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ROBBING A BARREN VAULT: THE IMPLICATIONS OF *DUKES V. WAL-MART* FOR CASES CHALLENGING SUBJECTIVE EMPLOYMENT PRACTICES

*Elizabeth Tippett**

I. INTRODUCTION

Although ostensibly about civil procedure, the Supreme Court decision in *Dukes v. Wal-Mart* garnered considerable attention from the media, businesses, and commentators alike. It was the largest employment class action lawsuit in American history, consisting of approximately 1.5 million women nationwide challenging Wal-Mart's subjective promotion and compensation practices under Title VII of the Civil Rights Act.¹ A district court first certified the class in 2004, which was affirmed by the Ninth Circuit in 2007 and *en banc* in 2010.²

In June 2011, the Supreme Court ruled that *Dukes* had not satisfied the commonality requirement for asserting a class action under Rule 23 of the Federal Rules of Civil Procedure.³ The Chamber of Commerce immediately issued a press release declaring it "the most important class action case in more than a decade."⁴ By contrast, the Christian Science

* Assistant Professor, University of Oregon School of Law. I thank Mohsen Manesh, Michael Moffitt, Michelle McKinley, John Greenman, Carl Bjerre, and the other faculty members at the University of Oregon who provided comments and feedback during a presentation in October 2011. Thanks also to Michael Harper, Erik Girvan, Alex Long, Gregg Polsky, John Conley, and Holly Holloway for their questions and comments. Any mistakes or inaccuracies in this article are entirely my own.

1. Richard T. Ford, *Everyday Discrimination: Why the Wal-Mart Sex-Bias Lawsuit is the Most Important Case the Supreme Court Will Hear This Year*, SLATE (Mar. 28, 2011, 1:49 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/03/everyday_discrimination.html.

2. See *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1223 (9th Cir. 2007); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2549 (2011).

3. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. at 2556-57.

4. Press Release, U.S. Chamber Applauds Supreme Court Ruling in *Wal-Mart v. Dukes*, U.S. CHAMBER OF COM. (June 20, 2011), available at <http://www.uschamber.com/press/releases/2011/june/us-chamber-applauds-supreme-court-ruling-wal-mart-v-dukes>.

Monitor called the case “a major blow to working women” and a “sign that some of the esteemed judges on our nation’s highest court need a primer in how contemporary discrimination functions.”⁵ In an interview on National Public Radio, a prominent plaintiff’s lawyer called the case “a disaster not only for civil rights litigations but for anyone who wants to bring a class action,” and commented “[t]he five-male majority decision today represents a jaw-dropping form of judicial activism.”⁶

Why the fuss over a procedural technicality? Interest in the case as a matter of substantive employment law is perhaps best summarized by commentator Melissa Hart:

“[e]mployment discrimination law is at a crossroads, and Wal-Mart is planted squarely at its juncture . . . its assault on the subjective decisions made as a consequence of Wal-Mart’s delegation – raises a question that has lurked behind Title VII litigation for years: What responsibility should employers take for gender stereotypes and biases that pervade United States culture when the effects of those cultural norms are felt at work?”⁷

The Supreme Court’s answer was a setback to the plaintiff’s bar – a system of delegated decision-making that produces large statistical disparities cannot furnish the requisite commonality to support a class action, even where the corporate culture is infected by gender stereotypes. It was also problematic for those who view subjective decision-making as the prime suspect for continued discrimination in the workplace due to its susceptibility to unconscious bias and subtle stereotype.

In this article, I use empirical methods to predict the likely impact of *Dukes v. Wal-Mart* on cases seeking to challenge subjective employment practices in federal court. To do so, I examined all of the federal court opinions from 2005 to mid-2011 challenging an employer’s subjective decision-making practice under a disparate impact or “pattern or practice” disparate treatment theory under Title VII or the ADEA. I choose this timeframe to approximate the period in which the district

5. Courtney E. Martin, Op-Ed., *Wal-Mart v. Dukes ruling is out of sync with 21st-century sex discrimination*, CHRISTIAN SCI. MONITOR (June 22, 2011), [http://www.csmonitor.com/Commentary/Opinion/2011/0622/Wal-Mart-v.-Dukes-ruling-is-out-of-sync-with-21st-century-sex-discrimination/\(page\)/2](http://www.csmonitor.com/Commentary/Opinion/2011/0622/Wal-Mart-v.-Dukes-ruling-is-out-of-sync-with-21st-century-sex-discrimination/(page)/2).

6. Nina Totenberg, *Top Court Rules In Favor Of Wal-Mart*, NAT’L PUB. RADIO, (June 20, 2011), available at <http://www.npr.org/2011/06/20/137304956/top-court-rules-in-favor-of-wal-mart> (quoting David Sanford).

7. Melissa Hart, *Learning from Wal-Mart* 2-3 (U. Colo. L. Sch. Legal Stud. Res. Paper Series, Working Paper No. 06-36, 2006).

court and Ninth Circuit's decision to certify the class in *Wal-Mart* remained good law.

My research suggests that the effect of *Wal-Mart* will be more limited than its portrayal in the media would suggest. First, results suggest that cases challenging subjective employment practices were very uncommon even prior to the *Wal-Mart* decision. An average employer's litigation risk in connection with such claims was so vanishingly small during the 2005-2011 time frame that I surmise that few employers adopted measures or altered their behavior to address this litigation risk. As a result, the employer-favorable ruling in *Wal-Mart* simply reaffirms the status quo as it relates to employer practices.

Results also suggest, however, that the risk of a lawsuit challenging subjective employment practices was not homogenous across all employers. From 2005-2011, Fortune 100 companies faced a substantial risk – about 15% – of being subject to such a suit. These lawsuits could best be described as “copycat”⁸ *Wal-Mart* claims. They typically involved very large nationwide classes where the facts and the theory of the case were nearly identical to those alleged in *Wal-Mart*. Their similarity to *Wal-Mart* likely means that this particular breed of lawsuit will no longer be viable under the standard articulated in the Supreme Court opinion.

Nevertheless, I find that about half of the previously successful class action claims⁹ challenging subjective employment practices may still be viable post *Dukes v. Wal-Mart*. These cases were typically more circumscribed than the copycat *Wal-Mart* claims, involving class sizes in the hundreds rather than thousands, and damages in the millions rather than tens of millions. They also tended to involve more aggravated facts patterns than the copycat claims, suggesting that their continued viability serves a valuable public purpose.

Lastly, results revealed a particularity in the way in which disparate impact lawsuits challenging subjective employment practices were litigated from 2005 – 2011. In all but one of the disparate impact cases I reviewed, the employer did not assert its affirmative defense that its practices were job related and consistent with business necessity. They failed to do so despite favorable Supreme Court jurisprudence suggesting the defense could be asserted in cases involving subjective

8. The term “copycat” is not entirely precise, in that some of the suits may have predated the *Wal-Mart* case. If a case was filed prior to 2004 but resulted in a published or unpublished decision between 2005 and 2011, it was included in my sample.

9. See *infra* text accompanying notes 129-133 for a discussion of how I define the term “success.”

claims without resort to complex scientific job validation procedures.¹⁰ As a result, the plaintiff in each case was never required to show that a less discriminatory alternative selection procedure was available prior to settling the case, sometimes for tens of millions of dollars and extensive injunctive relief.

While numerous commentators have maligned subjective employment practices as the scourge of the modern workplace, I argue that employment practices cannot be evaluated in isolation. Rather, they are only good or bad when compared to alternative selection procedures available in a particular context. Alternatives to subjective practices – such as testing – have historically been the source of considerable adverse impact, and may continue to result in significant disparities. Because the availability of better alternatives was never litigated in the *Wal-Mart* copycat lawsuits now precluded by the Supreme Court's decision, it is difficult to assess their importance as a matter of public policy.

Section II of this article provides an overview of how scholars have characterized the particular problem of subjective decision-making and its application to the facts alleged in *Wal-Mart*. Section III places *Wal-Mart* within existing jurisprudence regarding class certification, and explains how *Wal-Mart* imposes additional barriers to certification in cases challenging subjective practices. Section IV describes my methodology, and Section V analyzes the results. Lastly, Section VI discusses whether Congress should override *Wal-Mart* and whether other reforms would have a more substantial impact on the prevalence of claims challenging subjective employment practices.

II. LITERATURE REVIEW

Commentators have devoted considerable discussion to the issue of subjective decision-making as a potent vehicle for modern discrimination.¹¹ These commentators argue that “[c]ognitive bias,

10. See *infra* note 218 and accompanying text.

11. See, e.g., Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459-60 (2001) (“Smoking guns – the sign on the door that ‘Irish need not apply’ or the rejection explained by the comment that ‘this is no job for a woman’—are largely things of the past. . . . Cognitive bias, structures of decisionmaking, and patterns of interaction have replaced deliberate racism and sexism as the frontier of much continued inequality”); Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 482, 496 (2005); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 741 (2005) [hereinafter, Hart, *Subjective Decisionmaking*]; Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias* 3-6 (Pub. Law &

structures of decisionmaking, and patterns of interaction have replaced deliberate racism and sexism as the frontier of much continued inequality.”¹² Recent scholarly interest in the relationship between employment law and cognitive bias has grown following groundbreaking social science research by Anthony Greenwald, Mahzarin Banaji, and Brian Nosek. They tested the presence of unconscious stereotyping, termed “implicit bias,” by measuring the speed with which test subjects associated stereotypical and counter-stereotypical words with categories, such as race and gender.¹³ Subsequent studies of implicit bias suggest that approximately 75% of individuals studied demonstrate implicit bias favoring “relatively advantaged group[s]” over disadvantaged groups.¹⁴

Commentators theorize that implicit bias and other subtle stereotypes may be responsible for ongoing workplace disparities in gender and race.¹⁵ They argue that implicit bias operates through subjective decision-making.¹⁶ As Susan Sturm explained, “[d]ecisions requiring the exercise of individual or collective judgment that are highly unstructured tend to reflect, express, or produce biased outcomes. This bias has been linked to patterns of underrepresentation or exclusion of members of nondominant groups.”¹⁷ Tristin Green argues that subjective practices are increasingly prevalent as a result of a fundamental restructuring of the workplace over the last several decades.¹⁸

Legal Theory Univ. of Chi. L. Sch., Working Paper No. 124, 2006); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 947 (2006); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1078 (2006).

12. Sturm, *supra* note 11, at 460.

13. See Jolls & Sunstein, *supra* note 11, at 3-4 (describing the implicit association test).

14. See Greenwald & Krieger, *supra* note 11, at 955.

15. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995); Greenwald & Krieger, *supra* note 11, at 965; Jolls & Sunstein, *supra* note 11, at 5-6; Linda Hamilton Krieger & Rebecca Hanner White, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making* 8, (CALIF. L. REV., Working Paper No. 45, 2000); Kang & Banaji, *supra* note 11 at 1085 (“On subjective measures of merit, the perceiver’s (evaluator’s) expectations guide what she actually sees in the target (the person being evaluated). In more plain language, if we expect someone to be violent, we will likely see violence when presented with ambiguous behavior.”); Hart, *supra* note 7, at 15; Hart, *Subjective Decisionmaking*, *supra* note 11, at 745-49.

16. Lee, *supra* note 11 at 487; Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37, 41, 50 (noting that favorable settlements typically follow class certification); Hart, *supra* note 7, at 14.

17. Sturm, *supra* note 11 at 485-86.

18. Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account*

Many commentators have argued that antidiscrimination law fails to address these more subtle forms of discrimination by demanding evidence of discriminatory animus.¹⁹ A number have seized upon disparate impact theory as a promising method for challenging subtle discrimination under existing law because, unlike disparate treatment claims, it does not require proof of discriminatory intent.²⁰

It is within this context that *Dukes v. Wal-Mart*²¹ has captured the interest of commentators, businesses, and public policy groups alike. *Dukes* consisted of a putative class of 1.5 million female Wal-Mart employees nationwide, alleging discrimination on the basis of pay and promotion.²² *Dukes* alleged that women represented 72% of Wal-Mart's hourly employees, but only 33% of Wal-Mart's managers.²³ Plaintiffs also produced statistical evidence showing that women were promoted more slowly than men.²⁴ With respect to pay, *Dukes* alleged that women were "paid less than men in comparable positions, despite having higher

of Disparate Treatment Theory, 38 HARV. C.R.-C.L. L. REV. 91, 104 (2003). See also Sturm, *supra* note 11, at 469 ("Exclusion increasingly results not from an intentional effort formally to exclude, but rather as a byproduct of ongoing interactions shaped by the structures of day-to-day decision-making and workplace relationships.")

19. Jolls & Sunstein, *supra* note 11, at 14 n. 42 (reviewing scholarly literature critiquing antidiscrimination law for failing to address implicit bias). See also Hart, *Subjective Decisionmaking*, *supra* note 11, at 743; Erik J. Girvan & Grace Deason, A Question of Equal Treatment: A Psychological Case for Abandoning the "Discriminatory Motive" Under Title VII 2 (2011) (unpublished manuscript) (on file with author) (describing the judicially created disparate treatment doctrine, based on a search for "discriminatory motive, as incoherent and proposing an alternative framework that rejects discriminatory motive); Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395, 395 (2011).

20. Michael Selmi, *Was Disparate Impact a Mistake?*, 53 UCLA L. REV. 701, 704-05 (summarizing scholarship "offer[ing] numerous proposals to extend the disparate impact theory to cure all manner of social ills.")

21. Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct 2541 (2011), *rev'g* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 919 (9th Cir. 2010).

22. *Id.* at 2547.

23. First Amended Complaint at ¶ 1, Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004) (No. C-01-2252 MJJ). This disparity placed Wal-Mart significantly behind other retailers, a fact Wal-Mart's executives acknowledged in an internal memorandum. Brief for Respondents at 22, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct 2541 (2011) (No. 10-277) ("Executive Vice President Coleman Peterson made regular presentations to top management about the Company's workforce. Shortly before this case was filed, Peterson informed management that, based upon the company's own internal benchmarking, 'Wal-Mart's women in management percent . . . is significantly behind several of the other retailers reporting . . . [Wal-Mart] trails both the retail industry . . . and workforce averages.'") (ellipses in original).

24. *Dukes v. Wal-Mart Stores Inc.*, 222 F.R.D. 137, 154 (N.D. Cal. 2004). On average, Wal-Mart promoted women to assistant manager after 4.38 years, compared to 2.86 for men. *Id.* at 161. Similarly, "it took 10.12 years for women to reach Store Manager, compared with 8.64 years for men." *Id.*

performance ratings and greater seniority[.]”²⁵ The pay disparity ranged from 5 to 15% per year.²⁶

Dukes brought both a disparate impact claim and a “pattern or practice” disparate treatment claim against Wal-Mart. Dukes did not allege that Wal-Mart’s managers intentionally discriminated against female employees, but rather, that the disparities were caused by pay and promotion policies which “uniformly provide for managers to exercise significant subjectivity in making pay and promotion decisions.”²⁷ Although hourly positions were subject to a minimum starting wage, store managers had the authority to raise compensation within a two dollar per hour range unconstrained by oversight or objective criteria.²⁸ Likewise, Wal-Mart set a broad compensation range for its salaried employees, within which district and regional managers were given complete discretion to determine compensation for subordinates.²⁹

With respect to promotions, vacancies were rarely posted,³⁰ and participation in a management training program required a “tap on the shoulder” from a manager to participate.³¹ As a result, employees had “no ability to apply for, or otherwise formally express their interest in, openings as they arose”, which “further intensif[ied] the subjective nature of the promotion process.”³²

To tie Wal-Mart’s practices and the disparate statistical outcomes, plaintiffs presented the testimony of Dr. William Bielby, a sociologist and favored expert witness among plaintiff’s attorneys.³³ Dr. Bielby described social science research providing that “gender stereotypes are especially likely to influence personnel decisions when they are based on subjective factors.”³⁴ Bielby concluded that Wal-Mart’s policy of delegating subjective decision-making to managers with little oversight

25. *Dukes v. Wal-Mart*, 474 F.3d 1214, 1222 (9th Cir. 2007). Plaintiffs’ expert statistician found that women were paid significantly less than men in each of Wal-Mart’s forty-one regions. *Id.* at 1228.

26. *Wal-Mart*, 222 F.R.D. at 156.

27. *Id.* at 145.

28. *Id.* at 146-47.

29. *Id.* at 147.

30. *Id.* at 149.

31. *Id.* at 148.

32. *Id.* at 149.

33. See, e.g. *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 301, 327 (N.D. Cal. 1992) (accepting testimony of Dr. Bielby); *Butler v. Home Depot, Inc.*, 984 F. Supp. 1257, 1265 (N.D. Cal. 1997) (accepting testimony of Dr. Bielby); *EEOC v. Morgan Stanley*, 324 F. Supp. 2d 451, 461-62 (S.D.N.Y. 2004) (accepting testimony of Dr. Bielby); *Duling v. Gristede’s Operating Corp.*, 267 F.R.D. 86, 92, 93-94, 95 (S.D.N.Y. 2010) (accepting testimony of Dr. Bielby).

34. *Wal-Mart*, 222 F.R.D. at 153.

rendered the company “vulnerable” to gender bias.³⁵

Dukes’ ambitious challenge of Wal-Mart’s subjective practices captured the attention of commentator Melissa Hart. Although the central issue in *Wal-Mart* was class certification, Hart argued that such an inquiry was inextricably tied to the merits of the case:

[T]he question of whether employees are affected by a common policy [and] whether geographic dispersion should defeat certification is fundamentally tied to a judgment about the appropriateness of suits challenging the aggregate effects of decisions made through the exercise of unguided discretion. Indeed, given that most class actions that are certified settle before they go to trial, arguments about [certification] . . . may be the closest that the courts get to truly addressing [the merits].”³⁶

Commentator Tristin Green has taken a similar position, arguing that *Wal-Mart* is emblematic of a legal trend in which “longstanding theories of systemic discrimination are under attack” and an “individualistic model of organizational wrongdoing . . . has led to under-theorizing, even mis-theorizing, of entity responsibility for systemic disparate treatment.”³⁷ Likewise, commentator Michael Zimmer argues that *Wal-Mart* “can be viewed as a foreshadowing of the undermining of the litigation structure of systemic discrimination law.”³⁸

Wal-Mart also garnered the attention of business and public interest organizations. Twenty-eight amicus briefs were filed with the Supreme Court, from stakeholders as diverse as the ACLU, the NAACP, the United Food Workers, the US Women’s Chamber of Commerce, Intel, Costco, Bank of America, Fedex and Microsoft.³⁹ Businesses argued that “modern businesses regularly rely on centralized policies [but]

35. *Id.* at 154. Bielby did not, however, conduct any observational or other scientific studies of Wal-Mart specifically, and could not “definitively state how regularly stereotypes play a meaningful role in employment decisions.” *Id.*

36. Melissa Hart, *Symposium: Class and Collective Actions in Employment Law: Symposium Editors: Douglas D. Scherer and Robert Belton: Learning From Wal-Mart*, 10 EMP. RTS. & EMPLOY. POL’Y J. 355, 384 (2006). *Wal-Mart* generated further scholarly debate as to the admissibility of Bielby’s testimony. See, e.g., John Monahan, Laurens Walker, & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendancy of “Social Frameworks,”* 94 VA. L. REV. 1715, 1745-46 (2008) (pondering the efficacy, reliability, and admissibility of social framework testimony in the wake of *Dukes*).

37. Green, *supra* note 18, at 395.

38. MICHAEL J. ZIMMER, *WAL-MART V. DUKES: TAKING THE PROTECTION OUT OF PROTECTED CLASSES* 40 (2006).

39. See *Wal-Mart v. Dukes*, SCOTUSBLOG (Apr. 16, 2012), <http://www.scotusblog.com/case-files/cases/wal-mart-v-dukes/>.

delegated decision-making authority”, suggesting that a finding in plaintiffs’ favor would fundamentally alter the way they do business.⁴⁰ The US Women’s Chamber of Commerce argued that women suffer persistent disparities in compensation and advancement in the US workplace, exacerbated by “corporations . . . unable or unwilling to see or acknowledge gender disparities.”⁴¹ Class actions, they argued, serve a critical role in addressing social disparities, which “can force an internal re-examination of executive attitudes and corporate culture.”⁴² The NAACP argued that Wal-Mart sought to “impos[e] a series of heightened [certification] standards on Plaintiffs’ claims . . . [which] would dramatically narrow the circumstances in which the class action vehicle could be used.”⁴³

In this article, I attempt to provide some concrete texture to the debate on the likely impact of *Wal-Mart* by examining disparate impact and pattern or practice cases challenging subjective employment practices from 2005 to mid-2011. This period roughly approximates the time period in which the District Court’s decision to certify the class in *Dukes* remained good law.⁴⁴

Commentators have periodically undertaken an empirical review of disparate impact litigation. Ian Ayres and Peter Siegelman compared the prevalence of hiring and termination-related disparate impact claims in federal courts between 1971 and 1995.⁴⁵ More recently, Michael Selmi reviewed all reported disparate impact cases in district and appellate courts from six specific years spanning the period 1984 to 2001.⁴⁶

Other commentators have discussed the viability of cases challenging subjective practices under Title VII from a normative standpoint. In a 2006 note, Daniel Klein examined the various ways in which courts had addressed certification in the context of subjective

40. See Brief for Altria Group, Inc. et al. as Amici Curiae Supporting Petitioner at 3, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277).

41. Brief for US Women Chamber of Commerce et. al. as Amici Curiae Supporting Respondents at 13, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277).

42. *Id.* at 20.

43. Brief for NAACP Legal Defense and Educational Fund, Inc. et. al. as Amicus Curiae Supporting Respondents at 2, *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277).

44. A federal court in California certified the class in June 2004, which the Ninth Circuit affirmed in 2007, and again in an *en banc* decision in 2010. Although the District Court decision certifying in the class was unpublished, many jurisdictions permit citations to unpublished decisions.

45. See Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487, 1492-93 (1996).

46. See Selmi, *supra* note 20, at 738-39, tbls. A & B.

decision-making practices.⁴⁷ Klein argued that such cases should only be certified where the plaintiff presented robust and disaggregated statistical proof – showing the existence of disparities at the level of the decision-maker.⁴⁸ A 2005 article by Melissa Hart, *Subjective Decision-making and Unconscious Discrimination*, included a brief discussion of the manner in which courts responded to class actions challenging subjective employment practices.⁴⁹ Like Klein, she concluded that courts are divided in their treatment.⁵⁰ Hart, however, argued that judicial reluctance to certify such classes is frequently at odds with the Supreme Court’s “very explicit holding” in *Watson v. Forth Worth* that such claims are actionable.⁵¹

In attempting to quantify the likely effect of *Dukes v. Wal-Mart*, this paper seeks to provide an empirical answer⁵² to a number of questions left unaddressed in prior research. How prevalent are claims challenging subjective employment practices, and are they successful in doing so? What types of subjective practices are most commonly challenged? What distinguishes a winning class action challenging subjective practices from a losing one, and were courts already applying standards similar to those articulated by the Supreme Court in *Wal-Mart*? To what extent do successful class actions resemble the fact patterns alleged in *Wal-Mart*? What is the average monetary value and class size for successful class actions challenging subjective practices? The answers may inform the ongoing debate as to whether existing law, and the direction that law can be expected to proceed post-*Wal-Mart*, adequately regulates the modern workplace.

III. *DUKES V. WAL-MART* AND ITS POTENTIAL IMPLICATIONS

In theory, the Supreme Court’s decision in *Wal-Mart* was a purely procedural one. The question for which the Supreme Court granted certiorari was whether the class certification ordered under Federal Rule

47. Daniel S. Klein, Note, *Bridging the Falcon Gap: Do Claims of Subjective Decisionmaking in Employment Discrimination Class Actions Satisfy the Rule 23(a) Commonality and Typicality Requirements?*, 25 REV. LITIG. 131, 133-34 (2006).

48. See *id.* at 176.

49. Hart, *supra* note 11, at 778-88.

50. See *id.* at 781.

51. See *id.* at 783.

52. See generally Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63 (2008) (describing a standard methodology for systematically analyzing judicial opinions, recording consistent features of each, and drawing inferences about their use and meaning).

of Civil Procedure 23(b)(1) was consistent with Rule 23(a).⁵³ However, the decision necessarily alters the course of Title VII jurisprudence because the claims *Dukes* asserted are predominantly, and most successfully, asserted on a class basis.

Dukes alleged disparate impact and a “pattern or practice” of disparate treatment⁵⁴ under Title VII of the Civil Rights Act.⁵⁵ “Pattern or practice” claims can be brought by the EEOC, which is exempt from Rule 23’s class certification requirements,⁵⁶ or they can be brought on a class wide basis.⁵⁷ Courts generally do not permit individuals to prove disparate treatment solely through evidence of a “pattern or practice” of discrimination.

Although disparate impact claims are available to individual plaintiffs, such claims are rarely successful.⁵⁸ This is largely a function of the evidentiary rigors of a disparate impact claim, consisting of aggregate statistics showing that an employer’s facially neutral practice had a disproportionately adverse impact on a protected group.⁵⁹

53. See Petition for a Writ of Certiorari at i, *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277). The Supreme Court also certified the question of “[w]hether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2) . . . and, if so, under what circumstances.” *Id.* The potential implications of the Supreme Court’s answer to this second question is beyond the scope of this paper. For an in-depth analysis of this issue, see generally Suzette M. Malveaux, *Class Actions at the Crossroads: An Answer to Wal-Mart v. Dukes*, 5 HARV. L. & POL’Y REV. 375 (2011).

54. Technically, a “pattern or practice” claim is not a separate cause of action from other disparate treatment claims but a method of proving disparate treatment. Through a combination of statistical and anecdotal evidence, the “pattern or practice” plaintiff must “establish by a preponderance of the evidence that racial discrimination was the company’s standard operating procedure – the regular rather than the unusual practice.” *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977). The plaintiff need not show that the employer discriminated against each member of the class, but it must establish that a discriminatory policy or regular practice exists. *Id.* at 360. The “mere occurrence of isolated or ‘accidental’ or sporadic discriminatory acts” is insufficient. *Id.* at 336.

55. See Third Amended Complaint at ¶¶ 102-05, *Dukes v. Wal-Mart*, No. C-01-2252 (N.D. Cal. Sept. 12, 2002). Plaintiffs also alleged retaliation and hostile work environment claims. *Id.* at ¶¶ 110-11. Plaintiffs did not, however, include their retaliation and hostile work environment claims in their motion for class certification. *Wal-Mart*, 222 F.R.D. at 142 n.4.

56. See 42 U.S.C. § 2000e(6)(a) (authorizing the EEOC to file a disparate treatment claim on behalf of a group of employees alleging that the employer “is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights”).

57. *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 n.9 (1984), *EEOC v. Joe’s Stone Crab Inc.*, 220 F.3d 1263, 1286 (11th Cir. 2000).

58. See *Selmi*, *supra* note 20, at 736 n.145 (“There are a surprising number of individual claims, almost all of which fail.”).

59. See generally *Griggs v. Duke Power Co.*, 420 F.2d 1225 (4th Cir. 1970), *rev’d in part* 401 U.S. 424 (1971). “Pattern or practice” claims are also frequently proven through statistics, although courts will sometimes overlook deficiencies in statistical evidence when the plaintiff proffers strong anecdotal evidence. See, e.g., *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299,

Gathering and analyzing such statistics requires extensive discovery and expert testimony, which individual plaintiffs commonly fail to do.⁶⁰

To the extent that the Supreme Court's decision in *Wal-Mart* imposes additional burdens or barriers to class certification of cases challenging subjective practices, it can be expected to reduce the prospects of success for disparate impact and "pattern or practice" discrimination claims, as well as the accompanying settlement value of such claims.⁶¹

A. Class Certification Jurisprudence Prior to *Dukes v. Wal-Mart*

Rule 23 of the Federal Rules of Civil Procedure makes class actions available upon a showing of numerosity, commonality, typicality and adequacy.⁶² Of these, commonality was the central issue in *Wal-Mart*⁶³ – whether "there are questions of law or fact common to the class[.]"⁶⁴ Prior to *Wal-Mart*, district and appellate courts faced ambiguous guidance as to plaintiff's burden in establishing commonality for claims challenging subjective employment practices.⁶⁵ The only Supreme Court guidance came in the form of a footnote in the 1982 case, *General Telephone Co. v. Falcon*.⁶⁶

Falcon involved a Mexican-American employee alleging a pattern

307 (1977) ("[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination."); *Wright v. Stern*, 450 F. Supp. 2d 335, 363 (S.D.N.Y. 2006); *Brown v. Nucor*, 576 F.3d 149, 156-57 (4th Cir. 2009) (evidence of racist remarks sufficient to support class certification, despite statistical evidence that did not rise to the level of statistical significance).

60. See discussion *infra* p. 434-436.

61. This implication was not lost on the plaintiff's bar when *Wal-Mart* came before the Supreme Court. In an amicus brief submitted to the Court, they argued that "view[ing] subjective practices as inherently inconsistent with Rule 23's commonality requirement, or so much in tension that only an extremely high level of proof allows certification, is as wrong as viewing them as inherently inconsistent with disparate impact." Brief for National Employment Lawyers Association et al. as Amici Curiae Supporting Respondents at 14, *Wal-Mart Stores, Inc., v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277).

62. Specifically, the plaintiff must show that (a) "the class is so numerous that joinder of all members is impracticable" (numerosity); (b) "there are questions of law or fact common to the class" (commonality); (c) "the claims or defenses of the representative parties are typical of the claims or defenses of the class" (typicality); and (d) "the representative parties will fairly and adequately protect the interests of the class" (adequacy). FED. R. CIV. P. 23(a).

63. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550-51 (2011).

64. FED. R. CIV. P. 23(a)(2).

65. See Klein, *supra* note 47, at 138 (referring to the prior Supreme Court guidance as "oracular"); Hart, *supra* note 7, at 19-20.

66. 457 U.S. 147 (1982). See also Klein, *supra* note 47, at 140.

or practice of discrimination in hiring and promotion.⁶⁷ The plaintiff, who had been denied a promotion, failed to make any factual allegations regarding the employer's hiring practices.⁶⁸ While acknowledging that racial discrimination is by definition class discrimination and that "common questions of law or fact are typically present,"⁶⁹ the Supreme Court stated:

"Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims."⁷⁰

In a footnote, the Court observed that the plaintiff might have bridged that gap had the plaintiff proffered "[s]ignificant proof that an employer operated under a general policy of discrimination . . . if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision-making processes."⁷¹

The Supreme Court's guidance proved malleable in the hands of district and appellate courts. Courts inclined to grant certification focused on broad language in *Falcon* that "common questions of law or fact are typically present" in race discrimination questions.⁷² These courts then tended to distinguish *Falcon* on its facts, and interpreted the footnote to permit certification through mere allegations of a policy or practice extending class wide.⁷³

67. *Falcon*, 457 U.S. at 149.

68. *Id.* at 150.

69. *Id.* at 157.

70. *Id.*

71. *Id.* at 159 n.15. See also Klein, *supra* note 47, at 145-47 (discussing the *Falcon* footnote).

72. See, e.g., *Card v. City of Cleveland*, 270 F.R.D. 280, 293-94 (N.D. Ohio 2010) (certifying the common question of "whether Defendant's pattern or practice of utterly failing to promote women to the position of WPO violates Title VII").

73. See, e.g., *Cox v. American Case Iron Pipe Co.*, 784 F.2d 1546, 1558 (11th Cir. 1986) (Distinguishing *Falcon* on its facts); *Richardson v. Byrd*, 709 F.2d 1016, 1020 (5th Cir. 1983) (same). The Fourth and Fifth Circuits adopted this interpretation, opining that "the threshold requirements of commonality and typicality are not high" and that mere "[a]llegations of similar discriminatory employment practices, such as the use of entirely subjective personnel processes that operate to discriminate, satisfy the commonality and typicality requirements of Rule 23(a)." *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993); *Brown v. Nucor*, 576 F.3d 149, 153 (4th Cir.

Other courts treated *Falcon*'s "wide gap" language to impose an evidentiary burden on plaintiffs at the certification stage.⁷⁴ Courts also cited the *Falcon* footnote for the proposition that a subjective decision-making practice must be "entirely subjective" to be certifiable.⁷⁵

B. Additional Barriers to Certification Imposed by Dukes v. Wal-Mart

In *Wal-Mart*, the Supreme Court settled the *Falcon* debate with an extensive discussion of the commonality standard applicable to cases challenging subjective employment practices. In doing so, it made certification more difficult in two primary respects. First, it required the plaintiff to show that the subjective practice at issue affected the class in a uniform manner. Second, it declared that a policy of delegating subjective decision-making authority cannot furnish the requisite commonality for disparate impact claims or for pattern or practice claims.

1. The Challenged Practice Must Affect the Class Uniformly

In the majority opinion, Justice Scalia articulated the commonality standard as follows:

"[t]heir claims must depend upon a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke."⁷⁶

2009) (quoting *Shipes* with approval). Cases following this line of reasoning tend to simply cite the *Falcon* footnote for the proposition that "disparate treatment cases challenging subjective decision-making processes could be certified as class actions." *Caridad v. Metro North Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999), *overruled by In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006). See also *Hnot v. Willis Grp. Holdings Ltd.*, 228 F.R.D. 476, 482 (S.D. N.Y. 2005) (citing *Caridad* with approval for the proposition that challenges to subjective practices may be certified "even when it is likely to be extremely difficult to prove that a grant of discretionary authority has actually resulted in discriminatory practices.").

74. See, e.g., *Bacon v. Honda of America Mfg., Inc.*, 375 F.3d 565, 571 (6th Cir. 2004) (citing *Falcon* for the proposition that "conclusory allegations and general assertions of discrimination are not sufficient to establish commonality."); Petition for Writ of Certiorari at 20, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277) (emphasizing "wide gap" language).

75. See Klein, *supra* note 47, at 146.

76. *Wal-Mart*, 131 S. Ct. at 2551.

In the context of cases challenging subjective employment practices, the Supreme Court held that the plaintiff must “identify[] a common mode of exercising discretion that pervades the entire company[.]”⁷⁷ In other words, plaintiff must provide evidence that each class member was similarly affected by the subjective practice.

The plaintiffs in *Wal-Mart* were unable to meet this standard. Although plaintiffs’ statistics were highly statistically significant, they could not support uniformity across the class. Their statistics were aggregated at the regional level and not the store level – the locus of the subjective decision-making.⁷⁸ The Supreme Court also found plaintiffs’ anecdotal evidence insufficient to establish uniformity. *Dukes* proffered 114 declarations describing discriminatory treatment, which represented only 1 declaration per 12,500 class members.⁷⁹ Half of these originated from 6 states.⁸⁰ The Court deemed plaintiffs’ declarations neither sufficiently numerous nor sufficiently representative to establish “a common mode of exercising discretion.”⁸¹

The Supreme Court was equally dismissive of plaintiffs’ expert testimony. Under plaintiffs’ theory of the case, statistical disparities resulted from gender stereotyping imbued in Wal-Mart’s corporate culture.⁸² The Supreme Court, however, faulted plaintiffs’ expert for failing to quantify the portion of the observed disparities were attributable Wal-Mart’s corporate culture: “Whether 0.5 percent of 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking is the essential question on which respondents’ theory of commonality depends. If Bielby admittedly has no answer to that question, we can safely disregard what he has to say.”⁸³ Scalia’s outright rejection of Bielby’s testimony represents a significant setback for cases similar to *Wal-Mart*, henceforth unable to rely on social framework expert testimony⁸⁴ to stitch together otherwise heterogeneous class members for purposes of commonality.

The Supreme Court’s approach to commonality in *Wal-Mart* is

77. *Id.* at 2554-55.

78. *Id.* at 2555.

79. *Id.* at 2556. This figure compared unfavorably to other Supreme Court cases – the plaintiff in *Teamsters* proffered one declaration for every eight class members, which were spread throughout the region covered by the class.

80. *Id.* at 2556.

81. *See id.* at 2554-55.

82. *Id.* at 2549.

83. *Id.* at 2554 (internal quotation marks omitted).

84. *See generally* Monahan et. al, *supra* note 36 for a discussion of social framework testimony.

arguably more demanding than even stringent appellate interpretations of *Falcon*, under which commonality could be established through substantial evidence of an “entirely subjective” decision-making process. Under *Wal-Mart*, such evidence no longer suffices – the plaintiff would also need to show that the discriminatory component of the subjective decision-making manifested itself uniformly throughout the class.

2. Delegated Discretion Does Not Qualify as a “Specific Employment Practice” for Purposes of a Disparate Impact Claim

Disparate impact claims allege that an employer’s facially neutral practices had a disproportionately adverse impact on a protected group.⁸⁵ While disparate impact has long been a straightforward method for challenging objective employer selection methods – such as tests of physical strength, criminal background checks, and written tests⁸⁶ – the Supreme Court first recognized challenges to subjective employment practices in the 1988 decision, *Watson v. Fort Worth Bank & Trust*.⁸⁷

Although the Supreme Court in *Watson* expressed reservations about making subjective practices subject to challenge, it was concerned that failing to do so would “nullify” disparate impact jurisprudence by allowing “employers [to] easily . . . insulate themselves from liability” through the adoption of subjective practices.⁸⁸ The Court reasoned that disparate treatment claims alone could not remedy “the problem of subconscious stereotypes[.] . . . If an employer’s undisciplined system of subjective decision-making has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII’s proscription against discriminatory actions should not apply.”⁸⁹

Watson imposed an additional burden on plaintiffs seeking to challenge subjective practices – they must “identif[y] the specific employment practice that is challenged”.⁹⁰ While identifying a specific

85. The Supreme Court first recognized disparate impact claims in the 1971 case of *Griggs v. Duke Power*, 401 U.S. 424 (1971). Title VII prohibited not only employment actions based on discriminatory animus, reasoned the Court, it also mandated “the removal of artificial, arbitrary, and unnecessary barriers to employment.” 401 U.S. at 431. Consequently, “[t]he Act proscribes . . . practices that are fair in form, but discriminatory in operation” unless they can be shown to be related to job performance and fulfill a genuine business need. *Id.* at 431-32.

86. See Ayres & Siegelman, *supra* note 45, at 1492-93.

87. 487 U.S. 977 (1988).

88. *Watson*, 487 U.S. at 989-90.

89. *Id.* at 990-91.

90. *Id.* at 994.

practice is “relatively easy to do in challenges to standardized tests,” doing so in the context of subjective criteria “may sometimes be more difficult[,]” particularly when disentangling subjective criteria used in combination with more objective ones.⁹¹

In *Wal-Mart*, the Supreme Court waded into the substance of disparate impact claims by briefly touching upon the question of what qualifies as a “specific employment practice.” Citing *Watson*, and without elaborating further, the Supreme Court stated that plaintiffs had failed to identify a “specific employment practice” because “the bare existence of delegated discretion” did not qualify.⁹² Although the Supreme Court offered no illustrations of subjective practices that would qualify, it seemed to demand a subjective practice “whose nature and effects” are uniform across the class.⁹³

3. Delegated Discretion is Insufficient to Establish Commonality in Pattern or Practice Claims

The Supreme Court also altered the course of Title VII jurisprudence as it relates to “pattern or practice” discrimination claims. A “pattern or practice” claim is not a standalone cause of action but a method through which a class of employees can prove disparate treatment under Title VII using statistics⁹⁴ and anecdotal evidence.⁹⁵

As articulated by the Supreme Court in *Teamsters*, the “pattern or practice” plaintiff must “establish by a preponderance of the evidence that racial discrimination was the company’s standard operating

91. *Id.*

92. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2555 (2011).

93. *See id.* at 2555.

94. The Plaintiff generally must present statistical evidence that is both statistically and practically significant. Statistical significance refers to a small likelihood that the disparities occurred by chance. The generally accepted measure of statistical significance is a 5% likelihood that the results occurred by chance. *See Wright v. Stern*, 450 F. Supp. 2d 335, 363 (S.D.N.Y. 2006). However, courts will sometimes accept statistics based on a rule of thumb known as the “4/5ths rule,” comparing whether the selection rate for class members and non-class members are within 80% of each other. *Howe v. City of Akron*, 789 F. Supp. 2d 786, 797 (N.D. Ohio 2010). Practical significance refers to whether the statistical differences are meaningful in the real world. For example, in *Apsley v. Boeing*, the Court rejected a pattern or practice claim where workers over 40 were selected at a lower rate than those under 40. 722 F. Supp. 2d 1218 (D. Kan. 2010). Although the differences were highly statistically significant, the Court did not consider them to be meaningful because the disparity only amounted to about 48 people out of more than 8,000 hires. *Id.* at 1239.

95. *See Wright*, 450 F. Supp. 2d at 365-66. *See also Apsley*, 722 F. Supp. 2d at 1237, 1240-43.

procedure – the regular rather than the unusual practice.”⁹⁶ The plaintiff need not show that the employer discriminated against each member of the class, but it must establish that a discriminatory policy or regular practice exists.⁹⁷ The “[m]ere occurrence of isolated or ‘accidental’ or sporadic discriminatory acts” is insufficient.⁹⁸

In its discussion of *Falcon*, the *Wal-Mart* decision narrowed the types of employer practices that would qualify as a “pattern or practice” for purposes of commonality. Specifically, *Wal-Mart* requires either (1) a test that produces a common result;⁹⁹ or (2) evidence of a general policy of discrimination.¹⁰⁰ Under this framework, subjective criteria do not qualify as a “test” – “[t]he first manner of bridging the gap obviously has no application here; Wal-Mart has no testing procedure or other companywide evaluation method that can be charged with bias.”¹⁰¹ The Supreme Court also concluded, however, that a policy of decentralized decision-making does not qualify as a “general policy of decision-making”. Rather, a policy of decentralization “is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices.”¹⁰²

Although the standard articulated in *Wal-Mart* was nominally an interpretation of *Falcon*, it is considerably more demanding than the plain language of the *Falcon* footnote.¹⁰³ *Falcon* characterized an “entirely subjective decision-making process” as an example of a “general policy of discrimination”.¹⁰⁴ Under *Falcon*, the term “policy” encompassed the employer’s actual practices – “it is noteworthy that Title VII prohibits discriminatory employment *practices*, not an abstract policy of discrimination.”¹⁰⁵ Not so under *Wal-Mart*, where the term “policy” would appear to refer to the employer’s formalized policy, whether implemented or not. The Court found that a general policy of discrimination was “entirely absent” since “Wal-Mart’s announced

96. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

97. *See id.* at 360.

98. *Id.* at 336.

99. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553 (2011).

100. *See id.*

101. *Id.*

102. *Id.* at 2554.

103. Tristin Green argues that the Supreme Court’s requirement that an overt policy of discrimination be present to establish a “general policy of discrimination” represents a significant and troubling shift in the applicable substantive law. Green, *supra* note 19, at 409-10.

104. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 146, n.15 (1982).

105. *Id.*

policy forbids sex discrimination.”¹⁰⁶

To the extent that plaintiffs commonly base their disparate impact and pattern or practice claims on a decentralized policy of subjective decision-making alone, *Wal-Mart* could represent a significant shift. The likely import and impact of *Wal-Mart* will depend, however, on both the case law that preceded it, the overall prevalence of such claims, and the availability of distinguishing facts.¹⁰⁷

In Sections IV and V below, I attempt to assess the likely impact of *Wal-Mart*’s heightened certification requirements by examining disparate impact and pattern or practice claims from 2005 to mid-2011. I examine the likely effect of *Wal-Mart* along multiple metrics: (1) the prevalence of cases challenging subjective practices, (2) the success rates for such cases and the reasons for their success or failure, and (3) the presence of distinguishing facts that might have allowed cases to meet the more stringent certification standard articulated in *Wal-Mart*. I also examine the frequency with which the *Wal-Mart* district and appellate court decisions were cited by other district and appellate courts.

IV. METHODOLOGY

My research sample was constructed from a search on Westlaw and Google Scholar of all federal court decisions since 2005 for cases with the terms “employment” and “subjective” along with the phrases “disparate impact” and/or “pattern or practice.”

My sample included both published and unpublished opinions at the appellate and district court level. This empirical methodology has been used by other commentators studying disparate impact litigation.¹⁰⁸ As Ian Ayres observed, a more complete data set would have involved reviewing all cases filed, and not just those that produced a written opinion.¹⁰⁹ Such research is extremely costly, however, because it

106. *Wal-Mart*, 131 S. Ct. at 2553.

107. If claims similar to *Wal-Mart* have always been rare, a change in the case law would not likely alter employer decision-making. Similarly, if district courts were already applying standards similarly stringent to *Wal-Mart* prior to the Supreme Court ruling, *Wal-Mart* would have little impact on a plaintiff’s prospects. Likewise, if a large number of cases challenging subjective practices are dismissed prior to class certification or if they are denied class certification for reasons independent of commonality, then *Wal-Mart*’s impact would be similarly limited.

108. See, e.g., Ayres & Siegelman, *supra* note 45, at 1494-97; Selmi, *supra* note 20, at 701, 734. See also Hall & Wright, *supra* note 53.

109. See Ayres & Siegelman, *supra* note 45, at n.27. Research by the American Bar Foundation found that approximately 15,000 employment discrimination lawsuits were filed in

would have required reviewing the complaints of all filed employment cases.¹¹⁰

As Ayres observed, the use of an incomplete data set is only a concern if there is an appreciable difference between federal cases involving a written opinion and those that don't.¹¹¹ Cases devoid of any written opinions – published or unpublished – tend to be meritless or low value cases that are dropped or settled prior to significant motion practice, or where the facts or the law are so one-sided that the judge need not engage in extensive analysis or justify his or her ruling for the record.¹¹² By contrast, large complex class actions with close questions of law and fact are more likely to be heavily litigated, subject to extensive motion practice, and the motions are more likely to require analysis in the form of a written opinion.¹¹³ Where there are heavily contested issues of law and fact, a judge may also be more likely to draft a written opinion to create a record in the event of an appeal.

The cases of interest for the purposes of this article fall within the latter category. A meritless case devoid of factual or legal support would not likely be influenced one way or the other by the Supreme Court's opinion in *Wal-Mart*. To the contrary, and as discussed below in Section V, the cases most likely to be influenced by *Wal-Mart* are heavily contested class actions lasting several years and often generating multiple written opinions. Indeed, written opinions would seem to be particularly prevalent in cases challenging subjective practices on a class wide basis in light of conflicting authority as to class certification standards.

As Melissa Hart observed, class certification motions have a dispositive quality¹¹⁴ that lead employers to vigorously contest

2006, of which 4% of which alleged disparate impact. If we assume that filings from 2005 to mid-2011 were constant, the American Bar Foundation's figures suggest that approximately 3,300 disparate impact claims were filed during that time. My review represents approximately 7% of all disparate impact cases.

110. See *id.*

111. *Id.* at 1496.

112. See Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133, 1145-47 (1990) (observing that cases that do not result in a judicial opinion would be disposed through means other than a judicial decision, such as settlement or voluntary dismissal, or could be decided orally rather than through a written decision). See also Selmi, *supra* note 20, at 736 n.144 (reviewing literature on empirical research based upon published decisions).

113. See Selmi *supra* note 20, at 737 (noting that class actions are more likely to be litigated and appealed); Siegelman & Donohue, *supra* note 112, at 1145-47 (finding that complex cases are more likely to result in written opinions and that class actions are more likely to result in written opinions).

114. See Hart & Secunda, *supra* note 16, at 39.

certification and submit extensive briefing on that point. My review of cases suggests that employers attempt to preclude or limit class-related liability not only through oppositions through certification, but also in motions to dismiss, motions to strike class allegations, motions to limit the scope of class wide discovery, motions for summary judgment, decertification motions, and appeals of certification decisions. To the extent that the presiding judge issued a published or unpublished opinion on any such motion between 2005 and 2011, it would have been included in my sample. Where the subject of the motion was not dispositive as to the merits or to certification, I conducted follow up research on PACER, reviewing the docket sheet and electronic filings to locate any dispositive or class-related rulings and determine the outcome of the case.

The sample size generated by my search terms is comparable to past studies of disparate impact cases. My search for cases challenging subjective employment practices yielded 718 results on Westlaw, 184 of which alleged disparate impact, 65 alleged a pattern or practice disparate treatment, and 48 alleged both claims,¹¹⁵ for a total of 297 analyzed cases. Michael Selmi examined 6 years worth of published and unpublished disparate impact cases from a period spanning 1983-2002, which produced a total of 301 analyzed cases.¹¹⁶ Since Selmi was examining all disparate impact cases, as opposed to only those containing the word “subjective,” one would expect his sample to be larger than mine. Ian Ayres analyzed 13 years worth of published disparate impact cases spanning 1971 to 1995, which yielded 294 analyzed cases.¹¹⁷ One would expect Ayres’ sample size to be somewhat smaller than Selmi’s, since it contained only published opinions.

V. RESULTS

The results below first examine the prevalence of claims challenging subjective employment practices, and their accompanying success rates. This analysis includes cases brought by individuals, the

115. I included only Title VII and ADEA disparate impact and pattern or practice claims in my review. I excluded from my analysis cases challenging a pattern or practice of harassment, as they are subject to an idiosyncratic standard for class certification. I also excluded claims asserted under the Americans with Disabilities Act and the Family and Medical Leave Act because of the substantive differences involved in proving such claims.

116. Selmi, *supra* note 20, at 735.

117. See Ayres & Siegelman, *supra* note 45, at 1494-95.

EEOC, multiple plaintiffs, and putative class actions. I then examine the class action claims in greater detail, first with a discussion of cases for which class certification was denied or that were otherwise dismissed, and comparing the reasoning in those decisions to the Supreme Court's decision in *Wal-Mart*. Lastly, I examine cases where class certification was granted, and discuss the extent to which they could survive the more exacting commonality requirements set forth in *Wal-Mart*.

A. Prevalence of Claims Challenging Subjective Practices

1. Cases Dismissed with Little or No Discussion

Of the 297 analyzed cases, 98 were dismissed by the court with little or no discussion of the basis for the claim. The discussion of these claims was so cursory that I could not determine whether the plaintiff sought to challenge a subjective employment practice or a more objective practice, such as a written test.¹¹⁸

Disparate impact claims were most commonly dismissed for failure to exhaust administrative remedies and a failure to allege or proffer any evidence at all in support of the claim. For example, disparate impact plaintiffs sometimes failed to proffer any statistics in support of their claim, or the inadequate statistics they presented would fail to compare disparities in selection rates.¹¹⁹ Some of the disparate impact claims appeared to consist of 'kitchen sink' claims, added thoughtlessly to an overinclusive complaint, and voluntarily withdrawn by the plaintiff when it became clear that the claim lacked merit.

Pattern or practice claims were most commonly dismissed because they were brought by individuals or multiple plaintiffs rather than as class actions. Although courts sometimes permit a plaintiff to proffer statistics or other pattern or practice evidence in support of their pretext argument, none of the cases I reviewed permitted an individual plaintiff to rely exclusively on a pattern or practice to prove their individual claims.

118. Although all of these cases included the word "subjective," the term showed up in unrelated contexts, such as the standard for proving a harassment claim, or the principle that an employee's subjective belief that his or her performance was adequate is insufficient to prove pretext.

119. Disparate impact claims typically require a comparison between the number of applicants in each group to the number actually selected. Only where there is a large difference between selection rates are the statistics considered meaningful. Inadequate statistics, for example, would allege that older workers were terminated at a high rate in a reduction in force, but would not offer the selection rate for younger workers for comparison.

2. Cases Challenging Subjective Practices

Of the 297 analyzed cases, I identified 106 that challenged subjective employment practices, representing about sixteen cases per year.¹²⁰ Subject to the methodological problems described above – that my sample includes only cases involving written opinions, and that the written opinions had to be sufficiently detailed to identify the challenged practice as subjective – this represents a strikingly small number.

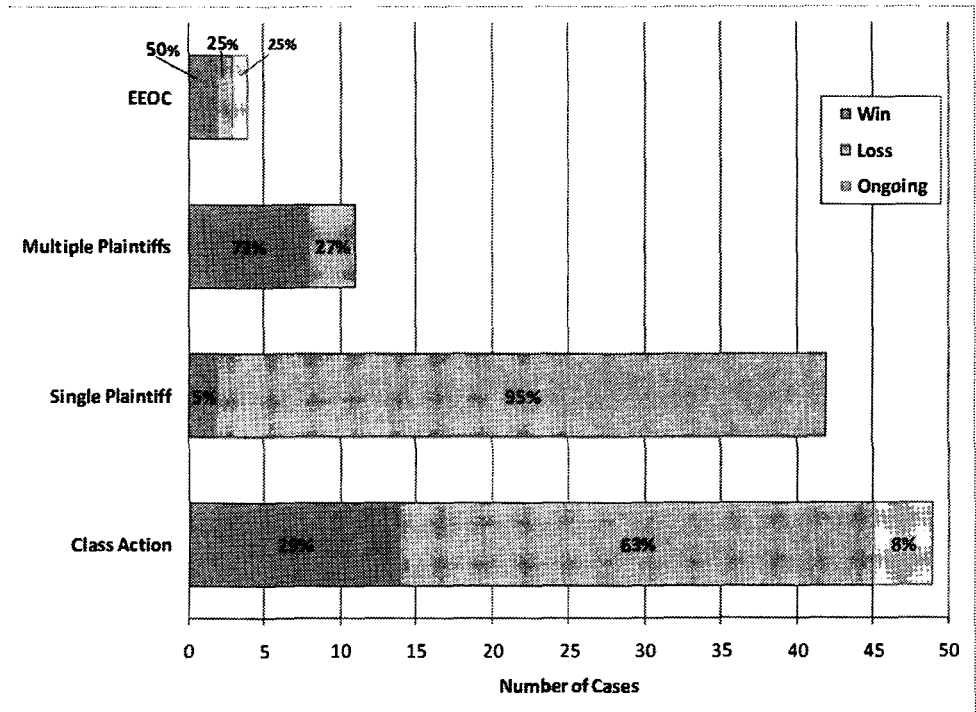
Chart 1 below summarizes the success rates of subjective cases based on the number of plaintiffs involved. I defined “win” very broadly, to include the granting of a class certification motion, in whole or in part. Surviving summary judgment was also counted as a “win.”¹²¹ A loss on appeal or the granting of a decertification motion, however, was counted as a loss.¹²² I defined “ongoing” narrowly, to include those cases where the issue of certification continues to be litigated.¹²³

120. The remaining ninety-three analyzed cases consisted of disparate impact or pattern practice claims challenging objective employment practices or tests.

121. In one case, this resulted in treating a case as a “win” after surviving summary judgment even though the plaintiff subsequently lost in a bench trial.

122. One of the cases I counted as a loss, *Boatwright v. Walgreen Co.*, No. 1:10-cv-03902, 2011 WL 843898 (N.D. Ill. Mar. 4, 2011), consisted of the court’s decision to dismiss class allegations on its own motion in light of the Supreme Court’s decision in *Dukes v. Wal-Mart*, 474 F.3d 1214 (9th Cir. 2007).

123. Cases with an open docket, but where the court had already ruled on certification or summary judgment were excluded from the “ongoing” category and were counted as either a win or a loss.

Chart 1 – Cases Challenging Subjective Practices By Plaintiff Type

As summarized in Chart 1, class actions represent nearly half (49 out of 106) of the disparate impact and pattern or practice cases. Class actions are ordinarily quite rare – representing 3% of employment discrimination cases.¹²⁴ Their prevalence among disparate impact and pattern or practice claims is to be expected for the reasons previously discussed: pattern or practice claims can only be asserted as a class, and disparate impact claims demand considerable aggregate statistical evidence. Individual claims are almost as common as class action claims (42 out of 106), but far less successful. Claims asserted by multiple individuals or in a collective action (“multiple plaintiffs”) are uncommon (11 out of 106) but fare reasonably well.

124. See Laura Beth Nielsen, Robert L. Nelson, Ryon Lancaster & Nicholas Pedriana, *Contesting Workplace Discrimination in Court: Characteristics and Outcomes of Federal Employment Discrimination Litigation 1987-2003*, AM. BAR FOUND. 13 (Oct. 29, 2008), http://www.americanbarfoundation.org/uploads/cms/documents/Nielsen_abf_edl_report_08_final.pdf.

My sample produced only four lawsuits brought by the EEOC.¹²⁵ By contrast, the EEOC brought or intervened in 1,461 Title VII lawsuits between 2005 and 2010.¹²⁶ The scarcity of EEOC claims challenging subjective practices suggests that such practices are not considered a priority by the Commission. Notably, the EEOC is not bound by Rule 23's class certification in bringing litigation on behalf of groups of employees.¹²⁷ The Commission therefore may come under increasing pressure to pursue claims involving subjective practices post-*Wal-Mart*.¹²⁸

Chart 1 overestimates success rates because it does not include the ninety-eight claims dismissed in cursory fashion without discussion of the practices being challenged.¹²⁹ Because the dismissed claims lacked sufficient information to determine whether they challenged subjective practices, the inclusion of such data does not generate a precise success rate. It can, however, be used to generate a range for success rates.¹³⁰ Using this methodology, class actions had a success rate of 27-29%, individual claims had a success rate of 2-5%, and claims brought as a collective action or by multiple plaintiffs had a success rate of 33- 73%.¹³¹ The success rate for EEOC claims was unchanged at 50%.

The success rate, combining claims by all plaintiff types, was

125. Indeed, my search terms generated more EEOC claims challenging a pattern or practice of harassment than those challenging subjective employment practices, which is somewhat surprising given that pattern or practice harassment claims are even more difficult to certify than discrimination claims.

126. *EEOC Litigation Statistics FY 1997 Through FY 2010*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm> (last visited Apr. 22, 2012).

127. See 42 U.S.C. § 2000e(6)(a) (2006).

128. According to a recent report by Seyfarth Shaw LLP, "the EEOC's prosecution of pattern or practice lawsuits is now an agency-wide priority. Many of the high-level investigations started in 2006 mushroomed into the institution of EEOC pattern or practice lawsuits in 2010 and 2011. False The Commission's 2011 Annual Report also announced that it expects to continue the dramatic shift in the composition of its litigation docket from small individual cases to pattern or practice lawsuits on behalf of larger groups of workers." ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT: 2012 EDITION, SEYFARTH SHAW LLP (Jan. 2012), [http://www.seyfarth.com/dir_docs/publications/2012%20car%20short%20final%20\(secured\).pdf](http://www.seyfarth.com/dir_docs/publications/2012%20car%20short%20final%20(secured).pdf).

129. The effect is particularly pronounced as to individual claims – seventy-one of the ninety-eight dismissed claims were brought by individuals. The omission also has a substantial effect on the success rate of claims brought by multiple plaintiffs – thirteen of these were dismissed. The inclusion of the dismissed cases would have only a limited effect on the results as to the class action claims, however, since only three of these were dismissed without discussion. No claims brought by the EEOC were dismissed without discussion.

130. The bottom of the range assumes all of the dismissed claims challenged subjective practices, and the top of the range assumes none of them did.

131. I treated "ongoing" cases as a loss.

between 13% and 25%, which is lower than the average success rate for federal employment discrimination cases of 35%.¹³² It is, however, comparable to the success rate obtained by Michael Selmi in his review of all disparate impact opinions. Selmi's success rate ranged from 11.5% to 20.8% for his sample taken between 1996 and 2002.¹³³ This suggests that plaintiffs were about as successful at challenging subjective practices under a disparate impact and/or a pattern or practice theory as the average disparate impact case.

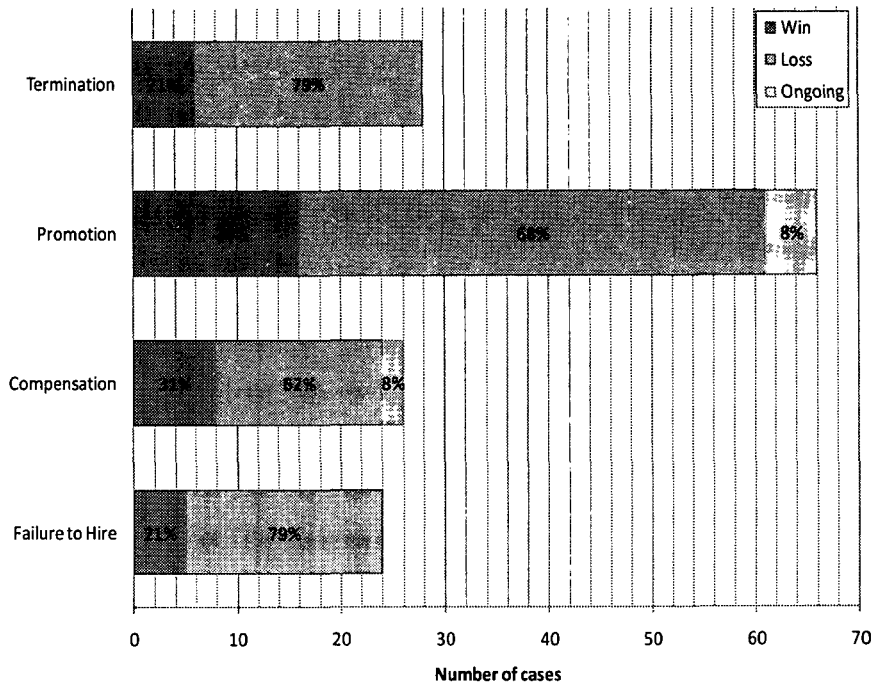
Chart 2, below, summarizes the success rate for cases challenging subjective practices based on the type of adverse employer action at issue.¹³⁴ Twenty one (21) of the cases challenged more than one adverse action, almost all of which consisted of compensation and promotion¹³⁵ claims. These cases appear multiple times on Chart 2.

132. Selmi, *supra* note 20, at 739. Selmi defined success as surviving a motion for summary judgment or a motion to dismiss. *Id.* at 735.

133. *Id.* at 739.

134. Chart 2 does not contain the ninety-eight cases dismissed in a cursory fashion, as most contained insufficient information to identify the adverse employment action at issue.

135. I defined "promotion" to include challenges to employer assignments.

Chart 2 – Cases Challenging Subjective Practices By Type of Claim

The majority of cases (64 out of 106) challenge compensation or promotion practices. Failure to hire and termination¹³⁶ claims are less than half as common. Compensation and promotion claims have a higher success rate than termination and failure to hire claims.

Termination-related claims are notably scarce, with only 28 cases brought over the 6 year period covered in my sample. This result is surprising, given that termination-related claims are otherwise quite common. A study conducted by the American Bar Foundation found that 60% of the federal discrimination claims filed in a random sample drawn from 1983-2003 challenged a termination.¹³⁷ With approximately 15,000 discrimination claims filed in federal court annually,¹³⁸ one would have expected more than a handful of termination-related disparate impact claims.

136. I defined "termination" to include reductions in force, as well as employee discipline.

137. See NIELSON ET AL., *supra* note 124, at 45.

138. Nathan Koppel, *Job-Discrimination Cases Tend to Fare Poorly in Federal Court*, WSJ.COM (Feb. 19, 2009), <http://online.wsj.com/article/SB123500883048618747.html>.

The predominance of promotion and compensation claims, often asserted together, is also uncharacteristic of employment discrimination claims generally. Promotion and pay-related claims represent only 19% and 14%, respectively, of all employment discrimination claims from 1983-2003.¹³⁹ The prevalence of pay and promotion claims in my sample may be partly attributable to the Lilly Ledbetter Fair Pay Act, passed in 2009, which enables plaintiffs to more easily recover back pay when a wage disparity occurs over the course of several years.¹⁴⁰

Pay and promotion claims may also be attractive to plaintiffs' attorneys because the damages can be quite high and are readily calculated using statistical models and comparisons which can readily be made to other current employees outside of the protected class. Because pay and promotion decisions affect almost every employee, the class can potentially encompass a large number of current and former employees, also increasing the settlement value of the lawsuit. Pay and promotion claims are also highly disruptive to employers because they often implicate current employees, rather than employees who were never hired or employees who have already been terminated. The disruption may cause the employer to pay a higher premium to settle the case.

Lastly, the prevalence of pay and promotion claims over hiring and termination claims may reflect information asymmetries. An employee who stays with a company long enough will likely discover the employer's pay and promotion criteria through discussions with co-workers, supervisors, and human resources. By contrast, an employee who is not hired or who is terminated through a reduction in force may never learn how the employer made its decision, making it difficult for the plaintiff to identify a "specific employment practice" for purposes of asserting a disparate impact claim.

The small absolute number of "failure to hire" claims in my sample is perhaps less surprising. Failure to hire claims represent only nine percent of all discrimination claims nationally.¹⁴¹ Hiring cases have been on the decline since the 1970s, as documented by Charles Donohue and Peter Siegelman in 1991.¹⁴² Ian Ayres documented a decline in hiring claims as a proportion of all disparate impact claims, with hiring cases representing about fifteen percent and firing cases representing

139. NIELSON ET AL., *supra* note 124, at 6.

140. Lilly Ledbetter Fair Pay Act of 2009, H.R. 11, 111th Cong. §§ 2(1), 3 (2009) (enacted).

141. NIELSON ET AL., *supra* note 124, at 45.

142. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, STAN. L. REV. 983, 1015 (1991).

twenty-five percent of all disparate impact claims.¹⁴³ Hiring cases are also difficult to prove, because they can require the plaintiff to proffer statistics about the qualified applicant pool in the relevant labor market.¹⁴⁴ By contrast, statistics for promotion, pay and termination related cases are based on incumbent employee information, which can be obtained from the employer through discovery.

Setting aside the comparative frequency of claims challenging subjective practices, their overall prevalence is quite low. Even when combining the 106 subjective cases with the ninety-eight cases dismissed with little or no discussion, the sample consists of only thirty-one cases per year. This represents a miniscule number of cases when compared to the ubiquity of subjective employment practices.¹⁴⁵

Indeed, legal scholars have theorized that subjective hiring practices have grown more prevalent over time. When Elizabeth Bartholet argued in a 1982 article that courts should subject subjective hiring practices to greater scrutiny, subjective employment practices were considered the domain of “jobs in high places.”¹⁴⁶ However, Ian Ayres theorized that the development of case law in the 1970s challenging objective employment practices under a disparate impact theory encouraged employers to “abando[n] testing and other objective practices in favor of subjective hiring standards that are less likely to give rise to disparate impact liability.”¹⁴⁷

The Supreme Court’s 1988 *Watson* decision recognizing subjective disparate impact claims¹⁴⁸ has apparently done little to alter the popularity of subjective practices. Tristin Green argued that “companies have been flattening hierarchies and pushing management and decision

143. Ayres & Siegelman, *supra* note 45, at 1494-95.

144. See *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977).

145. A 1965 study of 852 organizations found that ninety-nine percent of employers used interviews, a highly subjective method, to select candidates. Michael A. McDaniel, Deborah L. Whetzel, Frank L. Schmidt & Steven Maurer, *The Validity of Employment Interviews: A Comprehensive Review and Meta-Analysis*, 79 J. APPLIED PSYCHOL. 599, 599 (1994) (citing Lynn Ulright & Don Trumbo, *The Selection Interview Since 1949*, 63 PSYCHOL. BULL. 100, 100 (1965)). A follow up study in 1982 found that ninety-one percent of employers required at least two interviews before hiring a candidate, despite extensive research indicating that it is not a reliable predictor of job performance. Timothy A. Judge & Gerald R. Ferris, *The Elusive Criterion of Fit in Employment Interview Decisions* 3 (Ctr. For Advanced Human Res. Studies, Working Paper No. 91-26, 1991) (citing ROBERT L. DIPBOYE & WILLIAM CARL HOWELL, *ESSENTIALS OF INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY* (1982)).

146. See Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 995-96, 998 (1982).

147. Ayres & Siegelman, *supra* note 45, at 1491-92.

148. See generally *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988).

making authority lower” since the 1980s.¹⁴⁹ As a result, “evaluation of work performance is becoming more decentralized, subjective and contextual . . . more amorphous, both less easily measured in objective terms and more dependent on social interaction and firsthand observation.”¹⁵⁰ *Wal-Mart* would seem to be an example of this trend, where even the lowliest of first line managers were empowered to make both compensation and promotion decisions with no guidance from headquarters as to the basis upon which to make such decisions.¹⁵¹

Where subjective practices are ubiquitous and only thirty-one cases challenging such practices result in a written opinion each year, the odds of facing such litigation is the employment equivalent of being struck by lightning.¹⁵² The infrequency of these claims suggests that employers have, or perhaps should have, ignored litigation risks associated with disparate impact claims even while the district court’s plaintiff-favorable ruling in *Wal-Mart* remained good law.

Of course, it is possible that employers overestimated their litigation risk or acted conservatively as a result of the heavy publicity afforded to the *Wal-Mart* case as it worked its way up to the Supreme Court.¹⁵³ And as discussed in greater detail below, the risk of a very large disparate impact or pattern or practice class action is not homogenous across all employers – the 100 largest Fortune 500 companies faced a substantial risk of being sued for subjective practices between 2005 and 2011. Nevertheless, for the vast majority of employers, *Wal-Mart* will have no effect on their personnel practices, since their baseline litigation risk is *de minimus*.

149. Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 101 (2003).

150. *Id.* at 103.

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

152. An employer’s annual risk of being sued is somewhat more probable than being struck by lightning. The National Weather Service reports that an individual’s odds of being struck by lightning in any given year is one in 775,000. Mary Ann Cooper, *Medical Aspects of Lightning*, NATIONAL WEATHER SERVICE, <http://www.lightningsafety.noaa.gov/medical.htm> (last visited Mar. 24, 2012). Based on the Census Bureau’s report of 6,049,655 employers in the United States, an employer’s annual risk of disparate impact/pattern or practice litigation based on subjective practices is approximately one in 195,000. See *Statistics About Business Size (Including Small Business) from the U.S. Census Bureau, Table 2b. Employment Size of Employer and Nonemployer Firms, 2007*, U. S. CENSUS BUREAU, <http://www.census.gov/econ/smallbus.html#EmpSize> (last updated Mar. 21, 2012).

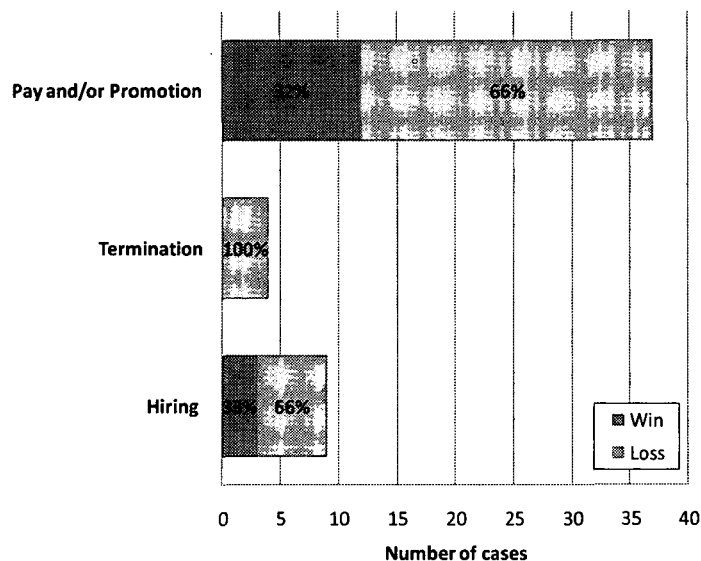
153. Indeed, personnel managers and defense attorneys may overestimate or overemphasize disparate impact litigation risks in seeking to persuade employers to improve their personnel practices. See Selmi, *supra* note 45 at 766; Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 984 (1999).

In subsections B and C below, I examine class actions challenging subjective practices in depth to better understand how the Supreme Court's ruling in *Dukes* might affect that subset of cases.

B. Characteristics of Losing Class Actions.

Chart 3 depicts the prevalence and success rates of class action challenging subjective employment practices.

Chart 3 – Composition of Class Action Claims Challenging Subjective Practices



Challenges to pay and/or promotion practices represent the large majority of class actions asserted (thirty-seven out of forty-nine), followed by nine lawsuits challenging hiring and only four challenging termination. The success rate for pay/promotion, and hiring claims was equivalent at 32-33%. Because pay/promotion claims were much more common than hiring cases, they also represented almost all of the successful class action claims, comprising twelve out of fourteen of successful claims. None of the termination related claims achieved class certification or withstood summary judgment.¹⁵⁴

154. However, plaintiffs appear to be challenging termination-related practices more

Of the losing cases, a substantial number denied class certification for the same reasons as articulated in *Wal-Mart*.¹⁵⁵ For example, in *McReynolds v. Merrill Lynch*, the court denied class certification to a nationwide class of African American financial advisors on the basis of commonality.¹⁵⁶ The court opined, “decentralized procedures, that allow decision-makers across the country to consider subjective factors makes it far more difficult to establish that the employer engages in a pattern or practice of discrimination as a standard operating procedure, and thus more difficult to establish commonality.”¹⁵⁷ Another district court held that, in the absence of a general discriminatory policy, certification requires the plaintiff to show that “bias emanating from the upper-echelons of corporate management . . . infected the [subjective decisions of] managers and supervisors below” or that a “corporate culture of . . . bias . . . resulted in a widespread pattern of” discriminatory decision-making.¹⁵⁸

Similarly, in *Puffer v. Allstate*, the court denied certification to a class of female employees challenging “excessively subjective” compensation and promotion practices.¹⁵⁹ Like the Supreme Court in *Wal-Mart*, the district court interpreted *Falcon* to require that “the alleged policy manifested itself in the ‘same general fashion’ as to all putative class members” and that the subjective policies were “uniformly used as a mask for discrimination” or “to evade statutory anti-

successfully in the context of claims by multiple individuals or a collective action, where class certification requirements need not be met. Four (4) out of the five (5) termination-related claims in my sample that were brought by multiple individuals or through a collective action were successful in doing so.

155. The remaining cases generally suffered from defects so severe that the Supreme Court’s decision in *Wal-Mart* would not have altered the result. Common defects included cases presenting flawed statistics or typicality issues arising from the particular circumstances of the named plaintiff. See, e.g., *Rollins v. Alabama Comty. Coll. Sys.*, No. 2:09cv636-WHA, 2010 WL 4269133 (M.D. Ala. Oct. 25, 2010); *Boyd v. Interstate Brands Corp.*, 256 F.R.D. 340 (E.D.N.Y. 2009); *Attenborough v. Constr. and Gen. Bldg. Laborers’ Local 79*, 238 F.R.D. 82 (S.D.N.Y. 2006); *Carpenter v. Boeing*, 456 F.3d 1183 (10th Cir. 2006); *Apsley v. Boeing*, 722 F. Supp. 2d 1218 (D. C. Kan. 2010); *Moore v. Napolitano*, 723 F. Supp. 2d 167 (D. C. 2010); *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248 (4th Cir. 2005).

156. See Amended Memorandum Opinion and Order at 9, 12, *McReynolds v. Merrill Lynch*, No. 05 C 6583 (N.D. Ill. Aug. 5, 2010).

157. *Id.* at 9.

158. *Apsley*, 722 F. Supp. 2d at 1240-1241. See also *Port Auth. Police Asian Jade Soc’y of New York & New Jersey, Inc. v. Port Auth. Of New York and New Jersey*, 681 F. Supp. 2d 456, 464 (S.D.N.Y. 2010) (finding that “intentional discrimination was so pervasive in the Port Authority’s [subjective] practices for promotion to sergeant that it amounted to a discriminatory policy or custom.”)

159. See *Puffer v. Allstate Ins.*, 255 F.R.D. 450, 459 (N.D. Ill. 2009).

discrimination rules.”¹⁶⁰ Several other cases denied class certification on the basis of commonality using similar reasoning.¹⁶¹

Like *Wal-Mart*, several courts also denied class certification to disparate impact claims on the basis that the plaintiff had failed to identify the subjective employment practice with sufficient specificity.¹⁶²

That several courts reached denied certification on the same basis as the Supreme Court in *Wal-Mart*, suggests that *Wal-Mart* was not a radical departure from existing jurisprudence. This finding is consistent with Melissa Hart’s conclusion in 2006 that “a majority of courts to consider similar class action claims have concluded that . . . the central decision to delegate authority does not transform the individual decisions into a single, uniform policy.”¹⁶³

C. Characteristics of Winning Class Actions.

Chart 4, below, illustrates the winning class action cases included in my sample, along with the four ongoing cases with certification disputes

160. *Id.* at 460.

161. *Yapp v. Union Pac.*, 229 F.R.D. 608 (E.D. Mo. 2005) (denied class certification to class of African American applicants on the basis of commonality where decision-making was decentralized to twenty different departments); *Gutierrez v. Johnson & Johnson*, 467 F. Supp. 2d 403, 412 (D.N.J. 2006) (denying class certification on the basis of commonality and noting that the class was broader in scope than *Dukes v. Wal-Mart*, 474 F.3d 1214 (9th Cir. 2007); *Rollins v. Alabama Cmty. Coll. Sys.*, No. 2:09cv636-WHA, 2010 WL 4269133 at *6 (M.D. Ala. 2010) (class certification denied on the basis of commonality where class involved decisions made by different individuals at geographically dispersed locations); *Armstrong v. Powell*, 230 F.R.D. 661 (W.D. Ok. 2005) (denying class certification on the basis of commonality, holding that “[a]bsent centralized decision-making or some other identifiable common ‘practice’ of discrimination, any acts of discrimination suffered by the Plaintiffs through their non-selection cannot be construed as company-wide.”).

162. *See Gutierrez*, 467 F. Supp. 2d at 409 (employer’s “policy of delegating discretion to operating companies . . . result[ing] in excessively subjective employment practices” insufficiently specific to support class certification); *O’Neal v. Wackenhut Servs., Inc.*, No. 3:03-CV-397, 2006 WL 1469348 (E.D. Tenn. May 25, 2006) (holding mere allegation of “excessive subjectivity” without “demonstrating that any practice or policy, which, though demonstrably neutral . . . ha[d] a disproportionate adverse impact upon African Americans” insufficient to satisfy commonality); *Yapp v. Union Pacific*, 299 F.R.D. 608, 621-22 (E.D. Mo. 2005) (holding that there is no commonality where plaintiff failed to identify subjective aspect of decision-making responsible for the disparity, noting that “[e]specially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.”); *Gaston v. Exelon Corp.*, 247 F.R.D. 75, 83 (E.D. Pa. 2007) (denying class certification where plaintiffs “failed to identify a policy, practice, or procedure that is the root of the alleged harm for all class members”).

163. Hart, *supra* note 7, at 21.

pending prior to the *Wal-Mart* decision.¹⁶⁴ Chart 4 attempts to illustrate the likelihood with which these cases might survive the Supreme Court's more stringent standard set forth in *Wal-Mart* based on the presence or absence of a number of distinguishing characteristics: (1) whether the applicable court reached its decision without citing the district or appellate court decision in *Wal-Mart*; (2) whether the geographic scope of the class is limited to a single site or multiple sites within a single city; (3) whether the decision-maker(s) responsible for the challenged employment action consisted of a single individual or a handful of individuals; and (4) whether the challenged subjective practice consisted of disregarding objective criteria specified by centralized management. Chart 4 also sets forth the applicable class size, if known, and the outcome or current status of the case.

164. I excluded the case that successfully obtained class certification but lost on the merits from Chart 5, since the unfavorable conclusion to the case would not have been affected by the Supreme Court's ruling in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). The pending status of cases was determined based on docket sheets and opinions available on PACER as of January 2012.

Chart 4 – Distinguishing Facts In Successful and Ongoing Class Actions¹⁶⁵

		Court ruling does not rely on district or appellate decision in <i>Wal-Mart</i>				Geographic scope limited to a city or a facility		Single or small group of decision-makers		Decision-maker disregarded objective criteria		Case	Class Size	Outcome
1	Card v. City of Cleveland												Small	Settled for injunctive relief and \$15,000.
2	Grant v. Nashville												> 200	Settled for injunctive relief and damages to be determined.
3	Wright v. Stern												3,500	Settled for injunctive relief and \$11.8 million in damages.
4	Duling v. Gristedes												> 600	Post-certification discovery ongoing.
5	McClain v. Lufkin												700	Court imposed injunctive relief and \$3.2 million in back pay.
6	Hnot v. Willis Group												106	Settled for injunctive relief and \$8.5 million in damages.
7	Brown v. Nucor												171	Motion for decertification pending.
8	Tumley v. Bank of America												Unknown	Settled for \$7.2 million after motion to dismiss denied.
9	Velez v. Novartis												5,600	Settled for injunctive relief and \$175 million after jury verdict.
10	Schaefer v. General Electric												> 1,000	Settled for undisclosed amount after surviving motion to dismiss.
11	Satchell v. FedEx												Thousands	Settled for injunctive relief, fees, and \$54 million.
12	Nelson v. Wal-Mart												3,501	Settled for injunctive relief, fees, and \$17.5 million.
13	Chen-Oster v. Goldman Sachs												Thousands	Plaintiff has not yet brought a certification motion.
14	Ellis v. Costco												700	Remanded in light of Supreme Court's <i>Wal-Mart</i> decision.
15	Carlson v. CH Robinson												1,925	Settled for injunctive relief, fees and \$15 million in damages.
16	Bell v. Lockheed Martin												17,000	Class certification denied given Supreme Court's <i>Wal-Mart</i> decision.
17	Holloway v. Best Buy												390,000	Settled for injunctive relief and fees.

The presence of the above four types of distinguishing features, particularly in combination, may render a case sufficiently distinct from *Wal-Mart* that it would survive the more stringent standards articulated by the Supreme Court. As discussed in greater detail below, these features are consistent with some of the language and reasoning in the Supreme Court's decision. They may also serve as distinguishing facts for district courts otherwise inclined to grant certification. *Wal-Mart* involved an extreme fact pattern – a sprawling class of 1.5 million current and former female employees in all 3,400 Wal-Mart stores nationwide.¹⁶⁶ As they did with *Falcon*, district courts may ultimately set aside the broad rhetoric in *Wal-Mart* and distinguish future cases on the facts.

165. A darkened square represents the presence of the applicable distinguishing characteristic. A light gray square refers to the partial presence of a distinguishing characteristic. The "ongoing" cases are in bold.

166. *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1222 (9th Cir. 2007).

1. Absence of a Citation to *Wal-Mart*

The first factor – the absence of a citation to *Wal-Mart* – would not, on its own, necessarily render the case distinguishable from *Wal-Mart*. The case could have cited other plaintiff-friendly case law effectively overruled by *Wal-Mart*. Somewhat surprisingly, only three of the thirteen successful class actions cited the district or appellate court ruling in *Wal-Mart* in support of its certification decision.¹⁶⁷

2. Limited Geographic Scope of Class

A more localized geographic scope is more likely to satisfy the *Wal-Mart* standard because it allows the plaintiff to avoid pursuing a theory of decentralized decision-making, which the Supreme Court characterized as “the opposite of a uniform employment practice that would provide the commonality needed.”¹⁶⁸ Particularly where the geographic scope of the class is localized to the area in which the decision-making takes place, the plaintiff need not make an attenuated argument about how the culture at headquarters infected decision-makers across a diffuse region.¹⁶⁹ The argument that a single site or geographically proximate sites were infected by stereotypes, arising through common personnel, interactions among sites, or an ongoing history of discrimination, would not necessarily be inconsistent with the Supreme Court’s ruling. Likewise, anecdotal evidence from a limited geographic area would be considered truly representative of the class – a fact the Supreme Court also deemed relevant in overturning the certification decision.¹⁷⁰

A recent report by Seyfarth Shaw LLP predicts that the number of employment discrimination class actions will increase as the plaintiff’s bar seeks to bring state-wide or regional claims in lieu of a nationwide

167. Three of the “ongoing” cases cited the district or appellate decisions in *Wal-Mart* in one way or another. Two pre-certification cases cite the Supreme Court’s decision in *Wal-Mart* in their briefing. See *Chen-Oster v. Goldman Sacks*, No. 6950, 2012 U.S. Dist. LEXIS 12961 (S.D.N.Y. Jan. 19, 2012); *Bell v. Lockheed Martin*, No. 08-6292, 2011 U.S. Dist. LEXIS 143657 (D.N.J. Dec. 14, 2011). The final ongoing case in my sample, *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011), was appealed to the Ninth Circuit following the district court’s granting of class certification. The Ninth Circuit remanded the case for the district court to consider whether, in light of the Supreme Court’s ruling in *Wal-Mart*, the named plaintiffs are adequate representatives of the putative class. See *Ellis*, 657 F.3d 970 at 988.

168. *Wal-Mart*, 131 S. Ct. at 2554.

169. Hart, *supra* note 7, at 19.

170. See *Wal-Mart*, 131 S. Ct. at 2549.

class action.¹⁷¹ However, it is yet to be seen whether state-wide or regional class actions may ultimately prove too ambitious to succeed within the framework set forth by the Supreme Court.¹⁷²

3. Small Number of Decision-makers

A class based upon a single decision-maker or a group of decision-makers acting in a joint or coordinated fashion would more likely meet *Wal-Mart*'s commonality requirement because class members would be affected similarly by the actions of those individuals.¹⁷³ It also renders the anecdotal evidence more meaningful because a discriminatory comment attributed to a decision-maker about one employee is probative of how that employee treated others similarly situated.

The Supreme Court found the presence of thousands of decision-makers in *Wal-Mart* particularly damaging to the plaintiffs' case for commonality.¹⁷⁴ While some managers in a decentralized decision-making structure may intentionally discriminate or reward attributes that produce a disparate impact, the Supreme Court claimed that "most managers . . . would select sex-neutral, performance based criteria . . . that produce no actionable disparity at all."¹⁷⁵ Class certification in the face of such heterogeneous decision-making would be counterproductive, the court reasoned, because "it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction."¹⁷⁶ Commonality fails because resolving an issue as to one manager would not necessarily shed any light on the behavior of another.¹⁷⁷

This aspect of the Supreme Court's decision may be the most troubling for those seeking to challenge subjective decision-making, since it effectively places an upper limit on the size of the class. However, as Chart 4 illustrates, it is still possible to assemble a fairly large class based on the actions of only a few decision-makers. *Wright*

171. See ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT, *supra* note 128, at 9.

172. The plaintiffs in *Dukes v. Wal-Mart* subsequently scaled back the proposed class size to California employees, with an estimated 45,000 class members. See *id.* at 3-4. Wal-Mart's motion to dismiss this more circumscribed class is pending in the California district court.

173. See, e.g., Amended Memorandum Opinion And Order at 9, *McReynolds v. Merrill Lynch*, No. 05 C 6583 (N.D. Ill. Aug. 5, 2010) (holding that commonality is "generally easily satisfied when an individual or even a small centralized group makes decisions").

174. See *Wal-Mart*, 131 S. Ct. at 2554.

175. *Id.*

176. *Id.* at 2555.

177. *Id.* at 2554.

*v. Stern*¹⁷⁸ involved a class of 3,500 challenging subjective employment decisions where the head parks commissioner was involved in a large proportion of the park's personnel decisions.¹⁷⁹ Similarly, *Duling v. Gristedes*¹⁸⁰ involved a class of more than 600 where a single personnel manager was involved in the promotion and compensation decisions.¹⁸¹ *Hnot v. Willis*¹⁸² presents an alternative model for challenging subjective decisions post-*Wal-Mart*. *Hnot* involved 106 female officers challenging promotion and compensation decisions made by a small handful of executives.¹⁸³ Indeed, five of the thirteen successful class actions involved a single or a small handful of decision-makers.

4. Disregarding Objective Criteria

The last factor—a decision-maker's disregard for objective criteria specified by centralized management—was present in four of the successful class actions depicted in Chart 4. For example, in one case, managers avoided the civil service exam prerequisite for promotions by subjectively appointing employees “temporarily” in the desired position on an effectively permanent basis.¹⁸⁴ The plaintiffs successfully demonstrated that no women had been afforded the benefit of the discretionary “temporary” appointments.¹⁸⁵ In another case, decision-makers subjectively adjusted interview results intended to produce objective scoring, which had a disparate impact on African American employees.¹⁸⁶

In theory, challenging a subjective disregard for objective criteria would be difficult under *Falcon*, since some courts interpreted it to require that a practice be “entirely subjective” to be actionable.¹⁸⁷ When faced with these cases, however, courts generally concluded that the “entirely subjective” language was merely an example *Falcon* presented of an actionable employer practice.¹⁸⁸ Courts instead cite *Watson* for the proposition that a practice with both objective and subjective

178. *Wright v. Stern*, 553 F. Supp. 2d 337 (S.D.N.Y. 2008).

179. *Id.* at 338.

180. *Duling v. Gristede's Operating Corp.*, 267 F.R.D. 86 (S.D.N.Y. 2010).

181. *Id.* at 100.

182. *Hnot v. Willis Group Holdings, Ltd.*, 228 F.R.D. 476 (S.D.N.Y. 2005).

183. *Id.* at 485.

184. *See Card v. City of Cleveland*, 270 F.R.D. 280, 284 (N.D. Ohio 2010).

185. *Id.* at 288.

186. *See Grant v. Metro. Gov't of Nashville*, 727 F. Supp. 2d 677, 710 (M.D. Tenn. 2010).

187. *See Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982).

188. *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938, 955 (9th Cir. 2003).

components could be challenged provided the plaintiff be sufficiently precise as to which of the components he or she seeks to challenge.¹⁸⁹

The Supreme Court in *Wal-Mart* arguably sided with *Watson* on this point. Although it quoted an excerpt from *Falcon* containing the “entirely subjective” language, it chose not to fixate on whether the practice at issue was “entirely” subjective.¹⁹⁰ Its focus instead was whether the “discrimination manifested itself . . . in the same general fashion” common to the class.¹⁹¹

Although the Supreme Court in *Wal-Mart* offered no examples of subjective practices manifested uniformly through the class, the subjective alteration of objective criteria could satisfy this standard. These fact patterns offer the objective criteria as a benchmark for decision-making absent the subjective component.¹⁹² To the extent that the injection of discretion produces a disparate impact, the impact can be precisely attributed to the subjective component. Such precision fits the Supreme Court’s insistence, relying on *Watson*, that the plaintiff identify a “specific employment practice” in a disparate impact claim beyond “the bare existence of delegated discretion.”¹⁹³ The decision to override objective criteria is also compelling in a pattern or practice claim because it injects a degree of animus into the plaintiff’s story: the decision-maker consciously chose not to follow an objective standard in a way that rendered the outcome more discriminatory.

5. Prevalence of Distinguishing Facts Among Winning Class Actions

Overall, six of the thirteen successful class actions from 2005-2011 possessed two or more of the distinguishing fact patterns described above. These cases are sufficiently distinct from the facts present in *Wal-Mart* in that they arguably would have reached the same conclusion had the Supreme Court’s ruling been in place as of 2005. These cases were smaller, on average, than those with similar fact patterns to *Wal-Mart*, and commensurately resulted in a smaller recovery. They had an

189. See *Watson v. Fort Worth*, 487 U.S. 977, 994 (1988).

190. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553 (quoting *Falcon*, 457 U.S. at 159). The Supreme Court chose not to do so despite extensive briefing by Wal-Mart that its practices were not “entirely” subjective. See Brief for Petitioner at 20, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277).

191. *Wal-Mart*, 131 S. Ct. at 2553 (quoting *Falcon*, 457 U.S. at 159).

192. While the comparison of a subjective practice to an alternative objective practice without a disparate impact could theoretically be made in any disparate impact case, the concrete nature of an existing objective practice is especially compelling.

193. *Wal-Mart*, 131 S. Ct. at 2555 (citing *Watson*, 487 U.S. at 994).

average class size of around 1,000 and a median class size of 600. The mean and median recovery was approximately \$5.8 million. This finding is consistent with a recent report by Seyfarth Shaw LLP, showing that class action settlements of employment discrimination claims were “decidedly smaller” in 2011 than in past years.¹⁹⁴

The remaining seven successful cases and three ongoing cases would likely have been influenced by the Supreme Court’s decision. The average and median class size for these cases was 59,000 and 3,500, respectively.¹⁹⁵ The mean and median recovery in these cases was \$45 million and \$16 million.¹⁹⁶

The largest of the class actions in the sample, *Holloway v. Best Buy*,¹⁹⁷ settled four days before the Supreme Court’s decision.¹⁹⁸ The case settled for injunctive relief and attorneys’ fees, with no damages for class members,¹⁹⁹ suggesting plaintiffs were fearful that the fallout from *Wal-Mart* would preclude any recovery at all. Similarly, the lead plaintiffs’ counsel in *Velez v. Novartis*,²⁰⁰ which involved a \$175 million recovery following a favorable jury verdict, told NPR that his case would not have succeeded had the Supreme Court’s decision been in place at the time.²⁰¹ In a third case, *Boatright v. Walgreen*, the Court dismissed a class action complaint on its own initiative in light of the Supreme Court ruling.²⁰²

Of the eleven completed and ongoing cases lacking distinguishing features from *Wal-Mart*, eight were brought against companies listed in the largest 100 companies in the Fortune 500. By contrast, none of the winning cases possessing distinguishing features were listed in the Fortune 500. Notably, at least six similar but losing class actions were also asserted against the largest 100 companies in the Fortune 500.²⁰³ As

194. See ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT, *supra* note 128, at 2.

195. See *supra* Chart 4. The average was skewed by *Holloway v. Best Buy*, No. C 05-5056 PJH, 2009 WL 1533668 (N.D. Cal. May 28, 2009), which consisted of a class of 390,000.

196. See *supra* Chart 4. The average was skewed by *Velez v. Novartis*, 244 F.R.D. 243 (S.D.N.Y. 2007), which settled for \$175 million.

197. 244 F.R.D. 243 (S.D.N.Y. 2007).

198. See Martinne Geller & Dhanya Skariachan, *Best Buy Settles Class-Action Bias Lawsuit*, REUTERS (June 17, 2011, 7:01 PM), <http://www.reuters.com/article/2011/06/17/bestbuy-bias-lawsuit-idUSN1727283720110617>; *Wal-Mart*, 131 S. Ct. at 2541.

199. Order Confirming Final Certification of Classes and Granting Final Approval to Class Action Settlement ¶¶ 3-4, *Holloway v. Best Buy*, No.C-05-5056 PJH (MEJ) (N.D. Cal. Nov. 9, 2011), available at <http://www.bbclassaction.com/pdf/20111109-settlement.pdf>.

200. No. 10 C 3902, 2011 WL 843898 (N.D. Ill. Mar. 4, 2011).

201. Totenberg, *supra* note 6.

202. See *Boatwright v. Walgreen Co.*, No. 10 C 3902, 2011 WL 843898, at *4 (N.D. Ill. Mar. 4, 2011). I did not list this case in Chart 4.

203. See, e.g., *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 171 (3d Cir. 2009)

a result, these companies faced a greater than one in ten chance of being sued under the same theory as *Wal-Mart*, a much larger litigation risk than the average employer. These large employers also faced potential damages in the tens of millions of dollars, and the likely involvement of thousands of current employees. By ruling in favor of *Wal-Mart*, the Supreme Court effectively removed a substantial penalty levied against large employers for subjective employment practices that resulted in statistical disparities.

VI. POLICY IMPLICATIONS

As described at the outset of this article, the press reacted to the *Wal-Mart* decision as a “disaster” for employees.²⁰⁴ My results, however, suggest that *Wal-Mart*’s effect on employer selection practices will be more muted than would appear at first blush for several reasons: (1) it primarily affects the largest employers, who employ a declining share of the workforce; (2) the largest employers tend not to be the worst offenders when it comes to legal compliance; and (3) as previously discussed, the baseline prevalence of these types of claims is so small that most employers largely ignored the aggregate statistical effect of their decision-making practices. It is also difficult to assess the public value of the mega-class actions now precluded by *Wal-Mart* because the plaintiffs in those cases were never required to demonstrate the availability of an alternate selection mechanism that produced a lesser adverse impact. I argue that altering the burden of proof in disparate impact cases and a disclosure regime would have a more substantial impact on employer selection practices than congressional abrogation of *Dukes v. Walmart*.

A. *Wal-Mart’s Effect on Employer Practices Will be Muted*

Wal-Mart’s primary effect on cases challenging subjective

(reversing class certification and remanding on appeal); *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1203-04 (10th Cir. 2006) (affirming summary judgment for employer because statistics failed to demonstrate practical significance); *Gutierrez v. Johnson & Johnson*, 467 F. Supp. 2d 403, 414 (D.N.J. 2006) (denying motion for class certification); *Lipkins v. 3M Co.*, No. 4:08CV01512-WRW, 2010 WL 3398426, at *2 (E.D. Ark. Aug. 26, 2010) (dismissing for failure to exhaust administrative remedies); *Puffer v. Allstate Ins. Co.*, 255 F.R.D. 450, 468 (N.D. Ill. 2009) (denying class certification for failure to establish commonality); *Anderson v. Boeing Co.*, 222 F.R.D. 521, 554 (N.D. Okla. 2004) (decertifying one subclass and granting summary judgment for employer on remaining subclass).

204. See, e.g., Totenberg, *supra* note 6.

employment practices will be increased difficulty in suing the very largest employers in the United States. This renders its effect more muted than would appear at first blush. Fortune 500 companies employ a decreasing share of the population, from 18% twenty years ago in the 1980s to less than 10% as of 1999.²⁰⁵ Moreover, the very largest employers represent only a small fraction of employers overall. Employers with less than 500 employees represent 99.7% of all employers in the United States,²⁰⁶ a class size much more likely to survive the more exacting standards set forth in *Wal-Mart*.

While the largest corporations represent easy targets for large class actions, they are not necessarily the worst offenders. Social science research suggests that larger organizations were the earliest adopters of internal grievance procedures,²⁰⁷ as well as antidiscrimination policies and protocols. Consistent with this finding, the smaller class actions depicted in Chart 4 were based upon much more concerning fact patterns than cases alleged against larger employers.

For example, *Wright v. Stern*²⁰⁸ involved a New York City parks commissioner with unilateral authority to determine compensation, who was also involved in promotion decisions.²⁰⁹ Plaintiffs produced evidence of various race-based remarks by the commissioner, including, “[y]ou look black, but when you talk, I know you’re Jewish,” asking an African American employee who complained about the denial of a promotion “whether he was a drug addict or drank on the job,” and attributing the absence of African Americans in managerial positions to “the smaller number of blacks who are able to perform managerial positions.”²¹⁰ The commissioner’s decision-making produced very large disparities in pay and promotions, with African Americans representing 92% of employees making less than \$20,000 but only 13% of those making more than \$70,000.²¹¹ White employees were also awarded 70% of promotions while representing only 50% of the park workforce.²¹² High-level parks employees also admitted to assigning employees to

205. Frank Elwell, An Essay on the Rationalization of the Work Place, in *INDUSTRIALIZING AMERICA* 75, 75 (1999).

206. Derek Leebaert, *How Small Businesses Contribute to U.S. Economic Expansion*, AMERICA.GOV ARCHIVE—(Jan. 3, 2006), <http://www.america.gov/st/econ-english/2008/July/20080814223926XJyreP0.615597.html>.

207. John R. Sutton et al., *The Legalization of the Workplace*, 99 AM. J. SOC. 944, 962 (1994).

208. 450 F. Supp. 2d 335 (S.D.N.Y. 2006).

209. *Wright v. Stern*, 450 F. Supp. 2d 335, 351-52 (S.D.N.Y. 2006).

210. *Id.* at 349.

211. *Id.* at 347.

212. *Id.* at 357.

neighborhoods on the basis of race.²¹³

In another geographically limited class action, *Duling v. Gristede's Operating Corp.*,²¹⁴ women at a New York City grocery store chain were channeled into the cashier position, which presented very few advancement opportunities.²¹⁵ The employer had no employment policies in place, and all human resources functions were managed by a single individual with no prior work experience and no training on anti-discrimination laws.²¹⁶ The disparities were highly statistically and practically significant, where the plaintiff's expert calculated that gender neutral job assignments would have placed 1,038 women into positions other than cashier.²¹⁷

By contrast, the mega class actions tended to allege only large disparities combined with delegated decision-making, without much in the way of anecdotal or circumstantial evidence.²¹⁸ These cases also tended to rely on expert testimony to establish commonality, perhaps to fill in the absence of a compelling or commonsense narrative as to how the disparities occurred.²¹⁹ Had more damaging facts been available, particularly facts relating to company-wide practices or admissions, the plaintiffs surely would have cited such evidence. The relative scarcity of anecdotal and circumstantial evidence on support of cases against very large companies suggests that they were not necessarily the worst actors, but were attractive litigation targets for other reasons, such as the potential for large class sizes with commensurately large damages, and the ease of generating statistically significant results from large employee pools.

213. *Id.* at 354-55.

214. 265 F.R.D. 91 (S.D.N.Y. 2010).

215. *Id.* at 95.

216. *Id.* at 89, 98.

217. *Id.* at 92.

218. See *Ellis v. Costco*, 657 F.3d 970, 977, 986 (9th Cir. 2011) (promotion class action based on subjective practices influenced by gender stereotypes); *Bell v. Lockheed Martin*, 244 F.R.D. 186, 191 (D.N.J. 2011) (disparate impact claim based upon word of mouth promotions); *Holloway v. Best Buy*, No. C-05-5056, 2009 WL 1533668, at *8 (N.D. Cal. May, 28 2009) (class action based on subjective decision-making); *Velez v. Novartis*, 244 F.R.D. 243, 259 (S.D.N.Y. 2007) (class action based on subjective evaluation practices that were "vulnerable to bias"); *Carlson v. CH Robinson*, No. 02-3780, 2003 WL 758602, at *8 (D. Minn. Mar. 31, 2005) (compensation class based on "unfettered discretion . . . coupled with the absence of objective factors").

219. See *Ellis*, 657 F.3d at 980 (relying on expert testimony); *Velez*, 244 F.R.D. at 258-59 (relying on expert testimony).

B. The Public Value of Mega Class Actions Challenging Subjective Employment is Difficult to Assess

Assessing the public value of the large class actions precluded by *Wal-Mart* is difficult because the plaintiff in each case was never required to show that an alternate selection mechanism was available that would produce a lesser adverse impact.

The ordinary burden allocation in disparate impact claims is that the plaintiff must first prove a *prima facie* case - consisting of a statistical disparity and evidence that a particular employment practice caused that disparity.²²⁰ The employer can then assert an affirmative defense that the challenged practice is job related and consistent with business necessity.²²¹ Where the employer successfully presents its defense, the plaintiff must show that an alternate selection method would produce a lesser impact while still serving the employer's legitimate business interests.²²²

The affirmative defense is routinely asserted in disparate impact cases challenging objective tests. Indeed, defendants have been so aggressive in doing so in testing cases, that plaintiffs' success rates in such cases has fallen over time.²²³ However, in cases challenging subjective employment practices, the affirmative defense is almost never asserted.²²⁴ This may partly be a function of cases being settled at the certification stage, rather than on the merits - the affirmative defense would not arise in the context of a certification motion. Nevertheless, many cases reached the summary judgment stage, with no mention of the affirmative defense. My sample included only one case where the court made reference to an employer having asserted the defense, which apparently consisted of one line in the employer's brief.²²⁵

One unfortunate consequence of the employer's failure to assert an affirmative defense in subjective cases, is that the plaintiff is never

220. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

221. *Id.* at 997.

222. See *id.* at 998.

223. See Selmi, *supra* note 20 at 742.

224. Employers fail to assert the defense in subjective cases even though the Supreme Court in *Watson* suggested that employers may proffer evidence short of validation in their affirmative defense of subjective practices. See *Watson*, 487 U.S. at 1006-07. The concurring opinion opined that the EEOC's Uniform Guidelines "may sometimes not be effective in measuring the job-relatedness of subjective selection processes" *Id.* See also Bartholet, *supra* note 146, at 1010 (noting the difficulty associated with validating subjective practices).

225. *Grant v. Nashville*, 727 F. Supp. 2d 677, 703 (M.D. Tenn. 2010), *order rev'd* by 446 Fed. App'x 737 (6th Cir. 2011).

required to demonstrate that an alternative selection mechanism would create a lesser adverse impact. This last stage of burden shifting, however, is critically important from a policy perspective. If there is no preferable alternative to a subjective practice – if other selection mechanisms produce equal or greater impact – then the case offers little by way of public value.²²⁶ It is a wrong with no practical remedy.

For this reason, it is a mistake to identify subjective practices as the scourge of the modern workplace.²²⁷ Labeling subjective practices as the problem fails to take into accounts the costs and benefits of the alternative: testing and other objective metrics. One prominent expert witness recently testified before the EEOC that while “some tests had less adverse impact than others”, years of research showed that “the average score for minority applicants was almost always lower than that of non-minority applicants.”²²⁸

Indeed, the Supreme Court expressed considerable ambivalence in its 1982 *Watson* decision that made subjective practices subject to challenge,²²⁹ perhaps reflecting a historical context where objective tests were more commonly the source of statistical disparities and represented a significant barrier towards equal employment opportunity. While the current imagined alternative to subjective practices is a selection mechanism that is race and gender neutral, the actual alternative could be greater adverse impact, or at best, somewhat less adverse impact. For all their drawbacks, subjective practices also promise a nuanced form of

226. The notion that an outcome should only be evaluated in the context of its alternatives comes from negotiation theory. See ROGER FISHER & WILLIAM URY, *GETTING TO YES* 99-100 (2d ed. 1991) (“When a family is deciding on the minimum price for their house, the right question to ask is not what they ‘ought’ to be able to get, but what they will do if by a certain time they have not sold the house What is your BATNA – your Best Alternative To a Negotiated Agreement? That is the standard against which any proposed agreement should be measured.”).

227. I am not arguing that subjective practices are always preferable to other selection mechanisms, but rather that selection practices are neither inherently good nor inherently bad. They are only better or worse than the alternatives available in a particular context, depending on the adverse impact each mechanism imposes, and its predictability of success on the job.

228. Equal Emp’t Opportunity Comm’n, *Meeting of May 16, 2007 – Employment Testing and Screening: Statement of James L. Outtz* (May 16, 2007), <http://www.eeoc.gov/eeoc/meetings/archive/5-16-07/outtz.html>. See also Selmi, *supra* note 20, at 705 (arguing that “disparate impact theory has produced no substantial social change . . . as the vast majority of tests continue to have significant adverse impact.”)

229. In *Watson* the Supreme Court took pains to point out that “an employer’s policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct.” *Watson*, 487 U.S. at 990. It was therefore concerned that allowing employees to challenge subjective criteria “could put undue pressure on employers to adopt inappropriate prophylactic measures” creating “a Hobson’s choice for employers . . . where quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability” *Id.* at 992-93.

fairness that the non-negotiable results of an objective test cannot provide.

A telling example of this problem is illustrated by a case the EEOC brought against Wal-Mart in 1998, alleging a pattern or practice of discrimination against female applicants to its Kentucky warehouse based upon Wal-Mart's subjective decision-making practices.²³⁰ The case was sufficiently similar to *Dukes v. Wal-Mart* that the EEOC even hired the same social science expert, William Bielby, to testify that gender stereotyping was a "compelling" reason for the alleged statistical disparities.²³¹ The lawsuit settled in 2010, through a consent decree in which Wal-Mart agreed to hire class members as positions opened, "subject to the criteria that is applicable for all new hires in the . . . position."²³²

Following the entry of the consent decree, Wal-Mart simply altered its hiring criteria by imposing two tests for all applicants - a physical abilities test, and a logistics test, measuring "safety awareness, integrity, and decision-making skills."²³³ Nearly a year later, Wal-Mart had not hired a single class member, and the EEOC sued to enforce the consent decree on the basis that Wal-Mart had implemented the tests to avoid hiring class members.²³⁴ In light of language in the consent decree permitting Wal-Mart to implement "criteria . . . applicable for all new hires," the Court refused to intervene.²³⁵

C. Alternate Approaches to Regulation

As a matter of policy, should Congress override the Supreme Court's ruling, much as it did to the *Wards Cove* decision in its 1991 amendment to Title VII?²³⁶ First, abrogating *Wal-Mart* would not address the question of whether lawsuits challenging subjective employment practices improve upon the status quo. That would require altering the existing burden shifting framework in disparate impact cases.

230. See *EEOC v. Wal-Mart*, 156 F.3d 989, 991 (9th Cir. 1998).

231. See *Wal-Mart v. Dukes*, 131 S.Ct. 2541, 2549 (2011).

232. *EEOC v. Wal-Mart*, No. 6:01-CV-339-KKC, 2011 WL 42997, at *3 (E.D. Ky. Jan. 16, 2001).

233. *Id.* at *2.

234. See *id.* at *1. The EEOC did not bring a separate disparate impact claim, presumably because it assumed the consent decree would provide an adequate and more easily obtained remedy.

235. *Id.* at *4.

236. See, e.g., *Wards Cove Packing Co. v. Atonio* 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

Second, if the purpose of reform is to encourage employers to reexamine their subjective practices, simply overturning *Wal-Mart* would not reliably alter employer behavior. As discussed in Section V above, cases challenging subjective practices prior to the *Wal-Mart* decision were so rare that they did not pose an effective litigation risk for all but the very largest employers. Making such claims more prevalent would require addressing information asymmetries that prevent employees from identifying aggregate disparities in hiring, pay, promotion and termination.

1. Altering the Burden of Proof in Cases Challenging Subjective Employment Practices

Wal-Mart has effectively ruled out certification for any disparate impact or pattern or practice claims based solely on disparities caused by the delegation of subjective decision-making. This shift creates a safe haven for large employers seeking to avoid litigation through benign neglect of their employment practices, making standardless decision-making a ‘best practice.’ As the plaintiff’s bar argued in an amicus brief to the Supreme Court in the *Wal-Mart* decision, “[i]f claims involving objective criteria are easier to certify than those involving subjective criteria, the likely result is that employers will move further away from objective measures of job performance, skills, or qualifications.”²³⁷

A preferable framework would make subjective practices based on delegated decision-making neither easier nor more difficult to challenge than other employment practices. Overturning *Wal-Mart* would not necessarily fix the problem. Because employers almost always assert their affirmative defense in cases challenging objective practices but almost never asserted the defense in cases challenging subjective practices, subjective practices became easier to litigate. And as described above, the affirmative defense serves a useful public function in assessing whether the law offers a practical remedy for the disparity.

Rather than abrogating *Wal-Mart*, Congress could simply permit plaintiffs challenging subjective employment practices to establish commonality through a common remedy – an alternative selection mechanism that is job related but has a lesser adverse impact. The employer, for its part, would retain its original affirmative defense that its subjective practices are job related and consistent with business

237. Brief for the National Employment Lawyers Association et al. as Amici Curiae Supporting Respondents at 15, *Wal-Mart v. Dukes*, 474 F.3d 1214 (9th Cir. 2007) (No. 10-277).

necessity, as well as a defense that the proposed alternative is neither job related nor consistent with its business needs.²³⁸ This would place plaintiffs challenging subjective and objective practices in equivalent legal positions.

With respect to “pattern or practice” claims, which *Wal-Mart* also rendered nearly impossible to allege in the case of large class actions challenging wholly subjective criteria, discriminatory animus could be shown through knowledge of a disparate impact and a failure to investigate or alter its practices. Under this method of proof, the employer’s reasonable and good faith efforts to identify alternative selection mechanisms and either failure to find one or its decision to implement that alternative mechanism, would serve as an affirmative defense. Like the affirmative defense set forth in *Faragher v. Boca Raton*,²³⁹ where an employer can avoid vicarious liability for harassment through a good faith investigation and attempt to remedy the harassment,²⁴⁰ such an affirmative defense would be intended to encourage employer vigilance. Under this framework, knowledge could be established through employee complaints, demand letters, EEOC investigations or other means. Periodic adverse impact analyses with reasonable efforts to identify and implement alternatives would support an employer defense.

Arguably, such a framework for “pattern or practice” claims represented the state of the law prior to *Wal-Mart*, at least in the Eighth Circuit. In *EEOC v. Dial*,²⁴¹ the Eighth Circuit affirmed a jury verdict in a pattern or practice claim, where discriminatory animus was proved through evidence that the employer knew of the disparate impact associated with a weightlifting test but continued to use it.²⁴² The addition of an affirmative defense would serve to encourage employers to take a proactive, rather than a “head in the sand,” approach.

The burden-shifting framework would be preferable to the status quo because it would neither encourage nor discourage employers from adopting subjective employment practices. Employers would still be able to make use of subjective practices, subject to their due diligence, to

238. Consistent with *Watson*, the employer would not need to use a validation test to establish this defense. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 1006-07 (1988), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074. Rather, the “proper means of establishing business necessity will vary with the type and size of the business in question, as well as the particular job for which the selection process is employed.” *Id.* at 1007.

239. 524 U.S. 775 (1998).

240. *See id.* at 807-08.

241. 469 F.3d 735 (8th Cir. 2006).

242. *Id.* at 738-39.

find a less impactful alternative in the event they learn it has caused an adverse impact. For their part, employees would still have a remedy available to challenge wholly subjective practices.

2. A Disclosure-Based Approach

Abrogating *Wal-Mart* would not address the low baseline prevalence of cases challenging subjective employment practices. Employees affected by an employer's aggregate practices rarely have more than an anecdotal understanding of ongoing statistical disparities; indeed, the employer may not even be aware of its own statistical disparities. Increasing the prevalence of disparate impact claims would require addressing this informational asymmetry, perhaps through stricter enforcement of existing recordkeeping requirements²⁴³ and a disclosure mandate.²⁴⁴

A disclosure mandate could come in various forms. It could, for example, require employers to conduct periodic adverse impact analyses and report their results to the EEOC. The EEOC could then investigate and, where appropriate, bring an enforcement action against the worst offenders rather than having to rely on employee complaints.

More aggressive disclosure regimes could require disclosure to the employees themselves. For example, such information could be required to be disclosed upon request, much like a California law requiring the employer to disclose the contents of an employee's personnel file upon request.²⁴⁵ While such requests would most commonly be made by employees at the behest of their attorneys, it nevertheless would provide a means for parties to test the merits of a potential disparate impact claim prior to filing a lawsuit and extensive discovery.

Another disclosure regime could consist of mandated disclosure to affected employees.²⁴⁶ For example, just as wage and hour laws require employers to disclose an employee's overtime premium on pay stubs,²⁴⁷ regulations could also require disclosure of statistical disparities in pay

243. The Uniform Guidelines on Employee Selection Procedures already require employers to keep records of the statistical effect of their employee selection procedures. See 29 C.F.R. § 1607.4 (2011).

244. See generally Cynthia Estlund, *Just the Facts: Toward Workplace Transparency*, 63 STAN. L. REV. 351 (2011) (discussing using disclosure regimes to regulate employment contexts).

245. See CAL. LAB. § 1198.5(a)-(c) (West 2011).

246. Alternatively, disclosure to employees could be structured as the penalty imposed by the EEOC for adverse impacts an employer fails to address after a particular grace period.

247. See, e.g., CAL. LAB. § 226(a) (West 2011); N.Y. LAB. LAW § 195(3) (McKinney 2011).

on pay stubs. A disclosure rule could also be structured like the federal Fair Credit Reporting Act, which requires employers to notify an employee when his or her credit served as a basis for retracting a job offer, and furnish a credit report serving as a basis for that retraction.²⁴⁸ An approach intended to address statistical disparities in hiring could consist of a notification to job applicants that they have been rejected, any statistical disparities accompanying the selection, and the selection criteria. The Older Workers' Benefit Protection Act already mandates a similar type of disclosure where an employer seeks to obtain a release from a terminated employee older than forty.²⁴⁹

A disclosure regime would have the added benefit of forcing employers to monitor the statistical impact of their employment practices, and encouraging them to consider alternative selection mechanisms where large and persistent disparities occur. It could, however, also impose considerable time and expense on the part of employers, particularly smaller employers lacking a sophisticated human resources department. Disclosure regimes also involve divulging confidential information; compensation information in particular is often treated with secrecy.²⁵⁰ Any disclosure mandate would therefore need to be crafted with care; taking into account whether the potential benefits to employees justify the additional burdens placed upon employers.²⁵¹

VII. CONCLUSION

In years hence, it may be tempting to attribute the prevalence of subjective employment practices and the paucity of litigation

248. See Fair Credit Reporting Act, 15 U.S.C. §§ 1681b(b)(2)(A), 1681(m)(a) (2006).

249. See 29 C.F.R. § 1625.22(a)(5), (f)(1) (2011). The existence of OWBPA's disclosure requirement has not spawned a large number of class actions challenging termination decisions on the basis of age. This could signal that disclosure regimes are not as effective as one might hope. It could also be attributable to factors unrelated to the efficacy of the disclosure requirement. The Supreme Court did not recognize disparate impact claims based upon age until 2005. See *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005). Because OWBPA's disclosures are only required in the context of a release, class size can be considerably eroded by potential members who ultimately choose to release their claims in exchange for severance. The disclosure requirement may, however, result in increased severance offers to a larger pool of laid off works.

250. See *Estlund*, *supra* note 244 at 391-94 (discussing when an employer's policy of confidentiality may be justified).

251. As articulated in *Watson*, it would be important to avoid a regulatory structure so burdensome that it would put undue pressure on employers to adopt inappropriate prophylactic measures" creating "a Hobson's choice for employers . . . where quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability . . ." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992-93 (1988), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

challenging them to *Dukes v. Wal-Mart*. However, as my research suggests, such litigation was very uncommon even prior to the Supreme Court's decision, with only the largest corporations facing a significant risk of being sued for their subjective practices. Moreover, because these mega-class actions did not force the plaintiff to prove the availability of an alternate selection mechanism with a lesser adverse impact, the extent to which such litigation advanced public interests is unknown. Encouraging employers to carefully scrutinize and improve upon their employment selection practices would require reforms beyond abrogating the *Wal-Mart* decision.

