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## The Issue Class

Joseph Seiner

University of South Carolina - Columbia, [seiner@law.sc.edu](mailto:seiner@law.sc.edu)

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# THE ISSUE CLASS

JOSEPH A. SEINER\*

**Abstract:** In 2011, in *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court refused to certify a proposed class of one and a half million female workers who had alleged that the nation's largest private employer had discriminated against them on the basis of their sex. The academic response to the case has been highly critical of the Court's decision. This Article does not weigh in on the debate of whether the Court missed the mark. Instead, this Article addresses a more fundamental question that has gone completely unexplored: what is the best tool currently available for workers to pursue systemic employment discrimination claims? Surveying the case law and Federal Rules of Civil Procedure, this Article identifies one procedural tool that offers substantial potential to workplace plaintiffs seeking to pursue systemic claims: issue class certification. Rule 23(c)(4) of the Federal Rules of Civil Procedure permits the "issue class," which in effect allows a court to certify common issues in a case while allowing the remaining issues to be litigated separately. The issue class is typically used where a case has a common set of facts but the plaintiffs have suffered varying degrees of harm. This is precisely the situation that many workplace claims present. This Article explains how the issue class is particularly useful for systemic discrimination claims. The Article further examines why traditional class treatment often fails in workplace cases, and addresses how the plaintiffs in *Wal-Mart* could have benefitted from issue class certification. Finally, this Article discusses some of the implications of using the issue class in employment cases, and situates the Article in the context of the broader academic scholarship.

*If you're part of a group of employees working for a major U.S. corporation with a gripe about unfair treatment, your collective voices were potentially muffled [after the U.S. Supreme Court's 2011 decision in Wal-Mart Stores, Inc. v. Dukes].*

—NBC News report, following the *Wal-Mart* decision<sup>1</sup>

*The Supreme Court's decision in Wal-Mart v. Dukes, heralded last term as a game-changer in employment class actions, has lived up to the hype.*

—Reuters News report, following the *Wal-Mart* decision<sup>2</sup>

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<sup>1</sup> Eve Tahmincioglu, *Wal-Mart Ruling Raises the Bar for Class Actions*, NBCNEWS.COM (June 21, 2011, 7:59:35 AM), <http://www.nbcnews.com/id/43468398/ns/business-careers/t/wal-mart-ruling-raises-bar-class-actions>, archived at <http://perma.cc/H4KB-G5E3>.

## INTRODUCTION

In 2011, in *Wal-Mart Stores, Inc. v. Dukes*, the U.S. Supreme Court held that the certification of one and a half million current and former female employees of Wal-Mart was not consistent with Federal Rule of Civil Procedure 23(a) and Rule 23(b)(2).<sup>3</sup> The news reports and legal analysis of the Supreme Court's decision in *Wal-Mart* were largely uniform: the case was a devastating setback for millions of workers across the nation.<sup>4</sup> The academic scholarship quickly followed suit, and decried the decision for significantly raising the bar for workers wanting to file suit against employers that run afoul of civil rights laws.<sup>5</sup> The media analysis and academic reaction to *Wal-Mart* have largely been correct. The decision undoubtedly undermines the ability of workers to vindicate their rights when they have suffered discrimination.

This Article does not take a position as to whether *Wal-Mart* was properly decided. Instead of weighing in on the merits of the case, this Article addresses the novel issue of how workplace plaintiffs can still act collectively following the decision. This Article thus focuses on how employees can preserve the class action mechanism when pursuing litigation after *Wal-Mart*.

There are numerous ways that plaintiffs can act collectively when pursuing employment discrimination claims, even in light of the *Wal-Mart* decision.<sup>6</sup> Previous work demonstrates that collateral estoppel, consolidation, and other procedural mechanisms serve as examples of such tools.<sup>7</sup> This Article expands on that scholarship and focuses on one largely unexplored avenue to collective action that is *almost* as effective as traditional class action litigation: issue class certification. Although there is no complete substitute for the traditional class claim, the issue class offers enormous potential to be the best tool currently available to workers pursuing class-wide employment discrimination cases.<sup>8</sup>

The Federal Rules of Civil Procedure allow a group of plaintiffs to certify certain issues common among them, even when the putative class itself has not been certified. Specifically, Rule 23(c)(4) provides that “[w]hen appropriate, an action may be brought or maintained as a class action with respect to par-

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<sup>2</sup> Andrew Longstreth, *Wal-Mart v. Dukes Shakes Up Employment Class Actions*, REUTERS (Jan. 9, 2012, 7:19 PM), <http://www.reuters.com/article/2012/01/10/us-walmart-study-idUSTRE80901320120110>, archived at <http://perma.cc/78VS-VEGL>.

<sup>3</sup> 131 S. Ct. 2541, 2556–57 (2011).

<sup>4</sup> See *supra* notes 1–2 and accompanying text (noting the news response to the *Wal-Mart* decision); *infra* notes 69–72 and accompanying text (noting the scholarly response).

<sup>5</sup> See *infra* notes 69–72 and accompanying text (discussing the critical reaction of scholars to the Supreme Court's decision).

<sup>6</sup> See *infra* note 7 and accompanying text.

<sup>7</sup> See generally Joseph Seiner, *Weathering Wal-Mart*, 89 NOTRE DAME L. REV. 1343 (2014) (addressing the possible procedural responses to the *Wal-Mart* decision).

<sup>8</sup> See *infra* notes 261–267 and accompanying text.

particular issues.”<sup>9</sup> Even when a class has not been permitted to proceed under Rule 23(b), then, litigants can still certify particular issues common to a class under Rule 23(c)(4).<sup>10</sup> This Rule thus allows a court to “treat common things in common and to distinguish the distinguishable.”<sup>11</sup>

Issue class certification offers many of the traditional benefits of class certification under Rule 23(b).<sup>12</sup> Most notably, the issue class provides trial judges enormous flexibility when managing a systemic case of workplace harm.<sup>13</sup> Although class claims are different, Rule 23(c)(4) allows the judge to separate specific common questions in the case and resolve other issues individually.<sup>14</sup> The judge can thereby tailor the certified issues to the facts of the specific case, thus leading to more efficient litigation.<sup>15</sup> In this way, issue class certification also results in more streamlined proceedings. Courts can resolve claims that touch on a common issue a single time, while allowing the remaining issues in the case to be litigated separately.<sup>16</sup>

Issue class certification is especially useful in class action employment discrimination cases, particularly after *Wal-Mart*.<sup>17</sup> This is because workplace class action claims often present the two criteria often required for issue class certification: (1) systemic litigation involving a common set of facts; and (2) varying degrees of harm amongst the individual plaintiffs.<sup>18</sup> Indeed, a survey of the case law and literature in this area reveals that three common factors are often involved in the outcome of workplace litigation: common corporate poli-

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<sup>9</sup> FED. R. CIV. P. 23(c)(4). Prior to the 2007 amendments to the Federal Rules of Civil Procedure, issue class certification was authorized by Rule 23(c)(4)(A). *See* FED. R. CIV. P. 23(c)(4)(A) (2006) (repealed 2007). In 2007, subparts (A) and (B) were removed, and the issue class provision was relabeled 23(c)(4); the change did not alter the Rule’s substantive meaning. *See* FED. R. CIV. P. 1, advisory committee’s note to 2007 amendment (“Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.”); *id.* 23, advisory committee’s note to 2007 amendment (“The language of Rule 23 has been amended as part of the general restyling of the Civil Rules to make them more easily understood . . .”).

<sup>10</sup> *See id.* (c)(4) (allowing the certification of specific issues in a case).

<sup>11</sup> *See* 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1790 (3d ed. 2005) (quoting *Jenkins v. United Gas Corp.*, 400 F.2d 28, 34 (5th Cir. 1968)). <sup>12</sup> *See infra* notes 122–130 and accompanying text (discussing the benefits of issue class certification).

<sup>12</sup> *See infra* notes 122–130 and accompanying text (discussing the benefits of issue class certification).

<sup>13</sup> *See* 7AA WRIGHT ET AL., *supra* note 11, § 1790 (noting the flexibility that issue class certification can provide to the trial courts).

<sup>14</sup> *See id.*

<sup>15</sup> *See id.*

<sup>16</sup> *See id.*

<sup>17</sup> *See infra* notes 131–193 and accompanying text (discussing why Rule 23(c)(4) is particularly appropriate for employment discrimination claims).

<sup>18</sup> *See* FED. R. CIV. P. 23(c)(4); *see also infra* notes 97–121 and accompanying text (setting forth the requirements of issue class certification).

cies, common personnel, and common company practices.<sup>19</sup> Specifically, because employer policies affecting an employee's terms, conditions, and privileges of employment are often uniform across a business, these cases will frequently present a common set of facts for numerous plaintiffs.<sup>20</sup> Moreover, because the managers, supervisors, and executive officers are the same at a particular company, there are often similar issues when these same "players" are involved in the wrongdoing. Finally, workplaces typically involve common practices—informal procedures or rules that are often more of an issue of corporate culture than written policy. Cases of discrimination frequently implicate these common company practices.<sup>21</sup>

Yet, despite their similarities, employment discrimination claims also vary substantially from one another.<sup>22</sup> Damages, for example, differ broadly among discrimination claims.<sup>23</sup> That is, even when workplace claims arise from similar facts, the relief available to plaintiffs varies tremendously across workers.<sup>24</sup> This is true because employees will often have different rates of pay and different positions at the company.<sup>25</sup> And, discrimination results in different degrees and kinds of psychological and emotional harm for individual workers.<sup>26</sup> Each employee's specific damages must therefore be determined on a case-by-case basis.

Given these similarities and differences, workplace claims are often ripe for issue class certification under Rule 23(c)(4). Because they inherently vary, discrimination claims will not always be suitable for traditional class treatment under Rule 23(b), as the *Wal-Mart* case clearly demonstrates. As these systemic cases will often arise from the same set of facts and involve the same policies, practices, and personnel, however, there will frequently be common issues that can be separated out and certified as an issue class. By resolving these common issues on a class basis, courts can handle the litigation much more efficiently.<sup>27</sup>

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<sup>19</sup> See *infra* notes 137–162 and accompanying text (discussing the common issues in employment proceedings).

<sup>20</sup> See *infra* notes 137–162 and accompanying text.

<sup>21</sup> See Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract*, 29 BERKELEY J. EMP. & LAB. L. 345, 353 (2008) (discussing an employer's "often informal" regulations and practices).

<sup>22</sup> See *infra* notes 163–175 and accompanying text (addressing how workplace claims frequently differ from one another).

<sup>23</sup> See *infra* notes 163–171 and accompanying text.

<sup>24</sup> See generally Craig Robert Senn, *Ending Discriminatory Damages*, 64 ALA. L. REV. 187 (2012) (discussing damages provisions of federal employment discrimination statutes).

<sup>25</sup> See *infra* notes 166–167 and accompanying text.

<sup>26</sup> See *infra* notes 168–171 and accompanying text.

<sup>27</sup> See *infra* notes 137–162 and accompanying text.

In fact, plaintiffs effectively used issue class certification alleging workplace discrimination in a case against Merrill Lynch.<sup>28</sup> In 2012, in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, the U.S. Court of Appeals for the Seventh Circuit held that a group of seven hundred black brokers could pursue the common issue of whether an employer's policies of arranging teams and distributing accounts had an adverse effect against minority workers.<sup>29</sup> No class was certified under Rule 23(b)(3), but Judge Richard Posner, writing for a majority panel of the court, allowed this *particular issue* to be considered on a class-wide basis under Rule 23(c)(4).<sup>30</sup> The court explained how its decision comports with the holding of *Wal-Mart*, and how resolution of the particular issue furthers the Supreme Court's reasoning.<sup>31</sup> This case shows that use of the issue class for workplace claims is more than theoretical, and that *all* employment discrimination plaintiffs contemplating systemic claims should consider utilizing Rule 23(c)(4).

Part I of this Article provides a brief overview of the *Wal-Mart* case, and discusses the widely held view that the decision largely eviscerates the civil rights protections of millions of workers.<sup>32</sup> Next, Part II explains the contours of Rule 23(c)(4) and how the issue class differs from traditional class treatment under Rule 23(b).<sup>33</sup> It then clarifies why issue class certification is particularly appropriate for employment discrimination cases, and explains how civil rights plaintiffs can use the Rule to help avoid the negative implications of *Wal-Mart*.<sup>34</sup> By way of example, it explores how Rule 23(c)(4) could be utilized in sexual harassment cases—one of the most commonly brought employment discrimination claims.<sup>35</sup> Then, Part II navigates Judge Posner's recent decision certifying an issue class in a post *Wal-Mart* employment case.<sup>36</sup> It also examines how the plaintiffs in *Wal-Mart* could have benefitted if they had pursued issue class certification rather than a traditional Rule 23(b) class.<sup>37</sup> Finally, Part III discusses

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<sup>28</sup> See *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 492 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 338.

<sup>29</sup> *Id.*

<sup>30</sup> See *id.*

<sup>31</sup> See *id.* at 482–92.

<sup>32</sup> See *infra* notes 39–72 and accompanying text (discussing the *Wal-Mart* decision).

<sup>33</sup> See *infra* notes 85–130 and accompanying text (discussing class actions generally and the issue class).

<sup>34</sup> See *infra* notes 131–193 and accompanying text (addressing how the issue class can be used in employment discrimination cases).

<sup>35</sup> See *infra* notes 176–193 and accompanying text (discussing how the issue class is particularly useful in sexual harassment cases).

<sup>36</sup> See *infra* notes 194–234 and accompanying text (discussing the Seventh Circuit's recent decision on the issue class in a disparate impact employment discrimination case).

<sup>37</sup> See *infra* notes 235–255 and accompanying text (examining *Wal-Mart* from the perspective of Rule 23(c)(4)).

some of the implications of using the issue class in employment cases, and situates the Article in the context of the broader academic scholarship.<sup>38</sup>

In sum, *Wal-Mart* presents an enormous challenge for employment discrimination plaintiffs. This Article attempts to identify the best way for workplace litigants to pursue systemic claims after *Wal-Mart*, and explains—for the first time—how issue class certification can be used to navigate around the Supreme Court’s recent decision. This Article seeks to fill the current void in the academic literature on Rule 23(c)(4), and attempts to start a dialogue on how the issue class can be used as an effective procedural tool for employment discrimination plaintiffs post *Wal-Mart*. The issue class—although perhaps somewhat underutilized and misunderstood—is simply the best available solution to the problem facing workplace claimants.

## I. THE *WAL-MART* DECISION

### A. *The Supreme Court Decision*

In *Wal-Mart*, the Supreme Court considered a case brought by one and a half million current and former female employees of the company who alleged discrimination on the basis of pay.<sup>39</sup> The case was “one of the most expansive class actions ever,” and was brought against the largest private employer in the United States.<sup>40</sup>

The plaintiffs maintained that Wal-Mart’s policy of allowing local managers to make pay and promotion decisions discriminated on the basis of sex and resulted in a violation of Title VII of the Civil Rights Act of 1964.<sup>41</sup> The workers did not maintain that there was any formal corporate policy of discrimination against females.<sup>42</sup> Instead, they argued that the discretion afforded to local supervisors was being used to favor male employees.<sup>43</sup> According to the plaintiffs, then, this policy resulted in an unlawful disparate impact under Title VII, as it had an adverse effect on the basis of sex.<sup>44</sup> And, because Wal-Mart was aware of this disparate impact yet did nothing, the plaintiffs contended that the company should further be held responsible for intentional discrimination under the statute.<sup>45</sup> The plaintiffs did not limit their claim to certain stores or regions, arguing instead that all women working at Wal-Mart were

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<sup>38</sup> See *infra* notes 256–286 and accompanying text (discussing the benefits and drawbacks of the issue class).

<sup>39</sup> 131 S. Ct. at 2547.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 2548.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> See *id.*

affected.<sup>46</sup> In support of these allegations, they introduced both anecdotal and statistical evidence demonstrating Wal-Mart's discriminatory practices.<sup>47</sup> The Court provided a succinct summary of the workers' claims:

The basic theory of the[] case is that a strong and uniform 'corporate culture' permits bias against women to infect, perhaps subconsciously, the discretionary decision making of each one of Wal-Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice. Respondents therefore wish to litigate the Title VII claims of all female employees at Wal-Mart's stores in a nationwide class action.<sup>48</sup>

The U.S. District Court for the Northern District of California certified the class under Federal Rule of Civil Procedure 23, and the U.S. Court of Appeals for the Ninth Circuit affirmed.<sup>49</sup> The Supreme Court granted certiorari in the case to determine whether the lower court had properly applied the class action standards.<sup>50</sup>

In analyzing the case, Justice Antonin Scalia, writing for the Court, looked to whether the plaintiff had properly satisfied the four requirements of Federal Rule of Civil Procedure 23(a): numerosity, commonality, typicality, and adequacy of representation.<sup>51</sup> In considering these factors, the Court focused primarily on the commonality requirement.<sup>52</sup> This element requires that the plaintiff demonstrate "questions of law or fact common to the class."<sup>53</sup> Emphasizing the large size of the putative class, the Court looked for "some glue" to hold the "millions of employment decisions" in the case together.<sup>54</sup>

The Court was unable to find a common thread sufficient to warrant class treatment under Rule 23. The Court found no "general policy of discrimination" at the company and instead viewed the case as involving individual decision makers being responsible for the discrimination.<sup>55</sup> The Court also found no fault in Wal-Mart's decision to permit local managers to exercise discretion over pay and promotion determinations.<sup>56</sup> This type of approach is "a very

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 2549.

<sup>48</sup> *Id.* at 2548.

<sup>49</sup> *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 577 (9th Cir. 2010) (en banc), *rev'd*, 131 S. Ct. 2541; *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 187 (N.D. Cal. 2004), *aff'd*, 603 F.3d 571 (en banc), *rev'd*, 131 S. Ct. 2541.

<sup>50</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 795 (2010) (mem.) (granting petition for certiorari).

<sup>51</sup> *Wal-Mart*, 131 S. Ct. at 2550.

<sup>52</sup> *See* FED. R. CIV. P. 23(a) (setting forth the four requirements that must be satisfied for a class to proceed); *Wal-Mart*, 131 S. Ct. at 2550 ("The crux of this case is commonality . . .").

<sup>53</sup> *Wal-Mart*, 131 S. Ct. at 2550–51 (quoting FED. R. CIV. P. 23(a)(2)).

<sup>54</sup> *Id.* at 2552.

<sup>55</sup> *See id.* at 2553–56 (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982)).

<sup>56</sup> *Id.* at 2554.



common and presumptively reasonable way of doing business.”<sup>57</sup> The Court did not say that permitting such discretion could never be discriminatory, but that here the plaintiffs failed to demonstrate that “a common mode of exercising discretion . . . pervades the entire company.”<sup>58</sup>

The Court also concluded that the statistical and anecdotal evidence of the putative class was insufficient.<sup>59</sup> Regardless of whether the statistics presented demonstrated some type of pay disparity, they still failed to establish the commonality necessary to certify the class.<sup>60</sup> Similarly, the Court found too few examples of specific discrimination to warrant any conclusion that there was a generalized practice of discrimination at Wal-Mart.<sup>61</sup> The Court thus concluded that the class members “held a multitude of different jobs, at different levels of Wal-Mart’s hierarchy,” across thousands of stores and every state, with numerous policies and different supervisors.<sup>62</sup> Thus, the Court stated that the class members “have little in common but their sex and this lawsuit,” and, accordingly, the Court denied class certification.<sup>63</sup>

Justice Ruth Bader Ginsburg, joined by three other justices, dissented from the majority opinion.<sup>64</sup> The dissent argued that the plaintiffs had demonstrated sufficient commonality to certify the class, noting that the company’s pay practices “operate uniformly across stores.”<sup>65</sup> The dissent also maintained that there was a common culture at Wal-Mart consisting of “frequent meetings to reinforce the common way of thinking, regular transfers of managers between stores to ensure uniformity [and] monitoring of stores on a close and constant basis.”<sup>66</sup> This evidence, along with the statistical and anecdotal offerings, led the dissent to believe “that gender bias suffused Wal-Mart’s company culture.”<sup>67</sup> Thus, the dissent strongly disagreed with the majority’s conclusion that there was no commonality in the plaintiffs’ claims, and further disagreed with the majority’s decision not to certify the class.<sup>68</sup>

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<sup>57</sup> *Id.*

<sup>58</sup> *See id.* at 2554–55.

<sup>59</sup> *Wal-Mart*, 131 S. Ct. at 2555.

<sup>60</sup> *Id.* at 2555–56.

<sup>61</sup> *Id.* at 2556.

<sup>62</sup> *Id.* at 2557 (quoting *Dukes*, 603 F.3d at 652 (Kozinski, C.J., dissenting)).

<sup>63</sup> *Id.* The Court’s discussion of monetary relief, which is beyond the scope of this Article, is omitted here.

<sup>64</sup> *Id.* at 2561–67 (Ginsburg, J., dissenting).

<sup>65</sup> *Id.* at 2563. Justice Ginsburg noted that “Wal-Mart’s delegation of discretion over pay and promotions is a policy uniform throughout all stores. The very nature of discretion is that people will exercise it in various ways.” *Id.* at 2567.

<sup>66</sup> *Id.* at 2563 (internal quotations omitted).

<sup>67</sup> *Id.*

<sup>68</sup> *See id.* at 2563–65.

### B. Academic Response to *Wal-Mart*

The academic response to *Wal-Mart* was largely uniform. Scholars have widely criticized the decision as undermining the civil rights protections of workers across the country.<sup>69</sup> For example, Professor Erwin Chemerinsky maintains that following *Wal-Mart*, “it will be very difficult for employment discrimination claims to be litigated as a class action.”<sup>70</sup> Similarly, two other scholars have argued that the Court’s decision “may undercut not only class actions, but also the procedurally distinct ‘collective actions’ that let masses of workers sue for unpaid wages.”<sup>71</sup>

The literature criticizing the Supreme Court’s decision in *Wal-Mart* continues to grow.<sup>72</sup> These scholars’ arguments are very well founded. It is now time to move past this debate, however, and examine how employment discrimination plaintiffs pursuing class claims can respond to the Supreme

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<sup>69</sup> See, e.g., Catherine Fisk & Erwin Chemerinsky, *The Failing Faith in Class Actions: Wal-Mart v. Dukes and AT&T Mobility v. Concepcion*, 7 DUKE J. CONST. L. & PUB. POL’Y 73, 77–97 (2011) (reading cases to interpret the Supreme Court’s conservative majority’s desire to protect big businesses and limit remedies for consumers and employees); Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593, 593 (2012) (“The *Wal-Mart* ruling—although procedural—will have a disproportionate impact on particular substantive areas of the law, even within civil rights litigation.”); Robert H. Klonoff, *Reflections on the Future of Class Actions*, 44 LOY. U. CHI. L.J. 533, 536–37 (2012) (concluding that *Wal-Mart* raises the burden for plaintiffs seeking class certification by requiring the common question be “essentially dispositive” and by giving defendants new methods to challenge certification); Alexandra D. Lahav, *Due Process and the Future of Class Actions*, 44 LOY. U. CHI. L.J. 545, 553 (2012) (quoting *Wal-Mart*, 131 S. Ct. at 2561) (“Without the possibility of what that opinion derisively referred to as ‘Trial by Formula,’ it will be difficult to certify many class actions.”); Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. REV. COLLOQUY 34, 44–45 (2011), <http://www.law.northwestern.edu/lawreview/colloquy/2011/18/LRColl2011n18Malveaux.pdf>, archived at <http://perma.cc/H648-LK3J> (concluding that the majority’s opinion will make it more difficult for employees relying on the theory of excessive subjectivity as a discriminatory policy to act collectively); Brian R. Martinotti, *Complex Litigation in New Jersey and Federal Courts: An Overview of the Current State of Affairs and a Glimpse of What Lies Ahead*, 44 LOY. U. CHI. L.J. 561, 564–65 (2012) (stating that *Wal-Mart* makes certification more difficult for plaintiffs by requiring district judges to conduct a “rigorous analysis, at times overlapping with the merits of the plaintiffs’ underlying claims”); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 148–54 (2011) (“These *Wal-Mart* rulings crafted new impediments to the congressional charter authorizing private enforcement of Title VII as well as to Rule 23’s recognition of different kinds of relatedness . . . as a predicate for aggregation under judicial supervision.”); Eric Schnapper, *Review of Labor and Employment Law Decisions from the United States Supreme Court’s 2010–2011 Term*, 27 ABA J. LAB. & EMP. L. 329, 329–41 (2012) (outlining the different ways *Wal-Mart* will require more of plaintiffs seeking to certify employment discrimination class actions); Suzanna Sherry, *Hogs Get Slaughtered at the Supreme Court*, 2011 SUP. CT. REV. 1, 36 (“The biggest losers in *AT&T Mobility* and *Wal-Mart* were not the class members, who deserved to lose on their particular claims, but consumers and employees who might wish to bring class actions in the future.”).

<sup>70</sup> Erwin Chemerinsky, *Closing the Courthouse Doors*, 14 GREEN BAG 2d 375, 380 (2011).

<sup>71</sup> Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 AM. U. L. REV. 523, 526 (2012).

<sup>72</sup> See *supra* notes 69–71 and accompanying text.

Court's decision. It is thus time to begin a dialogue not on the efficacy of *Wal-Mart*, but rather on how plaintiffs can best pursue their claims in light of this decision. This Article engages that discussion with an analysis of the best remaining tool for pursuing class action claims in the workplace context—the issue class.

## II. THE WAY FORWARD: ISSUE CLASS CERTIFICATION

In its 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court declined to certify a class of one and a half million current and former female employees of Wal-Mart.<sup>73</sup> Taking the academic commentary on *Wal-Mart* as true, the decision creates a sizeable hurdle for victims of employment discrimination.<sup>74</sup> The case substantially raises the bar for plaintiffs hoping to litigate systemic claims of discrimination.<sup>75</sup> In the employment discrimination context, class actions are particularly important, as many individual claims can be for small amounts not worthy of pursuit.<sup>76</sup> And, class actions can quickly get the attention of employers everywhere and encourage them to adopt non-discriminatory policies.<sup>77</sup> These types of claims also punish those employers that do discriminate, and compensate all victims of the company's unlawful behavior.<sup>78</sup>

This Article thus adopts the two-part approach taken by so many others to date: (1) class actions are good for enforcing civil rights law; and (2) the *Wal-Mart* decision has made it more difficult to pursue class actions and thus undermines the rights of workers everywhere.<sup>79</sup> The decision's reasoning may not be definitive enough to know the extent to which the case will redefine the law—at least not without taking a step back to see how the lower courts ultimately interpret the decision. Nonetheless, the commentators are largely correct that *Wal-Mart* represents a broad strike against workers, and will undoubtedly make it more difficult for them to litigate class claims. Thus, although it may be fair to

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<sup>73</sup> 131 S. Ct. 2541, 2556–57 (2011).

<sup>74</sup> See *supra* notes 69–72 and accompanying text (discussing the academic reaction to *Wal-Mart*).

<sup>75</sup> See, e.g., Erwin Chemerinsky, *New Limits on Class Actions*, TRIAL, Nov. 2011, at 54, 56 (stating that although *Wal-Mart* may be read as narrowly dealing with large class actions, class actions will be more difficult to bring in the future).

<sup>76</sup> See Pam Jenoff, *As Equal as Others? Rethinking Access to Discrimination Law*, 81 U. CIN. L. REV. 85, 97 (2012) (“[J]udgments in employment discrimination lawsuits are relatively modest compared to other areas of litigation.”).

<sup>77</sup> See, e.g., Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 887 (2001) (“[C]lass actions received increasing attention from policy-makers and the media.”).

<sup>78</sup> See, e.g., Seiner, *supra* note 7, at 1344 (discussing the role of class actions in employment discrimination cases).

<sup>79</sup> See *supra* notes 69–72 and accompanying text.

quibble with some of the current scholarship at the margins, the main thrust of the arguments against *Wal-Mart* is both sound and well supported.

This Article does not seek to engage in the debate over *Wal-Mart*'s impact, as this is well-traveled ground. Instead, it offers one creative way to utilize the class action provisions of the Federal Rules of Civil Procedure to help negate the impact of the Supreme Court's decision: issue class certification. First, Section A of this Part addresses traditional class certification under Federal Rule of Civil Procedure 23(a) and Rule 23(b).<sup>80</sup> Section B then discusses what issue class certification is, how it can be applied to employment discrimination cases, and the potential benefit of using this procedural mechanism.<sup>81</sup> Then, Section C walks through how this procedural tool was effectively used in a civil rights case following the *Wal-Mart* decision, in an opinion authored by Judge Posner.<sup>82</sup> Finally, Section D discusses how the plaintiffs in *Wal-Mart* could have effectively used this mechanism to pursue their claims.<sup>83</sup>

At the outset, it is important to make clear that issue class certification is not the only way to help circumvent the *Wal-Mart* decision. Indeed, previous scholarship has outlined other effective ways of pursuing systemic discrimination claims even in light of the Supreme Court's heightened view of "commonality" under the Rules.<sup>84</sup> And, this Article attempts to formulate one particularly useful way for plaintiffs to pursue class action claims after *Wal-Mart*. It therefore attempts to begin a dialogue on the techniques that civil rights litigants can utilize to pursue collective actions. Ideally, it will inspire others to offer similar suggestions and engage this debate.

### A. Rule 23 and the Class Action

The intricacies of the Federal Rules and class actions are well known. A brief review of the Rules, however, helps provide some context to the usefulness of the issue class. Rule 23 of the Federal Rules of Civil Procedure outlines how class actions may be certified.<sup>85</sup> To proceed, a class must satisfy all of the provisions of Rule 23(a) and one of the categories set forth in Rule 23(b).<sup>86</sup> The vast majority of systemic claims are analyzed under these two Rules.<sup>87</sup> Rule 23(a) sets forth the well-known requirements of numerosity, commonality, typicality,

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<sup>80</sup> See *infra* notes 85–96 and accompanying text.

<sup>81</sup> See *infra* notes 97–193 and accompanying text.

<sup>82</sup> See *infra* notes 194–234 and accompanying text.

<sup>83</sup> See *infra* notes 235–255 and accompanying text.

<sup>84</sup> See, e.g., Seiner, *supra* note 7, at 1352–78 (outlining the governmental, procedural, and damages responses to the Supreme Court's decision).

<sup>85</sup> See FED. R. CIV. P. 23.

<sup>86</sup> See Malveaux, *supra* note 69, at 35 ("For a case to be certified as a class action, all of the Rule 23(a) provisions and one of the Rule 23(b) provisions must be met.").

<sup>87</sup> See *id.*

and adequacy of representation that must be satisfied for a class to proceed.<sup>88</sup> Rule 23(b) offers three different ways of certifying a class action.<sup>89</sup>

A Rule 23(b)(1) class is permitted where individual litigation may create “inconsistent or varying adjudications” or judgments that “would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair . . . their interests.”<sup>90</sup> A subsection 23(b)(2) class action is one where injunctive relief would be primarily appropriate.<sup>91</sup> And a Rule 23(b)(3) class is sought where “questions of law or fact common to class members predominate” and where the “class action is superior to other available methods” of adjudication.<sup>92</sup>

Notably, 23(b)(1) and 23(b)(2) class certification permits *mandatory* class cases, whereas Rule 23(b)(3) allows “opt-out class actions.”<sup>93</sup> The opt-out cases of Rule 23(b)(3) have been the most challenging for the courts, as they have often struggled to apply this provision.<sup>94</sup> These challenges may stem from the fact that the majority of systemic cases seek certification under Rule 23(b)(3), and that these claims “usually . . . [involve] a high proportion of monetary damages.”<sup>95</sup> In these types of conventional class cases, the whole case is certified as a single action by the court.<sup>96</sup>

### B. The Issue Class

A separate procedural provision—added in 1966 as an amendment to the Federal Rules—can also be used to litigate specific issues in a case.<sup>97</sup> Although traditional claims brought under Rule 23(b) involve “an all-or-nothing decision to aggregate individual cases,” Federal Rule of Civil Procedure 23(c)(4) allows litigants to resolve specific issues in a case on a class-wide basis.<sup>98</sup> Or, as is more commonly known, this provision provides for “issue class” certification. According to the Rule, an issue class may proceed as follows:

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<sup>88</sup> FED. R. CIV. P. 23(a).

<sup>89</sup> *Id.* 23(b).

<sup>90</sup> *Id.* 23(b)(1).

<sup>91</sup> *Id.* 23(b)(2).

<sup>92</sup> *Id.* 23(b)(3).

<sup>93</sup> See Jenna G. Farleigh, Note, *Splitting the Baby: Standardizing Issue Class Certification*, 64 VAND. L. REV. 1585, 1594 (2011) (noting that many courts have “largely merged” Rules 23(b)(1) and (b)(2), and that cases often proceed under both provisions).

<sup>94</sup> See *id.* at 1594–95.

<sup>95</sup> See *id.*

<sup>96</sup> Jon Romberg, *Half a Loaf Is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249, 264. The court does not consider “whether there are issues in the case that cannot be resolved collectively.” *Id.*

<sup>97</sup> See FED. R. CIV. P. 23(c)(4); 7AA WRIGHT ET AL., *supra* note 11, § 1790.

<sup>98</sup> See FED. R. CIV. P. 23(c)(4); Romberg, *supra* note 96, at 251.

*Particular Issues.* When appropriate, an action may be brought or maintained as a class action with respect to particular issues.<sup>99</sup>

This “little-heralded” Rule is ambiguous, and does not explain when an issue class is appropriate.<sup>100</sup> Nevertheless, over time a substantial amount of litigation and scholarship has helped define the issue class. It is typically used where there are common issues present in the case that would apply to the entire class, even where other questions will need to be resolved individually in specific cases.<sup>101</sup> Thus, it is not uncommon for cases to proceed collectively on common questions under Rule 23(c)(4), while other issues are resolved independently, such as “questions of reliance[] [and] damages.”<sup>102</sup> Courts have even applied this Rule in instances where there is only a single issue common to the entire class.<sup>103</sup>

In proceeding as a Rule 23(c)(4) class, the plaintiffs must quickly—and precisely—identify the issue(s) that deserve common treatment.<sup>104</sup> This means that the plaintiffs must articulate precisely “what issues of fact or law they believe can and should be resolved collectively” and identify “what issues must be resolved individually.”<sup>105</sup> The procedural rules require that, “[a]t an early practicable time,” the court “determine by order whether to certify the action as a class action.”<sup>106</sup> Thus, the plaintiffs should move to certify the issue class as soon as possible in the case.<sup>107</sup> Raising the issue early on can be a double-edged sword, however, as discovery and other proceedings in the matter may require that the specific issue certified be modified or refined as the case proceeds.<sup>108</sup>

In certifying a case under Rule 23(c)(4), the court must still determine that the other provisions of Rule 23(a) have been satisfied.<sup>109</sup> Thus, the issue

<sup>99</sup> FED. R. CIV. P. 23(c)(4). See generally Jenna C. Smith, Comment, “Carving at the Joints”: Using Issue Classes to Reframe Consumer Class Actions, 88 WASH. L. REV. 1187 (2013) (discussing issue class certification).

<sup>100</sup> See Romberg, *supra* note 96, at 251.

<sup>101</sup> See 7AA WRIGHT ET AL., *supra* note 11, § 1790.

<sup>102</sup> *Id.*

<sup>103</sup> See Cortright v. Resor, 325 F. Supp. 797, 808 (E.D.N.Y. 1971), *rev’d on other grounds*, 447 F.2d 245 (2d Cir. 1971) (utilizing the issue class where only a single common issue was present); St. Augustine High Sch. v. Louisiana High Sch. Athletic Ass’n, 270 F. Supp. 767, 774 n.8 (E.D. La. 1967), *aff’d*, 396 F.2d 224 (5th Cir. 1968) (same).

<sup>104</sup> See, e.g., Romberg, *supra* note 96, at 268 (“The trial court should require the plaintiffs to state, quite specifically, the definition of their proposed class.”).

<sup>105</sup> *Id.* at 269.

<sup>106</sup> FED. R. CIV. P. 23(c)(1)(A).

<sup>107</sup> See Romberg, *supra* note 96, at 268.

<sup>108</sup> See *id.*

<sup>109</sup> See Michael J. Wylie, Comment, *In the Ongoing Debate Between the Expansive and Limited Interpretations of Fed. R. Civ. P. 23(c)(4)(A), Advantage Expansivists!*, 76 U. CIN. L. REV. 349, 352 (2007) (noting that commentators “agree that the four prerequisites of Rule 23(a) must be satisfied in order for a class to be certified as to a claim or issue”).

must share numerosity, commonality, typicality, and adequacy of representation for a class to proceed.<sup>110</sup> There is substantial debate, however, as to whether courts can certify an issue class when the plaintiffs have not satisfied the predominance element of Rule 23(b)(3).<sup>111</sup> As already discussed, where the plaintiffs seek monetary relief in the case, they must typically satisfy this element of Rule 23(b)(3).<sup>112</sup> This means that, in the majority of class action cases, the plaintiffs will have to show that “questions of law or fact common to class members predominate over” other questions.<sup>113</sup> Thus, although it is clear that plaintiffs seeking issue class certification must establish the four components of Rule 23(a), there is less certainty as to what they must establish under Rule 23(b).<sup>114</sup> Moreover, courts have issued varying opinions in this regard.<sup>115</sup>

For the most part, appellate courts have agreed that the issue class can proceed under Rule 23(c)(4) even where the predominance requirement of Rule 23(b) has not been satisfied.<sup>116</sup> The U.S. Courts of Appeals for the Second, Seventh, and Ninth Circuits have all followed this more permissive approach.<sup>117</sup> The Fifth Circuit has been more restrictive, however, and initially held that predominance was required for issue class certification.<sup>118</sup> The court’s more recent decisions have relaxed this approach,<sup>119</sup> leading some commentators to argue that the appellate courts are “unanimous in holding that Rule 23(c)(4) authorizes certification of issue classes” even where predominance is absent.<sup>120</sup> Others have disagreed with this conclusion.<sup>121</sup> The scholarship has

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<sup>110</sup> See FED. R. CIV. P. 23(a).

<sup>111</sup> See Wylie, *supra* note 109, at 353–54.

<sup>112</sup> See *id.* at 352.

<sup>113</sup> See FED. R. CIV. P. 23(b)(3).

<sup>114</sup> See *id.*

<sup>115</sup> See Mark A. Perry, *Issue Certification Under Rule 23(c)(4): A Reappraisal*, 62 DEPAUL L. REV. 733, 739–40 (2013) (setting forth the treatment of Rule 23(c)(4) by the appellate courts).

<sup>116</sup> See *id.* at 739 (discussing the opinion of the Seventh Circuit); Wylie, *supra* note 109, at 358–63 (discussing the opinions of the Second and Ninth Circuits).

<sup>117</sup> See *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 338; *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996); see also *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 438–45 (4th Cir. 2003) (reasoning in dicta that an issue class may proceed without first satisfying the predominance requirement imposed by Rule 23(b)(3)).

<sup>118</sup> See *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) (noting that “[a] district court cannot manufacture predominance through the nimble use of [Rule 23](c)(4)”).

<sup>119</sup> See *In re Rodriguez*, 695 F.3d 360, 369 n.13 (5th Cir. 2012) (quoting *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000)) (internal quotation marks omitted) (“Rule 23(c)(4) explicitly recognizes the flexibility that courts need in class certification by allowing certification with respect to particular issues and division of the class into subclasses.”); *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 626 (5th Cir. 1999) (finding that an issue class satisfied the predominance requirement because “the issues to be tried commonly . . . were significant in relation to the individual issues” unique to each plaintiff).

<sup>120</sup> See Patricia Bronte et al., “*Carving at the Joint*”: *The Precise Function of Rule 23(c)(4)*, 62 DEPAUL L. REV. 745, 745–46 (2013). Bronte and her co-authors argue that after the Fifth Circuit’s more recent decisions, the “circuit split . . . has all but vanished.” *Id.* (internal quotation marks omit-

been mixed on the question of whether an issue class should be permitted where the requirements of Rule 23(b) have not been satisfied.

Irrespective of the outcome of the predominance issue, however, issue class certification offers great promise as a way for employment discrimination plaintiffs to pursue systemic claims even after *Wal-Mart*.<sup>122</sup> Using Rule 23(c)(4) offers numerous benefits that should make issue certification appealing to both the litigants and the courts. Two such benefits jump immediately to mind—efficiency and flexibility.

Using the issue class to certify specific questions in a case helps courts handle complex matters more efficiently.<sup>123</sup> Where a particular question can be resolved as a class, that issue only needs to be answered a single time, forgoing the need for subsequent litigation.<sup>124</sup> This will save an abundance of time and resources for the parties, as the rest of the litigation can proceed without the need to revisit the common issue in the case. The issue class thus offers “a happy medium between individual cases and a global class action.”<sup>125</sup> By resolving a question only once across a swath of cases, then, the issue class helps to streamline the litigation and bring efficiency to the entire judicial process.<sup>126</sup>

Additionally, issue class certification provides the trial courts with an immense amount of flexibility when addressing systemic claims.<sup>127</sup> As all class claims are different, Rule 23(c)(4) allows the judge to peel off specific com-

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ted). For an example from the recent case law, see *In re Deepwater Horizon*, 739 F.3d 790, 811 (5th Cir. 2014) (holding that class certification was proper under Rule 23(b)(3)).

<sup>121</sup> Compare Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709, 763 (2003) (“Rule 23(c)(4)(A) in its current form cannot authorize expansive issue class actions. Interpreting the provision to do so would require an untenably strained reading of its text, impermissibly rewriting Rule 23 by judicial fiat.”), with Wylie, *supra* note 109, at 372 (“Rule 23(c)(4)(A) in its current form should be interpreted expansively to authorize issue class actions. . . . [C]ourts should not adopt the limited interpretation because it is on especially shaky grounds given the distortion of the language and structure of Rule 23(c)(4)(A) required to facilitate an interpretation that ultimately renders the provision a redundant expression of what the predominance requirement . . . already implies.”). See generally Perry, *supra* note 115 (arguing that “issue certification is properly limited to bifurcating liability from remedies, and does not allow the certification (or exclusion) of discrete claim elements and defenses”).

<sup>122</sup> This paper does not address the issue of whether predominance is needed to certify an issue class. Instead, it assumes the position taken by the majority of courts on the issue that a Rule 23(c)(4) class can proceed irrespective of whether Rule 23(b)(3) has been satisfied. See *supra* note 117 and accompanying text. Although this approach seems to carry the day in the appellate courts, the issue will not ultimately be resolved until the Supreme Court addresses the matter.

<sup>123</sup> See 7AA WRIGHT ET AL., *supra* note 11, § 1790; Romberg, *supra* note 96, at 299.

<sup>124</sup> See 7AA WRIGHT ET AL., *supra* note 11, § 1790 (“[T]he theory of Rule 23(c)(4)(A) is that the advantages and economies of adjudicating issues that are common to the entire class on a representative basis may be secured . . .”).

<sup>125</sup> Romberg, *supra* note 96, at 299.

<sup>126</sup> See *id.* (“The efficiency arises from collective resolution of the issues common to the class . . .”).

<sup>127</sup> See 7AA WRIGHT ET AL., *supra* note 11, § 1790.



mon questions in the case and resolve other issues individually.<sup>128</sup> Further, plaintiffs can use issue certification at any stage of the litigation.<sup>129</sup> This type of flexibility permits a class case “to be adjudicated that otherwise might have to be dismissed or reduced to a nonrepresentative proceeding because it appears to be unmanageable.”<sup>130</sup> Thus the issue class provides essential flexibility and simplification to otherwise difficult and complex systemic litigation.

The efficiencies and flexibility that Rule 23(c)(4) provides are particularly fitting in the employment discrimination context.<sup>131</sup> Again, the issue class is particularly appropriate where there are common facts among the litigants but individual differences as to the degree of harm that has been suffered. Systemic employment discrimination claims frequently involve this exact scenario, providing a common set of facts that give rise to the company’s wrongdoing.<sup>132</sup> Further, the employer’s discrimination often impacts plaintiffs to varying degrees, both financially and emotionally.<sup>133</sup> Thus, the common set of facts combined with the varying level of harm make the issue class a particularly useful tool for employment discrimination litigants.

The plaintiffs in *Wal-Mart* were unable to certify their claim as a traditional class action under Rule 23(b) because of a lack of commonality across plaintiffs and stores.<sup>134</sup> Yet, despite the differences among the claims, there were still common issues in the case.<sup>135</sup> Issue class certification could thus have provided a useful and efficient way of analyzing that particular litigation. Section D of this Part sets forth in detail how Rule 23(c)(4) might have been used to benefit the *Wal-Mart* litigation.<sup>136</sup> Beyond the *Wal-Mart* example,

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<sup>128</sup> See *id.* (“[S]ubdivision (c)(4) is designed to give the court additional flexibility in handling class actions . . .”).

<sup>129</sup> See *id.* (“Several courts thus have noted at the certification stage that allegations about potential conflicts among class members or manageability concerns may be handled later in the litigation by utilizing Rule 23(c)(4).”).

<sup>130</sup> *Id.*

<sup>131</sup> The issue class is not appropriate in all mass litigation. See Romberg, *supra* note 96, at 299 (“For a controversy with little in the way of severable common issues, certification may well not be worth the bother—individual lawsuits will be superior. For a controversy that is entirely composed of common issues, a global class action will be superior.”). For example, where it is difficult to identify an issue that can be easily separated out in the litigation, issue certification would not be proper. See *id.* Similarly, where numerous common questions exist across plaintiffs, a traditional class action—rather than an issue class—should be pursued. See *id.* Nonetheless, issue certification will often be superior for “those downstream cases in which there is a significant common nucleus of operative facts concerning the propriety of the defendant’s conduct . . . yet widespread variation in how or if that conduct . . . has harmed class members.” *Id.* at 299–300.

<sup>132</sup> See *infra* notes 137–162 and accompanying text (outlining the common issues in Title VII litigation).

<sup>133</sup> See *infra* notes 163–175 and accompanying text (outlining the differences among discrimination claims).

<sup>134</sup> See 131 S. Ct. at 2557.

<sup>135</sup> See *id.* at 2547–48.

<sup>136</sup> See *infra* notes 235–255 and accompanying text.

however, the issue class is promising for all workplace plaintiffs pursuing systemic claims. As *Wal-Mart* shows, these cases are ripe for issue class certification, as they frequently offer both a common set of facts to all plaintiffs and individual variances among specific plaintiffs.

The common issues in employment proceedings abound, as do the individual differences among litigants. A survey of the case law and literature in this area reveals many common factors among workplace claims. The most common similarities in Title VII litigation can be broken down into three areas: (1) common companywide policies; (2) common personnel; and (3) common practices.

### 1. Corporate Policies

It is very common for a corporation to adopt formal, company-wide policies. Specifically, companies frequently adopt a variety of policies related to a worker's employment.<sup>137</sup> These policies are often introduced to employees as part of their orientation process and set out in an employee handbook.<sup>138</sup> Employers may announce and adopt other policies over the course of an individual's employment.<sup>139</sup> These policies vary in scope and can range from the minutia of a worker's employment to the major components of an individual's job.<sup>140</sup>

For example, formal company policies often include such issues as vacation and leave rules, pay and promotion policies, discipline guidelines, benefit

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<sup>137</sup> See, e.g., Catherine Albiston et al., *Ten Lessons for Practitioners About Family Responsibilities Discrimination and Stereotyping Evidence*, 59 HASTINGS L.J. 1285, 1305 (2008) ("Formal policies can be important evidence in discrimination cases . . ."); Grace S. Ho, *Not Quite Rights: How the Unwelcomeness Element in Sexual Harassment Law Undermines Title VII's Transformative Potential*, 20 YALE J.L. & FEMINISM 131, 143 (2008) (noting that "[e]mpirical studies have found that sexual harassment policies proliferated in the wake of" Supreme Court case law); Sharon Rabin-Margalioth, *Love at Work*, 13 DUKE J. GENDER L. & POL'Y 237, 238 (2006) (noting that "employers have instituted a variety of rules and policies that regulate the extent to which employees are allowed to personally interact with one another"); Joshua C. Polster, Note, *Workplace Grievance Procedures: Signaling Fairness but Escalating Commitment*, 86 N.Y.U. L. REV. 638, 638 (2011) ("Over the last fifty years, nonunion employers have increasingly adopted formal grievance procedures, which allow employees to challenge a company decision or policy and appeal manager adjudications of the challenge.").

<sup>138</sup> See Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 INDUS. REL. L.J. 326, 334–35 (1993) ("Employee handbooks are a common source of an implied contract right to job security. The transformation of employee handbooks from gratuitous expressions of employer policy to enforceable legal obligations provides a vivid illustration of the declining adherence to the employment-at-will rule."); John Giovannone, Note, *In the Wake of Hurricane Asmus: A Lost Opportunity in Our Struggle with Employment Handbooks*, 37 LOY. L.A. L. REV. 1687, 1694 (2004) ("The employee handbook is arguably the most established and important illustration of the corporate policy exception to at-will employment.").

<sup>139</sup> See Giovannone, *supra* note 138, at 1697–98 (explaining that some employers change company policies by issuing modified or amended employee handbooks).

<sup>140</sup> See Rabin-Margalioth, *supra* note 137, at 246–51 (criticizing employers' overly-broad policies that forbid consensual relationships between employees).

arrangements, operating hours and rules, and grievance procedures.<sup>141</sup> Policies can also touch on discrimination in the workplace, and employers frequently adopt anti-harassment and anti-discrimination procedures that inform employees what to do if they believe that they have been subject to illegal workplace conduct.<sup>142</sup> It is not uncommon for workplace policies to also include information on health and safety, and to inform employees how to act in the context of a dangerous situation.<sup>143</sup> Key for purposes of this discussion is that an employment policy (1) can affect the terms, conditions, and privileges of employment and (2) can impact workers across the entire company.

Because employer policies are often formal and uniform across a business, they frequently present a common set of facts for numerous plaintiffs. As these policies are so widespread in the workplace, they also give rise to a common issue that could be certified under Rule 23(c)(4). The courts and litigants could thus save enormous judicial resources by resolving any workplace claims that touch on a common policy a single time, while litigating the remaining issues in the case separately. For example, a court could examine whether an employer's policy on healthcare discriminates against a particular religious group, or whether a business's pay platform negatively affects women. By resolving these questions only once in a case through Rule 23(c)(4), each individual plaintiff would not have to relitigate the issues.

Issue class certification can be particularly helpful in disparate impact cases. In a disparate impact case, an employer has violated Title VII by adopting an employment policy that is facially neutral, but nonetheless has a discriminatory impact on workers for which there is no business justification.<sup>144</sup> The Supreme Court first recognized a claim for disparate impact in 1971.<sup>145</sup> Congress subsequently codified this cause of action in Title VII as part of the Civil Rights Act of 1991.<sup>146</sup> A plaintiff bringing a disparate impact claim must set forth the policy in question that gives rise to the adverse effect.<sup>147</sup> For ex-

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<sup>141</sup> See Richard Harrison Winters, Note, *Employee Handbooks and Employment-At-Will Contracts*, 1985 DUKE L.J. 196, 196 ("An employee handbook typically informs the employee about grievance and termination procedures, severance pay, insurance, vacation pay, and general operating rules.").

<sup>142</sup> See Ho, *supra* note 137, at 142 (noting the rise in sexual harassment policies following the Supreme Court rulings on the issue).

<sup>143</sup> See generally Rowena M. Durán, Note, *The Employer's Dilemma: The Implications of Occupational Safety and Health in the Arbitral Process—Conflicting Contractual and Statutory Commands*, 34 SYRACUSE L. REV. 1067 (1983) (discussing various employer safety and health policies and issues).

<sup>144</sup> See 42 U.S.C. § 2000e-2(k) (2012) (setting forth the statutory prohibition for disparate impact).

<sup>145</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–31 (1971).

<sup>146</sup> See Joseph A. Seiner & Benjamin N. Gutman, *Does Ricci Herald a New Disparate Impact?*, 90 B.U.L. REV. 2181, 2185–95 (2010) (discussing the history of disparate impact and its codification into law).

<sup>147</sup> See *id.* at 2194.

ample, an employer might have a policy requiring that its employees have a high school diploma. Given the educational opportunities available to certain minority groups in particular areas of the country, such a policy could have a disparate impact on those groups. This was the central question in the 1971 case *Griggs v. Duke Power Co.*, in which the Supreme Court held that an employer's policy requiring that employees hold a high school diploma and take an IQ test violated the disparate impact provisions of Title VII.<sup>148</sup>

Moreover, because disparate impact claims typically affect large numbers of workers, issue class certification would be particularly appropriate for these claims.<sup>149</sup> Disparate impact claims involve a common policy that affects numerous employees in the workplace. Any questions as to that policy could be certified for a single resolution. Thus, in *Griggs*, the question of whether a diploma requirement had a statistical disparate impact on a protected group could have been certified for review.<sup>150</sup> Rule 23(c)(4) could have also been used to determine whether the employer had a business necessity for adopting the policy, and whether there were alternative policies available that would have served the employer's business goals yet had less of a discriminatory impact on the workforce.<sup>151</sup>

Company policies, then, provide an area of enormous potential for issue class certification in the employment discrimination context. As these policies involve a similar set of facts among numerous workers, cases that implicate corporate rules may be particularly appropriate for Rule 23(c)(4) review. Disparate impact claims, which inherently involve corporate policy, are thus one subset of workplace litigation that would benefit greatly from the use of the issue class.<sup>152</sup>

## 2. Common Personnel

Workplaces, by their very nature, involve the same managers, presidents, and executive officers. Many employees—sometimes hundreds or thousands—will thus end up sharing a particular boss at the same company. The decisions of these managers or supervisors will often end up impacting an entire class of workers. For example, a supervisor could treat women in a negative way, or

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<sup>148</sup> See 401 U.S. at 432.

<sup>149</sup> See Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 968 (2005) (noting that “disparate impact is conceived of as class-based litigation, typically pursued either in formal class actions or by the EEOC in pattern and practice cases”).

<sup>150</sup> See 401 U.S. at 427–28 (noting that the company policy of requiring a high school education applied to all employees).

<sup>151</sup> See *id.* at 431–36 (noting that the diploma requirement was not “a reasonable measure of job performance”).

<sup>152</sup> See generally Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 YALE L. & POL'Y REV. 95 (2006) (discussing the role of policies in disparate impact law).

may only allow white employees to be promoted within the company.<sup>153</sup> Similarly, the company president may make a discriminatory comment or remark at a meeting in front of the entire workforce.<sup>154</sup> Or, a regional manager might send out an email that disparages a particular group.<sup>155</sup>

Because the “players” in employment discrimination cases tend to be the same at a particular company, there may often be similar issues among plaintiffs when these same “players” are involved. Rather than resolving these issues multiple times, Rule 23(c)(4) would allow the court to answer questions involving common personnel once. Thus, the court could address on a class-wide basis whether a manager’s email was discriminatory, whether the president’s comments were disparaging, or whether a particular supervisor held a negative animus towards women.

In addition, it is also common for there to be more technical questions in employment cases, including whether the statutory minimum for employees has been satisfied, or whether the workforce is large enough to permit the maximum award of compensatory and punitive damages.<sup>156</sup> Or, there might be a question as to whether a particular individual at the company satisfies the statutory definition of being a “supervisor,” which could have important ramifications in particular workplace cases.<sup>157</sup> Similarly, it is not uncommon for a court to address the question of whether or not workers are employees or independent contractors under a particular statute.<sup>158</sup> A court could resolve these questions, which all involve issues pertaining to common personnel, a single time pursuant to issue class certification. A single jury could thus determine the size of a particular workforce, whether certain workers are truly employees, and which workers constitute management personnel. Although the individual issues could vary significantly in each case, courts can address these common questions to help streamline the broader litigation.

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<sup>153</sup> See, e.g., Deborah P. Kelly, *Evidence Issues and Jury Instructions in Harassment Cases*, in EVIDENCE ISSUES AND JURY INSTRUCTIONS IN EMPLOYMENT CASES 109, 111–15 (Am. L. Inst.-Am. Bar. Ass’n. ed., 2007) (discussing cases involving improper remarks by supervisors).

<sup>154</sup> See, e.g., *id.* at 112–14 (discussing cases involving discrimination by company presidents).

<sup>155</sup> See generally Meir S. Hornung, Note, *Think Before You Type: A Look at Email Privacy in the Workplace*, 11 FORDHAM J. CORP. & FIN. L. 115 (2005) (addressing the potential liability of employers for discriminatory emails).

<sup>156</sup> See Senn, *supra* note 24, at 193–97 (discussing damages provisions of federal employment discrimination statutes); Jacqueline Louise Williams, Note, *The Flimsy Yardstick: How Many Employees Does It Take to Defeat a Title VII Discrimination Claim?*, 18 CARDOZO L. REV. 221, 232–36 (1996) (addressing issues in coverage under Title VII).

<sup>157</sup> See *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2443–52 (2013) (addressing the standard for supervisory liability).

<sup>158</sup> See *Clackamas Gastroenterology Assocs., v. Wells*, 538 U.S. 440, 444–51 (2003) (discussing who is an “employee” under the terms of the Americans with Disabilities Act and Title VII).

### 3. Common Practices

Beyond similar policies and personnel, workplaces often involve common practices.<sup>159</sup> These practices tend to be more informal in nature, and are often more of an issue of corporate culture than written policy.<sup>160</sup> For example, it may simply be the particular practice at a business to consider a worker for partnership after eight years of practice. Or, it may be unspoken precedent that an employee who is late to work more than five times is automatically terminated. Or, it may be the practice of workers not to use their accrued vacation time or sick leave because it is frowned upon at the company.

These types of practices may have a discriminatory effect on certain groups.<sup>161</sup> The above vacation time example could negatively impact women more than men, if it could be established that this group has a greater need to use time off for family responsibilities.<sup>162</sup> Regardless of the alleged discriminatory practice, however, Rule 23(c)(4) offers a potential benefit in this area. The question of whether a particular practice even exists at a company—and if that practice does exist, whether it has a discriminatory impact—could be resolved class-wide without the need for individual litigation.

### 4. Individual Variances

Employment discrimination claims offer numerous similarities and often share common personnel, policies and practices.<sup>163</sup> Nonetheless, each workplace claim also tends to be unique, as individual employees differ in many respects.

The most notable difference among discrimination claims is the damages that individual workers can claim.<sup>164</sup> Even where workplace claims arise from the same set of facts, the relief available to plaintiffs will vary tremendously

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<sup>159</sup> See Fineman, *supra* note 21, at 353.

<sup>160</sup> See *id.* (“Notwithstanding the legalities, employers established their own, often informal, rules and practices in the absence of comprehensive state regulation. For example, beginning in the late 19th century many American employers began instituting hierarchical job ladders, specific job classification systems, seniority systems, and employee retention policies . . . .”); cf. Hishon v. King & Spalding, 467 U.S. 69, 74 (1984) (“In the context of Title VII, the contract of employment may be written or oral, formal or informal . . . .”).

<sup>161</sup> See Nancy E. Dowd, *Maternity Leave: Taking Sex Differences into Account*, 54 FORDHAM L. REV. 699, 738 (1986).

<sup>162</sup> See *id.* (“[T]he courts have indicated that the absence of an adequate leave policy could violate Title VII because of its disproportionate impact on women. While women would be affected by the absence of a general disability leave policy to the same extent as men, women would still bear the additional burden of pregnancy disability.”).

<sup>163</sup> See *supra* notes 137–162 and accompanying text.

<sup>164</sup> See Senn, *supra* note 24, at 193–97 (discussing the different types of damages available to plaintiffs under federal discrimination laws).

across workers.<sup>165</sup> This is true for two reasons. First, the financial ramifications that each employee suffers as a result of the discrimination can be different. This is because employees often have different rates of pay and different career paths.<sup>166</sup> The specific amount of damages each employee experiences will therefore have to be determined on a case-by-case basis.<sup>167</sup>

Second, compensatory damages also vary substantially across a workforce.<sup>168</sup> In employment discrimination cases, compensatory damages are typically comprised of emotional harm and psychological suffering that results from an employer's discrimination.<sup>169</sup> These types of damages are, by their very nature, individualized.<sup>170</sup> The fact-finder will thus have to make a case-specific determination as to the amount of harm each individual suffered by evaluating that particular employee's claim.<sup>171</sup>

Beyond the differences in financial and psychological harm, other variances in employment discrimination cases exist. For example, in a disability discrimination case, plaintiffs may allege that the employer has a policy of failing to reasonably accommodate individual workers.<sup>172</sup> Such a policy could violate federal law across a class of employees.<sup>173</sup> Yet, the fact finder would need to make an individual determination as to what accommodation would be appropriate for each specific worker.<sup>174</sup> Thus, although financial and psycho-

<sup>165</sup> See Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 B.Y.U.L. REV. 305, 305–06 (“The individualized issues of proof and liability raised by the availability of damages may destroy the commonality necessary to maintain a class action under Rule 23(b)(3) and may render other means of adjudication superior to a class action within the meaning of the Rule.”).

<sup>166</sup> See Deborah Thompson Eisenberg, *Wal-Mart Stores v. Dukes: Lessons for the Legal Quest for Equal Pay*, 46 NEW ENG. L. REV. 229, 270 (2012) (“Under Title VII, prevailing plaintiffs may recover the amount of the pay disparity plus compensatory and punitive damages . . .”).

<sup>167</sup> See Patrick O. Gudridge, *Title VII Arbitration*, 16 BERKELEY J. EMP. & LAB. L. 209, 238–39 (1995) (discussing the case-specific nature of damages in employment discrimination litigation).

<sup>168</sup> See *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 416–17 (5th Cir. 1998).

<sup>169</sup> See Anna Ku, Note, “*You’re Fired!*” *Determining Whether a Wrongly Terminated Employee Who Has Been Reinstated with Back Pay Has an Actionable Title VII Retaliation Claim*, 64 WASH. & LEE L. REV. 1663, 1692 (2007) (“The Civil Rights Act also specifically mentions types of damages for emotional harm (emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life) as forms of compensatory damage.”).

<sup>170</sup> See *Allison*, 151 F.3d at 416–17 (discussing the individualized nature of compensatory damages in Title VII litigation).

<sup>171</sup> See *id.*

<sup>172</sup> See generally Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861 (2006) (discussing the use of the class action mechanism under the Americans with Disabilities Act).

<sup>173</sup> See *id.* at 864 (explaining that stereotypes about a class of individuals sometimes lead to discrimination against the entire class).

<sup>174</sup> See *id.* at 883 (“Courts have denied certification to five classes containing individuals with a range of disabilities, and their respective denials were predicated on the notion that the remedies granted, if any, were based on individualized inquiry into disability and the accommodation needed, and thus lacked typicality.”).

logical harm are the two most common variances in employment cases, other differences exist based upon the facts of an individual's case.

As demonstrated, employment discrimination cases often have much in common. Systemic discrimination claims frequently involve common policies, practices, and personnel, though other similarities are often also present. At the same time, workplace claims are almost universally different because the damages available to individual workers vary greatly. These damages depend heavily on each worker's particular position and the amount of pain and suffering each employee experiences.<sup>175</sup>

Workplace claims are therefore particularly appropriate for certification under Rule 23(c)(4). Given that these claims will inherently vary across a class, they will not be suitable for traditional class treatment under Rule 23(b), as *Wal-Mart* demonstrates. And, as these systemic cases will often arise from the same set of facts and involve the same policies, practices, and personnel, there will often be overlapping issues that could be peeled off and certified as an issue class. Courts can therefore streamline litigation by resolving these common issues on a class basis under Rule 23(c)(4).

## 5. The Sexual Harassment Example

Issue class certification's value in employment cases is best seen through an example: sexual harassment. Hostile work environment cases are one of the most frequently filed claims under Title VII.<sup>176</sup> These claims allege that hostility on the basis of sex permeates the working environment.<sup>177</sup> Common evidence in these cases often involves workers' sexual jokes, touching, and comments, as well as the employer's policies and practices.<sup>178</sup> Critical inquiries in

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<sup>175</sup> See Eisenberg, *supra* note 166, at 270–72 (addressing the recovery of damages under Title VII).

<sup>176</sup> See Elvia R. Arriola, "What's the Big Deal?" *Women in the New York City Construction Industry and Sexual Harassment Law, 1970–1985*, 22 COLUM. HUM. RTS. L. REV. 21, 39 (1990) (noting that in the 1970s, "[t]he commonality of the experience proved that sexual harassment was pandemic and a function of gender"); *Sexual Harassment Charges EEOC & FEPAs Combined: FY 1997–FY 2011*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, [http://www.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment.cfm](http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm), archived at <http://perma.cc/U8LP-7X4F> (last visited Nov. 5, 2014) (providing statistical data and sexual harassment charge filings).

<sup>177</sup> See Laura E. Diss, Note, *Whether You "Like" It or Not: The Inclusion of Social Media Evidence in Sexual Harassment Cases and How Courts Can Effectively Control It*, 54 B.C. L. REV. 1841, 1848–49 (2013) ("[T]he success of a hostile work environment claim turns on the plaintiff proving that unwelcome sexual conduct is so severe or pervasive that it unreasonably interferes with her work performance or creates an intimidating, hostile, or offensive working environment."); *Sexual Harassment*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, [http://www.eeoc.gov/laws/types/sexual\\_harassment.cfm](http://www.eeoc.gov/laws/types/sexual_harassment.cfm), archived at <http://perma.cc/Q6CA-JHSS> (last visited Nov. 14, 2014) ("Harassment can include 'sexual harassment' or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.").

<sup>178</sup> See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) ("[W]e can say that whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threat-



these cases include whether the company knew or should have known about the harassment, and whether it took any remedial action.<sup>179</sup> Similarly, whether the company had implemented and maintained an effective anti-harassment policy will often go directly to the issue of liability in the case.<sup>180</sup>

Hostile work environments tend to impact several workers because the hostility will cut across an entire workforce. Thus, many workers are often affected when employers permit hostility, resulting in class action claims.<sup>181</sup> Sexual harassment will often not be appropriate for traditional class certification under Rule 23(b), however, because individuals suffer different kinds and degrees of harm.<sup>182</sup> The harassment will certainly vary with regard to intensity for each individual plaintiff.<sup>183</sup> Further, workers will perceive the harassment differently.<sup>184</sup> Finally, specific acts of harassment may be targeted directly at individual workers. This type of discrimination is inherently individual in nature.

Nonetheless, classes asserting systemic hostile work environment claims bear numerous similarities. Often, the same harassers will be involved in the conduct, and courts may need to resolve the question of whether certain comments, jokes, or emails were sent to the workforce class-wide.<sup>185</sup> Also, the question of what management knew and how it responded to the harassment

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ening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."'). *See generally* Jenson v. Eveleth Taconite Co., 139 F.R.D. 657 (D. Minn. 1991) (certifying a class action in a hostile work environment case).

<sup>179</sup> *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754–65 (1998) (setting forth the test for employer liability for sexual harassment); *Faragher v. City of Boca Raton*, 524 U.S. 775, 793–810 (1998) (same).

<sup>180</sup> *See Ellerth*, 524 U.S. at 807 ("While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.").

<sup>181</sup> *See* Jason R. Bent, *Systemic Harassment*, 77 TENN. L. REV. 151, 154 (2009) ("Although the viability of systemic harassment claims remains a largely unaddressed question, federal district courts have generally agreed that systemic harassment claims are at least cognizable."); Timothy G. Healy, Comment, *Sexual Pattern: Why a Pattern or Practice Theory of Liability Is Not an Appropriate Framework for Claims of Sexual Harassment*, 10 ROGER WILLIAMS U. L. REV. 537, 578 (2005) ("Despite the inherently individualized nature of sexual harassment claims, some federal trial courts have held that a pattern or practice theory is an appropriate framework for pursuing claims of sexual harassment.").

<sup>182</sup> *See* Bent, *supra* note 181, at 168 (noting that employers often argue against class certification in harassment cases because "hostile work environment claims necessarily require individualized analysis of each plaintiff's subjective perception of his or her work environment").

<sup>183</sup> *See id.* at 178–79 (explaining that some employees experience a single "discrete" act of discrimination, while other workers encounter repeated conduct).

<sup>184</sup> *See id.* at 168.

<sup>185</sup> *See id.* at 160 ("Private plaintiffs and the EEOC have articulated the systemic harassment theory . . . [through] the same basic idea: the defendant employer allowed sexual harassment to exist and persist in its workplace to such a degree that it constituted a 'pattern or practice' of harassment that affected a class of employees . . . and failed to take remedial action, even after becoming aware of the offensive behavior.").

will be critical to the entire litigation, because company practices for addressing discrimination will go directly to the question of liability.<sup>186</sup> Similarly, investigations into the harassment claims may impact numerous cases, and the notes and records that develop from those investigations could have a class-wide impact. Finally, and perhaps most importantly, the validity and effectiveness of the company's anti-harassment policy will impact all workers bringing a sexual harassment claim against a common employer.<sup>187</sup> These common questions in a sexual harassment case—which involve overlapping personnel, practices, and policies—can be separated out from the individual litigation and resolved on a class basis through the use of Rule 23(c)(4). Then, the remaining questions in the case can still be addressed through individual litigation.<sup>188</sup>

For example, in a case involving allegations of company-wide workplace hostility, it may be important to know: (1) whether the company distributed a sexual harassment policy to all employees; (2) whether the company properly trained the individuals identified in the policy to address complaints of harassment; and (3) whether upper management properly followed the harassment policy.<sup>189</sup> These questions go directly to the employer's defenses and liability.<sup>190</sup> Because these issues will impact employer liability each time an employee alleges harassment, they could be resolved a single time pursuant to issue class certification. A jury could thus examine each of these issues and render a finding that would bind the entire class. Then, the remaining issues would be litigated like any other case of discrimination.<sup>191</sup>

This use of issue class certification makes Rule 23(c)(4) extremely appealing. The issue class allows courts to address complex factual questions only once, saving enormous judicial resources. And, it still permits the individual litigation to proceed as it would otherwise. Litigating the remaining issues separately is important given that each plaintiff will have undergone dif-

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<sup>186</sup> See *Ellerth*, 524 U.S. at 754–65 (providing the test for liability in sexual harassment cases); *Faragher*, 524 U.S. at 793–810 (same); Ann Carey Juliano, *Harassing Women with Power: The Case for Including Contra-Power Harassment Within Title VII*, 87 B.U. L. REV. 491, 496 (2007) (“Employer liability for harassment by its employees turns on the organizational status of the harasser and the employer’s response to the harassment.”).

<sup>187</sup> See Juliano, *supra* note 186, at 553 (describing a federal district court case in which an employer had written and unwritten anti-harassment policies).

<sup>188</sup> See FED. R. CIV. P. 23(c)(4).

<sup>189</sup> See *EEOC v. Harbert–Yeargin, Inc.*, 266 F.3d 498, 510 (6th Cir. 2001) (“Although [the defendant] points out that it had an anti-sexual-harassment policy in place to address [the plaintiff’s] problems, a reasonable jury could have concluded from the evidence that this policy was not enforced in practice. Several employees testified that they were unaware that the policy even existed.”); *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 812 (7th Cir. 1999) (holding that the defendant exercised reasonable care where the evidence showed in part that the defendant “distribute[d] its sexual harassment policy to every one of its employees . . . [and] regularly trained its managers regarding its policy”).

<sup>190</sup> See *Ellerth*, 524 U.S. at 754–65 (setting forth the test for, and the affirmative defense to, employer liability for sexual harassment); *Faragher*, 524 U.S. at 793–810 (same).

<sup>191</sup> See FED. R. CIV. P. 23(c)(4).

ferent experiences, and will have suffered varying degrees of harassment.<sup>192</sup> Doing so will also lead to different findings on liability and diverse damages with respect to individual plaintiffs.<sup>193</sup> The typical systemic harassment claim, then, will not be appropriate for traditional Rule 23(b) class treatment. It will, however, often be extremely appropriate for issue class certification under Rule 23(c)(4) on specific issues.

Sexual harassment thus provides an excellent example—in one of the most commonly brought employment discrimination claims—of how Rule 23(c)(4) can help manage a systemic discrimination case. More broadly, class-wide employment claims are particularly appropriate for issue certification. It is therefore clear that Rule 23(c)(4) can help streamline litigation and bring efficiency to systemic discrimination claims. Given the uncertainty of class-based litigation after *Wal-Mart*, the issue class is likely the best tool for the courts and litigants to address common issues arising in the workplace.

### C. McReynolds: *Judge Posner's View of the Issue Class*

As outlined above, the issue class has enormous promise following *Wal-Mart*. But the possibilities for plaintiffs are more than theoretical. In fact, Judge Posner recently invoked Rule 23(c)(4) in systemic litigation brought against one of the nation's largest financial services firms.

In 2012, in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, the U.S. Court of Appeals for the Seventh Circuit held that issues raised by plaintiffs in an employment case can be certified under Rule 23(c)(4) and decided on a class-wide basis.<sup>194</sup> The *McReynolds* court considered a race discrimination case brought on behalf of seven hundred black brokers.<sup>195</sup> The plaintiffs alleged that Merrill Lynch had discriminated against them under Title VII of the Civil Rights Act of 1964 by enacting certain company policies.<sup>196</sup> The plaintiffs moved for issue class certification under Rule 23(c)(4), asking that the court decide the “common issue” of “whether the defendant has engaged and is engaging in practices that have a disparate impact . . . on the members of the class, in violation of federal antidiscrimination law.”<sup>197</sup> The U.S. District Court for the Northern District of Illinois denied certification, and the Seventh Circuit granted an interlocutory appeal on the issue.<sup>198</sup>

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<sup>192</sup> See *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1274 (11th Cir. 1999) (“Employees of either gender may experience discrimination or harassment in a variety of different forms . . .”).

<sup>193</sup> See 42 U.S.C. § 1981a (2012) (damages provision of Title VII of the Civil Rights Act of 1964).

<sup>194</sup> 672 F.3d 482, 492 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 338.

<sup>195</sup> *Id.* at 488.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 483.

<sup>198</sup> *Id.* at 484.

Specifically, the *McReynolds* plaintiffs alleged that the company had adopted two policies that discriminated against black brokers.<sup>199</sup> First, the company had adopted a “teaming” policy whereby brokers were permitted—but not required—to organize teams in particular offices.<sup>200</sup> Although many brokers chose to work independently, those members on corporate teams “share[d] clients” and attempted to “gain access to additional clients.”<sup>201</sup> The brokers—rather than an office supervisor or director—formed the teams themselves.<sup>202</sup> Although brokers could be successful working alone, joining a team was seen as a way of doing well at the company.<sup>203</sup>

Second, the plaintiffs challenged Merrill Lynch’s “account distribution” policy.<sup>204</sup> Under that policy, when a broker departed from the company, that broker’s accounts were redistributed to other employees.<sup>205</sup> Certain criteria, which measured the competing brokers’ prior success, helped determine who received the accounts.<sup>206</sup>

Those two policies ultimately worked together to impact how brokers were evaluated.<sup>207</sup> Moreover, a broker’s evaluation played a part in pay and promotion at the company.<sup>208</sup> The plaintiffs maintained that both policies were applied in a way that discriminated against black workers and impacted their pay.<sup>209</sup> Specifically, the plaintiffs alleged that white brokers “are more comfortable” working and teaming with other white brokers.<sup>210</sup> Although race did not always motivate how brokers were chosen to join a team, “emotions and preconceptions,” rather than “objective criteria,” played a major role.<sup>211</sup> Thus, although management may not have had any racial motivation in adopting this policy, the policy nonetheless resulted in an adverse disparate impact against black employees when they were excluded from the more profitable teams.<sup>212</sup>

Similarly, the plaintiffs also alleged that the account distribution policy had a disparate impact against black workers.<sup>213</sup> Because white brokers were disproportionately members of more successful teams, their revenues tended to

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<sup>199</sup> *Id.* at 488.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *See id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 488–89.

<sup>206</sup> *See id.* at 489.

<sup>207</sup> *See id.* at 488–89.

<sup>208</sup> *Id.* at 489.

<sup>209</sup> *See id.*

<sup>210</sup> *Id.*

<sup>211</sup> *See id.*

<sup>212</sup> *See id.*

<sup>213</sup> *Id.* at 489–90.

be higher than those of black brokers.<sup>214</sup> Thus, when accounts were redistributed at the company, white workers received those accounts at a disproportionately high rate.<sup>215</sup> The two policies thus worked together to create a “vicious cycle” where the “spiral effect” was “disadvantageous to black brokers.”<sup>216</sup> African-American brokers thus earned less than their white counterparts at the company.<sup>217</sup>

Judge Posner, writing for the panel, determined that the question of whether these two policies violated Title VII should be answered as part of an issue class under Rule 23(c)(4).<sup>218</sup> For the first time, the court analyzed the question specifically in the context of the *Wal-Mart* decision. It noted that it may seem “perverse” to consider certifying the class in light of the Supreme Court’s apprehension of systemic litigation, but noted that the Court’s decision provided substantial guidance on the class action mechanism.<sup>219</sup>

Judge Posner emphasized that although there was no evidence of discriminatory intent, such intent is unnecessary in a disparate impact case brought under Title VII.<sup>220</sup> The court further noted that the question at this stage of the proceedings is whether the disparate impact claims are “most efficiently determined on a class-wide basis rather than in 700 individual lawsuits.”<sup>221</sup> Given that the two policies may work together in causing the discrimination, and that the policies may have an “incremental causal [discriminatory] effect,” they are most appropriately decided as part of a single suit.<sup>222</sup>

In the decision, Judge Posner differentiated between an issue class claim, like the one asserted in *McReynolds*, and a broader class action case under Rule 23(b), like the one brought in *Wal-Mart*.<sup>223</sup> He explained:

Obviously a single proceeding . . . could not resolve class members’ claims. Each class member would have to prove that his compensation had been adversely affected by the corporate policies, and by how much. . . . But at least it wouldn’t be necessary in each of those trials to determine whether the challenged practices were unlawful.

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<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *See id.*

<sup>218</sup> *Id.* at 491.

<sup>219</sup> *See id.* at 487–88.

<sup>220</sup> *Id.* at 490 (“There is no indication that the corporate level of Merrill Lynch . . . wants to discriminate against black brokers. . . . But in a disparate impact case the presence or absence of discriminatory intent is irrelevant . . .”).

<sup>221</sup> *Id.*

<sup>222</sup> *See id.*

<sup>223</sup> *See id.* at 490–91.

Rule 23(c)(4) . . . . [thus brings efficiency] on a class-wide basis  
 . . . .<sup>224</sup>

The court also addressed a critical policy question that *Wal-Mart* raised: whether the enormity of the certified class could force the defendant to settle the matter.<sup>225</sup> Unlike the broad *Wal-Mart*-type class action brought under Rule 23(b), however, issue class certification does not raise the stakes to the level of requiring a defendant to gamble “one’s company on a single jury verdict.”<sup>226</sup> Rather, the financial services firm in *McReynolds* “is in no danger of being destroyed” if it receives an adverse verdict, particularly where only seven hundred plaintiffs are involved.<sup>227</sup>

In overturning the district court and permitting the issue class, the Seventh Circuit noted that it had “trouble seeing the downside of the limited class action treatment.”<sup>228</sup> The court thus certified the class under Rule 23(c)(4) and allowed the specific issues the plaintiffs raised to be decided on a class-wide basis.<sup>229</sup> The court further advised that if it decided the class-wide issues in favor of the plaintiffs, hundreds of individual suits for monetary damages might follow.<sup>230</sup> But such suits would be streamlined, as the court would not have to revisit whether the company violated Title VII in each individual case.<sup>231</sup>

In the end, it was clear that Judge Posner saw the value and role of the issue class under Rule 23(c)(4). Although he clearly understood and considered the Supreme Court’s reasoning in rejecting a Rule 23(b) class in *Wal-Mart*, Judge Posner saw no “downside” to the more “limited class action” brought in *McReynolds*.<sup>232</sup> Certifying narrow issues in the case would not threaten the existence of the company or cause it to settle, and would help to streamline future litigation in the individual cases.<sup>233</sup> Indeed, it is worth noting that were the defendant to win on the class-wide questions that were certified, the case itself would be over, which would prevent the unnecessary litigation of hundreds of federal suits.

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<sup>224</sup> *Id.*

<sup>225</sup> *See id.* at 484, 490–91; *see also Wal-Mart*, 131 S. Ct. at 2561 (finding that the plaintiffs’ claims for backpay could not be certified under Rule 23(b)(2) because, in part, “Wal-Mart will not be entitled to litigate its statutory defenses to individual claims”).

<sup>226</sup> *See McReynolds*, 672 F.3d at 491.

<sup>227</sup> *See id.*

<sup>228</sup> *Id.* at 492.

<sup>229</sup> *Id.* The court further allowed the plaintiffs to seek injunctive relief on the two policies pursuant to Rule 23(b)(2). *See id.* at 483, 491–92.

<sup>230</sup> *Id.* at 492.

<sup>231</sup> *See id.*

<sup>232</sup> *See id.*

<sup>233</sup> *Id.* at 491–92.

The *McReynolds* case, then, provides a superb example of how systemic litigation can still thrive after *Wal-Mart*, particularly in the employment discrimination context. As already addressed, where an employer permits employment discrimination to occur in a single instance, it is more likely to be widespread across the company. Common management and policies at a business thus provide common facts that may overlap between cases. Although the specifics of any individual case may vary among plaintiffs, there will be instances where courts can decide common polices and issues uniformly. As Judge Posner notes, where it is possible to resolve these common issues on a class-wide basis, there is a substantial opportunity to streamline the entire process and bring judicial efficiency to the case.<sup>234</sup> Rule 23(c)(4) provides the procedural mechanism to do so. Even after *Wal-Mart*, then, the procedural rules allow for plaintiffs to pursue—and prevail—in having specific issues decided on a class-wide basis.

#### D. Wal-Mart Revisited

With a more thorough understanding of the issue class and how it has been applied, it is worth revisiting the *Wal-Mart* case under Rule 23(c)(4). As already discussed, *Wal-Mart* was brought as a broad class action on behalf of one and a half million plaintiffs seeking to certify their case as a single uniform proceeding under Rule 23(b).<sup>235</sup> The Supreme Court ultimately rejected this certification, finding that there was no commonality among the claims.<sup>236</sup> There was simply too much variance across the stores and plaintiffs in the case to warrant class treatment.<sup>237</sup>

There has been substantial debate as to whether this case was properly decided.<sup>238</sup> Putting this debate aside, however, it is fair to ask what the case would have looked like if it had been brought as a more limited class action under Rule 23(c)(4). As *McReynolds* demonstrates, the issue class has far-reaching potential for employment discrimination claims.<sup>239</sup> The facts of *Wal-Mart* provide an excellent example of how the issue class could help reinvigorate systemic workplace claims. It is useful to reexamine these facts from the perspective of Rule 23(c)(4) to better understand how that Rule can be used in practice.

One alternative way that the *Wal-Mart* plaintiffs could have proceeded, then, would have been to pursue a more limited class certification on specific

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<sup>234</sup> See *id.*

<sup>235</sup> See 131 S. Ct. at 2547.

<sup>236</sup> *Id.* at 2556–57.

<sup>237</sup> See *id.*

<sup>238</sup> See *supra* notes 69–72 and accompanying text (discussing the academic response to the *Wal-Mart* decision).

<sup>239</sup> See generally 672 F.3d 482 (reasoning that the issue class under Rule 23(c)(4) can streamline litigation without forcing defendants to settle).

issues raised in the case. Although there are a myriad of strategic ways to formulate specific issues across the stores, there are two particular possibilities that jump quickly to mind.<sup>240</sup> First, the plaintiffs could have sought to certify *only the question* of whether the discretion given to management in determining pay and promotion issues discriminated against female employees.<sup>241</sup> Second, the plaintiffs could further have sought to certify this issue only as to *specific stores in specific regions* of the country. If the issue was resolved in favor of the plaintiffs on these claims, the individual cases could have proceeded against the company to determine the appropriate level of damages.<sup>242</sup> The question of the validity of the pay and promotion policy, however, would not have needed to be reexamined.

Thus, the issue in the case would have been narrower in two senses. First, certification would have only been sought on the single issue of the store policy. Second, certification would have only applied to a narrow geographic region. Based on the Supreme Court's reasoning, the plaintiffs would have been far more likely to prevail on this type of limited certification. Specifically, the Court repeatedly emphasized that the proposed class was simply too big and too diverse to permit certification.<sup>243</sup> As the Court explained, "Other than the bare existence of delegated discretion, respondents have identified no 'specific employment practice'—much less one that ties all their 1.5 million claims together."<sup>244</sup> The claims thus varied too much across too many stores around the country to warrant class treatment.<sup>245</sup> Underscoring the diversity and size of the class, the Court noted:

Some managers will claim that the availability of women, or qualified women, or interested women, in their stores' area does not mirror the *national or regional* statistics. And almost all of them will claim to have been applying some sex-neutral, performance-based criteria—whose nature and effects will *differ from store to store*.<sup>246</sup>

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<sup>240</sup> It is important to note that this Article does not address *all* of the possible ways that an issue class could have been certified in *Wal-Mart*. Indeed, there are numerous issues that could have been certified in the case. Rather, this Article provides, by way of example, one specific and valuable way of certifying an important issue in the case under Rule 23(c)(4).

<sup>241</sup> *See Wal-Mart*, 131 S. Ct. at 2547 ("Pay and promotion decisions at Wal-Mart are generally committed to local managers' broad discretion . . .").

<sup>242</sup> Conversely, if the issue was resolved in favor of the defendant, it would end the inquiry and the company would prevail.

<sup>243</sup> *See id.* at 2555–56.

<sup>244</sup> *Id.* The Court further emphasized the size of the class, noting that "[w]e are presented with one of the most expansive class actions ever." *Id.* at 2547. And, the Court noted that "[i]n a company of Wal-Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction." *Id.* at 2555.

<sup>245</sup> *Id.* at 2555–56.

<sup>246</sup> *Id.* at 2555 (emphasis added).



That problem would cease to exist under the issue class proposed here. By choosing to proceed against particular stores or stores in particular regions, there would likely be many more common elements to the individual claims. For individual stores, there would be a common set of managers, employees, and policies. For regional claims, multiple stores may share common employees or supervisors, and managerial staff may discuss and share pay and promotion policies. The issue addressed would thus be singular: whether the pay and promotion policy at the store (or in the region) adversely impacted female workers.

By litigating the case through this more limited class mechanism, the Court's objections to the class treatment in *Wal-Mart* would fall by the wayside. The Court's primary concern—the lack of commonality in the case—would not be a problem where a single issue was sought to be resolved in an individual store or in a geographically narrow grouping of stores.<sup>247</sup> Rather, the targeted geographical scope of the class would help bring “some glue” to hold the “employment decisions” in the case together.<sup>248</sup>

Similarly, the pure size of the class sought in *Wal-Mart* would have threatened the business itself.<sup>249</sup> By pursuing a more limited issue class in the case, this threat would no longer exist. Like the defendant in *McReynolds*, then, Wal-Mart would be “in no danger of being destroyed” if it received an adverse verdict on the issue certified, particularly where the classes are more limited in nature.<sup>250</sup> A narrower issue decided with fewer plaintiffs substantially limits the risk for the company.

At the same time, there would be a number of benefits to pursuing the issue class. Most importantly, the certification of the issue would help streamline the proceedings. It would allow the most important issue in the case—the legality of Wal-Mart's pay and promotion policies—to be resolved on a broader basis across regional stores. As the case stands now, the courts may be flooded with one and a half million claims from the individual plaintiffs that would need to be resolved.<sup>251</sup> The issue class would help consolidate this litigation, and would allow the issue to be resolved in a uniform way. Additionally, there would still be an incentive for the defendant to settle the case where the issue class has been certified.<sup>252</sup> A defendant may not want to risk an adverse ruling

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<sup>247</sup> See *id.* (expressing doubt that the plaintiff could demonstrate a “uniform, store-by-store [pay] disparity” on a national scale).

<sup>248</sup> See *id.* at 2552.

<sup>249</sup> See *id.* at 2547–57 (repeatedly emphasizing the enormous size of the purported class).

<sup>250</sup> See 672 F.3d at 491.

<sup>251</sup> See *Wal-Mart*, 131 S. Ct. at 2561 (denying the certification of the class but allowing individual claims to proceed against the company).

<sup>252</sup> Cf. Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2064 (1995) (“[V]irtually all class actions not dismissed on motion are settled.”).

in those courts, and the issue class would thus encourage settlement. Nevertheless, the risk of losing the case would not be as daunting to the company, and any settlement would likely be more reasonable in nature.<sup>253</sup>

It is thus interesting to consider what *Wal-Mart* would have looked like had the plaintiffs pursued an issue class under Rule 23(c)(4) rather than a broader class under Rule 23(b). More limited class treatment of the case would still have created substantial judicial economies for the courts and litigants, and would still have encouraged settlement in the case. At the same time, however, the issue class would not present make-or-break litigation for the company.<sup>254</sup> Considering *Wal-Mart* in this light reveals an important lesson for future employment discrimination litigants pursuing systemic claims: where a class may be too large or varied to warrant broad class treatment, the plaintiffs should strongly consider a narrowed approach under Rule 23(c)(4).

Ultimately, it is impossible to know how the Supreme Court would have reacted to an “issue class” brought against *Wal-Mart*, and whether the Court would have upheld that type of certification. Further, there are numerous other ways that an issue class could have been pursued than the one set forth here. Nonetheless, the objections the Court and litigants in *Wal-Mart* raised are less likely to exist with the more limited issue class, and it is far more likely that the Court would have approved the litigation. This is particularly true because the case itself was decided by a narrow 5-4 margin.<sup>255</sup> Certainly, the lower courts, like the Seventh Circuit in *McReynolds*, could see Rule 23(c)(4) as a way of helping consolidate massive litigation while still heeding the Supreme Court’s warnings in *Wal-Mart*.

### III. IMPLICATIONS OF THE ISSUE CLASS

In 2011, in *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court held that a class of one and a half million plaintiffs could not be certified under Federal Rule of Civil Procedure 23(b).<sup>256</sup> As already noted in this Article, there is no complete substitute for the traditional Rule 23(b) class action.<sup>257</sup> Nonetheless, in assessing the legal landscape post *Wal-Mart*, issue class certification is the best remaining tool available for workers to pursue systemic employment discrimination claims. The issue class presents a number of advantages for the courts and litigants, but there are also some noteworthy drawbacks. This Part first addresses the benefits of using the issue class in employment discrimina-

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<sup>253</sup> See *McReynolds*, 672 F.3d at 491–92 (discussing how issue class certification presents less risk to defendants).

<sup>254</sup> See *id.*

<sup>255</sup> See *Wal-Mart*, 131 S. Ct. at 2546.

<sup>256</sup> 131 S. Ct. 2541, 2556–57 (2011).

<sup>257</sup> See *supra* notes 85–96 and accompanying text.

tion cases.<sup>258</sup> Next, it addresses the drawbacks of the Rule.<sup>259</sup> Finally, it situates the discussion within the context of the broader academic scholarship.<sup>260</sup>

Perhaps the issue class's most substantial benefit is the flexibility it brings to the judiciary.<sup>261</sup> Rule 23(c)(4) provides the courts substantial freedom in managing a class case.<sup>262</sup> Specifically, the trial judge can examine the case and decide how best to separate out those issues that are ripe for collective determination. And, because an issue class can be certified at any point in the case, it provides enormous latitude for the court to determine how a systemic case should proceed.

By permitting this type of flexibility, Rule 23(c)(4) streamlines litigation.<sup>263</sup> It separates common issues in a case for collective determination, while allowing the remainder of each case to proceed individually.<sup>264</sup> This process makes the proceedings more efficient and efficacious.<sup>265</sup> Specifically, it avoids duplicate litigation because common issues are resolved in a single action. The process therefore saves judicial and litigant resources, and streamlines systemic litigation.

Employment discrimination cases are particularly appropriate for Rule 23(c)(4) certification.<sup>266</sup> As discussed, these claims' inherent commonality—including common policies, personnel, and procedures—is well-suited for issue class certification. The issue class should thus strongly be considered in any systemic employment discrimination case, as use of Rule 23(c)(4) can streamline the proceedings, and allow the case to proceed in a more efficient and effective manner. Similarly, as there are many individualized inquiries that must be addressed in employment cases, use of the traditional Rule 23(b) mechanism is often inappropriate for these cases, as *Wal-Mart* clearly shows.<sup>267</sup> As courts become more focused on the commonality requirement following *Wal-Mart*, then, Rule 23(c)(4) will become a much more important tool for pursuing class-wide workplace claims.

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<sup>258</sup> See *infra* notes 261–267 and accompanying text.

<sup>259</sup> See *infra* notes 268–275 and accompanying text.

<sup>260</sup> See *infra* notes 277–286 and accompanying text.

<sup>261</sup> See *supra* notes 127–130 and accompanying text (discussing the flexibility of Rule 23(c)(4)).

<sup>262</sup> See 7AA WRIGHT ET AL., *supra* note 11, § 1790 (noting the “additional flexibility” the issue class provides to courts).

<sup>263</sup> *Id.*

<sup>264</sup> See FED. R. CIV. P. 23(c)(4).

<sup>265</sup> See *supra* notes 123–126 and accompanying text (discussing the efficiencies of issue class certification).

<sup>266</sup> See *supra* notes 131–193 and accompanying text (addressing the particular benefits of issue class certification for employment discrimination claims).

<sup>267</sup> See *supra* notes 235–255 and accompanying text (addressing how the *Wal-Mart* litigation could have proceeded as an issue class).

Despite the great promise of the issue class, however, there are also many drawbacks relevant to traditional class certification under Rule 23(b).<sup>268</sup> Most notably, the issue class is not as efficient as Rule 23(b) certification of an *entire* class. Because Rule 23(c)(4) only allows certification of a *portion* of the case, it is simply less efficient, as a number of issues in each case will still have to be resolved on an individual basis.<sup>269</sup> Issue class certification can thus be more cumbersome compared to the traditional class action.

Additionally, from the plaintiff's perspective, issue class claims yield smaller settlements than traditional class claims.<sup>270</sup> This is because a class certified under Rule 23(c)(4) will typically not concern employers as much as traditional class actions brought under Rule 23(b), as the adverse resolution of a particular issue may still permit the employer to avoid liability and/or substantial damages in the case. As Judge Posner acknowledged, certifying narrow issues in a case will likely not threaten a company's existence.<sup>271</sup> Employers may therefore not be as eager to settle a case certified under Rule 23(c)(4).

Similarly, many individual employment discrimination cases arising out of the same facts may have only marginal value.<sup>272</sup> Although some issues can be certified on a class basis in these cases, the damages portion of each case will likely proceed in an individualized manner. Thus, many plaintiffs with smaller dollar claims may be reluctant to pursue systemic litigation that does not arise out of Rule 23(b) litigation, as there may be little financial incentive to do so.<sup>273</sup> This will allow some employers to avoid feeling the full impact of their discrimination under the civil rights laws, as not all plaintiffs will join in the litigation even where a particular issue has been certified. Similarly, Rule 23(b) class claims allow a more relaxed approach to the administrative filing requirements of the Federal Rules for employment discrimination claims.<sup>274</sup> Rule 23(c)(4) is likely not as permissive, and many potential plaintiffs that

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<sup>268</sup> See Romberg, *supra* note 96, at 299 (acknowledging that global class actions have some advantages over issue class certification).

<sup>269</sup> Compare FED. R. CIV. P. 23(c)(4) (permitting certification of specific issue(s) in a case), with *id.* 23(b) (permitting class-wide certification of an entire case).

<sup>270</sup> See *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 338 (noting that issue class certification imposes less pressure on defendants to settle than traditional class claims). Class action cases are often settled prior to trial. See Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 156 (2006) (“[N]early all class actions that survive dispositive motions settle.”).

<sup>271</sup> See *McReynolds*, 672 F. 3d at 491–92.

<sup>272</sup> See Moss & Ruan, *supra* note 71, at 561 (“Employment claims typically seek modest individual damages . . .”).

<sup>273</sup> See *id.* at 562 (discussing the difficulty of pursuing low-dollar cases on an individual basis in employment cases and noting that “individual litigation requires one plaintiff to shoulder all litigation costs and risks herself”).

<sup>274</sup> See Seiner, *supra* note 7, at 1363 (“[T]he administrative requirements (such as filing timely discrimination charges) will likely be more relaxed in the class setting.”).

have not satisfied the administrative requirements of the statute will fall through the cracks of the case.<sup>275</sup> Again, this will result in a smaller class size and a reduced impact on the employer for its wrongdoing.

In the end, there is simply no complete substitute for the traditional class claim. The reality of *Wal-Mart*, however, is that the traditional class action is forever changed for employment discrimination plaintiffs. These plaintiffs need solutions to the problems the Supreme Court's decision created. And the issue class is simply the best procedural tool available for permitting workplace plaintiffs to pursue systemic discrimination claims. Despite its shortcomings, then, the issue class offers enormous promise for employment discrimination plaintiffs. The issue class offers flexibility to the courts, and streamlined, efficient litigation for the parties involved. Rule 23(c)(4) should thus be strongly considered in any systemic workplace litigation, as the issue class is an effective tool for employment plaintiffs.

Finally, it should be noted that there is nothing prohibiting plaintiffs from bringing a traditional Rule 23(b) class action, and then pursuing an issue class if the traditional class is denied.<sup>276</sup> Thus, from a strategic standpoint, plaintiffs need not decide at the outset of the case between Rule 23(b) and Rule 23(c)(4). Instead, if the plaintiffs believe that they should pursue the case as a traditional class action, they should proceed on that basis. If certification is denied, the plaintiffs can still pursue the issue class at a subsequent time. Indeed, one of the great benefits of the Rule 23(c)(4) issue class is that it can be used at any time in the case to help streamline the proceedings. Plaintiffs thus need not gamble by asking the court for either a traditional class or the issue class, and can instead seek both forms of certification in the alternative.

As already discussed, much has been written on *Wal-Mart* generally.<sup>277</sup> The vast majority of this scholarship has denounced the decision as problematic for civil rights plaintiffs. Little has been written, however, on potential solutions to the Supreme Court's decision. Shortly after *Wal-Mart* was decided, several scholars began discussing possible ways to address the problems facing systemic employment discrimination plaintiffs.<sup>278</sup> One scholar suggested that plaintiffs could pursue class action claims smaller in size than the class in *Wal-Mart* to litigate these cases effectively.<sup>279</sup> Another scholar made several suggestions for plaintiffs to consider when bringing systemic discrimination claims.<sup>280</sup> This schol-

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<sup>275</sup> See FED. R. CIV. P. 23(c)(4).

<sup>276</sup> See Romberg, *supra* note 96, at 268 (noting that issue class certification is a valuable tool available to plaintiffs at multiple stages of the litigation).

<sup>277</sup> See *supra* notes 69–72 and accompanying text (outlining the views of various scholars on the *Wal-Mart* case).

<sup>278</sup> See Melissa Hart, *Civil Rights and Systemic Wrongs*, 32 BERKELEY J. EMP. & LAB. L. 455, 474–76 (2011); Malveaux, *supra* note 69, at 44.

<sup>279</sup> See Malveaux, *supra* note 69, at 44 (“Smaller classes are bound to be more successful.”).

<sup>280</sup> See Hart, *supra* note 278, at 474–76.

ar highlighted different procedural mechanisms that plaintiffs could pursue, and also raised the possibility of an enhanced role for governmental litigation and the potential for congressional intervention.<sup>281</sup>

Although these early voices briefly raised some possible solutions to the *Wal-Mart* dilemma, the legal academy has primarily focused on the problem itself rather than ways of resolving the issue. This Article continues the discussion that other scholars began, and explores how workplace plaintiffs can best proceed after the Supreme Court's decision. This Article thoroughly explains that issue class certification is the best tool available to employment discrimination plaintiffs and highlights the benefits and drawbacks of that potential tool.

To date, the academic scholarship has not identified Rule 23(c)(4) as a possible response to *Wal-Mart*. Indeed, very little had been written on issue class certification even prior to the Supreme Court's decision. Moreover, the existing scholarship is conflicting. For example, one scholar has criticized the expansive view of Rule 23(c)(4) that some courts have adopted.<sup>282</sup> This scholar argues that the Rule, "in its current form, simply cannot authorize an issue class action end-run around the predominance requirement for class actions that otherwise would fail to satisfy that requirement."<sup>283</sup> In contrast, other commentators believe that Rule 23(c)(4) should play a larger role in class action litigation, and can be more effectively used than the traditional Rule 23(b) type class.<sup>284</sup> One such commentator argues that the class action should not result in "an all-or-nothing decision to aggregate individual cases."<sup>285</sup> Instead, issue class certification can be used to isolate specific issues to be litigated.<sup>286</sup>

Regardless of how issue class certification was used prior to *Wal-Mart*, Rule 23(c)(4) now offers the best available way for plaintiffs to pursue systemic discrimination claims. The Supreme Court's decision has essentially resolved any conflict as to whether the traditional class action or the issue class is more effective for employment discrimination claims. Because *Wal-Mart* substantially raises the bar for class action workplace plaintiffs, these litigants may be best served by pursuing a more limited systemic claim in the form of the issue class.

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<sup>281</sup> See *id.* As Professor Melissa Hart properly notes, "For the time being . . . it is essential to consider other solutions to the bind that the *Wal-Mart* decision has incorrectly put the lower courts and litigants in." *Id.* at 474.

<sup>282</sup> See Hines, *supra* note 121, at 763.

<sup>283</sup> *Id.* at 712.

<sup>284</sup> See Romberg, *supra* note 96, at 251; Wylie, *supra* note 109, at 372.

<sup>285</sup> See Romberg, *supra* note 96, at 251.

<sup>286</sup> See *id.*

## CONCLUSION

There is a growing body of literature criticizing the Supreme Court's decision in *Wal-Mart*. This scholarship emphasizes that the case may undermine the civil rights protections of workers across the country. The arguments these scholars have set forth are well founded, but it is now time to move past this debate. A more helpful line of inquiry should focus on how plaintiffs can navigate around the Supreme Court's decision. This Article offers a discussion of the benefits and drawbacks of the best tool currently available for pursuing systemic employment discrimination claims: issue class certification. Although the traditional class action under Rule 23(b) remains the preferred mechanism for systemic litigation, all workplace plaintiffs should strongly consider the issue class following *Wal-Mart*.

This Article seeks to spark a dialogue on the ways that Rule 23(c)(4) can be used to assist civil rights claimants in a post *Wal-Mart* world. A discussion of how to litigate cases after the Supreme Court's decision—rather than a discussion of the flaws of the case itself—is far more helpful to plaintiffs pursuing employment discrimination claims. Although the issue class is not the only way to litigate class-wide workplace cases, it is likely the best way. Beyond offering a full discussion of the issue class, then, this Article also invites a dialogue on any additional means of addressing the Supreme Court's decision. *Wal-Mart* has unquestionably changed the playing field. It is now time to reassess how plaintiffs should play the game.