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Civil Procedure—Dukes Commonality Standard—Factors That Courts Should Weigh in Employment Discrimination Class Actions—Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011)

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CIVIL PROCEDURE—*DUKES* COMMONALITY STANDARD—FACTORS THAT COURTS SHOULD WEIGH IN EMPLOYMENT DISCRIMINATION CLASS ACTIONS. *WAL-MART STORES, INC. V. DUKES*, 564 U.S. 338 (2011).

I. INTRODUCTION

Class actions are of great importance to our society, not just because they help adjudicate numerous individuals' claims at once but also because defendants can be liable for millions, sometimes even billions, of dollars.[1] To court system observers, class actions can appear "out of place in the world of civil lawsuits because they pose certain risks to defendants."[2] Class actions may have a sizeable financial impact on parties, not just because of the potential liability but also because parties incur significant fees associated with "litigating class actions."[3] As a result, defendants may feel pressured to settle class actions because substantial capital is required to litigate these cases, and liability can be in the millions.[4]

A very small percentage of civil cases are employment discrimination class actions.[5] Employers, including smaller businesses, often perceive class actions as "a dreadful scourge."[6] Many employers feel forced to settle class actions regardless of the claim's merits because they do not want to assume the risk of losing at trial.[7] A study found that once a court certified a class action under Federal Rule of Civil Procedure 23, it created unwarranted pressure to settle, even if plaintiffs' claims had little merit.[8] Employers also oppose employment discrimination class actions because employers know that

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1. *See* Robert Barnes, *Wal-Mart Asks Supreme Court to Deny Class-Action Suit by Female Workers*, WASH. POST (Mar. 27, 2011), https://www.washingtonpost.com/politics/wal-mart-asks-supreme-court-not-to-allow-class-action-suit-by-female-employees-alleging-discrimination/2011/03/25/AFTMXokB_story.html?utm_term=.3140b7fd3023.

2. Michael Selmi & Sylvia Tsakos, *Employment Discrimination Class Actions After* Wal-Mart v. Dukes, 48 AKRON L. REV. 803, 806 (2015).

3. *Id.*

4. *Id.*

5. *Id.* at 805.

6. Matthew Grimsley, *What Effect Will* Wal-Mart v. Dukes *Have on Small Businesses*?, 8 OHIO ST. ENTREPRENEURIAL BUS. L.J. 99, 100 (2013) (quoting STEPHEN C. YEAZELL, CIVIL PROCEDURE 878, 878 (8th ed. 2012)); *see also* Jordan Rosales, Dukes*, the Corporate Savior: How the* Wal-Mart v. Dukes *Decision Reinforced the Corporate Defense Arsenal*, 7 U.P.R. BUS. L.J. 199, 203 (2016).

7. Selmi & Tsakos, *supra* note 2, at 805–06.

8. John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. COLL. L. REV. 323, 328–29 (2005) (explaining the advisory committee's Rule 23 study); *see also* FED. R. CIV. P. 23.

most of their employees would "never file [individual] claims, even if meritorious."[9]

All legal professionals understand that procedure can, in fact, "make all the difference."[10] Employment discrimination claims "have had an interesting procedural history" because "discrimination is an elusive concept."[11] Historically, employers have relied on procedural technicalities to dismiss employment discrimination claims.[12] Consequently, even though the *Dukes* commonality standard[13] seems to be a mere procedural hurdle, it is, nonetheless, very significant in practice. Thus, employees have a strong interest in clear and unambiguous procedural rules. Conversely, employers have a keen interest in procedural technicalities because they might be liable for billions of dollars.[14] A clear and unambiguous standard for commonality in employment discrimination class actions, therefore, benefits both employees and employers. Complicating the outsized impact of employment discrimination class actions is the fact that lower courts are inconsistently interpreting the prevailing *Dukes* commonality standard.[15] Accordingly, this Note provides a clear and unambiguous test that courts can use to assess the *Dukes* commonality standard for certifying employment discrimination class actions.[16]

Section II of this Note provides a brief overview of class actions.[17] Section III examines *Wal-Mart Stores, Inc. v. Dukes*, the leading employment discrimination class action case vis-à-vis commonality, and the prevailing standard it set forth.[18] Finally, Section IV provides an in-depth analysis of a few employment discrimination class actions decided after *Dukes* and provides a list of factors that courts should weigh under the totality of the circumstances when analyzing the commonality requirement for employment discrimination class actions.[19]

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9. Selmi & Tsakos, *supra* note 2, at 807; *accord* Suzette M. Malveaux, *How Goliath Won: The Future Implications of* Dukes v. Wal-Mart, 106 NW. U. L. REV. COLLOQUY 34, 37 (2011) (explaining how when individuals with small claims refrain from challenging large corporations, this "effectively immuniz[es] companies from complying with the law").

10. Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 74 (1999).

11. *Id.* (cleaned up).

12. *See id.*

13. *See infra* Section III.

14. *See* Barnes, *supra* note 1.

15. *See infra* Section IV.

16. *See infra* Section V.

17. *See infra* Section II.

18. *See infra* Section III.

19. *See infra* Section IV.

II. AN OVERVIEW OF CLASS ACTIONS

Courts developed class actions in equity to provide a means by which numerous individuals with a common cause of action could obtain relief.[20] Federal Rule of Civil Procedure 23 was adopted in 1938, replacing the old Federal Equity Rule 38 (Representatives of Class).[21] Unlike the previous rule, Rule 23 applies to both legal and equitable claims.[22] Major revisions of the rule occurred in 1966 and, more recently, in 2003, meaning cases decided prior to 1966 have limited value today.[23] Federal Rule of Civil Procedure 23(a) states four requirements that a party must satisfy before a district court can certify the class:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.[24]

"As a policy matter, the class action form promotes efficiency, economy, ease of presentation and proof."[25] However, class actions are often "highly controversial."[26] Specifically, in *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court of the United States noted, "[t]he class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."[27] Rule 23's four requirements—numerosity, typicality, adequate representation, and commonality—"limit the class claims to those fairly encompassed by the named plaintiff's claims."[28]

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20. *See, e.g.*, Bond v. Pub. Schs. of Ann Arbor Sch. Dist., 171 N.W.2d 557 (Mich. Ct. App. 1969).

21. *See* Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J.L. REFORM 1097, 1102 n.20 (2013) (stating that Professor James William Moore "was responsible for drafting [the 1938] Rule 23").

22. *See* Hiram H. Lesar, *Class Suits and the Federal Rules*, 22 MINN. L. REV. 34, 34–36 (1937).

23. *See generally* 7A CHARLES ALAN WRIGHT ET AL., , FEDERAL PRACTICE AND PROCEDURE § 1753 (4th ed. 2021).

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

25. GERALD F. HESS ET AL., CIVIL PROCEDURE 478 (2d ed. 2019).

26. *Id.*

27. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348 (2011) (internal quotations omitted).

28. Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 156 (1982) (quoting Gen. Tel. Co. of the Nw. v. EEOC, 446 U.S. 318, 330 (1980)).

A class of forty or more members is presumed to satisfy the numerosity requirement.[29] Typicality is satisfied when class members have the same argument vis-à-vis liability and individual class members' claims arise out of the same course of events.[30] Adequacy of representation is satisfied when the (1) class representative's interests are not adversial to other class members' interest, and (2) class's attorneys are qualified to represent the class.[31] Commonality is satisfied when there exists at least one common question of law or fact to the entire class.[32] The Supreme Court of the United States addressed the commonality requirement in *Dukes*.[33]

III. *DUKES* COMMONALITY STANDARD

Prior to the Court's decision in *Dukes*, the commonality requirement of Rule 23 was "construed permissively."[34] Courts spent little, if any, time determining whether the commonality requirement was met.[35] In some cases, district courts declared that commonality was satisfied because common questions existed.[36] In other instances, the parties conceded that the commonality requirement was satisfied.[37] "The inquiry [was] not whether common questions of law or fact predominate[d], but only whether such questions exist[ed]."[38] In other words, courts perceived commonality as a "low hurdle."[39]

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29. *See, e.g.*, Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir.1995) (asserting that "numerosity is presumed at a level of 40 members"); Jones v. Diamond, 519 F.2d 1090, 1102 n.18 (5th Cir. 1975) (forty-eight members). However, forty members is not a requirement but rather a guide for courts. *See, e.g.*, King v. Carey, 405 F. Supp. 41, 44 (W.D. N.Y. 1975) (thirty-eight members); Bradford v. AGCO Corp., 187 F.R.D. 600, 604 (W.D. Mo. 1999) (twenty to sixty-five members).

30. *In re* Drexel Burnham Lambert Grp., 960 F.2d 285, 291 (2d Cir. 1992); *see, e.g.*, Wajda v. Penn. Mut. Life Ins. Co., 80 F.R.D. 303, 307 (E.D. Pa. 1978); Ingram v. Joe Conrad Chevrolet, Inc., 90 F.R.D. 129, 131 (E.D. Ky. 1981); Robinson v. Metro-N. Commuter R.R., 267 F.3d 147, 155 (2d Cir. 2001).

31. Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 60 (2d Cir. 2000) (citing *In re* Drexel Burnham Lambert Grp., 960 F.2d at 291).

32. *In re* IndyMac Mortg.-Backed Sec. Litig., 286 F.R.D. 226, 233 (S.D.N.Y. 2012) (citing *Dukes*, 564 U.S. at 359); *see also* discussion *infra* Section III.

33. *Dukes*, 564 U.S. at 349–60.

34. Erin Shaughnessy, *Too Big to Be Sued?: Class Actions and the Commonality Requirement After* Wal-Mart v. Dukes, 57 U. LOUISVILLE L. REV. 125, 128 (2018); *see also* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 599 (9th Cir. 2010).

35. WRIGHT ET AL., *supra* note 23, at § 1763.

36. *Id.*

37. Randle v. Swank, 53 F.R.D. 577, 581 (N.D. Ill. 1971); Epstein v. Weiss, 50 F.R.D. 387, 390 (E.D. La. 1970); Minnesota v. U.S. Steel Corp., 44 F.R.D. 559, 566 (D. Minn. 1968); Mersay v. First Republic Corp., 43 F.R.D. 465, 467 (S.D. N.Y. 1968).

38. Hewlett v. Premier Salons Int'l, Inc., 185 F.R.D. 211, 216 (D. Md. 1997).

39. Williams v. Mohawk Indus. Inc., 568 F.3d 1350, 1356 (11th Cir. 2009); *see also* Shaughnessy, *supra* note 34, at 128.

However, this changed when the Court was presented with "one of the most expansive class actions ever" in *Dukes*.[40] The class included about one and a half million plaintiffs, and both lower courts approved the class certification of current and former female employees of Wal-Mart.[41]

The plaintiffs, including named plaintiff Betty Dukes, alleged that Wal-Mart's policy of providing discretion to local supervisors regarding pay and promotion decisions violated Title VII of the Civil Rights Act of 1964 by discriminating against women.[42] Specifically, the plaintiffs alleged discrimination against all female employees in violation of Title VII.[43] The district court certified the class under Federal Rule of Civil Procedure 23(a).[44] Under Rule 23(a)(2), plaintiffs are required to show, amongst other elements, that "there are questions of law or fact common to the class"[45] in order to satisfy the commonality requirement. According to the Court, the "crux" of *Dukes* was this commonality requirement.[46]

The *Dukes* plaintiffs alleged that Wal-Mart's policy regarding pay and promotion decisions was "largely subjective."[47] The plaintiffs stated that Wal-Mart disproportionately promoted their male counterparts to management and supervisory positions.[48] Furthermore, the plaintiffs alleged that Wal-Mart store managers treated them poorly, while not subjecting their male counterparts to similar adverse treatment.[49] To satisfy the commonality requirement of Rule 23(a), the plaintiffs offered three forms of proof: anecdotal evidence, statistical evidence, and expert testimony.[50]

The Court acknowledged that under the disparate-impact theory,[51] allowing lower-level supervisors to exercise discretion can form the basis of Title VII liability, but for plaintiffs to be successful under this theory, they must

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40. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 342 (2011); *see also* Shaughnessy, *supra* note 34, at 155 (stating that "[p]rior to *Dukes*, the commonality requirement was a relaxed standard, favorable to individuals because of the ease in satisfying the requirement").

41. *Dukes*, 564 U.S. at 342.

42. *Id.* at 343.

43. *Id.* at 342.

44. *Id. See also* Dukes v. Wal-Mart, 222 F.R.D. 137, 163 (N.D. Cal. 2004).

45. FED. R. CIV. P. 23.

46. *Dukes*, 564 U.S. at 349.

47. *Id.* at 343.

48. *Id.* at 344. Plaintiff Betty Dukes alleged that she received disciplinary violations and that male employees were not "disciplined for similar infractions." *Id.*

49. *Id.* Plaintiff Christine Kwapnoski claimed that "a male manager yelled at her frequently and screamed at female employees, but not at men." *Id.* Additionally, her manager told her "to 'doll up,' to wear some makeup, and to dress a little better." *Id.*

50. *Id.* at 346.

51. Griggs v. Duke Power Co., 401 U.S. 424 (1971). "Under Title VII, a claim for disparate impact covers 'practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities.'" Rodriguez v. United States, 852 F.3d 67, 75 (1st Cir. 2017) (quoting Ricci v. DeStefano, 557 U.S. 557, 577 (2009)).

first identify the "specific employment practice that is challenged."[52] However, the Court went on to say that the mere possibility of having a class-wide claim under the disparate-impact theory "does not lead to the conclusion that every employee in a company using the system of discretion has such a claim in common."[53] Both the majority and dissenting opinions agreed that for a class to satisfy the commonality requirement, even a single common question will do.[54] Nonetheless, the majority concluded that the *Dukes* plaintiffs failed to present a "common question" because the plaintiffs' proof was "worlds away" from the evidence needed to prove that Wal-Mart's policies were discriminatory.[55]

The Court reversed the district court's order certifying the class for failing to meet the commonality requirement.[56] The Court acknowledged that all "competently crafted class complaints" will necessarily raise a common question of law.[57] However, the Court further stated that to satisfy the commonality requirement, class members must "have suffered the same injury."[58] To provide more clarity, the Court held that commonality is satisfied when the plaintiffs' claims rest upon a common contention.[59]

The Court rejected the three forms of proof that Plaintiffs offered: (1) the Court stated the anecdotal reports of discrimination were inadequate because the 120 proffered accounts only represented one affidavit for every 12,500 class members; (2) the Court stated that the statistical evidence regarding pay and promotion disparities was flawed because "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 (3) the expert testimony of a sociologist who concluded that Wal-Mart was "vulnerable" to gender discrimination was insufficient because the expert

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52. *Dukes*, 564 U.S. at 357 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988)).

53. *Id.* at 355.

54. *Id.* at 358; *id.* at 369 (Ginsburg, J., dissenting).

55. *Id.* at 355–58.

56. *See id.* at 367.

57. *Id.* at 349 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. REV. 97, 131–32 (2009)).

58. *Dukes*, 564 U.S. at 350. Arguably, all class members in *Dukes* had suffered the same injury because they all were denied opportunities to managerial positions.

59. *Id.* The Court explained that the

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

Id. See also WRIGHT ET AL., *supra* note 23, at § 1763.1 (stating that under the *Dukes* test, "the question becomes whether dissimilarities between the claims may impede a common resolution of" the claims).

"conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking."[60]

Legal scholars perceived the majority opinion in *Dukes* to be based on a "general hostility to class action litigation" and, more specifically, towards nationwide employment discrimination class action lawsuits.[61] *Dukes* "presented a perfect storm for the conservative wing"[62] of the Court because the lawsuit included allegations against a controversial employer.[63] Some have characterized the Court's decision in *Dukes* as a "blustery decision," but lower courts often distinguish the facts presented to them from those of *Dukes*.[64]

Furthermore, the Court's decision in *Dukes* was a game-changer.[65] When the Court vacated the district court's decision certifying the class, there was a sense that the decision might mark the end of class actions based on claims of discrimination in the workplace.[66] The *Dukes* decision was particularly important because, before it, plaintiffs had successfully brought several employment discrimination class actions.[67] Yet, even though the decision has

60. *Dukes*, 564 U.S. at 354–58.

61. Selmi & Tsakos, *supra* note 2, at 804. *See also Dukes*, 564 U.S. at 356 (stating that employees "will be unable to show that all [their] . . . Title VII claims . . . depend on the answers to [their] common questions"). "The *Dukes* decision heightened the commonality requirement in favor of corporations requiring not just common questions, but common injuries and the capability of classwide resolution." Shaughnessy, *supra* note 34, at 155.

62. Selmi & Tsakos, *supra* note 2, at 804–05.

63. *See, e.g.*, Malveaux, *supra* note 9, at 34–37 (referring to Wal-Mart as "Goliath"); Alistair Torrance, *4 Reasons Why You Should Never Work at Walmart*, TOUGHNICKEL (Sept. 8, 2022), https://toughnickel.com/industries/Why-Never-To-Work-for-Walmart; Chris Osterndorf, *10 Reasons Walmart Is the Worst Company in America*, DAILY DOT (May 28, 2021, 6:56 PM), https://www.dailydot.com/unclick/walmart-labor-unions-bad-company/.

64. *See* Selmi & Tsakos, *supra* note 2, at 804–05; *see also* Ellis v. Costco Wholesale Corp. (*Ellis II*), 285 F.R.D. 492, 496–97 (N.D. Cal. 2012); Sherry E. Clegg, *Employment Discrimination Class Actions: Why Plaintiffs Must Cover All Their Bases After the Supreme Court's Interpretation of Federal Rule of Civil Procedure 23(a)(2) in* Wal-Mart v. Dukes, 44 TEX TECH. L. REV. 1087, 1089 (2012) (exploring "the consequences of the Court's divisive interpretation of" the commonality requirement).

65. *See, e.g.*, Elizabeth Tippett, *Robbing a Barren Vault: The Implications of* Dukes v. Wal-Mart *for Cases Challenging Subjective Employment Practices*, 29 HOFSTRA LAB. & EMP. L.J. 433, 444 (2012) (stating that the *Dukes* decision "can be expected to reduce the prospects of success for disparate impact and 'pattern or practice' discrimination claims, as well as the accompanying settlement value of such claims"); *see also* Melissa Hart, *Failing to Recognize Discrimination*, N.Y. TIMES (June 21, 2011, 11:02 AM), http://www.nytimes.com/roomfordebate/2011/06/20/a-death-blow-to-class-action/failing-to-recognize-discrimination; Clegg, *supra* note 64, at 1108 (stating that "[t]he heightened certification requirements . . . could lead to a decline in federal class-action lawsuits").

66. *See, e.g.*, Clegg, *supra* note 64, at 1108; Rosales, *supra* note 6, at 217.

67. *See, e.g.*, Black Grievance Comm. v. Philadelphia Elec. Co., 79 F.R.D. 98 (E.D. Pa. 1978); *see also* Rosales, *supra* note 6, at 217 (stating that the *Dukes* decision "was a major

significantly affected the number of case filings, the legal effect of the *Dukes* decision appears to be insignificant.[68] Certification of employment discrimination class actions has never been straightforward, with few such actions ultimately getting certified, and that remains true today.[69] Efforts to dismiss class claims have increased, with defense attorneys from all over the country unsuccessfully attempting to stretch the *Dukes* decision to dismiss claims even before the court holds a class certification hearing.[70] Although employees are still permitted to file nationwide employment discrimination class actions, these class actions are less likely to be certified in light of the *Dukes* decision.[71]

IV. RESOLVING THE AMBIGUITY SURROUNDING THE *DUKES* COMMONALITY STANDARD

This Section contains an in-depth analysis of several employment discrimination class actions decided by three circuits after the *Dukes* decision. Specifically, Part A discusses how circuits currently approach the *Dukes* commonality standard in these class actions.[72] Part B provides a "totality of the circumstances test" to reconcile cases discussed in Part A.

A. Circuits' Current Approach to the *Dukes* Commonality Standard

Plaintiffs have continued to file employment discrimination class actions even after the *Dukes* decision. Consequently, courts have continued to grapple with the commonality standard after *Dukes*, illustrated by the differing interpretations of the *Dukes* commonality standard by the Ninth, Seventh, and Fourth Circuits.

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setback to plaintiffs and a win-win situation for corporations that no longer need to fear the consequences that come with a class action lawsuit").

68. "Although more challenges to commonality under Rule 23(a)(2) will likely occur after . . . *Dukes*, the class-action lawsuit 'is far from dead.'" Clegg, *supra* note 64, at 1118. After the *Dukes* decision, defendants have sought to strike class allegations from complaints, but they have not always been successful. *See* Chen-Oster v. Goldman, Sachs & Co., 877 F. Supp. 2d 113, 119 (S.D.N.Y. 2012) (denying motion to strike); Simpson v. Boeing Co., 27 F. Supp. 3d 989, 995 (E.D. Mo. 2014) (denying motion to dismiss class claims). *See also* Andrew J. Trask, Wal-Mart v. Dukes: *Class Actions and Legal Strategy*, 2011 CATO SUP. CT. REV. 319, 350 (2011).

69. *See infra* Section IV.

70. *See* Selmi & Tsakos, *supra* note 2, at 804.

71. *See* Dustin Massie, *Too Soon for Employers to Celebrate?: How Plaintiffs Are Prevailing Post-Dukes*, 29 ABA J. LAB. & EMP. L. 177, 183 (2013); *see also* Wal-Mart v. Dukes, 564 U.S. 338, 356 (2011).

72. For the sake of brevity, this Note only discusses cases decided by the Ninth, Seventh, and Fourth circuits. Nonetheless, this Note gives an overview of the various cornerstones of employment discrimination class actions.

1. Ninth Circuit

In *Ellis v. Costco Wholesale Corp.*, the plaintiffs brought a class action lawsuit against Costco for gender discrimination in Costco's promotion and management practices.[73] Shortly after the *Dukes* decision, the Ninth Circuit reversed the district court's certification order because the allegations in *Ellis* were similar to those in *Dukes*.[74] On remand, Costco asked the district court to deny the plaintiffs' class certification motion.[75] Costco argued that this case was similar to *Dukes*; however, the district court disagreed.[76]

The district court gave four reasons why this case satisfied the *Dukes* standard of commonality under Rule 23(a)(2).[77] First, the *Ellis* class was "smaller and the scope of the claims [was] far narrower than" the *Dukes* class.[78] Second, unlike *Dukes*, where "there was no companywide policy," the *Ellis* class "point[ed] to several companywide policies and practices [that were] allegedly responsible for the disparity in promotions" to management positions.[79] Third, whereas the plaintiffs in *Dukes* relied "only on a contention that there was a common [discriminatory] culture within the company," the *Ellis* class presented "cultural and cognitive bias evidence" to supplement "their concrete evidence of companywide discriminatory policies and practices."[80] Lastly, *Dukes* plaintiffs offered evidence of "fragmented or localized" discriminatory practices, but the *Ellis* class's statistical evidence was sufficient to demonstrate that the class-wide "gender disparities" resulted from Costco's discriminatory practices.[81] According to the district court, the plaintiffs offered substantial proof of companywide discriminatory practices; therefore, the court certified the *Ellis* class.[82] In *Ellis*, the district court distinguished the facts of the case from *Dukes* by giving a detailed analysis vis-à-vis the *Dukes* commonality standard.[83]

In contrast, in *Stockwell v. City & County of San Francisco*, where a group of police officers brought a class action against the city for age discrimination, the district court denied class certification because the class did not

73. Ellis v. Costco Wholesale Corp. (*Ellis II*), 285 F.R.D. 492, 496 (N.D. Cal. 2012).
74. Ellis v. Costco Wholesale Corp. (*Ellis I*), 657 F.3d 970, 974–76 (9th Cir. 2011).
75. *Ellis II*, 285 F.R.D. at 530.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Ellis II*, 285 F.R.D. at 530.
82. *Id.* at 531.
83. *See id.* at 530; *see also* Selmi & Tsakos, *supra* note 2, at 822 (stating that *Ellis* was "essentially a copycat case brought by the . . . attorneys who sued Wal-Mart" in *Dukes*).

meet the *Dukes* commonality standard.[84] However, the Ninth Circuit reversed by applying the *Dukes* commonality standard.[85] Reading *Dukes* narrowly, the Ninth Circuit noted that "even a single common question will do" and while district courts should consider the merits of every action, "demonstrating commonality does not require proof that the putative class will prevail on whatever common questions it identifies."[86]

When certifying the class, the district court evaluated the relevance of statistical evidence showing a disparate impact and concluded that the evidence was of little probative value.[87] The Ninth Circuit, however, found that the question of whether the plaintiffs could successfully demonstrate a substantial adverse impact was a merits question and, thus, was not relevant in determining whether the class members had an issue in common sufficient to warrant class certification.[88] Instead, the Ninth Circuit focused on whether there was a disparate impact resulting from the police department's policy changes.[89] The Ninth Circuit found that the *Dukes* commonality standard was satisfied because there was a common question: whether the alleged disparate impact was caused by a "single policy" change.[90]

While the *Ellis* court correctly applied the *Dukes* commonality standard because the *Ellis* class bore "some superficial factual resemblance to *Dukes*,"[91] the *Stockwell* decision seems to be misleading because the facts of *Stockwell* are particularly distinguishable from those in *Dukes* and *Ellis*.[92] Although the *Stockwell* class was ultimately certified, the plaintiffs had to overcome several challenges for a fairly straightforward case.[93] Even though appellate courts might "sort things out" for plaintiffs in employment discrimination class actions, plaintiffs often have to wait years before a court hears

84. Stockwell v. City & County of San Francisco (*Stockwell I*), No. C 08-5180 PJH, 2011 WL 4803505, at *1, *8 (N.D. Cal. Oct. 11, 2011). This case was filed in 2008 when the police department started making promotions for investigator positions based on a new test (Q–50) instead of the preexisting list of applicants derived from the earlier test (Q–35). *Id.* at *1. The purported class of this original action primarily comprised of individuals who were eligible for promotion from Q–35, and they alleged that switching to Q–50 caused a "disparate impact" based on age. *Id.* at *1–2.

85. *See* Stockwell v. City & County of San Francisco (*Stockwell II*), 749 F.3d 1107, 1109 (9th Cir. 2014).

86. *Id.* at 1111–12. "'Whether class members could actually prevail on the merits of their claims' is not a proper inquiry in determining the preliminary question 'whether common questions exist.'" *Id.* at 1112 (quoting Ellis v. Costco Wholesale Corp. (*Ellis I*), 657 F.3d 970, 983 n.8 (9th Cir. 2011)).

87. *Id.* at 1115; *see also Stockwell I*, 2011 WL 4803505, at *4–5.

88. *See Stockwell II*, 749 F.3d at 1113–16.

89. Selmi & Tsakos, *supra* note 2, at 828.

90. *Stockwell II*, 749 F.3d at 1115–17.

91. *See* Ellis v. Costco Wholesale Corp. (*Ellis II*), 285 F.R.D. 492, 530–31 (2012).

92. Selmi & Tsakos, *supra* note 2, at 829.

93. *Id.* at 828–29.

their case on its merits.[94] The plaintiffs in *Ellis* faced more challenges, as the facts of their case resembled those of *Dukes*.[95] Nonetheless, the counsel for *Ellis*'s plaintiffs found interesting, yet effective, ways to distinguish *Ellis* from *Dukes*.[96] Even within the Ninth Circuit, there is a split regarding the proper application of the *Dukes* commonality standard. In *Stockwell*, the court stated that even a single "common question" will satisfy the commonality requirement,[97] while in *Ellis*, even though there was a single common question—Costco's promotion and management practices had a disparate impact on female employees—the district court conducted a detailed analysis to differentiate *Ellis* from *Dukes*.[98]

In essence, based on *Ellis* and *Stockwell*, a reasonable attorney could infer that the *Dukes* commonality standard for a regional class can be easily satisfied in the Ninth Circuit if the class counsel makes creative arguments by presenting (1) cultural and cognitive bias evidence, and (2) statistical evidence showing the existence of class-wide disparate impact from employer's discriminatory practices.

2. Seventh Circuit

In *McReynolds v. Merrill Lynch*, the Seventh Circuit relied on the disparate impact theory in reversing the district court's denial of class certification to a class of plaintiffs alleging racial discrimination.[99] In *McReynolds*, more than seven hundred black brokers, both former and current employees, sued Merrill Lynch.[100] These plaintiffs alleged that a couple of Merrill Lynch's policies delegating decisions to lower-level managers served as a framework for discretionary decisions that influenced compensation and promotions.[101] The challenged policies included a "teaming" policy, which allowed brokers in the same office to form "teams" and determine team membership, and an "account distribution" policy, where the company would distribute a departed broker's accounts to competing brokers with the best

94. *Id.* at 803, 805–06, 828–29 n.109. *Stockwell* was litigated for more than seven years because police officers initiated the class action in 2008 and then on remand, the district court denied plaintiffs' motion for class certification in 2015. *See Stockwell II,* 749 F.3d at 1109–11, 1113–14, 1117; Stockwell v. City & County of San Francisco (*Stockwell III*), No. C 08-5180 PJH, 2015 WL 2173852, at *1–3 (N.D. Cal. 2015).

95. *See Ellis II*, 285 F.R.D. at 530–31.

96. *Id.*

97. *Stockwell II*, 749 F.3d at 1116–17.

98. *See Ellis II*, 285 F.R.D. at 496, 501–02, 509–510.

99. McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 490–92 (7th Cir. 2012).

100. *Id.* at 488.

101. *Id.* at 489.

records.[102] Lower-level management had a measure of control over how the teaming and account distribution operated.[103] For example, they could veto teams or provide input for account distribution criteria.[104] However, their decisions were guided by the two companywide policies: "authorization to brokers, rather than managers, to form and staff teams; and basing account distributions on the past success" of competing brokers. [105]

The class alleged that Merrill Lynch's teaming policy resulted in racial discrimination, thus causing a "disparate impact" due to racial preferences at the team level.[106] Merrill Lynch's teaming policy perpetuated a cycle of disadvantages because black brokers had trouble joining predominantly white teams.[107] To satisfy the *Dukes* commonality standard, the Seventh Circuit found that there were two questions common to the class: whether the teaming policy had a disadvantageous effect on black brokers; and whether, given the teaming policy had a disparate impact, the policy was justified by "business necessity."[108]

The Seventh Circuit recognized that, on the face of the complaint, the facts of *McReynolds* seemed identical to *Dukes*.[109] The Seventh Circuit, however, distinguished *McReynolds* from *Dukes*.[110] Unlike *Dukes*, where "employment decisions were delegated to local managers," the "broker teams" were formed by brokers and "not managers."[111] To provide a clear precedent for future employment discrimination class actions, the Seventh Circuit provided the following example:

> Suppose a police department authorizes each police officer to select an officer junior to him to be his partner. And suppose it turns out that male police officers never select female officers as their partners and white officers never select black officers as their partners. There would be no intentional discrimination at the departmental level, but the practice of allowing police officers to choose their partners could be challenged as enabling sexual and racial discrimination—as having in the jargon of discrimination law a "disparate impact" on a protected group—and if a

102. *Id.* at 488–89.
103. *Id.*
104. *Id.* at 489.
105. *McReynolds*, 672 F.3d at 489.
106. *Id.* (stating that if "the teaming policy causes racial discrimination and is not justified by business necessity, then it violates Title VII as 'disparate impact' employment discrimination," and "whether it causes racial discrimination and whether it nonetheless is justified by business necessity are issues common to the entire class and therefore appropriate for classwide determination").
107. *Id.* at 489–90; *see also* Selmi & Tsakos, *supra* note 2, at 823.
108. *McReynolds*, 672 F.3d at 489–90.
109. *Id.* at 488–89.
110. *Id.* at 489–90.
111. *Id.* at 489.

> discriminatory effect was proved, then to avoid an adverse judgment the department would have to prove that the policy was essential to the department's mission. That case would not be controlled by Wal-Mart (although there is an undoubted resemblance), in which employment decisions were delegated to local managers; it would be an employment decision by top management.[112]

The Seventh Circuit compared the facts of *McReynolds* with the facts of the above "police officers" hypothetical.[113] The court stated that, similar to this hypothetical where police officers rather than managers chose their "partners," the brokers chose the Merrill Lynch's broker teams rather than the managers.[114] Similar to *Ellis*, in which on remand the district court gave a detailed analysis and distinguished *Ellis* from *Dukes*,[115] the Seventh Circuit distinguished the facts of *McReynolds* from *Dukes* and held that there was "a single common question of fact or law" that satisfied the *Dukes* commonality standard.[116] In essence, *McReynolds* demonstrates how the Seventh Circuit closely follows the commonality standard articulated in *Dukes*.

3. Fourth Circuit

In *Scott v. Family Dollar Stores, Inc*., a group of current and former female store managers sued Family Dollar Stores, Inc. for gender discrimination.[117] Their claims included allegations of disparate impact in violation of Title VII.[118] Specifically, plaintiffs alleged that Family Dollar compensated them less than their male counterparts who performed the same job under similar working conditions.[119] The plaintiffs challenged four different companywide policies: (1) "mandatory salary range for Store Managers," which allegedly locked in prior disparities; (2) the "existence of an annual pay raise percentage set by corporate headquarters," which was tied to performance ratings; (3) "'built-in headwinds' corporate-imposed compensation criteria for Store Managers," which allegedly caused a disparate impact; and (4) the "existence of a dual-system of compensation structured to pay less to persons *promoted* to the store managers than to persons *hired*" from outside the

112. *Id.* (internal citations omitted).
113. *Id.*
114. *McReynolds*, 672 F.3d at 489.
115. *See* Ellis v. Costco Wholesale Corp. (*Ellis II*), 285 F.R.D. 492, 496, 501–02, 509–10 (N.D. Cal. 2012).
116. *See McReynolds*, 672 F.3d at 489–90; *see also* Settlement Agreement and Release at 27, McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 2012 WL 5278555 (N.D. Ill. Aug. 28, 2013) (No. 1:05-CV-6583) (evidencing that the *McReynolds* plaintiffs obtained a $160 million commitment from Merrill Lynch).
117. Scott v. Family Dollar Stores, Inc., 733 F.3d 105, 108 (4th Cir. 2013).
118. *Id.*
119. *Id.*

company.[120] In dismissing the class allegations, the district court reasoned that the class could not satisfy the *Dukes* commonality standard because the alleged discrimination was based on "subjective decisions made at local store levels."[121]

While applying the *Dukes* commonality standard, the Fourth Circuit concluded that (1) *Dukes* "did not set out a per se rule against class certification where subjective decision-making or discretion is alleged," and (2) commonality will likely be satisfied when "high-level corporate decision-makers" exercise discretion.[122] Applying these two principles to the facts of the case, the Fourth Circuit concluded that the *Scott* class satisfied the *Dukes* commonality standard because (1) *Dukes* is not a per se rule vis-à-vis subjective discretion, and in this case, the discretion alleged "was exercised in a common way under some common direction"[123] and (2) high-level managers, specifically Regional Manager and Divisional Vice President, exercised discretion "under the pay raise percentage policy."[124]

On the other hand, in *Ealy v. Pinkerton Government Services, Inc.*, the Fourth Circuit emphasized the "rigorous analysis" requirement of the *Dukes* opinion.[125] The plaintiffs, private service employees, brought a class action lawsuit against the defendant, a government contractor at Andrews Air Force Base, for unpaid wages.[126] The district court granted the plaintiffs' motion for class certification, and Pinkerton appealed.[127] The Fourth Circuit recognized that there was indeed "a common question of fact among all the class members: whether or not they were compensated for their meal breaks."[128] The Fourth Circuit also acknowledged that under the facts of the case, there was a

120. *Id.* at 110.

121. *Id.*

122. *Id.* at 113–14.

123. *Scott*, 733 F.3d at 116.

124. *Id.* (stating that corporate set an "annual pay raise percentage" that corresponded to performance ratings, and "Regional Managers and Divisional Vice Presidents grant[ed] exceptions above the pay raise percentage, and 'significantly greater' exceptions [were] granted to men").

125. Ealy v. Pinkerton Gov't Services, 514 F. App'x 299, 305–06 (4th Cir. 2013). The court stated that:

> Rule 23 prerequisites are not to be taken lightly and do not set forth a mere pleading standard. Rather, a party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. As a result, the trial court may find it necessary to probe behind the pleadings and ultimately, will need to conduct a rigorous analysis to determine whether the Rule 23 prerequisites have been satisfied.

Id. (internal quotation marks and citations omitted).

126. *Id.* at 300, 302 (alleging that "Pinkerton's compensation practices related to disarming and meal breaks violated" FLSA and Maryland Wage and Hour Laws).

127. *Id.* at 302.

128. *Id.* at 306.

common question of law: whether class members should be paid for their meal breaks.[129] However, the Fourth Circuit noted that, even though there appeared to be a common question of law *and* fact to all class members, the district court should have done more analysis to determine "whether those common questions are dependent upon a common contention, the resolution of which will resolve each one of the claims in one stroke."[130]

The Court in *Dukes* noted that "sometimes it may be necessary for the [trial] court to probe behind the pleadings before coming to rest on the certification question, and that certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."[131] Arguably, the *Dukes* decision only addressed this "rigorous analysis" in dicta and did not address this requirement in its holding.[132] Nonetheless, the Fourth Circuit vacated the *Ealy* class certification order and remanded for the district court to perform the "required rigorous analysis."[133]

In essence, for the Fourth Circuit, even when there are common questions of law *and* fact to all class members, the district court must conduct a "rigorous analysis" to determine "whether those common questions are dependent upon a common contention."[134]

B. Uniform Test to Avoid the Varying Interpretations of the *Dukes* Commonality Standard

After the *Dukes* decision,[135] circuit courts have employed varying interpretations of the *Dukes* commonality standard in employment discrimination class actions.[136] For employment discrimination class actions in the Ninth Circuit, to satisfy the *Dukes* commonality standard, "even a single common question will do."[137] Moreover, even if the facts of the plaintiffs' claims are identical to *Dukes*, crafty attorneys—like the attorneys in *Ellis*—can skirt around

129. *Id.*

130. *Id.* (internal quotation marks and citations omitted).

131. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–51 (2011) (internal quotation marks and citations omitted).

132. *See generally id.* (discussing the "rigorous analysis" requirement). Most circuits now require the district court to conduct a rigorous analysis to ensure that the class is compliant with the requirements of Rule 23. *See, e.g.*, *In re* Blood Reagents Antitrust Litig., 783 F.3d 183, 187–88 (3d Cir. 2015); *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838, 852 (6th Cir. 2013); Chavez v. Plan Benefit Servs., Inc., 957 F.3d 542, 545–46 (5th Cir. 2020); CGC Holding Co. v. Broad & Cassel, 773 F.3d 1076, 1086–87 (10th Cir. 2014).

133. *Ealy*, 514 F. App'x at 311.

134. *Id.* at 306 (internal quotation marks and citations omitted).

135. *See supra* Section III.

136. *See supra* Section IV, Part A.

137. *See* Stockwell v. City & County of San Francisco (*Stockwell II*), 749 F.3d 1107, 1111 (quoting *Dukes*, 564 U.S. at 359 (2011)).

the *Dukes* commonality standard by providing more "cultural and cognitive bias evidence" and statistical evidence showing the existence of class-wide disparate impact from the employer's discriminatory practices.[138] In contrast, the Seventh Circuit closely follows the *Dukes* decision, only requiring a "common question" of law or fact.[139] For the Fourth Circuit, plaintiffs likely will satisify the commonality requirement when "high-level corporate decision-makers" exercise discretion.[140] Additionally, for the Fourth Circuit, even when there are common questions of law *and* fact to all class members, the district court must conduct "rigorous analysis" to determine "whether those common questions are dependent upon a common contention, the resolution of which will resolve each one of the claims in one stroke."[141] Even though the Court's opinion in *Dukes* provided some guidance for future class actions, lower courts continue to grapple with the commonality requirement, often using differing standards.[142] First, this Part will discuss how amending Rule 23 would not provide a clear and uniform commonality standard. Then, this Part will offer a "totality of the circumstances test" to provide a uniform commonality standard for employment discrimination class actions.

1. Amending Rule 23 Fails to Provide a Uniform Commonality Standard

On the one-year anniversary of the *Dukes* decision, several members of Congress, including Sen. Al Franken, Sen. Richard Blumenthal, and Rep. Rosa DeLauro, introduced legislation to nullify the impact of the Court's holding in *Dukes*.[143] However, these efforts were unfruitful.[144]

Some legal scholars have proposed amending relevant portions of Rule 23 to resolve the "inconsistent application" of the *Dukes* commonality

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138. *See* Ellis v. Costco Wholesale Corp. (*Ellis II*), 285 F.R.D. 492, 500–01, 510, 530 (N.D. Cal. 2012).

139. *See* McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 490 (7th Cir. 2012).

140. *See* Scott v. Family Dollar Stores, Inc., 733 F.3d 105, 113–14 (4th Cir. 2013).

141. Ealy v. Pinkerton Gov't Servs., Inc., 514 F. App'x 299, 306 (4th Cir. 2013) (internal quotation marks and citations omitted).

142. *See supra* Section IV, Part A.

143. *DeLauro, Franken, Blumenthal Introduce Bill to Restore Workers' Right to Challenge Workplace Discrimination in Court*, U.S. REP. ROSA DELAURO (June 20, 2012), https://delauro.house.gov/media-center/press-releases/delauro-franken-blumenthal-introduce-bill-restore-workers-right.

144. *See* Equal Employment Opportunity Restoration Act of 2012, H.R. 5978, 112th Cong. (2012) (as reported by H.R. Comm. on the Judiciary, June 28, 2012) (showing the lack of action on this bill); Equal Employment Opportunity Restoration Act of 2012, S. 3317, 112th Cong. (2012).

standard.[145] Although amending Rule 23 might "eradicate the ambiguity" associated with the *Dukes* commonality standard, the amended Rule 23 would still require a "single question of law or fact."[146] This "question of law or fact" requirement is identical to the current Rule 23 language.[147] Therefore, if this proposed language of Rule 23 is adopted, courts will continue to apply the current *Dukes* commonality standard. Moreover, when interpreting and applying the Federal Rules of Civil Procedure, courts often add requirements that are not explicit in the language of the rules.[148] However, adopting a "totality of the circumstances test" for the *Dukes* commonality standard—as this Note recommends—would allow courts to exercise discretion and ensure the fair and adequate protection of both employers and employees.

2. "Totality of the Circumstances Test" for the Dukes *Commonality Standard*

Before the Court's decision in *Dukes*, the commonality requirement was not "widely debated" by courts or commentators.[149] A review of class actions after *Dukes* demonstrates that plaintiffs' attorneys are seeking certification of regional, instead of nationwide, class actions.[150] While defendants in employment discrimination class actions no longer defend nationwide class actions, they now defend numerous regional class actions, where plaintiffs' attorneys

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145. Shaughnessy, *supra* note 34, at 146; *see also* Rosales, *supra* note 6, at 215–17 (demanding a change to the commonality requirement for employment discrimination class actions to avoid "widespread inequality").

146. Shaughnessy, *supra* note 34, at 153—54. The language of the relevant portions of the proposed Rule 23:

> [T]here is a single question or law or fact that is common among the class . . . Classes seeking a recovery in excess of $500 million will be subjected to a heightened standard and merits analysis. The burden of proof rests on the class to prove a common question of law or fact by a preponderance of the evidence[.]

Id. at 153. The proponents suggest that "[b]oth the individual and the corporation are fairly and adequately protected by this articulation of the rule." *Id.*

147. *Compare id. with* FED. R. CIV. P. 23(a) (requiring "questions of law or fact common to the class").

148. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–51 (2011); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–56 (2007) (requiring plaintiffs to include enough facts in their complaint to make the claims plausible); Ashcroft v. Iqbal, 556 U.S. 662, 677–78 (2009) (requiring plaintiffs to present a "plausible" cause of action).

149. Clegg, *supra* note 64, at 1089; *see also* J. Douglas Richards & Benjamin D. Brown, *Predominance of Common Questions—Common Mistakes in Applying the Class Action Standard*, 41 RUTGERS L.J. 163, 163 (2009) (explaining that in practice, Rule 23(a) criteria are normally "easily satisfied and often are not strongly contested").

150. *See supra* Section IV, Part A; *see also* Massie, *supra* note 71, at 200 ("A review of recent case law demonstrates that the heightened commonality and predominance requirements highlighted in *Wal-Mart v. Dukes* have led plaintiffs' attorneys to seek certification of smaller classes.").

pursue a strategy that commentators have called an "attack by a thousand cuts."[151]

Although nationwide employment discrimination class actions likely will not satisfy the *Dukes* commonality standard, regional classes likely will.[152] Arguably, each circuit has its own interpretation of the *Dukes* commonality standard.[153] Despite these differences, virtually all courts require a common question of law *or* fact to all class members. As such, courts should adopt a "totality of the circumstances test" to assess commonality. This test involves weighing of the different factors that courts currently use to satisfy the *Dukes* commonality standard. Under this Note's "totality of the circumstances test", courts should weigh whether: (1) plaintiffs have provided cultural and cognitive bias evidence, such as expert testimony and anecdotal evidence;[154] (2) plaintiffs have statistical evidence showing the existence of class-wide disparate impact from the employer's discriminatory practices;[155] and (3) plaintiffs and defendant(s) have provided sufficient evidence for the district court to conduct a "rigorous analysis" of the *Dukes* commonality standard.[156]

The courts should weigh the first and second factors more heavily than the third factor for two reasons. First, as seen in *Ellis*,[157] these two factors address the Court's primary concern of whether there is a common question of law or fact.[158] Second, the statistical evidence, along with the cultural and cognitive bias evidence, would allow the courts to "delv[e] into the merits of the case" while conducting a rigorous analysis of the commonality

151. Gerald L. Maatman, Jr. & Laura Maechtlen, *New Stratagems by the Plaintiffs' Class Action Bar—"Attack by a Thousand Cuts . . ."*, SEYFARTH (Feb. 4, 2012), http://www.workplaceclassaction.com/2012/02/new-stratagems-by-the-plaintiffs-class-action-bar-attack-by-a-thousand-cuts/.

152. *See* Massie, *supra* note 71, at 200–01.

153. *See generally supra* Section IV, Part A.

154. *See* Ellis v. Costco Wholesale Corp. (*Ellis II*), 285 F.R.D. 492, 496–99, 510, 530; Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 353–54 (2011) (criticizing the expert sociologist's inability to provide numeral statistics of employment decisions influenced by Wal-Mart employees' stereotyped thinking); *see also* Clegg, *supra* note 64, at 1117 (asserting "that a practitioner utilizing anecdotal evidence in support of class certification should collect as many affidavits as feasibly possible from a broad cross-section of the potential class members"). *But see* Malveaux, *supra* note 9, at 43 (asserting that the calculation of a specific percentage is a difficult process).

155. *See Ellis II*, 285 F.R.D. at 522; *see also* Clegg, *supra* note 64, at 1116 (stating "that practitioners should attempt to break any statistical analysis down into the smallest sample size available, while still compiling group-wide, aggregate statistics").

156. Ealy v. Pinkerton Gov't Servs., Inc., 514 F. App'x 299, 306 (4th Cir. 2013); *see also Dukes*, 564 U.S. at 350–51.

157. *See* Ellis v. Costco Wholesale Corp. (*Ellis I*), 657 F.3d 970, 974 (9th Cir. 2011).

158. *See Dukes*, 564 U.S. at 359; *see also* Clegg, *supra* note 64, at 1115 (stating that "[i]n *Dukes*, the majority addressed . . . the plaintiffs' use of statistical evidence, anecdotal evidence, and expert testimony").

requirement.[159] The third factor is arguably the least important factor because (1) this requirement was in dicta of the *Dukes* decision, (2) courts will likely use the evidence provided under the first two factors to conduct a "rigorous analysis," and (3) "the search for commonality" in smaller classes "should not require the rigorous analysis and significant proof that a mass class would require."[160]

When assessing the *Dukes* commonality standard, some courts consider whether high-level corporate decision-makers exercise discretion regarding class members' employment.[161] However, courts likely will consider this question while conducting a "rigorous analysis" of the commonality requirement;[162] thus, this should not be an explicit factor in the "totality of the circumstances test." Circuits have differing requirements for the *Dukes* commonality standard,[163] which requires a "common question" of law or fact.[164] Adopting this "totality of the circumstances test" would ensure that parties litigating employment discrimination class actions receive uniform treatment without regard to the forum's interpretation of the *Dukes* commonality standard.

V. CONCLUSION

Employment discrimination class action parties recognize the importance of demonstrating why the district court should adopt their commonality analysis. This is because district courts will conduct a more rigorous analysis of the *Dukes* commonality standard and will be more likely to delve into the underlying merits of the class action.[165] To provide a more uniform standard for satisfying the commonality requirement, courts should adopt a "totality of the circumstances test" and weigh whether (1) plaintiffs have provided cultural and cognitive bias evidence, such as expert testimony and anecdotal evidence, (2) plaintiffs have statistical evidence showing the existence of class-wide disparate impact from the employer's discriminatory practices, and (3) plaintiffs and defendant(s) have provided sufficient evidence for the district court to conduct a "rigorous analysis" of the commonality

159. *See* Clegg, *supra* note 64, at 1117 (asserting that "[b]ecause lower courts will be conducting a more rigorous analysis of the Rule 23(a)(2) commonality requirement after *Dukes*, judges will more likely delve into the merits of the case before certifying a class action"); *Dukes*, 564 U.S. at 350–51.

160. Shaughnessy, *supra* note 34, at 152; *see also* cases cited *supra* note 132.

161. Scott v. Family Dollar Stores, Inc., 733 F.3d 105, 114 (4th Cir. 2013).

162. *See id.*

163. *See supra* Section IV, Part A.

164. *See Dukes*, 564 U.S. at 350.

165. Clegg, *supra* note 64, at 1118 (asserting that class action plaintiffs should have "a trial plan that anticipates the judge's questions and provides solid reasoning for the judge to rely upon when issuing a certification order").

requirement. Adopting this "totality of the circumstances test" would ensure that parties litigating employment discrimination class actions are not subjected to varying interpretations of the *Dukes* commonality standard.

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