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### Learning from Wal-Mart

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# LEARNING FROM WAL-MART

BY  
MELISSA HART\*

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## I. INTRODUCTION

Employment discrimination law is at a crossroads, and Wal-Mart is planted squarely at its juncture. Two years ago, the largest employment discrimination class action in history was certified to

\* Associate Professor, University of Colorado Law School. An earlier version of this piece was presented at the 2006 Annual Meeting of the Law and Society Association. I am grateful to Rachel Arnow-Richman, Jon Bauer, Emily Calhoun, Pamela Coukos, Seth Harris, Martin J. Katz, Scott Moss, Nantiya Ruan, Doug Scherer, Pierre Schlag, Carolyn Shapiro, Catherine Smith and Kevin Traskos for their helpful comments. Mitra Pemberton, Elizabeth Porter-Merrill, Michael Wall, and Michelle Witter provided superb research assistance.

pursue claims of gender discrimination against the retail giant.<sup>1</sup> With 1.6 million plaintiffs, the suit has received considerable attention for its size and national span. But what is really significant about the suit is less its remarkable scope and more its implications for the development of discrimination law. As part of a growing trend of gender discrimination class claims, *Dukes v. Wal-Mart* has the potential to push the boundaries of the law to confront the pervasive, tenacious stereotypes that continue to limit women's workplace opportunities. And because of Wal-Mart's status as the largest private employer in the United States and a retail power with unparalleled influence over its competitors, consumers, and suppliers, this suit has unique transformative potential. This article will consider *Dukes v. Wal-Mart* both as a prototype of an emerging litigation strategy and also as a case that is entirely unique.

In some ways, the *Dukes* litigation is about more than just Wal-Mart. The plaintiffs' claims of inequality in pay and promotion are typical of a particular kind of discrimination working women continue to face all over the country in a range of different workplaces. Like other recent gender discrimination class actions, this case demands that the defendant-employer take responsibility for the intrusion of cultural stereotypes and biases into the workplace. In the process, the suit raises significant doctrinal questions about federal class action law as well as the limits of federal antidiscrimination law

The *Dukes* plaintiffs filed suit in 2001 on behalf of current and former female employees of Wal-Mart, alleging that for at least the preceding four years women at Wal-Mart stores had been paid less than their male counterparts every year and in every Wal-Mart region.<sup>2</sup> This inequity had developed even though the women had, on average, greater seniority and higher performance ratings.<sup>3</sup> The plaintiffs further alleged that Wal-Mart's female employees had been promoted to management less often than comparable male employees, and that those women who were promoted had to wait longer for promotion than their male peers.<sup>4</sup> In support of their motion for class certification, filed after two years of discovery, the

1. See *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004), *aff'd*, 474 F.3d 1214 (9th Cir. 2007).

2. See Plaintiffs' Motion for Class Certification and Memorandum of Points and Authorities, at 1, *Betty Dukes et al. v. Wal-Mart*, Case No. C-01-2252 MJJ (N. D. Cal. Apr. 28, 2003) [hereinafter Motion for Certification].

3. See *Dukes*, 222 F.R.D. at 141.

4. *Id.* at 141, 146.

plaintiffs offered “[e]vidence of common company policies and practices, including subjective decision-making, a culture of corporate uniformity, and gender stereotyping.”<sup>5</sup> They supported that evidence with anecdotes of gender discrimination from stores around the country and statistical expert opinion demonstrating gender disparities that permitted an inference of company-wide discrimination in promotions and pay.<sup>6</sup>

The plaintiffs’ arguments – both the narrative of discrimination that their evidence set out and the legal strategies they chose – were strikingly similar to the claims that have been made in many class action lawsuits over the past decade.<sup>7</sup> It is a strategy for litigation that challenges both the company-wide policy to delegate pay and promotion decisionmaking authority and the individual subjective decisions of managers throughout the country. The first challenge – to Wal-Mart’s centralized policy choices – puts this case squarely within doctrinal debates about Federal Rule of Civil Procedure 23 that have dominated class litigation for close to a decade. The second aspect of this litigation – its assault on the subjective decisions made as a consequence of Wal-Mart’s delegation – raises a question that has lurked behind Title VII litigation for years: What responsibility should employers take for gender stereotypes and biases that pervade United States culture when the effects of those cultural norms are felt at work?

This question is a particularly interesting one in the context of litigation against Wal-Mart. The retail giant sought to escape class certification in *Dukes* by emphasizing its size, and the national scope of the putative class.<sup>8</sup> But perhaps that size and scope are a part of why Wal-Mart is an especially appropriate locus for the kind of

5. *Id.* at 187.

6. *See id.*

7. *See, e.g.,* Palmer v. Combined Ins. Co., 217 F.R.D. 430 (N.D. Ill. 2003); Beckmann v. CBS, 192 F.R.D. 608, 614 (D. Minn. 2000); Butler v. Home Depot, Inc., 70 Fair Empl. Prac. Cas. (BNA) 51 (N.D. Cal. 1996); Stender v. Lucky Stores, 803 F. Supp. 259 (N.D. Cal. 1992); Ellis v. Costco Wholesale Corp., No. 3:04cv03341 (N.D. Cal. Aug. 17, 2004); *see also* Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 *FORDHAM L. REV.* 659, 682-687 (2003) (describing a number of similar cases); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 *ALA. L. REV.* 741, 785-88 (2005); William T. Bielby & Pamela Coukos, “Statistical Dueling” with Unconventional Weapons: What Courts Should Know About Experts in Employment Discrimination Class Actions, *EMORY L.J.* (forthcoming 2007), available at <law.bepress.com/expresso/eps/1859>.

8. *See* *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 142 (N.D. Cal. 2004); *see also* *Class Actions: 9th Circuit Grills Wal-Mart on Appeal*, *NAT’L L.J.*, Aug. 15, 2005, at 5 (Wal-Mart’s lawyer “tried to focus his argument on the notion that the class is so big, and the circumstances of its members so diverse, that it did not satisfy the basic requirements of a class action”).

challenge the *Dukes* plaintiffs have mounted. Wal-Mart's market power gives it the ability to define American employment culture in remarkable ways. This is an element of the so-called "Wal-Mart effect."<sup>9</sup> The concept has been primarily used to discuss Wal-Mart's impact on competitors in new markets and on suppliers and manufacturers in the vertical supply chain for the merchandise it sells.<sup>10</sup> But Wal-Mart's impact on the employment market and employer standards of conduct is receiving increasing attention. The retail giant "exerts pressure on the entire [retail] sector to imitate its methods – including its treatment of workers."<sup>11</sup>

Moreover, Wal-Mart has been, since its inception, deliberate in the creation and dissemination of a corporate culture so powerful that a former chief operating officer of the company opined that "the single, most important element in the continued remarkable success of Wal-Mart is our culture."<sup>12</sup> Elements of this corporate culture contribute to an environment in which employee rights take a distant second to the superstore's organizing mantra of "always low prices." And Wal-Mart's considerable attention to shaping and enforcing a particular workplace culture presents a challenge to any argument that altering or undercutting the previously held stereotypes and unspoken biases of its supervisory employees is beyond the company's capabilities. If the company is able actively and intentionally to foster the particular culture currently pervasive in its stores, there is little reason to doubt that it could take similarly active steps to foster a workplace environment that rejects bias and stereotyping.

This article will start by considering Wal-Mart's fit into current doctrinal debates about class action litigation and the revolutionary potential of litigation like *Dukes* to challenge pervasive stereotypes and bias as they manifest at work. Part II will briefly describe the *Dukes* plaintiffs' claims. In Part III, I will explore how these claims and others like them represent the most recent iteration of a continuing debate about how and when employers should be held

9. See *infra* Part V.A.

10. See, e.g., CHARLES FISHMAN, *THE WAL-MART EFFECT: HOW THE WORLD'S MOST POWERFUL COMPANY REALLY WORKS – AND HOW IT'S TRANSFORMING THE AMERICAN ECONOMY* 9 (2006).

11. T.A. Frank, *Everyday Low Vices: How Much Should We Hate Wal-Mart*, WASH. MONTHLY, Apr. 1, 2006, at <<http://www.alternet.org/story/33294>> (last viewed Nov. 12, 2006).

12. DON SODERQUIST, *THE WAL-MART WAY: THE INSIDE STORY OF THE SUCCESS OF THE WORLD'S LARGEST COMPANY* xvii (2005).

responsible for pervasive gender-biased cultural norms. By challenging the workplace consequences of hundreds of unchecked subjective decisions, the substantive claims demand that employers take some responsibility for the stereotypes their decisionmakers bring with them to work. Because the class action device is essential to these claims, and its use is increasingly under attack in this context, Part IV will discuss the ongoing debates about class action law in which *Dukes* is now a centerpiece. *Dukes* and similar suits present challenges to the aggregate results of individual decisionmaking and they are thus, by their nature, class claims. Consequently, if procedural impediments related to class certification hamper plaintiffs' efforts to bring the substantive claims of discrimination, this kind of challenge will fail as surely as if courts reject the substance of the claims themselves. In debates over certification of employment discrimination class claims, the geographic dispersion of the class members has presented a significant hurdle for plaintiffs. This Part will examine how the *Dukes* plaintiffs overcame that hurdle with arguments that, while framed procedurally, are inevitably entwined with the merits of their claims. Part V will shift the frame, considering not Wal-Mart's similarities to but its differences from other litigation. This case, although it is part of a trend of similar litigation, has unique importance because of Wal-Mart, and in particular because of Wal-Mart's effect on other markets and Wal-Mart's remarkably strong corporate culture.

## II. THE PLOT LINE: DUKES V. WAL-MART

The *Dukes* plaintiffs, who have been certified to represent women employed in more than 3400 Wal-Mart and Sam's Club stores throughout the United States, claim that women at Wal-Mart stores have for years been paid less and given fewer opportunities for promotion to management than their male peers.<sup>13</sup> The plaintiffs trace these inequities to several sources: Wal-Mart's centralized and tightly controlled corporate culture; the company's decision to delegate essentially unguided decisionmaking authority to local managers; and top management's willful ignorance of the gender-

13. See *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 141 (N.D. Cal. 2004). The proposed class covered "[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 programs." Motion for Certification, *supra* note 2, at 37.

biased results of the exercise of that unguided discretion. The plaintiffs' claims obviously include much that is unique to Wal-Mart and to the particular circumstances of women working there. But their allegations are similar in many important ways to those made by plaintiff classes targeting gender discrimination in other workplaces. It is useful, therefore, to consider in more detail the facts that the *Dukes* plaintiffs offered the court as a starting point for analyzing the significance of this and other gender discrimination class litigation today.

### A. Centralized Workplace Policies

In writing about her experience as a Wal-Mart employee, Barbara Ehrenreich described the "cult of Sam" pervading the retail giant.<sup>14</sup> Although Sam Walton is long dead, the tightly controlled, highly centralized culture that he created remains integral to the superstore's structure. It was also integral to the *Dukes* plaintiffs' argument for class certification. The plaintiffs had to demonstrate that Wal-Mart, although it has 3400 different stores all over the United States, is actually operating under sufficiently centralized policies to permit the class to reach into all of these thousands of stores. The plaintiffs successfully persuaded the court that Wal-Mart's Bentonville, Arkansas headquarters "monitors and controls – perhaps to an extent never before seen in corporate America – the minute details of operations at its far-flung stores, down to the temperature it sets for each store's heating and cooling system and the music played in each store."<sup>15</sup> The company is strict in maintaining compliance with its expectations and "has carefully constructed and aggressively maintains a distinct, consistent corporate culture throughout its operations."<sup>16</sup>

This monitoring and control is effectuated through a personnel system that ties each store back to Wal-Mart's storied Arkansas headquarters. Each of the company's forty-one regions around the country is supervised by a regional vice president who is based in Bentonville. While these regional managers spend much of their time visiting individual stores in their regions, they meet at least once

14. BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA 143 (2002).

15. Motion for Certification, *supra* note 2, at 2.

16. *Id.*



weekly with central corporate leadership in Bentonville.<sup>17</sup> In addition, each region is covered by a regional personnel manager, again based at corporate headquarters. The regional personnel managers monitor personnel policies and assist in the recruitment and selection of individual store managers.<sup>18</sup> The regions are divided into districts, with each district containing six to eight stores. Each district is run by a district manager who works with his regional personnel manager on personnel decisions in the district's stores.<sup>19</sup> Thus, personnel decisions throughout the nation emanate from Bentonville fairly directly, and managers come from corporate headquarters into each store on a regular basis to evaluate the store's compliance with personnel and other policies.

Other Wal-Mart practices reinforce this centralized structure. 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.<sup>20</sup> 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.<sup>21</sup> "By constantly moving people around, the Wal-Mart blood circulates to the extremities."<sup>22</sup> Similarly, Wal-Mart's strong preference for promoting from within ensures that most managers will have "grown up" in the Wal-Mart culture.<sup>23</sup> "The model is to bring employees into Wal-Mart and convert them to its principles."<sup>24</sup> Both the vertical movement of promotion from within and the horizontal movement of employees to stores around the country help to ensure that a consistent message carries across all of Wal-Mart's thousands of retail outlets.

### *B. Unguided Local Discretion*

Within this carefully controlled and centrally managed organizational system, important elements of local discretion remain.

17. *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 (describing Wal-Mart's management structure and noting in particular the expectation that "each level of management was in close and constant touch").

18. Motion for Certification, *supra* note 2, at 5.

19. *Id.*

20. *Id.* at 8.

21. *Id.* at 32-33.

22. See Cora Daniels, *Women v. Wal-Mart*, FORTUNE, July 21, 2003, at 78.

23. See Motion for Certification, *supra* note 2, at 4; see also SODERQUIST, *supra* note 12, at 39.

24. Daniels, *supra* note 22.

Of particular significance to the *Dukes* plaintiffs' arguments, local supervisors at Wal-Mart stores have been given largely unguided discretion to make decisions about pay differentials, management training, and promotion opportunities. As a result of this central decision to delegate unguided discretion to local supervisors, pay and promotion decisions throughout the company are based on the subjective assessments of local managers.<sup>25</sup>

The consequences of this exercise of subjective judgment for women working at Wal-Mart are stark. 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 \$1,100 less annually than men. In salaried management positions the annual pay gap was \$14,500.<sup>26</sup> These differences could not be explained by relevant non-discriminatory factors,<sup>27</sup> and the plaintiffs' evidence strongly suggests that the 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 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."<sup>28</sup> Moreover, the plaintiffs allege that Wal-Mart is aware of how manager discretion is exercised because variations from a range of "normal" pay for any particular job show up on exception reports. However, corporate management "has done nothing to rein [managers] in or ensure this discretion is exercised fairly."<sup>29</sup>

The story with regard to promotion is similarly unhappy for Wal-Mart's female workers. In 2001, 67 percent of all hourly workers and 78 percent of hourly department managers were women.<sup>30</sup> However, among salaried management, the percentage of women was dramatically smaller. Only 35.7 percent of assistant managers, 14.3 percent of store managers and 9.8 percent of district managers were female.<sup>31</sup> This drop in female representation within management is,

25. Motion for Certification, *supra* note 2, at 16-29.

26. *Id.* at 25.

27. *Id.* at 26.

28. *Id.* at 17.

29. *Id.* at 19.

30. *Id.* at 7.

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

according to the plaintiffs, the result of Wal-Mart's failure to ensure equal access.

Like pay decisions, promotion opportunities at Wal-Mart have been doled out through a process that has been largely unguided and relies on the subjective assessment of a predominantly male supervisory group. 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.<sup>32</sup> Supervisors who have explained the criteria they used to select management trainees often mentioned a series of subjective, difficult-to-define criteria that are especially susceptible to gender bias and stereotypes.<sup>33</sup> For example, employees were selected for management training on the basis of their integrity, their ability to get along with others, and their teamwork skills.<sup>34</sup> While these qualities are relevant to management potential, when their use leads to noticeable gender disparities in selection rates, that use merits critical evaluation because these criteria are notoriously subjective and can mask gender bias.

### *C. Evidence of Gender Bias*

The gender disparities in promotion at Wal-Mart were certainly noticeable, and yet the company essentially ignored the persistent absence of women from its management ranks. Indeed, the plaintiffs argued that Wal-Mart has been aware of the imbalance in promotion of women to managerial positions for years, but has remained "singularly uninterested in why so few women are promoted or whether its pay practices disadvantage its female employees."<sup>35</sup> Consultants hired by Wal-Mart in 1998 pointed out the lack of gender equity in the management levels of the company and recommended steps to address concerns about stereotyping, but the company chose not to proceed with the recommendations.<sup>36</sup> Two years earlier, an internal task force created by the company had suggested mechanisms for increasing representation of women in management, but Wal-Mart ignored these recommendations and disbanded the

32. *Dukes*, 222 F.R.D. at 148-49.

33. *Id.*

34. Motion for Certification, *supra* note 2, at 8-21.

35. *Id.* at 3.

36. *Id.* at 15.

group in 1998.<sup>37</sup> 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.<sup>38</sup>

According to the plaintiffs, Wal-Mart's response to these concerns has been limited and problematic. In management training programs that have attempted to address the gender imbalance in the company's management ranks, the absence of women from these jobs has been explained as a consequence of women's failure to be aggressive.<sup>39</sup> Corporate managers questioned about the underrepresentation of women in the management ranks at Wal-Mart have taken the position that there is no "forcing the issue."<sup>40</sup> Senior officials and store managers express the view that recruiting more women into management would be possible only by lowering standards.<sup>41</sup>

Moreover, the *Dukes* plaintiffs provided evidence of a work environment at Wal-Mart that was pervaded by gender stereotyping and even by some very explicit gender animus. They offered widespread anecdotal evidence that business at Wal-Mart was conducted in contexts that either explicitly or implicitly excluded women. For example, despite contrary requests from their few female peers, senior management continued to follow a long tradition of discussing significant work matters while quail hunting.<sup>42</sup> Around the country, work meetings were held at Hooters restaurants and, in some cases, at strip clubs.<sup>43</sup>

The *Dukes* plaintiffs also presented stories of biased treatment women received at stores throughout the nation. At meetings of Sam's Club executives, women employees were regularly referred to as "girls" and as "little Janie Qs."<sup>44</sup> One woman said that she was advised that if she wanted to get a better job at Wal-Mart she should

37. See Margaret Cronin Fisk & Karen Gullo, *Wal-Mart Didn't Act on Internal Sex-Bias Alert, Documents Show*, BLOOMBERG.COM (updated July 15, 2005), at <<http://www.bloomberg.com/apps/news?pid=71000001&refer=us&sid=aGS8a.3TSjRQ>>.

38. Motion for Certification, *supra* note 2, at 15-16.

39. *Id.* at 14.

40. *Id.* at 15.

41. *Id.*

42. *Id.* at 12-13.

43. *Id.* at 14; see also Daniels, *supra* note 22; Geri L. Dreiling, *The Women of Wal-Mart*, ALTERNET (posted Sept. 16, 2004), at <<http://www.alternet.org/module/19901>> (describing one female employee's experience with repeated visits to strip clubs on business trips).

44. Motion for Certification, *supra* note 2, at 13-14.

“doll up” and “blow the cobwebs from her makeup.”<sup>45</sup> Another testified that her boss repeatedly justified his favoritism for men with the explanation that “God made Adam first.”<sup>46</sup> Another 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.<sup>47</sup> A male district manager apparently told a store manager who was a single mother that she should not be running a store, but should be home with her baby.<sup>48</sup> The incident that is credited with being the genesis of the *Dukes* class action suit was the moment when a female store manager saw her male equal’s pay stub 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.<sup>49</sup>

The anecdotes are, of course, unique to Wal-Mart, as are the particular statistical inequities revealed by the plaintiffs’ data. The basic plot line, however, is remarkably similar to that told in other recent gender discrimination class claims.<sup>50</sup> These cases present challenges to centralized corporate decisions to delegate significant decisionmaking authority to local managers without guidance or oversight as to the risks of gender-stereotyped or biased decisionmaking. They include statistical evidence that the aggregate consequence of this unguided delegation is lower pay and fewer promotional opportunities for women. And they support the conclusion that gender bias lies behind these numbers with anecdotal evidence of explicitly biased conduct.

45. Daniels, *supra* note 22, at 78.

46. *Id.*

47. See Liza Featherstone, *Wal-Mart Values*, THE NATION, Dec. 16, 2002, available at <<http://www.thenation.com/doc/20021216/Featherstone>> (last viewed Nov. 14, 2006) (describing testimony witnesses would provide in the litigation).

48. Motion for Certification, *supra* note 2, at 25 n.22.

49. See LIZA FEATHERSTONE, *SELLING WOMEN SHORT: THE LANDMARK BATTLE FOR WORKER’S RIGHTS AT WAL-MART* 16 (2004).

50. See, e.g., *Palmer v. Combined Ins. Co.*, 217 F.R.D. 430 (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); *Butler v. Home Depot, Inc.*, 70 Fair Empl. Prac. Cas. (BNA) 51 (N.D. Cal. 1996); *Stender v. Lucky Stores*, 803 F. Supp. 259 (N.D. Cal. 1992).

### III. WORKPLACE DISCRIMINATION AND CULTURAL NORMS

Of course, the *Dukes* litigation is challenging employment policies and practices specifically at Wal-Mart stores. The focus is on what it might be about Wal-Mart that leads to the gender inequities the plaintiffs seek to redress. But *Dukes* and other similar litigation should be recognized also as challenging a broader phenomenon than the application of a particular employer's workplace policies. These cases ask employers to take some responsibility for the workplace consequences of widely held stereotypes. The question of what responsibility employers should be required to take for social problems and attitudes that are broader than the workplace, but that find harmful expression in the workplace, has been a current running through discrimination law in various forms since the passage of Title VII more than forty years ago. The question comes up when employers argue that customer preference should be a factor in evaluating whether gender is a so-called "bona fide occupational qualification" (BFOQ) for a job. It also arises when defendants assert that the reason for low representation of women or minorities in a particular job category is not discrimination by the employer but lack of interest on the parts of the employees in filling that type of job. The relatively recent spate of large-scale class action suits challenging subjective decisionmaking – with *Dukes* being the largest and most publicized – is another iteration of this debate.

This Part will consider the courts' varied responses to litigants' efforts to challenge (or rely upon) "the accepted mores and personal sensitivities of the American people"<sup>51</sup> in employment discrimination litigation. It will begin by briefly describing the customer preference BFOQ and the lack of interest defense and the ways in which social preferences have been used in these contexts. It will then consider how gender discrimination class litigation presents similar questions.

#### *A. Early Examples of Employer Reliance on Social Norms and Stereotypes in Title VII Litigation*

The history of Title VII provides at least two clear examples of how courts consider whether employers must take responsibility for cultural norms that may be viewed as emanating from outside the workplace. In one group of cases, employers have sought to rely on

51. *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191, 1195 (E.D. Ark. 1981).

the demands of asserted customer preference to justify discrimination by claiming that satisfying that preference is a job qualification. Employers have also sought to rely on social norms to justify the absence of women in particular workplaces or positions by arguing that the best explanation for that absence is women's lack of interest in particular kinds of work rather than any employer conduct. Both of these arguments involve the use of unexamined and unsupported assumptions about "the natural order of things,"<sup>52</sup> but they have received quite different treatment in the courts.

### 1. The Customer Preference Bona Fide Occupational Qualification

Title VII's "bona fide occupational qualification" (BFOQ) defense permits employers to engage in explicit gender discrimination "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of [the] particular business or enterprise."<sup>53</sup> Since the statute's earliest days, employers have sought to extend the reach of the BFOQ beyond the physically obvious (women cannot work as sperm donors or men as wet nurses), arguing among other things that the preferences of customers should be a factor in assessing whether having employees of a particular sex is necessary to the operation of the business. The first cases raising the argument involved airlines' efforts to hire only women as flight attendants, arguing that women were better at "providing reassurance to anxious passengers, giving courteous personalized service and, in general, making flights as pleasurable as possible."<sup>54</sup> Questions of customer preference have also come up when United States companies operating in foreign countries have sought to rely on the customs and mores of those other cultures in justifying gender-based hiring decisions.<sup>55</sup> At base, what employers are arguing in these cases is that they should not be forced to sacrifice business profit in order to reshape society's gender norms.<sup>56</sup> Courts have not been willing to interpret Title VII as

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, 44 (2005).

53. 42 U.S.C. § 2000e-2(e)(1) (2000).

54. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 387 (5th Cir. 1971); *see also* *Wilson v. Sw. Airlines*, 517 F. Supp. 292 (N.D. Tex. 1981).

55. *See, e.g., Lam v. Univ. of Hawaii*, 40 F.3d 1551, 1560 (9th Cir. 1994); *Fernandez v. Wynn Oil Co.*, 20 Fair Empl. Prac. Cas. (BNA) 1162 (C.D. Cal. 1979), *aff'd*, 653 F.2d 1273 (9th Cir. 1981).

56. Michael Selmi has made the excellent point that the stereotypes at issue in this claim

offering employers an “out” to accommodate gender stereotypes in this manner. Indeed, some have argued that it was precisely this type of stereotyping that the antidiscrimination laws were enacted to eradicate.<sup>57</sup>

The only circumstance in which the customer-preference BFOQ has met with success is in cases where the defense can be described in terms of privacy, rather than purely customer preference.<sup>58</sup> For example, a hospital can hire exclusively female nurses in its labor and delivery unit because some patients express an absolute preference for female attendants in that context.<sup>59</sup> In such cases, courts interpret the defendants’ argument not as a claim about customer attitudes toward women (or men), but instead about the customers’ sensitivities regarding their own bodies and personal space.<sup>60</sup> In that context, courts exhibit a certain deference to what could be characterized as cultural or social norms. Kimberly Yuracko has argued persuasively that the courts’ deference to privacy concerns in this context reflects what she calls “consumer-focused perfectionism” – a willingness to defer to “highly valued desires for personal privacy.”<sup>61</sup> As one court expressed the idea: “It is necessary to stress that the purpose of the sex provisions of the Civil Rights Act is to eliminate sex discrimination in employment, not to make over the accepted mores and personal sensitivities of the American people in the more uninhibited image favored by any particular commission or

are most likely those of the employers themselves, not necessarily their customers. *See Selmi, supra* note 52, at 43.

57. *See, e.g., Ernest F. Lidge III, Law Firm Employment Discrimination in Case Assignments at the Client’s Insistence: A Bona Fide Occupational Qualification?*, 38 CONN. L. REV. 159, 168 & n.58 (2006). The courts’ treatment of the range of cases in which employers have sought to argue that gender is a BFOQ because the particular business seeks to sell sexual titillation in addition to its more obvious product could also be described as involving judgments about customer preference. *See Kimberly A. Yuracko, Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147 (2004). I do not discuss these cases here because, while customer preference is one aspect of the argument made in them, they are at least as focused on questions about the nature of the employer’s business and whether sexual titillation is “reasonably necessary” to the business.

58. *See, e.g., EEOC v. Sedita*, 816 F. Supp. 1291 (N.D. Ill. 1993); *Jennings v. N.Y. State Office of Mental Health*, 786 F. Supp. 376 (S.D.N.Y.), *aff’d*, 977 F.2d 731 (2d Cir. 1992); *see also Katherine T. Bartlett, Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms and Workplace Equality*, 92 MICH. L. REV. 2541, 2542 (1994); Deborah A. Calloway, *Equal Employment and Third Party Privacy Interests: An Analytical Framework for Reconciling Competing Rights*, 54 FORDHAM L. REV. 327 (1985).

59. *See, e.g., EEOC v. Mercy Health Ctr.*, 29 Fair Empl. Prac. Cas. 159 (W.D. Okla. 1982).

60. *See Sharon M. McGowan, The Bona Fide Body: Title VII’s Last Bastion of Intentional Sex Discrimination*, 12 COLUM. J. GENDER & L. 77, 78 (2003).

61. Yuracko, *supra* note 57, at 191-92.



court or commentator.”<sup>62</sup>

Thus, in this context, courts are reluctant up to a point to allow gender preferences developed outside of the workplace to limit the applicability of Title VII’s broad antidiscrimination principle. Only when the issue can be cast as a matter of privacy rather than preference does the goal of gender equality give way to other cultural norms.

## 2. The Lack of Interest Defense

In contrast to the courts’ resistance to importing gender stereotypes into Title VII through the customer preference-based BFOQ, employers have had significant success with the “lack of interest” defense. This defense allows employers to argue that the reason for poor representation of female employees in the workplace is that women just do not want certain kinds of jobs, not that employers do not want them there. As in the BFOQ context, arguments about women’s lack of interest in particular jobs seek to insulate employers from the mandates of federal law by insisting that social norms standing outside of the workplace create circumstances that excuse continued workplace sex segregation and exclusion.

In one of the most famous sex discrimination cases ever litigated under Title VII, *EEOC v. Sears Roebuck, & Co.*,<sup>63</sup> the defendant argued that the reason women worked in lower paying, lower status jobs at the department store was because they were not interested in taking the higher paying, higher status positions occupied almost entirely by men.<sup>64</sup> In response to the EEOC’s statistical demonstration that job categories at the department stores were extremely sex-segregated, Sears presented evidence that it had sought to encourage women to enter the at-issue commission sales positions, but that women had consistently turned down that opportunity.<sup>65</sup> Thus, a significant focus of the litigation turned on what responsibility Sears must shoulder for the apparent fact that the higher paying jobs were structured in ways that made them unattractive to women. Sociological and historical experts dueled in court over women’s choices, and whether they were shaped by cultural and physiological norms for which Sears had no responsibility or whether women’s job

62. *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191, 1195 (E.D. Ark. 1981).

63. 628 F. Supp. 1264 (N.D. Ill. 1986), *aff’d*, 893 F.2d 302 (7th Cir. 1988).

64. *See EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 312, 320-21 (7th Cir. 1988).

65. *Id.* at 312-14, 320-21.

choices were shaped at least in part by the ways in which the options were structured and presented – something well within the employer’s control.<sup>66</sup> The Seventh Circuit ultimately accepted Sears’ argument, affirming the district court’s determination that the employer could not be held responsible for the fact that women did not want these jobs.<sup>67</sup> As Vicki Schultz has ably demonstrated, Sears’ argument – that the reason for sex segregation is women’s lack of interest in “men’s” jobs, and that the employer should not be held liable for this social reality – was not an isolated strategy, but is an argument that has been successfully applied by employers since the earliest days of Title VII.<sup>68</sup> Indeed, only in rare instances is an employer called to account for the small numbers of women in its applicant pool.<sup>69</sup>

The success of the lack of interest defense has been a particular set-back for gender equality. As Judge Cudahy exhorted in his partial dissent from the Seventh Circuit’s opinion, the lack of interest argument is “of a piece with the proposition that women are by nature happier cooking, doing the laundry, and chauffeuring the children to softball games than arguing appeals or selling stocks.”<sup>70</sup> The defense focuses attention on institutional and social factors outside the workplace, like the tensions between work and childrearing and stereotypical preferences and characteristics of women, and reinforces the notion that these factors exist independent of workplace dynamics. By focusing on these phenomena as pervasive aspects of our culture, employers – and courts – avoid any examination of the ways in which employer norms have contributed to shaping these social norms.<sup>71</sup> “Throughout history, the dominant culture has rationalized women’s employment in low-paying, dead-end jobs as the expression of their preordained preferences for

66. *Sears*, 628 F. Supp. at 1288-1327.

67. *Sears*, 839 F.2d at 360.

68. Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1754 (1990).

69. Courts will look behind the employer’s argument that the limited applicant pool explains a lack of workplace diversity only if a plaintiff can demonstrate that the employer has in some way deterred applications by women or minorities for particular positions. *See, e.g.*, *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365-67 (1977); *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977).

70. *Sears*, 839 F.2d at 361 (Cudahy, J., concurring in part and dissenting in part); *see also* Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 818-19 (1989).

71. *See* Vicki Schultz & Stephen Petterson, *Race, Gender, Work and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1081, 1181 (1992); Selmi, *supra* note 52, at 28-30 & n.140.

suitably 'feminine' work."<sup>72</sup> Plaintiffs have for decades argued that choices employers make about how to structure their workplaces are in fact substantially responsible for women's perceived lack of interest in particular jobs, but courts have been reluctant to force employers to make changes in workplace norms in the service of challenging broader social norms.

These two examples reveal a tension in antidiscrimination law over how far-reaching laws prohibiting discrimination in employment can and should be. In the BFOQ context, cultural norms cannot be used in most instances as an excuse for workplace inequalities, while in the lack of interest cases they can be used as an excuse and are used that way. There are differences in the two contexts that might explain this different outcome. For example, the customer preference BFOQ involves an affirmative decision by an employer to exclude women while the lack of interest defense is simply an explanation for the absence of women in an applicant pool or job category. But this act/omission distinction does not alter the fact that the two examples reflect different attitudes about the spill-over of employment discrimination laws into social interactions and expectations outside of work. As the rejection of a customer preference BFOQ suggests, Title VII has forced some change in consumers' abilities to restrict their interactions with people of different races or genders. On the other hand, the success of the lack of interest defense reflects the reluctance of courts to use the employment relationship as a tool for pushing back against notions of "women's work" as distinct from "men's work," even though those categories have developed within the workplace at least as much as without.<sup>73</sup>

72. Schultz & Petterson, *supra* note 71, at 1181.

73. A third early example of the interaction between antidiscrimination law and societal discrimination can be found in employer-initiated voluntary affirmative action plans. Unlike the bona fide occupational qualification or the lack of interest defense – which raise questions about what responsibility employers *must* take for societal discrimination – affirmative action plans raise questions about what employers *may* do to address this discrimination. Few questions have proved more divisive in the interpretation of Title VII than the appropriateness of voluntary affirmative action, but the Supreme Court has held that "[s]uch a plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace." *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 642 (1987). In *Johnson*, the Santa Clara County Transportation Agency had adopted an affirmative action plan designed in part to increase the number of women in segregated job categories where women had not been traditionally employed and in which they had not been motivated to seek training. *Id.* at 621. The kind of affirmative action effort at issue in *Johnson* is an inversion of employer arguments that they should not be held responsible for sex segregation at work because women are not interested in particular positions. Rather than justifying the dearth of female applicants with a "lack of interest" defense, the Transportation Agency acknowledged the historical factors that

*B. Subjective Decisionmaking Class Actions: Another Challenge to Social Norms in Employment Litigation*

The question of employer responsibility for social and cultural norms also lurks behind the recent spate of multi-state class actions filed against some of the best-known icons of American retail culture – not only Wal-Mart, but also Home Depot,<sup>74</sup> Sears,<sup>75</sup> Costco,<sup>76</sup> Circuit City,<sup>77</sup> Coca Cola,<sup>78</sup> and others.<sup>79</sup> In all of these cases, the plaintiffs have challenged the employer's delegation of excessive, unguided decisionmaking authority to lower-level supervisors and managers who have exercised it in ways that limited opportunities for women or minorities.<sup>80</sup> These challenges push employers to take more active responsibility for the often subconscious assumptions and biases that intrude into employment decisions and that may be invisible in particular decisions, but become apparent when employment outcomes are viewed in the aggregate.

Like other plaintiffs challenging subjective decisionmaking through class litigation, the *Dukes* class is challenging a set of cultural norms that are reinforced and supported by Wal-Mart, but that cannot be attributed exclusively to the retail giant. Of course, the plaintiffs in this case and others carefully structure their arguments to focus on specific policies of the defendant-employer, seeking to distinguish the conduct of the particular defendant from other comparable employers.<sup>81</sup> And it is certainly true that some employers

contributed to a sex segregated workplace and sought to overcome those factors. While coming at the issue from a very different viewpoint, affirmative action plans do provide another important example of the close but contentious link between societal discrimination and workplace accountability.

74. *Butler v. Home Depot, Inc.*, 70 Fair Empl. Prac. Cas. (BNA) 51 (N.D. Cal. 1996) (gender discrimination).

75. *Robinson v. Sears, Roebuck & Co.*, 111 F. Supp. 2d 1101 (E.D. Ark. 2000) (race discrimination).

76. *Ellis v. Costco Wholesale Corp.*, No. 3:04cv03341 (N.D. Cal. Aug. 17, 2004) (gender discrimination).

77. *McKnight v. Circuit City Stores, Inc.*, 70 Fair Empl. Prac. Cas. (BNA) 1681 (E.D. Va. 1996) (race discrimination).

78. *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2001) (race discrimination).

79. See, e.g., Selmi, *supra* note 52, at 2 & nn.4, 5 (discussing recent cases); Michael Zimmer, *Systemic Empathy*, 34 COLUM. HUM. RTS. L. REV. 575, 599-600 (2003) (same); Lauren Weber, *The Stories Never Seem to Change*, NEWSDAY, Aug. 23, 2004, at A24 (quoting Naomi Earp, vice chair of the EEOC, as saying "I've been amazed at the kinds of companies that have charges against them. Some of them are American icons.").

80. See *supra* Part II.

81. For example, the *Dukes* plaintiffs' Motion for Certification includes extensive comparison of Wal-Mart to other retailers, arguing that Wal-Mart's record on opportunities for women lags far behind that of its competitors. See Motion for Certification, *supra* note 2, at 30-31.

are worse than others in their willingness to tolerate or encourage gender disparities in the workforce. But, underneath the critiques of specific workplace policies, there is also a challenge to something much broader that lurks behind – and is permitted to intrude because of – the particular policies. That broader something is the gender stereotyping and continued bias that is pervasive in American culture; and it is the potential for gender discrimination litigation to target those continuing cultural norms that this article considers.

When individual managers exercise their subjective judgment in making pay and promotion decisions, they are bringing their assumptions, biases, and stereotypes into the workplace and deploying them in shaping employment opportunities for their subordinates. Sometimes these subjective evaluations involve very explicit gender animus, but at least as often they will reflect stereotypes that the decisionmaker does not notice or that he perceives as neutral or benign.<sup>82</sup> From the perspective of the woman being denied an employment opportunity, the difference may be of little consequence. The tangible impact of unexamined stereotype – like the tangible effect of animus – is lower pay and fewer workplace opportunities. And there is considerable evidence that “[i]n decision-making contexts characterized by arbitrary and subjective criteria and substantial decision-maker discretion, individuals tend to seek out and retain stereotyping-confirming information and ignore or minimize information that defies stereotypes.”<sup>83</sup> So a significant problem with unguided subjective evaluation systems is that they permit stereotypes to influence decisions about hiring, pay, and promotion.<sup>84</sup>

The structure of the central arguments made in the *Dukes* certification litigation demonstrates how important broader social and cultural norms are to the challenge. In *Dukes*, like other similar litigation, the plaintiffs have relied significantly on evidence from social science experts demonstrating the existence of gender stereotyping in society at large.<sup>85</sup> Having established the prevalence of

82. 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).

83. Expert Report of William T. Bielby, at 12, *Dukes v. Wal-Mart Stores, Inc.*, Case No. C-01-2252 MJJ (N.D. Cal. Feb. 3, 2003).

84. See, e.g., 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 (2003); Hart, *supra* note 7, at 788-90.

85. See Expert Report of William T. Bielby, *supra* note 83, at 1, 10-13 (noting testimony in

that stereotyping and the harms that flow from it in the context of workplace decisions, the plaintiffs identify employer policies that allow that stereotyping to intrude into the workplace.<sup>86</sup> As social psychologist Dr. William Bielby has explained, “the issue is whether a given set of policies and practices structured the decision-making context in a way that allowed cognitive bias to place women at a systematic disadvantage in hiring, job assignment, training, promotion, or compensation.”<sup>87</sup> In other words, bias exists and will, if unchecked, limit opportunities for women. A company can adopt policies that tend to sustain or create bias, or it can adopt policies that minimize bias.<sup>88</sup>

In response, defendants have countered that plaintiffs ought to be required to demonstrate the existence and operation of stereotypes in the specific workplace and with reference to particular decisions.<sup>89</sup> If the plaintiffs cannot point to specific decisions and meet their burden of demonstrating that those decisions were infected by stereotype and bias, then, defendants argue, plaintiffs are simply challenging statistics and social norms more generally. In this way, the argument is very similar to the lack of interest defense.<sup>90</sup> The fear that defendants seek to invoke in courts is that plaintiffs are asking the courts to hold defendants responsible for social realities that exist independent of the employer.

In subjective decisionmaking claims, plaintiffs generally acknowledge that identifying precisely how often and how much stereotyping has affected specific decisions in a particular workplace is not possible.<sup>91</sup> What they can do is identify significant statistical

other cases; offering general evidence of stereotyping).

86. See, e.g., *Dukes v. Wal-Mart*, 222 F.R.D. 137, 145-55 (2003); *aff'd*, 474 F.3d 1214 (9th Cir. 2007); *Butler v. Home Depot*, 984 F. Supp. 1257, 1263-64 (N.D. Cal. 1997) (discussing expert testimony offered by plaintiffs).

87. Bielby, *supra* note 84, at 385-86; see also Expert Report of William T. Bielby, *supra* note 83, at 1 (listing other cases in which Dr. Bielby has served as an expert).

88. The *Dukes* plaintiffs, for example, challenge a series of Wal-Mart’s specific policies – like failure to post training and promotion opportunities and failure to articulate criteria for promotion – that made decisions vulnerable to bias. See *supra* Part II.C.

89. See, e.g., Defendant Wal-Mart Stores, Inc.’s Opposition to Plaintiffs’ Motion for Class Certification, at 20, *Dukes v. Wal-Mart Stores, Inc.*, No. C-01-2252 MJJ (N.D. Cal. June 12, 2003); see also Paul E. Starkman, *Discovery and Expert Issues in Employment Cases*, in *COURSE MATERIALS: EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN FEDERAL AND STATE COURTS* 71, 74 (SL021 ALI-ABA, 2005).

90. See *supra* Part III.A.2. As of yet, defendants have not had the same kind of success in this context that they had in enshrining the lack of interest defense as a standard justification for women’s under-representation.

91. See, e.g., Plaintiffs’ Reply Brief in Support of Motion for Class Certification, at 20-21, *Dukes v. Wal-Mart Stores, Inc.*, No. C-01-2252 MJJ (N.D. Cal. July 8, 2003).

inequities and challenge employer policies that fail to provide sufficient guidance and review of individual decisions. Given the prevalence in society generally of gender bias and stereotypes, and the employer's failure to monitor pay and promotion decisions, it is extremely likely (perhaps inevitable) that bias is affecting employment opportunities. And the final step in the plaintiffs' argument in these cases is the assertion that employers need to take responsibility for the demonstrable aggregate consequences of this likely bias, even if it is not possible to identify definitively which particular employment decisions were affected by it.

There has been a diverse judicial response to these claims and in particular to their challenge to the aggregate consequences of unguided subjectivity.<sup>92</sup> Some courts, like Judge Jenkins in *Dukes*, have concluded that employers may be called to take responsibility through class litigation for the aggregate results of probable bias where plaintiffs can point to workplace policies that are likely to be permitting that bias into the workplace.<sup>93</sup> Other courts have held that, while plaintiffs can challenge individual decisions where they have proof of bias in particular cases, aggregate challenges through class action suits are too disconnected from any identifiable employment policy or practice.<sup>94</sup>

But the focus on the aggregate is an essential element of these suits. The fundamental importance of aggregation or disaggregation to the outcomes in these types of litigation is at one level quite practical, and reveals itself in the dueling statistical experts presented by the parties.<sup>95</sup> Aggregation highlights discriminatory patterns that are masked by disaggregation.<sup>96</sup> Thus, defendants labor to convince courts that aggregate statistics are flawed, and that statistical imbalances in the workplace must be considered on a disaggregated basis – worksite by worksite.<sup>97</sup> Indeed, in *Dukes*, Wal-Mart urged the

92. See Hart, *supra* note 7, at 786-88.

93. See, e.g., *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 150-52 (N.D. Cal. 2004), *aff'd*, 474 F.3d 1214 (9th Cir. 2007).

94. See Hart, *supra* note 7, at 788.

95. See Bielby & Coukos, *supra* note 7, at 39-42.

96. See, e.g., Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 468 (2001) ("Behavior that appears gender neutral when considered in isolation may actually produce gender bias when connected to broader exclusionary patterns.")

97. In a similar move, defendants will characterize all anecdotal evidence of sexism and inequality as isolated examples. As Wal-Mart spokeswoman Mona Williams puts it "When you have one million people working for you, there are always going to be a couple of knuckleheads out there who do dumb things. But they are the exceptions. That's not Wal-Mart." Daniels,

court to accept statistical analyses that looked as narrowly as department by department in some stores – some 7500 different statistical runs.<sup>98</sup> Not surprisingly, the disaggregated statistical picture does not appear to demonstrate any discrimination. But when the numbers are looked at in the aggregate the gender inequities show up quite sharply.<sup>99</sup>

The discriminatory patterns that this aggregate picture reveals are widely recognized as the most pervasive form of discrimination in the workplace today. It is a form of discrimination that operates “less as a blanket policy or discrete, identifiable decision to exclude than as a perpetual tug on opportunity and advancement.”<sup>100</sup> The inequalities being challenged by the *Dukes* class are not unique to Wal-Mart (or to any of the other employers who have been defendants in similar suits). The stories these groups of plaintiffs are telling – of women being paid less than men for the same or comparable work, of women being isolated in lower-status job classifications and passed over or ignored when management opportunities arise, of male supervisors giving the “tap on the shoulder” to their friends (also male) when promotions and training programs become available – have the same basic themes as studies of women’s employment status in America more generally.<sup>101</sup> Indeed, a decade and a half ago, the federal legislature recognized that “despite a dramatically growing presence in the workplace, women and minorities remain underrepresented in management and decisionmaking positions in business.”<sup>102</sup> As part of the Civil Rights Act of 1991, Congress authorized the establishment of a “Glass Ceiling Commission,” charged with studying the pervasive artificial barriers to advancement that were then, and are still now, limiting women’s employment opportunities.<sup>103</sup> It is a kind of dis-

*supra* note 22.

98. See Bielby & Coukos, *supra* note 7, at 15-16.

99. See *infra* Part II.C.

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

101. See, e.g., Jane Eisner, *American Rythms: Women’s Job Choices: Good but not Perfect*, PHILADELPHIA INQUIRER, July 7, 2005, at A19 (describing pay and partnership opportunities for female lawyers). As Naomi Earp, Vice Chair of the Equal Employment Opportunity Commission has explained it, “Title VII has been phenomenal in opening the door for women and minorities. . . but questions of access and questions of mobility after access have become more prevalent.” Lauren Weber, *Frequency of Sexual Harassment, Discrimination Cases Holds Steady*, NEWSDAY, Aug. 23, 2004.

102. The Glass Ceiling Act of 1991, Pub. L. No. 102-166 § 202, 105 Stat. 1071 (1991).

103. *Id.*, § 203(a)(1). The Commission’s 1995 report lists many of the practices targeted by the *Dukes* plaintiffs among the problems limiting women’s opportunities for advancement. See U.S. GLASS CEILING COMMISSION, GOOD FOR BUSINESS: MAKING FULL USE OF THE



crimination that is “largely invisible because it is so common, and because it raises fundamental questions regarding our societal commitment.”<sup>104</sup> The fact that these inequalities remain commonplace makes the possibility of challenge and reform particularly important.<sup>105</sup>

To say that class litigation contesting unguided subjectivity in pay and promotion decisions represents a challenge to the broader culture is not to suggest that these suits are seeking to place responsibility on employers for problems having no connection to the workplace. First, and most obviously, what the plaintiffs are seeking to show in *Dukes* is that women have lost employment opportunities at Wal-Mart because of that company’s policies. So the problems being challenged are directly tied to work circumstances at Wal-Mart. But there is also a connection between the type of discrimination these suits challenge and employer conduct at a more general level. The social and institutional factors that help to create and sustain stereotypes about women’s desires and abilities are varied, but the traditional structures of employment certainly play a role. Moreover, employers can and do make choices that maintain those stereotypes or they can institute policies that challenge them. Recognizing these facts, these suits are consistent with a growing call for “focusing directly on the employer’s role in enabling the forms of discriminatory bias that hinder opportunities of women and minorities in the modern workplace.”<sup>106</sup> *Dukes* and similar cases mount a challenge to “corporate indifference to gender inequality”<sup>107</sup> and push employers to be more reflective, to consider the consequences of unexamined decisions in terms of the risks that widely held biases and stereotypes will affect the workplace.<sup>108</sup>

Employers should not be permitted to avoid responsibility for persistent patterns of discrimination with the argument that the

NATION’S HUMAN CAPITAL, A FACT-FINDING REPORT OF THE FEDERAL GLASS CEILING COMMISSION, 30-36 (1995).

104. Selmi, *supra* note 52, at 49.

105. This fact also raises questions about the best measures employers can take to structure their workplaces in an effort to minimize discrimination and, realistically, to insulate themselves from the risks of class litigation. See Melissa Hart, *The Possibility of Avoiding Discrimination: Considering Compliance and Liability*, 39 CONN. L. REV. (forthcoming 2007) (on file with author).

106. Green, *supra* note 7, at 145.

107. Selmi, *supra* note 52, at 46.

108. See, e.g., Joan C. Williams, *Litigating the Glass Ceiling and the Maternal Wall: Using Stereotyping and Cognitive Bias Evidence to Prove Gender Discrimination*, 7 EMPLOYEE RTS. & EMP. POL’Y J. 287 (2003).

inequalities are the result of institutional factors outside the workplace. Suits like *Dukes* mount a challenge to this complacent view and help to uncover the ways in which employer policies contribute to and continue the detrimental impact of these purportedly external influences. Perhaps as important is the possibility that opposition to discrimination of this sort in the workplace will have beneficial effects in other areas. Because “[s]ocial relations in the workplace . . . shape social relations in the society at large,”<sup>109</sup> class action litigation challenging the delegation of unguided discretion has the potential to change not only the workplace, but perhaps social norms that prevail outside of work as well. There are, of course, some questions about the efficacy of this kind of litigation.<sup>110</sup> There is certainly substantial evidence that litigation alone cannot make the kinds of changes that will provide equal access to pay and promotion opportunities for women.<sup>111</sup> But the workplace is “amenable to more effective and extensive regulation” than other “arenas of social interaction.”<sup>112</sup> It is more realistic, and arguably more legitimate, to challenge persistent gender discrimination at work than in families, churches, friendships or any of the other private relationships around which social life is structured. If the underlying stereotypes and biases that shape women’s opportunities cannot be challenged in the workplace, it is hard to see where they can be challenged.

Thus, the stakes of litigation like *Dukes* are enormous. If this type of claim enjoys steady or increased success, it may present the best available opposition to entrenched patterns of discrimination. If, instead, courts are unwilling to recognize these claims – and in particular, as discussed below, unwilling certify them for class treatment – they will eliminate a potentially significant tool not only for challenging workplace policies that limit opportunities, but also perhaps for taking on the underlying stereotypes that these policies have failed to address.

109. Cynthia Estlund, *The Changing Workplace as a Locus of Integration in a Diverse Society*, 2000 COLUM. BUS. L. REV. 331, 369.

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

111. See, e.g., Sturm, *supra* note 96.

112. Estlund, *supra* note 109, at 339.

#### IV. CLASS LITIGATION: GEOGRAPHY AND COMMONALITY

The potential for suits like *Dukes v. Wal-Mart* to challenge the stereotypes and widespread barriers that working women face in pay and promotion is dependent on plaintiffs' successful efforts to obtain class certification. The claims being pressed are fundamentally claims about aggregate effects and they need a litigation vehicle that permits the full consideration of evidence demonstrating these effects. The battle over certification in these cases is therefore as hard-fought as any merits battle would be. Moreover, one of the central arguments in the certification analysis – the debate over whether a geographically dispersed class can be certified – is essentially another form of argument about the merits of the claims and the appropriateness of aggregation.

Federal Rule of Civil Procedure 23 puts the burden on class representatives to demonstrate that their proposed class meets certain threshold requirements, set out in 23(a),<sup>113</sup> and that it fits into one of the acceptable class action categories set out in 23(b).<sup>114</sup> In employment discrimination litigation, the interpretation of Rule 23 has focused judicial attention predominantly on two significant debates: whether the claims of class members are sufficiently common (a 23(a) question) and whether a class can be certified at all if it seeks money damages (a 23(b) question).<sup>115</sup> Both of these issues were central in the debate over certification of the *Dukes* class.<sup>116</sup> The second question – about certification of class claims for money damages – has received considerable attention, both academic and judicial,<sup>117</sup> and I will not revisit it here. The first question, and in

113. These requirements include numerosity (that the class be so large as to render traditional joinder impracticable); typicality (that the named class members' claims be typical of those of absent members); commonality (that all of the class members' claims share a common question of law or fact); and adequacy of representation (that the named plaintiffs and their attorneys have the resources, skills and inclination to adequately represent the absent class members). See FED. R. CIV. P. 23(a).

114. See FED. R. CIV. P. 23(b).

115. See, e.g., Terri L. Ross, *After Dukes v. Wal-Mart*, N.Y. L.J., Dec. 6, 2004, at S4, col. 2.

116. See *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 141-87 (N.D. Cal. 2004), *aff'd*, 474 F.3d 1214 (9th Cir. 2007).

117. See, e.g., Meghan E. Changelo, *Reconciling Class Action Certification with the Civil Rights Act of 1991*, 36 COLUM. J. L. & SOC. PROBS. 133 (2003); Keith R. Fentonmiller, *Damages, Jury Trials and the Class Action under the Civil Rights Act of 1991*, 12 LAB. LAW. 421 (1997); Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813 (2004); Suzette Malveaux, *Fighting to Keep Employment Discrimination Class Actions Alive: How Allison v. Citgo's Predominance Requirement Threatens to Undermine Title VII Enforcement*, 26 BERK. J. EMP. & LAB. L. 405 (2005); Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 BYU L. REV. 305; W. Lyle

particular the significance of geographic dispersion to the commonality analysis, has received much less academic notice. It is, however, a question of considerable importance, particularly in light of the burgeoning ranks of nationwide employment discrimination class actions.

In *Dukes*, the question whether Wal-Mart had a common policy that the plaintiffs could challenge collectively was directly tied to the size and national scope of the putative class. Wal-Mart's attorneys sought to avoid certification by emphasizing the suit's "historic" size and scope, urging the court in dramatic tones that if the *Dukes* class were certified it would be breaking with precedent and creating a litigation monster unlike any seen before in United States courts.<sup>118</sup> "If this Court were to certify anything like the requested class," asserts Wal-Mart's opposition to the Motion for Certification, "it will be in uncharted waters, going where no court has ever gone."<sup>119</sup> Judge Jenkins rejected that assertion, taking the view that a company should not be able to avoid this kind of challenge under Title VII simply by

Stamps, *Getting Title VII Back on Track: Leaving Allison Behind for the Robinson Line*, 17 BYU J. PUB. L. 411 (2003); Lesley Frieder Wolf, *Evading Friendly Fire: Achieving Class Certification After the Civil Rights Act of 1991*, 100 COLUM. L. REV. 1847 (2000). When Congress passed the Civil Rights Act of 1991, it provided Title VII plaintiffs with potential for significantly greater damages than had previously been available under the statute. In particular, successful plaintiffs alleging intentional discrimination may be entitled to receive compensatory and punitive damages. See 42 U.S.C. § 1981a(a)(1). In the years since that change, a number of courts of appeals have concluded that Rule 23 does not permit certification of employment classes seeking these damages because the money damages take precedence over equitable relief and render the claims too individual for class resolution. See *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 898 (7th Cir. 1999); *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402 (5th Cir. 1998); see also Hart, *supra*, at 820. This approach has not been universally accepted in the courts of appeals. Other courts have reasoned that, so long as the purpose of the plaintiffs' suit is to achieve equitable relief – workplace reform – the inclusion of a request for monetary damages should not defeat certification under 23(b)(2). See *Molski v. Gleitch*, 318 F.3d 937 (9th Cir. 2003); *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147 (2d Cir. 2001). In its decision upholding certification in *Dukes*, the Ninth Circuit reaffirmed its position that no absolute rule should limit certification where money damages form part of a claim, so long as "stopping the illegal behavior is vital to the interests of the class as a whole." *Dukes v. Wal-Mart Stores, Inc.*, 474 F.3d 1214, 1234 (9th Cir. 2007). This split among the circuits has been unresolved for almost a decade now, and the *Dukes* case, with the massive public attention it has received and its national scope, might ultimately push the Supreme Court to take and resolve this disagreement. See, e.g., Rob Fisher, *Dukes v. Wal-Mart: Can 1.5 Million Women Save Employment Discrimination Class Actions?*, 12 CARDOZO J. L. & GENDER 1009, 1010 (2006).

118. See *Dukes*, 222 F.R.D. at 142; see also *Class Actions: 9th Circuit Grills Wal-Mart on Appeal*, NAT'L L.J., Aug. 15, 2005, at 5 (Wal-Mart's lawyer "tried to focus his argument on the notion that the class is so big, and the circumstances of its members so diverse, that it did not satisfy the basic requirements of a class action").

119. Defendant Wal-Mart Stores, Inc.'s Opposition to Plaintiffs' Motion for Class Certification at 50, *Dukes v. Wal-Mart Stores, Inc.*, No. C-01-2252 MJJ (June 12, 2003).

virtue of its mammoth size.<sup>120</sup> Instead, Jenkins concluded that, despite its size, Wal-Mart's highly regulated corporate culture and its centrally made decision to delegate largely unguided discretion in pay and promotion decisions to local supervisors constituted sufficiently common policies to permit certification.<sup>121</sup> In reaching this conclusion, the court positioned itself on one side of a growing debate in class action litigation.

Over the past several decades, courts have regularly cited the geographic dispersion of the putative class in an employment discrimination suit as a reason for denying certification.<sup>122</sup> In some of these cases, plaintiffs have unsuccessfully sought to represent nationwide classes, or classes whose membership spanned several states.<sup>123</sup> But courts have relied on concerns about geographic scope to deny certification even in more limited circumstances. In one of the earliest cases to discuss the problem of geographic dispersion, the Fourth Circuit reversed a district court's certification decision where the putative class covered twenty-four facilities located throughout North Carolina.<sup>124</sup> The Sixth Circuit recently affirmed the denial of certification where the named plaintiffs sought to represent a class of employees in four different plants in Ohio.<sup>125</sup> And in one case, the court counted geographic dispersion among the reasons for denying certification even where the putative class included members only at a single, large facility.<sup>126</sup> The court concluded that the "large size and

120. See *Dukes*, 222 F.R.D. at 142 ("Title VII, however, contains no special exception for large employers.").

121. See *id.* at 145.

122. See, e.g. *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 571 (6th Cir. 2004); *Bradford v. Sears, Roebuck & Co.*, 673 F.2d 792, 796 n.4 (5th Cir. 1982); *Doninger v. Pacific Nw. Bell, Inc.*, 564 F.2d 1304, 1311 (9th Cir. 1977); *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655 (N.D. Ga. 2001); *Zachery v. Texaco Exploration & Production, Inc.*, 185 F.R.D. 230, 238-39 (W.D. Tex. 1999); *Seidel v. GMAC*, 93 F.R.D. 122, 124-25 (W.D. Wash. 1981); *Webb v. Westinghouse Elec. Corp.*, 78 F.R.D. 645, 651 (E.D. Pa. 1978). Of course, not every court has viewed dispersion as fatal to certification. See, e.g., *Radmanovich v. Combined Ins. Co. of Am.*, 216 F.R.D. 424, 431-32 (N.D. Ill. 2003) (finding that class met commonality requirement although the class members were spread throughout the nation); *Smith v. Texaco*, 88 F. Supp. 2d 663 (E.D. Tex. 2000); *McClain v. Lufkin Indus., Inc.*, 187 F.R.D. 267, 280 (E.D. Tex. 1999); *Morgan v. United Parcel Servs. of Am., Inc.*, 169 F.R.D. 349, 356 (E.D. Mo. 1996); *Allen v. Isaac*, 99 F.R.D. 45 (C.D. Ill. 1983). Courts have long recognized that the commonality analysis can turn on questions about the "size of the work force; number of plants and installations involved . . . ; degree of geographic dispersion of the employees and of intra-company employee transfers and interchanges; [and] degree of decentralization of administration and supervision." *Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 277 (4th Cir. 1980).

123. See, e.g. *Zachery*, 185 F.R.D. at 235.

124. See *Stastny*, 628 F.2d at 278-279 & n.17.

125. See *Bacon*, 370 F.3d at 571.

126. *Lott v. Westinghouse Savannah River Co.*, 200 F.R.D. 539 (D.S.C. 2000).

unique organization” of the facility “render it more akin to [a] multi-facility operation.”<sup>127</sup> As these cases suggest, in recent years, geography has been a powerful tool for defendants opposing certification of an employment class, and any putative class that can be described as geographically dispersed faces an uphill battle.

The concern that geographic scope raises is that, because the plaintiffs are located in multiple worksites, there may be no common question that links their various claims and makes class resolution a fair and efficient approach. In the context of employment discrimination claims, courts have particularly concluded that plaintiffs located in different facilities or different states are being affected by the decisions of different supervisors, and therefore could not possibly have claims about the same discriminatory conduct. For courts to accept a geographically dispersed class, they have tended to require plaintiffs to point to a single policy that applies in the same basic manner in all of the employer’s locations or otherwise to demonstrate that the different locations are not truly autonomous.<sup>128</sup> There is a general “consensus [in the courts] that a plaintiff may represent a multi-facility class only where centralized and uniform employment practices affect all facilities in the same way.”<sup>129</sup>

In the context of gender discrimination claims like those presented in *Dukes*, this consensus on the need for a uniformly applied policy when class members are geographically dispersed has the potential to block class certification. These suits challenge the aggregate effects of many individual decisions, and the failure of employers to heed and address these effects. As discussed in Part III, it is this focus on the aggregate that gives the claims such extraordinary transformative potential. However, this focus is also a source of vulnerability. As Judge Jenkins recognized in deciding to certify the *Dukes* class, “[t]here is a tension inherent in characterizing a system as having both excessive subjectivity at the local level and

127. *Id.* at 554.

128. See *Beckmann v. CBS*, 192 F.R.D. 608, 614 (D. Minn. 2000).

129. *Reid v. Lockheed Martin*, 205 F.R.D. 655, 667-68 (N.D. Ga. 2001); see also *Stastny v. S. Bell Tel & Tel Co.*, 628 F.2d 267, 279-80 (4th Cir. 1980); *Lott*, 200 F.R.D. at 555-56; *Zachery v. Texaco Exploration & Production, Inc.*, 185 F.R.D. 230, 238-40 (W.D. Tex. 1999); *Morgan v. United Parcel Servs. of Am., Inc.*, 169 F.R.D. 349, 356 (E.D. Mo. 1996); *Seidel v. Gen. Motors Acceptance Corp.*, 93 F.R.D. 122, 124-25 (W.D. Wash. 1981); *Webb v. Westinghouse Elec. Corp.*, 78 F.R.D. 645, 651 (E.D. Pa. 1978); Michael W. Hawkins, *Current Trends in Class Action Employment Litigation*, 19 LAB. LAW. 33, 49 (2003); Gary Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Classes*, 15 LAB. LAW. 415, 437 (2000).

centralized control.”<sup>130</sup> For many courts, that tension has been irreconcilable. A majority of courts to consider similar class action claims have concluded that these challenges are best viewed as attacks on multiple decisions that individual managers and supervisors have made in exercising their subjective judgments and that the central decision to delegate authority does not transform the individual decisions into a single, uniform policy.<sup>131</sup>

A significant minority of courts to consider the issue, however, has concluded that the decision to delegate can constitute a sufficiently common policy to overcome the hurdle of geographic dispersion.<sup>132</sup> These courts have looked at systems like Wal-Mart’s and have focused their attention on the cohesiveness of a centrally generated corporate culture; the ways in which personnel structures and policies are tied to central headquarters; and the use or availability of corporate review of employment decisions individually or in the aggregate. When a company can be characterized as having tightly controlled and centralized management, which Wal-Mart certainly does, a court will be more likely to view the decision to delegate individual pay and promotion decisions as a common policy even when that delegation means that the particular decisions are being made in stores all over the nation.

These debates about whether plaintiffs in nationwide or other dispersed worksites can bring their claims as a class are necessarily framed in the language and requirements of Rule 23. However, the arguments are tightly linked with the parties’ and the courts’ views about the underlying merits of these claims. In fact, although the certification decision is not supposed to be an evaluation of the plaintiffs’ claims on their merits,<sup>133</sup> numerous courts and commentators have recognized that a merits inquiry can be difficult to disentangle from the commonality analysis.<sup>134</sup> Particularly in cases like *Dukes*, the question of whether the employees are affected by a

130. *Dukes*, 222 F.R.D. at 152.

131. See Hart, *supra* note 7, at 787 & n.248.

132. See *id.*; see also Daniel S. Klein, *Bridging the Falcon Gap: Do Claims of Subjective Decisionmaking in Employment Discrimination Class Actions Satisfy the Rule 23(a) Commonality and Typicality Requirements?*, 25 REV. LITIG. 131,153 (2006).

133. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

134. See, e.g., *Staton v. Boeing, Co.* 327 F.3d 928, 954 (9th Cir. 2003); *Stastny v. Southern Bell*, 628 F.2d 267, 274-75 (4th Cir. 1980); *Ellis v. Elgin Riverboat Resort*, 217 F.R.D. 415, 423 (N.D. Ill. 2003); *Orlowski v. Dominick’s Finer Foods, Inc.* 172 F.R.D. 370, 373-74 (N.D. Ill. 1997); see also David S. Evans, *Class Certification, The Merits and Expert Evidence*, 11 GEO. MASON L. REV. 1, 7-9 (2003).

common policy – the certification question – can look very similar to the question whether the employer has a discriminatory policy – the merits question. And the question of whether geographic dispersion should defeat certification is fundamentally tied to a judgment about the appropriateness of suits challenging the aggregate effects of decisions made through the exercise of unguided discretion. Indeed, given that most class actions that are certified settle before they go to trial,<sup>135</sup> arguments about geographic dispersion and the characterization of a policy of delegation as either centralized and uniform or not may be the closest that the courts get to truly addressing the particular claims of discrimination made in these suits.

## V. THE WAL-MART DIMENSION

Gender discrimination class action suits challenging the aggregate impact of unchecked subjective decisionmaking on women's pay and promotion opportunities are a fundamental step in efforts to break through the glass ceiling that seems to impose a persistent barrier to workplace equality. As the largest such class action suit in history, and one that has been well-litigated and widely publicized, *Dukes v. Wal-Mart* is an important piece of a larger project. But the case is also significant in unique ways simply because Wal-Mart is the defendant. Some of this significance flows from Wal-Mart's impact beyond its own borders – the Wal-Mart effect. Another important element of the case is Wal-Mart's vaunted corporate culture, often referred to as the Wal-Mart Way.<sup>136</sup> It is a conservative culture in fundamental ways that stem from the company's founder and its roots, and it is a culture focused constantly and almost exclusively on the value of low prices. Both of these aspects of the Wal-Mart culture may have consequences for Wal-Mart's women. And, independent of whether the current culture at Wal-Mart is bad for the women who work there, the idea that Wal-Mart can hire and mold employees to aspire to certain values – which seems to be a central organizing principle of the Wal-Mart Way – has its own implications for the company's responsibility for the workplace choices made by local managers. This Part will consider how these two phenomena – the Wal-Mart Effect and the Wal-Mart Way – give

135. Because the vast majority of class action suits settle after certification, the class certification issue is frequently the only fully litigated stage of a suit. See Hart, *supra* note 7, at 780.

136. See, e.g., Motion for Certification, *supra* note 2, at 1; SODERQUIST, *supra* note 12.



this suit unique potential and importance.

### A. The Wal-Mart Effect

Economists and social scientists have used the term “the Wal-Mart effect” to describe both Wal-Mart’s impact on market competitors when it enters a new community and its controlling influence over its suppliers (and their producers and manufacturers), who struggle to keep up with the competitive demand to keep prices low.<sup>137</sup> In both instances, Wal-Mart’s overwhelming market power allows it to control the choices of other players to a “nearly unfathomable” extent.<sup>138</sup> As to competitors in local markets, Wal-Mart’s entry into a new community shuts down smaller businesses that cannot compete on price, and that do not get the government benefits that Wal-Mart has regularly commanded.<sup>139</sup> And in terms of the vertical supply chain, Wal-Mart’s mandate of “every day low prices” affects manufacturing standards around the globe as producers struggle to meet Wal-Mart’s maximum price point.<sup>140</sup>

Wal-Mart is the largest company in the world.<sup>141</sup> It is the largest grocer in the U.S. and the leading seller of jewelry, furniture, dog food, and toys.<sup>142</sup> An average of 100 million customers each week

137. See, e.g. FISHMAN, *supra* note 10; Nancy Cleeland, *The Wal-Mart Effect: Seams Start to Unravel*, L.A. TIMES, Nov. 24, 2003, at A19 (part of three-day series); Nancy Cleeland et al., *The Wal-Mart Effect; Scouring the Globe to Give Shoppers an \$8.63 Polo Shirt; Wal-Mart, Once a Believer in Buying American, Extracts ever Lower Prices from 10,000 Suppliers Worldwide. Workers Struggle to Keep Pace*, L.A. TIMES, Nov. 24, 2003, at A1 (part of three-day series); Nancy Cleeland & Abigail Goldman, *The Wal-Mart Effect: Grocery Unions Battle to Stop Invasion of the Giant Stores; Wal-Mart Plans to Open 40 of its Nonunion Supercenters in California. Labor Is Fighting the Expected Onslaught, but the Big Retailer Rarely Concedes Defeat*, L.A. TIMES, Nov. 25, 2003, at A1 (part of three-day series); Abigail Goldman & Nancy Cleeland, *The Wal-Mart Effect: An Empire Built on Bargains Remakes the Working World; Wal-Mart is so Powerful that It Moves the Economies of Entire Countries, Bringing Profit and Pain. The Prices Can’t Be Beat, but the Wages Can*, L.A. TIMES, Nov. 23, 2003, at A1 (part one of a three-day series); Evelyn Iritani & Nancy Cleeland, *The Wal-Mart Effect: Audit Stance Generates Controversy*, L.A. TIMES, Nov. 24, 2003, at A19 (part of three-day series); see also Stephan J. Goetz & Hema Swaminathan, *Wal-Mart and County-Wide Poverty*, 87 SOC. SCI. Q. 211, 212 (2006) (noting the term “Wal-Mart effect” and observing that “[b]ecause of its size, power, and technological sophistication, the chain is revolutionizing not only the industrial organization of local retail trade, but also the entire wholesale, transportation, and logistics sector.”)

138. Bob Thompson, *Cart Blanche? The Megamarket’s Savings Don’t Come Cheap*, WASH. POST, Apr. 13, 2006, at C01.

139. See, e.g. Goldman & Cleeland, *supra* note 137, at A1.

140. See, e.g. Charles Fishman, *The Wal-Mart You Don’t Know*, FAST COMPANY, Dec. 2003, at 68, at <<http://www.fastcompany.com/magazine/77/walmart.html>> (last viewed Nov. 19, 2006).

141. *Id.*

142. Goldman & Cleeland, *supra* note 137.

shop at the superstore.<sup>143</sup> Wal-Mart estimates that in 2004, 90 percent of Americans – about 270 million people – shopped in one of its stores at least once.<sup>144</sup> It has been described as “a retail planet with a gravitational pull so strong it shapes our economic universe in ways we can barely comprehend.”<sup>145</sup>

One of the ways it shapes that universe is in terms of employment policies. Wal-Mart is the nation’s largest private employer, with a workforce representing almost 1 percent of total employment in the United States.<sup>146</sup> And links between the consumer culture the store relies upon and the employment culture it has created have drawn increasing fire. Critics charge that “Wal-Mart’s stingy compensation policies – workers make, on average, just over \$8 an hour, and if they want health insurance, they must pay more than a third of the premium – contribute to an economy in which, increasingly, workers can afford to shop only at Wal-Mart.”<sup>147</sup> The company has faced growing pressure from myriad suits challenging the falsification of employee records and coercion of employees to work off the clock in order to keep total payroll costs down.<sup>148</sup> In a much-publicized case, Wal-Mart was caught and fined for employing undocumented immigrants to clean its stores.<sup>149</sup> The company was once again embarrassed after the surfacing of an internal memorandum that included, as part of a plan to revise Wal-Mart’s

143. See Jim Hopkins, *Wal-Mart’s Influence Grows*, USA TODAY, Jan. 29, 2003 at 1B.

144. See John Wagner & Michael Barbaro, *Md. Passes Rules on Wal-Mart Insurance*, WASH. POST, Apr. 6, 2005, at A1.

145. Thompson, *supra* note 138; see also Susan Strasser, *Woolworth to Wal-Mart: Mass Merchandising and the Changing Culture of Consumption*, in *WALMART: THE FACE OF TWENTY-FIRST CENTURY CAPITALISM* 53 (2006) (“Wal-Mart was so vast, investment banking adviser Peter J Solomon explained in 2004, ‘that the principal strategic question for every American retailer and consumer goods manufacturer is: “What’s my relationship to Wal-Mart?””).

146. See David Neumark et al., *The Effects of Wal-Mart on Local Labor Markets*, 1 (Nat’l Bureau of Econ. Research, Working Paper 11782, 2005), available at <<http://www.nber.org/papers/w11782>>. See also Ellen Israel Rosen, *The Wal-Mart Effect: The World Trade Organization and the Race to the Bottom*, 8 CHAP. L. REV. 261, 262 (2005).

147. Liza Featherstone, *Wal-Mart’s Women – Employees and Customers – in Unhealthy Relationship*, THE SEATTLE POST-INTELLIGENCER, January 2, 2005.

148. See, e.g., *Theibes v. Wal-Mart Stores, Inc.*, No. Civ. 98-802-KI, 2004 WL 1688544, at \*1 (D. Ore. July 26, 2004); *Wal-Mart Faces Class-Action over Off-the-clock Work*, USA TODAY, Nov. 6, 2003, at <[http://www.usatoday.com/money/industries/retail/2003-11-06-walmart-off-the-clock\\_x.htm](http://www.usatoday.com/money/industries/retail/2003-11-06-walmart-off-the-clock_x.htm)>; Steven Greenhouse, *U.S. Jury Cites Unpaid Work at Wal-Mart*, N.Y. TIMES, Dec. 20, 2002, at A26.

149. See, e.g., Stephanie Armour & Donna Leinwand, *Wal-Mart Cleaners Arrested in Sweep*, USA TODAY, Oct. 23, 2003, at <[http://www.usatoday.com/money/industries/retail/2003-10-23-walmart-arrests\\_x.htm](http://www.usatoday.com/money/industries/retail/2003-10-23-walmart-arrests_x.htm)>; Marcus Kabel, *Affidavit Says Wal-Mart Officials Knew Illegal Workers Were Hired*, THE MODESTO BEE, Nov. 9, 2005, available at <<http://www.modbee.com/business/story/11453970p-12195493c.html>>.

benefits strategy, the recommendation that all jobs at the company be revised to include some physical activity so that the store would attract more healthy – and therefore less costly – employees.<sup>150</sup> Most recently, Wal-Mart cashiers in Texas made the news with a request for an injunction against the retail giant, asserting that managers were threatening to fire employees who joined a lawsuit claiming that they were forced to work off the clock.<sup>151</sup>

Even state legislatures have begun to put pressure on the superstore's employee benefits (or lack thereof). In Maryland, the legislature last year passed a law requiring companies with more than 10,000 employees to pay at least 8 percent of their payroll on health benefits.<sup>152</sup> Though neutrally worded, the law was universally understood to be targeted at Wal-Mart. Other states are considering similar laws, all of them fairly explicitly driven by Wal-Mart's notorious reliance on government-funded health insurance for its employees.<sup>153</sup> While a federal court quickly declared the Maryland law preempted by federal statute,<sup>154</sup> and the direct effect of the law is therefore likely to be minimal, the critical trend is undeniable. Lurking behind all of these challenges is the reality that one significant way that Wal-Mart keeps prices low is through its employment policies.

Wal-Mart does not act in isolation. "Wal-Mart's decisions influence wages and working conditions across a wide swath of the world."<sup>155</sup> At a conference organized last fall by the retailer itself, economists estimated that Wal-Mart's entry into a market depresses payrolls in that market by an average of 5 percent.<sup>156</sup> At least one economist has suggested that Wal-Mart's employment policies affect retail employment throughout the nation, contributing to slower wage

150. See Reviewing and Revising Wal-Mart's Benefits Strategy: Memorandum to the Board of Directors from Susan Chambers, Wal-Mart Board of Directors Retreat FY2006, at 15 (on file with author).

151. See Margaret Cronin Fisk & Lauren Coleman-Lochner, *Wal-Mart Cashiers Ask Judge to Bar Threats to Workers*, BLOOMBERG.COM, at <[http://www.bloomberg.com/apps/news?pid=20670001&refer=&sid=a\\_Nj4JQ7qvGg](http://www.bloomberg.com/apps/news?pid=20670001&refer=&sid=a_Nj4JQ7qvGg)> (last updated Aug. 21, 2006).

152. See Associated Press, *Md. Forces Wal-Mart to Spend More on Health Care*, MSNBC, Jan. 13, 2006, at <<http://www.msnbc.msn.com/id/10827217/>>.

153. See *id.*

154. See Reed Abelson & Michael Barbaro, *Judge Gives Wal-Mart Reprieve on Benefits*, N.Y. TIMES, July 20, 2006, at C1, available at <<http://www.nytimes.com/2006/07/20/business/20walmart.html>> (last viewed Nov. 20, 2006).

155. Goldman & Cleeland, *supra* note 137.

156. See Neumark et al., *supra* note 146, at 27. See also Goetz & Swaminathan, *supra* note 137, at 223 (concluding that Wal-Mart contributes to an increase in county-wide poverty rates in areas where the stores are located).

growth in the entire retail sector.<sup>157</sup> The intense pressure the company puts on its suppliers to constantly lower their prices “means that vendors have to be as relentless and as microscopic as Wal-Mart is at managing their own costs. They need, in fact, to turn themselves into shadow versions of Wal-Mart itself.”<sup>158</sup>

Given the superstore’s remarkable influence on how Americans shop and how they work, any litigation involving Wal-Mart is almost certain to have repercussions for workers both inside and outside of the company. This is another iteration of the Wal-Mart effect and it is one that gives *Dukes* particular significance. Wal-Mart may be an ideal defendant for this type of litigation because changes at Wal-Mart may force – or at least permit – changes in other workplaces.<sup>159</sup> As a group of federal legislators wrote in a letter to Wal-Mart last year, “Wal-Mart has a unique role and responsibility to do the right thing and set the best standard for America” because of its status as the largest private employer and wealthiest company in the nation.<sup>160</sup> Wal-Mart’s extraordinary market power and its impact on such things as retail wage rates make it reasonable to wonder whether, if Wal-Mart adopts more progressive and reflective employment policies, other companies will follow suit.

The incredible publicity that the suit against Wal-Mart has generated may position the case to serve as a catalyst for broader change as well. Nothing that happens at Wal-Mart seems to go unnoticed, and this case is no exception. As one commentator has put it: “Outside some small circles, gender discrimination is rarely discussed. Most people acknowledge that it probably happens in isolated instances, but few seem to think there is any deliberate attempt to uniformly discriminate against women. But along comes the Wal-Mart case, and you start thinking.”<sup>161</sup>

157. See Hopkins, *supra* note 143.

158. Fishman, *supra* note 140; see also David Roberts, *Wal-Mart’s Green Makeover*, TOMPAINE.COMMON SENSE, Aug. 8, 2006, at <[http://www.tompaine.com/articles/2006/08/08/walmarts\\_green\\_makeover.php](http://www.tompaine.com/articles/2006/08/08/walmarts_green_makeover.php)> (last viewed Nov. 20, 2006) (noting that “Wal-Mart’s notorious monopsony powers force suppliers to bend to its will or suffer.”).

159. This possibility has been suggested by the plaintiffs’ lawyers in the suit, one of whom has commented that a possible “effect of the lawsuit could be reversing the trend of other retailers emulating Wal-Mart’s business model.” Ritu Bhatnager, *Dukes v. Wal-Mart as a Catalyst for Social Activism*, 19 BERKELEY WOMEN’S L.J. 246, 252 (2004) (Telephone Interview with Debra Smith, Attorney, Equal Rights Advocates (Jan. 20, 2004)).

160. Joel Rothstein, *U.S. Lawmakers Seek Wal-Mart Pay Data*, REUTERS, May 12, 2005.

161. Michael Kinsman, *Career Pros: Wal-Mart Case an Eye Opener*, CALIF. JOB J., Sept. 12, 2004, at <[http://www.jobjournal.com/article\\_printer.asp?artid=1244](http://www.jobjournal.com/article_printer.asp?artid=1244)>. In his recent book evaluating Wal-Mart’s influence on the American economy, Charles Fishman describes a study of Wal-Mart shoppers that revealed “the depth of feeling Americans have about what is,

The *Dukes* class action has already changed Wal-Mart. Even if an *en banc* panel of the Ninth Circuit reverses the recent decision affirming certification, or if the Supreme Court ultimately weighs in for Wal-Mart, the impact of this cases on the retail grant will have been momentous.<sup>162</sup> For example, Wal-Mart is developing a system for posting promotion opportunities, eliminating the word-of-mouth system that operated to women's detriment.<sup>163</sup> It has also instituted a formal mentoring program to identify and encourage women and minorities interested in pursuing management positions.<sup>164</sup> And company officers have been informed that they will lose bonus potential if they don't meet diversity goals.<sup>165</sup> These changes may not shatter the glass ceiling, but they could lead to progress in that direction. Even if change at Wal-Mart does not lead to change in other workplaces, Wal-Mart is such a huge employer that the simple fact of increased attention to equality in pay and promotion within the company's own walls will affect hundreds of thousands of female employees. But the Wal-Mart effect suggests that this suit will have ripple effects, just as Wal-Mart's actions do in so many other contexts.

### B. The Wal-Mart Way

Like most corporations today, Wal-Mart has worked hard to create a strong and defined corporate culture. Indeed, the development of a corporate culture – a “deeply felt system of shared values and assumptions . . . that explains how members of the organization think, feel, and act”<sup>166</sup> – is generally viewed as essential

fundamentally, just a place to shop.” FISHMAN, *supra* note 10, at 220. Wal-Mart garners attention and debate in ways that really are unusual.

162. *Wal-Mart Did Not Act on Internal Sex-Bias Alert, Documents Show*, BLOOMBERG.COM, July 15, 2005, at <<http://www.bloomberg.com/apps/news?pid=71000001&refer=us&sid=aGS8a.3TSjRQ>> (quoting a Wal-Mart vice president: “clearly the *Dukes* case has put additional focus on this and caused us to move more quickly than we already were moving”).

163. *See id.* (noting that Wal-Mart began posting management trainee openings in early 2003).

164. *See id.*; *see also* Wendy Zellner, *A Wal-Mart Settlement: What it Might Look Like*, BUSINESS WEEK ONLINE, July 5, 2004, at <[http://www.businessweek.com/print/magazine/content/04\\_27/b3890047\\_mz011.htm](http://www.businessweek.com/print/magazine/content/04_27/b3890047_mz011.htm)>.

165. *See, e.g., Wal-Mart Did Not Act on Internal Sex Bias Alert, Documents Show, supra* note 162; *Wal-Mart Sex Bias Suit Gets Class Certification*, BLOOMBERG.COM June 22, 2004, at <[http://quote.bloomberg.com/apps/news?pid=10000006&sid=aGV\\_0AtQIy48&refer=home](http://quote.bloomberg.com/apps/news?pid=10000006&sid=aGV_0AtQIy48&refer=home)>.

166. PRICE M. COBBS & JUDITH L. TURNOCK, CRACKING THE CORPORATE CODE, at xi (2003); *see also* Expert Report of William T. Bielby, *supra* note 83, at 7 & nn.21-23 (describing corporate culture as “a shared set of values and beliefs about how things are done in the organization”).

to a company's success. In recent years human resources and business literature has espoused the view that "the right corporate culture . . . will increase corporate performance and employee motivation, while the wrong corporate culture will . . . endanger a company's 'very survival'."<sup>167</sup> Moreover, an employee's ability to conform to work culture has taken on growing significance in determining success on the job.<sup>168</sup> Thus, many organizations (and Wal-Mart is certainly one of these) devote considerable attention to the creation and dissemination of a unique corporate work culture.

At Wal-Mart, the culture has "been woven into the very fabric of the company."<sup>169</sup> Employees are trained in the Wal-Mart Way at their first orientation meeting, and it is reinforced in mandatory weekly store meetings.<sup>170</sup> For these meetings, store managers are provided with detailed "corporate 'culture' lessons and accompanying training materials."<sup>171</sup> At the company's headquarters, senior managers also attend weekly Saturday morning meetings, one of which each month is dedicated to corporate culture.<sup>172</sup> Corporate culture is included as a topic in the company newsletter, *Wal-Mart World*.<sup>173</sup> Wal-Mart's website includes an entire section on "culture."<sup>174</sup> Senior managers are responsible for communicating the messages about Wal-Mart culture to the field. "Wal-Mart evaluates managers on their understanding of the culture and rewards employees who show a strong commitment to it."<sup>175</sup>

The importance of this culture to Wal-Mart's identity raises two

167. Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 637 (2005).

168. *See id.* at 631.

169. SODERQUIST, *supra* note 12, at xvii.

170. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 141 (N.D. Cal. 2004); *see also* EHRENREICH, *supra* note 14, at 143-44 (describing the orientation process).

171. Motion for Certification, *supra* note 2, at 11.

172. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 151 (N.D. Cal. 2004); *see also* SODERQUIST, *supra* note 12, at 38-39 (describing the monthly Saturday Morning Meeting "dedicated . . . to discussing and reinforcing our culture").

173. Expert Report of William T. Bielby, *supra* note 83, at 7.

174. *See Wal-Mart Culture*, WAL-MART, at <<http://walmartstores.com/GlobalWMStoresWeb/navigate.do?catg=251>> (last viewed Nov. 20, 2006).

175. Motion for Certification, *supra* note 2, at 11; *see also* ROBERT SLATER, THE WAL-MART DECADE 109-10 (2003) (quoting current Wal-Mart CEO as saying "You have to be less tolerant of people who don't get the culture."); SODERQUIST, *supra* note 14, at 41 ("We put a lot of faith in our managers and planning teams and count on them to spread the culture."). The uniformity and pressure of Wal-Mart's national employment culture has come up in other lawsuits as well. In the myriad suits alleging that Wal-Mart forced employees to work unpaid overtime, witnesses have testified that managers whose labor costs were thought to be too high "were singled out during the company's weekly in-house satellite broadcasts." Rosen, *supra* note 146, at 262.

questions for the kinds of gender discrimination claims the *Dukes* litigation is targeting. One is a question of substance: is there something about the content of Wal-Mart's culture that contributes to discrimination? And the second is a question about employer power: if Wal-Mart has the tools to disseminate and enforce such a strong culture, can the employer use those tools to foster a culture of nondiscrimination and should it be held responsible for not doing so?

As to the first question, there is little immediately apparent in the Wal-Mart culture that directly encourages gender discrimination. It is certainly a traditional company, often cited for its "red-state" credentials and its "ideology of family, faith and small town sentimentality."<sup>176</sup> Some of the plaintiffs' anecdotes of discrimination – in particular the stories of women being told men should make more money because men are the breadwinners<sup>177</sup> – may share these ideological roots. And Wal-Mart's long-standing policy that candidates for store manager positions must be willing to relocate anywhere in the country assumes a traditional family model, with the flexibility that a household with two working adults is unlikely to have. Such a policy is at best willfully ignorant of the different impact such a requirement is likely to have on female candidates.<sup>178</sup>

But Wal-Mart's corporate culture is focused almost entirely on the company's central goal – to provide low prices on its merchandise. The tag line for Wal-Mart's trademark is "Always Low Prices. *Always*." This concept is what Wal-Mart was built on, and it is still the centerpiece of the company's operating philosophy.<sup>179</sup> This single-minded focus has negative consequences for all Wal-Mart employees. Labor costs are one of the most substantial costs of the retail business, and Wal-Mart's mission is to keep its costs as low as possible

176. Nelson Lichtenstein, *Wal-Mart: A Template for Twenty-First Century Capitalism*, in *WAL-MART: THE FACE OF TWENTY-FIRST CENTURY CAPITALISM* 3, 16 (Nelson Lichtenstein, ed. 2006); see also SODERQUIST, *supra* note 12, at 45 ("I can unequivocally say that Sam [Walton] founded the company on the Judeo-Christian principles found in the Bible."); Daniel Gross, *Shop the Vote: Wal-Mart=Bush. Costco=Kerry. Costco's Winning*, SLATE, Aug. 10, 2004, at <<http://www.slate.com/id/2104988/>> (describing Wal-Mart's "red-state" status).

177. See *supra* Part II.C.

178. The *Dukes* plaintiffs allege that "Wal-Mart management has long been aware that its relocation requirement had an adverse impact on female employees seeking management promotions, and that the requirement led some managers to avoid considering women for management." Motion for Certification, *supra* note 2, at 32. Apparently, Sam Walton recognized not long before he died in 1992 that this requirement had a disproportionate effect on the opportunities of women to enter management. See *id.* at 33.

179. See, e.g., FISHMAN, *supra* note 10, at 225-27; see also *id.* at 30 (describing the culture as "instinctively, reflexively frugal.")

to keep its prices as low as possible.<sup>180</sup> The consequence for employees is relatively low wages and minimal benefits.<sup>181</sup> The effort to keep costs low may well also explain much of the misconduct that has been brought to light in litigation against the company in the past few years.<sup>182</sup> It is difficult, however, to attribute wide gender disparities in pay and promotion at Wal-Mart to this bargain-driven aspect of the company culture.

What is interesting about Wal-Mart's culture for the problem of gender discrimination may be less its particular content and more the company's focused and apparently effective efforts to disseminate its message to all employees. "At Wal-Mart, we are intentional about dispersing our culture throughout the company and determined that our values and beliefs be on the mind of every associate."<sup>183</sup> In addition to the considerable training and emphasis on culture for every employee, Wal-Mart never opens a store with a manager new to the company, moves managers around from one store to another, and grows managers from the hourly ranks to be certain that its supervisory ranks are well-versed in the corporate culture.<sup>184</sup>

The company's ability to disseminate and reinforce a consistent cultural message presents a challenge to one of the principal arguments against holding employers responsible for the intrusion of gender and other stereotypes into the workplace. Some have argued that employers cannot be held accountable for supervisory decisions that are infected with stereotyping or subconscious biases because the employer is not in a position to control those stereotypes.<sup>185</sup> There is considerable, and increasing, evidence that people can control, or more likely correct for, their stereotypical assumptions when they are pressured to do so.<sup>186</sup> If Wal-Mart has the tools to create a workforce

180. *See id.* at 227.

181. *See, e.g.* Steven Greenhouse & Michael Barbaro, *At Wal-Mart, A Push to Cut Worker Costs*, N.Y. TIMES, Oct. 2, 2006, at A1, A13 (discussing the company's shift to increasing part-time employees, motivated in part by desire to keep costs down).

182. *See supra* Part V.A. *See also* FISHMAN, *supra* note 10, at 47, 227.

183. SODERQUIST, *supra* note 12, at 33.

184. *See id.* at 39-40; *Did You Know?*, WAL-MART, at <<http://walmartstores.com/GlobalWMStoresWeb/navigate.do?catg=215>> (last viewed Nov. 20, 2006) (noting that 76 percent of store managers started in hourly positions).

185. *See, e.g.* Amy Wax, *Discrimination as Accident*, 74 IND. L. J. 1129, 1133 (1999).

186. *See e.g.*, Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 980-88 (2006) (describing how antidiscrimination law could target implicit bias in part through encouraging employers to adopt mechanisms to "debias"); Audrey J. Lee, *Unconscious Bias Theory in Employment Litigation*, 40 HARV. C-R C-L L. REV. 481, 486 (2005) (citing evidence that automatic assumptions can be retrained); Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity*



– and particularly a managerial workforce – dedicated to particular cultural ideals, it has the tools to challenge the stereotypes and biases of the supervisors who make pay and promotion decisions that limit women’s opportunities. Wal-Mart is almost certainly not the only company in the United States with such a strong corporate culture. But because Wal-Mart’s culture is so strong, it presents a unique opportunity to evaluate what an employer can do to challenge entrenched attitudes toward women in the workplace.

## VI. CONCLUSION

Federal law has prohibited sex discrimination in the workplace for more than forty years. Despite this prohibition, full-time working women today earn, on average, about eighty-one cents for every man’s dollar.<sup>187</sup> Women make up an increasing percentage of full-time employees in the United States, and yet the percentage of women in upper-level management remains in the single digits in a wide array of industries. These phenomena of persistent gender inequality are so widely recognized that the idea of the “glass ceiling” has become commonplace.<sup>188</sup>

The plaintiffs’ evidence in *Dukes* suggests that women at Wal-Mart confront these problems, but they are not problems only at Wal-Mart. This is part of why lawsuits like *Dukes* are so important. Widespread gender inequalities have survived the first generation of antidiscrimination litigation. Class action suits challenging the aggregate effects of individual workplace decisions target perhaps the most persistent barriers to equal employment – the unexamined, unchecked subjective judgments about the relative potential of men and women for management positions and the relative value of their work. As the largest such class ever to be certified, *Dukes v. Wal-Mart* is a historic decision. And because the suit is against Wal-Mart, it has opened up public debate about the challenged practices in ways that

*Privilege*, 74 WASH. L. REV. 913, 923-25 (1999); Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the “Cluelessness” Defense*, 7 EMP. RTS. & EMP. POL’Y J. 401, 446-47 (2003).

187. This estimate is from data gathered by the U.S. Department of Labor and available on its website at <<http://www.dol.gov/wb/factsheets/Qf-ESWM05.htm>> (last viewed Nov. 1, 2006).

188. The concept of the “glass ceiling” as an “invisible – but impenetrable – barrier between women and the executive suite, preventing them from reaching the highest levels of the business world regardless of their accomplishments and merits” was first identified by the Wall Street Journal in the mid-1980s. See U.S. GLASS CEILING COMMISSION, *supra* note 103, at iii. It has now even found its way into *Wikipedia*. See *Glass Ceiling*, WIKIPEDIA, at <[http://en.wikipedia.org/wiki/Glass\\_ceiling](http://en.wikipedia.org/wiki/Glass_ceiling)> (last viewed Nov. 20, 2006).

other cases have not. The *Dukes* plaintiffs took great pains to provide the court with evidence that Wal-Mart was outside of the norm in the kinds of inequalities present within its workforce. But it is also worth noting that what happens at Wal-Mart continues to happen in workplaces all over the country, and that the success of this litigation, both as part of a broader trend and because of Wal-Mart's market power, its strong corporate culture and its remarkable ability to generate public debate, may well reverberate beyond the expansive boundaries of Wal-Mart itself.