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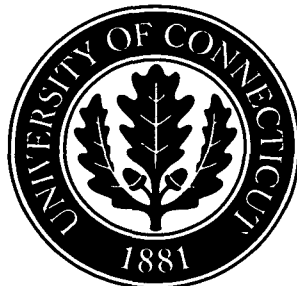
The Possibility of Avoiding Discrimination: Considering Compliance and Liability

MELISSA HART

*The gender discrimination class action *Dukes v. Wal-Mart Stores, Inc.*, whose certification was recently affirmed in the Ninth Circuit, presents a large-scale challenge to the company's excessive reliance on subjective judgment in employment decision-making. It is one in a growing number of similar suits, all of which are fundamentally attacks on the continued operation of entrenched gender stereotypes in the allocation of workplace opportunities. The breadth of this aim is one of the strengths of these suits, but it also raises a significant question: because this kind of litigation targets a broad social phenomenon, is it reasonably possible to distinguish employers who are part of the problem from those who are not? This Article argues that, given the real possibility of judicial and public resistance to these suits, there is a serious need for some articulation of what employer practices would be sufficient to demonstrate legal compliance sufficient to forestall litigation like *Dukes*. Past litigation, the evaluations of human resources experts, and Supreme Court interpretations of the requirements of federal antidiscrimination law all provide some guidance as to employer policies that could satisfy these compliance efforts. But a growing body of empirical research suggests that workplace programs designed for compliance do not necessarily improve circumstances for women and minorities. Any discussion of compliance must grapple with this problem. This Article argues that employers, and those offering them guidance, must develop strategies for compliance that will in fact remove barriers to equality, but that litigation like *Dukes* may not be appropriate to target employers who have made substantial compliance efforts, even if those efforts have not eliminated inequalities.*

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The Possibility of Avoiding Discrimination: Considering Compliance and Liability

MELISSA HART*

I. INTRODUCTION

It is not really surprising that Wal-Mart is the defendant in the largest employment discrimination lawsuit in U.S. history. Wal-Mart is, after all, the largest private employer in the world, with a workforce that is nearly 1% of the U.S. working population.¹ And Wal-Mart has become notorious for its unfriendly workplace policies. So, when *Dukes v. Wal-Mart Stores, Inc.* was certified in June 2004, authorizing the named plaintiffs to represent more than 1.5 million current and former Wal-Mart employees in their claims of gender discrimination in pay and promotion,² it might have seemed almost inevitable.

But litigation is never—or perhaps should never be—inevitable. In the context of federal antidiscrimination law, in particular, the law's primary goal is arguably "not to provide redress but to avoid harm."³ If this is truly the goal of Title VII and other similar laws, it must be possible for an employer who wishes to do so to comply with the law's obligations and thereby to avoid liability, and even perhaps to avoid some kinds of litigation entirely.

The past decade has seen a growing number of large class action suits challenging the aggregate effects of multiple individual employment decisions.⁴ These cases are an extremely important tool for challenging the

* Associate Professor, University of Colorado Law School. I would like to thank Rachel Arnow-Richman, Susan Bisom-Rapp, Emily Calhoun, Tristin Green, Martin J. Katz, Scott Moss, Catherine Smith, Grant Sullivan and Kevin Traskos for their helpful comments, and the participants in and organizers of the *Wal-Mart Matters* symposium for a fascinating event.

¹ See Ellen Israel Rosen, *The Wal-Mart Effect: The World Trade Organization and the Race to the Bottom*, 8 CHAP. L. REV. 261, 262 n.5 (2005); David Neumark et al., *The Effects of Wal-Mart on Local Labor Markets 1* (Nat'l Bureau of Econ. Research, Working Paper No. 11782, 2005), available at <http://www.nber.org/papers/w11782>.

² *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004). The Ninth Circuit affirmed the certification decision on February 6, 2007. *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007). Wal-Mart has announced it will seek rehearing en banc. See *Wal-Mart to Appeal Discrimination Suit Status*, CNNMONEY.COM, Feb. 6, 2007, <http://money.cnn.com/2007/02/06/news/companies/walmart/index.htm>.

³ *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998); see also *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999).

⁴ Like many of the topics discussed at the *Wal-Mart Matters* symposium, this is an area where one could say that you do not need Wal-Mart to study the Wal-Mart effect. See, e.g., V. Sridhar & Vijay Prashad, *Wal-Mart with Indian Characteristics*, 39 CONN. L. REV. 1785 (2007); Chris Tilly, *Wal-Mart and its Workers: NOT the Same All Over the World*, 39 CONN. L. REV. 1805 (2007).

subtle but pervasive discrimination that continues to limit women's job opportunities. The patterns of exclusion and inequality presented in *Dukes* mirror patterns that still hamper women's opportunities in many workplaces. And they are not inevitable or excusable patterns. By seeking to hold employers accountable for the persistent gender divide in work opportunities, litigation like *Dukes* holds transformative potential. In pushing employers to take steps to counteract the harmful impact of unexamined stereotypes, these suits destabilize settled assumptions about the limits of legal change and the inevitability of workplace inequality.

But one of the very things that makes these cases so significant—the challenge to broad cultural norms—has the potential to undermine their success. The challenge to widespread cultural stereotypes raises concerns about where to locate legal boundaries. In particular, cases like *Dukes* push us to the question of what an employer can do to avoid liability in litigation of this sort. Employers have raised the specter that there is no legitimate way to avoid liability under Title VII if these suits are permissible, and some courts are clearly bothered by this possibility as well.

This Article will consider the problem of compliance: What can an employer do to avoid liability for excessively subjective decision-making that leads to gender-biased outcomes in pay and promotions? It will first explore the significance of *Dukes* and the kind of challenge it mounts as an important step in antidiscrimination litigation. It will then consider the standard defense arguments—that only quotas or strict objective tests will protect them—and will reject those solutions as potentially illegal and certainly unnecessary. Next, it will explore the kinds of requests that litigants like the *Dukes* plaintiffs make—not only for monetary remedies, but also for structural reforms. It will place those remedial options in the context of the Supreme Court's jurisprudence on employer compliance with Title VII. Finally, this Article will consider the dilemma presented by the possibility that compliance is not achieving the goals of equal employment opportunity. There has been a significant scholarly critique of the Court's emphasis on employer training programs and other internal antidiscrimination policies, and recent empirical work raises questions about the effectiveness of many employer-driven diversity efforts. These are serious concerns that cannot be ignored, but in spite of these concerns, compliance efforts and the internal enforcement mechanisms they generate must be considered as a central element of efforts to limit discrimination in the workplace.

II. LITIGATION TRENDS:

DUKES AND OTHER CHALLENGES TO ENTRENCHED STEREOTYPES

Dukes v. Wal-Mart Stores, Inc. is part of a litigation trend that includes similar suits against well-recognized national retailers like Home Depot⁵ and Costco,⁶ as well as dozens of other chain stores, grocery stores and other relatively large, geographically dispersed employers.⁷ Each of these suits raises a challenge to the defendant employer's policy of allowing local decision-makers to make important employment decisions in a largely unguided subjective manner. The suits also challenge the individual results of that unguided decision-making. What these suits are fundamentally doing is contesting the continued operation of entrenched gender stereotypes in workplace decision-making.

This Part will begin by briefly describing the claims in *Dukes v. Wal-Mart Stores, Inc.*, and the facts the plaintiffs focused on to support their legal claims. Because the allegations in *Dukes* are typical of the claims brought in other recent class action suits, they help to illuminate the particular kind of persistent discrimination such litigation targets. This Part will then explore the role these suits push employers to play in challenging entrenched cultural norms.

A. Statistical Disparities, Centralized Policies, and Stories of Bias at Wal-Mart

In 2001, the *Dukes* plaintiffs filed suit on behalf of current and former female employees of Wal-Mart, alleging that for years women at Wal-Mart stores had been paid less than their male counterparts every year and in every Wal-Mart region and that they had been denied opportunities for promotion during that same time and on the same broad geographic scale.⁸ The plaintiffs charged that "Wal-Mart discriminates against its female employees by advancing male employees more quickly than female employees, by denying female employees equal job assignments, promotions, training and compensation, and by retaliating against those who oppose its unlawful practices."⁹ They alleged that the retail giant had

⁵ See *Butler v. Home Depot, Inc.*, No. 94-4335, 1996 WL 421436 (N.D. Cal. Jan. 25, 1996).

⁶ See *Ellis v. Costco Wholesale Corp.*, 372 F. Supp. 2d 530 (N.D. Cal. 2005).

⁷ See, e.g., Melissa Hart, *Learning from Wal-Mart*, 10 EMP. RTS. & EMP. POL'Y J. 355, 372 (2007) (discussing recent cases involving employment discrimination); Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 EMP. RTS. & EMP. POL'Y J. 1, 2 & n.4, 5 (2005) (same); Michael Zimmer, *Systemic Empathy*, 34 COLUM. HUM. RTS. L. REV. 575, 599-600 (2003) (same).

⁸ See Motion for Class Certification at 1, *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004) (No. C-01-2252) [hereinafter Motion for Certification].

⁹ Plaintiffs' Third Amended Complaint ¶ 2, *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004) (No. C-01-2252) [hereinafter Third Amended Complaint].

violated Title VII of the Civil Rights Act of 1964 both through intentional discrimination and through maintenance of policies that, while facially neutral, operate in a manner that disproportionately harms female employees and that cannot be justified as necessary to Wal-Mart's business.¹⁰ They supported these claims with a narrative and a theory of discrimination that have become increasingly common in efforts to combat workplace inequality.

The narrative and theory of *Dukes v. Wal-Mart Stores, Inc.*, like those in other similar litigation, have three central elements: an attack on the aggregate results of multiple individual decisions; identification of a number of company policies that either foster discriminatory attitudes or at least allow them to thrive unchecked; and detailing of anecdotal instances of explicit gender bias and stereotyping. The plaintiffs' goal is to demonstrate how the individual decisions that form the basis of the statistical showing are attributable to the policies and cultural attitudes of the employer. By making this showing, plaintiffs enable the courts to evaluate the aggregate consequences of individual decisions and expose patterns of discriminatory outcomes that might be difficult or impossible to challenge through individual suits.¹¹

The first step in the *Dukes* plaintiffs' argument was to demonstrate a statistically significant disparity in pay and promotion between men and women at Wal-Mart. Plaintiffs' statistical expert looked at men and women hired at the same time into the same position over a five-year period and found that, on average, women in hourly positions made \$1100 less annually than men. In salaried management positions the annual pay gap was \$14,500.¹² Relevant non-discriminatory factors could not explain these pay differences.¹³ The statistical disparities in promotion of women at Wal-Mart were similarly stark. Wal-Mart has a large female employee population at the lowest sales ranks; in 2001, women comprised 67% of hourly workers and 78% of hourly department managers.¹⁴ The percentage of women is considerably different, however, in the salaried management ranks. Only 35.7% of assistant managers, 14.3% of store managers and 9.8% of district managers were female.¹⁵

As to both pay and promotion, the plaintiffs pointed to substantial evidence that these disparities are attributable to the unguided discretion vested in store managers. Wal-Mart's policies for setting pay combine a fixed base rate for each job with manager discretion for fairly substantial

¹⁰ *Id.* ¶¶ 102, 104.

¹¹ See Hart, *supra* note 7, at 365.

¹² Motion for Certification, *supra* note 8, at 25.

¹³ *Id.* at 27–28.

¹⁴ *Id.* at 7.

¹⁵ *Id.*; see also *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 146 (N.D. Cal. 2004).

adjustments. The company “provides no guidance on what circumstances would justify such an adjustment. Without proper criteria, inappropriate gender-based factors therefore can, and do, affect pay decisions.”¹⁶ Wal-Mart offered similarly little information or guidance to managers about standards for promotion. Opportunities for promotion to most management positions were not posted; permission to apply for them often had to be obtained from supervisors; and access was limited by invitation-only training programs.¹⁷ Evidence suggests that supervisors relied on difficult-to-define criteria—like teamwork skills and ability to get along with others—that are especially susceptible to gender bias and stereotypes.¹⁸

Other evidence presented by the *Dukes* plaintiffs showed that, as to both pay and promotion, Wal-Mart’s corporate management consistently disregarded the developing gender disparities.¹⁹ For example, variations from a range of “normal” pay for any particular job show up on exception reports, allowing corporate headquarters to see where significant differences in pay have developed. While corporate management “is aware of how its Store Managers are using their discretion” in setting pay “it has done nothing to rein them in or ensure this discretion is exercised fairly.”²⁰ And the company has been unwilling to engage in monitoring of gender disparities in compensation.²¹ As to the gender differences in promotion rates, consultants hired by Wal-Mart over the years have pointed to the lack of gender equality in the management levels of the company and a task force created by the company in 1996 suggested mechanisms for increasing representation of women in management.²² Wal-Mart ignored these recommendations and disbanded the group in 1998.²³ An internal group of Wal-Mart women told the company as long ago as 1992 that they were concerned that gender stereotypes throughout the company were limiting opportunities for women’s advancement.²⁴ Wal-Mart did not act on these recommendations and expressions of concern.

The largely unguided and unchecked allocation of pay and promotion opportunities described by the plaintiffs’ evidence is at odds with Wal-Mart’s highly centralized and controlled corporate environment. Both

¹⁶ Motion for Certification, *supra* note 8, at 9.

¹⁷ *Dukes*, 222 F.R.D. at 148–49.

¹⁸ *Id.*; see also Motion for Certification, *supra* note 8, at 25–26.

¹⁹ Motion for Certification, *supra* note 8, at 2.

²⁰ *Id.* at 19.

²¹ See Expert Report of Dr. William T. Bielby, *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004) [hereinafter Bielby Report].

²² See Motion for Certification, *supra* note 8, at 15; *Wal-Mart Didn’t Act on Internal Sex-Bias Alert, Documents Show*, BLOOMBERG.COM, July 15, 2005, <http://www.bloomberg.com/apps/news?pid=71000001&refer=us&sid=aGS8a.3TSjRQ>.

²³ See *Wal-Mart Didn’t Act*, *supra* note 22.

²⁴ Motion for Certification, *supra* note 8, at 15–16.

Wal-Mart's personnel management structure and, especially, the company's corporate culture are tightly managed out of corporate headquarters in Bentonville, Arkansas. The retail giant's U.S. operations are divided into forty-one national regions supervised by vice presidents who meet at least weekly with central corporate leadership in Bentonville.²⁵ Each region is also covered by a regional personnel manager, based at corporate headquarters, who monitors personnel policies and assists in the recruitment and selection of individual store managers.²⁶ The regions are divided into districts, each run by a manager who works directly with his regional personnel manager on personnel decisions.²⁷ This system connects human resources decisions directly back to corporate headquarters along several lines.

This centralized personnel structure is one of the tools Wal-Mart uses to ensure the dissemination of and continued emphasis on its corporate culture. From the first orientation to mandatory weekly store meetings, employees are trained in Wal-Mart's culture.²⁸ Store managers use standardized "corporate 'culture' lessons and accompanying training materials" to run these meetings.²⁹ The company newsletter, *Wal-Mart World*, includes a section on corporate culture,³⁰ and Wal-Mart's website has a section devoted to culture.³¹ Every store manager is expected to monitor a real-time computer link connected to the home office to keep immediately up-to-date with corporate policy.³² Moreover, store-level managers at both Wal-Mart and Sam's Club are frequently transferred from one facility to another, and even from one state to another.³³ This movement within the company helps to ensure that a consistent message carries across retail outlets. "By constantly moving people around, the Wal-Mart blood circulates to the extremities."³⁴ Similarly, Wal-Mart's strong preference for promoting from within ensures that most managers

²⁵ *Id.* at 5; see also Cheryl L. Wade, *Transforming Discriminatory Corporate Cultures: This is Not Just Women's Work*, 65 MD. L. REV. 346, 366-67 (2006) (describing Wal-Mart's management structure and noting in particular the expectation that "[e]ach level of management was in 'close and constant touch.'").

²⁶ See Motion for Certification, *supra* note 8, at 2.

²⁷ See *id.* at 5.

²⁸ See *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 151 (N.D. Cal 2004); see also BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA 143-44 (2001) (describing the orientation process).

²⁹ Motion for Certification, *supra* note 8, at 11.

³⁰ Bielby Report, *supra* note 21, at 7.

³¹ See Wal-Mart Stores, Wal-Mart Culture, <http://www.walmartstores.com/GlobalWMStoresWeb/navigate.do?catg=251> (last visited Mar. 30, 2007).

³² Motion for Certification, *supra* note 8, at 8, 9.

³³ *Id.* at 12.

³⁴ See Cora Daniels, *Women v. Wal-Mart; How Can the Retailer Reconcile its Storied Culture with the Anger of These Female Workers?*, FORTUNE, July 21, 2003 at 78, available at LEXIS, News Library, FORTUN File.

will have been “thoroughly steeped” in the company culture.³⁵ Wal-Mart reinforces this lesson by rewarding commitment to the corporate culture in evaluation and allocation of opportunities.³⁶

As a final step in their argument, the *Dukes* plaintiffs offered anecdotal evidence that business at Wal-Mart was often conducted in contexts that either explicitly or implicitly excluded women and that women faced considerable bias at stores throughout the nation. The incident that is credited with being the impetus for the *Dukes* class action suit was the moment when a female store manager saw her male counterpart’s paystub and realized he was making thousands of dollars more than she was for doing the same job. When this single working mother questioned her manager about the disparity, he explained that the male employee had a family to support and therefore was appropriately paid more.³⁷ Another member of the class said that she was advised that if she wanted to get a better job at Wal-Mart she should “doll up” and “blow the cobwebs off” her makeup.³⁸ Another testified that her boss repeatedly justified his favoritism for men by explaining that “God made Adam first.”³⁹ One woman was discouraged from applying for a position as manager of the sporting-goods department with the explanation that customers would feel more comfortable with a man in the position.⁴⁰ Other women reported that women were generally steered to “traditionally female” departments, which often came with fewer advancement opportunities.⁴¹ One class member testified that during an interview she was informed that “it was a man’s world and that men control managerial positions at Wal-Mart.”⁴² Class members explained that work meetings in stores and divisions around the country were held at Hooters restaurants and, in some cases, at strip clubs.⁴³ And at meetings of Sam’s Club executives, women employees were regularly referred to as “girls” and as “little Janie Qs.”⁴⁴

³⁵ See Motion for Certification, *supra* note 8, at 11–12; see also DON SODERQUIST, *THE WAL-MART WAY: THE INSIDE STORY OF THE SUCCESS OF THE WORLD’S LARGEST COMPANY* 39–40 (2005).

³⁶ See Motion for Certification, *supra* note 8, at 11; see also ROBERT SLATER, *THE WAL-MART DECADE* 109 (2003) (quoting current Wal-Mart CEO as saying “[y]ou have to be less tolerant of people who don’t get the culture”).

³⁷ See LIZA FEATHERSTONE, *SELLING WOMEN SHORT: THE LANDMARK BATTLE FOR WORKERS’ RIGHTS AT WAL-MART* 16 (2004); see also Third Amended Complaint, *supra* note 9, ¶ 65, (describing another employee who was told that a male co-worker was paid more “because he had a family to support”).

³⁸ Third Amended Complaint, *supra* note 9, ¶ 64.

³⁹ Daniels, *supra* note 34, at 78.

⁴⁰ Third Amended Complaint, *supra* note 9, ¶ 57.

⁴¹ *Id.* ¶ 93.

⁴² *Id.* ¶ 52.

⁴³ Daniels, *supra* note 34; see also Geri L. Dreiling, *The Women of Wal-Mart* (2004), <http://www.alternet.org/rights/19901/> (describing one female employee’s experience with repeated visits to strip clubs on business trips).

⁴⁴ Motion for Certification, *supra* note 8, at 6.

The pieces of the *Dukes* plaintiffs' narrative fit together to describe an environment with a very strong and central corporate culture that emanates directly out of headquarters and that requires managerial compliance with all sorts of directives, but without any kind of attention to or concern about gender bias in promotion and compensation. The anecdotes of discriminatory attitudes and biased treatment at Wal-Mart stores around the country portray a culture that permitted or even encouraged local managers to act on stereotypes and bias in exercising discretion on pay and promotion decisions. And the statistical inequities in both compensation and management opportunities demonstrate that Wal-Mart's corporate decision to remain at best indifferent to concerns of gender equality in the workplace had real consequences for its female employees.

B. *Potential for Challenging Culturally Entrenched Stereotypes*

There are obviously elements of the *Dukes* plaintiffs' narrative that are entirely unique to Wal-Mart. The basic framework of the challenge, however, is much the same as that in *Ellis v. Costco*, where plaintiffs allege that an entirely subjective system with no written standards for doling out promotion opportunities has blocked women from the higher paying management positions,⁴⁵ or *Butler v. Home Depot*, where a system that granted a largely male supervisory staff the discretion to make decisions about pay and promotion allegedly kept women in lower paying, lower status positions at the company,⁴⁶ or *Shores v. Publix Super Markets*, where women were allegedly relegated to low-paying positions and denied access to management at the grocery store chain by a system of pay and promotions that relied on the unguided discretion of supervisory personnel.⁴⁷ In all of these cases, and in many others,⁴⁸ the pay and promotion policies being challenged "have as a common feature that they have entrusted to managers very broad discretion to make promotion and compensation decisions with little or no oversight."⁴⁹ This is a core theme in recent Title VII class litigation, and it is this aspect of the claims that

⁴⁵ *Ellis v. Costco Wholesale Corp.*, 372 F.2d 530, 533 (N.D. Cal. 2005).

⁴⁶ *Butler v. Home Depot, Inc.*, No. C-94-4335 SI, 1996 WL 421436, at *1 (N.D. Cal. Jan. 25, 1996).

⁴⁷ *Shores v. Publix Super Markets, Inc.*, No. 95-1162-CIV-T-25(E), 1996 U.S. Dist. LEXIS 3381, at *15 (M.D. Fla. Mar. 12, 1996).

⁴⁸ See, e.g., *Palmer v. Combined Ins. Co.*, 217 F.R.D. 430, 435 (N.D. Ill. 2003) (seeking certification of class challenging employer's central policy of delegating unfettered discretion and ignoring consequences); *Beckmann v. CBS*, 192 F.R.D. 608, 614 (D. Minn. 2000) (describing challenge to a centrally formulated and disseminated personnel policy that leaves discretion to individual managers to make personnel decisions); see also Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 787 n.247 & 248 (2005) (collecting cases).

⁴⁹ Motion for Certification, *supra* note 8, at 16.

gives them great potential as a tool to push on the glass ceiling that continues to limit women's opportunities at work.

These claims of excessive subjectivity in decision-making are attacks both on the employer practices that allowed subjectivity to intrude into workplace decisions and on the substantive content of the subjective judgments being made. The former is a challenge to particular workplace policies of the defendant employer. So, for example, the *Dukes* plaintiffs point to Wal-Mart's failure to post training and promotion opportunities; its lack of clear written criteria for advancement, evaluation and pay differentials; and its residual reliance on a willingness to relocate as a requirement for management positions as specific policies and practices that make the retail giant an appropriate litigation target. As one of the plaintiffs' experts has explained, the difficulty with these employment practices is that they have "structured the decision-making context in ways that allowed cognitive bias to place women at a systematic disadvantage."⁵⁰ Among the plaintiffs' litigation goals is to force Wal-Mart to adopt policies that will limit the opportunity for bias and stereotype to intrude into workplace decisions. They are challenging what Susan Sturm has described as "second generation discrimination" that is "structurally embedded in the norms and cultural practices of an institution"⁵¹ and are seeking institutional reforms that will disrupt persistent patterns of inequality.

These challenges attack not only what Michael Selmi has described as "corporate indifference to gender inequality,"⁵² but also the stereotypical attitudes of the individual supervisors who have been making decisions at the company for years. In this regard, class action claims challenging the aggregate effects of unguided subjective decision-making are attacks on gender stereotyping and bias more generally.⁵³ They contest not only the institutional culture of a particular workplace, but also the widespread stereotypes and biases that exist outside the workplace and that are imported into worksites through individual decision-makers.

⁵⁰ William T. Bielby, *Can I Get a Witness? Challenges of Using Expert Testimony on Cognitive Bias in Employment Discrimination Litigation*, 7 EMP. RTS. & EMP. POL'Y J. 377, 385 (2003).

⁵¹ Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277, 280-81; see also Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 468 (2001) [hereinafter Sturm, *Second Generation Discrimination*] (defining second generation employment discrimination).

⁵² Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 EMP. RTS. & EMP. POL'Y J. 1, 46 (2005); see also Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 145 (2003) (noting that recent litigation focuses on "the employer's role in enabling the forms of discriminatory bias that hinder opportunities of women and minorities in the modern workplace").

⁵³ I explore this aspect of the claims in more detail in Hart, *supra* note 7, at 372-74.

These claims require for their success that workplace decisions be evaluated in the aggregate. Looking at broad swaths of pay and promotion decisions reveals patterns of inequality that may be masked if decisions are considered in isolation.⁵⁴ The decision whether or not to certify a class to pursue these claims is therefore fundamental. Many district courts have certified class action suits that challenge the consequences of unguided subjective decision-making, recognizing, as both the district court and the Ninth Circuit did in *Dukes*, that an employer can have corporate policies that tolerate and even encourage the operation of stereotypes in decision-making and that the widespread discrimination that results is properly attributable to the employer.⁵⁵ Others have viewed these claims as simply an impermissible effort to aggregate dozens or hundreds of individual claims with the class action device.⁵⁶

Underlying the decisions from courts that have been unwilling to certify these class action suits is an anxiety about holding employers liable on a class-wide scale for the type of discrimination at issue in these claims. As one court has put it, "a decision by a company to give managers the discretion to make employment decisions, and the subsequent exercise of that discretion by some managers in a discriminatory manner, is not tantamount to a decision by a company to pursue a systemic, companywide policy of intentional discrimination"⁵⁷ The concern reflected in these comments is with the move from holding a single manager responsible for his stereotyped decisions (or even finding the employer liable for this individual bias under established standards of proof in individual discrimination cases) to holding the employer responsible for the aggregate of many managers' decisions. A core element of this concern is that it may be difficult to distinguish an employer that should be held liable under this theory from one that should not. Are employers obligated to eliminate stereotypes from all decision-making in the workplace in order to avoid this kind of aggregate liability, or simply to make legitimate efforts to do so? How can we tell when an employer is doing enough?

⁵⁴ See, e.g., *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 150–51 (N.D. Cal. 2004); see also Sturm, *supra* note 51, at 469 ("[B]ehavior that appears gender neutral when considered in isolation may actually produce gender bias when connected to broader exclusionary patterns.").

⁵⁵ See, e.g., *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1231 (9th Cir. 2007); *Dukes*, 222 F.R.D. at 150–51; see also Hart, *supra* note 48, at 787 n.247.

⁵⁶ See Hart, *supra* note 48, at 787.

⁵⁷ *Sperling v. Hoffman-LaRoche, Inc.*, 924 F. Supp. 1346, 1363 (D.N.J. 1996); see also *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526, 541 (N.D. Ala. 2001) ("[T]he purported class is comprised of a large group of diverse and differently situated employees whose highly individualized claims of discrimination do not lend themselves to class-wide proof."); *Robertson v. Sikorsky Aircraft Corp.*, No. 397CV1216(GLG), 2000 WL 33381019, at *5 (D. Conn. July 5, 2001) ("[W]hat we have here are evaluations and decisions made by hundreds of supervisors and managers on a variety of things besides promotions, such as job assignments, salary determinations, merit increases, etc. From a practical standpoint, it is impossible to put these all under one roof.").

III. AVOIDING LITIGATION LIABILITY: WHAT SHOULD EMPLOYERS DO?

Class actions challenging the results of excessive subjectivity in employment decision-making raise fundamental questions about the responsibility employers should have for eliminating or minimizing the impact of persistent gender stereotypes when they operate at work. The considerable potential of these suits to challenge widespread cultural norms has a flipside that presents a significant question: because this kind of litigation targets a broad social phenomenon, is it reasonably possible to distinguish employers who are part of the problem from those who are not? This question presents a formidable challenge and contributes to judicial resistance to recognizing these claims at all. Given the real possibility of continued—or even increasing—judicial resistance to this type of litigation, there is a serious need for some articulation of what employer practices would be sufficient to demonstrate legal compliance sufficient to forestall a suit like *Dukes*.

My concern here is not so much with remedies in litigation, but with whether there are steps an employer can take to avoid liability, or even to avoid litigation altogether and whether those same steps will necessarily diminish workplace inequality. The topics are certainly not unrelated, and the question of what litigation remedies are appropriate in these cases is also very difficult and hotly contested.⁵⁸ Some have noted that in many instances employment discrimination lawsuits appear to be simply opportunities to transfer money from one party to the other in compensation for past wrongs, rather than serious catalysts for workplace change.⁵⁹ Others who are perhaps more optimistic have pointed to the inclusion of “systemic prospective relief aimed at reducing future discrimination” in consent decrees approving settlement in several cases.⁶⁰ It is clear that, even taking this more optimistic view, once the discussion is focused on remedies in litigation, money becomes a central element of the conversation.

Perhaps for that reason, among others, recent scholarship has emphasized the role that employers, consultants and non-litigation arbiters

⁵⁸ Much of the litigation in *Dukes*, particularly in the appellate arguments in the Ninth Circuit, has been focused on the appropriateness of a remedial scheme that allocates money damages to class members based on a formula, rather than based on individualized proof of damages. Wal-Mart has asserted that this formulaic allocation of damages is unconstitutional, and that courts' use of such a model calls the legality of Federal Rule of Civil Procedure 23 into question. The Ninth Circuit rejected these arguments in affirming the certification decision. See *Dukes*, 474 F.3d at 1237–42. While the arguments surrounding damages allocation are fascinating, they are beyond the scope of this paper.

⁵⁹ See, e.g., Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1300–01 (2003).

⁶⁰ Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 688 n.129 (2003); Sturm, *Second Generation Discrimination*, *supra* note 51, at 529–30; Sturm, *The Practice of Workplace Equity*, *supra* note 51, at 280–81.

have come to play in crafting solutions to continuing discrimination.⁶¹ Increasingly, it seems possible that the best hope of organizational—and consequently societal—change in this arena may come from outside litigation. At the same time, litigation and the significant threat it poses to employers will likely always play a fundamental part in forcing change that might otherwise be considered too costly or too complicated. Moreover, independent of this coercive potential, there is the possibility that the remedies plaintiffs seek in litigation, the expert reports that inform those remedial requests, and consent decrees from settled cases can provide guidance to employers and consultants seeking pre-emptive workplace reform. Thus litigation and non-litigation solutions should not be considered as entirely independent and neither is likely to be entirely sufficient.

This Part will examine a range of compliance alternatives, including the steps defendants incorrectly assert that they would have to take in order to avoid class action lawsuits as well as solutions that plaintiffs and courts have proposed in litigation. It will then consider how tight the relationship is and should be between eliminating inequality and avoiding liability. That is, if an employer adopts the kinds of policies that plaintiffs, experts and courts are suggesting as tools for the elimination of stereotype and bias in decision-making and yet statistical disparities persist, should the employer be liable under Title VII in a *Dukes*-type suit or not?

A. *Quotas and Objective Testing: The Defendants' Parade of Horribles*

Defendants warn of a “parade of horrors” if courts begin to permit class action challenges to the aggregate impact of excessive unguided subjective decisionmaking.⁶² They assert that, if claims like those made in *Dukes* are allowed, employers will be pushed into one of two unpalatable choices: the adoption of quota systems to avoid the statistical imbalances that support the claims or the rigid elimination of all subjective elements of employee selection and evaluation.⁶³ Neither of these options is viable and so, employers suggest, the claims themselves must not be legitimate.

Defendants are about half correct. Neither quotas nor strictly objective testing is a workable solution in the current legal and political context. Not only is there widespread opposition to quotas as a matter of social policy, but Title VII quite explicitly states that nothing in the statute should be

⁶¹ See, e.g., Rachel Arnow-Richman, *Public Law and Private Process: Toward an Incentivized Organizational Justice Model of Equal Employment Quality for Caregivers*, 2007 UTAH L. REV. 25; Sturm, *Second Generation Discrimination*, *supra* note 51, at 566.

⁶² See JOCELYN LARKIN & CHRISTINE E. WEBBER, CHALLENGING SUBJECTIVE CRITERIA IN EMPLOYMENT CLASS ACTIONS 7 (2005), available at <http://www.impactfund.org/pdfs/Subjective%20Criteria.pdf>.

⁶³ *Id.*

interpreted to require employers to give preferential treatment to members of a protected class because of an existing workforce imbalance in representation of that class among its employees.⁶⁴ And experience teaches that when employers do adopt quotas to avoid statistical imbalances in workforce representation of different groups, they may face legal challenges to the quotas themselves.⁶⁵ Further, the Supreme Court has made it clear that even employer-initiated affirmative action plans are valid only if they do not involve strict numerical quotas.⁶⁶ Thus, any interpretation of Title VII, or any claim made under the statute, that required an employer to adopt a strict statistical balance of men and women in particular positions would be unlikely to survive scrutiny.

The elimination of subjective aspects of selection and evaluation of employees would face similar attack. Every federal court of appeals has recognized that "subjective evaluations 'are more susceptible of abuse and more likely to mask pretext.'"⁶⁷ Courts have also been careful, however, to acknowledge that "[h]onorable employers frequently use subjective criteria . . . [i]ndeed, in many situations they are indispensable to the process of selection in which employers must engage."⁶⁸ The Supreme Court has very explicitly endorsed the use of subjective evaluations, emphasizing that "[s]ome qualities—for example, common sense, good judgment, originality, ambition, loyalty, and tact—cannot be measured accurately through standardized testing techniques."⁶⁹ Thus, an argument that subjective elements of employment decision-making should be eliminated entirely is unlikely to carry much weight in any court. Moreover, for much the reasons the courts have recognized, a shift to purely objective testing would not make sense as a matter of employment policy. In most job categories, there are aspects of qualification for the position that are not amenable to objective measure and eliminating their consideration would diminish the ability of employers to select qualified employees.

⁶⁴ 42 U.S.C. 2000e-2(j) (2000); *see also* *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652 (1989) ("The only practicable option for many employers would be to adopt racial quotas, insuring that no portion of their work forces deviated in racial composition from the other portions thereof; this is a result that Congress expressly rejected in drafting Title VII."); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992–94 & n.2, (1988) (the Court of Appeals's theory would "leav[e] any class of employers with 'little choice'" but to engage in a subjective quota system of employment selection. This, of course, is "'far from the intent of Title VII'").

⁶⁵ *See, e.g., Martin v. Wilks*, 490 U.S. 755, 755 (1989) (discussing annual racial hiring goals challenged under Title VII).

⁶⁶ *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 309 (2003) (stating that "universities cannot establish quotas for members of certain racial or ethnic groups"); *Gratz v. Bollinger*, 539 U.S. 244, 272 (2003); *Johnson v. Santa Clara Trans. Agency*, 480 U.S. 616, 616–17 (1987).

⁶⁷ *Weldon v. Kraft, Inc.*, 896 F.2d 793, 798 (3d Cir. 1990) (quoting *Fowle v. C&C Cola*, 868 F.2d 59, 64–65 (3d Cir. 1989)); *see also* Hart, *supra* note 48, at 767 n.132 (listing a host of federal court decisions warning of the discriminatory potential of subjective evaluation methods).

⁶⁸ *Sengupta v. Morrison-Knudson Co.*, 804 F.2d 1072, 1075 (9th Cir. 1986).

⁶⁹ *Watson*, 487 U.S. at 991.

Further, an employer who trades all subjective evaluation for an entirely objective system of testing puts itself at risk of litigation for that decision. Title VII law entitles employees to challenge employer practices that have a disparate impact on a particular group. To succeed in a disparate impact claim, an employee must identify a particular practice and then show that the challenged practice has a statistically significant negative impact on members of a protected class.⁷⁰ While not all objective evaluation systems have this kind of disparate impact, the risk is not inconsiderable.⁷¹ And in order to avoid the risks associated with a disparate impact challenge to an objective test, employers have to spend considerable resources validating the tests and ensuring that they are consistent with the employer's business necessity. Making this kind of showing would be particularly complicated in a circumstance where the employer in fact believes that a different measure—one with some subjective element—would produce outcomes more consistent with business needs.

B. Best Practices?: Workplace Policies that May Reduce the Negative Effects of Stereotype and Bias and Limit the Risk of Liability

Defendant employers are correct that neither quotas nor elimination of subjectivity is a viable solution to the problems targeted by class action suits challenging the aggregate impact of excessive subjectivity in decision-making. They are not necessarily correct, however, that these are the only employer practices that could decrease the negative effects of stereotyping and bias at work. In fact “[l]ists of ‘best practices’ in diversity management have proliferated recently.”⁷² Moreover, remedies proposed by plaintiffs in litigation and often incorporated into consent decrees suggest steps employers might take to avoid lawsuits like *Dukes*.⁷³ The kinds of changes often voluntarily made by employers facing these suits—the kinds of changes Wal-Mart has made in the past few years—provide similar guidance. As well, some of the Supreme Court's recent

⁷⁰ See 42 U.S.C. § 2000(e)(2)(k) (2000); *New York City Trans. Auth. v. Beazer*, 440 U.S. 568, 568–69 (1979); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

⁷¹ See, e.g., Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 705–06, 755 (2006) (noting evidence that most written tests have some disparate impact).

⁷² Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AMER. SOC. REV. 589, 589 (2006). See generally UNITED STATES EQUAL OPPORTUNITY COMMISSION, BEST PRACTICES OF PRIVATE SECTOR EMPLOYERS (1998), available at http://www.eeoc.gov/abouteeoc/task_reports/practice.html. In this context, a “best practice” is generally understood to mean a practice that “promotes equal employment opportunity and addresses one or more barriers that adversely affect equal employment opportunity.” *Id.*

⁷³ See *Green*, *supra* note 60, at 705 (noting that “consent decrees like those recently agreed upon can provide valuable foundational information for other organizations seeking to avoid Title VII liability”).

Title VII jurisprudence offers instruction to employers about implementation of antidiscrimination training and prevention programs as an important aspect of compliance.

These diverse sources offer some consensus about areas in which workplace regulation may help to both prevent discrimination and limit the likelihood of liability in litigation. These areas include neutral and well-advertised posting of management positions and training opportunities; written standards of both expectation and evaluation; monitoring and appraisal of workplace statistics; and antidiscrimination policies and training. Of course, no check-list of policies will or should automatically insulate an employer from liability for discrimination. Courts must consider how policies in fact operate in the particular context of a given workplace. But the practices described here may offer a starting point for considering what kinds of basic steps employers should be taking to reduce the likelihood of stereotyping in workplace decisions. And it seems quite likely that an employer that implements this range of practices will be less susceptible to class litigation challenging organizational discrimination. This Part will elaborate on these employer practices and their relevance in a few notable recent cases, including *Dukes*.

1. *Advertising and posting positions*

One of the most commonly criticized employer practices that tends to permit subjective judgments to limit women's opportunities is the failure to make job opportunities widely available through posting and some form of objective initial screening of applicants.⁷⁴ A central allegation of the *Dukes* litigation, for example, was that the retail giant allowed individual supervisors to select candidates for management training and other promotion gateway opportunities through a "tap on the shoulder."⁷⁵ This kind of selection system for training and promotions is extremely likely to replicate the existing composition of managerial ranks.⁷⁶ Instead, employers seeking to eliminate subtle discrimination in the workplace should maintain some form of neutral, public job posting that "communicates clear and accurate information to employees about the training and experience required to become eligible for a job, about job

⁷⁴ See, e.g., *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004); *Shores v. Publix Super Markets, Inc.*, No. 95-1162-CIV-T-25(E), 1996 U.S. Dist. LEXIS 3381, at *31-32 (M.D. Fla. Mar. 12, 1996); Abigail Goldman, *Costco Manager Files Sex-Bias Suit*, L.A. TIMES, Aug. 18, 2004, at C1, available at LEXIS, News Library, LAT File.

⁷⁵ See *Dukes*, 222 F.R.D. at 148; Motion for Certification, *supra* note 8, at 8.

⁷⁶ See, e.g., Bielby Report, *supra* note 21, at 11; Scott A. Moss, *Women Choosing Diverse Workplaces: A Rational Preference with Disturbing Implications for Both Occupational Segregation and Economic Analysis of Law*, 27 HARV. WOMEN'S L. J. 1, 32-33 (2004).

conditions, and about how the job fits into a career path in the organization.”⁷⁷

Since the *Dukes* suit was first initiated, Wal-Mart seems to have taken substantial steps toward such a publicly available posting system.⁷⁸ Similarly, the settlement decree in the Home Depot litigation included implementation of a less subjective promotion application process in which employees and applicants would enter their job preferences into a computerized database, which would automatically place qualified applicants into an interview pool.⁷⁹ In the wake of the Wal-Mart class certification decision, at least one major employment defense firm explicitly recommended to its clients that it “adopt or modify a posting system so that promotional opportunities (or more of them) are publicized internally.”⁸⁰ While publicizing promotion opportunities will not eliminate subjectivity in assessment of candidates for these opportunities, it will at least give women the opportunity to apply for senior positions that, in a tap on the shoulder world, they often never learn of at all.

2. Establishing written standards

An emerging consensus about best practices for equal employment opportunity also focuses on the need to develop written standards for evaluation and to require supervisors conducting evaluations to provide explanations in writing. Without written guidelines, neither those doing evaluations nor those being evaluated know what measures are being applied. This information vacuum allows different standards of evaluation to be applied to different candidates and diminishes accountability.

The absence of written criteria may also be a significant factor in class litigation. For example, the allegations in *Ellis v. Costco* focus in substantial part on the fact that the warehouse store does not provide written criteria or procedures for filling its highest-paying store management positions and that, as a consequence, “[c]andidates who aspire to these positions often have little or no idea how these positions are filled or what they need to do to obtain them.”⁸¹ When senior management does describe the promotion criteria, these criteria are highly subjective.⁸² Wal-Mart’s approach has been much the same, with individual managers applying their own assessments of the criteria most relevant for promotion.

⁷⁷ Bielby Report, *supra* note 21, at 15.

⁷⁸ See *Wal-Mart Didn’t Act*, *supra* note 22.

⁷⁹ See Green, *supra* note 60, at 684.

⁸⁰ James J. Oh, *Dukes v. Wal-Mart: A Foreboding Class Certification Decision For Employers*, ASAP, (Littler Mendelson, Chicago, Ill.), July 2004, <http://www.littler.com/collateral/print/A59F4C0FA2B09CDB3C0F709269E2D5BE.html>.

⁸¹ Plaintiffs’ Motion for Class Certification and Appointment of Counsel at 1, *Ellis v. Costco Wholesale Corp.*, 2007 U.S. Dist. LEXIS 2103 (N.D. Cal. Jan. 11, 2007) (No. C-04-3441).

⁸² *Id.* at 9–10.

Factors like "teamwork, ethics, integrity, ability to get along with others, and willingness to volunteer," which some managers at Wal-Mart described as the standards they used for doling out advancement opportunities, are concededly relevant to all kinds of jobs, but evaluation of those qualities is likely to be biased "unless they are assessed in a systematic and valid manner, with clear criteria and careful attention to the integrity of the decision-making process."⁸³ Requiring managers to provide written explanations for decisions may counter the operation of unthinking bias because it will require them to articulate the reasons for the decision. Similarly, "requiring a supervisor to anchor an evaluation of a particular skill or characteristic of an employee with examples of specific observed behaviors rather than vague impressions can diminish the influence of subconscious stereotyping."⁸⁴

Written standards can also counteract misunderstandings about corporate policies or preferences that have discriminatory impact. Without written standards, outdated policies that have been abandoned in part because of their impact on women or minority candidates can have continuing detrimental effects as they live on in practice if not in formal policy. In Wal-Mart's case, for example, there was evident internal confusion about whether higher-level management positions required a willingness to relocate anywhere in the country. It is clear that the company's original policies required a willingness to relocate, and in fact that new managers were consistently relocated around the country.⁸⁵ That official policy seems to have been dropped in recent years, but testimony from the *Dukes* litigation makes clear that some evaluating supervisors still consider it to be one of the requirements for promotion.⁸⁶ Since it had been recognized even within Wal-Mart itself that this policy disadvantaged female applicants for management positions, clear written directives about its discontinuation would have been one step to opening more promotion opportunities to women.

3. *Establishing Antidiscrimination Policies and Education*

Of all the possible employer responses to the problem of discrimination, the one that has received the most sustained attention is the development of antidiscrimination training and internal prevention programs. This is the one area in which the Supreme Court has

⁸³ Bielby Report, *supra* note 21, at 14. Supporting this general perspective, legal scholarship on cognitive bias and its effects at work draws on and contextualizes a well-developed body of psychological research documenting the intrusion of biases into workplace decisions. See, e.g., Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186-1211 (1995).

⁸⁴ LARKIN & WEBBER, *supra* note 62, at 8.

⁸⁵ Bielby Report, *supra* note 21, at 18.

⁸⁶ *Id.* at 17-18.

affirmatively suggested that employers may avoid liability (or at least decrease their liability risks) through policy implementation. No doubt at least in part as a consequence of the Court's encouragement, employers have been fairly aggressive in implementing antidiscrimination education and prevention policies.⁸⁷ But these are also, as I discuss further below,⁸⁸ the kinds of employer policies that have received the most sustained skeptical review from scholars evaluating their effectiveness as a mechanism for challenging workplace inequalities.

What guidance there is from the Supreme Court on the measures an employer can take to comply with the federal law's antidiscrimination mandates focuses primarily on when an employer will be held vicariously liable for sexual harassment undertaken by a supervisor. In that context, the Supreme Court has recognized that Title VII was intended not only to provide a cause of action to injured employees, but also to "encourage the creation of anti-harassment policies and effective grievance mechanisms."⁸⁹ In a pair of 1998 decisions, the Court held that an employer would be vicariously liable for supervisory sexual harassment, but that the employer could avoid liability if it could demonstrate (1) that it had taken effective steps to prevent harassment and to correct for harassment if and when it was made aware of it; and (2) that the complaining employee had unreasonably failed to take advantage of available preventative or corrective measures.⁹⁰ In a similar vein, the Court held in 2000 that an employer would not be liable for punitive damages if it engaged in good faith efforts to comply with Title VII and that an employer's creation of antidiscrimination policies and education of its employees about the importance of these policies would constitute such good faith.⁹¹

Even before these Supreme Court opinions offered incentives to employers to establish antidiscrimination training and prevention policies, diversity training was a relatively popular human resources practice among larger companies.⁹² The theory behind this training is that if you sensitize people to the problem of stereotyping and suggest behavioral changes that will cut down on the incidence of bias, you may be able to reduce the negative effects of these phenomena.⁹³ Over the past three decades, companies have also grown increasingly likely to have established

⁸⁷ See Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 335–36 (2005).

⁸⁸ See *infra* Part III.C.

⁸⁹ *Burlington Indus. v. Ellerth*, 524 U.S. 742, 764 (1998).

⁹⁰ *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus.*, 524 U.S. at 764; see also *Pa. State Police v. Suders*, 542 U.S. 129, 145–46 (2004).

⁹¹ *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545–46 (1999).

⁹² See, e.g., Kalev et al., *supra* note 72, at 593.

⁹³ See *id.*

procedures for addressing complaints of discrimination internally. Creation or enhancement of this type of internal program is a common component of consent decrees settling class action discrimination claims.

4. *Monitoring and Ensuring Accountability*

A consistent message in evaluating the efficacy of employer efforts to reduce workplace discrimination is that any program must include strong central support and clear channels of accountability.⁹⁴ In order to be most effective, internally driven antidiscrimination practices must involve "a process of self-assessment that would lead to genuine accountability and organizational self-monitoring."⁹⁵ Regular monitoring and oversight of how promotion criteria are developed and applied is essential to diminishing the discriminatory effects of stereotyping in workplace decisions.⁹⁶ One of the most troubling among the employment practices challenged in *Dukes* was Wal-Mart's unwillingness to acknowledge and assess available information about pay and promotion disparities or to address the perceptions of its female employees that gender discrimination limited their opportunities in the company.⁹⁷ Available research shows that the negative impact of bias and stereotyping on employment decision-making "can be minimized when decision-makers know that they will be held accountable for the criteria used to make decisions, for the accuracy of the information upon which the decisions are based, and for the consequences their actions have for equal employment opportunity."⁹⁸

Thus, organizations that incorporate evaluation of patterns of segregation or differential status by gender into their personnel systems are

⁹⁴ See, e.g., U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, BEST PRACTICES OF PRIVATE SECTOR EMPLOYEES 7 (1997), available at http://www.eeoc.gov/abouteeoc/task_reports/practice.html [hereinafter GOOD FOR BUSINESS] ("Management must have a positive and unequivocal commitment to equal employment opportunity. Without commitment from top-level management to front-line supervisors, nothing can reasonably be expected to be done."); U.S. GLASS CEILING COMM'N, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 39 (1995).

⁹⁵ Susan Sturm, *Race, Gender and the Law in the Twenty-First Century Workplace: Some Preliminary Observations*, 1 U. PA. J. LAB. & EMP. L. 639, 676 (1998). More than a decade ago, the federal Glass Ceiling Commission made the point that any successful effort to shatter the glass ceiling would include CEO support, an emphasis on accountability, explicit confrontation of preconceptions and stereotypes, mechanisms for tracking progress and a comprehensive scope. GOOD FOR BUSINESS, *supra* note 94, at 39.

⁹⁶ See, e.g., Kalev et al., *supra* note 72, at 592 (noting that "[s]cholars and consultants alike advise ongoing coordination and monitoring of diversity progress by dedicated staff members or task forces").

⁹⁷ Similar allegations were made in *Ellis v. Costco Wholesale Corp.* See Plaintiffs' Motion for Class Certification and Appointment of Counsel, *supra* note 81, at 15-16.

⁹⁸ Bielby Report, *supra* note 21, at 19; see also Green, *supra* note 52, at 147; Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 986-87 (2006) (discussing mechanisms for "debiasing," including prohibitions on implicit bias). Courts have long recognized this as an option for safeguarding against bias. See, e.g., *Pouncy v. Prudential Ins. Co. of Am.*, 499 F. Supp. 427 (S.D. Tex. 1980).

more likely to catch troubling patterns of inequality relatively early. Similarly, monitoring employees' perceptions of the workplace culture may counter "subtle forms of bias and related problems not immediately apparent from analyses of more objective workforce data."⁹⁹ For these reasons, human resources experts recommend that companies designate specific individuals or committees with explicit responsibility for monitoring diversity progress and concerns.¹⁰⁰ Further, settlement decrees in employment discrimination cases regularly require the creation of systems to monitor employment decision-making patterns and often include outside review processes.¹⁰¹

C. *What if Compliance Does Not Work?*

An employer that adopted a human resources policy incorporating this range of "best practices" would be extremely unlikely to face serious risk of liability under a theory like that presented in *Dukes*. If these kinds of practices are in fact working to diminish the discriminatory consequences of stereotyping and bias, then it seems entirely appropriate that employers would not be liable for class claims seeking structural reform.¹⁰² Moreover, even absent clear evidence that these practices are working to eliminate discrimination, courts are unlikely to find employers responsible for class-wide discrimination when they have adopted policies that track what many have identified as "best practices." But what if the issue is not an absence of evidence that certain policies *do* work and instead the existence of evidence that they *do not*? In this Part, I will consider what the link can and should be between the effectiveness of compliance efforts for equal opportunity goals and their effectiveness for liability prevention.

Dukes, like other similar suits, challenged the aggregate effects of unguided, excessively subjective decision making. The theory behind the suits is that the employer practice of permitting unguided subjectivity allowed the stereotypes and biases of individual managers to intrude into workplace decisions. An employer that established written standards for evaluation, that required written explanations for evaluation and that

⁹⁹ Bielby Report, *supra* note 21, at 24; see also LARKIN & WEBBER, *supra* note 62, at 7–8; GOOD FOR BUSINESS, *supra* note 94, at 40.

¹⁰⁰ See, e.g., GOOD FOR BUSINESS, *supra* note 94, at 39–40; Kalev et al., *supra* note 72, at 592–93.

¹⁰¹ Green, *supra* note 60, at 685–86 (describing consent decree provisions in several cases). As Michael Selmi has noted, there may be good reason to look to outside monitoring rather than creating diversity review processes that report only internally. Selmi, *The Price of Discrimination*, *supra* note 59, at 1327–28.

¹⁰² Liability for intentional discrimination in individual cases is a separate question. One could certainly imagine a workplace that operated on terms that forestalled a class action claim challenging the aggregate effects of unguided subjectivity in decision-making but in which individuals might still face occasional instances of discrimination. My focus here is exclusively on class action litigation seeking structural reform.

monitored the outcomes of pay and promotion decision-making would not be guilty of permitting “unguided” decision making. An employer that ensured posting of positions, with publicly available minimum standards and careful attention to a decision maker’s obligation to explain his decisions would be less likely to suffer the problems that attend excessive subjectivity in selection of candidates for hiring or promotion. So there is a chance that an employer who adopted these types of policies would have created a workplace in which stereotypes and bias were visibly the exception to general practice. This assumption is one of the principal justifications for the liability theory in suits like *Dukes*, which allege that the absence of these employer practices is responsible for the operation of continued stereotyping and bias in allocation of opportunities.

Moreover, it is this assumption, at least in part, that undergirds the Supreme Court’s vicarious liability decisions. In holding that training and prevention programs should limit an employer’s liability for the discriminatory acts of its employees, the Court emphasized that Title VII’s primary goal was “to avoid harm.”¹⁰³ If an employer is making reasonable efforts to limit the harm that Title VII seeks to prevent, the Court reasoned it should be “give[n] credit” for those efforts.¹⁰⁴ But what if this assumption proves wrong? What if “best practices” either have no impact on diversity in the workplace or even have negative consequences for women’s employment opportunities?

A wave of recent scholarship on diversity training programs has raised the concern that these programs are enabling employers to avoid liability despite the fact that they do little to actually diminish stereotypes and bias in the workplace.¹⁰⁵ These critics of what sometimes appears to be unexamined judicial deference to the existence of employer antidiscrimination policies raise a number of powerful cautionary points about the risks of reliance on these internal mechanisms for enforcement of the equality ideals embodied in federal antidiscrimination laws.

Some note that the Supreme Court’s justification for its liability standards—that the existence of antidiscrimination programs will reduce the incidence of discrimination—rests on an empirically testable

¹⁰³ *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998).

¹⁰⁴ *Id.*

¹⁰⁵ See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 28 (2006); Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 3 (2001); Susan D. Carle, *Acknowledging Informal Power Dynamics in the Workplace: A Proposal for Further Development of the Vicarious Liability Doctrine in Hostile Work Environment Sexual Harassment Cases*, 13 DUKE J. GENDER L. & POL’Y 85, 86–87 (2006); Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN’S L. J. 3, 3 (2003); Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 197–98 (2004).

assumption that has not truly been tested and that may very well prove to be incorrect.¹⁰⁶ If an employer is to avoid liability because of the existence of these policies, it should perhaps only be if the policies in fact work to reduce discriminatory conduct.¹⁰⁷ Without some attention to this issue, there is a risk that internal programs will be merely “symbolic responses—responses designed to create a visible commitment to law, which may, but do not necessarily, reduce employment discrimination.”¹⁰⁸ In fact, a recent empirical study offers evidence that diversity training does not lead to an increase in diversity.¹⁰⁹ To the extent that this evidence undercuts the proffered justification for doctrines that limit liability because of these programs, it might be cause for rethinking those doctrines.

Others make the related point that the judiciary’s acceptance of employer-created training and prevention programs carries the risk that self-regulation will descend into deregulation.¹¹⁰ Sociologist Lauren Edelman and her colleagues have conducted significant empirical evaluations of the ways in which implementation of antidiscrimination laws through internal human resources managers tends to shift the focus of the laws to a more managerial approach and how these internal shifts are then exported into judicial understandings of compliance.¹¹¹ Other concerns include the risk that, by letting employers off the hook for admittedly egregious incidents of discrimination by individual employees, courts are limiting the law’s ability to address that underlying discrimination and may even be masking its occurrence.¹¹² And, finally, there is some disturbing evidence that the existence of antidiscrimination and anti-harassment policies can have unintended negative effects in the

¹⁰⁶ See Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 WM. & MARY J. WOMEN & L. 273, 275 (2000); Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147, 148 (2001); Linda Hamilton Krieger & Susan Fiske, *Behavioral Realism in Employment Discrimination Law*, 94 CAL. L. REV. 997, 1017–19 (2006).

¹⁰⁷ Krieger & Fiske, *supra* note 106, at 1061 (“When a court, like the Supreme Court in *Faragher* and *Ellerth*, justifies its adoption of an affirmative defense to otherwise meritorious harassment cases on the grounds that anti-harassment training programs and grievance procedures will prevent harassment from occurring, social science evidence on this question is of undeniable import in evaluating the defense’s merit as a normative legal rule.”).

¹⁰⁸ Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1542 (1992); see also Bisom-Rapp, *supra* note 106, at 23–24 (discussing the risk that diversity training becomes “mere window dressing”).

¹⁰⁹ Kaley et al., *supra* note 72, at 590, 604.

¹¹⁰ Estlund, *supra* note 87, at 337.

¹¹¹ See, e.g., Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC’Y REV. 497, 499 (1993).

¹¹² See Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FL. ST. U. L. REV. 959, 962 (1999).

workplace by reinforcing stereotypes or exacerbating underlying tensions.¹¹³

There has been less empirical research done of other “best practices” for equal employment opportunity. The recent study that demonstrated little positive impact from diversity training did show significant positive results when employers adopted structures of accountability, such as diversity committees or staff positions and affirmative action plans.¹¹⁴ When courts are evaluating the reasonableness of employer efforts to counter discrimination in the workplace, this kind of empirical information should inform their analysis. As the relative effectiveness of different programs becomes better known, an employer’s decision to adopt a less effective alternative in lieu of one with demonstrably better outcomes starts to seem less reasonable.

Given the information currently available, for example, caution about the unthinking embrace of internal employer training and prevention efforts is essential. Certainly, the mere existence of an antidiscrimination policy or educational program—or of any other practice—should not automatically insulate an employer from liability. Wal-Mart, for example, was not completely without any diversity programs or initiatives, but the programs it did have in place were (especially compared with its to-the-minute operations more generally) haphazard and underemphasized.¹¹⁵ Courts must be able—and willing—to conduct some independent evaluation of the effectiveness of an employer’s policy in assessing what kind of impact it should have on liability.¹¹⁶ And training and prevention programs should be tied to other organizational practices designed to minimize the negative impact of stereotyping and bias in employment decisions.

Ultimately, though, if an employer has adopted the kinds of policies that experts—even plaintiffs’ experts—recommend as best practices for meeting the demands of equal employment opportunity, there will be a point at which liability under a class-wide structural theory of

¹¹³ Bisom-Rapp, *supra* note 106, at 29–41; *see also* Kalev et al., *supra* note 72, at 604.

¹¹⁴ Kalev et al., *supra* note 72, at 590; *see also* Susan Bisom-Rapp, Margaret S. Stockdale & Faye J. Crosby, *A Critical Look at Organizational Responses to and Remedies for Sex Discrimination*, in *SEX DISCRIMINATION IN EMPLOYMENT: MULTIDISCIPLINARY PERSPECTIVES* 280–83 (Faye J. Crosby et al. eds., forthcoming 2007) (describing success rates of employer compliance efforts); Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 *HARV. J. L. & GENDER* 247 (2006) (describing a program at the University of Michigan that produced measurable results in improving women’s experiences and opportunities in the sciences through internal mechanisms of accountability and inclusion).

¹¹⁵ Bielby Report, *supra* note 21, at 22–25.

¹¹⁶ *See, e.g.*, *Williams v. Spartan Communications*, 2000 WL 331605, at *3 (4th Cir. Mar. 30, 2000) (No. 99-1566) (looking at the context in which an antidiscrimination policy was disseminated and concluding that it did not meet the employer’s affirmative defense because the employee reasonably believed the employer was not committed to the goals expressed in the policy).

discrimination will not be appropriate. This may be true even if the kinds of programs an employer has adopted have not led to the kinds of diversity gains that proponents of equal opportunity would hope for. If suits like *Dukes* are to continue to survive, courts will want to know how to distinguish an employer whose policies and practices are in line with the requirements of the law from those whose policies are not. A precise elaboration of where that distinction lies may not be possible, but consciousness about the existence of the distinction should frame both litigation arguments and compliance recommendations.

IV. CONCLUSION

The Wal-Mart gender discrimination litigation may never get to trial. It is statistically most likely, in fact, that it will not do so. If the certification decision survives further review, the case will probably settle. Employment discrimination class actions almost never actually get tried.¹¹⁷ But *Dukes v. Wal-Mart Stores, Inc.* will have had a significant impact even if it never does go beyond class certification. The case has received considerable media attention, and Wal-Mart's reform efforts, implemented largely in response to the litigation, have also generated press attention. Research suggest that employers, with increasingly sophisticated personnel advisors, are likely to look at the efforts of other companies in determining what employment policies make sense for avoiding discrimination litigation and liability. So perhaps the *Dukes* litigation will ultimately have contributed to a better understanding of the contours of compliance in this central and complex area of equal employment opportunity.

In any event, those supportive of claims like *Dukes* must have responses to the concerns raised by employers and skeptical courts about the limits of antidiscrimination law. I believe that part of that effort must include some recognition that it is possible for an employer to structure its workplace in such a way as to avoid liability in this type of litigation. This is not to say that an employer would be immune from any form of antidiscrimination litigation, but rather that it could take steps to substantially eliminate the risk of this particular kind of litigation, which pushes the employer to adopt structures that counter the effects of cultural stereotypes and bias in the workplace. Without some notion of what an employer whose workplace culture and policies complied with the requirements of Title VII would look like, there is a significant risk that courts will react against the apparently unbounded nature of these claims.

¹¹⁷ See Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 814 (2004).