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TRYING TO KILL ONE BIRD WITH TWO STONES: THE USE AND ABUSE OF CLASS ACTIONS AND COLLECTIVE ACTIONS IN EMPLOYMENT LITIGATION

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I. INTRODUCTION

Since the late 1960s, shortly after the passage of Title VII of the Civil Rights Act, class actions have played a significant role in shaping employment law.[1] Rule 23 of the Federal Rules of Civil Procedure, which provides for the use of class actions,[2] enabled the full enforcement of Title VII and helped put a stop to widespread discrimination in workplaces across the U.S.[3] Within the past decade, droves of plaintiffs have filed class actions against their current or former employers alleging all types of discrimination.[4]

A more recent development has been class and/or collective actions under the Fair Labor Standards Act ("FLSA").[5] This is somewhat ironic because the FLSA, which was passed in 1938, is considerably older than

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1. *See generally* Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813 (2004) (discussing the evolution of class actions and employment discrimination).

2. FED. R. CIV. P. 23.

3. *See* Hart, *supra* note 1, at 816-17 (explaining how "class action suits have been perhaps the most important means for challenging and eliminating systemic employment discrimination, one of the principal goals of Title VII").

4. Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 374-75 (2008) (stating that employment discrimination class actions filed in federal court dropped in 1991 but began to rise again in 2006).

5. *See* Alfred B. Robinson, Jr., *FLSA Lawsuits Continue to Rise*, OGLETREE DEAKINS (July 30, 2012), http://blog.ogletreedeakins.com/flsa-lawsuits-continue-to-rise/#sthash.5ywMIFzr.dpuf (stating that FLSA law suits continue to grow and set new records each year).

Title VII of the Civil Rights Act.[6] Even more surprising, it took fifty years for collective actions to evolve as a tool used to enforce the FLSA.[7] Prior to the development of collective actions, the U.S. Department of Labor was responsible for enforcing the statute under 29 U.S.C. §§ 217 and 216(c) of the Act.[8] Individuals pursued claims, or could pursue claims, under § 216(b) and, though attorneys' fees were available, the private bar did not have much interest in pursuing such cases.[9] That has all changed with the evolution and expansion of a new type of growing litigation used to enforce the FLSA: the § 216(b) collective action.[10]

Collective actions under the FLSA are significantly different than traditional class actions under Rule 23, including available claims and remedies, applicable procedures, and other administrative hurdles.[11] In an attempt to capture the best of both worlds, plaintiffs recently have been attempting to combine Rule 23 "opt-out" class action claims and § 216(b) "opt-in" collective action claims within a single lawsuit.[12] This bold and somewhat contradictory strategy has created new legal questions while breaking new ground in employment litigation.[13]

As plaintiffs filed more and more class action and/or collective action lawsuits, and as plaintiffs realized more and more success in properly using such representative actions, class actions and collective actions became extremely popular and heavily-used means of pursuing employment litigation.[14] Unfortunately, the inevitable occurred: plaintiffs began misusing and abusing class action and/or collective action lawsuits.

A significant and ever-changing body of law has developed through

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6. *See generally* Jonathan Grossman, *Fair labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, United States Dep't of Labor, http://www.dol.gov/dol/aboutdol/history/flsa1938.htm; *Pre 1965: Events Leading to the Creation of EEOC*, EEOC.COM, http://www.eeoc.gov/eeoc/history/35th/pre1965/index.html (last visited June 14, 2014).

7. *See* Jared P. Buckley ET AL., *Collective-Actions Breathe New Life into the Fair Labor Standard Act's Salary Test*, 50 Wayne L. Rev. 905, *914*-16 (2004) (explaining the history of collective actions under the FLSA).

8. Wage and Hour Division History, Dep't of Labor (last visited June 22, 2014), http://www.dol.gov/whd/about/history/whdhist.htm.

9. Thomas Barnard worked with the Department of Labor and did not see many case filings initially.

10. *See infra* Part II.b.

11. *See infra* Part II.b.

12. See *infra* Part II.f.

13. See *infra* Part II.f.

14. *See* Levit, *supra* note 4, at 376 (stating that certified class actions have a greater likelihood of settling and that only three to six percent of all class action lawsuits are tried).

the years, culminating in the seminal U.S. Supreme Court case, *Wal-Mart Stores, Inc. v. Dukes*.[15] After years of the overuse and misuse of class actions in employment litigation, the court in *Dukes* finally put its foot down and heightened the standard that plaintiffs must show in order to achieve class certification.[16]

Class actions and collective actions undeniably have both played important roles in shaping employment litigation.[17] However, the overuse of such representative actions, and the increasingly overused "shotgun" approach of simultaneously pursuing both types of claims in employment litigation, has both degraded the effectiveness of the claims as well as decreased the odds of a successful certification.[18]

II. LEGAL BACKGROUND

A. *Traditional Class Actions Under Rule 23*

"The class action is a *procedural device* intended to advance judicial economy by trying claims together that lend themselves to collective treatment. It is not meant to alter the parties' burdens of proof, right to a jury trial, or the substantive prerequisites to recovery under a given tort."[19] For decades, class actions have played a significant role in shaping employment law, and especially, employment discrimination litigation.[20] Many plaintiffs have utilized class actions as a means of pursuing claims under Title VII of the Civil Rights Act of 1964 ("Title VII").[21]

Rule 23 of the Federal Rules of Civil Procedure was adopted in 1938, and significant revisions modified the application of the rule in 1966.[22] The "key innovation of the 1966 amendments to Rule 23" was the creation of a presumption in favor of binding all class members who do not affirmatively opt-out.[23]

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15. *See infra* Part II.a-b.

16. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2550-52 (2011).

17. *See infra* Part II.a-b.

18. *See infra* Part II.g.

19. Blaz v. Beifer, 368 F.3d 501, 504 (quoting Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 437 (Tex. 2000)).

20. *See* Hart, *supra* note 1, at 816-817.

21. Scott Shively, *Resurgence of the Class Action Lawsuit in Employment Discrimination Cases: New Obstacles Presented by the 1991 Amendments to the Civil Rights Act*, 23 U. ARK. LITTLE ROCK L. REV. 925, 925 (2001).

22. *See* 97 AM. JUR. 3D *Proof of Facts* § 2 (2007).

23. JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS: LAW AND PRACTICE § 1:1 (10th ed. 2013) (citing FED. R. CIV. P. 23(c)(3) ("Whether or not favorable to the class, the

Shortly after the 1966 amendments took effect, the U.S. Supreme Court held that a plaintiff in a Title VII case "was a private attorney general, 'vindicating a policy that Congress considered of the highest priority.'"[24] Further, the Supreme Court stated that "[w]hen the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law."[25] Class actions allow for multiple individuals to initiate litigation where individually they may not have otherwise been able to do so without joining resources and support.

Following the 1966 amendments to Rule 23, plaintiffs began using class actions as a popular method of pursuing litigation:

> Despite the new rule's encouragement of courts to utilize class actions, courts were reluctant at first to permit the certification of sprawling class actions .... The courts' cautious attitude changed in the mid-1980s. Responding to dockets clogged with ... cases, courts became far more receptive to approving major class actions .... Class actions in the 1980s and 1990s (and even into the 2000s) resulted in numerous multi-million dollar and billion dollar settlements. Attorneys' fees for class counsel—mainly from settlements—came under attack as being excessive.[26]

Plaintiffs often bring class actions under Rule 23 in order to pursue claims of widespread employment discrimination.[27] Class actions are used by plaintiffs in employment discrimination cases brought under Title VII of the Civil Rights Act and are viewed as a way of stopping

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judgment in a class action must ... for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members."); Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 614-15 (1997) (noting that Rule 23's "most adventuresome innovation" was its authorization of "class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded"); Sosna v. Iowa, 419 U.S. 393, 399 n.8 (1975) ("The certification of a suit as a class action has important consequences for the unnamed members of the class. If the suit proceeds to judgment on the merits, it is contemplated that the decision will bind all persons who have been found at the time of certification to be members of the class.").

24. *See Proof of Facts, supra* note 22, § 4 (quoting Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968)).

25. *Newman*, 390 U.S. at 401.

26. Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 736-37 (2013) (citations omitted).

27. *See Amchem Prod.*, 521 U.S. 591, 614; *Proof of Facts, supra* note 22, § 1.

disparate impact discrimination and pattern or practice of intentional discrimination claims.[28] In general, class actions in employment discrimination cases have generated equal employment opportunities by providing solutions to widespread disparate impact discrimination as well as relief for affected individuals.[29]

Class actions can be beneficial to plaintiffs as a more economical means of pursuing a claim, and such class certification provides defendant(s) with protection against multiple inconsistent judgments.[30] There are also procedural advantages to pursuing a class action claim for widespread employment discrimination. Once a class representative exhausts administrative remedies available to him or her, all other similarly situated class members may avoid dismissal for their individual failures to exhaust administrative remedies.[31] In addition, the filing of a class action lawsuit may toll certain statutes of limitations.[32]

Certain prerequisites must be satisfied before one or more individuals may bring a class action. One or more individuals may sue on behalf of a class of individuals who meet the numerosity, commonality, typicality, and adequacy of representation requirements set forth in Rule 23(a): one or more members of a class may sue or be sued as representative parties on behalf of all members only if:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.[33]

The party seeking class certification bears the burden of establishing the numerosity, commonality, typicality, and adequacy of representation elements necessary to bring a class action.[34]

In addition to these four prerequisites, in order for a lawsuit to be

28. Meghan E. Changelo, *Reconciling Class Action Certification with the Civil Rights Act of 1991*, 36 COLUM. J.L. & SOC. PROBS. 133, 133 (2002).

29. *See Proof of Facts, supra* note 22, § 1.

30. Edward F. Sherman, *Class Actions and Duplicate Litigation*, 62 IND. L.J. 507, 510 (1987).

31. *Proof of Facts, supra* note 22, § 6 (citing Williams v. Tenn. Valley Authority, 552 F.2d 691, (6th Cir. 1977)); Bell v. Auto. Club of Mich., 80 F.R.D. 228, 234-35 (E.D. Mich. 1978).

32. *See generally* Rhonda Wasserman, *Tolling: The American Pipe Tolling Rule and Successive Class Actions*, 58 FLA. L. REV. 803, 805 (2006).

33. FED. R. CIV. P. 23(a).

34. *See, e.g.*, Arnold v. U.S. Theatre Circuit, Inc. 158 F.R.D. 439, 448 (N.D. Ca. 1994).

eligible for class certification under Rule 23(b), one of the following eligibility requirements must also be met: (1) the pursuit of separate actions could lead to inconsistent adjudications or prejudice non-parties, (2) the defendant has acted in a way that applies to all members of the class, or (3) questions of law or fact common to class members predominate.[35] While subsection (b)(3) is generally intended for claims seeking monetary relief, subsection (b)(2) was "intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate."[36] More specifically, Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."[37] This limitation has pushed some plaintiffs away from seeking certification under subsection (b)(2). Although subsection (b)(3) was originally thought to be the most complex and confusing portion of Rule 23, it has now become the most common basis for certification.[38]

Despite challenges to obtaining class certification, the class action lawsuit has played a vital role in stopping and preventing widespread employment discrimination. For example, in 1980, an assistant professor at the University of Minnesota filed a class action lawsuit alleging sex discrimination.[39] Shyamala Rajender accused her employer, the University of Minnesota, of discriminating against her on the basis of her sex and national origin after she was turned down for a tenure-track position.[40] As a result of her lawsuit, Ms. Rajender received $100,000 and the court prohibited the university from discriminating against women on the basis of sex.[41]

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35. FED. R. CIV. P. 23(b)(1)-(3); Gammon v. GC Serv. Ltd., 162 F.R.D. 313, 317 (N.D. Ill. 1995).

36. FED. R. CIV. P. 23 (advisory committee notes) (adding that although (b)(2) is not limited to civil-rights cases, such cases are illustrative of that subdivision's intended application).

37. *Id.; see also* Changelo *supra* note 28, at 134 (citing Allison v. Citgo Petroleum Corp., 151 F.3d 402, 402 (5th Cir. 1998) ("The Fifth Circuit found that class certification under Rule 23 was not appropriate where plaintiffs requested both injunctive relief and compensatory damages under the 1991 Act."). *But see* Robinson v. Metro-North Commuter R.R. Co, 267 F.3d 147 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2002) ("[O]pen[ing] the door to class certification of employment discrimination claims despite the availability of compensatory and punitive damages under the 1991 Act.").

38. Klonoff, *supra* note 26, at 792.

39. *See* Rajender v. Univ. of Minn., No. 4-73-435, 1979 WL 287, at *1 (D. Minn Aug. 14, 1979).

40. *Id.*

41. *See* Rajender v. Univ. of Minn., 546 F. Supp. 158, 170 (D. Minn. 1982).

In 1981, the settlement of a class action race discrimination lawsuit changed the examinations given to candidates for employment with the federal government's executive branch.[42] African-American and Hispanic applicants who had failed the exam alleged that the test had a disparate impact on minorities.[43]

In December 1998, a mining company settled the first class action sexual harassment lawsuit in America.[44] Female employees alleged that they were being harassed by their male co-workers, and that the company was discriminating against them on the basis of their sex.[45] The case originally went to trial based on a theory of liability, and the district court found the mining company liable on the female employees' claims of sex discrimination in promotions to the position of "step-up foreman" and foreman and the claims of sexual harassment.[46] The court required that the company educate all employees about sexual harassment.[47] A second trial, this time focused on damages only, resulted in awards of approximately $10 thousand per plaintiff, but the Eighth Circuit Court of Appeals reversed and remanded the case on damages.[48] Before the next trial began, the company settled the case.

In April 2005, national retailer Abercrombie & Fitch finalized a settlement for a large race and sex discrimination class action lawsuit, which provided $50 million to minority and female applicants and employees.[49] The plaintiffs in that case alleged that Abercrombie & Fitch "violated Title VII of the Civil Rights Act of 1964 by maintaining recruiting and hiring practices that excluded minorities and women and adopting a restrictive marketing image, and other policies, which limited

42. Luevano v. Campbell, 93 F.R.D. 68, 78, 80 (D.D.C. 1981).

43. *Id.* at 72.

44. Stephanie Carlson, *Background on Class Action Suit*, National Women's History Museum, https;//www.nwhm.org/blog/background-on-class-action-suit/ (last visited Apr. 25, 2014); *see* Suzanne Goldenberg, *It Was Like They'd Never Seen A Woman Before*, Guardian (Feb. 2, 2006), www.theguardian.com/film/2006/Feb/03/gender.world; Stephanie Carlson, *Background on the Class Action Suit Brought Against Eveleth Mines*, National Women's History Museum, www.nwhm.org/blog/real-women-of-north-country/ (last visited Apr. 24, 2014). *See generally* Jensen v. Eveleth Taconite Co., 130 F.3d 1287, 1304 (8th Cir, 1997).

45. *See Jensen,* 130 F.3d at 1290.

46. *Id.*

47. Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 888-89 (D. Minn 1993).

48. *Jenson,* 130 F.3d at 1304.

49. Lief, Cabraser, Heimann & Bernstein, LLP, *$50 Million, Less Attorney's Free and Costs, Paid to Class Members In December 2005 in Abercrombie & Fitch Discrimination Lawsuit Settlement*, AFJustice http://www.afjustice.com/ (last visited Apr. 16, 2014); Steven Greenhouse, *Abercrombie & Fitch Bias Case Is Settled*, N.Y. Times (Nov. 17, 2004), http://query.nytimes.com/gst/fullpage.html?res=9B05EEDA123FF934A25752C1A9629C8B63.

minority and female employment."[50] As part of the settlement, the company was prohibited from targeting fraternities, sororities, or specific colleges for recruitment, and was required to: work toward certain "benchmarks" for the hiring and promotion of females and minorities; advertise available positions in publications targeting minorities; hire twenty-five recruiters focused on seeking minority and female employees; set up a new Office and Vice President of Diversity; provide diversity training for all employees with hiring authority; revise performance evaluations for managers to include diversity goals as a factor for bonuses and compensation and to include minorities in marketing materials; and establish and follow a new internal complaint procedure.[51]

In February 2007, a class action employment discrimination lawsuit was successfully settled against a company for unlawful discrimination against African-Americans, Hispanics, and Asians with respect to pay, promotions, and training opportunities.[52]

In May 2009, a class action race discrimination lawsuit resulted in a successful settlement for African-American employees who had been laid off after working for the company for short periods of time a three-year consent decree prohibiting the company from engaging in future discrimination and retaliation, the implementation of a policy against race discrimination and retaliation and a procedure for handling complaints of race discrimination and retaliation, the requirement that the company provide training to employees regarding race discrimination and retaliation, and the requirement that the company file periodic reports to the EEOC regarding layoffs and complaints of discrimination and harassment.[53]

These examples and many more, illustrate the important role class actions have played in the history and evolution of employment discrimination litigation.

50. Press Release, EEOC, EEOC Agrees to Landmark Resolution of Discrimination Case Against Abercrombie & Fitch (Nov. 18, 2004), available at http://www1.eeoc.gov//eeoc/newsroom/release/11-18-04.cfm?renderforprint=1.

51. Lief, Cabraser, Heimann & Bernstein, *supra* note 49.

52. *Significant EEOC Race/Color Cases*, EEOC.GOV, http://www1.eeoc.gov/eeoc/initiatives/e-race/caselist.cfm?renderforprint=1 (last visited June 6, 2014) (citing EEOC v. Woodward Governor Company, No. 06-cv-50178 (N.D. Ill. Feb. 2007)).

53. *Id.* (citing EEOC v. Area Erectors, Inc., No. 1:07-CV-02339 (N.D. Ill. May 29, 2009)).

B. *The Fair Labor Standards Act And The Evolution Of Collective Actions Under Section 216*

Congress passed the Fair Labor Standards Act in 1938 to set federal standards for minimum wage and overtime for employees as well as to address general working conditions and prevent oppressive child labor.[54] The Equal Pay Act of 1963 was later passed to amend the FLSA to prohibit sex discrimination in wages.[55] In 1967, the Age Discrimination in Employment Act ("ADEA") was passed as an amendment to the FLSA to prohibit discrimination against persons 40 years of age and over.[56] Originally, the ADEA prohibited age discrimination against individuals between the ages of 40 and 65.[57] In 1978, the age cap was increased from 65 to 70.[58] Finally, in 1986, the statute was amended to remove the age cap altogether. Separate lawsuits seeking damages for violations of the FLSA tend to yield limited awards for each individual plaintiff.[59] Thus, collective actions, when pursued as intended by Congress, are essential to the proper enforcement of the FLSA.

An employer that violates the minimum wage or overtime provisions of the FLSA may be liable to affected employees for unpaid minimum wage and/or overtime compensation, as well as liquidated or double damages.[60] One or more employees may bring an action under 29 U.S.C. § 216(b) on behalf of other similarly situated employees.[61] More specifically, Section 216(b) provides a private cause of action by "one or more employees for and in behalf of himself or themselves and other employees similarly situated" to recover for violations of the FLSA. The "similarly situated" standard applicable to Section 216(b) collective actions is less demanding than the Rule 23 class action requirements:

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54. Federal Labor Standards Act (FLSA) of 1938, 29 U.S.C. §§202, 206, 207, 212 (2006). *See* Grossman, *supra* note 6.

55. Equal Pay Act (EPA) of 1963, 29 U.S.C. § 206(d) (2006).

56. Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C.A. §§ 621, 631 (1967).

57. Brennan v. Paragon Employment Agency, Inc., 356 F. Supp. 286, 288 (S.D.N.Y. 1973) ("The Act was intended to alleviate the serious economic and psychological suffering of people between the ages of 40 and 65 caused by widespread job discrimination against them.").

58. Age Discrimination in Employment Act (ADEA) of 1967, Pub. L. No. 95-256, 92 Stat. 189.

59. Age Discrimination in Employment Act (ADEA) of 1967, Pub. L. No. 99-272, 100 Stat. 82.

60. Federal Labor Standards Act (FLSA) of 1938, 29 U.S.C. § 216(b) (2006).

61. *Id.*

> [T]o maintain a collective action, a plaintiff bears the burden at all times to demonstrate that the group of employees is similarly situated. This burden, however, is lighter than "that for joinder or for certification of a class action under Federal Rules of Civil Procedure 20(a) or 23." A plaintiff need only demonstrate that his or her position is "similar, not identical" to the positions held by the potential plaintiffs.[62]

In order to participate in, and benefit from, a collective action under section 216, an individual must actually opt in to the litigation by filing a consent form: "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."[63] This "opt-in" requirement stems, in part, from the overuse and/or misuse of traditional "opt-out" class actions: "In part responding to excessive litigation spawned by plaintiffs lacking a personal interest in the outcome, the representative action by plaintiffs not themselves possessing claims was abolished, and the requirement that an employee file a written consent was added."[64] This specific "opt-in" requirement separates collective actions from traditional class actions under Rule 23 where all individuals (or potential plaintiffs) within the definition of the class are bound by the result unless they opt-out of the class.

In 2003, the Eleventh Circuit discussed the purpose behind the "opt-in" procedures outlined in Section 216(b):

> While employees still may sue on behalf of other employees under § 216(b), the 1947 amendments did restrict their rights in one important respect. The 1947 amendments added an "opt-in" provision, which provides that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." Congress's aim in adding the "opt-in" language to § 216(b) was to "prevent[] large group actions, with their vast allegations of liability, from being brought on behalf of employees who had no real involvement in, or knowledge of, the lawsuit." "The 'consent in writing' requirement . . . [sought] to eradicate the problem of totally

62. Espanol v. Avis Budget Car Rental, LLC., No. 8:10-cv-944-T-35-AEP (M.D.Fla. Mar. 27, 2014) (citations omitted).

63. 29 U.S.C. § 216(b).

64. Hoffman-La Roche, Inc. v. Sperling, 493 U.S. 165, 173 (1989).

> uninvolved employees gaining recovery as a result of some third party's action in filing suit." Thus, the 1947 amendments to the FLSA prohibit what precisely is advanced under Rule 23—a representative plaintiff filing an action that potentially may generate liability in favor of uninvolved class members.[65]

The different standards applied in traditional class actions versus collective actions under the FLSA have sparked debate for years.[66] Because collective actions under the FLSA have specific "opt-in" procedures, there are often fewer plaintiffs involved, and thus, potentially lower damages for defendants.[67] However, state wage-and-hour laws provide an alternate avenue for recovery.[68] The difficulty arises where plaintiffs try to "have their cake and eat it too" by bringing both an "opt-out" class action under state wage-and-hour laws and an "opt-in" collective action under the FLSA.

Employers often argue that state wage and overtime claims are incompatible with federal FLSA claims because Rule 23 "opt-out" class action procedures cannot be reconciled with Section 216 "opt-in" collective action procedures.[69] Courts previously were divided on whether such differing claims could be combined in a single lawsuit. For example, the Third Circuit previously held that there is an "inherent incompatibility" between Rule 23 "opt-out" class actions and Section 216 "opt-in" collective actions.[70] However, in 2012, the Third Circuit joined the majority of Circuits, including the Second, Seventh, Ninth and District of Columbia Circuits, in allowing the combination of "opt-out" class actions and "opt-in" collective actions.[71]

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65. Cameron-Grant v. Maxim Healthcare Servs., Inc., 347 F.3d 1240, 1248 (11th Cir. 2003).

66. *See, e.g.*, Allan G. King, Lisa A. Schreter & Carole F. Wilder, *You Can't Opt-Out of the Federal Rules: Why Rule 23 Certification Standards Should Apply to Opt-In Collective Actions Under the* FLSA, MASONLEC.ORG 6, http://www.google.com/url?q=http://masonlec.org/site/rte_uploads/files/You%2520Can't%2520Opt-Out%2520of%2520the%2520Fed%2520Rules%2520-%2520Rule%252023.pdf&sa=U&ei=KG05U9ieC6HNsQSu9oDQDw&ved=0CCgQFjAC&usg=AFQjCNFvK0BBOLvJzyHtb3RLZOPD2q0Kig (last visited June 8, 2014).

67. *See* supra Part b.

68. Espenscheid v. Directsat U.S.A., L.L.C., 705 F.3d 770 (7th Cir. 2013) (bringing state wage law claims under Rule 23 and FLSA claims under section 216(b)).

69. *See* De Asencio vs. Tyson Foods, Inc., 342 F. 3d 301, 307 (3rd Cir. 2003).

70. *See id.* at 306; Bell v. Citizens Financial Grp., No. 10-0320, 2011 WL 2261117, at *5 (W.D. Pa. June 8, 2011).

71. *See* Knepper v. Rite Aid Corp., 675 F.3d 249, 261-62 (3d Cir. 2012); *see also* Shahriar v. Smith & Wollensky Rest. Inc., 659 F.3d 234, 247-49 (2d Cir. 2011) ("[W]e agree with the Seventh Circuit that . . . 'the 'conflict' between the opt-in procedure under the FLSA and the opt-out

The FLSA does not provide a procedure for certifying a collective action nor does it even define "similarly situated".[72] Through the years, courts have developed a significant body of law regarding certification of a collective action. In order to bring a collective action under the FLSA, a plaintiff must first demonstrate the existence of a group of "similarly situated" individuals.[73] This initial threshold requires only a "modest factual showing" and is fairly lenient.[74] A plaintiff only needs to prove a "reasonable basis" for his or her claim that there are other similarly situated employees.[75] If the plaintiff satisfies this minimal initial inquiry, the court may certify a "conditional" class of individuals who may then opt in.[76] Notice may be sent to similarly situated potential plaintiffs who may decide to opt in.[77]

Following the opt-in period and possible discovery by the parties, the court will once again examine, usually upon a defendant's motion to decertify the collective action, whether the plaintiffs are sufficiently "similarly situated" to allow the collective action to continue.[78] At this stage in the litigation, maintenance of the collective action requires a greater showing than at the initial stage.[79] Several courts have adopted the following two-tiered process in making that determination:

> Under this two-tiered analysis, [t]he first determination is made at the so-called "notice stage." At the notice stage, the district

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procedure under Rule 23 is not a proper reason to decline jurisdiction . . . ."); Ervin v. OS Rest. Servs., Inc., 632 F.3d 971, 976-79 (7th Cir. 2011) ("There is ample evidence that a combined action is consistent with the regime Congress has established in the FLSA."); Wang v. Chinese Daily News, 623 F.3d 743, 760-61 (9th Cir. 2010), *vacated on other grounds*, 132 S. Ct. 74 (2011) ("We follow *Lindsay* in concluding that it was within the district court's discretion to exercise supplemental jurisdiction over the [state law] claim in this case."); Lindsay v. Gov't Emps. Ins. Co., 448 F.3d 416, 424 (D.C. Cir. 2006) ("While there is unquestionably a difference . . . between opt-in and opt-out procedures, we doubt that a mere *procedural* difference can curtail section 1367's *jurisdictional* sweep.").

72. *See* O'Brien v. Ed Donnelly Enters., 575 F.3d 567, 584 (6th Cir. 2009).

73. *See* Federal Labor Standards Act (FLSA) of 1938, 29 U.S.C. § 216(b) (2006).

74. *See* Foster v. Food Emporium, No. 99 CIV 3860 CM, 2000 WL 1737858, at *1 (S.D.N.Y. Apr. 26, 2000); Jackson v. New York Telephone Co., 163 F.R.D. 429, 431 (S.D.N.Y. 1995); Frank v. Gold'n Plump Poultry, Inc., No. Civ. 041018JNERLE, 2005 WL 2240336, at *3 (D. Minn. Sept. 14, 2005); Espanol v. Avis Budget Car Rental L.L.C., Case No. 8:10-cv-944-T-30AEP, 2011 WL 4947787, at *2 (M.D. Fla. Oct. 18, 2011); Rubery v. Buth-Na-Bodhaige, Inc., 569 F. Supp. 2d 334, 336 (W.D.N.Y. 2008); Realite v. Ark Rest. Corp., 7 F. Supp. 2d 303, 306 (S.D.N.Y. 1998); Scholtisek v. Eldre Corp., 229 F.R.D. 381, 387 (W.D.N.Y. 2005).

75. *See* Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1260-61 (11th Cir. 2008).

76. *See id.* at 1258-61.

77. *See id.* at 1259.

78. *See id.* at 1261.

79. *See id.* at 1261-62.

court makes a decision—usually based only on the pleadings and any affidavits which have been submitted—whether notice of the action should be given to potential class members. Because the court has minimal evidence, this determination is made using a fairly lenient standard, and typically results in "conditional certification" of a representative class. According to some courts, certification at the notice stage requires nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan. Under this approach, the district court then makes a second determination after discovery is largely complete and the case is ready for trial. At this stage, the court has much more information on which to base its decision, and makes a factual determination on the "similarly situated" question. Thus courts generally analyze the "similarly situated" issue under a higher standard at this stage. If the plaintiffs are similarly situated, the district court allows the case to proceed to trial as a collective action under § 216(b).[80]

80. Thiessen v. Gen. Elec. Capital Corp., 996 F. Supp. 1071, 1080 (D. Kan. 1998) (citations omitted); *see also* Blake v. Hewlett-Packard Co., No. 4:11-CV-592, 2013 WL 3753965, at *3 (S.D. Tex. July 11, 2013) ("Like most district courts, this Court has generally adopted the two-stage approach . . . consisting of (i) a notice stage, followed by (ii) a decertification stage."). Under the *Lusardi* approach, in the notice stage, the district court first makes a preliminary determination whether potential plaintiffs are similarly situated to the named plaintiff. *Blake,* 2013 WL 3753965, at *3.

> If they are, then the court conditionally certifies the action and authorizes notice to potential plaintiffs to opt in, and the suit "proceeds as a representative action throughout discovery." The second stage comes after discovery is largely complete and the defendant files a motion for decertification. If the court determines from discovery evidence that the plaintiffs are in fact similarly situated, then the case proceeds as a representative action. But if the court finds that the plaintiffs are not similarly situated, then the class is decertified, the opt-in plaintiffs are dismissed without prejudice, and the original plaintiff proceeds to trial on his individual claims.

Id. Roberts v. Target Corp, No. CIV-11-0951-HE, 2013 WL 5256867, at *2 (W.D. Okla. Sept. 17, 2013) (quoting Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095 (10th Cir. 2001) ("[A] court determines, on an ad hoc case-by-case basis, whether plaintiffs are "similarly situated." In utilizing this approach, a court typically makes an initial "notice stage" determination of whether plaintiffs are "similarly situated." In doing so, a court 'require[s] nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan.' At the conclusion of discovery (often prompted by a motion to decertify), the court then makes a second determination, utilizing a stricter standard of "similarly situated." During this "second stage" analysis, a court reviews several factors, including '(1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; (3) fairness and procedural considerations; and (4) whether plaintiffs made the filings required by the ADEA before instituting suit.")).

Although a court's initial inquiry as to whether plaintiffs are "similarly situated" requires only a "modest factual showing," some courts have denied certification following discovery based upon insufficient proof at the second stage of the analysis.[81] Other courts choose to bypass the initial conditional certification stage altogether and proceed directly to the second stage of the certification analysis.[82]

C. *Other Collective Actions in Employment Law*

Age discrimination claims raised under the Age Discrimination in Employment Act also may be brought as collective actions.[83] More specifically, while discrimination claims raised under Title VII are governed by Rule 23 class action procedures, employment cases brought under the FLSA, the ADEA, and the Equal Pay Act, as collective actions, are governed by Section 216(b).[84]

D. *Wal-Mart v. Dukes Case: Rule 23 Commonality Requirement*

Prior to 2011, class actions and collective actions were more and more frequently being used by plaintiffs as a "shotgun approach" to pursuing larger awards.[85] Class actions and collective actions often were

81. *Thiessen,* 996 F. Supp. at 1080; (citing Bayles v. American Med. Response, 950 F. Supp. 1053, 1067 (D. Colo. 1996) ("[D]ecertifying class in FLSA context where the case was 'fraught with questions requiring distinct proof as to individual plaintiffs' and defenses could not be addressed on a class-wide basis")); Brooks v. Bellsouth Telecomm., Inc., 164 F.R.D. 561, 569 (N.D. Ala. 1995) (denying certification in part because the "circumstances of employment termination are diverse" and the court "would be faced with numerous individualized defenses," including waiver issues); *See also* Botero v. Commonwealth Limousine Serv. Inc., No. 12-10428-NMG, 2014 U.S. Dist. WL 1248158, at *6 (D. Mass. Mar. 25, 2014) ("[E]ach would be class member, were he or she to file a separate complaint, could provide sufficient proof to survive summary judgment, yet that fact alone would not be sufficient to render such class members "similarly situated.").

82. Nieddu v. Lifetime Fitness, Inc., No. H-12-2726, 2013 U.S. Dist. WL 5530809, at *4 (S.D. Tex. Sept. 30, 2013); *see, e.g.,* Aguirre v. SBC Commc'ns, Inc., No. H-05-3198, 2007 U.S. Dist. WL 772756, at *9 (S.D. Texas Mar. 12, 2007); *Blake,* 2013 WL 3753965, at *4-6; Valcho v. Dallas Cnty. Hosp. Dist., 574 F. Supp. 2d 618, 622 (N.D. Texas 2008); Morisky v. Pub. Serv. Elec. & Gas Co., 111 F. Supp. 2d 493, 497-98 (D.N.J 2000).

83. *See* 29 U.S.C § 626(b) (2000) ("The provisions of [the ADEA] shall be enforced with the powers, remedies, and procedures provided in section[] . . . 216 (except for subsection (a) thereof) . . . .").

84. James M. Fraser, *Opt-in Class Actions Under the FLSA, EPA, and ADEA: What Does It Mean to Be "Similarly Situated"?*, 38 Suffolk U. L. Rev. 95, 97 (2004); Candis A. McGowan, *The ABCs of Title VII Class and Age Discrimination Collective Actions*, 25 Am. J. Trial Advoc. 257, 262 (2001).

85. *See, e.g.*, Edwards v. Prime, Inc., No. 08-AR-1016-S, 2008 WL 9393800, at *1 (Dec. 11, 2008) (making it impossible for the court to certify a collective class because of the convoluted

misused in attempts to apply them to a broader group of individuals than was permitted by Rule 23's commonality requirement.[86] After years of plaintiffs overusing and misusing class actions in employment litigation, the Court in *Dukes* finally put its foot down and heightened the standard of what plaintiffs must show in order to achieve class certification.[87]

In 2011, the U.S. Supreme Court addressed the commonality requirement under Rule 23.[88] In *Wal-Mart Stores, Inc. v. Dukes*, current and former employees of Wal-Mart sought injunctive and declaratory relief, punitive damages, and backpay on behalf of themselves and 1.5 million female employees alleging sex discrimination in pay and promotions.[89] More specifically, the women alleged that pay and promotion decisions were largely subjective and discretionary, and that such decisions had an unlawful disparate impact on female employees.[90] The district court and the Ninth Circuit both certified the class of women, finding that the plaintiffs met Rule 23(a)(2)'s commonality requirement and that their claims for backpay could be certified as part of a (b)(2) class because those claims did not predominate over the claims for equitable relief.[91] On June 20, 2011, the Supreme Court reversed the Court of Appeals decision, holding that (1) certification of the plaintiff class was not proper under Rule 23(a), and (2) plaintiffs' backpay claims were not properly certified under Rule 23(b)(2).[92]

Plaintiffs had moved to certify a plaintiff class consisting of "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices."[93] In evaluating the commonality requirement under Rule 23(a)(2), the Supreme Court noted that the "language is easy to misread, since '[a]ny competently crafted class complaint literally raises 'common questions.'"[94] The Supreme Court succinctly scrutinized plaintiffs' proof of commonality: "Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be

shotgun complaint).

86. Hamm v. TBC Corp., 597 F. Supp. 2d 1338, 1351 (S.D. Fla. 2009).
87. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2550-52 (2011).
88. *See Id.* at 2550-51.
89. *Id.* at 2547-48.
90. *Id.*
91. *Id.* at 2549-50.
92. *Id.* at 2561.
93. *Id.* 2549 (quoting Pl.'s Mot. for Class Certification 37).
94. *Id.* at 2551.

impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*."[95]

Although the plaintiffs alleged that "Wal-Mart's "policy" of *allowing discretion* by local supervisors over employment matters" leads to disparate impact in favor of men, the Supreme Court noted that the very policy itself "is just the opposite of a uniform employment practice that would provide the commonality needed for a class action . . . [and] is also a very common and presumptively reasonable way of doing business."[96] Further, the Supreme Court held that Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages" because plaintiffs with individual claims for monetary damages should be given the opportunity to decide for themselves whether or not to join the class.[97]

Although many plaintiffs point to the fact that the Supreme Court was divided on the issue of commonality, it must not be overlooked that the Court ruled unanimously on other issues, including the fact that the case was improperly certified under Rule 23(b)(2) because claims for monetary relief may only be certified, if at all, under Rule 23(b)(3).[98]

Many courts have cited and attempted to interpret *Dukes*.[99] Indeed, *Dukes* is seen as a landmark case with regard to a heightened standard for proving commonality and has sparked much discussion in the legal community.[100] Following the Supreme Court's ruling in *Dukes*,

95. *Id.* at 2552 (emphasis in original).

96. *Id.* at 2554.

97. *Id.* 2557, 2559.

98. *Id.* at 2557-61.

99. *See* Mary Dunn Baker, *Class Certification Statistical Analysis Post-Dukes*, 27 ABA J. LAB. & EMP. L. 471, 481 (2012).

100. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 463-64 (2013); Sergio J. Campos, *Proof of Classwide Injury*, 37 BROOK. J. INT'L L. 751, 754-56 (2012); John M. Husband & Bradford J. Williams, Wal-Mart v. Dukes *Redux: The Future of Sprawling Class Action*, 40-SEP COLO. LAW. 53 (2011); Suzette M. Malveaux, *The Power and Promise of Procedure: Examining the Class Action Landscape After* Wal-Mart v. Dukes, 62 DEPAUL L. REV. 659, 661 (2013); Anthony F. Fata, *Doomsday Delayed: How the Court's Party-Neutral Clarification of Class Certification Standards in* Wal-Mart v. Dukes *Actually Helps Plaintiffs*, 62 DEPAUL L. REV. 675, 675-76 (2013); Marcia L. McCormick, *Implausible Injuries:* Wal-Mart v. Dukes *and the Future of Class Actions and Employment Discrimination Cases*, 62 DEPAUL L. REV. 711,711-12 (2013); L. Camille Hébert, *The Supreme Court's 2010-2011 Labor and Employment Law Decisions: A Large "Mixed Bag" for Employers and Employees*, 15 EMP. RTS. & EMP. POL'Y J. 279, 280 (2011); Suzette M. Malveaux, *How Goliath Won: The Future Implications of* Dukes v. Wal-Mart, 106 NW. U. L. REV. COLLOQUY 34, 37-38 (2011); Julie Slater, Comment, *Reaping the Benefits of Class Certification: How and When Should*

plaintiffs may struggle to continue successfully bringing employment discrimination class action suits. The Court's ruling in *Dukes* certainly has brought an end to the frivolous filing of improper class action lawsuits.

E. *Application of Dukes to Collective Action Lawsuits*

Although collective actions have allowed for the growth of lawsuits seeking recovery under the FLSA, the Supreme Court's holding in *Dukes* may restrict potential plaintiffs' eligibility to file both class actions and collective actions. So why does the holding in *Dukes* matter to the evolution of collective actions? Some courts have held that the Rule 23 requirements do not apply to a group of "similarly situated" individuals seeking to bring a collective action.[101] However, others hold that collective action plaintiffs must meet the Rule 23 class action requirements.[102] Thus, the holding in *Dukes* underscores the importance of determining whether the stringent Rule 23 class action requirements apply.

F. *A New Type Of Case: The Hybrid*

Lawsuits that combine Section 216(b) "opt-in" collective actions with Rule 23 "opt-out" class actions give rise to unique difficulties. "Opt-in" rules generally reduce the number of applicable members while "opt-out" rules significantly increase the number of participating members.[103] As discussed above, courts have been divided as to whether these two types of actions can be brought in a single lawsuit and whether plaintiffs can move for dual certification.[104] Not surprisingly, much debate has arisen regarding the seemingly contradictory requirements of class actions and collective actions:

"Significant Proof" Be Required Post-Dukes*?*, 2011 BYU L. REV. 1259, 1259-61 (2011); Saby Ghoshray, *Hijacked by Statistics, Rescued by* Wal-Mart v. Dukes: *Probing Commonality and Due Process Concerns in Modern Class Action Litigation*, 44 LOY. U. CHI. L.J. 467, 468-471 (2012); Jennifer Brooks-Crozier, *Put Up Your Dukes: The Fight Over Commonality in the Era of* Wal-Mart v. Dukes, 19 TEX. WESLEYAN L. REV. 711, 711-12 (2012).

101. *See* Robert P. Davis & David S. Fortney, MANAGING WAGE & HOUR RISKS 2010, 261-62 (2010).

102. *See, e.g.*, Shushan v. Univ. of Colo., 132 F.R.D. 263, 265 (D. Colo. 1990); *see also* Wilkerson v. Martin Marietta Corp., 875 F. Supp. 1456, 1461 (D. Colo. 1995).

103. *See* Andrew C. Brunsden, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 BERKELEY J. EMP. & LAB. L. 269, 274 (2008).

104. *See id.* at 275.

> The need for clarification of this issue took on greater significance in 1966, when the Supreme Court's Advisory Committee revised Rule 23 to resemble its modern form. Prior to the revision, class action plaintiffs were not bound by a judgment unless they affirmatively opted into the suit. Like the pre-1966 version of Rule 23, § 216(b) also requires plaintiffs to opt in. When the Advisory Committee revised Rule 23, however, it replaced the "opt-in" requirement with Rule 23(b)(3), which provides that absent parties are automatically included in the suit unless they affirmatively opt out. As a result, Rule 23's opt-out provision was directly at odds with the FLSA's opt-in requirement. This distinction is central to the debate of whether courts should apply Rule 23's certification requirements to collective actions under § 216(b).[105]

Violations of the FLSA come in many different shapes and sizes: some employers fail to pay the federally mandated minimum wage, while others fail to maintain adequate records of hours worked; some employees are not compensated or given for rest and meal periods, while others do not receive overtime pay because they are misclassified as exempt employees.[106] For years, the FLSA was not strictly enforced, and employers were able to get away with noncompliance.[107]

The interplay between the "opt-in" collective action under the FLSA and the "opt-out" class action under Rule 23 has the potential to create different, and potentially contradictory, classes within one single lawsuit. Plaintiffs attempting to bring state law wage claims under Rule 23 and collective actions under the FLSA are essentially trying to "have their cake and eat it too." For example, Rule 23 allows for the tolling of statute of limitations pending class certification, and the statute of limitations is similarly tolled for class members when one single plaintiff files an employment discrimination claim.[108] On the other hand, the filing of a lawsuit under the FLSA generally does not toll the statute of limitations, only the filing of a consent by the individual will toll the statute of limitations.[109] Plaintiffs cannot be allowed to "cherry-pick" the benefits from both class actions and collective actions while seeking

105. Fraser, *supra* note 84, at 96.

106. *See Wage and Hour Division (WHD)*, DEP'T OF LAB., http://www.dol.gov/whd/flsa/index.htm (last visited on April 23, 2014).

107. *See* Brunsden, *supra* note 103, at 272.

108. Davis & Fortney, *supra* note 101, at 264.

109. *See id.* at 265.

to avoid the limitations of both.

G. *Post-Dukes Employment Litigation*

There have been a growing number of wage and hour cases all across the country.[110] Statistics relating to federal case loads confirm this recent trend.[111] Even a quick review of cases within the last month illustrates this quickly growing trend. For example, in March 2014, Walgreens paid $23 million to settle nine class actions under the FLSA.[112] A Florida plaintiff and more than 100 opt-ins who were employed as shift managers requested second-stage class certification, which was granted against Avis Budget Car Rental LLC.[113] JPMorgan Chase & Co. has agreed to pay $16 million to settle a proposed class and collective action lawsuit regarding overtime pay.[114] Plaintiffs in a wage-and-hour class action lawsuit were granted class certification by a federal district court judge in New York.[115] KeyBank recently agreed to pay $3.5 million to settle a class and collective action alleging that the company misclassified certain employees.[116]

Class actions are extremely popular and heavily-used means of pursuing employment litigation because Plaintiffs, and their class action attorneys, often see class actions as an easy way to maximize damages while minimizing effort[117]:

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110. *See* Robinson, *supra* note 5.

111. *See id.* ("One obvious reason for the increase is that plaintiffs' lawyers are still finding FLSA violations to litigate. Also, the recovery of liquidated damages and attorneys' fees, especially in cases brought as collective or class actions, makes FLSA cases lucrative and attractive for the plaintiffs' bar. Economic uncertainties contribute to this growing trend of more wage and hour litigation by employees; and plaintiffs' lawyers are able to take advantage of these uncertainties, especially by bringing lawsuits as collective or class actions.").

112. *See* Allissa Wickham, *Walgreen Shells Out $23M to Settle Wage Class Actions*, LAW360 (Mar. 26, 2014), http://www.law360.com/articles/522119/walgreen-shells-out-23m-to-settle-wage-class-actions.

113. Ben James, *Collective Status Affirmed in Avis Budget OT Suit*, LAW360 (Mar. 27, 2014), http://www.law360.com/articles/522530/collective-status-affirmed-in-avis-budget-ot-suit.

114. Jeff Sistrunk, *JPMorgan Pays $16M to Settle Bankers' OT Class Action*, LAW360 (Mar. 25, 2014), http://www.law360.com/articles/521813/jpmorgan-pays-16m-to-settle-bankers-ot-class-action.

115. Jackson v. Bloomberg, L.P., No. 13 Civ. 2001 (JPO), 2014 WL 1088001, at *1, *18 (S.D.N.Y. Mar. 19, 2014).

116. Jeff Sistrunk, *KeyBank to Pay $3.5M to Settle FLSA, Unpaid OT Claims*, LAW360 (Mar. 14, 2014), http://www.law360.com/articles/518775/keybank-to-pay-3-5m-to-settle-flsa-unpaid-ot-claims.

117. *See* Creative Montessori Learning Ctr. v. Ashford Gear, L.L.C., 662 F.3d 913, 915 (7th Cir. 2011).

> Certification as a class action can coerce the defendant into settling on highly disadvantageous terms, regardless of the merits of the suit .... As explained in *Szabo*, "the class certification turns a $200,000 dispute (the amount that Szabo claims as damages) into a $200 million dispute. Such a claim puts a bet-your-company decision to Bridgeport's managers and may induce a substantial settlement even if the customers' position is weak."[118]

Courts have commented on "the effect of a class certification in inducing settlement to curtail the risk of large awards."[119]

As we all know, with great power comes great responsibility. Unfortunately, over the years, plaintiffs, and their class action counsel, increasingly have abused the class action process, to the point that certain plaintiffs' attorneys have even been sanctioned for recruiting plaintiffs in order to bring such lawsuits.[120] Finally, in 2011, the U.S. Supreme Court called for the end of improper and misused class action lawsuits.[121]

In the years following the U.S. Supreme Court's ruling in *Dukes*, other courts have similarly denied requests for class certification, imposing a heightened standard for class certification.[122] For example, in 2012, the California Supreme Court denied class certification of a proposed subclasses relating to work "off-the-clock."[123] Five hourly employees sought to bring wage-and-hour claims against companies that owned and operated restaurant chains throughout California on behalf of cooks, stewards, buspersons, wait staff, host staff, and other hourly employees who staff the restaurants.[124] The court decertified the plaintiffs' proposed subclass covering "Class Members who worked 'off-the-clock' or without pay from and after August 16, 2000."[125] In

118. *Id.* (citation omitted) (quoting Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 675 (7th Cir. 2011)).

119. West v. Prudential Sec., Inc., 282 F.3d 935, 937 (7th Cir.2002).

120. *But see* Reliable Money Order, Inc. v. McKnight Sales Co., Inc., 704 F.3d 489, 490-91 (7th Cir. 2013) (finding that the district court's certification of a class would not be invalid based solely on the improper actions of counsel).

121. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547, 2556 (2011).

122. *See* Comcast Corp. v. Behrend, 133 S.Ct. 1426, 1428-29, 1435 (2013); Bolden v. Walsh Constr. Co., 688 F.3d 893, 896-97 (7th Cir. 2012) (reversing an order certifying two multi-site classes, finding no commonality among proposed class members); Tabor v. Hilti, Inc., 703 F.3d 1206, 1228 (10th Cir. 2013); Camilotes v. Resurrection Health Care Corp., 286 F.R.D. 339, 345-46, 354 (N.D. Ill. 2012).

123. Brinker Rest. Corp. v. Superior Court, 273 P.3d 513, 521 (Cal. 2012).

124. *Id.* at 521.

125. *Id.* at 522.

doing so, it held that plaintiffs failed to rebut the company's policy, which generally prohibits "off-the-clock" work.[126] Where plaintiffs only provided "anecdotal evidence of a handful of individual instances in which employees worked off the clock, with or without knowledge or awareness by [defendants'] supervisors," certification is not proper.[127]

In February 2013, the Seventh Circuit Court of Appeals decertified class and collective actions brought by three named plaintiffs, who installed and repaired home satellite dishes for the defendants.[128] The plaintiffs alleged various violations of federal and state wage-and-hour laws.[129] The state law claims were brought as Rule 23 class actions while the claim under the FLSA was brought as a collective action under Section 216(b).[130] Where monetary damages were sought under the class actions and the collective actions, and where specific hours worked by 2341 technicians would need to be addressed, the court held that granting certification would be infeasible.[131]

In May 2013, the Sixth Circuit Court of Appeals affirmed a district court's denial of a plaintiff's motion for class certification, where the would-be class covered female job applicants denied employment as entry-level sales representatives.[132] The court refused to certify the proposed class, in part, because the plaintiff failed to establish commonality under Rule 23 where "the plaintiff . . . could not show that a number of women, who failed to obtain employment at many places, over a long time, under a largely subjective hiring system, shared a common question of law or fact."[133] The court held that the fact "that subjective decisions made by some of [the defendant's] managers favored males because of [the defendant's] male-dominated corporate culture" is insufficient to warrant class certification.[134] Quoting the court in *Dukes*, this court held that "[u]nless a plaintiff can somehow show that the corporation's managers all used 'a common mode of exercising discretion that pervades the entire company,' . . . '[a] party seeking to certify a nationwide class will be unable to show that all the employees' Title VII claims will in fact depend on the answers to

126. *Id.* at 544.
127. *Id.* at 544.
128. Espenscheid v. DirectSat USA, L.L.C., 705 F.3d 770, 771-72, 777 (7th Cir. 2013).
129. *Id.* at 771.
130. *Id.*
131. *See id.* at 772, 776.
132. Davis v. Cintas Corp., 717 F.3d 476, 479-80 (6th Cir. 2013).
133. *Id.* at 489.
134. *Id.* at 488.

common questions.'"[135]

On March 27, 2014, the Western District of New York ruled on a class and collective action alleging that a health care network failed to pay hourly employees for all hours worked and/or overtime for hours worked over forty hours per week.[136] The district court denied the plaintiffs' motion for Rule 23 class certification and their motion to finally certify a FLSA class, and granted the defendants' motion to decertify the plaintiffs' conditionally certified FLSA collective action.[137] The court noted that Rule 23's class action requirements do not apply to a court's approval of a collection action under FLSA.[138] The court first analyzed the plaintiffs' request for certification of the state law claims under Rule 23 and held that the plaintiffs failed to satisfy the commonality requirement.[139] Next, after examining whether the plaintiffs and the opt-in plaintiffs were similarly situated, the court decertified the conditional FLSA collective action and dismissed the claims of the opt-in plaintiffs.[140]

While plaintiffs continue to file class actions and collective actions in an attempt to maximize damages, the "glory days" for plaintiff class actions have come to an end. Beginning with *Dukes*, courts have put their collective feet down at improper requests for certification. Courts are no longer tolerating the seeming abuse and misuse of class actions and collective actions.

III. CONCLUSION

Class actions in employment litigation have a rich history of eradicating and preventing widespread discrimination in the workplace.[141] Indeed, class actions have been instrumental in bringing an end to such intolerable workplace environments.[142] However, over the years, plaintiffs, and their attorneys, have increasingly abused the class action process.[143] In the aftermath of *Dukes*, plaintiffs are no longer able to obtain class certification so easily, requiring class action

135. *Id.* (quoting Wal-Mart Stores, Inc., v. Dukes, 131 S.Ct. 2541, 2454-2455 (2011)).

136. Hinterberger v. Catholic Health Sys., No. 08-CV-380S, 2014 WL 1278919, at *1 (W.D.N.Y. Mar. 27, 2014).

137. *Id.* at *34.

138. *Id.* at *23.

139. *Id.* at *25, *30, *32.

140. *Id.* at *33-34.

141. *See supra* Part I.

142. *See* Hart, *supra* note 3, at 816-17.

143. Hamm v. TBC Corp., 597 F. Supp. 2d 1338, 1351 (S.D. Fla. 2009).

attorneys to more seriously assess whether certification is proper.[144]

Similarly, collective actions have also played an important role in the development of better working environments for employees.[145] Collective actions have been essential in securing employee rights and preventing employer abuses, especially in the areas of minimum wage, overtime, meal breaks, donning and doffing, and related situations within the workplace.[146] Such actions have brought a new and focused approach to wage and hour laws; however, they too have been abused and misused.[147]

Despite the valuable roles that class actions and collective actions have served in getting rid of widespread workplace discrimination and unlawful employer practices, *Dukes* signaled the end of the "one-size-fit-all," "shotgun approach" utilized by class action attorneys.[148] This "shotgun approach" is no longer welcomed by courts and is not a proper use of class actions or collective actions. There is certainly a place for class actions and collective actions in employment litigation. However, plaintiffs must be judicious and thoughtful when seeking class certification in these post-*Duke* days using a "rifle approach" aimed at specific abuses by employers.

144. *See supra* Part II.g.
145. *See supra* Part I.
146. *See* Buckley, *supra* note 7, at 914-16.
147. *Hamm*, 597 F. Supp. 2d at 1351.
148. Wal-Mart Stores, Inc., v. Dukes, 131 S. Ct. 2541 (2011).