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## The Impact of *Wal-Mart v. Dukes* on Employment Discrimination Class Actions Five Years Out: A Forecast That Suggests More a Wave Than a Tsunami

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**Date :** March 7, 2017

Michael Selmi & Sylvia Tsakos, [Employment Discrimination Class Actions After \*Wal-Mart v. Dukes\*](#), 48 *Akron L. Rev.* 803 (2015).

The Supreme Court's decision in [Wal-Mart v. Dukes](#) set off a groundswell of concern among many scholars, lawyers, and legal commentators about its potential impact on employees' capacity to collectively pursue relief, particularly for systemic intentional discrimination claims. As one of those concerned parties, I enjoyed reading the five-year retrospective by Michael Selmi and Sylvia Tsakos, which seems to suggest that *Wal-Mart's* impact on such claims has been more of a wave than a tsunami. Selmi and Tsakos recognize the ways in which the Court's ruling has taken its toll, but they highlight how much *Wal-Mart's* impact is a matter of degree rather than kind. Pre-*Wal-Mart*, the class action landscape was characterized by skepticism toward nationwide class actions, greater merits-focused class certification, and jurisdiction-dependent class treatment. Post-*Wal-Mart*, those trends have expanded to the detriment of civil rights claims. While this expansion is normatively problematic, this article makes an important contribution to the literature by situating *Wal-Mart* historically and putting it into a broader perspective. In addition, Selmi and Tsakos identify a forward trend of class certification jurisprudence involving certain kinds of subjective employment practices, which have been found to satisfy Rule 23's commonality requirement even under current class action jurisprudence.

The authors' sobering observation that employment discrimination class actions alleging subjective practices have been struggling, combined with their positive observation that some of these class actions remain viable post-*Wal-Mart*, lead the authors to conclude that *Wal-Mart's* effect thus far has been modest.

As an initial matter, the article establishes that *Wal-Mart* has changed the litigation landscape to the detriment of employees. For example, fewer plaintiffs have filed employment discrimination class actions, and those that have must incur substantial additional costs if they seek damages under Rule 23(b)(3). Moreover, emboldened by the ruling, more defendants are seeking to dismiss employment cases even before the class certification determination. (P. 804.)

The authors make no bones about their impression that the Supreme Court – and certainly its “conservative wing” – is hostile to class litigation in general and in particular to the kind of class action pursued in the *Wal-Mart* case. This hostility stems from the common-yet-unsupported perception that defendants are unfairly subjected to immense pressure to settle given the high costs and potential widespread liability class actions present. They argue that this overlooks the absence of evidence of potential blackmail, the availability of alternative tools for curbing settlement pressure, and the reality that plaintiffs face significant costs and risks too.

Initially, systemic challenges to facially discriminatory employment policies seeking injunctive relief made class certification straightforward. But as workers started to challenge subjective employment practices and to seek significant monetary damages (and a jury trial) for intentional discrimination pursuant to the Civil Rights Act of 1991, their capacity to unite under the umbrella of one lawsuit waned. Federal appellate courts split over the propriety of class certification under Rule 23(b)(2) — the traditional injunctive class action for civil rights cases. Some courts continued to allow employees to litigate collectively, while others rejected such routine certifications where employees sought monetary relief. This schism and differing judicial philosophies about aggregation naturally led to forum shopping.

The article contends that barriers to aggregation that existed prior to *Wal-Mart*, not surprisingly, have bled into the post-*Wal-Mart* era. This means that *Wal-Mart* is like its predecessors — a product of judicial hostility toward aggregation of employment claims that dates back at least a couple of decades. At the same time, the particular facts of *Wal-Mart* are distinct from typical employment class actions. The plaintiffs attempted to sew together the claims of 1.5 million women nationwide in a single suit on the ground that decentralized excessive subjective personnel decision-making was a policy that harmed women; this was a bridge too far for the Court. Although plaintiffs' liability theory did not cover new ground, the size and scope of the case did. Consequently, no amount or type of evidence could satisfy the *Wal-Mart* majority that there existed a policy of systemic gender discrimination here.

Selmi and Tsakos pivot from establishing the fertile ground from which *Wal-Mart* swelled to how employment discrimination class actions have since fared. They conclude that for cases not alleging the identical theory pursued in *Wal-Mart*, there has not been a “death knell” of employment discrimination class actions.<sup>1</sup> Given *Wal-Mart*'s unique facts, courts have been able to distinguish the case, thereby permitting certification or denying decertification.<sup>2</sup> Some noteworthy appellate cases have breathed new life into the possibility of class certification for discriminatory subjective decision-making in the workplace. For example, in [McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.](#), Judge Posner distinguished *Wal-Mart* and reversed denial of class certification where low-level managers exercised discretion but did so pursuant to two companywide policies that had an adverse disparate impact on African-American brokers. Another example is [Scott v. Family Dollar Stores, Inc.](#), where the court clearly delineated *Wal-Mart*'s strictures and permitted certification of a class action alleging discretionary employment practices. The Fourth Circuit concluded that commonality was satisfied where there existed a uniform corporate policy and higher-level managers were the ones making discretionary decisions that had a disparate impact on female workers or that revealed a pattern or practice of intentional gender discrimination. These appellate decisions demonstrate that the ambit of *Wal-Mart*'s reach may not be as wide as anticipated.

In sum, Selmi and Tsakos do a great job of making sense of a complex area of law by putting *Wal-Mart* into a broader context for analysis. Granted, their conclusion that *Wal-Mart* has not greatly diminished class certification for employment discrimination cases because it was already difficult to begin with is not good news for plaintiffs. This observation speaks only to *Wal-Mart*'s relative impact, and the certification bar was already high before the *Wal-Mart* decision. More encouraging is the jurisprudence emanating from lower courts that define the contours of *Wal-Mart* and forecast potentially viable employment discrimination class actions.

Selmi and Tsakos have made a compelling case for why *Wal-Mart* has not marked the “death knell” of collective actions challenging workplace discrimination. This is crucial. It also leaves a question: Is this good enough? Teeing up this question is an equally important contribution of this article. I look forward to our answering this next fundamental question in the future.

1. The authors, however, rightly struggle to explain why plaintiffs' subsequent smaller regional versions of the parent *Wal-Mart* case have not been certified if size explains the Supreme Court's rejection of a national class action. [?]
2. The authors note, however, that on the district court level, some courts have seemed to reflexively apply *Wal-Mart* to deny class certification, even in cases where the facts could not be more distinct from those in *Wal-Mart*. [?]

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