likely never get past the starting gate).

[173] Malveux, *supra* note 103, at 52.

[174] *Id.* (referring to the unbalance that is the class action post-*Dukes*, where corporations are more heavily favored due to the more stringent requirements necessary to certify a class).

[175] *Dukes*, 131 S.Ct. at 2562 (Ginsburg. J., dissenting).