SOMETHING OLD, SOMETHING NEW, SOMETHING BORROWED, SOMETHING BLUE AND A SILVER SIXPENCE FOR HER SHOE: *DUKES V. WAL-MART* & SEX DISCRIMINATION CLASS ACTIONS

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I. INTRODUCTION

The settlement figures of the recent wave of sex discrimination class actions against some of the country's most well-known companies have garnered much media attention.[1] Lost in the keen focus on the record payoffs is the indication that employment discrimination on the basis of sex or gender continues to be a systemic problem in the country more than forty years after Congress enacted the Equal Pay Act and Title VII to provide women with the opportunity to achieve equal status as similarly-situated men in the workplace.[2] It has also been forty years since Congress amended rule 23 of the Federal Rules of Civil Procedure ("Rule 23"), which facilitated the certifications of class actions for civil rights.[3]

While courts have held corporate defendants financially accountable for workplace violations of sex discrimination, very little is known about the changes, if any, that corporations have been obligated to adopt in the face of increasing scrutiny. The potentially high expenditure and negative publicity of prolonged

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[*] Benjamin N. Cardozo School of Law, J.D., June 2006. I dedicate this Note to the memory of Professor E. Nathaniel Gates, whose lessons will never cease to teach. In his words, he has left me with much "to ponder in my retirement." I also send my thanks to the editors and staff of the *Cardozo Journal of Law & Gender*, and particularly to Christina for refusing to accept no as an answer.

[1] *See Talk of the Nation: Analysis: Class Action Lawsuits* (National Public Radio (NPR) Broadcast, July 15, 2004), *available at* 2004 WL 57331514: "Class-action lawsuits litter the public debate these days . . . 1.6 million women could win monetary damages in the sex discrimination case against Wal-Mart. And earlier this week on Wall Street, Morgan Stanley agreed to pay $54 million to settle its discrimination case." *See also* Brooke A. Masters & Amy Joyce, *Costco is the Latest Class-Action Target; Lawyers' Interest Increases in Potentially Lucrative Discrimination Suits*, WASH. POST, Aug. 18, 2004, at A01.

[2] *See* Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2005); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (2005).

There were 23,094 complaints of sex discrimination filed with the Equal Employment Opportunity Commission (EEOC) in fiscal year 2005. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, CHARGE STATISTICS FY 1992 THROUGH FY 2005 (2006), http://www.eeoc.gov/stats/charges.html [hereinafter EEOC CHARGE STATISTICS]. The number of sex discrimination charges has not shown any steady decline since 1992. In fact, the numbers have remained relatively stable, ranging from a low of 21,796 charges in fiscal year 1992 to a high of 26,181 charges in fiscal year 1995. *Id.*

[3] FED. R. CIV. P. 23. *See* Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 678 (2003).

class actions provide incentive for employers to settle and to nominally agree to implement changes in their employment practices regarding women. However, media focus on the monetary aspect of litigation has defined and skewed the public's perspective of class actions as a means for economic gain by greedy plaintiffs as opposed to a tool for institutional reform for women.[4] At best, the current trend of sex discrimination class actions may achieve only one of the dual objectives of Title VII, namely, to make whole the victim of employment discrimination through compensation, but rarely achieves the second goal to end discriminatory practices in the workplace.

This Note evaluates the effectiveness of large-scale sex discrimination class actions as an impetus for corporate America to improve the status of women in the workplace. The high-profile case of *Dukes v. Wal-Mart*[5] highlights some of the common trends in the recent sex discrimination class actions against "big name" employers.[6] Elements of the old, new, borrowed, and "blue" fuel these cases, most of which result in little more than a mere "sixpence" for the plaintiffs.[7] This Note shifts the focus from the often misleading settlement figures reported by the media to the obstacles that classes of women continue to face when seeking legal redress for company-wide discrimination by formidable employers.

Sections II and III reviews the relevant federal laws related to sex discrimination class actions discussed in this Note. Section IV traces the general trends in sex discrimination class actions during the four decades since the enactments of Title VII and Rule 23. The background provides a basis for the discussion in section V about *Dukes v. Wal-Mart* and the recent wave of class actions. Section VI concludes with suggestions to better utilize sex discrimination class actions to advance the objectives of the law, including more transparency about pay and promotion practices, greater disclosure of allocations of settlement funds, increased monitoring of the implementation and enforcement of institutional changes, as well as a concerted commitment from the leaders of corporations to effect change for women in the workplace.

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[4] *See Talk of the Nation*, *supra* note 1.

> Class action suits have a sort of Jekyll and Hyde place in the American imagination. Some view them as a way for noble crusaders, like Erin Brockovich, to pursue evil corporations. For others, they just give fee-hunger [sic] lawyers a chance to gouge big business and line their own pockets, while the real victims get a pittance.

Id. Carolyn Short, an employment discrimination specialist, said: "This is a case that is monetarily driven. . . ." Constance L. Hays, *Wal-Mart Seeking Review of Class-Action Suit Status*, N.Y. TIMES, July 7, 2004, at C7.

[5] Dukes v. Wal-Mart Stores Inc., 222 F.R.D. 137 (N.D. Cal. 2004).

[6] This Note will focus on class actions involving Equal Pay or Title VII claims based on sex discrimination against women employed by well-known or large corporate employers. Typically, the core allegations in these cases will involve pay and promotion practices of women, rather than those of sexual harassment.

[7] "Something old, something new, something borrowed, something blue, and a silver sixpence for her shoe" is a traditional rhyme and "lucky" wedding tradition for brides. *See* Wikipedia.org, English/British Coin Sixpence, http://en.wikipedia.org/wiki/English/British_coin_Sixpence (last modified Mar. 12, 2006).

II. RELEVANT FEDERAL STATUTES PROTECTING WOMEN'S RIGHTS IN THE WORKPLACE[8]

The beginning of social and economic legislation in the employment context is particularly noteworthy because employment impacts every segment of society on both macro and micro levels. During the civil rights movement in the 1960s, Congress began to enact laws to respond to the growing unrest among socially marginalized groups, namely racial minorities and women. In the area of employment, Congress implemented anti-discrimination laws to protect the rights and interests of historically disadvantaged groups.[9] For some groups, equal employment opportunities likely provided the first real access to resources to improve the group's status in society. Therefore, for a disadvantaged group such as women, the significance of eliminating discriminatory employment barriers meant more than just a better job and improved living conditions; it also paved a path to more opportunities for the group for generations to come, and it further served as a means to gradually redress the devastating effect that past policies of discrimination inflicted on the group as a whole.

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[8] This section discusses only those federal laws that are relevant to the sex discrimination class actions cited in this Note, namely the Equal Pay Act and Title VII. However, there are other federal, state and local laws that protect women's rights in the workplace.

For example, the Secretary of Labor interprets and enforces the Family and Medical Leave Act of 1993, 29 U.S.C. § 2654 (2005) [hereinafter FMLA]. The FMLA is outside the scope of traditional employment discrimination law, but the law provides entitlements that greatly affect many women, particularly mothers, in the workplace. 29 U.S.C. § 2612 (2005). In fact, the congressional findings of the FMLA suggest that the act supplements the gaps in employment law regarding concerns relevant to women. 29 U.S.C. § 2601(a)(3) (2005) (finding that the "the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting"). Congress noted that "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affect the working lives of men . . . ." § 2601(a)(5). Further, "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender." § 2601(a)(6).

Additionally, many state and local anti-discrimination employment laws provide protections that mirror Title VII. *See, e.g.*, CAL. GOV'T CODE § 12940(a) (West 2006); N.Y. EXEC. LAW § 296(1)(a) (McKinney 2006); TEX LAB. CODE ANN. § 21.051 (Vernon 2005). Many jurisdictions have implemented proscriptions not covered in federal statutes. For example, discrimination on the basis of marital status or sexual orientation, which is not covered under Title VII, is prohibited in a number of states under human rights law. *See, e.g.* ALASKA STAT. § 18.80.220 (2005); N.Y. EXEC. LAW § 291(1) (McKinney 2006). In the absence of actual conflict with state laws, federal employment statutes neither preempt overlapping state laws nor preclude states from granting protections that go beyond those in the federal statutes. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-7 (2005).

> Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

Id. *See* Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 283 (1987) (noting "the importance Congress attached to the state antidiscrimination laws in achieving Title VII's goal of equal employment opportunity," the Court held that a California statute requiring leave and reinstatement for disabled pregnant employees is not inconsistent with and thus not preempted by the Pregnancy Discrimination Act under Title VII).

[9] Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d) (2005); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (2005).

A. Equal Pay Act

The Equal Pay Act of 1963 ("EPA") was the first federal statute that Congress passed to prohibit employment discrimination on the basis of sex.[10] Under the statute, similarly-situated female and male employees must receive equal pay for equal work, unless the pay differential is attributable to one of four exceptions, including a seniority system, a merit system, a system that measures by quantity or quality of production, or "any other factor other than sex."[11]

A year later, Congress enacted the influential Title VII of the Civil Rights Act of 1964 ("Title VII"), which provided broader protections that to some extent overshadowed the narrow scope of the EPA.[12] Whereas the EPA specifically addresses sex-based wage discrimination, Title VII prohibits discrimination with respect to an individual's "compensation, terms, conditions, or privileges of employment, because of . . . race, color, religion, sex, or national origin."[13] The EPA remains viable, however, as the compensation levels of women continue to lag behind similarly-situated men in many fields.[14] Perhaps more importantly, Title VII claims of sex-based pay discrimination incorporate the EPA defenses according to the "Bennett Amendment,"[15] such that even under Title VII, the employer bears the burden of showing that the wage differential resulted from a factor other than sex.[16] Attempts to pass the Paycheck Fairness Act, which would expand the remedies and enforcement of the EPA, have thus far failed.[17]

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[10] Equal Pay Act § 206(d).

[11] Equal Pay Act § 206(d)(1).

> No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs . . . [that] requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor than sex.

Id.

[12] Title VII § 2000e.

[13] Title VII § 2000e-2.

[14] According to EEOC statistics, there were 970 charges under the Equal Pay Act in fiscal year 2005. EEOC CHARGE STATISTICS, *supra* note 2.

[15] The Bennett Amendment refers to the last sentence of section 2000e-2(h) of Title VII, which provides:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) [Equal Pay Act] of title 29.

[16] In *County of Washington v. Gunther*, 452 U.S. 161 (1981), the Supreme Court accepted that the work of male prison guards and female guards was not "equal" within the meaning of the EPA. The employer argued that under the Bennett Amendment, a finding that the EPA was not violated precluded a sex-based pay discrimination complaint under Title VII. The Court disagreed, holding that a pay difference is "authorized" by the EPA only when it is based on one of the four statutory defenses in the EPA. The employee may still prove that the pay difference was *motivated* by sex in violation of Title VII, regardless of the EPA finding. Thus, the Bennett Amendment simply makes the EPA defenses applicable to Title VII claims of sex-based pay discrimination.

[17] *See, e.g.*, Paycheck Fairness Act, S. 841, H.R. 1687, 109th Cong. (2005).

B. Title VII of the Civil Rights Act of 1964

Title VII proscribes discrimination based on race, color, religion, sex, or national origin.[18] According to the Supreme Court,

> [t]he objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.[19]

Congress thus required employers to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of impermissible . . . classification."[20]

Title VII provided broad safeguards to the protected groups, extending across almost every phase of the employment process from application through termination. Pursuant to the statute, an employer may not (1) "fail or refuse to hire or to discharge . . . or otherwise discriminate against" any woman with respect to "compensation, terms, conditions or privileges of employment" or (2) "limit, segregate, or classify" in any way that would "deprive or tend to deprive . . . employment opportunities or otherwise adversely affect [her] status as an employee . . . ."[21] Employment agencies and labor organizations are also subject to similar restrictions under Title VII.[22] In addition to job applicants, individuals of the protected groups may not be discriminated against in "admission to, or employment in, any program established to provide apprenticeship or other training."[23]

In the 1972 amendments to Title VII, Congress extended coverage to public employees[24] and authorized the Equal Employment Opportunity Commission (EEOC), the administrative body that enforces Title VII, to file judicial actions on behalf of the government.[25] The Civil Rights Acts of 1991 included extensive

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[18] Title VII § 2000e-2(a).

[19] Griggs v. Duke Power, 401 U.S. 424, 429-30 (1971).

[20] *Id.* at 431.

[21] Title VII § 2000e-2(a).

[22] Title VII § 2000e-2(b) (employment agency); § 2000e-2(c) (labor organization).

[23] Title VII § 2000e-2(d).

[24] Title VII § 2000e(f).

[25] Title VII § 2000e-6(c). Prior to the amendments, only the aggrieved individuals had the authority to file Title VII suits, except that the Attorney General could file "pattern or practice" suits. *See* § 2000e-6(a).

> Granting the Commission the power to institute lawsuits under Title VII was not meant to be mere duplication of the authority to institute such suits already granted to private individuals. Rather, the . . . amendments . . . gave the Commission enforcement powers, because Congress viewed discrimination in employment as a wrong perpetrated upon society as a whole. Elimination of job bias was made a high national priority, a primary burden of which was to rest upon the Commission.

EEOC v. Whirlpool Corp., 80 F.R.D. 10, 13 (N.D. Ind. 1978) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972)).

amendments that further expanded the protections under Title VII, some of which were responses to Supreme Court decisions.[26] For example, Congress authorized award of expert fees,[27] clarified the requirements for liability in "mixed motive" cases,[28] redefined evidentiary burdens,[29] authorized jury trials[30] and extended protection to American citizens engaged in extraterritorial employment.[31] Most significantly, the amendments allowed limited recovery of compensatory and punitive damages to victims of intentional employment discrimination.[32] Prior to 1991, plaintiffs could only seek injunctive relief and equitable relief in the form of reinstatement, back pay, and front pay.

C. Title VII Protection "Because of Sex"

Given the significance and wide-ranging impact of Title VII to women, the legislative history regarding the inclusion of "sex" as a protected class is surprisingly scarce. It seems incredulous that Congress never considered the topic, but in fact, *opponents* of the bill inserted the word "sex" to Title VII in an effort to defeat the bill, the original purpose of which was to end discrimination against African-Americans.[33] Howard Smith, a congressional leader of the southern

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[26] *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071 (1991) ("The purposes of this Act are . . . to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace . . . to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.").

[27] Title VII § 2000e-5(k) ("[T]he court, in its discretion, may allow the prevailing party, other than the [EEOC] or the United States, a reasonable attorney's fee (including expert fees) as part of the costs . . . .").

[28] Title VII § 2000e-2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."). In "mixed-motive" cases, both discriminatory and non-discriminatory factors played a role in the employer's adverse employment decision against the protected employee.

[29] Title VII § 2000e(m) (defining the term "demonstrate" to mean both burdens of production and persuasion); Title VII § 2000e-2(k)(1)(A) (reinstating the status of law regarding the burden of proof in disparate impact cases prior to the Supreme Court decision in *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989)).

[30] 42 U.S.C. § 1981A(c) (2005) ("If a complaining party seeks compensatory or punitive damages under this section, any party may demand a trial by jury . . . ."). Section 1981A(a) cross-references to Title VII to include any action brought under sections 2000e-2, e-3, or e-5 against an employer for *intentional* discrimination. § 1981A(a) (emphasis added).

[31] Title VII § 2000e(f) ("With respect to employment in a foreign country, ["employee"] includes an individual who is a citizen of the United States."). Unless compliance with Title VII violates the law of the foreign country in which the workplace is located, Title VII protections will extend to an American citizen who works in a foreign country. *See* § 2000e-1(b).

[32] 42 U.S.C. § 1981A(b)(1) ("A complaining party may recover punitive damages . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual.").

[33] *See* Bradford v. People's Natural Gas Co., 60 F.R.D. 432 (W.D. Pa. 1973). District Judge Dumbauld wrote in the opening of a ruling that denied class certification to female employees complaining of sex discrimination:

> The suave and subtle Southerners in Congress who put sex into the Civil Rights Act of 1964 (doubtless with the hope of defeating the bill but the strategy backfired and a giant step towards 'women's lib' was perhaps unintentionally taken) were not affected by Chief Justice Burger's subsequent proposal that when enacting new legislation Congress

conservatives who opposed the bill, tacked on the "sex amendment," assuming that its unpopularity would sink the bill.[34] He clearly miscalculated. Yet it is rather telling that the drafters of the bill never truly contemplated the protection of women in the most sweeping employment legislation that changed the face of civil rights and society in American history.

Despite the fortuitous inclusion of "sex" as a protected class under Title VII, since the earliest cases, courts have interpreted from "reading of the statute itself" that Congress aimed "to provide equal access to the job market for both men and women."[35] Accordingly, the statute embodied an assumption "that Congress sought a formula that would not only achieve the optimum use of our labor resources but, and more importantly, would enable individuals to develop as individuals."[36] The EEOC bolstered such interpretations in their guidelines, stating that "[t]he principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group."[37]

However, the courts have generally construed "sex" narrowly, limiting "sex" to the traditional biological concept of sex, and to gender characteristics culturally associated with masculinity or femininity. In the Pregnancy Discrimination Act of 1978, Congress amended the definition of "because of sex" or "on the basis of sex" to "include, but . . . not limited to . . . pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . ."[38] In *Price Waterhouse v. Hopkins*, the plurality opinion of the Supreme Court suggested that although stereotypes in and of themselves do not constitute Title VII violations, employers may not rely on gender stereotypes to make employment decisions that adversely affect a female employee.[39]

> should consciously . . . consider what new burdens in the way of case load will be imposed thereby on the federal judicial system.

Id. at 434-35. "The amendment adding the word 'sex' to 'race, color, religion and national origin' was adopted one day before House passage of Civil Rights Act. It was added on the floor and engendered little relevant debate." Diaz v. Pan Am. World Airways, 442 F.2d 385, 386 (5th Cir. 1971) (refusing to hire men as flight cabin attendant solely because of their sex violated Title VII of Civil Rights Act).

[34] *See Bradford*, 60 F.R.D. at 435 n.1 ("Addition of this omnific word was the result of an amendment offered from the floor by Howard W. Smith of Virginia on February 8, 1964.").

[35] *Diaz*, 442 F.2d at 386 (construing the purpose of the Title VII "to provide a foundation in the law for the principle of nondiscrimination").

[36] *Id.* at 386-87.

[37] EEOC Guidelines on Discrimination Because of Sex, 29 CFR § 1604.2(a)(1)(ii) (2006).

[38] Title VII, 42 U.S.C. § 2000e-1(k) (2005). Congress cautioned, however, that the "subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medial complications have arisen from an abortion." *Id.*

[39] In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989), the employer refused to make plaintiff a partner because she was "too macho" and needed "to go to charm school."

In certain circumstances, the bona fide occupational qualification ("BFOQ") defense may allow an employer to overtly discriminate on the basis of sex.[40] Consistent with EEOC guidelines regarding sex as a BFOQ,[41] courts have interpreted this exception very narrowly.[42] The BFOQ must be "reasonably necessary to the normal operation of that particular business or enterprise."[43] The job qualification must relate to the essence of the business and must be related to the central mission of the employer's business.[44]

III. RELEVANT FEDERAL RULES REGARDING CLASS ACTIONS[45]

Class actions are procedural devices that serve valued objectives in the American judicial system, including fairness, efficiency and judicial economy. In 1966, only two years after Title VII became law, Congress amended rule 23 of the Federal Rules of Civil Procedure, which facilitated certifications of civil rights class actions.[46]

To obtain certification of a class action, the plaintiff must first satisfy the four threshold prerequisites of numerosity, commonality, typicality and representation under Rule 23(a).[47] Thus, the lead or named plaintiff(s) must seek to represent a group of people that are so numerous that joinders of the other named plaintiffs would be impracticable.[48] Common questions of law or fact must exist within the

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[40] The BFOQ defense is also available for allegations based on religion or national origin. Title VII § 2000e-2(e). "Race" is specifically excluded from this section, suggesting that where there may be genuine and natural reasons for disparate treatment in terms of sex, religion, or national origin, there is no fundamental difference between people of different "races." *See* Swint v. Pullman-Standard, 624 F.2d 525, 535 (5th Cir. 1980), *overruled on other grounds by* 456 U.S. 273 (1982) ("We believe that the omission of race and color as [BFOQs] was deliberate and intentional on the part of Congress . . . . Congress did not view race as a qualification which could, conceptually, be reasonably necessary to the efficient operation of any business.").

[41] "The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly." 29 C.F.R. § 1604.2(a). However, sex may be considered a BFOQ "[w]here it is necessary for the purposes of authenticity and genuineness . . . e.g., an actor or actress." 29 C.F.R. § 1604.2(a)(2).

[42] *See, e.g.*, International Union v. Johnson Controls, Inc., 499 U.S. 187 (1991) (rejecting BFOQ defense for employer policy that bars fertile women from jobs that involve potentially harmful lead exposure exceeding occupational health standards); Diaz v. Pan Am. World Airways, 442 F.2d 385, 387 (5th Cir. 1971) (ruling that being a female was not a BFOQ for the job of flight cabin attendant and stating that "it would be totally anomalous" to construe the BFOQ provision "in a manner that would, in effect, permit the exception to swallow the rule.").

[43] 42 U.S.C. § 2000e-2(e).

[44] Dothard v. Rawlinson, 433 U.S. 321 (1977) (granting BFOQ defense for employer to hire only male guards in areas of maximum security penitentiaries because). The Court noted in *Dothard* that danger to the woman herself would not have justified discrimination because it was "the individual woman's decision to weigh and accept the risks of employment" but more was at stake when sex related to the ability to maintain prison security. *Id.* at 335.

[45] States also have rules as related to class actions, but this note will address only class actions under the federal rules. The Class Action Fairness Act, signed into law by President Bush on February 18, 2005, will funnel many large class action suits from the state courts to federal courts, where conditions are thought to be more favorable to corporate defendants. *See* 28 U.S.C. § 1715 (2006).

[46] *See* Green, *supra* note 3, at 678.

[47] FED. R. CIV. P. 23(a).

[48] FED. R. CIV. P. 23(a)(1).

class.[49] The claims or the defenses of the named plaintiff must be typical of the claims or defenses existing in the class.[50] The named plaintiff must fairly represent and adequately protect the interests of the unnamed class members.[51]

Additionally, the class action may only be certified if the action satisfies one of the three circumstances outlined under Rule 23(b): (1) prosecution of separate suits would create the risk of inconsistent or conflicting judgments, or judgments that would substantially impair the interests of unnamed or absent class members; (2) injunctive or declaratory relief is appropriate on a class-wide basis; or (3) common questions of law or fact predominate over unique or individual claims and if the maintenance of a class action is superior to other available methods of adjudication.[52] Factors that would be considered under 23(b)(3) include the interest of the members of the class, the extent and nature of any existing litigation by or against members of the class, the desirability of adjudicating in the particular forum and the difficulties likely to be encountered in management of a class action.[53]

The court *may* direct appropriate notice to the class members for any class certified under 23(b)(1) or (2),[54] but where damages are sought under 23(b)(3), "the court *must* direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[55] The court that certifies a class must also appoint an appropriate class counsel[56] whose experience, knowledge, and resources in handling class claims[57] will be able to "fairly and adequately represent the interests of the class."[58]

Therefore, class actions permit a representative plaintiff to sue on behalf of the common interests of numerous individuals and to secure relief for all members of a defined "class." Where the number of potential plaintiffs involved is vast but the individual relief requested is small, class actions allow the assertion of legal rights that may otherwise be left unaddressed.[59] Further, class actions provide a more efficient and economical means for courts to tackle the merits of all the

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49 FED. R. CIV. P. 23(a)(2).
50 FED. R. CIV. P. 23(a)(3).
51 FED. R. CIV. P. 23(a)(4).
52 FED. R. CIV. P. 23(b).
53 FED. R. CIV. P. 23(b)(3).
54 FED. R. CIV. P. 23(c)(2)(A).
55 FED. R. CIV. P. 23(c)(2)(B).
56 FED. R. CIV. P. 23(g)(1)(A).
57 FED. R. CIV. P. 23(g)(1)(C).
58 FED. R. CIV. P. 23(g)(1)(B).
59 *See* FED. R. CIV. P. 23(b)(1) advisory committee's note (regarding the 1966 amendment) ("The difficulties which would be likely to arise if resort were had to separate actions by or against the individual member of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device.").

potential claims by many plaintiffs as a single albeit larger case instead of as multiple duplicative lawsuits.[60]

Under this reasoning, class actions appear to be theoretically ideal procedural tools to implement the objectives of the Equal Pay Act and Title VII to improve the status of women in employment. As one district court noted, class actions are "the foremost tool with which to fight wide-scale deprivation of our basic constitutional freedoms and reprehensible and disparate treatment based solely on gender or race. The importance and significance of the class action cannot be overstated, and every member of society has benefited from its use."[61]

IV. EBB & FLOW OF SEX DISCRIMINATION CLASS ACTIONS

The courts' historical response to sex discrimination class actions has ebbed and flowed with the social and political climate of the nation. Intuitively, class actions seem like particularly appropriate devices to address Title VII cases that involve allegations of a "pattern or practice" of systemic discrimination against a protected group.[62] Technically, however, Title VII sex discrimination class actions must satisfy not only the procedural prerequisites of Rule 23, but also the substantive *and* procedural requirements of Title VII, including the administrative guidelines set forth by the EEOC.[63]

A. Expansion of Rights and the Liberality of Certification

In the late 1960s to mid-1970s, the courts worked to define, and refine, its interpretations of the newly-enacted Title VII rights as well as the newly-amended Rule 23 procedures.[64] The sex discrimination class suits during this early period often involved issues regarding the technicalities of formulating viable claims that comply with the statutory requirements of both Title VII and Rule 23.[65] On a more theoretical level, courts wrestled with the conflict of dealing with concerns for the private individual as well as the public class in sex discrimination class

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[60] *See* FED. R. CIV. P. 23(a) advisory committee's note (referring to "numerousness of the class making joinder of the members impracticable").

[61] Leach v. Standard Register Co., 94 F.R.D. 621, 630 (W.D. Ark. 1982).

[62] This is particularly true in cases where the defendant employer is a large firm or company. Note that protection of small businesses is already built into Title VII as "employer" under the statute refers only to those who have "fifteen or more employees . . . ." Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (2005).

See Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 614 (1997) (referring to the advisory committee's notes, the Court noted "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples."); Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1201 (7th Cir. 1971) ("The vindication of public interest expressed by the civil rights act constitutes an important facet of private litigation under Title VII.").

[63] *See* Title VII § 2000e-5 (enforcement provisions of the EEOC).

[64] Title VII §§ 2000e to e-17; FED R. CIV. P. 23.

[65] *See, e.g.*, Glus v. G.C. Murphy Co., 329 F. Supp. 563 (W.D. Pa. 1971) (certifying class for a group of female employees alleging sex discrimination). The *Glus* Court cautioned that "[t]he national public policy reflected . . . in Title VII . . . may not be frustrated by the development of overly technical judicial doctrines of standing or election of remedies." *Id.* at 566 (citing Hackett v. McGuire Bros., 445 F.2d 442 (3d Cir. 1971)).

allegations.[66] In *Bowe v. Colgate Palmolive Co.*, a much-cited sex discrimination class action during this early period, the Seventh Circuit noted that "[a] suit for violation of Title VII is *necessarily* a class action as the evil sought to be ended is discrimination on the basis of a class characteristic, i.e., race, sex, religion or national origin."[67] Therefore, most courts readily certified class actions because civil rights claims seemed, by their nature, related to rights belonging to a group rather than that of one individual.[68]

The administrative procedures of the EEOC complicated the process but it did not pose too much of an obstacle for the courts.[69] For example, it is a jurisdictional prerequisite for Title VII plaintiffs to first file a charge with the EEOC against the employer to be sued.[70] In a large class action suit, it is highly impracticable and administratively costly for *all* potential members of the class to file a charge with the EEOC and formally join in the suit, or to obtain "right to sue"

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[66] *See, e.g.*, Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401 (1968) (concluding that the race discrimination class action under Title II of the Civil Rights Act of 1964 was "private in form only"). The Court explained that "[w]hen the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law." *Id.*

See also Hecht v. Coop. for Am. Relief Everywhere, Inc., 351 F. Supp. 305 (S.D.N.Y. 1972) (certifying class status for more than 100 female employees alleging sex discrimination). In the defendant's memorandum in opposition to motion for class action, the company vigorously argued that "the complaint is a conglomerate of essentially personal grievances." *Id.* at 312 (internal quotations omitted). The district court held that although "[p]laintiffs . . . allege individual acts of discrimination of which they were the victims . . . their argument extends much further since they contend that these acts are part and parcel of a pattern of discriminatory treatment of all women applicants and employees." *Id.*

[67] Bowe v. Colgate Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969) (emphasis added).

[68] *See, e.g.*, Sprogis v. United Airlines, Inc., 444 F.2d 1194 (7th Cir. 1971) (affirming that district court had jurisdiction to provide relief to individuals similarly situated where plaintiff did not request class relief). In *Sprogis*, the employer implemented a "no-marriage" rule that applied to female stewardesses only, and the plaintiff was discharged from her position after marriage. The court rejected the defendant's argument "that the 'class' aspect of a Title VII action must be established prior to the judgment on the merits." *Id.* at 1201. The court further declared:

> We need not anticipate and resolve the array of issues which may arise in the determination of the propriety of class relief. In its present posture, this case presents the bald question of the court's power to grant such relief where justice requires such action. In our opinion, Rule 23 to the contrary notwithstanding, the district court possess such power in Title VII cases.

Id. *See* Piva v. Xerox Corp., 70 F.R.D. 378, 383-84 (N.D. Cal. 1975) (concluding that Xerox "should reasonably have expected the EEOC to examine class aspects of plaintiff's individual charge, and . . . [Xerox was] estopped from objecting now . . . that it has been given improper notice and insufficient opportunity to conciliate class claims contained in the complaint").

[69] *See, e.g.*, Parmer v. Nat'l Cash Register Co., 346 F. Supp. 1043 (S.D. Ohio 1972) (denying defendant's motion to dismiss plaintiff's class certification despite failure to file a proper EEOC charge). The *Parmer* Court also noted that "federal courts should not allow procedural technicalities to preclude Title VII complaints" and that the availability of class action suits under Title VII is no longer subject to question. *Id.* at 1046-47.

[70] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e) (2005). "[E]ach person seeking recovery must first file a charge with the EEOC and then formally join in or institute suit for recovery." *Bowe*, 416 F.2d at 720. Further, "[t]his provision serves two important purposes. First, it notifies the charged party of the asserted violation. Secondly, it brings the charged party before the EEOC and permits effectuation of the Act's primary goal, the securing of voluntary compliance with the law." *Id.* at 719.

notices to institute a private action.[71] *Bowe* summarily rejected the requirement, stating that the procedure "would have a deleterious effect on the purpose of the Act and impose an unnecessary hurdle to recovery for the wrongly inflicted."[72] Further, *Bowe* reiterated that

> [i]t would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC . . . . The better approach would appear to be that once an aggrieved person raises a particular issue with the EEOC which he has standing to raise, [s]he may bring an action for [her] self and the class of persons similarly situated.[73]

Therefore, even this procedural hurdle did not curb the liberality of certification in the courts, as evident in *Bowe* and subsequent Title VII sex discrimination class actions that contended with the issue during this early period of expansion.[74]

B. "Pulling in the Reins" with Rigorous Analysis

By the late 1970s, courts began to note the risks of "the liberal view that class actions have been accorded in Title VII context."[75] Courts began to apply Rule 23 more stringently, particularly after the Supreme Court observed that "careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable," despite the awareness that "suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs."[76] As expected, courts interpreted that the same "careful attention" necessarily applied to sex discrimination class suits.[77]

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[71] EEOC Procedural Regulations, 29 C.F.R. § 1601.28 (2005) (regarding issuance of "notice of right to sue").

[72] *Bowe*, 416 F.2d at 720.

[73] *Id.* (citing Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968)) (alterations added).

[74] *See, e.g.*, Piva v. Xerox Corp., 70 F.R.D. 378 (N.D. Cal. 1975). The court cited *Bowe* to support the "well-settled" principle

> that a single plaintiff who has filed a charge of discrimination with the EEOC has standing to bring a class action on behalf of other person similarly situated, whether or not those other persons have filed charges with the EEOC, and there is no statutory or case law requirement that the single charge be labeled or otherwise denominated a "class" charge.

Id. at 383.

[75] Hubbard v. Rubbermaid, Inc., 78 F.R.D. 631, 645 (D. Md. 1978) (limiting scope of the class to past, present, and future female employees in only the Home Product Field Sales operations). When considering the plaintiff's motion for class certification, the court attempted to strike a balance between "an awareness of the pitfalls of certifying an overbroad class" and "a view toward the liberality extended to Title VII class actions." *Id.* at 640.

[76] E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405 (1977) (reversing class certification on the basis that plaintiffs were not proper class representatives in race and national origin discrimination case).

[77] *See, e.g.*, Miller v. Motorola, Inc., 76 F.R.D. 516 (N.D. Ill. 1977) (granting motion to strike class action allegations). The court cited the Supreme Court in *Rodriguez*, 431 U.S. at 395, and concluded that "[i]t is axiomatic that this admonition applies with equal force to class actions involving claims of sex discrimination . . . ." *Miller*, 76 F.R.D. at 518. *See also* Richardson v. Coopers & Lybrand, 82 F.R.D. 335, 337 (D.D.C. 1978) (citing *Rodriguez* to deny class certification to African-American female

However, where the EEOC was concerned, the courts found it more difficult to "pull in the reins." The 1972 amendments to Title VII took effect in 1974 and gave the EEOC the authority to file judicial actions on behalf of the government.[78] The EEOC intervened and investigated individual sex discrimination charges, but its role in class litigations remained in a state of flux as it was difficult to accommodate the often-divergent private and public interests of the suits.[79] Specifically, the issue of "adequate representation" split the courts because

> [t]he only class which the [EEOC] can represent adequately and without conflict is the public as a whole, a group that is not at all the same as that comprised of individual employees who seek relief under the Act . . . . Rule 23, however, requires both class membership and adequate representative status . . . conditions that the [EEOC] cannot meet.[80]

Furthermore, the EEOC "may be more concerned with general injunctive and affirmative relief [that] affects future compliance with the Act than with redressing employee grievances that have already occurred."[81] In 1980, in *General Telephone*

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plaintiffs who cannot adequately represent "white women employees"); Steffin v. First Charter Fin. Corp., 77 F.R.D. 498 (C.D. Cal. 1978) (denying motion for class certification in sex discrimination case against former employer). The court in *Steffin* held that even under a liberal interpretation, the plaintiff failed to demonstrate or even to suggest claims that were representative of a purported class. *Id.* at 500. Further, Judge Gray added in dictum:

> A Title VII class action . . . does give an aggrieved employee an opportunity for relief, but it also has a divisive tendency to create dissatisfaction where contentment previously had prevailed, which is contrary to the legitimate interests of all concerned. I am aware of the possibility that some employees may feel abused but are reluctant to speak up and risk the wrath of the employer. However, the actual absence of a commonly held feeling of discrimination and abuse would defeat the typicality required by Rule 23, and it is unfair to the employer and destructive to good personnel relationships to proceed with a class action under the assumption that there must be some class members that share the plaintiff's unhappiness if only we could find them.

Id. at 500-01.

78 *See supra* note 25 and accompanying text.

79 *See e.g.* EEOC v. D.H. Holmes Co., 556 F.2d 787 (5th Cir. 1977) (holding that the EEOC must comply with Rule 23 when it brings a class action involving sex discrimination allegations); EEOC v. Delaware Trust Co., 81 F.R.D. 448 (D. Del. 1979) (holding that the EEOC must comply with Rule 23 to the extent that the Commission intended to seek individualized relief for unnamed members of the affected class of female employees). *But see* EEOC v. Akron Nat'l Bank & Trust Co., 78 F.R.D. 684 (N.D. Ohio 1978) (declining to follow *D.H. Holmes*, 556 F.2d 787, and holding that the EEOC may for public interest prosecute a "pattern or practice suit" alleging sex discrimination as a statutory class action exempt from provisions of Rule 23); EEOC v. Whirlpool Corp., 80 F.R.D. 10, 21 (N.D. Ind. 1978) (holding that compliance with Rule 23 is not a prerequisite to a class action alleging Title VII violations because of sex). "The Commission must represent the public interest as well as the interests of the two charging parties, even though [the plaintiffs] may be the immediate beneficiaries of this suit." *Id.* at 13. "[T]he Commission is a federal agency representing primarily the public interest when it sues to enforce Title VII rather than the interests of the private charging parties . . . ." *Id.* at 16.

80 *Whirlpool Corp.*, 80 F.R.D. at 15 (alterations added).

81 *Id.* at 21 ("Therefore, to require the Commission to proceed under Rule 23 would only present necessary and complicated procedural problems making Title VII suits more time-consuming and burdensome.").

Company of the Northwest v. EEOC, a sex discrimination class action, the Supreme Court finally held that the EEOC was not required to comply with Rule 23.[82]

Perhaps responding to its concession to the EEOC only two years earlier, the Court categorically abrogated the liberality once applied to the certification of Title VII class actions in *General Telephone Company of the Southwest v. Falcon*.[83] The Court proclaimed that nothing in Title VII indicated "that Congress intended to authorize such a wholesale expansion of class-action-litigation,"[84] Additionally, the Court stated "that a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a *rigorous analysis*, that the prerequisites of Rule 23(a) have been satisfied."[85] In explicit and emphatic terms, the Court embraced Judge Godbold's specially concurring opinion in *Johnson v. Georgia Highway Express, Inc.*, and quoted his warning about "the error of the 'tacit assumption' underlying the across-the-board rule that 'all will be well for surely the plaintiff will win and manna will fall on all members of the class.'"[86]

Therefore, *Falcon* forcefully curtailed the liberal certifications of Title VII sex discrimination class actions, and the influence of "rigorous analysis" reverberated far into the 1990s.[87] In *Churchill v. International Business Machines,*

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[82] Gen. Tel. Co. of the Nw. v. EEOC, 446 U.S. 318, 324 (1980) (stating that the EEOC "need look no further than § 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals").

[83] Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147 (1982) (reversed certification order in Title VII national origin discrimination case).

[84] *Id.* at 159. The Supreme Court "pulled in the reins" on expansive "across the board" employment discrimination class actions "by insisting on actual, not presumed, compliance with the typicality and commonality provisions of Rule 23." Goodman v. Lukens Steel Co., 777 F.2d 113, 122 (3d Cir. 1985), *aff'd*, 482 U.S. 654 (1987) (limiting period of Title VII charges in race discrimination class action).

While conceding that "[i]n the wake of *Falcon,* courts have been generally strict in their application of the Rule 23(a) criteria[,]" some courts apparently struggled with the treatment of *Falcon* in sex-based discrimination class actions. Rossini v. Ogilvy & Mather, Inc., 798 F.2d 590, 597 (2d Cir. 1986) (reversing denial of class status to female employees while recognizing "that the primary thrust of *Falcon* was that satisfaction of Rule 23(a) requirement may not be *presumed*"). *See also* Meiresonne v. Marriott Corp., 124 F.R.D. 619, 623 (N.D. Ill. 1989) (distinguishing *Falcon* in granting class certification to female employees alleging discrimination in promotions); Avagliano v. Sumitomo Shoji Am., Inc., 103 F.R.D. 562 (S.D.N.Y. 1984) (certifying Title VII class for female secretarial employees in spite of *Falcon* and vigorous arguments regarding inadequate representation). *But see* Ross v. Nikko Sec. Co. Int'l, 133 F.R.D. 96 (S.D.N.Y. 1990) (emphasizing *Falcon* in denying class certification to female employees alleging sex, race, and national origin discrimination).

[85] *Falcon*, 457 U.S. at 161 (emphasis added).

[86] *Id.* at 160-61 (quoting Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1127 (5th Cir. 1969)) (Godbold, J., specially concurring). The "across-the board" rule alleges

> a single or unified underlying policy or pattern of discrimination attributable to the defendant-employer and seek to rectify the various forms in which the discrimination is manifested. In such cases the named plaintiff is permitted to represent all who are affected by the company-wide policy and not just those who suffer from the peculiar factual grievance suffered by the plaintiff.

Bartelson v. Dean Witter & Co., 86 F.R.D. 657, 662 (E.D. Pa. 1980).

[87] *See, e.g.*, International Union v. LTV Aerospace & Def. Co., 136 F.R.D. 113 (N.D. Tex. 1991) (limiting certification to a subclass of employees in Title VII sex discrimination case); Caridad v. Metro-North Commuter R.R., 191 F.3d 283 (2d Cir. 1999) (applying rigorous analysis to deny certification to employees in Title VII sexual harassment case).

Inc., a New Jersey district court denied certification and concluded that anonymous affidavits alleging general sex-based salary discrimination failed the requirement of *Falcon* to bridge the conceptual "wide gap" between the plaintiffs' claim and the existence of a purported class of aggrieved persons who have suffered the same discrimination.[88] "*Falcon* . . . virtually eliminated the across-the-board rule, leaving only a vague possibility that it may be used in cases where employers have entirely subjective decisionmaking processes."[89]

The "rigorous analysis" test, well-established since *Falcon* in 1982, continues to exert a limiting influence on the certification of class actions.[90] Furthermore, courts increasingly favor and rely on a footnote to support denial of class certifications.[91] In recent cases against Honeywell and Microsoft, for example, district courts refused to certify class status for female employees who alleged sex discrimination because as required by footnote fifteen in *Falcon*, the plaintiffs lacked "significant proof" to establish a pattern or practice discrimination class action.[92] Even today, *Falcon* remains very viable and is often cited in a vast array of class certification cases well beyond that of Title VII.[93]

C. Uncertainty After the Civil Rights Act of 1991

The Civil Rights Act of 1991 ("1991 Act") introduced a new complexity for the courts, specifically regarding Title VII class actions that involve Rule 23(b)(2) certification. As part of the 1991 Act, Congress expanded the Title VII remedies to include compensatory and punitive damages in addition to equitable relief for victims of intentional discrimination.[94] In *Amchem*, the Court stated that Rule 23(b)(2) is particularly appropriate for "[c]ivil rights cases against parties charged

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[88] Churchill v. Int'l Bus. Machines, Inc., 759 F. Supp. 1089, 1101 (D.N.J. 1991) (quoting *Falcon*, 457 U.S. at 157-58).

[89] *LTV Aerospace*, 136 F.R.D. at 121.

[90] *See, e.g.*, Hoffman v. Honda of Am. Mfg., 191 F.R.D. 530, 537 (S.D. Ohio 1999) (stressing "rigorous analysis" of the prerequisites of Rule 23); Boyce v. Honeywell, Inc., 191 F.R.D. 669 (M.D. Fla. 2000) (denying motion for class certification of female and minority employees). *Boyce* cited *Falcon* extensively at the outset of its analysis, stating that "[c]ourts have been dissuaded from certifying 'across-the-board' class actions in Title VII cases." *Id.* at 675.

[91] *See, e.g., Boyce*, 191 F.R.D. at 675; Donaldson v. Microsoft Corp., 205 F.R.D. 558, 565 (W.D. Wash. 2001).

[92] Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 159 n.15 (1982):

> Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes. In this regard it is noteworthy that Title VII prohibits discriminatory employment *practices*, not an abstract policy of discrimination.

[93] *See, e.g.*, Deiter v. Microsoft Corp., 436 F.3d 461, 466 (4th Cir. 2006) (holding that consumers did not satisfy typicality requirement to certify class); Bates v. United Parcel Serv., 204 F.R.D. 440 (N.D. Cal. 2001). (distinguishing *Falcon* to hold that hearing-impaired employees satisfied requirements for certification).

[94] 42 U.S.C. § 1981A(b)(1) (2005). Compensatory and punitive damages are not available in disparate impact cases, in which "intent" is not necessary to prove discrimination. *See* § 1981A(a); *supra* note 32 and accompanying text.

with unlawful, class-based discrimination."[95] However, 23(b)(2) authorizes certification only if injunctive or declaratory relief is appropriate as related to the class as a whole.[96] Circuit courts that addressed the question consistently endorsed the position contained in the advisory committee's note that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."[97]

In *Ticor Title Insurance Co.*, the Supreme Court acknowledged "at least a substantial possibility" that plaintiffs seeking money damages on behalf of a class may be certified only under Rule 23(b)(3).[98] The Court declined to decide on the hypothetical issue in *Ticor*,[99] but the result was a circuit split that remains unresolved today. The Fifth Circuit concluded that "monetary relief predominates in (b)(2) class actions unless it is *incidental* to requested injunctive or declaratory relief."[100] However, the Second Circuit adopted a less rigid ad hoc balancing approach instead of the incidental damages standard.[101] Some courts responded to the uncertainty with the creation of the "hybrid class."[102] Under the hybrid rule, the court first considers issues of liability under 23(b)(2), and *then* addresses issues relating to damages using the opt-out procedures available under 23(b)(3).[103] In other words, the court certifies a (b)(2) class for the equitable claims and a (b)(3) class for the monetary claims.

Similar to other Title VII suits, sex discrimination class actions were typically certified under 23(b)(2). After the 1991 Act, class actions that sought both equitable relief and damages stood on rather uncertain constitutional footing. Therefore, although Congress may have intended the 1991 Act to expand the remedies available under Title VII, the intricacies of both the 1991 Act and Rule 23 appeared to have made it more difficult for sex discrimination class actions. Yet

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95 Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 614 (1997).

96 FED. R. CIV. P. 23(b)(2). *See, e.g.*, Hoffman v. Honda of Am. Mfg., 191 F.R.D. 530, 536 (S.D. Ohio 1999) (concluding that female employees seeking both injunctive relief and money damages "*may* be certified as a class under Rule 23(b)(2), as long as money damages do not constitute the predominate [sic] type of relief requested").

97 FED. R. CIV. P. 23(b)(2) advisory committee's note. *See, e.g.*, Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998) (denying class certification to plaintiffs in race discrimination case). "We, like nearly every other circuit, have adopted the position taken by the advisory committee that monetary relief may be obtained in a (b)(2) class action so long as the predominant relief sought is injunctive or declaratory." *Id.* at 411.

98 Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 121 (1994) (dismissing writ of certiorari as improvidently granted in action brought by class of consumers who alleged that title insurers conspired to fix rates for title search services).

99 *See id.* at 122.

100 *Allison*, 151 F.3d at 415 (emphasis added). The court elaborated on the meaning of "incidental" as "damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief. Ideally, incidental damages should be only those to which class members automatically would be entitled once liability to the class . . . as a whole is established." *Id.* (internal citations omitted).

101 Robinson v. Metro-North Commuter R.R., 267 F.3d 147 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2002).

102 *See, e.g.*, Beckmann v. CBS, Inc., 192 F.R.D. 608, 615 (D. Minn. 2000) (finding that the hybrid rule is an "appropriate vehicle" for certification of a class of female technical employees).

103 *Id.*

sex discrimination class actions did not ebb and the next wave of cases culminated in the late 1990s to early 2000s with a deluge of headlines about class actions involving women and some of the country's most well-known companies, including the world's largest retailer.[104]

V. THE CURRENT WAVE: *DUKES V. WAL-MART*

On June 21, 2004, neither rigorous analysis nor the uncertainty as to the application of Rule 23(b)(2) prevented a California district court from certifying the class in *Dukes v. Wal-Mart*.[105] Headlines about the certification—the largest Title VII sex discrimination class action ever and the largest civil rights class action in U.S. history—quickly spread across the front pages of newspapers in the country.[106] The six named plaintiffs[107] became representatives for a class of all the current and former female employees in U.S. locations of Wal-Mart since December 26, 1998.[108] The certification of the class pitted some 1.6 million women against the largest private employer in the world, a fact that sparked immediate nationwide interest in the case.[109]

However, the main attraction of the case remains the defendant with the deep pockets.[110] The decision comes at a time when labor groups and activists have literally waged a crusade against Wal-Mart for its many exploitive employment

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[104] *See* Betsy Morris et al., *How Corporate America is Betraying Women: Forty Years After Sex Discrimination Became Illegal, A Huge Gap in Pay and Promotions Still Yawns. Now Angry Women Are Suing Their Employers—and Winning. How Afraid Should You Be?*, FORTUNE, Jan. 10, 2005, at 64.

> The deluge began last May. That's when Boeing agreed to cough up as much as $72.5 million to settle a class-action lawsuit brought by female employees; they had asserted that the company paid them less than men and did not promote them as quickly. The next month . . . a court ruled that a lawsuit charging Wal-Mart with discriminatory pay and promotion practices could proceed as a class action. In July, Morgan Stanley stunned a courtroom jam-packed with Wall Street women by announcing an 11th-hour $54 million settlement to a class-action suit that made similar allegations. Then, in August, an assistant store manager for Costco sued the retailer for denying her a promotion. Her lawyers have asked the court to allow that case, too, to proceed as a class action.

Id.

[105] Dukes v. Wal-Mart Stores Inc., 222 F.R.D. 137 (N.D. Cal. 2004).

[106] *See, e.g.*, Lisa Girion & Abigail Goldman, *Wal-Mart Must Face Huge Sex-Bias Suit: Case Is Given Class-Action Status. The Ruling Could Spur Mass Complaints Against Other U.S. Firms*, L.A. TIMES, June 23, 2004, at A1; Steven Greenhouse & Constance L. Hays, *Wal-Mart Sex Bias Suit Given Class-Action Status*, N.Y. TIMES, June 23, 2004, at A1.

[107] *Dukes*, 222 F.R.D. at 141.

[108] *Id.* at 188 (certifying class for "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have "been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices").

[109] *See, e.g.*, Amy Joyce, *Wal-Mart Bias Case Moves Forward: 1.6 Million Women May Join Class-Action Suit*, WASH. POST, June 23, 2004, at A01; Ann Zimmerman, *Judge Certifies Wal-Mart Suit as Class Action: Up to 1.6 Million Could Join Sex-Discrimination Case; Company Plans to Appeal*, WALL ST. J., June 23, 2004, at A1.

[110] "Every plaintiff wants to grab something from the world's deepest pockets. As the world's largest company, Wal-Mart Stores Inc. is an international target for lawsuits." Keith Ecker, *Labor Group Holds Wal-Mart to Code of Conduct*, CORP. LEGAL TIMES, Nov. 2005, at 70, col. 1.

practices.[111] Allegations and suits against Wal-Mart surface on a seemingly daily basis.[112] Notably, the court's response has been quite receptive to the appeals of the employees,[113] even in class suits, despite the rigorous analysis standard.[114] In fact, *Dukes* cited *Falcon*, and the court acknowledged its obligation to "conduct a rigorous analysis to determine that the prerequisites of Rule 23 have been met," but it also promptly observed that "[w]hile the court's analysis must be rigorous, Rule 23 confers broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court."[115] The court further stated that "[i]mplicit in this deferential standard is recognition of the essentially factual basis of the certification inquiry and of the district court's inherent power to manage and control pending litigation."[116]

Although admittedly extraordinary because of the size of the "players" in the suit, *Dukes* also illustrates some of the common trends in the recent surge of Title VII sex discrimination class actions against high profile corporate defendants. Underlying these cases are elements of the old, the new, the borrowed, the "blue," and in spite of media reports to the contrary, the settlements of the cases frequently leave victims with little more than relative pennies as relief.

A. Something Old: Allegations and Arguments

District Judge Jenkins downplayed the "notions of historical import" of *Dukes*, observing that the ruling of certification does not make any determination on the merits and that "while the size of the proposed class is unique, the issues are not novel, and Plaintiffs' claims are relatively narrow in scope."[117] Indeed, the plaintiffs' allegations of sex discrimination in terms of promotions and pay were typical of most cases with similar claims. Specifically, the women claimed Wal-Mart paid them less than their male counterparts in comparable positions, despite

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[111] *See* Stephanie Armour, *Growing Opposition Frowns on Wal-Mart*, USA TODAY, Dec. 5, 2005, at 01B. A representative of WakeUpWalMart.com said, "Wal-Mart is facing a perfect storm of negativity . . . . People are rallying around this movement. It's not just workers. It's rippling out and becoming a real debate about values." *Id.* (internal quotations omitted).

[112] "In fact, it is estimated that Wal-Mart faces roughly 5,000 lawsuits each year, an average of about thirteen new suits *each day*." JOHN DICKER, THE UNITED STATES OF WAL-MART 29 (2005) (internal citation omitted).

[113] *See, e.g.*, Pérez-Cordero v. Wal-Mart Puerto Rico, No. 05-1255, 2006 WL 598128 (1st Cir. Mar. 13, 2006) (reversing district court's summary judgment in favor of Wal-Mart in gender discrimination sexual harassment suit).

[114] *See, e.g.*, Lupiani v. Wal-Mart Stores Inc., 435 F.3d 842 (8th Cir. 2006) (reversing district court's dismissal of ERISA class action alleging that Wal-Mart excluded union members from coverage); *In re* Wal-Mart Wage & Hour Employment Practices Litigation, No. 1735, 2006 WL 461026 (J.P.M.L. Feb. 16, 2006) (granting centralization of pretrial proceedings in up to eleven actions pending in eleven districts alleging that Wal-Mart failed to pay its hourly employees for all of their time worked).

[115] Dukes v. Wal-Mart Stores Inc., 222 F.R.D. 137, 143 (N.D. Cal. 2004) (internal citations omitted).

[116] *Id.* (internal quotations omitted).

[117] *Id.* at 142. In a footnote, Judge Jenkins rejected defendant's characterization of the case as a "wall-to-wall" and "across-the-board" class action. *Id.* at n.4.

more years of experience and better performance evaluations.[118] As compared with similarly-situated men, women allegedly received fewer promotions to management positions, and for those who were promoted, women had to wait longer than their male counterparts for advancement opportunities.[119]

The plaintiffs argued that company-wide discriminatory policies and practices allowed Wal-Mart managers to exercise broad discretion and "excessive subjectivity which provides a conduit for gender bias" in pay and promotions.[120] Further, the failure to post a large proportion of advancement opportunities reinforced the subjectivity factor in promotional decisions.[121] Store managers virtually acted as the sole decision-makers in the selection of candidates into the Management Training Program.[122] Wal-Mart countered that the company has implemented a number of diversity and equal opportunity policies in the past few years, including goals to increase female representation in management.[123] Plaintiffs also presented expert opinions, statistical evidence, and anecdotal evidence to support their arguments.[124]

These allegations and arguments, and even the fact patterns, are hardly new or ground-breaking in sex discrimination class actions. Some of the earliest cases under Title VII consisted of similar allegations and strategic maneuvers. For example, as early as 1973, female employees brought a Title VII class action against the New York Telephone Company, alleging sex discrimination in filling management level vacancies.[125] Similar to *Dukes*, the plaintiffs relied primarily on statistical evidence to prove their case.[126] Specifically, the plaintiffs claimed that six percent or less of the participants in the Management Development Program

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[118] *Id.* at 141.

[119] *Id.*

[120] *Id.* at 145, 148 (internal citations omitted).

[121] *Id.* at 148.

[122] *Id.* There were minimum corporate guidelines for such selections of candidates, including "above average" evaluations, willingness to relocate, one year experience in the current position, current training, a "Rising Star" and not in a "high shrink" department or store. *Id.*

[123] *Id.* at 153-54. "Wal-Mart has earned national diversity awards and its executives discuss diversity and include it in the company handbooks and trainings." *Id.* at 154. However, expert testimony for the plaintiffs criticized that Wal-Mart did not implement many of its diversity plans until the last few years and that their effectiveness is questionable. *Id.* at 153-54. "[T]he company has not translated that emphasis [on diversity issues] into practical and effective measures, there has been little actual impact on gender differentials in pay and promotion." *Id.* at 154 (alterations added).

[124] *Id.* at 145.

> Plaintiffs present extensive evidence . . . grouped into three major categories: (1) facts and expert opinion supporting the existence of company-wide policies and practices; (2) expert statistical evidence of class-wide gender disparities attributable to discrimination; and (3) anecdotal evidence from class members around the country of discriminatory attitudes held or tolerated by management.

Id. See generally Lisa Girion, *Brief Details Gender Bias Claims at Wal-Mart: Testimony from Women Is Gathered to Make the Case for a Class-Action Suit*, L.A. TIMES, Apr. 28, 2003, at C1 (summarizing details from the plaintiff's sixty-one page brief, including some of the more egregious testimony from "more than 100 depositions of executives and the voluntary declarations of 110 female employees").

[125] Leisner v. N.Y. Tel. Co., 358 F. Supp. 359 (S.D.N.Y. 1973).

[126] *Id.* at 363-65.

were women.[127] The defendant contended that the Management Development Program, which was "designed to permit employees to demonstrate that they have the aptitude for high management level positions[,]" failed "to attract significant numbers of women."[128] Company interviewers appeared to exercise "considerable discretion in determining whether applicants have the potential for the Management Development Program."[129]

Furthermore, anecdotal evidence included the sympathetic accounts of very credible and qualified plaintiffs.[130] The named plaintiff Mrs. Leisner was described as an experienced manager boasting impressive academic accolades and educational achievement.[131] She also scored the highest of the three possible ratings in the management assessment test.[132] The court discredited the employer's subjective selection criteria and techniques, and certified the class on the basis that the employer could not fully account for disparities that resulted in the "under-utilization of women in many management level jobs."[133]

Recent sex discrimination class actions also involved allegations and arguments that are strikingly similar to those of *Dukes*. Although "[t]he women workers of Wall Street and Wal-Mart appear worlds apart[,]"[134] the female plaintiffs in *EEOC v. Morgan Stanley* also complained that they were paid far less than their male counterparts, and recounted anecdotes about inappropriate behavior or comments by male coworkers.[135] In *Beck v. Boeing* in 2001, female employees of the company's aircraft plants also alleged sex discrimination in promotion and pay, among other things.[136] The case involved 29,000 women.[137] Plaintiffs' experts alleged that Boeing injured women by adopting policies that permit "excessive subjectivity" and discriminatory decision-making procedures.[138] Unlike the nationwide certification in *Dukes*,[139] however, the Washington District Court in *Beck* limited the class to female employees in the Puget Sound area since

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127 *Id.* at 364.

128 *Id.*

129 *Id.* at 365.

130 *Id.* at 364-66.

131 Mrs. Leisner graduated from the University of Pennsylvania in 1968; she was also an alumni regional scholar and a member of an academic honor society. *Id.* at 365. When the defendant hired her, she had completed four semesters at New York University in post-graduate work pursuing a Masters degree in business administration. *Id.*

132 *Id.*

133 *Id.* at 368.

134 Gail Gibson, *Women Workers in U.S. Have Bias in Common: Discrimination Lawsuits Highlight How Little Their Complaints Differ from the Boardroom to the Stockroom*, BALT. SUN, July 16, 2004, at 1A (noting the shares experiences of both groups despite the fact that "[o]ne group shows up in suits from Bergdorf Goodman and takes home a paycheck routinely into six figures; the other clocks in wearing a trademark blue smock and might not clear $30,000 a year").

135 *See* Amended Complaint at ¶ 7, EEOC v. Morgan Stanley & Co., No. 01 CV 8421(RMB) (S.D.N.Y. Sept. 5, 2002), *available at* 2002 WL 32915010.

136 Beck v. Boeing Co., 203 F.R.D. 459, 461 (W.D. Wash. 2001).

137 *See* J. Lynn Lunsford, *To Settle Sex-Bias Suit, Boeing Agrees to Pay Up to $72.5 Million*, WALL ST. J., July 19, 2004, at B2.

138 *Beck*, 203 F.R.D. at 461 (internal quotations omitted).

139 Dukes v. Wal-Mart Stores Inc., 222 F.R.D. 137 (N.D. Cal. 2004).

1997.[140] The plaintiffs therefore sued in separate regional class actions[141]—a fate that may still befall the Wal-Mart plaintiffs if the Ninth Circuit Court of Appeals reverses certification on review.[142]

Wal-Mart's answers to the plaintiffs' allegations were also quite typical of the defenses raised by large corporate defendants. The company "contest[ed] the accusation of gender stereotyping on the facts" and challenged the statistical analysis of the plaintiffs' expert.[143] Wal-Mart further countered that acts of discrimination, if any, were "the fault of individual managers whose behavior did not reflect the intent of the corporation,"[144] As such, even if there were acts of discrimination, they were isolated occurrences that represent mere aberrations of conduct for which the company should not be held liable.[145] Additionally, Wal-Mart argued that the 110 female employees who filed declarations in support of the suit were "exceptions," particularly since they comprised a "tiny fraction" of the women currently employed by Wal-Mart.[146]

The allegations in *Boeing* also drew similar responses and counterarguments from the company. Boeing denied all allegations of discriminatory practices, and further stated that it "has gone to great lengths to ensure equity in the very things the ladies brought suit against—and that is equity in pay and promotion . . . ."[147] In one of the regional cases, *Anderson v. Boeing*, the company attempted to cast doubt on the plaintiffs' statistical evidence,[148] and disputed that the company's decision-making elements was not "entirely" subjective.[149] The Oklahoma District Court observed that Boeing contradicted itself by arguing that the company guided managers to use "a myriad of objective factors . . . in making employment decisions," [150] but also "pursue[d] a decentralized management structure in which

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[140] *Beck*, 203 F.R.D. at 461, 468. *See also* Lunsford, *supra* note 136.

[141] The regional suits, for the most part, did not succeed. Courts in southern California, Kansas and Missouri denied or decertified class action status against Boeing in late 2003 and early 2004. *See, e.g.*, Moore v. Boeing Co., No. 4:02CV80 CDP, 2004 WL 3202777, at *1 (E.D. Mo. Mar. 31, 2004) (denying certification). *See also Boeing Co.: Class-Action Status Is Dropped in Sex-Discrimination Case*, WALL ST. J., Feb. 27, 2004 at B2 (reporting on the decertification of class in Kansas); Caroline Daniel, *Boeing Agrees to Dollars 72.5m Settlement in Sex Bias Case*, FIN. TIMES (London), July 17, 2004, at 1.

[142] *See* Wendy Zellner, *Wal-Mart's Discovery Dispute*, BUS. WK., Aug. 16, 2004, at 8. The Ninth Circuit Court of Appeals heard an appeal by Wal-Mart on August 8, 2005. BLOOMBERG NEWS, *Wal-Mart Asks Court to Narrow Bias Suit*, N.Y. TIMES, Aug. 9, 2005, at C2.

[143] *Dukes*, 222 F.R.D. at 154 (alteration added).

[144] *Id.* at 154.

[145] Girion, *supra* note 124. "The entire company is very decentralized . . . . Store managers run their stores. They have an awful lot of autonomy to make the right decisions . . . . Sometimes they've made the wrong decision, but there is absolutely no basis for any kind of system-wide discrimination at Wal-Mart." *Id.*

[146] "[W]e cannot afford to be judged by these exceptions." *Id.*

[147] *Boeing Co.: Class Action Status Is Dropped In Sex-Discrimination Case*, *supra* note 141.

[148] Anderson v. Boeing Co., 222 F.R.D. 521, 532 (N.D. Okla. 2004).

[149] *Id.* at 537. The court rejected Boeing's arguments regarding a "list of objective factors" as "vague." *Id.* (internal quotations omitted).

[150] *Id.* "While Boeing attempts to detail how 'well-established' its guidelines are in order to avoid the claim of subjective decision-making, it belies its later claim that the highly individualized nature of the practice challenged . . . ." *Id.*

the vast majority of employment decisions are determined by direct supervisors . . . with no influence from higher management."[151]

Sympathetic lead plaintiffs, "tap on the shoulder" promotions, excessively discretionary or subjective policies, centralized managerial structures, divergent adversarial expert testimonies, and statistical analyses are common staples of most employment discrimination cases. *Dukes* is no different in this aspect. Although indispensable to the case, these allegations and arguments likely play a minimal part in the nationwide appeal of the case, and these "some things old" may ultimately become no more than a nominal part of the suit's success, or lack thereof.

B. Something New: Mega-Class, Mammoth Company & Manageability Concerns

The sheer size of *Dukes*, and its potentially staggering payout to a class of 1.6 million women, has contributed much to its novel nature.[152] Even the district court acknowledged that the class "dwarf[ed] other employment discrimination cases that have come before."[153] However, the court also noted at the outset of its ruling that the fiftieth anniversary of *Brown v. Board of Education* in 2004 should serve "as a reminder of the importance of the courts in addressing the denial of equal treatment under the law wherever and by whomever it occurs."[154]

Yet Wal-Mart contends that *it* is "being held to a different standard because of [*its*] size and visibility and success."[155] Despite the threat of such unprecedented litigation and severe public criticism, Wal-Mart is still the top-ranking company on Fortune 500, and in 2004, "yet again defied the laws of large numbers, with sales climbing 10% to an astonishing $288 billion. Profits rose 13%, to more than $10 billion, in spite of a soft Christmas season."[156] Wal-Mart currently employs 1.6 million[157] "associates"[158] worldwide,[159] dictates product

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[151] *Id.* at 538 (internal citations omitted).

[152] "The Wal-Mart sex discrimination class action has drawn serious attention for its size. Justly so. Some 1.6 million women are confronting the retail colossus in what is being billed as the largest civil rights class action ever certified." Nathan Koppel, *Joint Chiefs*, AM. LAW., Aug. 2004, at 15.

[153] Dukes v. Wal-Mart Stores Inc., 222 F.R.D. 137, 142 (N.D. Cal. 2004).

[154] *Id.* at 142 (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954)). Interestingly, Judge Jenkins did not point out that 2004 was also the fortieth anniversary of Title VII under the Civil Rights Act of 1964, which is the substantive law involved in this case.

[155] Constance L. Hays, *Social Issues Tug Wal-Mart in Differing Directions*, N.Y. TIMES, June 30, 2004, at C1 (alterations and emphasis added).

[156] Andy Serwer, *Bruised in Bentonville: For Wal-Mart, the Customer Has Always Been King. But Lately the Retailer Has Realized that It Has Other Constituents—And Some Are Mad as Hell. Can the World's Biggest Company Adjust?*, FORTUNE, Apr. 18, 2005, at 84.

[157] *See id.* at 86.

[158] In company parlance, Wal-Mart calls its sales clerks "associates." *See generally* Wal-Mart Stores—People, http://walmartstores.com/GlobalWMStoresWeb/navigate.do?catg=215 (last visited Mar. 17, 2006).

[159] *See* WAL-MART STORES INC., 2005 ANNUAL REPORT (2006), *available at* http://www.walmartstores.com/Files/2005AnnualReport.pdf. In addition to the United States, Wal-Mart also runs 25% of its operations in nine other countries, including Argentina, Brazil, Canada, China, Germany, Mexico, Puerto Rico, South Korea, and the United Kingdom. *Id.* at 4.

design and pricing for entire industries, and overwhelmingly dominates the retail sector. Indeed, "no single statistic or analogy sums up Wal-Mart's imperial might."[160]

> Wal-Mart's statistical pedigrees of retail success are touted so often, and with tones of such envy and awe, that just the numbers alone begin to sound like a mantra of capitalist power prostration.
>
> Wal-Mart is . . .
>
> - the largest corporation in the world.
> - the largest retailer in the world, hawking more DVDs, magazines, books, CDs, dog food, diapers, bicycles, toys and toothpaste than any other company.
> - the largest grocer in the world.
> - owner of the nation's largest private trucking fleet.
> - the largest jeweler in the world, with approximately $2.3 billion in sales each year.
> - the largest private employer in the United States. And Mexico. And Canada . . . .
> - a country unto itself: if Wal-Mart were an official sovereign nation, its GDP would be larger than that of 80 *percent* of the world's countries, including Israel, Ireland, and Sweden.
> - the richest company in the world: $288 billion in annual sales. *Billion.* This staggering number marks an increase of $123 billion from only five years earlier, an accomplishment no less incredible since the years were marked by a stock-market collapse, a recession, and topped off by a tepid, jobless recovery.
> - by 2007, likely to control 35 percent of all food and drug sales in the United States.
> - a corporation that buys more than $1 billion worth of land *each month.*[161]

Although the enormity of both the class and the defendant has garnered much attention to the case, as well as contributed to the national debate about Wal-Mart,[162] "size" may also ultimately defeat the plaintiffs' case. As expected, Wal-Mart argued on appeal that the class which exceeded "the entire population of at least 12 of the 50 U.S. states[,]" is too large for the company to address individual claims.[163] The company also emphasized the burdensome aspects of discovery, contending that 30,000 interviews and the collection and review of 60 million

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160 DICKER, *supra* note 112, at 3.

161 *Id.* at 2-3.

162 "Many people are realizing that Wal-Mart is a scandal, not a praiseworthy business model: its profits and low prices come at a terrible human cost. Sex discrimination is not Wal-Mart's only crime against its employees." LIZA FEATHERSTONE, SELLING WOMEN SHORT: THE LANDMARK BATTLE FOR WORKERS' RIGHTS AT WAL-MART 9 (2005).

163 *Wal-Mart Seeks to Have Suit Recovered*, WALL ST. J., Nov. 30, 2004, at A10 (internal quotations omitted).

pages of documents at more than 3,400 stores would require 680,000 hours.[164] The company further noted that the numbers were but a "conservative" estimate.[165]

However, Wal-Mart's "imperial might" [166] manages far more complex and more massive business operations on a daily basis, and it does so more efficiently than anyone else, perhaps even the U.S. government. For example, Wal-Mart "flexed its massive distribution muscle" when its fleet delivered vital supplies to Hurricane Katrina victims days before the Red Cross and the Federal Emergency Management Agency (FEMA).[167] Wal-Mart's own meteorologists had warned its business director of continuity that Katrina was headed just east of New Orleans "more than 12 hours before the National Weather Service issued a similar advisory."[168] Wal-Mart's speedy and generous response was so impressive—in stark contrast to that of the federal, state, and local government—that even the company's severest critics had to offer praise. One critic noted, "Wal-Mart can do the right thing when they choose to . . . . For Wal-Mart, it's never been a question of can't. It's always been a question of will."[169] Wal-Mart's efficiency may be at the expense of its workers, particularly its women, but there is no doubt that Wal-Mart is the master of logistics. With ever advancing technology and Wal-Mart's already widespread and well-connected communications networks,[170] arguments about manageability for a class action, even one of unprecedented size, is unpersuasive.

In his ruling, Judge Jenkins seemed to have anticipated Wal-Mart's best argument on appeal when he conceded the existence of reasonable concerns regarding the manageability of the massive case.[171] The court cautiously dismissed the issue, and reasoned that "Title VII, however, contains no special exception for large employers . . . . Insulating our nation's largest employers from allegations that they have engaged in a pattern and practice of gender or racial discrimination—simply because they are large—would seriously undermine" the imperatives of

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164 Zellner, *supra* note 142.

165 *Id.*

166 DICKER, *supra* note 112, at 3. *See supra* notes 156-61 and accompanying text.

167 Eugenia Levenson, *The Only Lifeline Was the Wal-Mart: The World's Biggest Company Flexed Its Massive Distribution Muscle to Deliver Vital Supplies to Victims of Katrina. Inside An Operation that Could Teach FEMA a Thing or Two*, FORTUNE, Oct. 3, 2005, at 74.

168 *Id.*

169 *Id.*

170 Judge Jenkins noted in his ruling that

> Wal-Mart . . . has a very advanced information technology system which allows managers in the Home Office to monitor the operations in each of its retail stores on a close and constant basis. For example, the Home Office is connected through a real-time computer link . . . to every Store Manager throughout the country. The company uses the same Computer-Based Learning Modules in all stores, it broadcasts "Wal-Mart TV" into all stores, and employs a number of other uniform communications tools. Centralization at Wal-Mart extends to the point where the Home Office controls the temperature and music in each store throughout the country.

Dukes v. Wal-Mart Stores Inc., 222 F.R.D. 137, 152 (N.D. Cal. 2004).

171 "Certainly, the size of the putative class raises concerns regarding manageability, which this Court must, and does, carefully consider." *Id.* at 142.

Title VII that forbid sex discrimination in the workplace and the purpose of federal rules that facilitates the vindication of civil rights on a broader basis in the context of class actions.[172]

Manageability, in and of itself, is not a new issue in class actions. Yet courts have rarely confronted the problem of manageability in a case of this size in an employment discrimination context.[173] With the increasing globalization and expansion of America's corporate employers, the issue of manageability is critical to the viability of class actions as "an invention of equity . . . mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs."[174]

Therefore, as Judge Jenkins inferred, disallowing certification of large plaintiff classes against large employers on the basis of manageability would yield perverse results contrary to the purpose of class actions and more significantly, the objectives of Title VII, because the largest employers will always be insulated from suit. If the purpose of class actions is to provide a procedural vehicle that allows—through aggregation—the society in general to police legal wrongs *and* the "little" plaintiffs to address deprivation of their rights,[175] then it is indeed incongruous to deter civil rights actions such as *Dukes* because of its size alone. The courts must learn to deal with these "new" elements of the current wave of sex discrimination class actions, as more are sure to follow.[176]

C. Something Borrowed: Media Momentum

"It takes 20 years to build a reputation, and five minutes to ruin it."[177] Public relations concerns exert a powerful influence on both sides of sex discrimination class actions against large corporate companies. "Even before the court certified the class, media report drawn widespread attention to the case and both parties took advantage of every public relations opportunity to appeal to the sympathy of the

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[172] *Id.*

[173] Courts have, however, dealt with the issue in mass torts cases. *See, e.g.*, Amchem Prod., Inc. v. Windsor, 521 U.S. 591 (1997).

[174] Leach v. Standard Register Co., 94 F.R.D. 621, 630 (W.D. Ark. 1982) (denying class certification for sexual harassment case) (internal citations omitted).

[175] *See generally* Patti Waldmeir, *Wal-Mart Women Take a Class War to California*, FIN. TIMES, Jan. 20, 2005, at 9 (defining a class action lawsuit as "the quintessentially American kind of legal action designed to empower the little guy by allowing individuals to sue in groups, when suing alone would be too costly").

[176] For example, former and present employees of Best Buy, one of the nation's top electronic sellers, recently filed an action against the company in federal court in San Francisco. Molly Selvin, *Employees Sue Best Buy Over Alleged Discrimination*, L.A. TIMES, Dec. 9, 2005, at Bus. Section. Similar to *Dukes*, the women alleged that Best Buy discriminated against women in pay and promotion and sought national class action status. *Id.*

[177] Warren Buffet coined this aphorism. *See* Anne Fisher, *America's Most Admired Companies: In a Year When the Market Was Dodgy and the Economic News Mixed, Companies Like GE that Take the Long View Got a Boost*, FORTUNE, Mar. 6, 2006, at 65.

public."[178] Intense public scrutiny by the media and the consequences of negative publicity often serve as a great leverage for the plaintiffs in sex discrimination class cases.

Media attention and public opinion has generated by far the most response from the usually unapologetic and recalcitrant Wal-Mart,[179] which has a track record of fighting "to the bitter end"[130] in legal challenges. Although Wal-Mart's earnings may not have suffered at all as a result of *Dukes*,[181] its public image seemed to be at an all-time low, although the latter may not be due to *Dukes* alone.[182] Amidst mounting negative publicity, Dell, General Electric, and Starbucks toppled Wal-Mart from its perch atop the rankings to fourth place in *Fortune*'s 2005 survey of America's Most Admired Companies.[183] In the 2006 survey, relentless negative publicity plunged Wal-Mart further down the rankings to twelfth place.[184] In an effort to salvage its wholesome image, Wal-Mart and its typically reticent CEO, Lee Scott, launched an uncharacteristic media blitz to respond to its critics.[185] The CEO claimed to have decided to speak up for his associates, who were allegedly suffering from low employee morale because of the "barrage of criticism."[186] The CEO said "[t]hey wanted to know Lee Scott has the courage to speak up for them."[187]

Although the plaintiffs and their attorneys often ride on the momentum generated by the media to exert pressure on the defendants, the plaintiffs themselves must also heed the power of public opinion, albeit to a different extent. Named plaintiffs tend to tell compelling and sympathetic stories. For example, the lead plaintiffs in *Dukes* recounted personal stories that described seemingly direct evidence of flagrant discrimination.[188] Even the plaintiffs' attorneys are not

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[178] Steven Greenhouse, *Wal-Mart Faces Lawsuit Over Sex Discrimination*, N.Y. TIMES, Feb. 16, 2003, § 1, at 22.

[179] CEO Scott said in an interview that critics "need to bring their lunch" if they want to take on the company because "we're not going to lay down . . . . We've got nothing to apologize for." Nancy Cleeland & Debora Vrana, *Wal-Mart CEO Takes His Case to California*, L.A. TIMES, Feb. 24, 2005, at A1.

[180] Zimmerman, *supra* note 109. *See also* Koppel, *supra* note 152. A lawyer representing the plaintiffs said: "Wal-Mart is known for a reluctance to settle cases . . . . We have to be ready to go to trial." *Id.* (internal quotations omitted).

[181] *See supra* note 156 and accompanying text.

[182] *See supra* notes 111-12 and accompanying text.

[183] Jerry Useem, *America's Most Admired Companies*, FORTUNE, Mar. 7, 2005, at 67; *see* Cleeland & Vrana, *supra* note 179.

[184] Fisher, *supra* note 177, at 71 ("Besieged by criticism and a slumping stock, Wal-Mart tumbled from No. 4 to No. 12.").

[185] Wal-Mart launched a nationwide public relations campaign that consisted of "full page ads in prominent newspapers, television spots and sponsorships of National Public Radio programs" portraying "the company as a benevolent employer and good citizen that contributes enormously to local and state tax bases." Cleeland & Vrana, *supra* note 179. The company also set up a new website to boast "facts" about Wal-Mart and its employee-friendly environment as well as community-building activities. Wal-Mart Facts, http://www.walmartfacts.com (last visited Mar. 17, 2006).

[186] Cleeland & Vrana, *supra* note 179.

[187] *Id.*

[188] One woman testified at her deposition that a district manager attributed the $23,000 difference between her salary and that of a male counterpart to the fact that he had a family to support, and yet, the

exempt from media scrutiny. "The Wal-Mart . . . class . . . is also noteworthy for its representation: three nonprofit groups . . . ."[189] The public interest lawyers serve as "insurance that the public, as well as the court, can know that this case is not just a lawyer's case, not just a money case," said Brad Seligman of The Impact Fund, the lead public attorney and usual spokesperson for the plaintiffs' case.[190]

Some plaintiffs who are aware of the power of publicity may even take matters into their own hands. For example, when Linda Conti became frustrated with the constant stalling by Merrill Lynch to address her discrimination claim after a 1998 settlement agreement, she simply requested 900 tickets to the annual shareholder meeting in 2001.[191] It proved to be a very effective course of action as Merrill quickly and quietly resolved the issue with Conti and a few other original plaintiffs before the event.[192] Merrill declined to comment on whether Conti's actions hastened the settlement of her claim.[193] To Merrill's dismay, however, Conti set an example for other frustrated female employees who decided to take advantage of Merrill's vulnerability to negative publicity.[194] One group of former and present female brokers began to organize protests, which included airplanes towing banners stating "Merrill Lynch Discriminates Against Women," at Merrill's high profile, sponsored events.[195] However, the women did not fare as well as Conti, and Merrill "declined to characterize the company's reaction to the airborne intrusion[s]."[196]

Corporations place tremendous value on their public image. Communications and technological advances have made media and public relations an increasingly vital part of the maintenance of a corporation's "brand." Therefore,

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woman was a single mother with a six-month-old child. Greenhouse, *supra* note 178. Another manager allegedly stated similar reason for the promotion of a man instead of a qualified woman. *Id.* One department manager added a divine element to the analysis, allegedly explaining that women earn less than men at Wal-Mart because according to the Bible, "God made Adam before Eve." *Id.*

189 Koppel, *supra* note 152.

190 *Id.*

191 Susan E. Reed, *Business; When a Workplace Dispute Goes Very Public*, N.Y. TIMES, Nov. 25, 2001, at 34. *See generally* Cremin v. Merrill Lynch, Inc., 328 F. Supp. 2d 865 (N.D. Ill. 2004) (post-settlement motion).

192 Reed, *supra* note 191.

193 *Id.*

194 *Id.*

195 *Id.*

> On a warm, clear morning last Sunday, on the Pebble Beach golf courses in Carmel, Calif., 40 professional and 40 amateur golfers were in the final round of the Callaway Golf Invitational when a small plane began circling the long, narrow course beside the Pacific. It towed a banner that read "Merrill Lynch Discriminates Against Women." The plane created an hourlong [sic] distraction for the event, sponsored by Merrill Lynch, the latest in a series of protests by a vocal group of women, former and current brokers, who were part of a class-action lawsuit the firm settled three years ago. They have sought to publicize their unresolved complaints while the company is entertaining clients at high-profile events.

Id.

196 *Id.*

for corporate defendants involved in sex discrimination class actions, the media momentum can serve as an Achilles' heel that sympathetic plaintiffs may use to their advantage.

D. Something "Blue": Sobering Statistics

As unoriginal as the allegations may be, and as much as some may try to "spin" the story to the media, *Dukes* reflects the sobering and sad reality that sex discrimination against women remains pervasive in the American workplace. Forty years after the enactment of the Equal Pay Act and Title VII, statistics and studies of workplace demographics demonstrate that women as a group continue to lag behind men in compensation and promotional opportunities across industries. Given the allegations of *Dukes*, Wal-Mart is a microcosm of this larger social reality. Despite ambitions and qualifications comparable, or even superior, to those of their male counterparts, women continue to receive less pay and to encounter more difficulty moving into higher or management positions.

According to data from the U.S. Census Bureau as of February 22, 2006, women who worked full-time year-round earned 77 cents for every $1 their male counterparts earned in 2004;[197] the median income for women was $31,223 compared to $40,798 for men.[198] EEOC reported that while women represent 48% of all employment in the private sector in 2002, they comprised only 36.4% of officials and managers.[199] In October 2003, the Bureau of Labor Statistics reported that "[d]espite the movement of many women into managerial and professional jobs, they still are concentrated in clerical and service jobs. Nearly one-half of women workers are employed in three occupational groups—sales . . . services, and administrative support—compared with about one-fifth of male workers."[200] "While the presence and status of women in the work force have increased dramatically since the passage of the Civil Rights Act of 1964, there are still concerns about the relative absence of women in higher management ranks, which some have described as the 'glass ceiling.'"[201]

The findings by Catalyst, a leading research and advisory non-profit organization focused on expanding opportunities for women in business and the

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[197] U.S. CENSUS BUREAU, RELEASE NO. CB06-FF.03-2, FACTS FOR FEATURES: WOMEN'S HISTORY MONTH: MARCH 2006 (2006), *available at* http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/006232.html.

[198] CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2004, at 5 tbl.1 (2005), *available at* http://www.census.gov/prod/2005pubs/p60-229.pdf.

[199] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, GLASS CEILINGS: THE STATUS OF WOMEN AS OFFICIALS AND MANAGERS IN THE PRIVATE SECTOR, at i (2004) (executive summary) [hereinafter GLASS CEILINGS], *available at* http://www.eeoc.gov/stats/reports/glassceiling/index.pdf.

[200] BUREAU OF LABOR STATISTICS, *Women at Work: A Visual Essay*, MONTHLY LAB. REV., Oct. 2003, at 48, *available at* http://www.bls.gov/opub/mlr/2003/10/ressum3.pdf.

[201] *Id.* at 1.

professions,[202] supported the fact that "[t]he glass ceiling is firmly in place[.]"[203] Based on 2002 and 2003 data, Catalyst research found that "[d]espite the growing numbers of educated women entering the workforce, as well as their increasing buying power and influence . . . women continue to hold only a small proportion of leadership positions in businesses."[204] "The social disadvantage of these glass ceilings is the inability of the most qualified employees to move into the most important positions due to irrelevant criteria such as . . . gender. The selection of a less qualified employee negatively impacts both the employer and ultimately the economy as a whole."[205]

It is undeniable that women have made great progress during the last forty years, but it is equally irrefutable that throughout the country women still "earn less, are less likely to own a business, and are more likely to live in poverty than men." [206] Women "do not enjoy equality with men, and they lack many of the legal guarantees that would enable them to achieve it. Women . . . would benefit from stronger enforcement of equal opportunity laws, greater political representation, adequate and affordable quality child care, and other policies to improve their status."[207] Furthermore, "[e]ven in areas where there have been significant advances in women's status, rates of progress are slow."[208]

In the absence of discrimination, it is difficult to explain why women are forced to continue to "play catch up" to men. The U.S. General Accounting Office reported that for the period from 1983 to 2000, the wage gap between men and women could not be entirely explained by the combined effect of differences in human capital, unionization, work hours, and industry and occupation.[209] In a 2003 survey, women executives from Fortune 1000 companies mentioned some of the factors that they thought were holding women back. Forty-seven percent said lack of significant general management or line experience; 41% referred to exclusion from informal networks; 33% referred to stereotypes of women's roles

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202 About Catalyst: Our Mission, http://www.catalystwomen.org/about/mission.shtml (last visited Mar. 17, 2006).

203 CATALYST, FACTSHEET, WOMEN "TAKE CARE," MEN "TAKE CHARGE:" STEREOTYPING OF U.S. BUSINESS LEADERS EXPOSED (2005), *available at* http://www.catalystwomen.org/headlines/stereotype.html.

204 CATALYST, FACTS ABOUT WORKING WOMEN 4, *available at* http://www.catalyst.org/files/tid/tidbits04.pdf (last visited Apr. 12, 2006).

205 GLASS CEILINGS, *supra* note 199, at 1.

206 AMY CAIAZZA ET AL., INSTITUTE FOR WOMEN'S POLICY RESEARCH (IWPR), THE STATUS OF WOMEN IN THE STATES 2004, WOMEN'S ECONOMIC STATUS IN THE STATES: WIDE DISPARITIES BY RACE, ETHNICITY, AND REGION 4 (2004), *available at* http://www.iwpr.org/pdf/R260.pdf. IWPR is a non-profit scientific research organization dedicated to informing the debate on public policy issues of critical importance to women and their families. *See* About IWPR: Institute for Women's Policy Research, http://www.iwpr.org/About/About_IWPR.htm (last visited Apr. 12, 2006).

207 MISHA WERSCHKUL & ERICA WILLIAMS., IWPR, THE STATUS OF WOMEN IN THE STATES: POLITICS, ECONOMICS, HEALTH, RIGHTS, DEMOGRAPHICS 5 (Amy B. Caiazza & April Shaw eds., 2004), *available at* http://www.iwpr.org/States2004/PDFs/National.pdf.

208 *Id.* at 1.

209 U.S. GEN. ACCOUNTING OFFICE, WOMEN'S EARNINGS: WORK PATTERNS PARTIALLY EXPLAIN DIFFERENCE BETWEEN MEN'S AND WOMEN'S EARNINGS 2-3 (2003), *available at* http://www.gao.gov/new.items/d0435.pdf.

and abilities, 28% said failure of senior leadership to assume accountability for women's advancement, and 26% said commitment to personal or family responsibilities.[210]

In certain industries, the discrimination against women in pay and advancement is especially egregious. For example, Wall Street is notorious for its legacy of glass ceilings and maternal walls[211] against women. The numbers are literally impossible to dispute—that is, where the statistics are disclosed in the first place.[212] Ultimately, there are only so many plausible arguments, if any at all, to justify the fact that "[a]s of 1999, [Merrill Lynch] had only one district director, 11 regional vice presidents and 5 sale managers who were women in a network of more than 15,000 brokers."[213] Further, it is at best uncertain whether the status of women has improved in Wall Street in the last decade, despite unsupported and routine claims by employers that "things have changed."[214] "[N]othing has changed[,]" said one female broker at Merrill Lynch, who was also a financial supporter of the airplane protests.[215] Most telling, however, was that she spoke on the condition that neither she nor the branch would be identified,[216] which seems to suggest that a stigma may still exist for those who "make noise," or that there is still a fear of being labeled as a "troublemaker." In the widely-reported Morgan Stanley case[217] that settled in the summer of 2004, an EEOC attorney observed that "anyone who thought that Morgan Stanley was being tried for the sins of its past should note that the period covered by the case was 1995 to Monday."[218]

Wall Street is a conspicuous example but the financial industry is not exclusive in its notoriety for discrimination against women. In 2005, the President

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210 CATALYST, FACTS ABOUT WORKING WOMEN, *supra* note 204, at 6.

211 *See generally* Joan C. Williams, *Beyond the Glass Ceiling: The Maternal Wall as a Barrier to Gender Equality*, 26 T. JEFFERSON L. REV. 1 (2003).

212 *See* Patrick McGeehan, *Discrimination on Wall St.? The Numbers Tell the Story*, N.Y. TIMES, July 14, 2004, at C1.

> In a sex discrimination lawsuit that Morgan Stanley settled . . . as in those that Merrill Lynch and Smith Barney settled in the late 1990's [sic], executives decided not to go public with their track records of hiring, paying and promoting women. In each case . . . the numbers painted a picture that would have been hard to defend.

Id.

213 *See* Patrick McGeehan, *Merrill Lynch Firm Is Told It Must Pay in Sexual Bias Case*, N.Y. TIMES, Apr. 21, 2004, at A1.

214 *See, e.g.*, Robin Sidel, *Moving the Market: Panel Awards Ex-Merrill Broker $2.2 Million in Gender Bias Case*, WALL ST. J., Apr. 21, 2004, at C3. Regarding a finding by a court-ordered panel that the company engaged in a practice and pattern of gender discrimination, Merrill Lynch responded that "[t]he firm described in the panel's decision is not today's Merrill Lynch. We agree, and regret, that nearly a decade ago there was inappropriate behavior . . . . It should not have occurred and would not be tolerated today." *Id.*

215 Reed, *supra* note 191 (internal citations omitted); *see supra* notes 194-96 and accompanying text.

216 *Id.*

217 *See* EEOC v. Morgan Stanley & Co., 324 F. Supp. 2d 451 (S.D.N.Y. 2004).

218 Richard Beales & David Wells, *The Lawsuit Against Morgan Stanley—Settled this Week—Highlights the Hurdles Women Face in the Banking Sector*, FIN. TIMES (London), July 16, 2004, at 15 (internal quotations omitted).

of Harvard University caused uproar when he publicly stated that the under-representation of women in science results from innate, biological differences between men and women, and the unwillingness of women to work long hours.[219] Still more worrisome and rather shameful is that as of 2004 in the field of *law* itself, women made up 48% of law school students but only 29.4% of all lawyers, and 47.4% of associates but only 17.1% of all partners.[220] In 2001, the American Bar Association reported that women make up 31.5% of law school faculty, of whom only 5.9% are tenured.[221] The statistics cannot appear more discouraging than when members of the profession that vows to uphold the law engages in the very discrimination that it was supposed to help end under the law.[222]

Wal-Mart is a microcosm of this social reality. On appeal, the Ninth Circuit Court of Appeals "grilled" Wal-Mart's counsel with questions regarding the company's statistical evidence. One judge also cited some of the key statistics in plaintiffs' case: women make up two-thirds of Wal-Mart's hourly employees but only one-third of its managers, higher management positions are more male-dominated; women earn less than men in every region and in most job categories, and women take longer than men to reach management positions.[223]

In sum, all the statistics reflect the fact that women continue to face unlawful discrimination in employment. The numbers are not a revelation for women who must experience and endure the discrimination on a daily basis. Class actions such as *Dukes* and *Morgan Stanley* are supposed to help women address this sobering reality and achieve the purposes of the EPA, Title VII, and Rule 23. There is obviously still much work left to be done.

E. And a Silver Sixpence for Her Shoe: Settlement

Thus far, sex discrimination class actions have failed to end discrimination against women in the workplace. Media reports of record settlements and payouts give the illusion that the class suits achieve at least the other objective of making whole the victims of employment discrimination. While this is perhaps true for some named plaintiffs, class members often receive little more than a meager

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219 Lawrence H. Summers, Remarks at NBER Conference on Diversifying the Science & Engineering Workforce, January 14, 2005, *available at* http://www.president.harvard.edu/speeches/2005/nber.html. *See generally* Symposium, *Innate Differences: Responses to the Remarks by Lawrence H. Summers*, 11 CARDOZO WOMEN'S L.J. 497 (2005).

220 CATALYST, QUICK TAKES: WOMEN IN LAW, *available at* http://www.catalystwomen.org/files/quicktakes/Quick%20Takes%20-%20Women%20in%20Law.pdf (last updated Nov. 11, 2005) (citing 2004 data from the American Bar Association, the Bureau of Labor Statistics, and the National Association for Law Placement).

221 ABA, COMMISSION ON WOMEN IN THE PROFESSION, CURRENT GLANCE OF WOMEN IN THE LAW (2001), *available at* http://www.abanet.org/women/glance.pdf.

222 *See generally* Joni Hersch, Ph.D., *The New Labor Market for Lawyers: Will Female Lawyers Still Earn Less?*, 10 CARDOZO WOMEN'S L.J. 1 (2003).

223 Bob Egelko, *Wal-Mart Fights to Split Sex Bias Suit: Class Action Status Inhibits Fair Defense, Retailing Giant Claims*, S.F. CHRON., Aug. 9, 2005, at A1; Justin Scheck, *Retail Giant Wants to Undo Certification of 1.6M Class in Bias Suit*, NAT'L L.J., Aug. 15, 2005, at 5, col. 1.

"sixpence." Most of the settlement dollars end up as fees for the attorneys, not as compensation for the victims.[224]

Furthermore, settlements have little consequence for large corporate defendants—the payouts do not hurt the bottom line and the companies do not even have to admit any wrongdoing. Moreover, settlement terms are shrouded in secrecy, and institutional reform become little more than mere formalities. As to *Dukes*, the critical juncture for settlement will likely come after the Ninth Circuit return its decision on Wal-Mart's appeal of the class certification. Regardless of whether Wal-Mart ultimately decides to settle, the world will be watching. Unfortunately, if *Dukes* follow the trend set by all its record-breaking predecessors, the settlement, no matter how staggering, will have little real effect on the 1.6 million women in the class or the future female employees of Wal-Mart.

Experts in the field attribute the resurgence of class action employment claims to the Civil Rights Act of 1991,[225] which revamped Title VII of the Civil Rights Act of 1964 by providing victims of employment discrimination with the right to jury trials and the opportunity to seek compensatory and punitive damages.[226] To some profit seekers, the changes dramatically increased the potential for lucrative payouts from the country's largest corporations.[227] Despite necessary expenditures of costly time and labor,[228] class action employment suits became more appealing and worthy of pursuit.[229] Even law firms on the employee side cannot deny the financial attractiveness of large class action employment claims; an attorney who represents Wal-Mart employees said, "It's a mix of business judgment and moral conviction that led the firm in this area."[230] In addition to the economic benefits, employment law experts believe that class actions are often easier to prove and hence more likely to succeed.[231] In class

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[224] *See* Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1250-53 (2003) (empirical study of employment discrimination class action lawsuits).

[225] *See, e.g.*, Mark S. Dichter, *Gender Discrimination Litigation*, *in* LITIGATING EMPLOYMENT DISCRIMINATION & SEXUAL HARASSMENT CLAIMS 2005, at 335, 348 (PLI Litig. & Admin. Practice, Course Handbook Series No. 727, June 2005); Masters & Joyce, *supra* note 1.

[226] *See* 42 U.S.C. § 1981A(a)-(c) (2005); Masters & Joyce, *supra* note 1; *supra* notes 30 & 32 and accompanying text.

[227] *See* Masters & Joyce, *supra* note 1. "In 1991, changes in discrimination law . . . made these cases attractive to a more sophisticated and wealthier group of lawyers. 'Folks who had been doing securities litigation and toxic torts . . . are noticing that there are green pastures in a new area,' said . . . a Washington partner at Paul Hastings . . . ." *Id. See generally* Amy Tsao, *Ganging Up on Mega-Retailers; Giant Class Actions Hit Wal-Mart First and Now Costco. It Could Be the Start of a Wave. What Are Investors to Do?*, BUS. WK. ONLINE, Aug. 19, 2004, *available at* 2004 WLNR 14306366.

[228] Victoria Slind-Flor, *Bashing the Glass Ceiling*, 17 NAT'L LAW J., No. 10, at C13, col. 1 ("The long time it takes to resolve civil rights cases often means severe cash-flow problems for a plaintiffs' [sic] lawyer."). *See, e.g.*, Jessi Hempel, *Brad Seligman: Taking on Retailing's Behemoth*, BUS. WK., July 19, 2004, at 16 (Ira Sager ed.) ("To take on Wal-Mart . . . [h]e must contact 1 million women who are no longer at Wal-Mart. Postage alone may cost $500,000.").

[229] Justin M. Norton, *Costco Latest in Wave of Gender Bias Suits*, LEGAL INTELLIGENCER, Aug. 19, 2004, at 4 ("'If you win, you win so much more money, so it's worth expending the resources to keep up [with big companies],' said one workplace law specialist.") (alteration in original).

[230] Masters & Joyce, *supra* note 1 (internal quotations omitted).

[231] Norton, *supra* note 229; Justin M. Norton, *Wholesale Justice*, CORP. COUNS., Oct. 2004, at 200.

actions where many women in similar situations allege similar discriminatory claims, employers may not rely on the defense that one or even a few plaintiffs were just too sensitive.[232]

If history is any indication, most employment discrimination class actions will not proceed to trial.[233] Public relations concerns are a big factor—"[c]orporations with established brand names usually settle and avoid having accusations of bad behavior and unequal treatment hit the headlines."[234] Settlement before trial is thought to be beneficial to both sides, at least on a practical level.

> The advantage of a voluntary resolution for the employer include: (1) enabling the company to focus on its business and not on litigation; (2) avoiding divisive battles with and among employees; (3) minimizing negative publicity about the company and its business practices; (4) reducing legal fees; (5) avoiding court-ordered injunctive relief that may not be well-tailored to the company's business operations or philosophy; (6) eliminating the risk of an unacceptably high monetary award . . . and (7) maintaining control and flexibility over how the company will modify its employment practices in response to the suit . . . .
>
> There are advantages to plaintiffs as well, including (1) avoiding the risk of lost or gaining no injunctive relief, or less than sought; (2) obtaining injunctive relief earlier than would occur if the case were to proceed through trial and appeal; (3) avoiding the risk of receiving little or no monetary compensation; (4) the mental peace of not having to go through a trial and possible appeal; and (5) avoiding the lengthy passage of time that will pass before a resolution.[235]

Class certification typically determines the victor, or at the very minimum, weighs the scale heavily in favor of one side in settlement discussions.[236] Plaintiffs hold a powerful bargaining chip once the class overcomes the obstacle of certification, which enables them to demand a higher settlement price and to seek stronger injunctive relief.[237] Therefore, for some, the ultimate goal is certification

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232 Norton, *Wholesale Justice*, *supra* note 231. "With one client you can say the person is especially sensitive . . . . When a large group of people join together, they really can't take that defense . . . . Class action cases can level the playing field." *Id.* (internal quotations omitted).

233 *See* Masters & Joyce, *supra* note 1.

234 Patrick McGeehan, *The Women of Wall Street Get Their Day in Court*, N.Y. TIMES, July 11, 2004, at 35. *See* discussion *supra* Part V.C.

235 Charles S. Mishkind & V. Scott Kneese, *Big Risks and Opportunities, Class Actions and Pattern and Practice Cases*, *in* 30TH ANNUAL INSTITUTE ON EMPLOYMENT LAW, at 403, 474-75 (PLI Litig. & Admin. Practice, Course Handbook Series No. 662, Oct. 2001).

236 *See* Zimmerman, *supra* note 109.

> Granting of class certification to plaintiffs often has been a key turning point in corporate lawsuits in recent years. The mere threat of a large trial that can drag on for years, at a steep cost to both sides, is often enough to prompt talks if initial appeals don't work. As a result, recent class-action discrimination suits rarely have reached trial.

Id.

237 *See* Mishkind & Kneese, *supra* note 235, at 477.

so that there would be sufficient pressure to reach settlement.[238] "The question is not whether they will settle . . . it is when," said one employment law specialist.[239] Some attorneys observe that a case is essentially proven upon certification because the Supreme Court requires federal judges to examine class action claims very closely, even though there should not be any judgment on the merits of the case.[240]

Additionally, after certification of a class, the court must approve any proposed settlement of claims under Rule 23(e)(1)(A).[241] The court may approve a settlement, often known as a consent decree, only after a hearing and on finding that the settlement is "fair, reasonable, and adequate."[242] "Title VII grants a district court broad discretion to formulate a remedy for victims of unlawful discrimination. To the extent the district court's power is limited, it is because the court has an obligation to fashion the most complete relief possible."[243] The U.S. Supreme Court stated that "the court has not merely the power but the *duty* to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."[244] As to sex discrimination class actions, the courts have failed to achieve the desired results of the Supreme Court's mandate.

One of the reasons for this failure is that record-breaking settlements rarely, if ever, have any bearing on company earnings or the class plaintiffs.[245] Companies expect discrimination lawsuits to be an expense of doing business, and for large corporate defendants, it is a negligible expense. "Fifty-four million dollars is really pocket change to a firm the size of Morgan Stanley"[246]—"a mere rounding error in its $1 billion quarterly earnings."[247] Even where settlements require company-wide changes in pay practices, as was the case for Boeing, analysts are unlikely to change their projections as to the value of the company.[248] As to the individual class plaintiffs, they receive relatively modest to minimal amounts after the

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238 Tsao, *supra* note 227. Linda Friedman, a lawyer involved in the high-profile Smith Barney "Boom Boom Room" sexual harassment case that settled in 1997, said, "Any time you get past class certification, there is pressure to settle." Zimmerman, *supra* note 109.

239 Norton, *supra* note 229 (internal quotations omitted).

240 Masters & Joyce, *supra* note 1. As evident from the 2003 amendments to Rule 23(e), Congress appears to agree with the Supreme Court that class actions require particular judicial oversight. *See* FED R. CIV. P. 23(e); *infra* notes 241-42 and accompanying text.

241 FED. R. CIV. P. 23(e)(1)(A) ("The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.").

242 FED. R. CIV. P. 23(e)(1)(C).

243 Kraszewski v. State Farm Gen. Ins. Co., 912 F.2d 1182, 1185-86 (9th Cir. 1990).

244 Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (emphasis added).

245 Selmi, *supra* note 224, at 1250 (finding that high profile employment discrimination class actions "do not substantially influence stock prices, either at the filing or their settlement, and when there is an effect, it tends to be short-lived").

246 Kate Kelly & Colleen DeBaise, *Morgan Stanley Settles Bias Suit for $54 Million*, WALL ST. J., July 13, 2004, at A1.

247 Emily Thornton, *A Bad Deal for Women; Morgan Stanley's Modest Settlement Won't Do Much to Curb Sex Discrimination*, BUS. WK., July 26, 2004, at 75.

248 TRIBUNE NEWS SERVICES, *Boeing Planning Big Boost in Hiring: Judge Approves Settlement of Sex-Bias Lawsuit*, CHI. TRIB., July 17, 2004, at 1.

attorneys' fees, and after the advertised millions is divided among all the members of the class.[249] For example, some members of the class in the Boeing case may receive as little as $500 depending on when she worked and how much she earned.[250] This amount is far shy of the relief one would likely receive in individual suits, and for many woman, it is "not enough for them to risk ruining their careers by being branded as troublemakers."[251]

Therefore, contrary to the skewed public perception about class action settlements, monetary relief typically fails to address both objectives of Title VII—it neither sufficiently compensates the victim for the company's past behavior, nor does it impose any deterrent value to induce the company to curb future discrimination against women. Moreover, amidst the overwhelming media focus on the price tags of settlements,[252] the court, the class counsels, and unfortunately, the defendants often neglect to follow through on the injunctive relief portion of consent decrees.[253] Injunctive relief typically requires a company to reform its practices and to meet set goals within the duration of the decree.[254] Where courts do not remain involved and where class counsels fail to properly monitor the implementation and enforcement of the remedies, meaningful changes in employment practices are very rare.[255] Changes, if any, "tend to be cosmetic in nature and are primarily designed to address public relations problems."[256]

Seldom do corporate defendants even recognize a need to change. In fact, one of the incentives for settlement is that the companies do not have to admit any wrongdoing at all. Therefore, when Morgan Stanley settled its case against the EEOC, the company denied any wrongdoing and further contended that it has always treated all female employees fairly and equitably; however, the company's lawyer did acknowledge that "diversity is always enhanceable."[257] When Boeing reached settlement days before trial, the spokesperson for Boeing said that the settlement was in the "best interests of the company, employees and shareholders. We are doing it because it enables the company to move forward and avoid the continued expense and distraction of protracted litigation."[258]

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249 Selmi, *supra* note 224, at 1250.

250 Lunsford, *supra* note 137.

251 Thornton, *supra* note 247.

252 *See, e.g.*, Allen R. Myerson, *Supermarket Chain to Pay $81 Million to Settle a Bias Suit*, N.Y. TIMES, Jan 25, 1997, at A1 (describing Publix Supermarket's settlement of sex discrimination claims); *Rent-A-Center to Pay $47 Million to Settle Sex-Bias Suit*, WASH. POST, March 9, 2002, at A09 (involving more than 5,000 female employees and job applicants).

253 *See* Mishkind & Kneese, *supra* note 235, at 478 ("Companies and the media primarily focus on monetary relief and the attorney's fees, as big numbers make for big headlines. However, injunctive relief is an important part of resolving class action—often the most import part, as injunctive relief often changes the way a company does business.").

254 *Id.* at 478-79.

255 *See* Selmi, *supra* note 224, at 1250.

256 *Id.*

257 *Another Wall Street Settlement*, NY TIMES, July 15, 2004, at A22.

258 Daniel, *supra* note 141.

Moreover, some companies settle on the condition of confidentiality. Neither the Morgan Stanley nor the EEOC made public the details of the alleged disparities between Morgan Stanley's male and female employees, and as part of the settlement, "the parties agreed to honor a pre-existing confidentiality order, designed to keep many of the documents related to the case under wraps."[259] Thus, not only is the settlement "chump change" for Wall Street, but the "alleged misdeeds now won't be aired in a public trial, leaving many troubling questions raised by the case unanswered. The firm denies that it has ever discriminated against women, though it is adopting a bunch of programs to treat them better."[260] Unfortunately, in most cases, women are treated better on paper only.

Much ado is made about the size of the class in *Dukes*, the deep pockets of Wal-Mart, and the possibly staggering settlement figure. Although the Ninth Circuit Court of Appeals has yet to rule on the company's appeal to reverse certification, *Dukes* seems poised to follow the rather predictable "sixpence" phenomenon set by its predecessors. Even if Wal-Mart customers, approximately 70% of whom are women, sympathize with the female employees, most are "more concerned with saving a buck."[261] A multi-billion dollar settlement will not truly inflict damage on the company with sales of more than $250 billion. Like Wall Street, the corporate culture of Wal-Mart is so entrenched that any change will likely be superficial at best. Under this analysis, *Dukes* will not substantially benefit the 1.6 million members of the class nor will it effect any significant change in Wal-Mart's treatment of its female employees.

To the optimistic few, however, even if *Dukes* ultimately fails, the case has already made its mark. Specifically, Wal-Mart has begun to implement practices within the company that it probably would not have absent *Dukes*. Since the suit was filed in 2001, Wal-Mart has altered the way it posts management jobs.[262] The company hired outside consultants to improve the "objectivity" of job criteria.[263] Officer compensation is now linked to diversity goals—bonuses are reduced by as much as fifteen percent if goals are not met.[264] Wal-Mart set up a $25 million private equity fund to support businesses owned by women and members of minority groups over the next five years, although a spokeswoman vehemently denied any connection between the establishment of the fund and the company's

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259 Kelly & DeBaise, *supra* note 246. *See* EEOC v. Morgan Stanley & Co., 206 F. Supp. 2d 550 (S.D.N.Y. 2002) (holding that potential class members may view compensation and promotion data only after signing confidentiality agreement).

260 Thornton, *supra* note 247.

261 James F. Peltz & Dawn Wotapka, *Will Female Shoppers Stray? Regardless of Their Feelings About a Discrimination Lawsuit Against Wal-Mart, Many Say They Can't Afford to Put Principle Before Price*, L.A. TIMES, July 4, 2004, at C1.

262 Wendy Zellner, *A Wal-Mart Settlement: What It Might Look Like: Damages for Sex Bias Would Be Just the Start. After That Could Come an Entire Change of Culture*, BUS. WK., July 5, 2004, at 48; Ann Zimmerman, *Wal-Mart Expected to Tie Pay Closer to Workers' Job Duties*, WALL ST. J., June 4, 2004, at A8.

263 Zellner, *supra* note 262.

264 Wal-Mart Key Topics: Gender Discrimination Lawsuit Update, http://www.walmartfacts.com/keytopics/default.aspx#a868 (last visited Apr. 16, 2006).

legal woes.[265] The company also conducted a massive review of the law firms that Wal-Mart retains for outside legal services, and announced that it will end or limit relationships who fail to demonstrate a meaningful interest in the importance of diversity in hiring female and minority attorneys.[266] Wal-Mart may have implemented these changes only to redeem its battered public image, but at least some good has arose from *Dukes*, and these changes are nevertheless a step in the right direction. More importantly, Wal-Mart is beginning to recognize that it has responsibilities as a corporate citizen. CEO Scott said at a June 2003 shareholders' meeting: "What we have to realize is that our success and our size have increased our responsibilities . . . . When we were a small, regional retailer, not much was expected of us. But today it's different."[267]

At least one civil rights lawyer believes that "Wal-Mart has . . . changed the landscape completely. In the world of gender discrimination, there was before Wal-Mart and after Wal-Mart."[268] Employment attorneys have predicted that *Dukes* "will spark more claims and prompt employers to change behavior. Indeed, once the Wal-Mart case was filed . . . Costco began to post jobs for positions below the manager level . . . ."[269] A Columbia Law School professor noted that the "Boeing settlement is not pushing the envelope compared with the Wal-Mart case, which is truly novel and carries vulnerabilities for other companies, as it is national and covers all categories of workers."[270] Others think that *Dukes* will pave the way for a flood of class actions, but this may have more to do with plaintiffs' lawyers who "are often looking for profitable new areas of litigation . . . . [I]f the Wal-Mart case moves forward . . . attorneys are bound to be searching for other big companies that may be vulnerable to discrimination suits . . . ."[271] In other words, there will be more meaningless sixpences and settlements for women.

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265 Michael Barbaro, *Wal-Mart to Start Equity Fund to Help Diversify Its Suppliers*, N.Y. TIMES, Oct. 19, 2005, at C11.

266 Meredith Hobbs, *Shopping for Diversity*, CORP. COUNS., Dec. 2005, at 20. It seems that an end to the relationship with Wal-Mart is no loss to some defense lawyers:

> "Lawyers tend to have a love-hate relationship with [Wal-Mart] because they can develop, for a firm or attorney, a significant amount of business, often on very interesting issues," said a defense lawyer . . . who, like most defense lawyers contacted for this story, declined to be named for fear of business repercussions. "But they can be very difficult to work with in regard to rates and litigation strategy."

Justin Scheck, *Lawyers Unconcerned with Wal-Mart's Diversity Approach*, LEGAL INTELLIGENCER, July 11, 2005, at 4.

267 Cora Daniels, *Women vs. Wal-Mart: How Can the Retailer Reconcile Its Storied Culture with the Anger of These Female Workers?*, FORTUNE, July 21, 2003, at 78.

268 Brooke A. Masters & Amy Joyce, *Wall St. Women Take Suit to Court; Morgan Stanley Case Could Set Precedents*, WASH. POST, July 7, 2004, at E01 (quoting John P. Relman of civil rights law firm Relman & Associates) (internal quotations omitted).

269 Masters & Joyce, *supra* note 1.

270 Daniel, *supra* note 141.

271 Lisa Girion, *Wal-Mart Lawsuit Could Pave Way for Other Massive Job-Bias Claims: More Class Actions Against Big Firms May Have Their Day in Court. But Obstacles Abound.*, L.A. TIMES, June 26, 2006, at C1.

VI. CONCLUSION

"[I]t can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena."[272] The status of women has progressed since the Supreme Court made this statement in 1973, but sex discrimination continues to be a systemic problem in the workplace today. Class actions provide the conceptually ideal procedural device for groups of women to achieve the objectives of the law to compensate victims for past discrimination and to end future discrimination by the employer.

However, the courts' interpretation of Title VII and Rule 23 has historically shaped the development and effectiveness class actions as a means to address the discrimination that women face against formidable corporate employers. *Dukes* and the current wave of sex discrimination class actions has evolved from forty years of cases—from the liberality of class certifications during the civil rights era to the severe limitation of the rigorous analysis standard and the uncertainty after the 1991 Act. Despite routine arguments, the allegations reflect a sobering reality of the American workplace where women continue to lag behind men in pay and promotion across industries. With ever growing and globalizing companies in the U.S., the courts must learn to deal with class actions that are significant in substance and in size. The focus should not be on the novelty of size alone where the case involves the rights and livelihood of so many women. Large corporate defendants, such as Wal-Mart, should not be allowed to circumvent the law under the guise of manageability concerns, especially when most cases settle before they ever reach trial.

Unfortunately, sex discrimination class actions have been relegated to strategic smear campaigns to force early settlements from the deep pockets of high-profile defendants to plaintiffs' attorneys. Outside of the EEOC, "[c]lass actions offer the only other avenue for plaintiffs to impose structural changes to a company's employment practices. But some class actions focus on compensation at the expense of making structural changes within a company."[273] The intense and narrow focus on the record payouts has created a misleading public image of sex discrimination class actions as motivated by greedy plaintiffs alone. In fact, however, the victims often end up with very modest amounts after attorneys' fees and division among other class members. The little to no attention paid to the injunctive and reformative aspects of settlements has further compounded the problem as it is at best unclear whether the suits bring about any meaningful change to the practices of employers.

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[272] Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

[273] Michael Bobelian, *The EEOC Meets Goals with the Morgan Stanley Settlement*, 15 N.Y.L.J. 5 (July 22, 2004).

Dukes has demonstrated that corporate defendants respond to public opinion, even where it is typically unwarranted by the lack of financial impact of the suits on company earnings.[274] If public relations concerns are the only way to sway employers to improve the treatment of women in the workplace, then there should be more transparency and more scrutiny of pay and promotion practices—both before and after settlements. Secrecy nullifies the deterrent value of the consequences for companies that misbehave. There should be increased disclosure of the allocation of settlement funds that are used for claims and for the implementation of structural changes; there should also be increased monitoring of the enforcement and effects of the changes. In addition to increasing monetary relief for victims specifically, funds may be set aside for scholarships or programs that help women in the pursuit of different careers.

Finally, women need the commitment of CEOs and board directors to overhaul the current corporate culture that tolerates an unequal playing field between men and women. Such actions from those in positions of power at the country's top organizations will not only gain goodwill for the companies, but also motivate other employers to follow suit. *Dukes* has thrown down the gauntlet for Wal-Mart to take up this challenge and to visibly lead the nation in a role of good corporate citizenship for women. Wal-Mart has the ability to make *Dukes* a truly monumental case by shifting the tide of sex discrimination class actions to effect meaningful change in the lives of women in the workplace.

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[274] *See* Selmi, *supra* note 224, at 1250. Professor Selmi observed in his oft-cited study about class action employment discrimination litigation that "although the lawsuits do not result in significant financial losses to shareholder value, managers still often take them seriously—more seriously than is typically warranted by the financial impact of the suits." *Id.*