

## From Duke Power to Wal-Mart: Title VII Class Actions Then and Now

By Brad Seligman

### Introduction

More than forty years have passed since the premier employment discrimination statute in the nation, Title VII of the Civil Rights Act of 1964, was adopted. While many of the more overt forms of discrimination of that time have faded, discrimination is still an ever-present reality, albeit more difficult to prove. The early years after Title VII was passed presented a kind of perfect storm for litigation: a new law, sympathetic judges (especially in the South), and newly adopted permissive class action rules. Those early years led to industry-wide consent decrees, and an explosion of class action suits.

Times change. With overt conduct going underground, more sophisticated defendants, and a much less sympathetic judiciary, class litigation was all but extinguished by the early 1990s. Then came the Civil Rights Act of 1991, which, along with other factors, resurrected class litigation, at least to some extent.

Today, there is a remarkable split largely between the Southern federal circuit courts of appeal (the Fourth, Fifth and Eleventh) where class civil rights litigation rarely gets a good hearing, and the rest of the country. In any circuit, however, litigation of class employment cases today requires greater focus, and more careful case selection, than ever before. The district and appellate decisions in the gender discrimination class action of *Dukes v. Wal-Mart Stores, Inc.*, suggest some steps that can enhance the chances of any class case. In this demanding era, it is also particularly important that civil rights lawyers network and plot common appellate, administrative and legislative strategies.

### First Generation

Congress passed Title VII of the Civil Rights Act of 1964 after years of civil rights struggle and southern senatorial recalcitrance. It might well have been delayed for years more but for the assassination of President Kennedy, and Lyndon Johnson's insistence on the passage of the Civil Rights Act as a tribute to the slain president. As of 1964, there were few national precedents for any anti-discrimination workplace initiative. Indeed, the basic model of Title VII was drawn from the National Labor Relations Act—not a civil rights model. Southern Senators were able to limit the remedies under the statute, and require an administrative processing prerequisite. In one of their largest miscalculations, however, they added “sex” to the list of protected categories, assuming, incorrectly as it turned out, that the amendment would be a poison pill that would doom the whole bill.

The American workplace in 1964 was much like pre-*Brown v. Board of Education* school systems. In the South, many industries' jobs had explicit, race segregated occupational categories. There were very few women in higher paying jobs. Title VII meant to change all that, and in what was one of its most marvelously idealistic and unrealistic provisions, it gave employers a one year grace period in which to dismantle explicitly discriminatory policies. Many employers ignored the statute, or did what Duke Power did—eliminated explicit racial classifications, but imposed facially neutral requirements that had the effect of disqualifying most black applicants from higher paying jobs. This led to the Supreme Court's seminal *Griggs v. Duke Power*<sup>1</sup> decision, which ruled that such requirements, where they acted as a “built in headwind” to minority aspirations, could only be imposed if they met a stringent business necessity standard. Thus the adverse impact standard was created, a liability theory that did not

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<sup>1</sup>401 U.S. 424 (1971)

require proof of discriminatory intent, only a statistical proof of an adverse outcome from the imposition of a test or other standard.

The original Title VII gave very limited authority to the Equal Employment Opportunity Commission (EEOC), although it allowed the Justice Department to bring “pattern and practice” cases—essentially class-wide enforcement cases. (The EEOC was given authority to file suits in 1972). On its own, however, Title VII did not allow private litigants a means to challenge systemic practices. That authority came in 1966 when the Federal Rules of Civil Procedure were overhauled, and the modern rule for class actions (Rule 23) was adopted. The Federal Advisory Committee that developed the new class action rule was motivated in large part by the civil rights movement. The Committee accordingly devised a new form of class action that would make class adjudication particularly stream-lined in civil rights cases: Rule 23(b)(2) which provides for class actions where injunctive or declaratory relief is the primary relief sought. Membership in this form of class was automatic and mandatory—there is no right to “opt out” of the class, or necessity to “opt in.” There was likewise no expensive class notice requirement prior to a liability trial.<sup>2</sup> Civil rights class cases were also easier to certify than damage cases which, under 23(b)(3), must have common questions that “predominate” and be “superior” to other methods of adjudication.

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<sup>2</sup>Where class notice is required, plaintiffs have to pay for it no matter how strong the case. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974).

The early years of Title VII saw broad attacks brought by the government and private counsel on entrenched racial and gender classifications. The government filed a series of industry-wide cases against the steel, automotive and other industries. Private plaintiffs, seizing upon the newly revised class action rules, filed extremely broad cases that attacked the entire spectrum of discriminatory practices of an employer. These broad cases, often called “across the board” cases because the range of practices challenged (hiring, promotion, firing, demotion, pay and other practices would be challenged in the same case), were often certified on the theory that discrimination was by definition class conduct.<sup>3</sup> Proof of liability in these cases was often based on statistical data showing that disparate employment patterns were unlikely to be the result of chance. The Supreme Court endorsed this statistical approach and, with marvelous imprecision, explained that a disparity of “2 or 3” standard deviations could raise a class-wide inference of discrimination.<sup>4</sup>

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<sup>3</sup>*Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 719 (7th Cir 1969) (“A suit for violation of Title VII is necessarily a class action as the evil sought to be ended is discrimination on the basis of a class characteristic i.e. race, sex, religion or national origin.”)

<sup>4</sup>*Hazelwood School Dist. v. U.S.*, 433 U.S. 299, 308 n.14(1977). Two standard deviations is roughly akin to a 1 in 20 probability that the result would occur by random fluctuation, while 3 standard deviations roughly correspond to a nearly 1 in 500 probability.

Many of these cases ended in broad consent decrees, some, however, were tried. The Supreme Court, in a series of decisions in the 1970s, developed the procedures and standards of proof for such cases, emphasizing the broad remedial purposes of Title VII and rejected “good faith” or other “equitable” defenses. It made clear that, in virtually all cases, “make whole” and “rightful place” relief (i.e. full economic losses and reinstatement and retroactive seniority) must be provided if liability is established.<sup>5</sup> Proof of a pattern of discrimination created a presumption that all members of the class are entitled to such relief (with the employer bearing a burden of proof to show that in the absence of discrimination each class member would not have received the sought-for job).<sup>6</sup> Lower courts extended these concepts by holding that a proven discriminator bears the risk if damages are uncertain, and if its own conduct makes determining who was damaged a “quagmire of hypotheticals,” then a formula or statistical model could be used to determine lost back pay.<sup>7</sup>

This first period of Title VII cases, sometimes called the “first generation,”<sup>8</sup> “involved overt intentional acts and policies which were not difficult to discern as discriminatory, such as blanket exclusion of women from certain positions regardless of their ability to do the work . . .

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<sup>5</sup>*Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975)(back pay); *Franks v. Bowman Transportation Co. Inc.*, 424 U.S. 747(1976)(retroactive seniority)

<sup>6</sup>*Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 361-62 (1977).

<sup>7</sup>*Pettway v. American Cast Iron Pipe Co.*, 494 F. 2d 211, 261 (5th Cir 1974).

<sup>8</sup> Title VII does not encompass age or disability as protected categories. Thus the first generations of age and disability cases began much later. Age discrimination was banned in 1967 (though the Age Discrimination in Employment Act has a cumbersome “opt in” class process) and disability discrimination by the private sector in 1990.

or the use of tests with an obvious racial bias.”<sup>9</sup> The state of the law and courts during this period was in many ways the mirror image of today. Class certification was relatively easy, proof of discrimination often could be established through explicit discriminatory classifications or blatantly discriminatory statements of an employer, and the appellate courts, especially in the South, were often jealous guardians of the spirit of Title VII. The road became much harder for the next generation of cases.

### The Empire Strikes Back

The backlash was not long in coming. Starting in the Reagan years, a series of factors began to limit and undermine Title VII as a tool for systemic change. Employers had become more sophisticated—they now understood that their policies should at least comply with the letter of the law. The “easy” first generation cases soon gave way to cases where discrimination went underground—its existence “is likely to be subtle, detectable, if at all, only upon careful examination of sophisticated statistical analyses.”<sup>10</sup> Cases thus became harder to prove, and much more expensive to maintain. And the defense grew much more tenacious.

As significantly, the ease of class certification was abruptly ended in 1982 with the Supreme Court’s decision in *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982). The Court rejected the automatic “across the board” approach, with its assumption that discrimination cases were particularly entitled to class treatment, and insisted on a “rigorous analysis” in each case of whether the plaintiff had met his or her burden of establishing class requisites. The Court demanded a close nexus between the claims and theories of the plaintiff,

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<sup>9</sup>*Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 612 (N.D. Cal. 1979)

<sup>10</sup>*Boyd*, supra at 613

and those of the class. While the specific facts and limitations (and exceptions) of *Falcon* have been endlessly debated, there is no question that the case emboldened defenders of corporations and allowed an increasingly conservative judiciary to limit class certification in employment cases.

Private enforcement of Title VII was also hampered by a series of decisions that limited the availability and extent of attorney's fees to prevailing plaintiffs.<sup>11</sup> Changing political and administrative winds also hampered federally funded legal services organizations from bringing class civil rights cases. Ultimately, an explicit bar on class cases was imposed on all federally funded legal aid offices.

The cumulative effect of these changes, along with an increasingly conservative judiciary, can be traced in the number of federal class action employment discrimination cases filed annually. In 1976, the earliest year for which data is available,<sup>12</sup> 1174 employment discrimination class actions were filed in federal courts. By 1986 the number had plunged to 68. Filings hit their lowest point in 1991, when only 32 class cases were filed. They have since modestly rebounded to 96 in 2004.

This huge drop-off in private enforcement was not offset by any increase in government activity. The Reagan-Bush years saw the EEOC and the Justice Department all but abandoning pattern and practice enforcement. Under EEOC chair Clarence Thomas, the new focus was on individual cases, while the Justice Department's Civil Rights Division, under the leadership of

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<sup>11</sup>Most significantly, the Court limited fees in most instances to the "lodestar"—reasonable hours times hourly rates, and did not allow any enhancement for risk or other factors, thereby making civil rights cases less economically viable (or desirable). *See, e.g., City of Burlington v. Dague*, 505 U.S. 557(1992) (no multiplier for risk)

<sup>12</sup> Data is from Administrative Office of the United States Courts

Bradford Reynolds, made a priority out of *challenging* affirmative action plans, rather than in filing systemic cases.

As if it couldn't get worse, in the late 1980s, the Supreme Court issued a series of draconian rulings that undermined or rejected earlier Supreme Court civil rights cases, including *Griggs*. It erected new procedural barriers to enforcement for all but white males challenging affirmative action plans.<sup>13</sup> For awhile it truly looked like the Supreme Court was re-enacting the post Civil War Supreme Court's successful effort to gut the original Civil Rights Acts.

### Russian Spring

But then, amazingly, in quick succession Congress passed the Americans With Disabilities Act of 1990 (ADA) and the Civil Rights Act of 1991, both signed by a Republican President. These two statutes reflect perhaps the largest legislative gains for civil rights since 1964. The Civil Rights Act of 1991(P.L. 102-166) not only reversed more than a half dozen

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<sup>13</sup>Cases included *Wards Cove Packing Co. Inc., v. Atonio*, 490 U.S. 642 (1989) (reducing employer burden of proving business necessity); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (severely limiting reach of the Civil Rights Act of 1966, 42 U.S.C. 1981); *Martin v. Wilks*, 490 U.S.755(1989) (white males who failed to intervene to challenge affirmative action decree could bring later action challenging promotions made under the decree); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900(1989)(challenge by women to seniority system must be brought when system adopted); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987)(expert witness fees not recoverable in Title VII action). The 1991 Act reversed or limited each of these decisions.

Supreme Court cases (and put *Griggs* firmly back on its pedestal), but it actually extended the remedies of Title VII , providing for the first time for the recovery of emotional distress and punitive damages, and created a right to a jury trial, for intentional discrimination. The ADA established the first federal disability discrimination law broadly applicable to private employers.

The 1990's also saw the first \$100 million plus employment discrimination class settlements—cases against State Farm, Shoneys, Lucky Stores, Coca Cola, Texaco, and Voice of America were settled at or above this range. The scent of money also brought new players into the employment discrimination arena, once limited to civil rights lawyers toiling in the vineyards. Now firms that had litigated successful mass tort, anti-trust and securities cases began to litigate Title VII cases. While these firms brought funding and staffing and big case management experience to employment cases, they also brought some of the same issues and problems from their older practice areas: a focus on damages and attorneys fees (rather than injunctive relief), races to the court house and claims of case poaching.

The “monster” cases also brought new media attention to civil rights cases, at least cases with a big price tag. The media plan became an integral part of case planning for plaintiffs, as well as defendants.

#### The Empire Strikes Back . . . Again

But the circle turns. While the Civil Rights Act of 1991 was clearly intended to expand Title VII remedies, this sword has been turned into a shield, at least in the Southern circuits. Prior to 1991, virtually all Title VII class actions had been certified under the permissive Federal Rule 23(b)(2) standard which did not require expensive notice prior to trial, in contrast to the more demanding 23(b)(3), which requires such notice and mandates that common issues “predominate.”

In 1998, however, the Fifth Circuit issued its draconian decision denying class certification in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir 1998), *reh'g. denied*, 151 F. 3d 402 (1998). *Allison* was a garden variety class race case which sought, as permitted under the 1991 Civil Rights Act, compensatory and punitive damages as well as the traditional remedies of lost back pay and injunctive relief. The Court rejected Rule 23(b)(2) certification in terms that virtually bar such treatment in any case which sought damages, as well as equitable relief, holding that only where damages “flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief” would (b)(2) treatment be appropriate. Moreover, such damages “must be capable of computation by means of objective standards and not dependant in any significant way on the intangible, subjective differences of each class member’s circumstances.”<sup>14</sup> Since compensatory and punitive damages never “automatically” flow from a class judgment, and by definition compensatory damages are not based on objective standards, (b)(2) certification would never be available where full relief is sought for a Title VII violation.

Likewise, certification was not appropriate under (b)(3) because damages claims, according to the Fifth Circuit, require a particularized inquiry into each class member’s circumstances, thus precluding a finding that common questions of law or fact predominate.<sup>15</sup> The Fifth Circuit justified its (b)(3) holding in part on the notion that class treatment was not necessary, because the \$300,000 damage cap in Title VII and its attorneys fee provision made

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<sup>14</sup>*Allison*, 151 F.3d at 415. A Fifth Circuit decision subsequent to *Alison*, *In re Monumental Life Ins. Co.*, 365 F.3d 408 (5th Cir 2004) has arguably softened some of its harsher implications.

<sup>15</sup>*Id.* at 419.

individual cases economically viable, and thus class treatment was not a “superior” method of litigation, as required by 23(b)(3). The subsequent history of the *Allison* litigation put the lie on this facile reasoning. On remand, the trial court granted summary judgment against all plaintiffs. They argued, on appeal, that summary judgment was not justified because of evidence that defendant (now called *Petroleos de Venezuela*) engaged in a pattern and practice of discrimination. The Fifth Circuit rejected this argument, however, on the grounds that pattern and practice evidence was only available . . . in a class action.<sup>16</sup>

*Allison* was subsequently embraced by the Sixth and Eleventh Circuits. *Reeb v. Ohio Department of Rehabilitation & Correction*, 435 F.3d 639 (6th Cir. 2006); *Cooper v. Southern Co.*, 390 F.3d 695, 720 (11th Cir. 2004) (citing *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228 (11th Cir. 2000); *Murray v. Auslander*, 244 F.3d 807 (11th Cir 2001)). A number of district courts in the Fourth Circuit have also followed suit.<sup>17</sup>

*Alison* is in a curious way the mirror image of claims made by plaintiffs prior to the *Falcon* decision—that Title VII cases are an exception to standard application of Rule 23. Before *Falcon*, plaintiffs’ counsel argued that employment discrimination cases were *per se* class cases, regardless of Rule 23 standards. The *Alison* court suggests its own *per se* rule—Title VII cases are almost never appropriate for class treatment, regardless of Rule 23.

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<sup>16</sup> *Celestine v. Petroleos de Venezuela SA*, 266 F.3d 343, 356 & n.4 (5th Cir 2001).

<sup>17</sup> See, e.g., *Lott v. Westinghouse Savannah River Co., Inc.*, 200 FRD 539 (D.S.C. 2000); *Adams v. Henderson*, 197 FRD 162, 172 (D. Md 2000).

Outside of the South, a less rigid approach has commanded the majority of the Circuits, where damages, in addition to injunctive relief, remain a viable option in a class case. The Second and Ninth Circuits have explicitly rejected *Allison*, and focused instead on the intent of the plaintiffs in bringing an injunctive relief and damages case.<sup>18</sup> The Seventh and D.C. Circuits have approved “hybrid” classes (certifying equitable claims under (b)(2) and damages claims under (b)(3)).<sup>19</sup>

The Civil Rights Act of 1991 overturned the *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), a ruling that watered down the adverse impact theory, particularly by reducing the defendant’s burden of proving the business necessity (which the Court defined loosely) of a practice that has an adverse impact to a burden of production only. The *Atonio* approach made it easier to defend facially neutral policies, especially subjective employment practices such as vague promotion standards, that otherwise would be very hard to validate.<sup>20</sup> While subjective practices had been challenged before 1991—and indeed the *Falcon* decision recognized the

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<sup>18</sup> *Dukes v. Wal-Mart Stores, Inc.*, 474 F.3d 1214 (9th Cir. 2007); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001); *Molski v. Gleich*, 318 F. 3d 937 (9th Cir. 2003).

<sup>19</sup> *Jefferson v. Ingersoll Intern. Inc.*, 195 F.3d 894, 899 (7th Cir 1999); *Lemon v. International Union of Operating Engineers, Local 139*, 216 F. 3d 577, 581(7th Cir. 2000); *Eubanks v. Billington*, 110 F.3d 87, 96 (D.C. Cir 1997).

<sup>20</sup> *Atonio* followed, and approved, the *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977(1988) plurality opinion which, while finding that subjective criteria could be challenged under the adverse impact standard, opined that the defendant’s burden in adverse impact cases was solely one of production, not persuasion. Moreover, subjective criteria, under *Watson*, would be easier to justify than objective criteria. *Id.* at 999. The 1991 Civil Rights Act reversed *Atonio*’s attempted reduction of the defendant’s burden, and made no distinction between objective and subjective criteria. *See* 42 U.S.C. § 2000e-2(k)(1)(A); 42 U.S.C. § 2000e(m).

class-worthiness of such claims<sup>21</sup>—the 1991 Act greatly enhanced the viability of such claims.

At least in some courts.

Some of the largest class cases won or settled in the 1990s were subjective criteria cases.

Yet the same narrow view that animated courts that disfavored post 1991 damage claims also doomed such class cases in some jurisdictions. While some courts found that a practice of leaving employment decisions to lower level managers without any objective standards satisfied class action commonality requirements,<sup>22</sup> other courts asserted that such a practice indicated that there was no common policy.<sup>23</sup> Straining to avoid class treatment, other courts refused to allow class treatment unless a practice was totally subjective.<sup>24</sup>

### Today

While the Southern Circuits remain inhospitable to class cases, there has been a modest resurgence of class filings elsewhere in recent years, and large class recoveries continue to be made. The most dramatic recent example of a Title VII class certification is in *Dukes v. Wal-Mart Stores, Inc.*, 222 FRD 137 (N.D. Cal. 2004), *aff'd* 474 F.3d 1214 (9th Cir. 2007).<sup>25</sup> There,

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<sup>21</sup>*Falcon* at fn 15. The Supreme Court had held that subjective criteria could be challenged under adverse impact theory. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988).

<sup>22</sup>See e.g. *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999) cert denied 529 U.S. 1107; *Morgan v. United Parcel Service of America, Inc.*, 169 FRD 349, 356 (E.D. Mo. 1996); *Shores v. Publix Super Markets Inc.*, 69 EPD Cases (CCH) 44,477, 1996 WL 407850.

<sup>23</sup>See, e.g., *Rhodes v. Cracker Barrel Old Country Store, Inc.*, 213 FRD 619, 680 (N.D. Ga 2003); *Reid v. Lockheed Martin Aeronautics Co.*, 205 FRD 655 (N.D. Ga. 2001).

<sup>24</sup>See, e.g., *Griffin v. Dugger*, 823 F.2d 1476, 1490-91 (11th Cir. 1987). *But see Staton v. Boeing Co.*, 327 F.3d 938, 954-55(9th Cir. 2003).

<sup>25</sup>Class motion papers, expert reports and other pleadings are available at

in an exhaustive 84 page ruling, the district court certified a nation-wide class. The case challenged largely subjective pay and promotion practices of Wal-Mart, alleging such practices discriminated against female workers. The certified class, estimated at larger than 1.6 million workers, is many times larger than any prior certified civil rights class action.

Wal-Mart, making some of the arguments endorsed by the Southern Circuits, emphasized the individualized nature (according to Wal-Mart) of the decisions being challenged, and asserted a statutory and due process right to challenge the claims of each class member—which would have made the class trial endless and thus unmanageable. The district court, which noted the many common factual and legal issues in the case, held that damages could be determined through statistical means, thus obviating the need for individualized testimony from class members. The Ninth Circuit affirmed, holding that individualized hearings are neither required nor always appropriate.<sup>26</sup> The court also reconfirmed its agreement with the proposition that “individualized hearings may be inappropriate where the employer’s conduct would reduce efforts to reconstruct individually what would have happened in the absence of discrimination to a ‘quagmire of hypothetical judgments.’”<sup>27</sup> It also rejected the argument that the Supreme Court’s punitive damages jurisprudence—which addresses individual challenges under state law—compelled individual hearings in federal class actions.

Although *Dukes* was litigated in the so-called liberal Ninth Circuit, class counsel recognized that in the post-1991 environment, a class filing must emphasize common issues, and

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[www.walmartclass.com](http://www.walmartclass.com).

<sup>26</sup> 474 F.3d at 1238.

<sup>27</sup> *Id.* at 1239 (quoting *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974)).

eliminate, or reduce in significance, individualized issues. The following list of factors, many of which were noted by the district court, supported the class certification:

1. The issues were pared down to two basic claims—equal pay and promotion to management. No class claims were asserted for issues such as hostile environment, failure to train, retaliation, discipline matters and the like. The claims were limited to gender discrimination. This allowed the Court to reject Wal-Mart’s description of the case as an “across the board” or “wall to wall” case. Instead, the Court described the issues as “substantially more limited.”

2. Only the national Title VII claim was asserted—no state law claims, with potentially different standards and statutes of limitations, or other federal claims were alleged on a class-wide basis.

3. Only store employees—and not outside applicants, upper management, or employees at other facilities—were included in the class.

4. The primacy of injunctive relief claims was emphasized at every stage and all plaintiffs averred that changing Wal-Mart policies and practices was the main purpose of the litigation. The plaintiff legal team included non-profit firms dedicated to seeking such changes.

5. Although lost earnings and punitive damages were sought, no class compensatory damages were alleged. Removing these more individualized damages eliminated the most effective argument a defendant has against class certification.

6. Plaintiffs asserted that the case should be certified under the permissive Rule 23(b)(2). Notwithstanding the elimination of compensatory damages, plaintiffs nevertheless proposed that the class be given notice and opt out rights, thereby forestalling defense claims that class

member due process rights would be compromised by certification.

7. Plaintiffs presented voluminous evidence of centralized control and monitoring by Wal-Mart's Bentonville headquarters of nearly every aspect of store operations.

8. In addition to showing company-wide statistical patterns, plaintiffs' experts demonstrated that the patterns were consistent in *each* of defendant's 41 regions.

9. In order to present the class case for a challenge to subjective practices, plaintiffs increasingly have relied upon recent social science research, particularly in the areas of sociology and psychology. Thus in *Dukes*, plaintiffs offered the testimony of a sociologist who explained how the absence of job posting and objective employment criteria can foster a discriminatory climate. In addition, this expert explained how Wal-Mart's "culture" ensured consistency in implementation of its pay and promotion policies, thus also buttressing commonality.

10. Plaintiffs worked in a broad coalition of non-profit and private law firms and grass roots organizations, with several important consequences. First, it helped to get the word out during the search for plaintiffs and witnesses. Second, it insured that the focus of the case would be on changing Wal-Mart, not just in obtaining a large damage pot. Third, it focused media attention which has been sustained and fierce. An extraordinarily large number of women stepped forward as witnesses, allowing the plaintiffs to file over 100 detailed declarations of class members with the class certification motion. The anecdotal evidence in turn served the media strategy—newspapers and television stations could find a "local angle" for their stories.

Wal-Mart continues to appeal the class certification ruling. Yet *Dukes* illustrates some of the strategies that can enhance class certification.

## Tomorrow

Many threats remain to class employment discrimination cases, the foremost are future Supreme Court cases that might endorse restrictive views of Rule 23 and the Civil Rights Act of 1991. Rule 23 itself remains under active consideration for future rule changes. The Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 12 (codified at 28 U.S.C. §§ 1332(d), 1453, 1711-1715), which federalizes many state class actions, shows the ever present danger of new legislation.

Employers also continue to employ new strategies. In today's tight labor market, many employers have discovered the joys of "outsourcing" discrimination—arranging to have agencies or labor contractors employ contingent workers. These new contract employees are left unsure of who is ultimately responsible for their plight. This practice, long the bane of immigrant workers, is spreading throughout more mainstream sectors of the labor force. Research has shown, moreover, that employment agencies are likely to have a higher rate of discrimination than most of the employers who do their own direct hiring. In today's economy, outside agencies have become a major gatekeeper to employment, and "temp to perm" the route to long term employment.<sup>28</sup> This is where the next generation of hiring cases may come from.

Our increasingly diverse society makes it nearly impossible to justify a non-diverse workforce, at least in entry level jobs. Increasingly, the battle for equality in the workplace will be a battle for better pay and promotions. The glass ceiling is not just a gender issue. The ceilings come in all colors, and limit opportunities for people with disabilities, accents, or other

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<sup>28</sup>See, for example, recent research by the Discrimination Research Center, at [www.drcenter.org](http://www.drcenter.org).

characteristics that make them different from their supervisors and managers. Many companies have perfectly fine pay and assignment systems at the bottom, featuring open application and posting regimes and objective pay criteria. As one advances above the lower levels, however, systems often disappear, and subjectivity reigns.<sup>29</sup> Increasingly, empirical social science research shows the perils of such systems, and the vulnerability of employers that rely upon them.

Judicial appointments remain critical. Although it is nice to imagine that forum and judicial assignment should make no difference in the outcome, we know this to be false. The Circuit, District, and judge a case is before, especially a class case, is often a major determinant of success in class litigation. Obviously affecting judicial selections—by changing the nominator, and offering information about specific nominees, is critically important. Educating the public about the importance of systemic litigation, and showing how discrimination works, puts a spotlight on the judiciary.

All this serves to emphasize the importance of litigating smarter, and with more focus, than ever before. It also calls on all of us to work together to coordinate appellate, administrative and legislative strategies. Historically, civil rights class action lawyers have never been very organized. In the old days, a few elite civil rights organizations such as the NAACP Legal Defense Fund or the Lawyers Committee for Civil Rights were important clearinghouses for civil rights lawyers. Today, however, their roles have diminished, and there

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<sup>29</sup> See, for example, the recent class certification decision in *Ellis v. Costco*, **Error! Main Document Only**.372 F. Supp. 2d 530 (N.D.Cal.2007).

are many newer firms involved who do not have the civil rights history or connections.

In the last four years, however, The Impact Fund has hosted national conferences of plaintiff employment discrimination class action lawyers, and a national Title VII class action LISTSERV has been established.<sup>30</sup> The National Employment Lawyers Association (NELA) has also re-invigorated its class action committee. All present and future class action lawyers are urged to participate in both efforts. We can't afford not to.

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Brad Seligman is executive director of The Impact Fund, and lead counsel in the *Dukes v. Wal-Mart* case. Further information about both are at [www.impactfund.org](http://www.impactfund.org). This is an updated version of an article originally published in Civil Rights Litigation and Attorneys Fees Annual Handbook, Vol. 20 (2004). Copyright © 2004 West, a Thomson business.

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<sup>30</sup> Class lawyers interested in being added to the LISTSERV and our annual conference invitation list, should send an email to [bseligman@impactfund.org](mailto:bseligman@impactfund.org).