Exploring Viable Options for Class Actions for Underrepresented African-American Professors in American Universities Post-*Wal-Mart v. Dukes*

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I. INTRODUCTION

In recent decades, racial differences in faculty salaries, tenure, and academic rank have become prominent issues in our educational landscape.[1] Next to Hispanics, African Americans account for the smallest percentage of college and university faculty in the United States.[2] Many of the colleges and universities in the United States do not have any African-American faculty members, and an even greater number of them do not employ any tenured African-American faculty.[3] Because of declining enrollment, greater financial pressures, and an increasing emphasis on funded research, achieving tenure at major institutions of higher learning has become a highly-selective process.[4]

Faculty salaries are "primarily determined by an individual's qualifications, including their level of educational attainment, length of service and experience, scholarly productivity, amount of administrative responsibilities, and teaching performance."[5] "[F]aculty who are equal in these attributes of human capital and who work in comparable institutions should have equivalent tenure and rank and receive equal pay regardless of their gender or their race/ethnicity."[6]

Research suggests that the underrepresentation of African-American professors in universities is "not completely and consistently explained by experience, productivity, and performance."[7] Discrimination continues[8] decades after the passage of the Equal Pay Act of 1963 (EPA) and Title VII of the Civil Rights Act of 1964 (Title VII), both of which prohibit discrimination in employment.[9] Just four percent of professors are African-American,[10] whereas African Americans comprise 13.2% of the United States population.[11] State and federal courts have recognized the importance of safeguarding academic freedom in institutions of higher learning,[12] but they have not yet

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[1] ELLEN M. BRADBURN ET AL., SALARY, PROMOTION, AND TENURE STATUS OF MINORITY AND WOMEN FACULTY IN U.S. COLLEGES AND UNIVERSITIES 1 (2000).

[2] *Id.* at 11.

[3] *Id.*

[4] *Id.*

[5] BRADBURN, *supra* note 1, at 1.

[6] *Id.*

[7] *Id.* at 1.

[8] *See* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 991 (2004) (finding that resumes with white-sounding names received fifty percent more callbacks than those with African-American-sounding names, even though the resumes were essentially the same).

[9] The Equal Pay Act of 1963, 29 U.S.C. § 206 (West 2014); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2006).

[10] STATE & CENSUS QUICK FACTS, U.S CENSUS BUREAU (last updated Feb. 5, 2015, 1:11 PM), http://quickfacts.census.gov/qfd/states/00000.html.

[11] *Id.*

[12] The U.S. Supreme Court has recognized a First Amendment right of institutional academic freedom: "It is the business of a university to provide that atmosphere which is most conducive to

attempted to impose promotion and tenure standards on U.S. colleges and universities.[13] However, the courts have recognized that the subjective nature of academic personnel evaluation decisions creates the potential for race-based, as well as other types of, discrimination.[14]

Despite statutory schemes prohibiting discrimination, fear of retaliation may deter individual plaintiffs from bringing employment discrimination claims.[15] An additional deterrent is the financial risk.[16] Class actions, pursuant to Federal Rule of Civil Procedure Rule 23 (Rule 23), are useful to plaintiffs subject to employment discrimination. Ultimately, the class action permits "individuals to pool their resources, which allows them to share litigation risks and burdens," helping to motivate and inspire confidence in individual class members.[17] However, availability of a class action for employees subject to discrimination has been compromised throughout our history with various interpretations by the courts. The Supreme Court sought to settle Rule 23's class certification requirements through *Wal-Mart v. Dukes*,[18] resulting in a strict interpretation.[19]

This Note will first provide a historical background of employment discrimination law and how it has evolved throughout recent decades. Next, this Note will discuss class actions. It will consider their uses, case law regarding their statutory interpretation by the courts, and end with a discussion of the Court's decision in *Wal-Mart*. Finally, it will substantively discuss how this controversial decision will affect plaintiffs, specifically underrepresented African-American professors, and opportunities to bring a viable class action pursuant to Rule 23.

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speculation, experiment, and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (citations omitted). *See also* Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 312 (1978) (Powell, J., concurring) ("The [academic] freedom of a university to make its own judgments as to education includes the selection of its student body.").

[13] Jacques J. Parenteau, *How Universities and Colleges Undermine the Defense of Tenure Denial Cases*, http://www.mppjustice.com/tenure_denial.htm, <http://perma.cc/TL9E-QD8Q>.

[14] *Id.*

[15] Suzette M. Malveaux, *Clearing Civil Procedural Hurdles in the Quest for Justice*, 37 OHIO N.U. L. REV. 621, 631 (2011) [hereinafter Malveaux].

[16] *See* Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. REV. COLLOQUY 34, 37 (2011) [hereinafter *Goliath*] (arguing that "those with small claims and limited resources are unlikely to challenge powerful corporations on their own . . . .").

[17] Malveaux, *supra* note 15, at 631; *see also Goliath*, *supra* note 16, at 37 (explaining how when individuals with small claims refrain from challenging large corporations, this "effectively immuniz[es] companies from complying with the law.").

[18] Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011).

[19] *See infra* Part III.

II. OVERVIEW OF EMPLOYMENT DISCRIMINATION LAW AND CLASS ACTION

The Equal Pay Act,[20] signed in to law by President John F. Kennedy on June 10, 1963, was one of the first federal anti-discrimination laws that addressed wage differences based on gender.[21] Under the statute, similarly-situated female and male employees must receive equal pay for equal work, unless the pay differential is attributable to one of four exceptions: a seniority system, a merit system, a system that measures by quantity or quality of production, or "any other factor other than sex."[22] Congress proceeded with understandable caution; the initial sweep of the statutes was not all encompassing.

A. Title VII

A year after Congress passed the EPA, it enacted the influential Title VII, which laid down the first general constraint against employment discrimination contained within federal law.[23] It provided broader protections, some of which overshadowed the narrow scope of the EPA.[24] The EPA specifically addresses sex-based wage discrimination, whereas Title VII prohibits discrimination with respect to an individual's "compensation, terms, conditions, or privileges of employment, because of . . . race, color, religion, sex, or national origin."[25] Title VII's objective is "plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees."[26]

Congress charged The Equal Employment Opportunity Commission (EEOC) with the power to investigate discrimination charges, to seek voluntary compliance through conciliation, and to institute civil actions to enforce Title VII's provisions.[27] For an individual to bring suit under Title VII, however, he must first exhaust the Act's administrative requirements.[28] Title VII provides plaintiffs

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[20] 29 U.S.C. § 206 (West 2014).

[21] *Equal Pay Act of 1963*, NATIONAL PARK SERVICE, http://www.nps.gov/subjects/civilrights/equal-pay-act-1963.htm, <http://perma.cc/4JRN-S4H4>.

[22] 29 U.S.C. § 206(d)(1) (West 2014).

[23] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2006).

[24] *Compare* 29 U.S.C. § 206(d)(1) (specifically addressing sex based discrimination), *with* Title VII § 2000e-2 (a)(1), (a)(2) (prohibiting discrimination with respect to compensation terms conditions or privileges).

[25] Title VII § 2000e-2(a)(1), (a)(2).

[26] Griggs v. Duke Power, 401 U.S. 424, 429–30 (1971).

[27] 42 U.S.C. § 2000e-5(a), (b), (f)(1) (1981).

[28] An aggrieved party must file a charge with the EEOC within 180 days. 42 U.S.C. § 2000e-5(b), (f)

injunctive relief and back pay for a two-year period.[29] The Act also allows for the prevailing party to recover attorneys' fees.[30]

B. Disparate Treatment and Disparate Impact

The class-action lawsuit is valuable for employees looking to fight system-wide employment discrimination. A class of people alleging disparate treatment or disparate impact may bring a claim against an employer under Title VII. Title VII has burden of proof requirements based upon alternative theories of "disparate impact" and "disparate treatment."[31] In order to prevail on a disparate treatment claim, a class must prove defendants acted with a discriminatory motive, although motive is inferable merely from differences in treatment.[32] In a disparate impact case, a class must demonstrate that employment practices or policies, which are facially-neutral in their treatment of different groups, actually treat one group more harshly than another in a manner that cannot be justified by business necessity.[33]

Employment discrimination can be shown by what is referred to as "pattern or practice."[34] To establish a pattern or practice of disparate treatment, for purposes of a discrimination claim under Title VII, the class must show that the defendant regularly and purposefully treated members of the protected group less favorably,[35] and intentional discrimination was the employer's standard operating procedure.[36] The class can prove this through a combination of statistics and anecdotes.[37]

(West 2014). If the EEOC does not complete its investigation within 180 days of the filing of the charge, a plaintiff can immediately request a right-to-sue letter at that time. The EEOC will then stop its investigation and issue the Notice of Right to Sue. 42 U.S.C. § 2000e-5(b) (West 2014). If the EEOC finds reasonable cause for the charge, it pursues conciliation through conference. *Id.* If these efforts fail, the EEOC notifies the complainant of his right to sue in a federal court. 42 U.S.C. § 2000e-5(f) (West 2014). In addition, the EEOC may recommend to the Attorney General that he bring suit. *Id.* § 2000e-6(f) (1981).

[29] *See id.* § 2000e-5 (g)(1) ("If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.").

[30] *Id.* § 2000e-5(k) (West 2014).

[31] *See* Ricci v. DeStefano, 129 S.Ct. 2658, 2676 (2009).

[32] *See* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.").

[33] Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

[34] *Teamsters*, 431 U.S. at 336 (noting that pattern or practice may be established "by a preponderance of the evidence that racial discrimination was the [defendant's] standard operating procedure, the regular rather than the unusual practice.").

[35] Morgan v. United Parcel Serv. of Am., Inc., 380 F.3d 459, 463 (8th Cir. 2004).

[36] Cooper v. S. Co., 390 F.3d 695, 716, 724 (11th Cir. 2004).

[37] *Id.* at 724.

A class who raises a pattern-or-practice discrimination claim against an employer has the initial burden of demonstrating that unlawful discrimination has been the regular policy of the employer, that is, that the discrimination was the company's regular, rather than unusual, practice. Once a plaintiff establishes a prima facie case[38] based on a pattern-or-practice theory, the burden shifts to the employer to defeat the showing by demonstrating that the plaintiff's proof is inaccurate or insignificant, or by providing a nondiscriminatory explanation for the apparently discriminatory result.[39]

If the defendant satisfies its burden of production in a pattern-or-practice case under Title VII, the trier of fact must then determine, by a preponderance of the evidence, whether the employer engaged in a pattern or practice of intentional discrimination.[40]

C. Class Actions

Individual plaintiffs face a variety of obstacles when confronted with the prospect of bringing an employment discrimination claim against their employer.[41] A potential plaintiff will likely face a large risk of heavy financial burden coupled with a long period of litigation.[42] These are both significant impediments, particularly to low-wage employees.[43] Further obstacles include fear of retaliation by an employer, or a simple lack of knowledge regarding legal services available to someone pursuing an employment discrimination claim.[44]

Because such barriers may seem so insurmountable to a potential plaintiff, rarely does an individual consider the discrimination severe enough to seek litigation. Ultimately, utilizing the class action vehicle permits "individuals to pool their resources, which allows them to share litigation risks and burdens," helping to motivate and inspire confidence in individual class members.[45]

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[38] It is settled that "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." Hazelwood School Dist. v. U.S., 433 U.S. 299, 307–08 (1977); Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1015 (2d Cir.1980). The usefulness of statistics however, "depends on all the surrounding facts and circumstances." *Teamsters*, 431 U.S. at 340.

[39] Coates v. Johnson & Johnson, 756 F.2d 524 (7th Cir. 1985). *See* N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 587 n.13 (1979) (employer must show its rule is a means which significantly serves its goal).

[40] *Id.*

[41] *Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporation Behavior: Hearing Before the Committee on the Judiciary, United States Senate* (2011) (statement of Co-President for the National Women's Law Center, Marcia D. Greenburger).

[42] *Id.*

[43] *Id.*

[44] *See* Malveaux, *supra* note 15, at 631 (explaining that "the class action creates a more level playing field between an employer and employee.").

[45] *See id.* at 640 (explaining that when individuals with small claims refrain from challenging large corporations, they "effectively immunize companies from complying with the law").

Furthermore, class actions also help to decrease the burden on the court system.[46] Many plaintiffs may bring one action that greatly consolidates overlapping pleadings and discovery requests.[47] By joining these claims into one class action, it gives the court a chance to hear all of them together. Unfortunately, however, it is becoming increasingly difficult to bring a class action pursuant to Rule 23 since the Court's decision in *Wal-Mart*.

In order to maintain a class action, a court must certify the class pursuant to Rule 23.[48] Certification requires a putative class to establish the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation. As subdivision (a) states:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.[49]

Additionally, the class action may only be certified if the action satisfies one of the three circumstances outlined under Rule 23(b): (1) Prosecution of separate suits would create the risk of inconsistent or conflicting judgments, or judgments that would substantially impair the interests of unnamed or absent class members;[50] (2) injunctive or declaratory relief is appropriate on a class-wide basis;[51] or (3) common questions of law or fact predominate over unique or individual claims, and if the maintenance of a class action is superior to other available methods of adjudication.[52] Although these rules seem fairly straightforward, the courts' interpretations of these requirements have been a topic of controversy for several decades.

1. *The Across-the-Board Approach—Before* Falcon

In 1969, the Fifth Circuit announced the so-called "across-the-

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[46] *Id.* at 631–32.

[47] *Id.*

[48] FED. R. CIV. P. 23.

[49] FED. R. CIV. P. 23(a).

[50] *See* Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 BYU L. REV. 305, 310 (2001).

[51] The advisory committee's notes to Rule 23 describe typical (b)(2) actions as those "in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." FED. R. CIV. P. 23 advisory committee's note, 39 F.R.D. 69, 102 (1966).

[52] FED. R. CIV. P. 23(b).

board" rule in *Johnson v. Ga. Highway Express, Inc.*,[53] igniting the controversy over Title VII class certification. In this case the plaintiff, an African-American employee that was discharged, sought to represent all of the defendant's African-American employees, including those not discharged, in an action alleging a company-wide policy of racial discrimination in hiring, firing, promotion, and maintenance of facilities. The pleadings mounted a broad attack on unequal employment practices, which the employer allegedly engaged in pursuant to a policy involving racial discrimination.[54] The court held that it was improper to restrict members of class represented by plaintiff to other discharged African-American employees, rather than all African-American employees.[55]

The Court set a new precedent by certifying the class: a Title VII plaintiff could represent all members of a group allegedly harmed by an employer's discriminatory practices, including employees who worked in different positions or in different facilities than the plaintiff.[56] To be a Title VII plaintiff, an employee only must have been "subject to one discriminatory employment practice [and] seek[] to represent employees who were subject to another discriminatory employment practice by the same employer."[57]

For many years, the majority of courts followed this approach, exercising a liberal and less stringent interpretation of the Rule 23(a) threshold requirements when certifying employment discrimination lawsuits.[58] By the late 1970s, courts began to note the risks arising from "the liberal view that class actions have been accorded in Title VII context."[59] Courts began to apply Rule 23 more stringently, particularly after the Supreme Court observed that "careful attention to the requirements of [Rule 23] remains nonetheless indispensable," despite

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[53] *See* Johnson v. Ga. Highway Express, Inc., 417 F.2d 1122, 1124 (5th Cir. 1969) ("The first point raised by appellant involves the district court's narrowing of the class, i.e., that the appellant, a discharged Negro employee, could only represent other discharged Negro employees. This was error as it is clear from the pleadings that the scope of appellant's suit is an 'across[-]the[-]board' attack on unequal employment practices alleged to have been committed by the appellee pursuant to its policy of racial discrimination.").

[54] *Id.*

[55] *Id.*

[56] Rodriguez v. E. Tex. Motor Freight Sys., 505 F.2d 40 (5th Cir. 1974), *vacated*, 431 U.S. 395 (1977).

[57] Sherry E. Clegg, *Employment Discrimination Class Actions: Why Plaintiffs Must Cover All Their Bases After the Supreme Court's Interpretation of Federal Rule of Civil Procedure 23(a)(2) in Wal-Mart v. Dukes*, 44 TEX. TECH L. REV. 1087, 1097 (2012) (citing Maurice Wexler et al., *The Law of Employment Discrimination from 1985 to 2010*, 25 A.B.A. J. LAB. & EMP. L. 349, 350 (2010)).

[58] *See, e.g.*, Payne v. Travenol Labs., Inc., 565 F.2d 895, 899–900 (5th Cir. 1978) (holding that plaintiffs' class action could properly extend to the employment practices applicable to the positions subject to the college degree requirement even assuming that the named plaintiffs were not strictly affected thereby in that they allegedly lacked the level of capability required for those positions); Johnson v. Ga. Highway Express, Inc., 417 F.2d 1122, 1124 (1969) (applying the across-the-board rule and allowing the plaintiff to bring suit on behalf of a larger class of employees, as the plaintiff alleged discriminatory practices).

[59] Hubbard v. Rubbermaid, Inc., 78 F.R.D. 631, 645 (D. Md. 1978). When considering the plaintiff's motion for class certification, the court attempted to strike a balance between "an awareness of the pitfalls of certifying an overbroad class" and "a view toward the liberality extended to Title VII class actions." *Id.* at 639.

the awareness that "suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs."[60] Responding to these observations, the court categorically abrogated the liberality once applied to the certification of Title VII class actions in *General Telephone Company of the Southwest v. Falcon.*

2. General Telephone Company of the Southwest v. Falcon *Decision*

General Telephone Company of the Southwest v. Falcon was an employment discrimination suit brought under Title VII by a Mexican-American employee against his employer alleging discrimination in hiring and promoting.[61] The plaintiff sued on behalf of a class including Mexican Americans who had been denied employment altogether.[62] The Court of Appeals for the Fifth Circuit, using the across-the-board approach, upheld the district court's certification of the class.[63] The Supreme Court ultimately rejected this approach, [64] distinguishing the issue regarding an individual that has allegedly been harmed by an employer's promotion practices from that of whether an individual's claim is similar to that of the rest of the class.[65] The Court stated, "[t]he district court's error was a failure to evaluate carefully the legitimacy of named plaintiff's plea that he was a proper class representative."[66] Further, the Court was particularly concerned that if it allowed the across-the-board approach, "every Title VII case would be a potential company-wide class action."[67]

The Court stated that nothing in Title VII indicated "that Congress intended to authorize such a wholesale expansion of class-action-litigation."[68] Additionally, the Court stated "that a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."[69] The court observed:

> [T]here is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and

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[60] E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405 (1977) (reversing class certification on the basis that plaintiffs were not proper class representatives in race and national origin discrimination case).
[61] Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 149 (1982).
[62] *Id.*
[63] *Id.* at 155.
[64] *Id.* at 161.
[65] *Id.* at 157
[66] *Id.* at 160.
[67] Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 159 (1982).
[68] *Id.*
[69] *Id.* at 161.

> his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.[70]

Therefore, *Falcon* emphatically diminished the liberal certifications of Title VII class actions, and the influence of "rigorous analysis" resounded well into the 1990s.[71] The court did not conclusively seal the controversy in its opinion of *Falcon*;[72] in footnote fifteen of the opinion, the court "provide[d] a loophole for private litigants":

> Significant proof that an employer operated under a general policy of discrimination 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.[73]

Many courts have viewed the footnote as suggesting an exception to Falcon's requirements of rigorous analysis.[74] If the plaintiff can prove the employer used a policy of entirely-subjective decision-making, then the exception is "triggered,"[75] and commonality and typicality are presumed to be satisfied.[76] To determine if a policy fits within the exception, the court will focus on whether the employer's policies are entirely subjective.[77]

3. *After* Falcon

Predictably, the Court's lack of clarifying standards caused lower

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[70] *Id.* at 157.

[71] *See, e.g.*, Int'l Union v. LTV Aerospace & Def. Co., 136 F.R.D. 113, 122–25 (N.D. Tex. 1991) (limiting certification to a subclass of employees in Title VII sex discrimination case); Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 291–93 (2d Cir. 1999) (applying rigorous analysis to deny certification to employees in Title VII sexual harassment case).

[72] Robert P. Monyak, *Reinstating Vacated Findings in Employment Discrimination Class Actions: Reconciling* General Telephone Co. v. Falcon *with* Hill v. Western Electric Co., 1983 Duke L.J. 821, 826 (1983).

[73] *Id.* at 826–27 (quoting General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 158 n.15 (1982)).

[74] *Id.*

[75] Garcia v. Veneman, 224 F.R.D. 8, 14 (D.D.C. 2004) (explaining that "footnote 15 was not triggered" because the defendant used objective factors in the decision-making process).

[76] *Id.*

[77] *See, e.g.*, Vuyanich v. Republic Nat'l Bank of Dall., 723 F.2d 1195, 1199–1200 (5th Cir. 1984) ("The district court's finding that the Bank relied on two objective inputs—education and experience—in its necessarily subjective hiring process . . . precludes reliance on this 'general policy of discrimination' exception.") (citation omitted).

courts to struggle with its application.[78] Courts apt to grant certification focused on broad language in *Falcon* that "common questions of law or fact are typically present" in race discrimination questions.[79] These courts then tended to distinguish *Falcon* on its facts, and interpreted footnote fifteen to permit certification through mere allegations of a policy or practice extending class-wide.[80] On the other hand, courts such as the one in *Churchill v. International Business Machines, Inc.*,[81] leaned on the side of strict compliance. In that case, a New Jersey district court denied certification and concluded that anonymous affidavits alleging general sex-based salary discrimination "failed the requirement of *Falcon* to bridge the conceptual 'wide gap' between the plaintiffs' claim and the existence of a purported class of aggrieved persons who have suffered the same discrimination."[82]

III. *WAL-MART* DECISION

Nearly three decades later, the issue of commonality reached the Supreme Court once again in the landmark case of *Wal-Mart v. Dukes*.[83] This landmark case began when a large group of female Wal-Mart workers claimed that their behemoth employer was discriminating against them on the basis of their sex.[84] In June 2001, the three named plaintiffs, Betty Dukes, Christine Kwapnoski, and Edith Arana,[85] brought suit against Wal-Mart in the United States District Court for the Northern District of California in San Francisco.[86] The plaintiffs sought to represent 1.5 million women, including women who were currently working or who had worked in a Wal-Mart store any time since December 26, 1998.[87] Plaintiffs brought both a disparate impact claim and a "pattern-or-practice" disparate treatment claim against Wal-Mart.[88]

According to the plaintiffs, Wal-Mart's policy of giving local managers broad discretion over pay and promotions disproportionately favored men and thus amounted to a disparate impact.[89] Furthermore, the plaintiffs alleged that Wal-Mart was aware of the policy's effect on its

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[78] *Id.*

[79] *See, e.g.*, Card v. City of Cleveland, 270 F.R.D. 280, 293–94 (N.D. Ohio 2010) (certifying the common question of "whether Defendant's pattern or practice of utterly failing to promote women to the position of WPO violates Title VII").

[80] *See, e.g.*, Cox v. Am. Case Iron Pipe Co., 784 F.2d 1546, 1558 (11th Cir. 1986) (distinguishing *Falcon* on its facts).

[81] Churchill v. Int'l Bus. Machs., Inc., 759 F. Supp. 1089, 1101 (D.N.J. 1991).

[82] *Id.* (quoting *Falcon*, 457 U.S. at 157–58).

[83] Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2548 (2011).

[84] *Id.* at 2547–48.

[85] *Id.*

[86] *Id.* at 2549.

[87] *Id.* at 2547, 2549.

[88] *Id.* at 2548.

[89] Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2548 (2011).

female employees and failed to restrain the widespread misuse of its managers' discretionary authority, leading to disparate treatment of female employees.[90] The crux of the plaintiffs' allegations, however, rested with the latter theory.[91] More specifically, they alleged disparate treatment on a systemic, rather than individual level.[92] Their main argument was that Wal-Mart, as a corporate entity, knew that its employment practices were creating disparities between its male and female employees.[93]

Plaintiffs asserted that while women at Wal-Mart "comprise over 80% of hourly supervisors, they hold only one-third of store management jobs and their ranks steadily diminish at each successive step in the management hierarchy."[94] Plaintiffs produced three primary sources of evidence in support of their assertion: the testimony of an expert witness, statistical evidence of pay disparities between men and women at Wal-Mart, and reports of discrimination from almost 120 female employees.[95] Specifically, they submitted "extensive evidence of excessive subjectivity in personnel decisions, guided by a strong corporate culture infused with sexual stereotyping; centralized oversight of decision making; robust statistical evidence of gender disparities caused by discrimination; and anecdotal evidence of gender bias."[96]

Plaintiffs introduced substantial evidence in support of class certification, including 200 depositions, electronic personnel data, and more than a million pages of documents.[97] Their statistical evidence showed that women were paid significantly less than men in every one of Wal-Mart's forty-one regions, and this pay gap continued to increase every year.[98] Additionally, Plaintiffs presented an expert witness, Dr. William Bielby.[99] He concluded that Wal-Mart's corporate culture—in terms of personnel policies and practices—is a uniform practice.[100] With this substantial amount of evidence, Plaintiffs believed they had met their burden.

In response, Wal-Mart argued that Plantiffs's evidence failed to meet the requirement for class certification pursuant to FRCP 23.[101] First, Wal-Mart claimed that its company-wide policy "expressly bars discrimination based on sex."[102] Wal-Mart then turned to the plaintiffs' statistical evidence and argued that it was misleading because the data

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[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] Brief for Respondent at *2, Wal-Mart v. Dukes, 131 S.Ct. 2541 (2011) (No. 10-277).
[95] *Id.* at *6–7.
[96] *Id.* at *5.
[97] *Id.* at *10–11.
[98] *Id.* at *22.
[99] *Id.* at *35–36.
[100] Brief for Petitioner at *35–36, Wal-Mart v. Dukes, 131 S.Ct. 2541 (2011) (No. 10-277).
[101] *Id.* at *34.
[102] *Id.* at *3.

was aggregated nationally, meaning that it did not show any pay differentials locally.[103] Wal-Mart also presented expert testimony providing that ninety percent of its stores had no pay differentials.[104] Wal-Mart claimed that the plaintiffs' expert testimony was inconclusive in terms of the existence of "stereotyped thinking" by managers.[105] Wal-Mart characterized the anecdotal evidence from current and former employees as "widely divergent."[106] But most significantly, Wal-Mart argued that the "[p]laintiffs . . . never offered significant proof" of a discriminatory, company-wide pay and promotion framework, and that "millions of discretionary decisions by tens of thousands of individual managers around the country defy common treatment under Rule 23(a)."[107] All in all, Wal-Mart argued that plaintiffs failed to prove that the defendant intended to carry out discriminatory practices toward women, as was required for the certification of Title VII class actions.[108] This argument ultimately prevailed before the Supreme Court.

In the majority opinion, Justice Scalia articulated the commonality standard as follows:

> [t]heir 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 of the claims in one stroke.[109]

The Court conclusively found that class certification was inappropriate because the plaintiffs' claims involved employment decisions taken at numerous different stores and by numerous decision makers.[110] As a result, they could not show that their claims for relief would "produce a common answer" to the question of why they received unfavorable treatment.[111] After this case was settled,

> The Chamber of Commerce immediately issued a press release declaring it "the most important class action case in more than a decade." By contrast, the Christian Science Monitor called the case "a major blow to working women" and a "sign that some of the esteemed judges on our nation's highest court need a primer in how contemporary

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[103] *Id.* at *7.
[104] *Id.*
[105] *Id.*
[106] Brief for Petitioner at *8, Wal-Mart v. Dukes, 131 S.Ct. 2541 (2011) (No. 10-277).
[107] *Id.* at *11.
[108] *Id.*
[109] Wal-Mart v. Dukes, 131 S.Ct. 2541, 2551 (2011).
[110] *Id.* at 2552.
[111] *Id.*

> discrimination functions." In an interview on National Public Radio, a prominent plaintiff's lawyer called the case "a disaster not only for civil rights litigations but for anyone who wants to bring a class action," and commented "[t]he five-male majority decision today represents a jaw-dropping form of judicial activism."[112]

A. Before and After

Before *Falcon*, some federal courts applied an across-the-board approach to the Rule 23 commonality and typicality requirements, which allowed plaintiffs alleging one type of employment discrimination to represent a class asserting several different types of employment discrimination.[113] Other federal courts, however, refused to adopt this across-the-board approach.[114]

In *Falcon*, the Court rejected the across-the-board rule and limited plaintiffs' ability to gain class certification under Rule 23.[115] The Court held that proof that the employer discriminated against the plaintiff in some way did not justify the inference that discriminatory treatment typifies the employer's promotion practices, pervades the company, or exists in other practices of the employer.[116] However, the Court provided a loophole for litigants reaching for class certification with its footnote fifteen.[117]

B. *Wal-Mart* under *Falcon*'s Decision

In *Wal-Mart*, the Court described the *Falcon* decision as "the

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[112] Elizabeth Tippett, *Robbing a Barren Vault: The Implications of* Dukes v. Wal-Mart *for Cases Challenging Subjective Employment Practices*, 29 HOFSTRA LAB. & EMP. L.J. 433, 433–34 (2012).

[113] Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982) ("A Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."). Prior to *Falcon*, the Court warned the lower courts about their relaxed application of Rule 23. In *East Texas Motor Freight Sytems, Inc., v. Rodriguez*, 431 U.S. 395 (1977), the Court stated that even in discrimination class actions "careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains . . . indispensable." *Id.* at 403. The circuit courts, however, interpreted *East Texas Motor* in a variety of ways and several circuit courts continued to use liberal certification standards and allow across-the-board classes.

[114] *Falcon*, 457 U.S. at 161.

[115] *Id.* at 160–61.

[116] *Id.*

[117] *See* Monyak, *supra* note 72, at 827 ("In addition, footnote fifteen of the *Falcon* opinion provides a loophole for private litigants: 'Significant proof that an employer operated under a general policy of discrimination 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.'") (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 159 n.15 (1982)).

proper approach to commonality. . . . [T]he conceptual gap between an individual's discrimination claim and 'the existence of a class of persons who have suffered the same injury . . .'"[118] must be bridged by "significant proof" that an employer "operated under a general policy of discrimination."[119]

The court found no such proof in *Wal-Mart*.[120] It went on to analyze Wal-Mart's general policy, which forbids sex discrimination, and provides for penalties for denials of equal opportunity.[121] The only evidence that the Respondents brought forward of a general discrimination policy was a sociologist's analysis, "asserting that Wal-Mart's corporate culture made it vulnerable to gender bias."[122] But because he could not estimate what percent of Wal-Mart employment decisions might be determined by stereotypical thinking, the testimony did not amount to "significant proof" necessary to show that Wal-Mart operated under a general policy of discrimination.[123]

The Court distinguished its decision from *Falcon*.[124] In essence, *Falcon* characterized an "entirely subjective decision-making process" as an example of a "general policy of discrimination."[125] Under *Falcon*, the term "policy" encompassed the employer's actual practices—"it is noteworthy that Title VII prohibits discriminatory employment practices, not an abstract policy of discrimination."[126] Contrarily under *Wal-Mart*, the term "policy" appears to refer to the employer's formalized policy, whether actualized or not.[127] The Court found that a general policy of discrimination was "entirely absent" since "Wal-Mart's announced policy forbids sex discrimination," and that was the end of the analysis.[128] Furthermore, the Court held that under *Falcon*'s footnote fifteen, regarding subjective employment practices, a plaintiff must now "identif[y] a common mode of exercising discretion that pervades the entire company . . . ."[129] Fundamentally, plaintiffs must provide evidence that each class member was similarly affected by the subjective practice.[130]

Specifically, *Wal-Mart* requires either a test that produces a common result[131] or evidence of a general policy of discrimination.[132]

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[118] Wal-Mart v. Dukes, 131 S.Ct. 2541, 2545 (2011) (quoting *Falcon*, 457 U.S. at 157–58, 159 n.15).
[119] *Id.* (quoting *Falcon*, 457 U.S. at 159 n.15).
[120] *Id.* at 2553.
[121] *Id.*
[122] *Id.* at 2545
[123] *Id.* (quoting *Falcon*, 457 U.S. at 159 n.15).
[124] Wal-Mart v. Dukes, 131 S.Ct. 2541, 2545 (2011).
[125] Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 159 n.15 (1982).
[126] *Id.*
[127] *Wal-Mart*, 131 S.Ct. at 2563–64.
[128] *Id.* at 2553.
[129] *Id.* at 2554–55.
[130] Wal-Mart v. Dukes, 131 S.Ct. 2541, 2554–55 (2011)
[131] *Id.* at 2541.
[132] *Id.* at 2545.

The Supreme Court further concluded that a policy of discretionary decision making does not qualify as a "general policy of discrimination."[133] Rather, a policy of decentralization "is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy against having uniform employment practices."[134]

As unattainable as a class action seems post-*Wal-Mart*, the possibility of bringing a disparate treatment claim under "pattern or practice" by using evidence of subjective discriminatory decision-making was not erased. The Court's view of commonality consequently creates a higher standard necessary for class certification by requiring considerably more demanding evidentiary proof to satisfy the requirement of commonality.

IV. AFRICAN-AMERICAN PROFESSORIATE

This higher standard has made it more challenging than ever for plaintiffs to successfully bring a class action. This Note will now turn to a discussion of the impact this change has had on African-American professors and their now undeniable burden of overcoming the commonality requirement set by the Court in *Wal-Mart*. Specifically, the Court's decision in *Wal-Mart* significantly impacts "plaintiffs who wish to suggest that the persistent underrepresentation of African Americans on university faculties—often demonstrable by statistical evidence—is an indication of systematic disparate treatment."[135] Due to the highly subjective and multi-faceted criteria factoring in the decision-making process for professors' appointment and tenure, it will be very difficult for enough African-American professors to "identif[y] a common mode of exercising discretion that pervades" an institution.[136]

A. Tenure

Tenure provides a level of job security and status that faculty members can achieve upon successful completion of a six to eight year probationary period that is unique and peculiar to academia.[137] It is

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[133] *Id.*

[134] *Id.* at 2554.

[135] Loftus C. Carson, *Employment Opportunities and Conditions for the African-American Legal Professoriate: Perspectives From the Inside*, 19 TEX. J. C. L. & C. R. 1, 93 (2013).

[136] Wal-Mart v. Dukes, 131 S.Ct. 2541, 2554–55 (2011).

[137] *See* Jared L. Bleak, *On Probation: The Pre-Tenure Period*, *in* POLICIES ON FACULTY APPOINTMENT: STANDARD PRACTICES AND UNUSUAL ARRANGEMENTS 18, 18–19 (Cathy A. Trower ed., 2000) (explaining that a seven-year tenure clock is typical at most institutions, meaning that

important to note, however, that not all faculty members are eligible for tenure, regardless of the strength of their performance.[138] When a faculty member is hired at a college or university, she is hired into one of two broad categories: a tenure-track position or a non-tenure-track position.[139] There are several benefits to tenure-track positions. Typically, once a person receives tenure, she cannot lose her job without cause or for a reason prohibited by law.[140]

In contrast, faculty who have not yet received tenure, or faculty who are not on the tenure track, can lose their jobs for many different reasons—poor performance and budget cuts provide good examples of these.[141] In addition to job security, tenure-track or tenured positions have a higher status within the institution and are conferred more benefits, such as increased academic freedom, private office space, reductions in one's teaching load to allow time for conducting research, and statistically higher salaries.[142]

Many different decision makers have a hand in deciding a university employee's raise in salary, promotion, tenure, renewal of appointment, or non-renewal of appointment.[143] The responsibility for preparing recommendations for salary rates, promotion, tenure, renewal of appointment, or non-renewal of appointment rests with the budget council of the university, and administrative officers then give consideration to all recommendations.[144] Next, "all recommendations shall be forwarded to the President for final evaluation and decision."[145] The President's decisions with regard to salary advancement, promotion in rank, award of tenure, and renewal of appointment are subject to

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faculty become eligible for tenure in their seventh year of employment at the institution but also noting that the "clock" differs from institution to institution).

[138] *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments*, AM. ASS'N OF U. PROFESSORS, http://www.aaup.org/report/statement-procedural-standards-renewal-or-nonrenewal-faculty-appointments, <http://perma.cc/5532-CPE6>.

[139] *Id.*

[140] Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 L. & CONTEMP. PROBS. 325, 325 (1990).

[141] *Should Teachers Get Tenure?*, PROCON.ORG (September 29, 2014, 7:35 AM), http://teachertenure.procon.org/view.answers.php?questionID=001616.

[142] Judith M. Gappa, *The New Faculty Majority: Somewhat Satisfied, But Not Eligible for Tenure*, 105 NEW DIRECTIONS FOR INSTITUTIONAL RES. 77, 77–86 (2000).

[143] *See, e.g.*, *Recommendations Regarding Faculty Compensation, Faculty Promotion, Tenure, Renewal of Appointment, or Nonrenewal of Appointment*, UNIVERSITY POLICY OFFICE, https://www.policies.utexas.edu/policies/recommendations-regarding-faculty-compensation-faculty-promotion-tenure-renewal-appointment, <http://perma.cc/JV4E-JXFB>; *The University of Iowa Operations Manual*, THE UNIVERSITY OF IOWA, http://www.uiowa.edu/~our/opmanual/iii/10.htm, <http://perma.cc/A8ZE-M2NC>; *University of Alaska Board of Regents' Policy and University Regulation*, UNIVERSITY OF ALASKA, https://www.alaska.edu/bor/policy-regulations/, <https://perma.cc/98MQ-H5MX>; *Missouri State University Faculty Tenure and Promotion Policy*, SOUTHEAST MISSOURI STATE UNIVERSITY, http://www.semo.edu/facultysenate/handbook/2f.html, <http://perma.cc/GY7V-NDAG>.

[144] *Recommendations Regarding Faculty Compensation, Faculty Promotion, Tenure, Renewal of Appointment, or Nonrenewal of Appointment*, UNIVERSITY POLICY OFFICE (October 21, 2014), https://www.policies.utexas.edu/policies/recommendations-regarding-faculty-compensation-faculty-promotion-tenure-renewal-appointment, <http://perma.cc/JV4E-JXFB>.

[145] *Id.*

confirmation by the Chancellor of the University and the Board of Regents.[146] Finally, the department chair shares the results of the annual evaluation with each faculty member.[147]After consulting with the Executive Vice President and Provost and receiving the President's approval, the dean of a college or school may distribute to the faculty procedural guidelines and information for evaluation about salary advancement, promotion, or the award of tenure in the college or school.[148]

There are many decision makers who take part in the decision regarding a single employee's eligibility for any one of these advancements.[149] However, the distinguishing factor for purposes of class certification in the context of *Wal-Mart*, is that professors, unlike the plaintiffs in *Wal-Mart*,[150] have very similar job descriptions; all participate to some degree in teaching, research, and service. This weighs in favor of professors obtaining class certification under the *Wal-Mart* analysis. Scalia wrote in his majority opinion in *Wal-Mart* that the plaintiffs' "common contention . . . must be of such a nature that it is capable of class-wide 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."[151] This requirement is much more easily met when all the plaintiffs have the same the job description and that the "truth or falsity" of the claim will likely affect them all in a fairly uniform fashion.

B. System-Wide Disparate Treatment

One limited yet viable option for African-American professors is to bring a disparate treatment claim of pattern or practice. As noted herein, in order to prevail on a disparate treatment claim, plaintiffs must prove defendants acted with a discriminatory motive.[152] Peculiar to employment discrimination cases, the intent requirement can be proven by pattern or practice.[153] A plaintiff can prove this by showing that there has been unlawful discrimination by an employer in the course of its regular policy—that the discrimination was part of the company's regular, rather than an unusual, practice.[154]

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[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *See* Wal-Mart v. Dukes, 131 S.Ct. 2541, 2556–57 (2011) (describing the plaintiffs).
[151] *Id.* at 2551.
[152] Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).
[153] *Id.* at 335.
[154] See *McDonnell Douglas Corp. v Green*, 411 U.S. 792 (1973) for a description of the burdens each party bears at the outset of a Title VII trial.

1. Coser v. Moore

Although this class action option consisting of a pattern-or-practice claim for African-American professors is certainly limited by the decision in *Wal-Mart*, it would not be a claim that is entirely impossible for them to bring. For African-American professors to bring a class action suit against a university system, there would need to be enough African-American professors that are able to establish by "[s]ignificant proof that [their university] operated under a general policy of discrimination."[155] If they could do so, then they could satisfy the commonality requirement under the *Wal-Mart* decision.

There have been a few instances where the court had certified a class of women for a system-wide disparate treatment suit. In *Coser v. Moore*, the court certified a class of female faculty members as a class of employees for a system-wide disparate treatment suit.[156] In that case, current and former female employees of the state university, as individuals and as representatives of a class of teaching and non-teaching professionals, brought a Title VII sex discrimination suit against the university's President, the Chancellor of the university's system, and members of the university's board of trustees.[157]

Although the court certified them as a class, the analysis would have been much more intensive had it occurred post-*Wal-Mart*. In *Coser*, the court certified the women as a class before addressing the fact that Stony Brook, the employer in question, "ha[d] no official policies that explicitly operate[d] to the disadvantage of women."[158] Had this case occurred after *Wal-Mart*, this fact would have been considered before, not after the class was certified. Evidence such as the employer not having any official policies in place that "explicitly operated[d] to the disadvantage of women" would have been probative evidence that would likely have weighed against their certification as a class.

2. Chang v. Rhode Island

Another case in which the court found that female professors met the requirements for commonality pursuant to Rule 23 was *Chang v. Rhode Island*.[159] Chang's suit alleged that the University of Rhode Island (URI) discriminated against her on the basis of gender, both in

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[155] Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 159 n.15 (1982).

[156] Coser v. Moore, 587 F. Supp. 572, 574 (E.D.N.Y. 1983). The court did certify the class, but ultimately it did not find a university-wide pattern or practice of unlawful sex discrimination. The court remanded the case to consider what further steps may be taken to resolve individual claims. *Id.*

[157] *Id.* at 574.

[158] *Id.* at 579.

[159] Chang v. Rhode Island, 606 F. Supp. 1161, 1171 (D.R.I. 1985).

terminating her contract and in paying her "under scale" during her employment.[160] Chang also alleged that URI's failure to rehire her while recruiting equally- or less-qualified males violated Title VII.[161] She claimed that her experience was not unique, but rather was just one example of a pattern or practice of disparate treatment that URI "routinely utilized to the detriment of women faculty with regard to recruitment and hiring, rank at hire, pay at hire, promotion, annual compensation, tenure, and termination . . . ."[162]

Subsequently, in *Seleen*, another set of female professors filed suit against URI. This suit was "strikingly similar" to the *Chang* action in its allegations of pattern-or-practice discrimination.[163] However, the plaintiffs only challenged URI's practices with respect to annual compensation, promotion, and tenure.[164] The *Chang* and *Seleen* plaintiffs filed motions for class certification under Rule 23 and consolidation of their two actions.[165] On September 2, 1980, Judge Pettine granted consolidation of the two cases and certified the following class:

> All women faculty members who are now employed at URI; who might become employed at URI; who were employed at URI on or after March 24, 1972; and all women applicants for faculty employment on or after March 24, 1972.[166]

URI challenged the class certification via numerous motions, but consistently failed to persuade the court.[167] The court held in its post *Falcon* review that "given that linkage, Chang's claim was found to be sufficiently typical of the plaintiffs in the class and she was held to be a person who would adequately represent class interests in the litigation."[168]

Although the *Chang* court found enough linkage to bind the class for purposes of class certification, it also would have been a much different, more fact-intensive analysis under the *Wal-Mart* decision. The Court would likely have focused instead on whether the typicality of all of the plaintiffs' claims "depend upon a common contention . . . of such a nature that it is capable of class-wide 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."[169]

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[160] *Id.*

[161] *Id.* at 1170.

[162] *Id.* at 1170–71.

[163] *Id.*

[164] *Id.*

[165] Chang v. Rhode Island, 606 F. Supp. 1161, 1170–71 (D.R.I. 1985).

[166] *Id.* March 24, 1972 is significant because it was the date that the Equal Employment Opportunity Act of 1972 amended the Civil Rights Act allowing, among other things, individual plaintiffs to bring claims.

[167] *Id.*

[168] *Id.*

[169] Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2551 (2011).

It is not clear whether the Court would have certified the class in *Chang* due to the wide variety of positions that the members of the class held. If the court were to have found that all of their claims could have been answered by the ultimate decision of the Court, it could have certified and moved on with the claim; in this case, however, that seems unlikely.

3. *Analysis in the Context of African-American Professors*

Notwithstanding the above, there are still several situations in which a group of African-American professors could bring a strong, viable class action with a fair likelihood of being certified as a class under the *Wal-Mart* analysis. Before reaching viable options, it seems prudent to first address the remaining obstacles of *Wal-Mart*. The commonality requirement could be satisfied by a common, discriminatory policy that is consistent across all departments and schools of a particular university. However, this is highly unlikely. First, all universities are required to have an equal employment opportunity policy, pursuant to the Equal Employment Opportunity Act of 1972 amendments to Title VII.[170] The purpose of these policies is to "ensure that all qualified individuals under consideration for jobs, promotions, pay raises, training programs, and so on, receive equal consideration, regardless of race, color, national origin, gender, religion, disability, and age."[171]

Second, it would be quite rare (not to mention incoherent), for a university to have a university-wide policy stating a facially-discriminatory policy. Most universities are likely to be deliberate in choosing their words under their employment policies, such that they will not subject themselves to employment discrimination suits such as the one contemplated here. If this were being brought prior to *Wal*-Mart, this requirement could have been circumvented by arguing that the policy-as-stated was not the same as the policy-as-implemented, or that the policy was worded in a manner that could be vulnerable to implicit bias. Alas—the court in *Wal-Mart* eliminated both of these arguments.

The *Wal-Mart* decision did not set a standard for how much evidence is necessary to show that a policy is discriminatory.[172]

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[170] 42 U.S.C.A. § 2000e-5 (2009). *See also Applying for Employment*, THE UNIVERSITY OF TEXAS AT AUSTIN, http://www.utexas.edu/hr/prospective/apply/, <http://perma.cc/Y5H2-79MM> (stating that "The University of Texas at Austin is an Equal Opportunity Employer with a commitment to diversity at all levels. All qualified applicants will receive consideration for employment without regard to race, color, religion, gender, national origin, age, disability or veteran status. (Compliant with the new VEVRAA and Section 503 Rules).").

[171] *Id.*

[172] *See* Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2553 (2011) (noting that the only evidence of general discrimination was a sociologist's analysis asserting that Wal-Mart's corporate culture

Furthermore, it makes no difference whether the policy was actually implemented by the university faculty.[173] The *Wal-Mart* Court diverged from the *Falcon* Court by interpreting "policy" as the employer's formalized policy, whether actualized or not.[174] Therefore, the *Wal-Mart* decision has carved out a narrow possibility whereby African-American professors might bring a system-wide class action against their university.

One viable alternative for plaintiffs wanting to bring a disparate treatment claim against a university with a facially non-discriminatory policy would be to allege that they were subject to the subjective decisions of a common decision maker. This situation could lead to a viable disparate treatment pattern-or-practice claim if the employer operated under a general policy that allowed such subjective decision making, and it was aware that such subjective decision making was part of its policy.[175] For many plaintiffs employed by universities, it is likely this method provides their highest chance for success at certifying a class action.

The only limitation that *Wal-Mart* imposes on *Falcon's* footnote fifteen is that all of the plaintiffs' allegations of discriminatory actions must be against one specific decision maker. In a university setting, this is much easier than in the case of *Wal-Mart*. In *Wal-Mart*, the plaintiffs were spread out nation-wide with varying job descriptions, alleging that many different decision makers and supervisors participated in subjective decision-making practices.[176] This conclusion is consistent with Scalia's opinion in that the "determination of [the claim's] truth or falsity will resolve an issue. . . in one stroke."[177]

In a claim by African-American professors at a university, this requirement is much more likely to be met. For instance, in the context of tenure, the President is the ultimate decision maker.[178] Although the board of regents and the Chancellor must approve the decision, the President is the one who ultimately approves or disapproves.[179] The board of regents, in practice, typically would defer to the President's

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made it vulnerable to gender bias. The Court stated that the statistician's testimony was worlds away from "significant proof'" that Wal-Mart "operated under a general policy of discrimination" because the statistician could not estimate what percent of Wal-Mart employment decisions might be determined by stereotypical thinking.).

[173] *Id.* at 2553.

[174] *Id.* at 2563–64.

[175] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990–91 (1988) ("[I]n appropriate cases," giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory—since "an employer's undisciplined system of subjective decision making [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination.").

[176] Wal-Mart, 131 S.Ct. at 2554.

[177] *Id.* at 2552.

[178] *Recommendations Regarding Faculty Compensation, Faculty Promotion, Tenure, Renewal of Appointment, or Nonrenewal of Appointment*, THE UNIVERSITY OF TEXAS AT AUSTIN (Oct. 21, 2014).

[179] *Id.*

decision on the matter,[180] and effectively, the president approves any specific guidelines for determining the promotions of the employees.[181] This fact suggests there is hope for class actions brought by university professors in light of the *Wal-Mart* decision.

Some courts have held that it does not matter if the ultimate decision maker was, in fact, acting with non-discriminatory motives.[182] This is true under the "Cat's Paw Theory,"[183] laid out by the Supreme Court in *Staub v. Proctor Hospital.*[184] In transferring the characters of the fable to the workplace, the monkey represents a supervisor, motivated by a discriminatory bias, who uses the employer or the employer's decision maker to take adverse action against an employee.[185] The cat represents an unbiased decision maker who unknowingly disciplines an employee because of the supervisor's bias.[186] If a supervisor's discriminatory animus results in or contributes to an adverse employment action, the Cat's Paw Theory imputes liability on the employer.[187]

Therefore, in the context of African-American professors, if the President of a university was not, in fact, acting under discriminatory motives, but was being manipulated by inferiors, the ultimate responsibility would still lie with the President under the Cat's Paw Theory. Therefore, if the defendant were to argue that the discriminatory bias was not by the President, but by various supervisors or other employees in a department, this theory could be used to hold the President liable by satisfying the commonality requirement.

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[180] *Id.*

[181] *See supra* note 133 and accompanying text.

[182] *See* Staub v. Proctor Hosp., 131 S.Ct. 1186, 1192–93 (2011) (explaining that an entity may be liable if an apparently neutral decision maker's ruling was influenced, even unknowingly, by the discriminatory animus of another agent of the entity); *see also* Chattman v. Toho Tenax Am., Inc., 686 F.3d 339 (6th Cir. 2012) (holding that an employer is liable for discharging an employee based upon false statements made by another employee.).

[183] "The term 'cat's paw' originated in the fable, 'The Monkey and the Cat,' by Jean de La Fontaine. As told in the fable, the monkey wanted some chestnuts that were roasting in a fire. Unwilling to burn himself in the fire, the monkey convinced the cat to retrieve the chestnuts for him. As the cat carefully scooped the chestnuts from the fire with his paw, the monkey gobbled them up. By the time the serving wench caught the two thieves, no chestnuts remained for the unhappy cat." Julie M. Covel, Note, *The Supreme Court Writes a Fractured Fable of the Cat's Paw Theory in* Staub v. Proctor Hospital, 51 WASHBURN L.J. 159, 159 (2011).

[184] *Staub*, 131 S.Ct. at 1190 n.1.

[185] Edward G. Phillips, Staub v. Proctor Hospital: *The Cat's Paw Theory Gets Its Claws Sharpened*, 47 Tenn. Bar J. 21, 21 (2011).

[186] *Id.* The cat symbolizes the person or committee in a company who possesses the authority to make the final decision to an adverse employment action. *See* EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 484 (10th Cir. 2006). The person with the authority to make the final decision is often referred to as the decision maker. *Id.* at 482, 484 (noting the difference between the "formal decision maker" and a subordinate who lacks the authority to make final decisions).

[187] Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990).

C. Disparate Impact

Finally, a strong, viable option for meeting the commonality requirement in the context of African-American professors would be to bring a disparate impact class action. In a disparate impact case, a plaintiff must demonstrate that facially-neutral employment practices or policies fall more harshly on one group than another, and the practices and policies cannot be justified by business necessity.[188]

A plaintiff seeking to bring a disparate impact claim need not prove intentional discrimination, but instead must show that the employer's action or policy, while enacted without a specific discriminatory animus, nonetheless had discriminatory results.[189] As the Supreme Court has noted, "the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."[190] Disparate impact can be caused by "the problem of subconscious stereotypes and prejudices."[191]

In the landmark case of *Teamsters v. United States*, the Court found a viable disparate impact claim.[192] In that case, the plaintiff established company-wide discrimination through substantial statistical evidence.[193] The plaintiff produced about forty specific accounts of racial discrimination from particular individuals.[194] That number was significant because the organization had only 6,472 employees, of whom 571 were minorities,[195] and the class itself consisted of around 334 people.[196] The forty anecdotes thus represented roughly one account for every eight members of the class. Moreover, the Court of Appeals noted that the anecdotes came from individuals "spread throughout" the company who "for the most part" worked at the company's operational centers that employed the largest numbers of the class members.[197]

The Ninth Circuit distinguished *Wal-Mart* by showing that plaintiffs and the class filed about 120 affidavits reporting experiences of

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[188] Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); Dothard v. Rawlinson, 433 U.S. 321, 322 (1977).

[189] *See* Meditz v. City of Newark, 658 F.3d 364, 370 (3d Cir. 2011) (describing the disparate impact analysis).

[190] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988).

[191] Aware of "the problem of subconscious stereotypes and prejudices," the court held that the employer's "undisciplined system of subjective decision making" was an "employment practic[e]" that "may be analyzed under the disparate impact approach." *Id.* at 990–91. *See also* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989) (recognizing "the use of 'subjective decision making'" as an "employment practic[e]" subject to disparate-impact attack).

[192] *Teamsters*, 431 U.S. at 343.

[193] *Id.* at 337–38.

[194] *Id.* at 338.

[195] *Id.* at 337.

[196] United States v. T.I.M.E.-D.C., Inc., 517 F.2d 299, 308 (5th Cir. 1975), *vacated*, 431 U.S. 324 (1977).

[197] *Id.* at 315.

discrimination—about 1 for every 12,500 class members—relating to only some 235 out of Wal-Mart's 3,400 stores.[198] Even if every single one of these accounts were true, it would still not be sufficient to demonstrate that the entire company "operate[s] under a general policy of discrimination,"[199] and thus would fail to meet the commonality requirement under Rule 23.

This would be a starkly different scenario for African-American professors. For our purposes, the disparate impact claim could give African-American professors yet another mode to acquire class certification by meeting the commonality requirement of Rule 23. First and foremost, in practice, it would be most diligent to always bring both a disparate treatment and a disparate impact claim. If the parties cannot be certified as a class under one theory, then they potentially could be certified under the other.[200]

Further, African-American professors would not have to prove intent. This is a much lower burden than bringing a disparate-treatment action. It is also more likely to occur in a university where administrators are very cognizant of the wording of policies and procedures in regard to the law specifically to avoid such employment discrimination lawsuits. In a disparate impact claim, a class of underrepresented African-American professors could bring a suit when a policy appears neutral on its face but is discriminatory nonetheless. If the court then finds that the group of plaintiffs has a common contention "capable of class-wide resolution,"[201] then the court should find that the class has met the commonality requirement of Rule 23. If the plaintiffs meet the other requirements, then they should be certified as a class and permitted to bring the action against the employer.

V. CONCLUSION

It is clear that *Wal-Mart* has created more obstacles for meeting the class-action requirements under Rule 23. African-American professors are already so severely underrepresented in American universities that *Wal-Mart* inhibits justice when the courts must put such impediments on actions that redress discrimination. Even though it does seem that the *Wal-Mart* decision foreclosed viable options for underrepresented faculty and staff by narrowing Rule 23's commonality requirement, there are

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[198] Dukes v. Wal-Mart Stores, Inc. 603 F.3d. 2571, 634 (Ikuta, J., dissenting), *reversed*, 131 S.Ct. 2541 (2011).

[199] Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 159, n.15 (1982).

[200] Class actions may be maintained as either or both disparate treatment and disparate impact cases, but where a request for certification is based only on a pattern-or-practice theory, a type of intentional discrimination, the disparate impact theory has been waived. *See* Puffer v. Allstate Ins. Co., 675 F.3d 709, 711–12 (7th Cir. 2012).

[201] Wal-Mart Stores, Inc. v. Dukes 131 S.Ct. 2541, 2551 (2011).

still options for these African-American professors in universities. By breaking down the structure and decision-making process of such universities and identifying the ultimate decision makers, plaintiffs could obtain class certification even in light of *Wal-Mart*.

Just as in the past, the class-action requirements remain controversial and the topic of many discussions. But, with the Court's record of evolving interpretations of Rule 23's requirements throughout the decades, it is highly unlikely that the Court is done altering and amending its Rule 23 standards. At this time, attorneys face more challenges than before when bringing such actions. However, they must encourage the Court's stringent interpretation of Rule 23 to evolve into a more viable standard for plaintiffs that need class action when all other roads to justice seem impractical.