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## Class Action Litigation after Dukes: In Search of a Remedy for Gender Discrimination in Employment

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**CLASS ACTION LITIGATION AFTER *DUKES*:  
IN SEARCH OF A REMEDY FOR GENDER DISCRIMINATION  
IN EMPLOYMENT†**

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Cindy A. Schipani\*  
Terry Morehead Dworkin\*\*

*In this Article we argue for substantial reforms to our system of combating workplace gender discrimination in light of the Supreme Court's ruling in Wal-Mart Stores, Inc. v. Dukes. To help counter discrimination victims' decreasing access to the courts, our proposals call for a narrow construction of the holding of Dukes. At the same time, agencies such as the Equal Employment Opportunity Commission (EEOC), the Office of Federal Contract Compliance Programs (OFCCP), and the Securities and Exchange Commission (SEC) can better use their regulatory authority to address gender discrimination. Further, regulatory agencies, arbitrators, and courts can mandate mentoring programs to assist employees in overcoming the effects of discrimination and provide a potential pathway for career success.*

INTRODUCTION

The recent Supreme Court case, *Wal-Mart Stores, Inc. v. Dukes*,<sup>1</sup> is another in a line of cases over the last few years that limits employee access to the courts to vindicate important rights, including the right to be free of workplace discrimination. In *Dukes*, the Court denied the plaintiffs' request for class certification in a case involving claims of systemic gender discrimination in employment because it failed to see sufficient evidence of commonality among their claims.<sup>2</sup> Courts have also recently limited plaintiffs' access to

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1. 131 S. Ct. 2541 (2011).

2. *See id.* at 2550–57; *see also infra*, Part I.

the courts by strictly upholding arbitration agreements despite contrary state law<sup>3</sup> or arbitrator's findings.<sup>4</sup> As a result of these types of decisions, individuals may not be able to afford to prosecute their individual cases, and issues of public importance receive a limited spotlight and generate minimal public discussion. At the same time, studies indicate that gender discrimination, especially at the highest levels, continues. For example, no women lead the twenty largest U.S. banks or securities firms,<sup>5</sup> and only 14 percent of senior executives at Fortune 500 companies are women.<sup>6</sup>

In this Article we argue for substantial reforms to our system of combating workplace gender discrimination in light of the Supreme Court's ruling in *Dukes*. To help counter discrimination victims' decreasing access to the courts, our proposals call for a narrow construction of the holding of *Dukes*. At the same time, agencies such as the Equal Employment Opportunity Commission (EEOC), the Office of Federal Contract Compliance Programs (OFCCP), and the Securities and Exchange Commission (SEC) can better use their regulatory authority to address gender discrimination. Further, regulatory agencies, arbitrators, and courts can mandate mentoring programs to assist employees in overcoming the effects of discrimination and provide a potential pathway for career success.

Part I is a discussion of the Supreme Court's ruling in *Dukes*. In Part II, we articulate proposals for reform, which include a narrow construction of the holding in *Dukes*, statutory reform, regulatory action, preferential awards of government procurement contracts to businesses with a proven track record of treating employees fairly, and a ban on mandatory arbitration for claims of employment discrimination. In this Part, we also advocate that regulators, as well as courts and arbitrators, require firms to implement mentoring programs in connection with claims of employment discrimination. Part III follows with concluding remarks.

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3. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (holding that the Federal Arbitration Act preempts California's judicial rule, which invalidates class action waivers in arbitration agreements in adhesion contracts).

4. See *Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010) (holding that imposing class arbitration on parties who have not agreed to authorize class arbitration is inconsistent with the Federal Arbitration Act).

5. Dan Fitzpatrick & Liz Rappaport, *Financial Firms' Ceiling: Ouster of BoFA's Krawcheck Highlights Lack of Top Women Executives at Banks*, WALL ST. J., Sept. 8, 2011, at C1.

6. *Statistical Overview of Women in the Workplace*, CATALYST, (Mar. 13, 2013), [http://www.catalyst.org/file/672/qt\\_statistical\\_overview\\_of\\_women\\_in\\_the\\_workplace.pdf](http://www.catalyst.org/file/672/qt_statistical_overview_of_women_in_the_workplace.pdf).

I. *WAL-MART STORES, INC. v. DUKES*

*Dukes* involved allegations by former and current employees of the retailer Wal-Mart of discrimination in violation of Title VII of the Civil Rights Act of 1964.<sup>7</sup> The plaintiffs sought certification as a class, pursuant to Federal Rule of Civil Procedure (FRCP or Rule) 23(a)<sup>8</sup> and Rule 23(b)(2),<sup>9</sup> in an attempt to represent 1.5 million female employees.<sup>10</sup> The District Court certified the class,<sup>11</sup> and upon appeal the Court of Appeals for the Ninth Circuit agreed.<sup>12</sup> The U.S. Supreme Court, however, reversed the ruling of the Court of Appeals, citing three grounds.<sup>13</sup>

The first ground related to the commonality requirement of Rule 23.<sup>14</sup> The Court found that the plaintiffs had not presented sufficient evidence to support their claim that the company operated under a general policy of discrimination.<sup>15</sup> That is, the putative class failed to provide “significant proof”<sup>16</sup> that Wal-Mart exercised a general policy of discrimination, as required to satisfy the commonality prerequisite for class certification under FRCP 23(a)(2).<sup>17</sup>

Second, the Court held that class certification for claims of back pay was also inappropriate under FRCP 23(b)(2),<sup>18</sup> which permits class certification only for claims of injunctive or declaratory relief. Finally, the Court stated that the claims for back pay were not “incidental” to the claims for injunctive and declaratory relief and therefore found Wal-Mart was entitled to litigate each of those claims for back pay separately under Title VII.<sup>19</sup> These claims are discussed below.

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7. 131 S. Ct. 2541, 2547 (2011).

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

9. FED. R. CIV. P. 23(b)(2).

10. See *Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2546–47 (2011).

11. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 143 (N.D. Cal. 2004), *aff'd en banc*, 603 F.3d 571 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (2011).

12. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 577 (9th Cir. 2010) (en banc), *rev'd*, 131 S. Ct. 2541 (2011).

13. See *Dukes*, 131 S. Ct. at 2545–46.

14. See *id.* at 2550, 2556–57.

15. See *id.* at 2553–57.

16. *Id.* at 2545.

17. *Id.* at 2556–57.

18. *Id.* at 2557.

19. *Id.*

A. *Certification Denied under FRCP 23(a)(2): Lack of Commonality*

In order to be certified as a class, plaintiffs must satisfy a two-part test. First, they must meet the prerequisite requirements of FRCP 23(a).<sup>20</sup> In this case, the criterion at issue was the commonality element of Rule 23(a)(2).<sup>21</sup> If all requirements are satisfied, the putative class then must fit one of the categories of Rule 23(b).<sup>22</sup> The *Dukes* Court found that the plaintiffs' purported class did not meet the requirements of either FRCP 23(a)<sup>23</sup> or 23(b).<sup>24</sup>

In their motion for class certification, the *Dukes* plaintiffs presented three forms of proof: statistical evidence about pay and promotion disparities between men and women, anecdotal reports of discrimination from about 120 of Wal-Mart's female employees, the testimony of a sociologist whose study of "social framework analysis" of Wal-Mart's "culture" and personnel practices concluded that the company was "vulnerable" to gender discrimination.<sup>25</sup>

First, the Court held that the plaintiffs did not meet the prerequisite requirements for class certification under FRCP 23(a).<sup>26</sup> Specifically, the Court held that the plaintiffs did not meet the commonality requirement of Rule 23(a)(2).<sup>27</sup> FRCP 23(a)(2) states that: "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members only if . . . there are questions of law or fact common to the class . . ." <sup>28</sup> The Court held commonality requires that the class members suffered a common injury, not merely that they suffered a violation of the same law.<sup>29</sup>

The Court went on to say that plaintiffs bringing gender discrimination claims can meet the burden of proving commonality in two ways.<sup>30</sup> First, they can show that an employer used a biased testing

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20. *See id.* at 2548.

21. *See id.* at 2550-51.

22. *Id.* at 2548.

23. *See id.* at 2550-57.

24. *Id.* at 2557.

25. *Id.* at 2549 (citing *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 601 (9th Cir. 2010) (en banc)).

26. *Id.* at 2550-57.

27. *Id.* at 2556-57.

28. FED. R. CRV. P. 23(a)(2).

29. The Court explained the test for commonality:

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

*Dukes*, 131 S. Ct. at 2551.

30. *Id.* at 2552-53.

procedure to evaluate candidates for employment or promotion. Testing procedures were not at issue in this case, however.<sup>31</sup> Second, plaintiffs can provide “[s]ignificant proof that an employer operated under a general policy of discrimination [which] conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision-making processes.”<sup>32</sup> The only evidence the plaintiffs presented of a general policy of discrimination was that of the sociology expert who found Wal-Mart’s corporate culture “vulnerable to gender bias.”<sup>33</sup> The plaintiffs’ expert was, however, unable to determine how regularly stereotypes play a meaningful role in Wal-Mart’s employment decisions.<sup>34</sup> The Court thus found the plaintiffs’ evidence unpersuasive.<sup>35</sup>

The Court was also unconvinced by the plaintiffs’ argument that Wal-Mart’s policy of allowing discretion by local supervisors over employment matters was discriminatory under a disparate impact theory.<sup>36</sup> The Court reasoned that a policy of lower-level discretion does not tend to prove company-wide discrimination, because “demonstrating the invalidity of one manager’s use of discretion will do nothing to demonstrate the invalidity of another’s.”<sup>37</sup>

Furthermore, the Court found that statistical evidence of disparate pay and promotion “cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs’ theory of commonality depends.”<sup>38</sup> Additionally, even if the statistical evidence did show a discriminatory pay or promotion pattern, the plaintiffs would still need to identify a “specific employment practice”<sup>39</sup> in order to show commonality, and they had not done so.<sup>40</sup> Moreover, the anecdotal evidence offered by the plaintiffs was “too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory.”<sup>41</sup> The Court was unpersuaded by the

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31. *See id.* at 2553 (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982)).

32. *Id.* (quoting *Falcon*, 457 U.S. at 159 n.15).

33. *Id.* at 2545 (quoting *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 154 (N.D. Cal. 2004), *aff’d en banc* 603 F.3d 571 (9th Cir. 2010), *rev’d*, 131 S. Ct. 2541 (2011)).

34. *Id.* at 2553 (quoting *Dukes*, 222 F.R.D. at 192).

35. *See id.* at 2554.

36. *See id.*

37. *Id.*

38. *Id.* at 2555.

39. *Id.*

40. *See id.* at 2555–56.

41. *Id.* at 2556.

120 anecdotal reports presented because they represented only one out of every 12,500 class members.<sup>42</sup>

*B. Certification for Claims of Back Pay Denied Under FRCP 23(b)(2)*

Next, the Court held that the plaintiffs' claims for back pay were improperly certified under Rule 23(b)(2), which provides that:

A class action may be maintained if Rule 23(a) is satisfied and if . . . the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole . . . .<sup>43</sup>

In short, the Court held that because the claims for back pay were individualized and not a form of declaratory or injunctive relief for the class as a whole, plaintiffs did not satisfy the second requirement for class certification under Rule 23.<sup>44</sup>

The plaintiffs argued that because their claims for monetary relief did not predominate over their requests for injunctive and declaratory relief, the back pay claims were properly certified under

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42. Thus, on the issue of commonality under 23(a)(2), the Court concluded that:

Because respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question.

In sum, we agree with Chief Judge Kozinski [the author of the dissenting opinion for the Court of Appeals] that the members of the class: "held a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed . . . . Some thrived while others did poorly. They have little in common but their sex and this lawsuit."

*Id.* at 2556–57 (citing *Dukes v. Wal-Mart Stores, Inc.* 603 F. 3d 571, 652 (9th Cir. 2010) (en banc) (Kozinski, J., dissenting)).

43. FED. R. CIV. P. 23(b)(2). The *Dukes* Court said that:

[A]t a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule . . . . Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.

*Dukes*, 131 S. Ct. at 2557.

44. See *id.* at 2545. The Court went on to say that claims for individual monetary relief belong under FRCP 23(b)(3).

23(b)(2).<sup>45</sup> The Court, however, disagreed, finding no textual basis for this “predominat[ion]” interpretation of the rule.<sup>46</sup>

Additionally, the Court noted that this interpretation of the rule would have negative practical consequences. First, it would give class representatives incentives to forego potentially valid monetary claims. For example, in this case plaintiffs decided to pursue only back pay instead of compensatory damages, fearing that compensatory damages would “predominate” the injunctive and declaratory claims and preclude class certification.<sup>47</sup> Second, district courts would constantly need to reevaluate the roster of class members. In this case, once an employee left Wal-Mart, she would no longer be entitled to the injunctive relief and thus no longer eligible for the class.<sup>48</sup>

The plaintiffs also argued that because the back pay relief they sought was equitable in nature, it should qualify for class certification under Rule 23(b)(2).<sup>49</sup> But the Court dismissed this claim as well, noting that the Rule specifically refers to injunctions and declaratory judgments, not equitable remedies generally.<sup>50</sup> The Court also noted that the plaintiffs’ claims for back pay do not qualify as “incidental to requested injunctive or declaratory relief” under 23(b)(2),<sup>51</sup> although the plaintiffs did not argue this.<sup>52</sup>

### C. *Aftermath*

The decision in *Dukes* has engendered a flurry of commentary. For one commentator, *Dukes* is a “watershed case for employment law practitioners and class action litigators . . . . *Dukes* ensures that future class certifications will prove far more infrequent—and more expensive—than in the pre-*Dukes* era.”<sup>53</sup> One went further, stating that the majority opinion is “premised on a frank hostility to class actions and an expressed desire to protect big business” and that

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45. *Id.* at 2545–46.

46. *See id.* at 2559.

47. *See id.*

48. *Id.* at 2559–60.

49. *Id.* at 2560.

50. *Id.*

51. *Id.* (quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)).

52. *See id.* The Court further stated that “Wal-Mart is entitled to individualized determinations of each employee’s eligibility for backpay,” as prescribed by Title VII, contrary to the “Trial by Formula” proposed by the Court of Appeals. *Id.* at 2560–61.

53. John M. Husband & Bradford J. Williams, *Wal-Mart v. Dukes Redux: The Future of the Sprawling Class Action*, 40 *COLO. LAW.* 53, 59 (2011).



“[f]rom the legal process perspective, the activism of these two decisions is stunning.”<sup>54</sup> Further criticizing the ruling, another commentator agreed that the majority “showed little regard for the interest of employees and considerable concern for the burdens that such actions might place on employers.”<sup>55</sup>

Yet, not all commentators are as critical of the decision. For example, another contends *Dukes* “has not doomed the class action . . . . All it has done is make the game of certification a little fiercer.”<sup>56</sup> Another agreed, stating that *Dukes* “effectively reinvigorated” requirements of certification, “which had been treated by some courts as very easy to satisfy.”<sup>57</sup>

One author indirectly defended the opinion, stating that the Ninth Circuit “created an unmanageable class and undermined the efficiency and fairness goals of Rule 23’s commonality requirement.”<sup>58</sup> Another commentator argues that the result was due to the failure of the plaintiffs’ counsel “to grapple with many difficult doctrinal and policy problems underlying structural class actions,”<sup>59</sup> and should not be viewed as a “major blow to working women across America.”<sup>60</sup>

Another question related to the *Dukes* decision involves whether a court may certify a class action without determining whether the case is susceptible to damages on a class-wide basis. In *Comcast Corp. v. Behrend*,<sup>61</sup> the plaintiffs alleged that Comcast acted anti-competitively when it entered into a series of acquisition and “swap” agreements with other cable providers.<sup>62</sup> In these agreements,

54. Catherine Fisk & Erwin Chemerinsky, *The Failing Faith in Class Actions: Wal-Mart v. Dukes and AT&T Mobility v. Concepcion*, 7 DUKE J. CONST. L. & PUB. POL’Y 73, 96–97 (2011).

55. L. Camille Hébert, *The Supreme Court’s 2010–2011 Labor and Employment Law Decisions: A Large and “Mixed Bag” for Employers and Employees*, 15 EMP. RTS. & EMP. POL’Y J. 279, 280 (2011).

56. Andrew J. Trask, *Wal-Mart v. Dukes: Class Actions and Legal Strategy*, 2010–2011 CATO SUP. CT. REV. 319, 355 (2011).

57. Mac R. McCoy & D. Matthew Allen, *Taming the Kraken: The Supreme Court Weighs in on Class Actions in 2011*, BUS. L. TODAY, Jan. 23, 2012, at 1, <http://apps.americanbar.org/bus-law/blt/content/2012/01/article-1-mccoy-allen.pdf>.

58. Kathryn Smith, Comment, *What Do 1.5 Million Wal-Mart Women Have in Common?: Dukes v. Wal-Mart Class Action Certification*, 52 B.C.L. REV. E. SUPP. 149, 157 (2011), available at <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3203&context=bclr>.

59. Deborah M. Weiss, *A Grudging Defense of Wal-Mart v. Dukes*, 24 YALE J.L. & FEMINISM 119, 121 (2012).

60. See *id.* at 174. *Contra* Courtney Martin, *Wal-Mart v. Dukes Ruling is Out of Sync with 21st-Century Sex Discrimination*, CHRISTIAN SCI. MONITOR (June 22, 2011), <http://www.csmonitor.com/Commentary/Opinion/2011/0622/Wal-Mart-v.-Dukes-ruling-is-out-of-sync-with-21st-century-sex-discrimination>.

61. 133 S. Ct. 1426 (2013).

62. *Id.* at 1430.

Comcast either acquired competing cable companies in the Philadelphia Designated Market Area or exchanged cable systems it owned outside the Philadelphia area for competitor cable systems inside of the Philadelphia Designated Market Area.<sup>63</sup> Through these agreements, Comcast allegedly increased its share of subscribers in the area from 23.9 percent in 1998 to 69.5 percent in 2007.<sup>64</sup> The plaintiffs claim anti-competitive harm from these agreements alleging they “eliminate[ed] competition and [held] prices for cable services above competitive levels.”<sup>65</sup> Plaintiffs sought class action certification.<sup>66</sup>

In a typical antitrust case, the complainant does not need to provide evidence to support claims of anti-competitive behavior during the pleadings stage; rather, the pleadings only need to provide “enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”<sup>67</sup> Yet, in *Behrend*, the United States Supreme Court denied class certification because plaintiffs’ evidence failed to show that the claims were susceptible to damages on a class-wide basis for class certification.<sup>68</sup> This evidentiary burden at the pleadings stage may further limit the accessibility of the class action procedure.

In addition, in *Standard Fire Insurance Co. v. Knowles*,<sup>69</sup> the plaintiff alleged that the insurance company breached its contract with policy holders by failing to pay for general contractors’ overhead and profit associated with home repairs covered under their policies.<sup>70</sup> The insurance company attempted to remove the case to federal court, offering evidence that the aggregate damages to the putative class would be greater than the \$5 million maximum threshold for state court,<sup>71</sup> thereby giving the federal courts original jurisdiction.<sup>72</sup> In order to remain in state court, the plaintiff stipulated that he would not seek damages in excess of \$5 million on behalf of the class.<sup>73</sup> The District Court held that this stipulation

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63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). *See generally* FED. R. CIV. P. 8 (detailing general rules of pleading).

68. *Behrend*, 133 S. Ct. at 1432–33.

69. 133 S. Ct. 1345 (2013).

70. *Id.* at 1347.

71. *Id.* at 1348.

72. 28 U.S.C. § 1332(d)(2) (2006) (“The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which any member of a class of plaintiffs is a citizen of a State different from any defendant . . .”).

73. *Knowles*, 133 S. Ct. at 1347–48.

was legally binding and satisfied the plaintiff's burden of proving with legal certainty that his claim falls under the \$5 million threshold for remand to state court.<sup>74</sup> Then the defendant insurance company petitioned the Supreme Court to decide whether the plaintiff's stipulation was sufficient to destroy federal jurisdiction.<sup>75</sup> The Supreme Court held that the stipulation was not binding and therefore did not eliminate federal court jurisdiction.<sup>76</sup> This decision may serve yet another blow to the utility of class actions for plaintiffs who lack the resources to pursue claims independently. It restricts the ability of class action plaintiffs to opt for presumably less restrictive state law by stipulating they would not seek recovery of over \$5 million.

## II. PROPOSALS FOR REFORM

The *Dukes* holding has made it significantly more difficult for victims of workplace gender discrimination to fight for their rights in court. With class certifications becoming more difficult to attain, potential plaintiffs with limited resources may be unable to afford to bring lawsuits, and, as a result, corporations with company-wide discrimination problems may not be held accountable for the damage they cause. To ameliorate this problem, we (1) encourage courts to narrowly construe the decision, as some courts have done; (2) encourage Congress to create statutory exceptions to the commonality requirement and enact legislation to bar enforcement of mandatory pre-dispute arbitration agreements and conditions of employment that prohibit employees from joining class actions; (3) call for government agencies such as the EEOC, the OFCCP, and the SEC to better use their regulatory power to provide remedies for claimants affected by employment discrimination, including mandating adoption of mentoring programs to help rectify past discrimination and provide a pathway for career success; and (4) encourage the government to preferentially award procurement and services contracts to businesses that have superior track records for treating women properly.

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74. *Id.*

75. *Id.*

76. *Id.* at 1348–49.

A. *Narrowing the Holding of Wal-Mart Stores, Inc. v. Dukes*

Although the *Dukes* decision would appear to severely limit the availability of the class action mechanism in cases involving employment discrimination, some courts have found limits to its application. For example, in *Ramos v. SimplexGrinnell LP*,<sup>77</sup> rather than attempting to show a uniform discriminatory policy when seeking class certification, the plaintiffs satisfied the commonality requirement by showing a uniform *lack* of a policy *preventing* discrimination.<sup>78</sup> In *Johns v. Bayer Corp.*,<sup>79</sup> the court certified the plaintiffs' class after rejecting defendant's argument that the individual defenses it planned to raise should preclude certification. The court found that class certification would not prevent the defendant from presenting individual defenses to individual claims.<sup>80</sup>

We encourage future courts to similarly apply *Dukes* narrowly to avoid foreclosing an important remedy for those who have suffered harm. The decisions in *Ramos* and *Bayer Corp.* are discussed below.

1. Uniform *Lack of a Policy Preventing* Discrimination

In *Ramos v. SimplexGrinnell LP*,<sup>81</sup> employees sought to distinguish a company's routine failures to comply with statutory pay rates from its local managers' discretionary pay.<sup>82</sup> The court, by distinguishing the claims from those in *Dukes*, certified a class of employees who were denied the "prevailing wages"<sup>83</sup> to which they were entitled under state law.

With regard to the issue of commonality, the *Ramos* plaintiffs showed that they "were paid the same wages for their work on public and private projects and did not receive prevailing wages for their work on public job sites."<sup>84</sup> Additionally, they "also submitted evidence indicating that defendant's payroll procedures were centralized."<sup>85</sup> The company argued that because it lacked a uniform

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77. 796 F. Supp. 2d 346 (E.D.N.Y. 2011).

78. *See id.* at 355.

79. 280 F.R.D. 551 (S.D. Cal. 2012).

80. *Id.* at 560 (citing *Goedic v. Bayer Corp.*, No. 1:10-CV-224, 2011 WL 5513202, at \*7 (N.D. Ohio Nov. 11, 2011)).

81. 796 F. Supp. 2d 346.

82. *Id.* at 355.

83. *Id.*

84. *Id.* at 354.

85. *Id.*

procedure for denying prevailing wages, there was no commonality.<sup>86</sup> But the court found the offices were uniform in their failure to guarantee that prevailing wages were paid, and thus the evidence satisfied the commonality requirement.

The *Ramos* court found four ways to distinguish the *Dukes* decision from the case before it. First, the court said that unlike the promotion and pay decisions in *Dukes*, which were made independently by numerous local managers with broad discretion, in this case there was evidence that the defendant “routinely failed to account for labor performed on public works projects and pay prevailing wages for covered work.”<sup>87</sup> Second, whereas the managers in *Dukes* retained some discretion to make wage and payment decisions, SimplexGrinnell, the defendant in *Ramos*, had no discretion or subjective judgment when determining whether to pay prevailing wages on public projects. The right to prevailing wages arose automatically, by operation of law.<sup>88</sup> Third, Wal-Mart, the defendant in *Dukes*, had an official policy prohibiting discrimination, but the defendant *Ramos* did not have an “expressed uniform policy that ensured the payment of prevailing wages to its employees when due.”<sup>89</sup> Finally, although the statistical evidence used by the plaintiffs in *Wal-Mart* failed to prove commonality, the plaintiffs in *Ramos* had evidence from the defendant’s electronic data that was “sufficiently reliable to be presented at trial.”<sup>90</sup>

Future claimants might succeed in attaining class certification by urging a similar reading of the commonality requirement of Rule 23(a). That is, depending on the nature of the claim, it might be possible to show a common thread in the nature of the harm inflicted as opposed to showing commonality in the harm incurred. In *Ramos*, the commonality shown was the failure to pay prevailing wages even though the pay processes leading to the harms were not the same for all plaintiffs.<sup>91</sup> Additionally, future plaintiffs should focus their allegations on aspects of the employer’s behavior that fail to prevent discriminatory practices from occurring. For example, plaintiffs could cite gaps in enforcement of a company’s stated anti-discrimination policies, or a lack of such policies altogether. Finally, plaintiffs should present more complete statistical evidence in order to prove any alleged systemic failures in discrimination prevention.

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86. *Id.* at 355.

87. *Id.* at 356.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 355.

## 2. Individual Defenses

In seeking to certify a class, it may be helpful for plaintiffs to show that class certification will not prevent the defendant from presenting individual defenses to individual claims.<sup>92</sup> In *Johns v. Bayer Corp.*,<sup>93</sup> for instance, the plaintiffs, consumers of certain vitamins marketed to men to support prostate health, alleged that the defendant's advertising claims regarding the health effects of its vitamins violated the California Unfair Competition Law and the Consumers Legal Remedies Act.<sup>94</sup> The court granted class certification, finding the plaintiffs had met the prerequisites of Rules 23(a) and 23(b)(3).<sup>95</sup>

In this case, Bayer attempted to analogize its defense against class certification to the successful defense in *Dukes* by claiming that class certification would deprive it of the opportunity to prove defenses to individual claims.<sup>96</sup> In this regard, Bayer claimed that there were some members of the purported class who had not relied on the alleged illegal health claims and would thus not be entitled to recovery.<sup>97</sup> The court, however, found that certifying the class would not prevent Bayer from presenting this or any other defense to individual claims, and ruled in favor of class certification.<sup>98</sup>

Future plaintiffs seeking class certification might similarly attempt to rebut claims that individual defenses should preclude class action certification by showing that certification would not impair defendants' ability to raise defenses to the individual claims. This may require carefully couching the complaint allegations in terms that are applicable to all members of the class. Additionally, if possible, plaintiffs should consider bringing class actions under Rule 23(b)(3) if they are able to argue that a class action is the only suitable means of adjudicating the controversy because common questions of law and fact predominate over any defenses pertaining only to individual class members.<sup>99</sup>

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92. *Johns v. Bayer Corp.*, 280 F.R.D. 551, 560 (S.D. Cal. 2012) (citing *Godec v. Bayer Corp.*, No. 1:10-CV-224, 2011 WL 5513202, at \*7 (N.D. Ohio Nov. 11, 2011)).

93. *Id.*

94. *See id.* at 554.

95. *Id.* at 556.

96. *Id.* at 560.

97. *Id.*

98. *Id.* (“[T]o the extent Bayer has individualized defenses, it is free to try those defenses against individual claimants.” (quoting *Godec v. Bayer Corp.*, No. 1:10-CV-224, 2011 WL 5513202, at \*7 (N.D. Ohio Nov. 11, 2011))).

99. *See Godec*, 2011 WL 5513202, at \*7 (saying that although defendant Bayer “may have defenses applicable to some class members and not others, those defenses do not predominate,” and therefore class resolution was still appropriate, adding that “[i]n any

### B. Statutory Exceptions to the Commonality Requirement

Congress could create a statutory exception to the commonality requirement of Rule 23 for victims of systemic employment discrimination, thereby making it easier for them to attain class certification. For example, a statute could provide employees claiming violations of Title VII of the type alleged in *Dukes* the right to maintain an action against any employer on behalf of themselves and any other similarly situated plaintiffs.

A statute of this type currently exists to enforce the Fair Labor Standards Act (FLSA).<sup>100</sup> Rather than showing “commonality” under Rule 23(a), plaintiffs seeking class certification of claims brought under the FLSA only need to show that their claims are “similarly situated.” For example, in *Creely v. HCR ManorCare, Inc.*, workers at assisted living facilities alleged denial of statutory overtime pay in violation of the FLSA.<sup>101</sup> The defendant, HCR ManorCare, Inc., used a timecard system that automatically deducted a thirty-minute lunch period from employees who worked shifts longer than five or six hours.<sup>102</sup> The plaintiffs claimed that this system illegally shifted the burden of monitoring “compensable work time” to individual employees, requiring employees to notify a supervisor if they did not take an uninterrupted thirty-minute lunch break.<sup>103</sup>

According to the *Creely* court, the *Dukes* decision had no bearing on the FLSA claims.<sup>104</sup> Because the claim in this case was brought under the FLSA, the standard for class certification only required that the putative class be composed of “similarly situated” individuals.<sup>105</sup> Plaintiffs are “similarly situated” where “‘claims [are] unified by common theories of defendants’ statutory violations,’ even though ‘proof of a violation as to one particular plaintiff [does] not [necessarily] prove that the defendant violated any other plaintiff’s rights.’”<sup>106</sup>

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event, to the extent Bayer has individualized defenses, it is free to try those defenses against individual claimants.”).

100. Fair Labor Standards Act, 29 U.S.C. § 216(b) (2006).

101. 789 F. Supp. 2d 819, 821 (N.D. Ohio. 2011).

102. *Id.*

103. *Id.*

104. *Creely v. HCR ManorCare, Inc.*, Nos. 3:09 CV 2879, 3:10 CV 417, 3:10 CV 2200, 2011 WL 3794142 (N.D. Ohio July 1, 2011).

105. *Creely*, 789 F. Supp. 2d at 823.

106. *Creely*, 2011 WL 3794142, at \*1 (citing *O’Brien v. Ed Donnelly Enters.*, 575 F.3d 567, 585 (6th Cir. 2009)). This standard differs significantly from the commonality standard articulated by the Supreme Court in *Dukes*:

The “similarly situated” standard thus appears far easier to meet than the commonality standard articulated by the Supreme Court in *Dukes*.<sup>107</sup> Therefore, using a “similarly situated” standard for class certification of Title VII plaintiffs rather than requiring a “common contention capable of classwide resolution” may allow more victims of employment discrimination to have their day in court.

Although the FLSA standard for class certification is easier to meet than the Rule 23 standard, it is not a panacea for the victims of widespread illegal employment practices. In another recent case against Wal-Mart, *Zavala v. Wal-Mart Stores Inc.*,<sup>108</sup> the Third Circuit affirmed the District Court’s decision to deny class certification under the FLSA to a group of undocumented immigrant cleaning crew members alleging RICO violations and false imprisonment.<sup>109</sup> The plaintiff workers, who “worked at dozens of different stores, for numerous different contractors, with various pay amounts and methods,”<sup>110</sup> attempted to prove that they were similarly situated via a comprehensive Wal-Mart Maintenance Manual, “which appears to establish uniform standards and procedures for cleaning Wal-Mart stores,” such as the products and methods to be used and the procedures for obtaining new supplies.<sup>111</sup> The plaintiffs also alleged that, though they worked for separate contractors, Wal-Mart store managers had actual control over them, with the power to approve, fire, and manage the cleaning crew members, and that the workers

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

*Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (emphasis added).

The court in *Creely* differentiated the nature of the claims from the claims in *Dukes*. *Dukes* involved “an examination of the subjective intent behind millions of individual employment decisions,” whereas the *Creely* court was concerned with “whether the company-wide policies, as implemented, violated Plaintiffs’ statutory rights.” *Creely*, 2011 WL 3794142, at \*1.

*Dukes* held that the class was also improperly certified under FRCP 23(b)(2) because the plaintiffs’ individual claims for back pay monetary damages predominated. *See Dukes*, 131 S. Ct. at 2557. Thus, the absence of notice and opt-out procedures under Rule 23(b)(2), as opposed to those required by Rule 23(c)(2)(B) for Rule 23(b)(3) classes, violated the due process rights of the plaintiffs. *Creely*, 2011 WL 3794142, at \*1. These concerns are not relevant to a FLSA claim because the FLSA has built-in procedures to ensure that plaintiffs may preserve their individual claims. *Id.*

107. *Dukes*, 131 S. Ct. at 2551 (emphasis added).

108. 691 F.3d 527 (3d Cir. 2012).

109. *Id.* at 530.

110. *Id.* at 531.

111. *Id.* at 532.



were all victims of a “common scheme to hire and underpay illegal immigrant workers.”<sup>112</sup>

The Third Circuit left undisturbed the District Court’s finding that these arguments were unpersuasive, noting that “the putative class members worked in 180 different stores in thirty-three states throughout the country and for seventy different contractors and subcontractors,” and that hours and wages varied depending on the contractor.<sup>113</sup> Additionally, the Court said that different individual defenses might be available to Wal-Mart with respect to each proposed plaintiff.<sup>114</sup> Altogether, this evidence, similar to the evidence cited by the Supreme Court in *Dukes* to deny class certification,<sup>115</sup> convinced the Third Circuit to deny final class certification on the grounds that the plaintiffs were not similarly situated. Thus, because of the inherent challenges of proving similarities among employees from several different stores over a wide geographical area, adopting a more relaxed standard for class certification may still leave some victims of large-scale gender discrimination without accessible means of relief.

Of course, expanding the availability of class actions is neither desirable nor practical in every context, such as when a highly individualized inquiry is unavoidable in order to determine the merits of a claim. For example, in *Basile v. H&R Block*,<sup>116</sup> the Pennsylvania Supreme Court decertified a putative class of H&R Block customers who alleged breach of fiduciary duties as a result of the company’s “Rapid Refund” program.<sup>117</sup> The plaintiffs alleged that, through marketing and other companywide practices, H&R Block gained the trust of its low-income customers, thus forming a confidential relationship with them, and then subsequently breached the fiduciary duties it owed by failing to adequately disclose that the “refunds” paid out under the program were actually high-interest loans.<sup>118</sup> The Pennsylvania Supreme Court held that class certification was inappropriate because whether a given customer had a confidential relationship with the company, and thus whether a breach of fiduciary duty was even possible, was a fact-intensive question individual to each class member.<sup>119</sup>

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112. *Id.* at 538.

113. *Id.* (quoting *Zavala v. Wal-Mart Stores, Inc.*, CA No. 03-5309 (GEB), 2010 WL 2652510, at \*3 (D.N.J. June 25, 2010), *aff’d sub nom.*, *Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527 (2012)).

114. *Id.* at 538.

115. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557, 2561 (2011).

116. 52 A.3d 1202 (Pa. 2012).

117. *Id.* at 1211–12.

118. *Id.* at 1208.

119. *Id.* at 1210–11.

Yet, the claims of the plaintiffs in cases like *Dukes* do not require such a highly individualized inquiry for resolution. Rather than requiring proof of how each individual class member relates to the defendant, resolution of a large-scale employment discrimination case requires proof that the defendant operated under a general policy of discrimination that was against the law.<sup>120</sup> This defendant-focused inquiry makes class actions more appropriate in discrimination suits than, for example, fiduciary duty-based consumer claims. Accordingly, a relaxed standard, limited to Title VII discrimination claims akin to the “similarly situated” standard of the FLSA, may be desirable.

Congress should evaluate whether, when plaintiffs allege employment discrimination against a particular employer, their ability to assert their claims as a class should be more restrictive than that of plaintiffs asserting violations of the FLSA. If not, we propose that Congress consider changing the “commonality” requirement in claims for employment discrimination to the “similarly situated” standard of FLSA claims.

### *C. Regulatory Actions*

Employment discrimination claims are handled by a number of different government agencies. The Equal Employment Opportunity Commission enforces a number of federal employment discrimination statutes, including Title VII of the Civil Rights Act of 1964,<sup>121</sup> the Equal Pay Act of 1963,<sup>122</sup> the Age Discrimination Employment Act,<sup>123</sup> and Section 501 of the Rehabilitation Act of 1973.<sup>124</sup> The Office of Federal Contract Compliance Programs (OFCCP), a division of the Department of Labor, enforces Executive Order 11246, which prohibits federal contractors from discriminating on various bases.<sup>125</sup> The Department of Education enforces Title IX of the Education Amendments of 1972, which

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120. *See Dukes*, 131 S. Ct. at 2553.

121. 42 U.S.C. §§ 2000e to 2000e-17 (2006) (prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin).

122. 29 U.S.C. § 206(d) (2006) (prohibiting pay discrimination between sexes).

123. 29 U.S.C. §§ 621–634 (2006) (prohibiting employment discrimination on the basis of age).

124. 29 U.S.C. §§ 791–794f (2006) (prohibiting employment discrimination against individuals with disabilities in the federal sector).

125. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965) (prohibiting discrimination by federal government contractors).

prohibits sex discrimination against employees in educational institutions that receive federal financial assistance.<sup>126</sup> Most employment discrimination claims are brought under Title VII—and thus enforced by the EEOC—because Title VII is very broad, encompassing private employers and discrimination on several different bases, including sex and race.<sup>127</sup> Additionally, the other agencies tend to follow the lead of the EEOC in discrimination matters.

The EEOC's procedure for handling Title VII claims begins when a charge of employment discrimination is filed by a victim. The EEOC then sends a notice and copy of the charge to the employer<sup>128</sup> and then frequently suggests the parties partake in mediation. If the claim is not resolved through mediation, the EEOC will undertake an investigation.<sup>129</sup> If during the investigation the EEOC finds a violation of law, it will attempt to reach a settlement with the employer. If no settlement is reached, the EEOC may decide to file a lawsuit. If the EEOC does not file a lawsuit, or if the investigation did not reveal a violation of law, then the EEOC will send the victim a Notice-of-Right-to-Sue, allowing the victim to pursue a lawsuit on his or her own behalf.<sup>130</sup>

### 1. Power of the EEOC—Mentoring Programs

To specifically help women who have faced employment discrimination, mentoring programs could be integrated into the mediation stage of the Equal Employment Opportunity Commission's (EEOC's) complaint process.<sup>131</sup> If the EEOC placed an emphasis on mentoring as an option for settlement, the resulting programs would benefit not only the employees who filed the complaint, but also other victims of discrimination who do not have the resources to pursue a discrimination claim outside of a class action.

As noted above, the underrepresentation of women in boardrooms and executives offices is well documented. The lack of coaching and grooming for women who seek these positions is a

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126. 34 C.F.R. § 106.51 (prohibiting employment discrimination on the basis of sex at any educational institution receiving federal financial assistance).

127. See 42 U.S.C. §§ 2000e to 2000e-17 (2006).

128. 42 U.S.C. § 2000e-5(b) (2006).

129. *Id.*

130. See 42 U.S.C. § 2000e-5(f)(1) (2006).

131. Currently, after an employee files a charge with the EEOC, the EEOC will often suggest that the employer and employees participate in mediation. *Alternative Dispute Resolution Policy Statement*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/policy/docs/adrstatement.html> (last visited Mar. 12, 2013).

major factor in that underrepresentation.<sup>132</sup> Another recent report of a study, involving 2,525 college-educated men and women, over half of whom were in large companies, cited inadequate career development as the primary reason women have not reached the top rungs of the corporate ladder.<sup>133</sup> Mentoring programs, when structured correctly, can and do play a central role in fostering talent and grooming both male and female employees for leadership positions.

Research in organizational behavior and other social science disciplines has established a significant knowledge base about mentoring for both men and women, including a rich theoretical base grounded in psychology and sociology.<sup>134</sup> Mentoring programs can be effective in helping women chart pathways around the barriers to leadership for a variety of reasons.<sup>135</sup> Legitimacy is enhanced because someone successful from a higher level in the organization (the mentor) is seen helping the mentee be successful, which, assumedly, shows that the mentor thinks the mentee has potential.<sup>136</sup> Additionally, mentors buffer an individual from overt and covert forms of discrimination, even discrimination they may not consciously realize exists.<sup>137</sup> A mentor can compensate for exclusion from organizational networks where important information is usually found. They can provide reflected power by signaling that an individual has a powerful sponsor.<sup>138</sup> They can even increase self-confidence and facilitate career goals.<sup>139</sup>

Some studies indicate that the impact of mentoring is greatest for women in male-dominated professions and industries, especially if they have a powerful male mentor.<sup>140</sup> Male-dominated industries are ones characterized by female underrepresentation or by aggressive, engineering-intensive, competitive, “up-or-out” corporate

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132. See Fitzpatrick & Rappaport, *supra* note 5.

133. Joann S. Lublin, *Coaching Urged for Women: Inadequate Career Development Holds Back Female Executives*, *McKinsey Says*, WALL ST. J., Apr. 4, 2011, at B8.

134. See generally THE HANDBOOK OF MENTORING AT WORK: THEORY, RESEARCH AND PRACTICE (Belle Rose Ragins & Kathy E. Kram eds., 2007).

135. See generally KATHY E. KRAM, MENTORING AT WORK: DEVELOPMENTAL RELATIONSHIPS IN ORGANIZATIONAL LIFE (1985).

136. See Monica C. Higgins, *The More, the Merrier? Multiple Developmental Relationships and Work Satisfaction*, 19 J. MGMT. DEV. 277, 280–81, 289 (2000).

137. See generally Ellen A. Fagenson, *The Mentor Advantage: Perceived Career/Job Experience of Proteges Versus Non-Proteges*, 10 J. ORGANIZATIONAL BEHAV. 309 (1989).

138. See Aarti Ramaswami et al., *Gender, Mentoring, and Career Success: The Importance of Organizational Context*, 63 PERSONAL PSYCHOL. 385, 386–87 (2010).

139. See generally George F. Dreher & Taylor H. Cox, Jr., *Race, Gender, and Opportunity: A Study of Compensation Attainment and the Establishment of Mentoring Relationships*, 81 J. APPLIED PSYCHOL. 297 (1996).

140. Ramaswami et al., *supra* note 138, at 386–87.

cultures.<sup>141</sup> Females in these workplaces seem to be especially in need of sponsorship and legitimacy; these are two key attributes of powerful, visible, and connected mentors.<sup>142</sup> In at least one study of a male-dominated industry, mentoring by senior male mentors was important for female lawyers but had little impact on the careers of male lawyers.<sup>143</sup>

The EEOC tends to bring high-impact discrimination cases that involve many employees.<sup>144</sup> Additionally, it can bring suit despite the employees having signed arbitration agreements, which employers increasingly require. In resolution of disputes related to the lack of promotions or opportunities to advance, the EEOC should require offending employers to adopt mentoring programs. It should also urge mentorship in cases where employees have brought successful claims of discrimination.<sup>145</sup> The benefits to women and men, and to the organizations in which they work, make the effort worth the cost, and potentially turn an issue of contention into a more fair and equitable approach to advancement in organizations. In utilizing mentoring programs, the EEOC would be following suggestions made by the Glass Ceiling Commission (discussed below) as a way to advance women into senior-level positions.

Of course, courts and arbitrators could likewise use mentoring programs as a remedy in appropriate cases. Judges and arbitrators should be made aware of the advantages of mentoring when discrimination against women is alleged and incorporate it as part of their tool bag of remedies. Title VII allows equitable as well as legal (damages) remedies.<sup>146</sup> Mentoring programs as an equitable remedy, or part of a remedy, seem well suited for Title VII disparate treatment cases. Although a mentoring program would not be a substitute for changes in a company's human resource policies, it could be an additional measure that would assist women in recognizing and managing barriers. Mentoring may be an even more

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141. *Id.*

142. Schipani, et al., *Pathways for Women to Obtain Positions of Organizational Leadership: The Significance of Mentoring and Networking*, 16 J. GENDER L. & POLICY, 89, 101 (2009).

143. See Ramaswami et al., *supra* note 138, at 389.

144. See, e.g., Sam Hananel, *EEOC Pursues Class-Action Strategy on Job Bias; Aim to Deter Workplace Discrimination; Business Groups Claim Agency is Overreaching*, SEATTLE TIMES, Aug. 19, 2012, at D1, D5, available at <http://www.highbeam.com/doc/1G1-300271089.html>.

145. One benefit of a mentor is to "have the mentee's back," which includes protection from discrimination.

146. The Civil Rights Act of 1991 allowed for compensatory and punitive damages for violations of Title VII. Previously, only equitable remedies such as hiring, reinstatement, and lost wages and benefits were allowed. In addition, the 1991 Act allowed jury trials for intentional discrimination. 42 U.S.C. § 1981a (2006).

effective remedy in disparate treatment cases where, for example, evaluation and selection criteria, including the sorts of criteria that come into play in selecting top management, have the effect of disproportionately stalling the careers of women who are otherwise qualified for top management.

## 2. Regulatory Power of the OFCCP

The Office of Federal Contract Compliance (OFCCP) within the Department of Labor enforces Executive Order 11246, which bars federal government contractors from discriminating against traditionally protected groups, including women.<sup>147</sup> It requires contractors of a certain size to adopt plans to correct underutilization of those in protected groups.<sup>148</sup> The plans can include goals and timetables.<sup>149</sup> The employers' actions "shall include, but not be limited to . . . upgrading . . . and selection for training."<sup>150</sup> Underrepresentation of women at management levels can be included in this language, and contractors should include plans and goals to address this.<sup>151</sup> The OFCCP selectively audits contractors to determine compliance with the contractor's plans. In order to avoid sanctions that could result from the audit, contractors must show they have in place internal auditing systems that measure the effectiveness of their plan and that they distribute and review the effectiveness reports with management on a schedule.

Congress, in 1991, passed the Civil Rights Act of 1991, which provided for the establishment of the Glass Ceiling Commission. During the four years of its existence, the Commission conducted studies and made recommendations designed to address the issue

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147. See Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965) (prohibiting discrimination by federal government contractors).

148. *Id.*

149. In 2000, the OFCCP stated in conjunction with significant revision of the regulations that the affirmative action requirements are described to include those "policies, practices, and procedures that the contractor implements to ensure that all qualified applicants and employees are receiving an equal opportunity for recruitment, selection, *advancement*, and every other term and privilege associated with employment." Government Contractors, Affirmative Action Requirements, 65 Fed. Reg. 68,022, 68,035 (Nov. 13, 2000) (codified as 41 C.F.R. §§ 60-1 to -2) (emphasis added).

150. Exec. Order No. 11,246, 30 Fed. Reg. at 12,320.

151. In 2000, the OFCCP revised its regulations to reflect a change in focus from technical compliance to one in which a management plan was viewed as a tool to ensure equal employment opportunity. It stated that a plan should contain practical steps to address underutilization. Office of Fed. Contract Compliance Programs, *Facts on Executive Order 11246—Affirmative Action*, U.S. DEP'T LAB. (Jan. 4, 2002), <http://www.dol.gov/ofccp/regs/compliance/aa.htm>.

of underrepresentation of women and minorities in the workforce, including at upper levels in organizations. The Commission, in its two final reports, discussed mentoring as a way to overcome barriers faced by women and minorities in advancing to senior positions. These barriers include access to information and networking.<sup>152</sup> The Commission posited that if organizations increased the availability of mentorship to these groups, the groups would have greater access to the resources they need to advance at a pace similar to their male counterparts.<sup>153</sup>

We argue that the OFCCP should aggressively audit contractors to determine compliance, both in terms of the number and the effectiveness of their plans. Where these are found wanting, it should urge or impose mentoring programs as an effective way to correct imbalances, especially in cases of sustained disparities.

### 3. SEC Actions

The SEC can also act to increase the representation of women in the boardroom. The underrepresentation of women on boards is significant. In the United States, approximately 14 percent of board members are women, with many boards having none<sup>154</sup> even though numerous studies have shown a strong correlation between better financial performance and female board representation.<sup>155</sup> Many countries, such as Norway and France, have established quotas to speed up gender diversity on boards, and others, such as Australia and the United Kingdom, encourage it through their corporate governance codes.<sup>156</sup> Although the Supreme Court has

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152. See generally FED. GLASS CEILING COMM'N, A SOLID INVESTMENT: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL (1995), available at <http://www.dol.gov/oasam/programs/history/reich/reports/ceiling2.pdf>. It found that women were frequently put into staff positions that "provide little access and visibility to corporate decisionmakers . . ." *Id.* at 14. To counteract this, it recommended businesses implement formal mentorship programs.

153. See Leslie Kaufman-Rosen, *Holes in the Glass Ceiling Theory*, NEWSWEEK, Mar. 27, 1995, at 24, available at <http://www.thedailybeast.com/newsweek/1995/03/26/holes-in-the-glass-ceiling-theory.html>.

154. Terry Morehead Dworkin et al., *Career Mentoring for Women: New Horizons/Expanded Methods*, 55 BUS. HORIZONS 363, 367 (2012).

155. *Id.* at 364; See, e.g., Christopher Shea, *Get on Board Ladies*, WALL ST. J. (WEEK IN IDEAS), Aug. 11, 2012, at C4; NANCY M. CARTER & HARVEY M. WAGNER, CATALYST, THE BOTTOM LINE: CORPORATE PERFORMANCE AND WOMEN'S REPRESENTATION ON BOARDS (2004–2008) 1 (2011), <http://www.catalyst.org/publication/479/the-bottom-line-corporate-performance-and-womens-representation-on-boards-20042008>. Evidence also exists that there is causality. Sonja S. Carlson, "Women Directors": A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards, 11 SEATTLE J. SOC. JUST. 337, 346–47 (2012).

156. Carlson, *supra* note 155, at 359–63; see Dworkin et al., *supra* note 154, at 367–68. Indeed, American female executives are increasingly serving on European company boards

banned the adoption of affirmative action quotas, it has acknowledged the benefits of diversity.<sup>157</sup> The SEC can help companies and society reap those benefits by following the lead of Australia and the United Kingdom and strengthening the diversity reporting requirements of listed companies.

In 2009, the SEC adopted a diversity disclosure requirement for proxy statements and now requires a listed company to state whether it used diversity as a factor in considering board candidates, how it considered diversity, and the effectiveness of its diversity policy if it had one.<sup>158</sup> The SEC, however, purposely did not define diversity.<sup>159</sup> The SEC should now use its regulatory power to define diversity to include gender as a specific consideration. This could spur more companies to adopt gender diversity policies. In addition, it could require companies to disclose their diversity plan if they have one and require companies that have not adopted a plan to disclose the reasons for why they have not.<sup>160</sup> These requirements would be consistent with the value of board independence expressed in Sarbanes-Oxley<sup>161</sup> and Dodd-Frank<sup>162</sup> and would also advance the goal of corporate boards in maximizing shareholder wealth.<sup>163</sup> They would also be consistent with the recommendations of the Congressional Glass Ceiling Commission, which looked at artificial barriers hindering advancement to mid- and senior-level positions.<sup>164</sup> It recommended the implementation of mentorship programs to help women get around barriers such as a lack of information, visibility, and resources.<sup>165</sup>

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such as Sodexo SA, Fiat, and Logica PLC due to the “pink quotas.” There are ninety-six American women on 136 boards in twelve European countries. Joann S. Lublin, *‘Pink Quotas’ Alter Europe’s Boards Gender Mandates, Expertise in Hot Fields Bring Foreign Directorships to More American Women*, WALL ST. J., Sept. 12, 2012, at B8.

157. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

158. See Corporate Governance, 17 C.F.R. § 229.407(c)(1)–(2) (2012).

159. Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,344 (Dec. 23, 2009); Carlson, *supra* note 155, at 365.

160. See Carlson, *supra* note 155, at 370–71.

161. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15, 18, 28, and 29 U.S.C.). The Act requires independent directors on the audit committee. *Id.* at 771, 775–76.

162. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, 1618.

163. See Carlson, *supra* note 155, at 340. Carlson also argues that the SEC could adopt a non-binding “Say-on-Diversity” shareholder vote rule similar to its nonbinding shareholder vote on executive compensation reflecting the Dodd-Frank disclosure requirement on executive compensation. *Id.* at 374–75.

164. See generally FED. GLASS CEILING COMM’N, *supra* note 152.

165. Dworkin et al., *supra* note 154, at 368.



Once companies embrace diversity, mentoring programs are likely to follow. Such programs are one of the most common tools companies have used to help achieve diversity goals. Many companies have not responded to the current SEC action on board diversity. One reason for the reluctance may be their fear that it would be hard to find well-qualified candidates.<sup>166</sup> A recent article in the *Wall Street Journal* shows how changing facts may lay to rest this assumption.<sup>167</sup> European companies seem to be able to find suitable women for their boards, including many American women.<sup>168</sup>

A focus on diversity could have another benefit—that of helping to overcome the tokenism problem. A single member of a minority group on a board will tend to have a limited voice.<sup>169</sup> Often, her voice will be minimized and her failures magnified. Achieving “critical mass” not only garners credibility for the individuals involved, but also helps overcome “groupthink.”<sup>170</sup> Some have posited that homogeneity and the resultant groupthink contributed to the financial crisis.<sup>171</sup> At a minimum, a critical mass will help lead to diversity of opinion, which, in turn, tends to result in more informed decisions and, often, better financial performance.<sup>172</sup>

The SEC could also play a role in helping to overcome the decades-long wage disparity experienced by women. Women still only earn approximately three-quarters of what men earn.<sup>173</sup> The Dodd-

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166. See Carlson, *supra* note 155, at 369 (citing PRICEWATERHOUSECOOPERS LLP, ANNUAL CORPORATE DIRECTORS SURVEY 2011 FINDINGS: BOARDS RESPOND TO STAKEHOLDER CONCERNS 18 (2011), available at [http://www.pwc.com/en\\_US/us/corporate-governance/assets/annual-corporate-director-survey-2011.pdf](http://www.pwc.com/en_US/us/corporate-governance/assets/annual-corporate-director-survey-2011.pdf)).

167. Joann S. Lublin & Kelly Eggers, *More Women Are Primed to Land CEO Roles: In the U.S., a Strong Pipeline of Female Senior Executives Means a Larger Pool Eyed by Recruiters*, WALL ST. J., Apr. 30, 2012, at B1 (detailing the ten top women considered to be a likely pick for a CEO position in the next five years after polling fifteen search firms, executive coaches, and women’s organizations).

168. See Lublin, *supra* note 167.

169. See Mariatersa Torchina et al., *Women Directors on Corporate Boards: From Tokenism to Critical Mass*, 102 J. BUS. ETHICS 299, 302 (2011).

170. See ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION (Basic Books 1977); Torchina et al., *supra* note 169.

171. Nicki Gilmour, *Why Accountability Is What Matters: Achieving Critical Mass with Targets or Quotas*, THE GLASS HAMMER (Jan. 21, 2010, 6:00 AM), <http://www.theglasshammer.com/news/2010/01/21/why-accountability-is-what-matters-achieving-critical-mass-with-targets-or-quotas>; Carlson, *supra* note 155, at 343.

172. For example, a recent study involving 1,500 American companies during the period from 1992–2006 found that women in management just below the CEO level had a significant positive impact on companies involved in research and development. Rebecca Tuhus-Dubrow, *The Female Advantage*, BOSTON.COM (May 3, 2009), [http://www.boston.com/boston-globe/ideas/articles/2009/05/03/the\\_female\\_advantage/](http://www.boston.com/boston-globe/ideas/articles/2009/05/03/the_female_advantage/).

173. David Jackson & Mimi Hall, *Women Gain in Education and Longevity*, U.S.A. TODAY, Mar. 2, 2011, at 5A.

Frank law included a pay equity disclosure provision, but the SEC has not yet written its implementing rule.<sup>174</sup> The provision is designed to give investors information about pay disparity so they can better evaluate the company by requiring companies to disclose the median pay of their CEO and of their employees. A large gap “can affect employee morale, productivity and turnover.”<sup>175</sup> If the SEC effectively implements the provision and if shareholders act on the disclosed information, the provision could put pressure on companies to reduce the gap. Because women are disproportionately at the lower end of pay disparities, any resulting raise would help narrow the gender disparity gap.

#### *D. Government Contracts*

Another possible means of ameliorating gender-based employment discrimination would be to preferentially award government procurement and services contracts to businesses that have superior track records for treating women properly.<sup>176</sup> For example, government entities could preferentially award contracts to businesses that have had fewer complaints filed with the EEOC, have mentoring programs open to all employees already in place, and have a higher proportion of women in leadership positions. Moreover, there are legitimate business reasons for government entities to prefer to do business with companies that treat women better, as studies have repeatedly shown that gender diversity in upper management is good for business.<sup>177</sup> This preference would give companies an incentive to treat their female employees better and proactively implement mentoring programs to help them. This form of incentive would have the added benefit of producing a more organic, informal mentoring system that is designed to truly achieve results,

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174. Leslie Kwoh, *Firms Resist New Pay-Equity Rules*, WALL ST. J., June 27, 2012, at B8.

175. *Id.* (citing several studies). It encourages whistleblowers to come forward with information of wrongdoing in the financial markets by providing them with large rewards and broadly protects them from retaliation when they provide useful and original information. § 748; 7 U.S.C. § 26(b) (2006). Further, Dodd-Frank amended the Sarbanes-Oxley Act (also designed to prevent financial crises) by precluding enforcement of mandatory pre-dispute arbitration agreements. Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15, 18, 28, and 29 U.S.C.).

176. See Ryan Edmonds, *The Glass Ceiling's Silver Bullet? Public Procurement as a Regulatory Solution to Gender Discrimination in Executive Employment* (April 10, 2011), Paper Presented to the 48th Annual Canadian Industrial Relations Association Conference: New Ideas about Work and Workers, Fredericton, New Brunswick, June 2-4, 2011, available at <http://ssrn.com/abstract=1845993>.

177. *E.g.*, Dworkin et al., *supra* note 154, at 364.

rather than a mentoring system that merely meets the terms of a settlement agreement.

### *E. Arbitration Agreements*

A large number of employers now require that applicants agree that they will arbitrate all disputes and not bring or join class action suits as a condition to employment. In order to facilitate suits that further important public policies, Congress has barred the enforcement of such pre-hire agreements in certain instances, including some involving Title VII. Under the Department of Defense Appropriations Act of 2010, contractors with contracts of more than \$1 million must agree not to enter into or enforce existing contracts that require arbitration of any Title VII claim or any tort related to sexual harassment or assault.<sup>178</sup> Further, the contractor must certify that it has required the same of subcontractors with contracts in excess of \$1 million.<sup>179</sup>

A similar prohibition can be seen in the recently-enacted Dodd-Frank Wall Street Reform and Consumer Protection Act,<sup>180</sup> passed after the financial crisis of 2008, which includes provisions that promote whistleblowing and protect whistleblowers. Part of that encouragement and protection involves prohibiting the enforcement of arbitration agreements, thereby allowing whistleblowers to sue when they suffer retaliation.<sup>181</sup> The Department of Labor has also refused to enforce agreements not to sue in FLSA cases.<sup>182</sup> Likewise, to further the long-standing and important public policy of preventing and remedying discrimination, Congress should bar enforcement of mandatory pre-dispute class action and arbitration agreements.<sup>183</sup>

Some commentators, however, have argued that the backlash against mandatory pre-dispute arbitration agreements has been

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178. Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, § 8116(a)(1), 123 Stat. 3409, 46-47 (2009), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr3326enr/pdf/BILLS-111hr3326enr.pdf>.

179. *Id.* at § 8116(b).

180. Pub. L. No. 111-203, 124 Stat. 1376.

181. § 922(e)(2); 18 U.S.C. 1514A(e)(2) (2006).

182. Steven Greenhouse, *Labor Board Supports Class Action For Workers*, N.Y. TIMES, Jan. 12, 2012, at B1. *But see* Owen v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013) (finding a class action waiver enforceable in FLSA case).

183. Whistleblowing is essentially an individual act, so no such bar was needed in promoting whistleblowing.

overzealous.<sup>184</sup> Admittedly, a large portion of the distrust of employment arbitration stems from negative stereotypes of employers as evil or biased, when in reality many employers implement pre-dispute arbitration agreements in good faith and with the best of intentions.<sup>185</sup> To be sure, pre-dispute arbitration agreements can sometimes resolve workplace issues more effectively than the judicial system,<sup>186</sup> and arbitration continues to be a less expensive, faster dispute resolution process than litigation in many circumstances.

Many of these efficiency benefits, however, are lost in a class action context.<sup>187</sup> Additionally, arbitration is not precedential and does not develop or advance the case law, which is a critical disadvantage when it comes to gender discrimination disputes, an area of law that is still in need of significant progression. Moreover, arbitration greatly restricts the opportunity to appeal decisions; for corporate bodies in routine contract disputes, the increased efficiency is worth the risk of limiting appeals, but for victims of discrimination with one opportunity at restitution, it frequently is not. Thus, in order to maintain the benefits of pre-dispute arbitration while still developing case law and assuring fair and efficient adjudication, the bar on mandatory pre-dispute arbitration agreements could be limited to employment discrimination cases involving class actions.

As noted above, educated observers anticipate that the holding in *Dukes* will severely hamper the ability of victims of sexual discrimination in the workplace to redress the wrongs they have suffered. It should be further noted that the holding of *Dukes* also has implications for the viability of the class action procedure generally.

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184. Beth M. Primm, Comment, *A Critical Look at the EEOC's Policy Against Mandatory Pre-Dispute Arbitration Agreements*, 2 U. Pa. J. Lab. & Emp. L. 151, 163 (1999) ("While the justifications offered by the EEOC against the enforcement of mandatory arbitration agreements appear facially compelling, further inquiry shows that they are overzealous, unsubstantiated, or at the least, questionable.").

185. *Id.* at 174 ("[T]he EEOC is unnecessarily excluding every private employer, regardless of good faith or intention, from establishing a useful role in the implementation and furtherance of employment law principles."). See generally *id.* at 172-77 (discussing how the EEOC's opposition to mandatory arbitration systems are premised on an unfair view of employers and arbitrators).

186. *Id.* at 163 ("[M]andatory arbitration agreements, if obtained through informed consent and reasonable methods, can actually achieve the goals that most individual claimants would cite as fundamental to employment law—restoring, retaining, and revitalizing employee power and dignity in the workplace—better than court adjudication.").

187. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011) (discussing how moving from bilateral arbitration to class action arbitration sacrifices the traditional benefits of arbitration, making the process "slower, more costly, and more likely to generate procedural morass than final judgment").

Although a detailed analysis of class action litigation in contexts other than employment discrimination is beyond the scope of this Article, we further urge (1) narrow construction of *Dukes* in class action litigation generally, (2) statutory reform which would restore the rights of parties who have been harmed to utilize the class action procedure where Congress sees it as appropriate, and (3) action by regulatory agencies in administrative procedures to fashion remedies to lessen the effects of *Dukes* where parties have shown harm worthy of redress.<sup>188</sup>

### CONCLUSION

What's the point in pouring a fortune into educating girls, and then watching them exceed boys at almost every level, if, when it comes to appointing business leaders in top companies, these are drawn from just half the population—friends who have been recruited on fishing and hunting trips or from within a small circle of acquaintances?<sup>189</sup>

In 2011, women made up 46.6 percent of the labor force.<sup>190</sup> But in the corporate world, for example, only 16.6 percent of the board members of Fortune 500 companies are female.<sup>191</sup> Similarly, women made up 45.4 percent of associates in the nation's major law firms but represent only 19.5 percent of the partners in these firms.<sup>192</sup> Women still earn seventy-seven cents on a man's dollar by the latest census conducted in 2008.<sup>193</sup> The number drops to 68

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188. The authors recognize that law regarding Rule 23 and the commonality requirement has developed differently depending on the subject matter of the litigation. For example, one of the authors has previously criticized the court's denial of class certification in the context of securities litigation brought by the bondholders of the American International Group (AIG). *In re Am. Int'l Grp. Sec. Litig.*, 265 F.R.D. 157 (S.D.N.Y. 2010). The commonality requirement in securities law class action litigation can be met with proof that securities traded in an efficient market. See Michael Hartzmark, Cindy A. Schipani, H. Nejat Seyhun, *Fraud on the Market: Analysis of the Efficiency of the Corporate Bond Market*, 2011 COLUM. BUS. L. REV. 654, 657, 662 (2011).

189. Gilmour, *supra* note 171 (quoting Ansgar Gabrielsen, the Norwegian Minister of Trade, who drafted the gender diversity quota legislation for boards); Carlson, *supra* note 155, at 337.

190. BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY, available at <http://www.bls.gov/cps/cpsaat03.htm> (last updated Feb. 5, 2013).

191. CATALYST, *supra* note 6.

192. AMERICAN BAR ASSOCIATION, A CURRENT GLANCE AT WOMEN IN THE LAW 2011 1 (2011), [http://www.americanbar.org/content/dam/aba/marketing/women/current\\_glance\\_statistics\\_2011.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_2011.authcheckdam.pdf).

193. Laura Fitzpatrick, *Why Do Women Still Earn Less Than Men?*, TIME, Apr. 20, 2010, at 1, available at <http://www.time.com/time/nation/article/0,8599,1983185,00.html>.

percent for African-American women and 58 percent for Latinas.<sup>194</sup> These numbers suggest that discrimination in the workplace is still a significant problem. Yet, in light of *Dukes*, employees may become discouraged from bringing claims if the class action procedure is effectively unavailable. Regulators and Congress should step up and take actions to help advance the important public policy of creating a level playing field in employment.

During the presidential race of 2012, women and Hispanics were identified as groups crucial to a candidate's success. The changes we suggest cannot be achieved without leadership from the top. The heads of the agencies are political appointees and those appointees reflect the focus of their appointer. Whether the focus on women will be carried beyond the election cannot be determined at this point. To the extent, however, that these groups are truly seen as crucial constituencies, the actions we suggest are more likely to be achieved.

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194. *Id.*