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Duke-ing Out Pattern or Practice After Wal-Mart: The EEOC as Fist

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DUKE-ING OUT PATTERN OR PRACTICE AFTER WAL-MART: THE EEOC AS FIST

ANGELA D. MORRISON*

The Equal Employment Opportunity Commission (EEOC) has an essential role to play in bringing pattern or practice suits, and now is the time for it to assert its role. A pattern or practice claim, also called a systemic claim, is one in which an employer has regularly and purposefully discriminated against a class of employees based on their religion, race, sex, color, or national origin, such that the discrimination is the employer's standard operating procedure. In recent years, the Supreme Court has limited private litigants' access to the courts in ways that impact the ability of plaintiff classes to assert systemic claims of employment discrimination under Title VII of the Civil Rights Act of 1964. The culmination of the Court's limitation on private Title VII pattern or practice suits was the 2011 case, Wal-Mart Stores, Inc. v. Dukes. Post Wal-Mart, the private pattern or practice class appears to be dead, and with it the advantages of pattern or practice suits for litigants and the courts.

At the same time, lower courts have begun to limit the EEOC's ability to bring pattern or practice claims in its own name. Specifically, they have restricted the scope of the EEOC's class and limited remedies for an employer's pattern or practice of discrimination. What these decisions fail to recognize, however, is the EEOC's unique role and history in enforcing Title VII. As an institutional player and by design, the EEOC is best suited to litigate systemic violations of Title VII. Additionally, the EEOC's administrative process addresses many of the due process concerns of both employee-victims and employers. Preserving the EEOC's litigation authority—both in terms of the

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scope of employees for whom the EEOC can seek relief and the type of damages it can recover—is necessary to ensure the effective enforcement of Title VII.

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INTRODUCTION

The pattern or practice employment discrimination suit, rather than being knocked out by the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*,¹ has a natural champion in the United States Equal Employment Opportunity Commission (EEOC or “the Commission”). Many legal scholars have focused on the Supreme Court’s 2011 decision in *Wal-Mart* and its negative impact on the future of systemic employment discrimination claims.² In particular, commentators have viewed the Court’s decision in *Wal-Mart* as effectively ending the private pattern or practice claim.³ In the decade after Congress enacted the Civil Rights Act of 1991,⁴ which amended Title VII of the Civil Rights Act of 1964,⁵ there “ha[d] been a substantial increase in disparate treatment class actions” due to the availability of punitive and compensatory damages in intentional discrimination cases.⁶ But in the years immediately preceding *Wal-*

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

2. See, e.g., Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395, 395 (2011) (showing how, since *Wal-Mart*, “an individualistic model of organizational wrongdoing more broadly has led to under-theorizing, even mis-theorizing, of entity responsibility for systemic disparate treatment”); Melissa Hart, *Civil Rights and Systemic Wrongs*, 32 BERKELEY J. EMP. & LAB. L. 455, 455 (2011) (critiquing “the Court’s novel and careless interpretations of Title VII and explain[ing] the threat [*Wal-Mart*] poses to the continued viability of pattern and practice claims”); Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After Wal-Mart v. Dukes*, 32 BERKELEY J. EMP. & LAB. L. 477, 477 (2011) (“[A]ssess[ing] the future of systemic discrimination litigation” and “emphasiz[ing] the need to go beyond statistical analysis to create a narrative of discrimination”). Some commentators, however, disagree with this assessment. See, e.g., Deborah M. Weiss, *A Grudging Defense of Wal-Mart v. Dukes*, 24 YALE J.L. & FEMINISM 119, 119–20 (2012) (asserting that the Court’s decision in *Wal-Mart* does not mean the end of class certification for private pattern or practice claims so long as plaintiffs pay greater attention to merits issues at the certification stage).

3. See Richard Thompson Ford, *Beyond Good and Evil in Civil Rights Law: The Case of Wal-Mart v. Dukes*, 32 BERKELEY J. EMP. & LAB. L. 513, 517–18 (2011) (“The obvious lesson [from *Wal-Mart*] is that the future looks dim for employees bringing claims of discrimination against their employers”); Green, *supra* note 2, at 397 (noting that the *Wal-Mart* decision “called into question the future of systemic disparate treatment law”); Hart, *supra* note 2, at 459 (commenting that the decision possesses “considerable potential to make systemic disparate treatment claims next-to-impossible to certify”); Selmi, *supra* note 2, at 479 (observing that the case “raised serious questions about the continuing viability of large class actions”). This Article uses the term “private pattern or practice” to refer to pattern or practice claims brought by private individuals rather than a government agency such as the EEOC or U.S. Department of Justice (DOJ).

4. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

5. Pub. L. No. 88-352, tit. VII, §§ 701–16, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2012)).

6. Selmi, *supra* note 2, at 478–79; see also Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 701 (2003) (“The 1991 amendments authorizing compensatory and, in some circumstances, punitive damages . . . provide an incentive for privately-instituted class-wide

Mart, courts had already appeared more reluctant to certify class actions in employment discrimination cases.⁷ As others have pointed out, the Court's decision in *Wal-Mart* is just the latest manifestation of its discomfort with certifying employment discrimination claims that focus on general, widespread harms.⁸

At the same time, the EEOC's role in the enforcement of Title VII has received relatively little attention in legal scholarship.⁹ And,

litigation"); Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1254 (2003) (noting the "sharp increase in class action litigation" that resulted from the availability of damages beyond mere equitable relief).

7. See Suzette M. Malveaux, *Clearing Civil Procedural Hurdles in the Quest for Justice*, 37 OHIO N.U. L. REV. 621, 638 & n.99 (2011) (noting that only ten of thirty-three class certifications were granted in employment discrimination cases from 2008 to 2010 (citing Kenneth Jost, *Class Action Lawsuits*, CQ RESEARCHER, May 13, 2011, at 433, 448)).

8. See, e.g., Ford, *supra* note 3, at 513–14 (discussing the traditional view of civil rights as individualistic and arguing for a more collectivist view of employment discrimination law that seeks to address collective harms); Green, *supra* note 2, at 400–10 (criticizing the majority opinion in *Wal-Mart* for substantively changing the systemic disparate treatment theory to impose entity liability "only for individual moments of disparate treatment at high levels within the organization"); Hart, *supra* note 2, at 457 (arguing that "[t]he Court's rejection of statistical modeling for remedial determinations [in *Wal-Mart*] rests on a novel interpretation of Title VII that leads to a misapplication of the Rules Enabling Act"); Weiss, *supra* note 2, at 173 (stating that "[l]ong before *Wal-Mart*, courts had displayed some reluctance to certify structural class actions").

9. There are scholars who have given the EEOC's role in litigation some attention. See, e.g., Jason R. Bent, *Systemic Harassment*, 77 TENN. L. REV. 151, 193–201 (2009) [hereinafter Bent, *Systemic Harassment*] (arguing that the EEOC should focus on injunctive relief and not monetary damages based on what the author views as the differing purposes of section 706 and section 707 of Title VII and on efficiency concerns); Jason R. Bent, *The Telltale Sign of Discrimination: Probabilities, Information Asymmetries, and the Systemic Disparate Treatment Theory*, 44 U. MICH. J.L. REFORM 797, 800–01 (2011) [hereinafter Bent, *Telltale Sign of Discrimination*] (observing that the EEOC's focus on systemic cases through its Systemic Initiative calls for further clarification of the application of systemic disparate treatment theory in cases arising under the Age Discrimination in Employment Act and the Americans with Disabilities Act, in claims based on hostile work environment, and in claims brought by individual private plaintiffs); Green, *supra* note 2, at 453 (noting that some courts have limited the EEOC's ability to seek relief other than injunctive or declaratory relief in pattern or practice claims).

Others have looked at the EEOC's role as an agency. See, e.g., Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1937 (2006) (examining the lack of deference that the Supreme Court has afforded the EEOC in its interpretation of federal anti-discrimination laws); Nancy M. Modesitt, *Reinventing the EEOC*, 63 SMU L. REV. 1237, 1238–39 (2010) (asserting that the EEOC has failed to live up to its mission of reducing workplace discrimination through its administrative processing and arguing for a complete overhaul of the EEOC's organization and authority). Additionally, Professor Michael Selmi conducted an empirical study in the early 1990s and concluded that the EEOC's administrative processing of claims was an obstacle that resulted in "meritorious cases being dismissed for failure to comply with those procedures" and that the private bar was better equipped to handle employment discrimination claims. Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 64 (1996). See generally Michael Waterstone, *A New Vision of Public*

there has been no real analysis of the EEOC's role in bringing pattern or practice claims as opposed to private litigants' role in the wake of *Wal-Mart*, beyond noting that the EEOC is not required to seek class certification to bring a pattern or practice claim.¹⁰ However, the EEOC itself has noted that one of the impacts of *Wal-Mart* is that it "may result in some of those [1.5 million] claimants filing sex discrimination charges against the company with the EEOC."¹¹

This Article begins with the background of the Title VII pattern or practice claim before turning to the advantages plaintiffs gain by bringing a discrimination claim as a pattern or practice, which include: a more favorable method of allocating burdens of proof, the ability of pattern or practice claims to address unconscious or hidden biases, the efficiencies gained in litigating as a class, and the wider array of remedies. The Article next discusses the concerns courts and scholars have expressed regarding systemic class claims. Courts have been reluctant to certify classes alleging a pattern or practice based on procedural concerns. This reluctance arises from a perceived lack of due process for victims of discrimination and their employers and from a general view that Title VII vindicates an individual right, making it ill-suited for class litigation.

A careful examination of the EEOC, its litigation authority, and its administrative processing reveals that the concerns animating the Court's limitations on private pattern or practice litigation are minimal or nonexistent when it comes to EEOC litigation of such claims. Yet, just as the private pattern or practice claim has come under attack, so too has the EEOC's litigation authority. Thus, the Article concludes that courts limiting the EEOC's ability to bring pattern or practice claims misapprehend its role as a federal agency litigating in the public interest. The EEOC is a public actor and, as such, it resolves many of the concerns expressed about private pattern or practice claims. First, the EEOC is exempt from the

Enforcement, 92 MINN. L. REV. 434, 458–78 (2007) (arguing that the EEOC and DOJ should take on a greater role in enforcing the American with Disabilities Act's (ADA) anti-discrimination in employment and public accommodations provisions, and, in particular, that both agencies should focus on structural litigation of ADA claims).

10. See, e.g., Hart, *supra* note 2, at 475 ("One possibility [absent legislative reform] is a greater reliance on the enforcement efforts of the E.E.O.C. Given that pattern or practice claims pursued by the E.E.O.C. are not subject to the requirements of Rule 23, these actions may be a more effective tool for addressing structural discrimination than private litigation subject to the post-*Wal-Mart* interpretation of Rule 23.").

11. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, STRATEGIC PLAN FOR FISCAL YEARS 2012–2016, at 32 (2012) [hereinafter EEOC STRATEGIC PLAN FOR FY 2012–2016], available at http://www.eeoc.gov/eeoc/plan/upload/strategic_plan_12to16.pdf.

procedural barriers facing private litigants, such as class certification, statutes of limitations, and challenges based on mandatory arbitration clauses. Second, the EEOC's pre-suit administrative processing and political accountability protect employers' due process rights. Third, EEOC litigation results in enhanced due process protections for victim-employees and their employers. Fourth, as an institution, the EEOC possesses special authorization and expertise in litigating systemic claims. Finally, that the EEOC litigates in the public interest as the sole "master of its case" means it is not just vindicating an individual right, but also enforcing the public interest in ensuring workplaces are free from illegal discrimination. In light of the *Wal-Mart* decision and courts' concerns over certifying private class claims of systemic employment discrimination, the EEOC must throw its hat into the ring and champion the goals underlying Title VII.

I. BACKGROUND OF THE TITLE VII PATTERN OR PRACTICE CLAIM

Title VII of the Civil Rights Act of 1964 provides protection to workers in the United States from some forms of discrimination in employment.¹² Section 703 of Title VII makes it illegal for an employer to discriminate against an employee on the basis of the employee's "race, color, religion, sex, or national origin."¹³ Unlawful discrimination encompasses a range of actions that an employer may undertake based on an employee's protected status, including failure to hire, termination of employment, failure to promote, or altering an employee's terms and conditions of employment.¹⁴

Section 706 authorizes individuals to bring a suit alleging unlawful discrimination under Title VII based on a charge of discrimination filed with the EEOC.¹⁵ Individuals asserting a Title VII claim generally bring it using one of three theories: individual disparate treatment,¹⁶ systemic disparate treatment,¹⁷ or disparate

12. 42 U.S.C. §§ 2000e to 2000e-17 (2012).

13. *Id.* § 2000e-2(a)(1).

14. *Id.* § 2000e-2(a).

15. *Id.* § 2000e-5(f)(1). An aggrieved individual may file an action based on a charge of discrimination after (1) the EEOC dismisses the charge and issues a "right to sue" letter to the individual; (2) after the charge is outstanding 180 days and the individual requests and receives a "right to sue" letter; or (3) the EEOC finds cause, conciliation fails, and the EEOC issues the individual a "right to sue" letter. *Id.* The individual must file suit within ninety days of receiving the "right to sue" letter. *Id.*

16. There are "three fundamental elements necessary in every individual disparate treatment case: (1) the plaintiff suffers an adverse employment action, (2) the employment action is linked to the defendant, and (3) the defendant's action is motivated by a protected characteristic of the plaintiff." Michael J. Zimmer, *A Chain of Inferences Proving Discrimination*, 79 U. COLO. L. REV. 1243, 1244 (2008).

17. Pattern or practice claims are also called systemic claims, but they are really

impact.¹⁸ The dividing line between disparate treatment and disparate impact claims is that disparate impact does not require a showing of intent to discriminate.¹⁹

A pattern or practice claim is one type of systemic disparate treatment claim in which the plaintiff alleges that an employer “regularly and purposefully” engaged in discrimination against a class of employees protected by Title VII.²⁰ It requires the plaintiff to demonstrate by a preponderance of the evidence that the discriminatory policy is the employer’s “standard operating procedure—the regular rather than the unusual practice.”²¹ Senator Humphrey explained in his remarks supporting the passage of Title VII that “[a] pattern or practice [of discrimination] would be present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature,” meaning that “[t]here would be a pattern or practice . . . if a company repeatedly and regularly engaged in acts prohibited by the statute.”²² Moreover, private plaintiffs asserting a pattern or practice of discrimination under Title VII generally seek class-wide relief and, therefore, must seek certification under Federal Rule of Civil Procedure 23.²³

Initially, private plaintiffs and the government brought pattern or practice claims alleging discrimination in hiring, firing, promotion, and pay policies.²⁴ In the almost two and a half decades since the

one sub-type of systemic disparate treatment claims. *See, e.g.*, *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 (1977). Another sub-type of systemic disparate treatment claims is one in which the employer has a policy that on its face discriminates against a protected category. *See, e.g.*, *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 704 (1978) (addressing an employer’s formal policy that “required its female employees to make larger contributions to its pension fund than its male employees”).

18. 42 U.S.C. § 2000e-2(k). *See generally* Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What’s Griggs Still Good for? What Not?*, 42 BRANDEIS L.J. 597 (2004) (providing an overview of the disparate impact model and arguing for more robust use of disparate impact claims in employment discrimination litigation).

19. Shoben, *supra* note 18, at 601.

20. *Teamsters*, 431 U.S. at 335.

21. *Id.* at 336.

22. *Id.* at 336 n.16 (quoting 110 CONG. REC. 14270 (1964)).

23. *See, e.g.*, *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (stating that an individual, private litigant who wishes to bring suit seeking class-wide relief must obtain class certification); *Davis v. Coca-Cola Bottling Co.*, 516 F.3d 955, 967–69 (11th Cir. 2008) (holding that private plaintiffs must obtain class certification under Rule 23 to have standing to bring a pattern or practice claim under Title VII); *see also* 118 CONG. REC. 7168 (1972) (noting that “many Title VII claims are necessarily class action complaints”).

24. *See Bent, Systemic Harassment, supra* note 9, at 156–62 (tracing the development of systemic harassment theory and noting that early systemic theory developed in cases such as *Teamsters* where the context was “hiring, firing, and promotion decisions”).

Supreme Court recognized hostile work environment claims, including sexual harassment, as cognizable claims under Title VII, most district courts also have affirmed the ability of plaintiffs to assert pattern or practice hostile work environment claims.²⁵

II. ADVANTAGES OF THE PATTERN OR PRACTICE CLAIM

Pattern or practice claims present several advantages for plaintiffs over individual disparate treatment claims. First, plaintiffs enjoy a more favorable allocation of burdens of proof and stronger presumptions. Second, the pattern or practice claim is better suited to addressing unconscious or hidden biases. Third, it provides savings in litigation costs to plaintiffs, defendants, and courts. Fourth, courts have greater flexibility at the remedial phase once a pattern or practice has been demonstrated. Finally, plaintiffs can seek broader discovery and relief by asserting a pattern or practice claim rather than an individual disparate treatment claim.

A. *More Favorable Allocations of Proof and Presumptions*

The basic framework most plaintiffs use to demonstrate their individual discrimination claims under Title VII illustrates one of the advantages a pattern or practice claim provides to plaintiffs. The plain language of Title VII's disparate treatment enforcement provision, section 703(a)(1), requires an employee to demonstrate that she suffered an adverse employment action and that the employer took the action with discriminatory intent.²⁶ Employees face two difficulties in demonstrating causation. First, there is usually no direct evidence indicating causation, as an employer will rarely say "I am firing you because you are a woman and I don't like women."²⁷ Second, most employers proffer a reason for the employment action

25. See *id.* at 160–62 (discussing district court cases that have recognized a pattern or practice claim based on allegations of a hostile work environment directed towards female employees).

26. 42 U.S.C. § 2000e-2(a)(1) (2012); see also Zimmer, *supra* note 16, at 1244 ("There now appear to be three fundamental elements necessary in every individual disparate treatment case: (1) the plaintiff suffers an adverse employment action, (2) the employment action is linked to the defendant, and (3) the defendant's action is motivated by a protected characteristic of the plaintiff.").

27. See Ford, *supra* note 3, at 520 ("Direct evidence of discriminatory intent is exceedingly rare. Most individual cases are proven by indirect or circumstantial evidence."); Ann C. McGinley, [j]Viva la Evolución!: *Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 448 (2000) ("[B]ecause of employers' increased sophistication today there are few cases where the employer directly admits his illegal motive for the adverse employment decision."); Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1641 (2011) ("What the putative plaintiff will rarely 'know' is the employer's intent in taking the challenged action.").

that does not violate Title VII.²⁸ Without direct evidence of discriminatory intent or in the face of an employer pointing to a non-discriminatory reason, the employee must demonstrate her case by creating a chain of inferences that allows the fact-finder to determine that the employer was motivated by the employee's protected status, or that the employer's reason is pretext for discrimination.²⁹

In 1973, in *McDonnell Douglas Corp. v. Green*,³⁰ the Supreme Court articulated a framework to address "the proper order and nature of proof in actions under Title VII" in cases where the employer put into evidence a non-discriminatory reason for the employment action.³¹ In *McDonnell Douglas*, an African American employee was laid off from his mechanic position and, believing that the layoff was racially discriminatory, engaged in a number of protests against the company.³² Subsequently, the company sought to hire qualified mechanics, and the employee applied for reinstatement.³³ The employer rejected the application and stated it was because of the employee's participation in the protests.³⁴ The district court dismissed the employee's Title VII claim and accepted the company's reason for rejection.³⁵

The Supreme Court determined that the lower court's dismissal of the claim, without allowing the employee to show that McDonnell Douglas's stated reason was pretext for a racially discriminatory motive, failed to apply the correct rules as to burden of proof and how the burdens should be allocated.³⁶ To address the issue, the Court set forth a framework of proof and allocation of burdens that plaintiffs may use to demonstrate their Title VII disparate treatment claims. The plaintiff "carr[ies] the initial burden . . . of establishing a

28. See Ford, *supra* note 3, at 517 (noting that the employer must respond to a well-pleaded employment discrimination claim by offering "a non-discriminatory reason for rejecting the plaintiff").

29. McGinley, *supra* note 27, at 448 (observing that, to demonstrate discriminatory intent, plaintiffs "have resorted to proving discrimination through indirect evidence, using the proof methodologies established in *McDonnell Douglas Corp. v. Green*"); see also Zimmer, *supra* note 16, at 1251, 1274 (discussing the different methods of demonstrating inferences using the *McDonnell Douglas* framework).

30. 411 U.S. 792 (1973).

31. *Id.* at 793-94.

32. *Id.* at 794-95. For example, the employee, Percy Green, engaged in a number of protests with Congress on Racial Equality, a prominent civil rights organization, against McDonnell Douglas Corporation, including blocking road access to the company (stall-in) and perhaps participating in a lock-in. *Id.*

33. *Id.* at 796.

34. *Id.*

35. *Id.* at 797.

36. *Id.* at 801.

prima facie case of racial discrimination.”³⁷ A plaintiff may meet this burden by demonstrating that she belonged to a protected class, that she was qualified for the position, that despite her qualifications she was rejected for the position, and that “the position remained open and the employer continued to seek applicants from persons of [plaintiff]’s qualifications.”³⁸ If the plaintiff meets her burden, “[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”³⁹ If the employer meets its burden of production, the plaintiff “must . . . be afforded a fair opportunity to show that [the employer’s] stated reason for [the plaintiff’s] rejection was in fact pretext.”⁴⁰

The *McDonnell Douglas* burden-shifting framework remains the basic analytical framework by which individual plaintiffs demonstrate an inference that the employer’s actions were discriminatory.⁴¹ At all times the ultimate burden of persuasion remains with the plaintiff.⁴² “[T]he focus of *McDonnell Douglas* cases is on the third step of the analysis, where the plaintiff is required to carry her burden of proving that the defendant’s asserted reason for taking the adverse employment action was a pretext for discrimination.”⁴³ In an individual case, in which a plaintiff must rely on inferences to demonstrate discrimination, not only does the plaintiff bear the burden of production and persuasion as to her prima facie case, but she also most likely will have to produce additional evidence to demonstrate pretext, for which she continues to bear the burden of production and persuasion.⁴⁴

In a pattern or practice claim, however, once a class of employees have demonstrated the prima facie case of discrimination, the burden of production and persuasion shift to the employer.⁴⁵ The

37. *Id.* at 802.

38. *Id.*

39. *Id.* at 803.

40. *Id.* at 804.

41. See Sullivan, *supra* note 27, at 1651 (concluding that “the lower courts are familiar with *McDonnell Douglas*, and [that] any plaintiff who can plead such a prima facie case . . . would be well advised to do so since such a pleading should make the claim plausible”); Zimmer, *supra* note 16, at 1281–89 (describing the application of the *McDonnell Douglas* framework to various claims of discrimination in different factual scenarios).

42. See Sullivan, *supra* note 27, at 1652–53 (citing *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981); *McDonnell Douglas*, 411 U.S. at 802, 804).

43. Zimmer, *supra* note 16, at 1249.

44. *Id.* at 1271–72.

45. Professor Bent has noted, however, that the Supreme Court has never explicitly stated that the burdens of production and persuasion shift to the employer in a pattern or practice claim. Bent, *Telltale Sign of Discrimination*, *supra* note 9, at 816. Instead, “[c]ourts and commentators have generally agreed . . . that the rebuttable presumption (or inference) of the required discriminatory intent . . .

Supreme Court in *International Brotherhood of Teamsters v. United States*⁴⁶ articulated the model under which pattern or practice suits could proceed.⁴⁷ The plaintiff initially must show that the employer (or a group of employers) has engaged in unlawful employment discrimination as “a regular procedure or policy.”⁴⁸ This initial burden does not mean that the plaintiff must “offer evidence that each person for whom it will ultimately seek relief was a victim of the employer’s discriminatory policy.”⁴⁹ Instead, the plaintiff need only prove a prima facie case that a pattern or practice exists, often through statistical evidence.⁵⁰ Once the plaintiff meets its burden of demonstrating sufficient evidence to support the prima facie case, the burden of proof shifts to the employer to show that the plaintiff’s prima facie case “is either inaccurate or insignificant.”⁵¹ If the employer cannot meet its burden of proof to rebut the prima facie case, then the court may determine that the pattern or practice exists without further proof submitted by the plaintiff.⁵²

One of the arguments the employer in *Teamsters* made to the Supreme Court was that it had presented evidence that rebutted the government’s statistical proof.⁵³ The Court characterized the company’s evidence as a “showing of recent changes in hiring and promotion policies, consist[ing] mainly of general statements that it hired only the best qualified applicants.”⁵⁴ However, it rejected this evidence because “affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion.”⁵⁵

This standard differs from the level of evidence that an employer must proffer to overcome the plaintiff’s prima facie case in an individual disparate treatment case under *McDonnell Douglas*. Under the *McDonnell Douglas* framework, all an employer must do in response to the employee’s prima facie case is articulate a legitimate non-discriminatory reason capable of being put into evidence that is specific enough to support its burden of production.⁵⁶ Under

amounts to a shift in the burden of persuasion, not just the burden of production.”
Id. at 816–17.

46. 431 U.S. 324 (1977).

47. *Id.* at 360.

48. *Id.*

49. *Id.*

50. *Id.* at 339, 360.

51. *Id.* at 360.

52. *Id.* at 361.

53. *Id.* at 342.

54. *Id.* at 342 n.24.

55. *Id.* at 343 n.24 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

56. *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254–55 (1981).

Teamsters, however, most courts have found that a claim by the employer that it hired only qualified applicants is sufficient to meet the employer's burden in overcoming the plaintiff's prima facie case.⁵⁷

If the plaintiff in a *Teamsters* pattern or practice claim also seeks individual relief on behalf of the victims of the illegal pattern or practice, then "a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief."⁵⁸ Because the plaintiff has already supported a finding that the employer did engage in a pattern or practice of unlawful discrimination, the individual victims of the pattern or practice are entitled to a presumption that any negative employment decision was a result of the illegal pattern or practice.⁵⁹ The employer must then demonstrate that the employee "was denied an employment opportunity for lawful reasons."⁶⁰ This provides employees the opportunity to "claim particular relief due [to] them" and employers an opportunity "to rebut a prima facie case in individual instances."⁶¹ The *Teamsters* method for shifting burdens of proof and the presumptions it affords a plaintiff, therefore, makes bringing a pattern or practice claim more advantageous than an individual disparate treatment claim.

B. *Best Suited To Address Unconscious or Hidden Biases*

Another advantage of the pattern or practice framework is its ability to address unconscious or hidden biases, such as the problem of the "subtle sexist" or "benign bigot." Patterns of discrimination that might have gone unchallenged because they are not recognized

57. See, e.g., *Provenzano v. LCI Holdings, Inc.*, 663 F.3d 806, 815 (6th Cir. 2011) (supervisor's deposition stating she promoted someone who was more qualified); *Chapman v. Al Transp.*, 229 F.3d 1012, 1028 (11th Cir. 2000) (en banc) (decision maker's statement that plaintiff exhibited poor interview skills and instability in work history); *Driver v. Ill. Cent. Gulf R.R.*, No. 87 C 6214, 1989 WL 8577, at *3 (N.D. Ill. Jan. 30, 1989) (employer's stated desire to hire better and more qualified employees); cf. *Anaeme v. Diagnostek, Inc.*, 164 F.3d 1275, 1279–80 (10th Cir. 1999) (employer's statements that it had no record of plaintiff applying for the position).

58. *Teamsters*, 431 U.S. at 361.

59. *Id.* at 362.

60. *Id.* at 362 (citing *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 773 n.32 (1976)).

61. *Marshall v. Kirkland*, 602 F.2d 1282, 1295 (8th Cir. 1979) (citing *Williams v. Anderson*, 562 F.2d 1081, 1081 (8th Cir. 1977); *Clark v. Mann*, 562 F.2d 1104, 1117 (8th Cir. 1977)). The Eight Circuit has also reasoned that individual determinations of backpay rather than class-wide backpay relief was the better course "because it will best compensate the victims of discrimination without unfairly penalizing the employer." *Id.* at 1296 n.10 (quoting *Stewart v. Gen. Motors Corp.*, 542 F.2d 445, 452 (7th Cir. 1976)).

at the individual level become apparent once viewed in the aggregate. Most workplaces will not have an explicit policy of discrimination.⁶² Instead, just as *Wal-Mart* did, many corporations give broad discretion to individual supervisors or managers in making employment decisions.⁶³ Such discretion, as the plaintiffs in *Wal-Mart* argued, opens the door for individual managers or hirers to act in a discriminatory manner.⁶⁴ It can occur even where an individual manager or supervisor implements policies that she believes to be non-discriminatory but has unconscious biases that influence her decisions.⁶⁵ Individual instances of intentional discrimination are difficult to prove not only in the absence of an “honest racist,”⁶⁶ which instead requires the plaintiff to build her case on a chain of inferences,⁶⁷ but they also are “often difficult to discern on an individual basis—[discrimination] occurs subtly in day-to-day interactions . . .—and therefore can frequently only be identified in the aggregate” through a pattern or practice claim.⁶⁸

62. See Ford, *supra* note 3, at 522 (arguing that “in this day and age there almost never is” an explicit policy of discrimination).

63. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2547 (2011) (noting that local managers exercise “broad discretion” in making pay and promotion decisions).

64. *Id.* at 2548; see also Ford, *supra* note 3, at 523 (“Indeed, most cases of individual discrimination do not involve discrimination by upper management or a company policy that encourages discriminatory conduct—they involve discrimination by lower managers which is attributed to the employer as an entity.”).

65. Professor Ford uses this unconscious bias example to demonstrate how the employer is still liable for the discrimination because the employer “did not try hard enough to prevent discrimination.” Ford, *supra* note 3, at 522. For an overview of the operation of unconscious biases in Title VII cases, see McGinley, *supra* note 27.

66. The “honest racist” refers to the supervisor in *Slack v. Havens*, who admitted he told a female African American employee that “[c]olored folks are hired to clean because they clean better” and that “colored folks should stay in their place.” *Slack v. Havens*, No. 72-59-GT, 1973 WL 339, at *2, *5 (S.D. Cal. May 15, 1973), *aff’d as modified*, 522 F.2d 1091 (9th Cir. 1975). The term was coined by the authors of *Cases and Materials on Employment Discrimination*. MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 5 (7th ed. 2008).

67. See *supra* note 29 and accompanying text (discussing the employee’s burden in the absence of direct evidence of discriminatory intent).

68. Green, *supra* note 2, at 433. This is particularly true in hostile work environment claims, which require a showing that the harassment is severe or pervasive. As one example, the court in *EEOC v. Scolari Warehouse Markets, Inc.* noted that although one of the individual claimants would not be able to assert an individual claim of sexual harassment, she still would be able to be part of a pattern or practice claim:

[A] “great leap” would be necessary to conclude that individuals that may not maintain individual claims also may not recover as part of a pattern-or-practice of sexual harassment. The purpose of a pattern-or-practice claim is not to identify isolated incidents of discrimination, but to identify a pattern of discrimination that, over time, permeates the workplace, resulting in widespread discrimination.

488 F. Supp. 2d 1117, 1147 (D. Nev. 2007) (citation omitted).

It is not only courts that may have difficulty recognizing subtle forms of intentional discrimination in isolation. Looking at individual instances of discrimination on an incident-by-incident basis makes it less likely that workers who have been affected will come forward because “individuals are particularly reluctant to see themselves as victims of discrimination when incidences are viewed in isolation.”⁶⁹ Bringing a pattern or practice claim also can put other class members on notice that adverse actions taken against them may have been the result of illegal discrimination.⁷⁰ Additionally, not every person affected by the illegal pattern or practice would need to be aware of it to be included in the class due to the way that “opt out” notice in class actions works.⁷¹ Accordingly, addressing discrimination through a pattern or practice claim can result in more victims of systemic discrimination coming forward in the first instance.

C. *Efficiencies in Litigation*

Litigation is expensive.⁷² Litigating a case as a class action can provide savings to defendants, plaintiffs, and courts.⁷³ For plaintiffs,

69. Green, *supra* note 2, at 433. See generally Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275 (2012) (giving an overview of studies that have shown the reluctance of individuals to attribute treatment to discrimination and arguing that much of this is due to American beliefs). Eyer credits this reluctance to persistent beliefs in meritocracy and unwillingness to believe discrimination is widespread. *Id.* at 1278–79.

70. Cf. Malveaux, *supra* note 7, at 631 (noting that evidence in a class action can “put[] others on notice of potential deceptive practices of which they may not have been aware”); Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87, 119 (2012) (explaining that class actions permit plaintiffs to “represent other similarly situated persons who do not know they have been harmed, and who do not even know, at least initially, that a class action has been filed on their behalf”).

71. Sternlight, *supra* note 70, at 120.

72. See RONALD L. BURDGE, UNITED STATES CONSUMER LAW ATTORNEY FEE SURVEY REPORT 2010–2011, at 11 (2011), available at www.nclc.org/images/pdf/litigation/fee-survey-report-2010-2011.pdf (reviewing consumer law attorneys’ fees from 2007 to 2011). In 2010, the national average for a consumer law attorney’s hourly rate was \$304 and the national median was \$300. *Id.*

73. Federal Rule of Civil Procedure 23 allows federal courts to certify a group of plaintiffs as representative of a class of potential plaintiffs. FED. R. CIV. P. 23(a). The prerequisites to any class action are (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *Id.* Numerosity means that a “class is so numerous that joinder of all members is impracticable.” FED. R. CIV. P. 23(a)(1). A class meets the commonality requirement if the class presents “questions of law or fact common to the class.” FED. R. CIV. P. 23(a)(2); see *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977). Typicality requires that the class representative be a member of the class at the time the district court certifies the class. FED. R. CIV. P. 23(a)(3); *Sosna v. Iowa*, 419 U.S. 393, 403 (1975). Finally, the class representatives must “fairly and adequately protect the interests of the class.” FED. R. CIV. P. 24(a)(4). Once a class meets these preliminary requirements, courts

bringing an action together as a class can reduce the information costs of bringing suit.⁷⁴ Instead of hundreds or thousands of individual lawsuits all seeking similar information from the defendant in discovery, a class only needs to depose each witness once, pay once for counsel to review deposition transcripts and issue discovery requests, and can pay the associated costs jointly.⁷⁵ It also may be the only way for many employees with smaller claims and limited resources to challenge systemic discrimination.⁷⁶

Bringing an employment claim collectively rather than individually also results in better outcomes for the plaintiffs.⁷⁷ Such cases “are less likely to be dismissed and less likely to lose on motion for summary judgment” than individual lawsuits.⁷⁸ Plaintiffs in a collective action also win at trial more often than individual plaintiffs.⁷⁹

Litigation likewise has emotional costs in terms of “peace of mind.”⁸⁰ Moreover, “[i]n employment cases, individuals who choose to bring lawsuits against their employer may face retaliation.”⁸¹ When

look to whether the class is maintainable under Federal Rule of Civil Procedure 23(b). The Rule sets forth four general types of classes: (1) the incompatible standards class; (2) the limited funds class; (3) the injunctive or declaratory relief class; and (4) the superiority or predominance class. FED. R. CIV. P. 23(b).

74. See Bent, *Telltale Sign of Discrimination*, *supra* note 9, at 827 (“The parties’ relative information costs are the ‘costs of gathering and presenting evidence on the contested issue.’” (quoting Bruce L. Hay & Kathryn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective*, 26 J. LEGAL STUD. 413, 419 (1997))); see also Malveaux, *supra* note 7, at 631 (“[T]he class action enables individuals to pool their resources, which allows them to share litigation risks and burdens, and more easily retain counsel for small value claims.”).

75. In a study commissioned by the Federal Judicial Center about attorney views of the costs of federal civil litigation, each deposition drove up the cost of litigation by 5%, and attorneys reported “that in their practice the volume of discovery is a primary factor driving the cost of litigation.” THOMAS E. WILLGING & EMERY G. LEE III, IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 14 (2010), [http://www.fjc.gov/public/pdf.nsf/lookup/costciv3.pdf/\\$file/costciv3.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv3.pdf/$file/costciv3.pdf).

76. See Malveaux, *supra* note 7, at 621 (noting the importance of this procedural tool for people with little resources) see also Sternlight, *supra* note 70, at 88 (highlighting how arbitration clauses enhance this problem).

77. See Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 189 (2010) (analyzing employment discrimination lawsuits filed in federal court from 1988 through 2003).

78. *Id.* The researchers in the study defined “collective legal mobilization” as “cases involving multiple plaintiffs, certified class actions, and representation by a public-interest law firm or the EEOC.” *Id.*

79. *Id.*

80. Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 723 (2012).

81. *Id.*; see also Malveaux, *supra* note 7, at 631 (arguing that “class action[s] create[] a more level playing field between an employer and employee” by protecting individual employees from retaliation). The 31,208 charges of retaliation received by the EEOC in the last fiscal year (FY) demonstrate that this fear is not unfounded. See *Charge Statistics FY 1997 Through FY 2012*, U.S. EQUAL EMP.

representative plaintiffs in a pattern or practice claim take on these emotional costs, the absent class members benefit. The class action thereby can provide relief to individuals who may have otherwise been unwilling to take on the emotional cost or too afraid to step forward.⁸²

Defendants, too, can experience cost savings by litigating against a class rather than against several individual plaintiffs.⁸³ Not only can defendant employers take advantage of the efficiency savings provided by litigating all claims in one action, they can settle the claims (“on the cheap of course”) often in concert with “friendly class counsel, and thereby enter into a cozy settlement that eradicates the potential claims of individual claimants.”⁸⁴

Furthermore, several features of Federal Rule of Civil Procedure 23(b)(2) class benefit both plaintiffs and defendants.⁸⁵ The court may certify a class under Rule 23(b)(2) if the party opposing the class has acted in a way that makes “final injunctive or corresponding declaratory relief . . . appropriate.”⁸⁶ The court is not required to give the best notice possible to class members but must only make provisions for “appropriate” notice, which can be done at the court’s discretion.⁸⁷ This is in contrast to the notice requirements for class

OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Oct. 12, 2013) (documenting 31,208 claims of retaliation under Title VII, which make up 31.4% of all charges the EEOC received in FY 2012). Moreover, a growing segment of our workforce has become increasingly vulnerable to retaliation from employers due to the workers’ or their family members’ immigration status and the federal government’s increased focus on immigration enforcement. See Leticia M. Saucedo, *Immigration Law Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Workplace*, 38 FORDHAM URB. L.J. 303, 310 (2010) (explaining that fears of retaliation or detection by U.S. Immigration and Customs Enforcement will make workers reluctant to exercise their employment rights); see also Kati L. Griffith, *Discovering “Immigration” Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 YALE L. & POL’Y REV. 389, 419–23 (2011) (discussing the impact of state and local immigration regulation on the enforcement of Title VII); Leticia M. Saucedo, *A New “U”: Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 931 (2008) (discussing how employers use workers’ immigration status to control noncitizen employees and prevent them from complaining about workplace conditions).

82. See Sternlight, *supra* note 80, at 723 (arguing that many class members will avoid the costs of representation and emotional distress and that few consumers would bring individual claims).

83. See *id.* at 719 n.82 (asserting that some companies occasionally prefer being sued in class actions instead of litigating many individual claims).

84. *Id.* (citing Maria Glover & Charles Silver, *Zombie Class Actions*, SCOTUSBLOG (Sept. 8, 2011, 10:16 AM), <http://www.scotusblog.com/2011/09/zombie-class-actions>).

85. See *infra* Part III.A.2 for an overview of the Rule 23(b)(2) class in the context of private pattern or practice class actions.

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

87. FED. R. CIV. P. 23(c)(2)(A); see also *Quern v. Jordan*, 440 U.S. 332, 335 n.3 (1979) (stating that no notice is required in a Rule 23(b)(2) action, but that Rule 23(d)(2) allows the court to use its discretionary powers to require notice).

certification under Rule 23(b)(3) and (c)(2), which require “the best notice . . . practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.”⁸⁸

Additionally, the class is mandatory.⁸⁹ This means there is no right for class members to opt out of the class, and the judgment or decree binds the entire class.⁹⁰ The Rule states “[w]hether or not favorable to the class, the judgment in a class action . . . under Rule 23(b)(1) or (b)(2), [must] include and describe those whom the court finds to be class members.”⁹¹ Again, this differs from the effects of a class certification under 23(b)(3) which is a voluntary class because class members may opt out and the judgment is only binding on those members who do not opt out.⁹²

For representative plaintiffs and their attorneys, the lack of a mandatory notice requirement to absent class members presents significant time and cost savings.⁹³ It also lessens the burden (and associated costs) of class certification because absent class members have no right to opt out.⁹⁴ The preclusive effect also increases the

88. FED. R. CIV. P. 23(b)(3); FED. R. CIV. P. 23(c)(2).

89. FED. R. CIV. P. 23(c)(3).

90. *Id.*; see FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment (“The judgment [embraces the class] whether it is favorable or unfavorable to the class.”); see also *In re A.H. Robins Co.*, 880 F.2d 709, 728 (4th Cir. 1989) (indicating that when a class is certified under Rule 23(b)(2), “all party members become mandatory class members without any opt-out rights”), *abrogated on other grounds by Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Holmes v. Cont’l Can Co.*, 706 F.2d 1144, 1153 (11th Cir. 1983) (asserting that absent class members have no right to opt out); *LaChappelle v. Owens-Ill., Inc.*, 513 F.2d 286, 288 & n.7 (5th Cir. 1975) (per curiam) (finding that each person who is considered a class member and does not or cannot opt out is bound by the judgment); *Airline Stewards & Stewardesses Ass’n Local 550 v. Am. Airlines, Inc.*, 490 F.2d 636, 642 (7th Cir. 1973) (“Unless a class action is maintained under Rule 23(b)(3), no right to opt out exists. All members of the class are bound by the judgment.”).

91. FED. R. CIV. P. 23(c)(3); see also *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) (“There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation.”).

92. FED. R. CIV. P. 23(c)(3).

93. The Rule states only that “the court may direct appropriate notice to the class.” FED. R. CIV. P. 23(c)(2)(A). The Advisory Committee notes to the 2003 amendment state that “[t]he authority to direct notice to class members in a . . . (b)(2) class action should be exercised with care.” FED. R. CIV. P. 23 advisory committee’s note to 2003 amendment. The Advisory Committee further indicated that “[t]here is no right to request exclusion from a . . . (b)(2) class.” *Id.*

94. See Thomas R. Grande, *Innovative Class Action Techniques—The Use of Rule 23(b)(2) in Consumer Class Actions*, 14 LOY. CONSUMER L. REV. 251, 253–54 (2002) (indicating that class members have no right to obtain personal notice and no right to opt out, which can advantage plaintiffs because notification costs can make claims not worth pursuing); see also Stephen J. Safranek, *Do Class Action Plaintiffs Lose Their Constitutional Rights?*, 1996 WIS. L. REV. 263, 271 (“[T]he lawyers representing the class prefer certification without a right to opt out or notice because the expense of

appeal of class certification under Rule 23(b)(2) to representative plaintiffs and their attorneys because defendants likely will be more willing to settle and thus save the time and money that the plaintiffs and their attorneys would have expended on a trial.⁹⁵

The preclusive effect of the Rule 23(b)(2) class is also desirable to defendants. Defendants have the reassurance that no matter the outcome of the adjudication, the judgment or decree will eliminate future suits based on the same claim.⁹⁶ It is also appealing to defendants because defense of the legality of employment actions requires only one lawsuit.⁹⁷ Finally, a pattern or practice claim provides efficiencies to the courts because instead of resolving the employer's liability for systemic discrimination case-by-case, through each affected individual bringing her own suit, a court can resolve the employer's liability in one suit.⁹⁸

D. *Efficiencies and Flexibility at the Remedial Phase*

Since *Teamsters*, courts have been able to adapt its two-phase approach to suit the specific factual and procedural circumstances of various cases.⁹⁹ Depending on the case, courts have used individual hearings to determine damages, or they have used statistical modeling to determine the appropriate backpay damages once the plaintiffs have demonstrated the pattern or practice.¹⁰⁰ Statistical modeling can lead to greater efficiency and accuracy in assessing remedies, as opposed to taking an individualized approach to

notification to class members is absent, class members cannot complain, and their presence fattens the recovery.”).

95. See Safranek, *supra* note 94, at 271 (noting that defendants are more willing to settle a class action under Rule 23(b)(2) “because all of the possible parties will be bound by the judgment”). See discussion *infra* notes 164–169 regarding concerns about the fairness of class action settlements to plaintiffs and defendants.

96. Safranek, *supra* note 94, at 271; see Grande, *supra* note 94, at 254 (concluding that defendants are assured that res judicata will bar all future plaintiffs from bringing the same claims).

97. See Safranek, *supra* note 94, at 271 (explaining that the appearance of institutional efficiency is ensured because only one case is required to settle the claims).

98. Malveaux, *supra* note 7, at 631–32. See *infra* text accompanying notes 186–189 for a discussion on the impact of the *Wal-Mart* decision on the ability of lower courts to resolve individual monetary damages, such as backpay, on a class-wide basis.

99. Hart, *supra* note 2, at 465.

100. *Id.* at 470. However, as Professor Hart discusses in her article, the *Wal-Mart* decision disapproved of statistical modeling as a method of determining backpay. See *infra* text accompanying notes 171–172 (summarizing Professor Hart’s argument that the Court’s approach in *Wal-Mart* is inconsistent with the flexible approach encouraged in *Teamsters*).

remedies for the types of systemic wrongs the pattern or practice claim addresses.¹⁰¹

Indeed, as Professor Melissa Hart has explained, in many circumstances a statistical modeling approach may be the only way to accurately capture the type of discrimination that occurs in modern workplaces “like Walmart, which are characterized by ‘a large low wage workforce, high turnover, a decentralized management structure’ and highly subjective criteria for employee evaluation.”¹⁰² Assessing damages through statistical modeling rather than through individual accounts of harm means that an employer is liable not only for damages to those plaintiffs who come forward and testify, but also for damages to everyone affected by the discriminatory pattern or practice.¹⁰³ This more accurately captures the systemic nature of the harm because it focuses on the “[employer’s] liability for creating the discriminatory structural and cultural context of the particular workplace.”¹⁰⁴

Statistical modeling to assess damages ensures that individuals harmed by systemic discrimination receive some sort of recovery and an employer that engages in systemic discrimination will be deterred from future discrimination.¹⁰⁵ Moreover, other employers will be discouraged from engaging in systemic discrimination lest they face a pattern or practice claim, resulting in fewer cases of systemic discrimination.¹⁰⁶

E. Broader Discovery and Relief

Because a pattern or practice claim involves systemic, company-wide discrimination, plaintiffs are granted broader discovery and are able to obtain broader relief. For plaintiffs who allege pattern or practice claims, the scope of discovery is much broader, even prior to achieving class certification, and can include company-wide discovery.¹⁰⁷ On the other hand, in an individual disparate treatment

101. Hart, *supra* note 2, at 469–70 (explaining that statistical models are sometimes more accurate in assessing the appropriate remedy than individual hearings).

102. *Id.* at 468–69 (footnote omitted) (quoting Ford, *supra* note 3, at 516).

103. *Id.* at 469–70.

104. *Id.* at 469.

105. See Malveaux, *supra* note 7, at 631–32 (“[P]otential class-wide liability encourages companies to voluntarily comply with the law and deters future misconduct.”).

106. *Id.* at 631.

107. See, e.g., *Duke v. Univ. of Tex. at El Paso*, 729 F.2d 994, 995–96 (5th Cir. 1984) (reversing the trial court’s decision to limit discovery of university-wide promotion and pay records because the limitations “prejudiced [the plaintiff’s] effort to obtain class certification”); *Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294, 306–07 (S.D.N.Y. 2012) (dismissing efforts to limit discovery production to a particular

case, courts often limit the plaintiff's discovery to her immediate department or supervisor because only discovery regarding individuals similarly situated to the plaintiff is relevant.¹⁰⁸ More extensive discovery is advantageous because a pattern manifested through company-wide evidence, such as statements, documents, and statistics, can show the systemic nature of discrimination in ways that individual claims looking at isolated instances of discrimination cannot.¹⁰⁹

Plaintiffs who prove a pattern or practice claim are able to seek more expansive injunctive and declaratory relief than individual plaintiffs.¹¹⁰ Individuals can recover "backpay for up to two years preceding the filing of the charge"¹¹¹ and compensatory and punitive damages.¹¹² The prevailing party also may recover "a reasonable attorney's fee" and costs.¹¹³ The statute additionally provides for the court to issue injunctive or other equitable relief addressing the illegal employment practice alleged in the complaint:

[T]he court may enjoin the [employer] from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to,

division of the company because it would impair plaintiffs' establishment of the class certification prerequisites); *see also* FED. R. CIV. P. 26 (enumerating the general provisions governing discovery).

108. *See, e.g.*, *Brunker v. Schwan's Home Serv., Inc.*, 583 F.3d 1004, 1009–10 (7th Cir. 2009) (concluding, despite the plaintiff's assertion that disciplinary records of employees with different supervisors could reveal a pattern of discrimination, that "the magistrate judge properly found irrelevant the discovery requests regarding discrimination from supervisors who were not involved with [the plaintiff's] termination"); *Rubinstein v. Adm'rs of the Tulane Educ. Fund*, 218 F.3d 392, 398 (5th Cir. 2000) (limiting plaintiff's discovery to his immediate department); *Tumbling v. Merced Irrigation Dist.*, 262 F.R.D. 509, 517 (E.D. Cal. 2009) (denying discovery of co-worker's personnel file because co-worker was not linked to any discrimination against the defendant); *Palmer v. N.Y. State Office of Court Admin.*, Nos. 5:00-CV-01110 (FJS/GHL), 6:07-CV-0702 (FJS/GHL), 2009 WL 1118271, at *1–2 (N.D.N.Y. Apr. 27, 2009) (denying plaintiff's discovery request for the employment files of other employees with her job position as a "fishing expedition" because she had not demonstrated how they were similarly situated to her).

109. *See Malveaux, supra* note 7 at 631 (asserting that employers can typically mask discrimination more easily when addressing individual claims than they can when defending claims on a class-wide basis).

110. *See id.* (indicating that a class action claim allows plaintiffs to share risks and resources and that the broader scope of discovery can potentially reveal company-wide trends and other evidence of deceptive practices, allowing for notice to others, a more tailored remedy, and a more even playing field between plaintiffs and defendant in litigation).

111. 42 U.S.C. § 2000e-5(e)(3)(B) (2012).

112. *Id.* § 1981a(a)(1). Section 1981a(b)(3) limits the recovery amount of compensatory and punitive damages to between \$50,000 to \$300,000 for each individual depending on the number of employees the employer has. *Id.* § 1981a(b)(3).

113. *Id.* § 2000e-5(k).

reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.¹¹⁴

Thus, individual plaintiffs can recover money damages, such as backpay, future pay, compensatory damages, and punitive damages, in addition to appropriate equitable relief such as reinstatement.

A class of plaintiffs who win a pattern or practice claim can not only recover damages and seek equitable relief for individuals affected by the pattern or practice, but can also obtain wide-ranging relief that addresses a company-wide practice.¹¹⁵ In contrast, courts have been “unwilling to implement organizational solutions for individual discriminatory decisions.”¹¹⁶ As a result, pattern or practice claims remain the best option for seeking broader remedial measures that address systemic discrimination. All of these advantages, taken together, demonstrate the reasons why plaintiffs bring pattern or practice claims and how pattern or practice claims operate to address systemic discrimination. Despite these benefits, the pattern or practice claim has come under attack by courts and scholars for a variety of reasons. And, the *Wal-Mart* decision may be the final knock-out punch that eliminates private litigants’ ability to *Duke*-out these claims in court.

III. TITLE VII PATTERN OR PRACTICE SUITS DOWN FOR THE COUNT

Individuals bring their systemic, intentional discrimination claims—both individual and class-wide—under section 706(f)(1) of Title VII.¹¹⁷ To bring a pattern or practice claim, private litigants must first obtain class certification, a litigation vehicle that was significantly limited both procedurally and substantively in Title VII claims by the Supreme Court’s *Wal-Mart* decision.¹¹⁸ The three

114. *Id.* § 2000e-5(g)(1).

115. *See generally* Green, *supra* note 6, at 678 (“The use of the class action device . . . encourages development of solutions aimed at systemic reform.”).

116. *Id.* at 678 & n.79 (citing *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 766–67 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999); George Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688, 688 (1980)).

117. 42 U.S.C. § 2000e-5(f)(1) (enabling aggrieved persons to bring a civil action against respondents named in an EEOC proceeding within ninety days after the EEOC claim is dismissed).

118. 131 S. Ct. 2541, 2550–61 (2011). Other recent cases also may limit court access in significant ways for plaintiff classes in employment discrimination suits. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746, 1753 (2011) (holding that the Federal Arbitration Act preempts individual state courts’ holdings that arbitral class action waivers are unconscionable when the party with superior bargaining power enforces the clause to exempt itself from responsibility for willful injuries to the other party); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (finding that notice pleading means that a complaint must include enough factual sufficiency “to ‘state a claim to relief that is plausible on its face’” (quoting *Bell Atl. Corp. v.*

named plaintiffs—Betty Dukes, Christine Kwapnoski, and Edith Arana—sought class certification for a group of 1.5 million women, alleging that Wal-Mart discriminated against them in pay or promotion on the basis of their sex.¹¹⁹ The women claimed that Wal-Mart made employment decisions based on gender stereotypes.¹²⁰ They argued that Wal-Mart was liable for these decisions because of its corporate culture, which permitted gendered stereotyping to infect the company and allowed “a nearly all male managerial workforce” to make completely subjective, discretionary decisions in pay and promotion.¹²¹

The Court considered whether the lower court had properly certified the Wal-Mart class under Federal Rule of Civil Procedure 23(a) and (b)(2).¹²² The Court found that the class could not meet Rule 23(a)’s commonality requirement because in Title VII cases, commonality requires “significant proof” that an employer operates under a general policy of discrimination, and the plaintiff class had failed to put forward sufficient evidence indicating such a policy.¹²³ The Court likewise found that the plaintiffs’ statistical evidence demonstrating a bottom line disparity failed to show commonality, as it was based on a policy that permitted discretionary decision making.¹²⁴

The Court also determined that the class was inappropriately certified under Rule 23(b)(2) because the class sought backpay as part of the relief.¹²⁵ It concluded that because backpay is not an

Twombly, 550 U.S. 544, 570 (2007)). Professor Sternlight has looked at the challenges to class actions posed by *AT&T Mobility*. See Sternlight, *supra* note 80, at 708 (asserting that broad subsequent rulings make the future of employment discrimination class actions “look grim”). Among the obvious challenges for victims of employment discrimination is that employees who have signed an arbitral class action waiver will not be able to access the courts in the first instance, let alone seek class certification. See *id.* at 708–09. For a discussion of the potential impact of *Iqbal* and *Twombly* on intentional employment discrimination claims, see Sullivan, *supra* note 27, at 1639–49.

119. *Wal-Mart*, 131 S. Ct. at 2547–48.

120. *Id.* at 2563 (Ginsburg, J., concurring in part and dissenting in part).

121. *Id.*

122. *Id.* at 2547 (majority opinion).

123. *Id.* at 2553–54.

124. *Id.* at 2554–57.

125. *Id.* at 2557. This part of the decision, while unanimous, is surprising. Although a circuit split existed about whether other types of damages, such as punitive damages, could be incidental to a Rule 23(b)(2) class action, it had been fairly uncontroversial that backpay was an equitable remedy that could be included in the Rule 23(b)(2)’s injunctive or declaratory relief. See *Robinson v. Metro N. Commuter R.R.*, 267 F.3d 147, 165–66 (2d Cir. 2001) (accepting backpay as injunctive or declaratory relief and permitting monetary damages in a Rule 23(b)(2) suit, but adopting a hybrid model that would allow for notice and opt-out to class members and provide for individualized hearings at the remedial stage); Allison v.

“indivisible” and “single” remedy, permitting it as part of a Rule 23(b)(2) class would negatively impact both class members’ and defendant’s rights.¹²⁶ First, the Court stated that because Rule 23(b)(2) classes do not provide notice and opt-out opportunities to absent class members, the unnamed class members’ monetary claims are at risk if backpay is allowed.¹²⁷ Second, the Court found that backpay could not resolve the class claim “as a whole” because an employer in a Title VII suit is entitled to an individualized determination of each employee’s eligibility for backpay, to raise affirmative defenses as to each employee’s claim, and to prove that its action was lawful as to each employee.¹²⁸ Each of these limitations is based on underlying, sometimes unvoiced, concerns on the part of the Court. The paramount reason, however, may be a perception that Title VII addresses and protects individual rights rather than group harms.

These limitations on a representative plaintiff’s ability to obtain class certification directly impact the private pattern or practice claim. First, for the reasons discussed above, bringing an individual lawsuit is not a viable option for many victims of employment discrimination, and so a class action remains the only option. Second, in most federal courts, an individual plaintiff cannot bring a pattern or practice claim using the *Teamsters* framework and instead can only bring the claim as part of a class certified under Rule 23.¹²⁹

Citgo Petrol. Corp., 151 F.3d 402, 425 (5th Cir. 1998) (accepting backpay as part of equitable relief and setting four requirements providing when a 23(b)(2) class may claim non-equitable relief); see also Malveaux, *supra* note 7, at 634–35 (noting that all of the courts of appeals that have relied on the Advisory Committee on Rules of Civil Procedure’s notes have concluded that non-predominant monetary relief is available and that, while backpay has been historically permitted, compensatory and punitive damages are typically only allowed if they do not predominate over injunctive and declaratory relief).

126. See *Wal-Mart*, 131 S. Ct. at 2557–59 (explaining that a claim for monetary relief, such as backpay, may not be certified under Rule 23(b)(2) because of its “individualized” nature, unlike the “indivisible nature” of injunctive or declaratory relief).

127. *Id.* at 2559. The Court indicated that where absent class members were deemed not to be entitled to backpay, they may be collaterally estopped from seeking individual compensatory damages because Rule 23(b)(2) does not ensure their right to decide whether to join the class or bring individual claims. See *id.*

128. *Id.* at 2557, 2560–61.

129. See Bent, *Telltale Sign of Discrimination*, *supra* note 9, at 812–13 & nn.63–64 (citing cases); Green, *supra* note 2, at 453 & n.231 (same). According to Professor Bent, the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have found that because the *Teamsters* framework addresses a group harm, individual plaintiffs may not bring a pattern or practice claim using the *Teamsters* framework. Bent, *Telltale Sign of Discrimination*, *supra* note 9, at 812–13 & n.63. The D.C. Circuit is the only circuit that arguably permits individual plaintiffs to bring a pattern or practice claim without a certified class. *Id.* at 813 & n.64.

The ability to achieve class certification is essential, then, for private plaintiffs wishing to bring a pattern or practice claim.

A. *Court Concerns About Certifying Pattern or Practice Claims*

1. *Rule 23(a)—Commonality*

In *Wal-Mart*, the Court was concerned that general class-wide claims, especially those alleging discrimination on the basis of discretionary policies, could not meet Rule 23's commonality requirement because they are not capable of being solved through a "classwide resolution."¹³⁰ To get at whether the class could meet the commonality requirement, the Court stated it is necessary to look at the merits of the pattern or practice claim.¹³¹ According to the Court, in a pattern or practice claim, "the crux of the inquiry [regarding commonality] is 'the reason for a particular employment decision.'"¹³² For the Court, this means that a plaintiff in a pattern or practice must either point to an explicit policy, such as a testing mechanism or company-wide evaluation procedure, or affirmatively demonstrate a pattern or practice through "significant proof that [the company] 'operated under a general policy of discrimination'" to meet the commonality requirement of Rule 23(a).¹³³

While the *Wal-Mart* Court acknowledged that it had previously recognized that discretionary policies could lead to liability under Title VII in disparate impact claims, in Part II of its decision, the Court expressed doubt that a discretionary policy could lead to a claim of company-wide intentional discrimination:

But the recognition that this type of Title VII claim "can" exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common. To the contrary, left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-

130. *Wal-Mart*, 131 S. Ct. at 2551. Professor Michael Zimmer argues that *Wal-Mart* is an example of the Roberts Court's view that antidiscrimination laws prohibit the classification of individuals (the anticlassification theory) rather than protect classes from subordination (the antsubclassination theory). See Michael J. Zimmer, *Wal-Mart v. Dukes: Taking the Protection Out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409 (2012).

131. *Wal-Mart*, 131 S. Ct. at 2552.

132. *Id.* (quoting *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984)).

133. *Id.* at 2553; see also Green, *supra* note 2, at 408–10 (noting that under the Court's explanation of the systemic discrimination standard, plaintiffs must demonstrate that high-level company officers implemented a subjective decision making process for the purpose of discriminating against women).

based criteria for hiring and promotion that produce no actionable disparity at all. . . . In such a company, demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's.¹³⁴

Professor Green makes the case that much of this view is driven by a framework that "impos[es] entity liability only for individual moments of disparate treatment at high levels within the organization."¹³⁵ This theory stands in contrast to an understanding that "[e]ntity liability is established in systemic disparate treatment cases . . . based on a finding that individual instances of disparate treatment are so widespread within the organization . . . that the entity is in some part to blame."¹³⁶

Skepticism that intentional discrimination occurs to such a degree that it is spread throughout the company, rather than the result of a few bad apples, also seems to be motivating the Court's holding.¹³⁷ Part of the reason may be that the Court views earlier cases recognizing widespread discrimination, like *Teamsters* or *Hazelwood*, as "products of their era."¹³⁸ The era was one in which employers had recent histories of openly discriminating against women and African Americans, and so pattern or practice claims based on statistical disparities where there was no explicit policy "worked reasonably well in the 1970s and through much of the 1980s."¹³⁹ The *Wal-Mart* Court's statement that "most managers in any corporation" would not implement discriminatory policies¹⁴⁰ shows that the Court may doubt that widespread discrimination exists in the modern corporation.

134. *Wal-Mart*, 131 S. Ct. at 2554.

135. Green, *supra* note 2, at 410.

136. *Id.* at 428.

137. See *Wal-Mart*, 131 S. Ct. at 2554. However, as Professor Green has noted, "[a] practice of regular, systemic disparate treatment . . . is unlikely to be the result of select rogue individuals acting on biases uninfluenced by the work cultures/practices/norms of the organization." Green, *supra* note 2, at 439. In answering the question of whether most people believe that discrimination is common, Professor Eyer has pointed out that studies have shown that the group that most federal judges (and five of the nine Justices) belong to—white men—is the most likely to believe that discrimination is rare. Eyer, *supra* note 69, at 1316 & n.147.

138. This view that *Teamsters* and *Hazelwood* are "products of their era" is why Judge Ikuta, in her dissent from the Ninth Circuit's en banc *Wal-Mart* decision, and Professor Richard Nagareda argued pattern or practice claims require a policy or practice as proof of discrimination. Selmi, *supra* note 2, at 503 (citing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 152–53 (2009)); see also *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 629 (9th Cir. 2010) (en banc) (Ikuta, J., dissenting) (asserting that without evidence of a company-wide policy of discrimination or other evidence of company-wide discriminatory practices, the 1.5 million claims at issue could be considered as a class), *rev'd* 131 S. Ct. 2541.

139. Selmi, *supra* note 2, at 487.

140. *Wal-Mart*, 131 S. Ct. at 2554.

The Court in *Wal-Mart* and some scholars are also critical of pattern or practice claims because of their use of aggregate proof to support employer liability.¹⁴¹ In addressing commonality, the Court stated that “[m]erely showing that Wal-Mart’s policy of discretion has produced an overall sex-based disparity does not suffice” to demonstrate a discriminatory “specific employment practice.”¹⁴² This appears to be based on an individualistic view of employment discrimination claims—a view that means a class action based on a pattern or practice claim is only hundreds or even thousands of individual instances of intentional discrimination lumped together.¹⁴³ Thus, relying on statistics that show a bottom-line disparity to prove intent is problematic because “the emphasis has to be on the employer’s own blameworthiness, something that goes beyond the reliance on statistics.”¹⁴⁴ The Court’s underlying concerns with commonality, then, include a view that company-wide liability in Title VII cases requires an explicit policy or consistent practices, skepticism that discrimination is widespread, and distrust of aggregate proof.

2. *Rule 23(b)(2) concerns*

The Court’s Rule 23(b)(2) concerns include the mandatory nature of the class and its directive that both the harm to the class and the

141. *See id.* at 2554–56 (discussing the statistical evidence adduced by plaintiffs and determining that the bottom-line statistics showing a gender disparity at Wal-Mart do not meet the requirement of “significant proof” to show commonality); Green, *supra* note 2, at 451 (“Several scholars have argued that class treatment of employment discrimination lawsuits like *Wal-Mart* ‘distorts’ the substantive law by allowing entity liability to turn on aggregate proof.” (citing Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475 (2003); Nagareda, *supra* note 138)). Professor Selmi has argued that plaintiffs must do more than rely on a statistical showing of disparity to demonstrate a pattern or practice of intentional discrimination because that model does not fit the context of modern claims:

[T]he older Supreme Court pattern or practice cases were almost entirely statistical in nature, and there is enough in the case law to suggest that a pattern or practice claim can be based solely on statistics. But outside of those cases from the 1970s—a time when Jim Crow’s heart was still beating—it has never been clear why statistics can prove an intent to discriminate, and certainly one message arising from the *Wal-Mart* case is that a majority of the Supreme Court is now skeptical of the power of statistics to prove intentional discrimination. Indeed, I would suggest that one implicit message from *Wal-Mart* case is that the older cases no longer fit contemporary claims of discrimination and we need to develop better, less statistically-dependent, models to establish classwide claims of intentional discrimination.

Selmi, *supra* note 2, at 480.

142. *Wal-Mart*, 131 S. Ct. at 2555–56.

143. *See* Green, *supra* note 2, at 451–54.

144. Selmi, *supra* note 2, at 481. Professor Selmi notes, however, that a showing of statistical imbalance is sufficient to establish a claim of systemic discrimination under a strict reading of the *Teamsters* and *Hazelwood* cases, at least for unskilled jobs. *Id.* at 502.

relief sought be class-wide.¹⁴⁵ This focuses the court's inquiry on the defendant's conduct and makes an inquiry into the individualized facts regarding each plaintiff's harm irrelevant.¹⁴⁶ Therefore, because the Court views backpay as an individual remedy, its resolution on a class-wide basis with a "Trial by Formula" method would violate the due process rights of the class members and the defendant.¹⁴⁷

a. Employee class members' due process

As discussed above, one of the benefits of a Rule 23(b)(2) class is that it can resolve the legality of the defendant's actions in one suit and can effectively result in issue preclusion as to that action.¹⁴⁸ However, as the *Wal-Mart* Court noted, issue preclusion is achieved through the mandatory nature of the class, and as a result, the lack of opt-out rights and notice could lead to a violation of the class members' due process rights if the relief sought does not remedy the rights of the class as a whole.¹⁴⁹ Because of this, class certification under Rule 23(b)(2) is unavailable "when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant" or "when each class member would be entitled to an individualized award of monetary damages."¹⁵⁰ To the *Wal-Mart* Court, the risk of violating individual class members' due process rights was one of the problems with certifying a class seeking backpay under Rule 23(b)(2).¹⁵¹ The individualized nature of backpay means that class members should "decide *for themselves* whether to tie their fates to the class representatives' or to go it alone—a choice Rule 23(b)(2) does not ensure that they have."¹⁵²

145. See *Wal-Mart*, 131 S. Ct. at 2557–61 (noting that class members are not afforded even notification of the action and that employers are entitled to individualized determinations of monetary damages such as backpay).

146. Grande, *supra* note 94, at 255. Grande also notes that this is in direct opposition to the typical inquiry in a 23(b)(3) class, which focuses on the effect of the wrongful conduct on each individual plaintiff. *Id.*

147. See *Wal-Mart*, 131 S. Ct. at 2557–58, 2561.

148. See *supra* notes 96–98 and accompanying text.

149. *Wal-Mart*, 131 S. Ct. at 2557–59.

150. *Id.* at 2557; see also Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 232 (2003) (noting that by necessity, a court adjudicates the legality of a defendant's action as to the class as a whole, since a court could not "ascertain the legality of [a] defendant's conduct as to one affected claimant without necessarily doing so as to all others").

151. *Wal-Mart*, 131 S. Ct. at 2557.

152. *Id.* at 2559. The Supreme Court has also previously found that classes could not be certified under Rule 23(a) because the representative class members were not typical, based, in part, on the preclusive effect of the judgment or the relief sought. See *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 158–59 (1982); *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403–06 (1977). In *Rodriguez*, the Court found that the named plaintiffs "would not 'fairly and adequately protect the

The *Wal-Mart* class argued that Rule 23(b)(2) allows backpay when it does not “‘predominate’ over the[] requests for injunctive and declaratory relief.”¹⁵³ In rejecting this argument, the Court stated that a “predominance test” would “create[] perverse incentives for class representatives to place at risk potentially valid claims for monetary relief.”¹⁵⁴ As an example, the Court noted that class representatives could forego seeking compensatory damages in order to take advantage of the mandatory nature of Rule 23(b)(2) and instead seek only backpay.¹⁵⁵ This could result, according to the Court, in class members with valuable compensatory claims being bound by a suit for which they had no notice and no right to opt out.¹⁵⁶ And, seeking only backpay would mean that the case would be tried before a judge rather than a jury.¹⁵⁷ For Title VII claims, particularly those involving hostile work environment claims in which emotional distress damages and punitive damages compose the bulk

interests of the class,” partly because the plaintiff’s requested remedies included a request for a merger of two collective bargaining units, which conflicted with a “vote by members of the class rejecting a merger.” 431 U.S. at 404–05 (quoting FED. R. CIV. P. 23(a)(4)). In *Falcon*, the Court found that because the named plaintiff had failed to show how “the adjudication of his claim of discrimination in promotion would require the decision of any common question,” his claims could not be presumed to be typical of the class claims. 457 U.S. at 158–59. This mattered, according to the Court, because of “the potential unfairness to the class members bound by the judgment if the framing of the class is overbroad.” *Id.* at 161 (citing *Johnson v. Ga. Highway Express, Inc.*, 417 F.2d 1122, 1126 (5th Cir. 1969) (Godbold, J., specially concurring)).

153. *Wal-Mart*, 131 S. Ct. at 2559. This view stems from the argument that class members’ interests may diverge if they seek individual damages, which would undercut the mandatory nature of the Rule 23(b)(2) class action. See Malveaux, *supra* note 7, at 635–36 (citing *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 412–13 (5th Cir. 1998)). This view is further supported by “the Advisory Committee’s statement that Rule 23(b)(2) ‘does not extend to cases in which the appropriate final relief relates *exclusively or predominantly* to money damages.’” *Wal-Mart*, 131 S. Ct. at 2559 (quoting FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment).

154. *Wal-Mart*, 131 S. Ct. at 2559.

155. *Id.*; see also Nagareda, *supra* note 150, at 164–66 (explaining that despite the attendant risks, “the monopoly conferred upon class counsel by procedural rule” can unlock substantial gains for the class).

156. *Wal-Mart*, 131 S. Ct. at 2559; see also Nagareda, *supra* note 150, at 167 (observing that class members with high-value claims are most at risk under the Rule 23(b)(2) class action). Prior to *Wal-Mart*, even the courts that had found Rule 23(b)(2) allowed non-predominant monetary damages for Title VII pattern or practice claims included an opt-out provision as part of the certification. See, e.g., *Robinson v. Metro N. Commuter R.R.*, 267 F.3d 147, 166 (2d Cir. 2001) (opining that “any due process risk posed by [Rule](b)(2) class certification of a claim for non-incident damages can be eliminated by the district court simply affording notice and opt out rights to absent class members for those portions of the proceedings where the presumption of class cohesion falters”).

157. See Nagareda, *supra* note 150, at 166–67.

of the recovery, the risk may be more apparent given that juries tend to award higher damages to those with more severe injuries.¹⁵⁸

Another concern in *Wal-Mart* may have been the sheer size of the class, which may have exacerbated perceptions that class counsel and the representative plaintiffs were driven by the potential backpay recovery,¹⁵⁹ not the injunctive and declaratory relief that would remedy the structural inequalities the class also alleged. Professor Michael Selmi has demonstrated that even when private plaintiffs have been able to achieve class certification for a pattern or practice claim, monetary damages are the dominant form of relief and employers are rarely required to modify their employment practices pursuant to injunctive or declaratory relief.¹⁶⁰ When monetary damages are the primary form of relief achieved in settlement, there is generally no continued monitoring of the employer, unlike with injunctive relief that is set out in a consent decree that requires monitoring of the employer's compliance.¹⁶¹ The focus on money damages is problematic because it results in a "lack of oversight and enforcement of the class action settlements involving employment discrimination," and is "a dramatic change from the past, when class action employment discrimination litigation was thought to represent one of the hallmarks of public law litigation, brought by lawyers who were primarily interested in pursuing justice rather than profit."¹⁶²

Class actions and, in particular, their settlements, raise concerns about class counsel and her motivations. Class counsel may be perceived as "the driving force behind the lawsuit, [as having] more at stake financially than any individual class member, and [as] rarely communicat[ing] with absent class members."¹⁶³ In the settlement context the potential for "collusion between the defendant and class

158. *Id.* at 166.

159. *See, e.g.*, Suzanna Sherry, *Hogs Get Slaughtered at the Supreme Court*, 2011 SUP. CT. REV. 1, 1 (arguing that in *Wal-Mart*, "the losing side got greedy and suffered the inevitable consequences").

160. *See* Selmi, *supra* note 6, at 1297 ("Monetary damages, often at minimal levels when calculated on an individual basis, constitute the primary—and frequently the only—relief intended to compensate for past discrimination. The lawsuits rarely require corporations to modify their existing practices, and whatever changes occur tend to be driven by a company's own interests or by public relations concerns rather than the requirements of a consent decree.").

161. *Id.* at 1324–25.

162. *Id.* at 1325–26. Of course, neither courts nor critics of plaintiffs' lawyers seem troubled by the motives of lawyers representing defendant employers in these cases and do not seem to expect employer-side lawyers to be motivated by anything other than profit.

163. Rhonda Wasserman, *Secret Class Action Settlements*, 31 REV. LITIG. 889, 934 (2012).

counsel” in orchestrating “a deal that would maximize class counsel’s fee while minimizing recovery for the class are of real concern.”¹⁶⁴

Increasing the potential for abuse is that some class actions are filed as settlement-only classes. In settlement-only cases, class counsel files for class certification and approval of the settlement of the class at the same time.¹⁶⁵ Of course, once a class is certified, settlement of a class action requires the court’s approval under Rule 23(e).¹⁶⁶ But, some classes settle before certification, thereby escaping the procedural protections of Rule 23(e).¹⁶⁷ And, the desirability of the claim-preclusive effect of the settlement to a defendant may cause class counsel to bargain away individual non-representative plaintiffs’ high value claims to settle the suit without costly litigation.¹⁶⁸ As Professor Malveaux has noted, the view that class action settlements in particular are often a bad deal for plaintiffs and a bonanza for plaintiffs’ attorneys led to the enactment of the Class Action Fairness Act of 2005.¹⁶⁹

b. Employers’ due process

The Court also found that the lower court improperly certified the class under Rule 23(b)(2) because determining backpay through statistical modeling would “abridge” Wal-Mart’s substantive right under Title VII “to litigate its statutory defenses to individual

164. *Id.* at 933–34; *see, e.g.*, *Staton v. Boeing Co.*, 327 F.3d 938, 944–45 (9th Cir. 2003) (rejecting a class settlement based on inequitable distribution of a \$7.3 million award amongst class members where attorneys’ fees would have been \$4.04 million); *see also* Sternlight, *supra* note 70, at 121 (confirming that in some cases, class actions potentially serve the interests of plaintiffs’ counsel to a greater degree than the interests of the class of plaintiffs).

165. An example of a settlement-only employment discrimination class action is *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2001). The plaintiff initially filed the case as an individual racial-discrimination case and then conducted discovery on the class issues. *Id.* at 687. Eventually, the plaintiff and the defendant participated in mediation, after which the plaintiff filed for class certification and approval of a binding settlement in principal, both of which the court approved. *Id.*

The Supreme Court has found that although courts need not consider whether a potential settlement-only class under Rule 23(b) and (c) would pose “intractable management problems,” courts must still determine whether the class can “satisfy the requirements of common issue predominance and adequacy of representation.” *AmChem Prods., Inc. v. Windsor*, 521 U.S. 591, 620, 628 (1997).

166. FED. R. CIV. P. 23(e).

167. Wasserman, *supra* note 163, at 901.

168. Nagareda, *supra* note 150, at 168.

169. Pub. L. No. 102-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.); *see* Malveaux, *supra* note 7, at 632 (explaining that the Class Action Fairness Act—which was enacted “to provide more rigorous checks and balances” as a result of widespread perceptions that class members gain little from class settlements while plaintiffs’ lawyers earn substantial fees—also had the effect of liberalizing jurisdiction for class actions).

claims.”¹⁷⁰ As Professor Hart has argued, this can be regarded as a misapprehension of *Teamsters* and not in keeping with the flexible approach *Teamsters* encouraged in remediating a pattern or practice claim.¹⁷¹ The Court’s concern that the use of statistical modeling interferes with employers’ ability to raise statutory defenses further exemplifies the Court’s general distrust of aggregate proof of discrimination.¹⁷²

There are three additional, unstated reasons that could have motivated the Court to ensure defendant employers receive greater procedural protections. First, the Court may believe that holding employers liable for backpay on the basis of a discretionary policy will impede businesses’ ability to have discretionary policies. In addressing commonality, the Court hinted at this reason by stating that “[t]he whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard.”¹⁷³ And, it deems discretionary decision making within a corporation as a “presumptively reasonable way of doing business.”¹⁷⁴ Second, the Court has also been concerned in the past about what it views as the “in terrorem” effect of class actions on defendants—that “[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.”¹⁷⁵

170. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (affirming that procedural rules cannot abridge statutory rights under the Rules Enabling Act, 42 U.S.C. § 2072(b)).

171. See Hart, *supra* note 2 at 459–61, 464–66.

172. See *supra* notes 135–138 and accompanying text.

173. *Wal-Mart*, 131 S. Ct. at 2553. Requiring that plaintiffs demonstrate an intentionally discriminatory policy on the part of a company serves business interests and can be viewed as part of the movement to cut back on regulations governing businesses. Green, *supra* note 2, at 417–18.

174. *Wal-Mart*, 131 S. Ct. at 2554. The Court asserted that a discretionary policy is the opposite of the type of uniform policy that would be required to show commonality under Rule 23(a):

The only corporate policy that the plaintiffs’ evidence convincingly establishes is Wal-Mart’s “policy” of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a *policy against having* uniform employment practices. It is also a very common and presumptively reasonable way of doing business—one that we have said “should itself raise no inference of discriminatory conduct.”

Id. (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988)).

175. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011); see also Malveaux, *supra* note 7, at 632 (addressing defendants’ arguments “that certification is akin to blackmail and makes the pressure to settle irresistible”); Sternlight, *supra* note 70, at 719–20 (explaining that many prospective defendants relish of a prospect of a “class-action-free world,” while some companies seek to bind customers to arbitration agreements).

Finally, the Court could have lingering concerns from *General Telephone Co. of the Southwest v. Falcon*¹⁷⁶ about notice to defendants. There, the Court suggested that part of the reason Rule 23(a) requires the representative plaintiffs' claims to be typical of the class claims is the notice it provides to employers regarding the types of claims it will need to defend.¹⁷⁷ This relates directly to the *Wal-Mart* Court's emphasis on what it views as the common source of the harm and indivisible nature of the remedy permitted in a Rule 23(b)(2) certified class.¹⁷⁸ If a Rule 23(b)(2) class seeks to remedy a harm that an employer imposed on the class as a whole, then it follows that the employer would have actual knowledge of the pattern or practice and know how to defend itself in the suit. However, if the class simply seeks to remedy several individual harms, then the employer would not necessarily be aware of the source of the harm for each individual wrong, making the claims difficult to defend.¹⁷⁹

B. *Individual Right, Group Wrong*

Finally, at the heart of much of the Court's concern over certifying classes for pattern or practice claims, appears to be an inherent tension between the Court's view of Title VII and the underlying purpose of a systemic claim. While the Court views the statute as designed to address discrimination against individuals, the pattern or practice requires courts not only to decide the merits of the case by analyzing class-based evidence, but also to fashion a remedy that looks at the class rather than individuals.

The Court highlighted this tension in *City of Los Angeles, Department of Water & Power v. Manhart*,¹⁸⁰ in which a group of female employees brought a class action against the Los Angeles Department of Water

176. 457 U.S. 147 (1982).

177. *See id.* at 160–61 (reasoning that “without reasonable specificity [of the pleadings,] the court cannot define the class, cannot determine whether the representation is adequate, and the employer does not know how to defend” (quoting *Johnson v. Ga. Highway Express, Inc.*, 417 F.2d 1122, 1126 (5th Cir. 1969) (Godbold, J., specially concurring))).

178. *See Wal-Mart*, 131 S. Ct. at 2557 (“The key to the (b)(2) class is ‘the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.’” (quoting Nagareda, *supra* note 138, at 132)).

179. Additionally, notice of the type of claims for which the class seeks certification not only serves the defense of the current claim, but also ensures “that future employers have adequate notice of which policies will pass muster under Title VII and which will not. If all class actions settle, only relatively specific analysis of the merits at the certification stage can provide this information.” Weiss, *supra* note 2 at 135.

180. 435 U.S. 702 (1978).

& Power.¹⁸¹ They alleged that the department's requirement that female employees make larger contributions to its pension plan than male employees discriminated against women on the basis of sex in violation of Title VII.¹⁸² The department based its policy on actuarial tables, which showed that women as a group experience greater longevity than men.¹⁸³ Although the issue of class certification was not before the Court, the Court considered whether "discrimination" is to be determined by comparison of class characteristics or individual characteristics."¹⁸⁴ The Court's answer to that question foreshadowed the concerns expressed in later cases looking at class certification.

In reaching its decision that the department's policy, which was based on class characteristics rather than individual characteristics, was discriminatory, the Court focused on how the policy unfairly impacted individuals:

The statute's focus on the individual is unambiguous. . . . Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply. . . . [T]he basic policy of [Title VII] requires that we focus on fairness to individuals rather than fairness to classes. Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals.¹⁸⁵

Language in the *Wal-Mart* decision also demonstrates the Court views Title VII as vindicating individual rights, not class-wide wrongs.¹⁸⁶ The Court reiterated that "[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.'"¹⁸⁷ Similarly, in discounting the notion that class-based statistical modeling is an appropriate method of determining each employee's entitlement to backpay, the Court focused on Wal-Mart's right to "individualized determinations"¹⁸⁸ Finally, it was concerned with "individual class members'" claims when it found that the mandatory nature of Rule

181. *Id.* at 704.

182. *Id.*

183. *Id.* at 705.

184. *Id.* at 708.

185. *Id.* at 708–09.

186. A variation of the word "individual" appears in the majority opinion, partial concurrence, and partial dissent fifty-eight times, nearly as many times as variations on the word "discrimination" appear (sixty-seven). *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

187. *Id.* at 2250 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)).

188. *See id.* at 2560 ("Wal-Mart is entitled to individualized determinations . . .").

23(b)(2) did not allow the certification of a class that sought backpay as part of the remedy.¹⁸⁹ The Wal-Mart Court's decision may be the final bell in this round of the *Duke*-out over the private, pattern or practice claim. Nonetheless, the EEOC has the ability and authority to ensure the pattern or practice claim is not down for the count.

IV. THE EEOC'S LITIGATION AUTHORITY AND ADMINISTRATIVE PROCESSING

The EEOC's ability to fight against the erosion of the pattern or practice claim in the wake of *Wal-Mart* is best understood in the context of the EEOC's litigation powers and its administrative processing of charges of discrimination. First, sections 706 and 707 of Title VII provide the EEOC with authority to bring lawsuits against employers who violate Title VII. The legislative history of these two sections provides an important gloss to the source and scope of the EEOC's ability to litigate pattern or practice claims. Second, through its pre-suit administrative processing, the EEOC must provide the employer notice of the claim, investigate the claim, make a determination regarding the claim's merits, and attempt to settle any claim prior to filing a suit in federal court.

A. *The EEOC's Litigation Authority*

The EEOC may bring suit in federal district court in its own name against an employer who violates Title VII.¹⁹⁰ Section 706 of the statute specifically provides that the EEOC may bring a civil action in federal district court against a private employer—i.e., not a federal, state, or local government entity—engaged in unlawful employment practices based on a charge of discrimination filed with the EEOC.¹⁹¹ Section 707 authorizes the EEOC to file suit whenever the EEOC has “reasonable cause to believe” that an employer is engaged in a “pattern or practice” of discriminating against its employees in violation of Title VII.¹⁹² When the EEOC files a charge of

189. *See id.* at 2559.

190. *See* 42 U.S.C. § 2000e-5(f) (2012) (allowing members of the EEOC to file charges by or on behalf of persons claiming to be the victims of unlawful employment practices); *id.* § 2000e-6(a) (granting the Attorney General the same powers).

191. *Id.* § 2000e-5(f)(1).

192. *Id.* § 2000e-6(a). Section 707 provides:

Whenever the [EEOC] has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by [Title VII], and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the [EEOC] may bring a civil action in the

discrimination under section 707, section 706 “and regulations promulgated thereunder govern the form and content of such a charge and the manner in which the employer should be notified of the allegations of wrongdoing.”¹⁹³

Initially, Congress created the EEOC to receive and investigate charges of employment discrimination.¹⁹⁴ However, the EEOC had no independent authority to file suit against employers who engaged in unlawful discrimination.¹⁹⁵ Instead, the United States Attorney General, through the U.S. Department of Justice, had authority to bring suit in federal court against employers under section 707 and to seek injunctive and other equitable relief.¹⁹⁶

In 1972, Congress amended Title VII, transferring the authority to bring lawsuits against private employers from the United States Attorney General to the EEOC.¹⁹⁷ Sections 706 and 707 of the Act, as amended, now authorize the EEOC to bring an action in federal district court asserting that an employer has engaged in a pattern or practice of discrimination.¹⁹⁸ It may also bring suit based on an aggrieved individual or individuals’ charge of discrimination filed with the EEOC.¹⁹⁹ In amending Title VII, the question was not whether Congress should grant the EEOC additional authority to enforce Title VII, but rather “what kind of additional enforcement powers should be granted to the EEOC.”²⁰⁰

As initially proposed, the 1972 amendments would have created an administrative judicial proceeding within the EEOC to adjudicate claims of discrimination “and issue judicially enforceable cease-and-desist orders.”²⁰¹ Instead, a compromise was reached that allowed the

appropriate district court of the United States by filing with it a complaint (1) signed by [the EEOC], (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as [the EEOC] deems necessary to insure the full enjoyment of the rights herein described.

Id.

193. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 56 (1984).

194. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 706, 78 Stat. 241, 259 (1964) (codified as amended at 42 U.S.C. § 2000e-5).

195. *See* *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 358–59 (1977) (explaining that initially, the EEOC’s function was limited to informal methods of conciliation and persuasion).

196. § 707, 78 Stat. at 261 (codified at 42 U.S.C. § 2000e-6).

197. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 4–5, 86 Stat. 103, 104–07 (codified as amended at 42 U.S.C. §§ 2000e-5 to -6).

198. 42 U.S.C. §§ 2000e-5(f), 2000e-6(a), (c).

199. *Id.* § 2000e-5(f).

200. *Occidental Life Ins. Co.*, 432 U.S. at 361.

201. 118 CONG. REC. 4939–40 (1972).

EEOC to bring suit in federal court.²⁰² The Conference Committee's section-by-section analysis of the amendments made clear that the purpose of the amendments was to vindicate the public interest through broad relief and more robust enforcement of Title VII.²⁰³ For example, the Conference Committee's analysis of section 706(f)(1), which provides for enforcement of Title VII, states:

[I]t is not intended that any of the provisions contained therein shall affect the present use of class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure. The courts have been particularly cognizant of the fact that claims under Title VII involve the vindication of a major public interest, and that any action under the Act involves considerations beyond those raised by the individual claimant. As a consequence, the leading cases in this area to date have recognized that many Title VII claims are necessarily class action complaints and that, accordingly, it is not necessary that each individual entitled to relief be named in the original charge or in the claim for relief. A provision limiting class actions was contained in the House bill and specifically rejected by the Conference Committee.²⁰⁴

The 1972 amendments specifically recognized the need for pattern or practice claims that addressed issues beyond that of the "individual claimant."

Similarly, the amendments sought to provide broad relief to victims of discrimination:

The provisions of [section 706(g)] are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. . . . [T]he scope of relief . . . is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.²⁰⁵

Thus, Congress also intended that the amendments would provide make-whole relief.

The Conference Committee's section-by-section analysis says very little about the EEOC's pattern or practice authority other than to outline the timeline for the transfer of this authority from the

202. *Id.* at 4940.

203. *See id.* at 7168.

204. *Id.*

205. *Id.*

Attorney General to the EEOC.²⁰⁶ The analysis clarifies that “the Commission’s present powers to investigate charges of discrimination remain. In addition, the EEOC now has jurisdiction to initiate court action to correct any pattern or practice violations.”²⁰⁷ Only one federal circuit court has addressed directly whether section 707 provides the sole method for the EEOC to bring a pattern or practice claim.²⁰⁸ The U.S. Court of Appeals for the Sixth Circuit concluded that the EEOC may bring a pattern or practice claim and use the *Teamsters* burden-shifting framework to prove the claim under either section 706 or section 707.²⁰⁹ The court determined that the distinction between section 706 and section 707 is “the presence of a previously filed charge by an aggrieved person.”²¹⁰

Through the Civil Rights Act of 1991, Congress provided a means for litigants to recover not only equitable remedies such as backpay and injunctive relief but also compensatory and punitive damages.²¹¹ Congress listed the need for additional remedies “to deter unlawful harassment and intentional discrimination in the workplace” as one of the purposes of the Act.²¹² The legislative changes also were necessary “to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.”²¹³ Importantly, because litigants could now seek non-equitable remedies, the Act also provided for a jury trial.²¹⁴

206. *See id.* (providing that the authority would be transferred two years after the amendment’s enactment).

207. *Id.*

208. *See Serrano v. Cintas Corp.*, 699 F.3d 884, 894 (6th Cir. 2012), *cert. denied*, No. 12-1347, 2013 WL 1951616 (Oct. 7, 2013). The Eighth Circuit has not squarely addressed the EEOC’s authority under section 706 or section 707 but, in a recent case, appears to have presumed that when the EEOC asserts a section 706 claim in its complaint, it must prove discrimination as to each individual claimant. *See EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 674 (8th Cir. 2012).

209. *See Serrano*, 699 F.3d at 896.

210. *Id.*

211. *See* 42 U.S.C. § 1981a(a)(1) (2012). Compensatory damages include “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.” *Id.* § 1981a(b)(3). Despite these important policy objectives, Congress did include limitations on the amount of compensatory and punitive damages that each claimant may recover, which ranges from \$50,000 to \$300,000, depending on the size of the employer. *Id.*

212. Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat 1071, 1071.

213. *Id.* § 3, 105 Stat at 1071.

214. *See* 42 U.S.C. § 1981a(c). In 1972, when Congress amended Title VII, Senator Ervin of North Carolina proposed an amendment that would have provided for jury trials even though the only remedies available at the time under Title VII were equitable remedies. 118 CONG. REC. 4919 (1972). The amendment failed with fifty-six nays and thirty yeas. *Id.* at 4920. Senator Ervin’s stated purpose in proposing the amendment was to preserve “the right to demand a trial by jury on the issues of fact” and “citizen participation in the enforcement of the provisions of this bill.” *Id.*

Congress intentionally included the EEOC within the class of complaining parties who could seek punitive and compensatory damages under the statute.²¹⁵ This subsection was part of a technical amendment requested by EEOC chairman Evan J. Kemp to clarify the EEOC's ability to seek punitive and compensatory damages.²¹⁶ Mr. Kemp argued that the change was needed because, without it, the EEOC's enforcement abilities would be undermined:

It would undermine the Commission's ability to enforce Title VII . . . if private parties, but not the EEOC, are allowed to seek the enhanced remedies. Indeed, if that were the case the Commission might have a duty to refer all cases of intentional discrimination to private attorneys because, by filing suit, the Commission would dramatically reduce the relief available to the victims. This would be true especially in the case of sexual harassment claims; because there is often no back pay at stake in those cases, the only monetary relief would be compensatory and punitive damages.²¹⁷

Congress intentionally permitted the EEOC to seek the full-range of remedies under the Civil Rights Act of 1991 thereby serving the broader purpose of ensuring victims of illegal discrimination receive adequate relief.

B. The EEOC's Pre-suit Administrative Processing

The EEOC must meet certain conditions precedent to file suit through its administrative processing of a charge of discrimination. Specifically, the EEOC must receive an underlying charge, provide notice of the charge to the employer, conduct an investigation, make a reasonable cause determination, and attempt to conciliate.²¹⁸ A charge provides the EEOC with the initial jurisdiction to investigate an employer's alleged violation of Title VII.²¹⁹ The charge may be initiated "by or on behalf of a person claiming to be aggrieved, or by a member of the Commission."²²⁰ The EEOC must serve the employer with notice of the charge within ten days of receipt.²²¹ To the extent that the initial notice provided to the employer of the charge of discrimination is deficient, notice of the reasonable cause determination through the letter of determination can cure the

215. 42 U.S.C. § 1981a(d)(1).

216. See 137 CONG. REC. 28861 (1991).

217. *Id.*

218. *Id.* § 2000e-5(b), (f).

219. See *id.* § 2000e-5(b); see *infra* note 227 (discussing cases that have found that the charge is the "jurisdictional springboard" of the investigation).

220. 42 U.S.C. § 2000e-5(b).

221. *Id.*; 29 C.F.R. § 1601.14(a) (2012).

deficiency.²²² And, if the EEOC alleges any class claims in subsequent litigation, the allegations must be sufficiently related to those for which the employer received notice in the administrative processing.²²³

Generally, an employer may not challenge the adequacy of the EEOC's investigation in any subsequent litigation, and, even when such a challenge is made, courts will generally reject it as long as the EEOC performed at least "some" investigation into the charge.²²⁴ Title VII grants the EEOC broad investigatory powers, and the EEOC can issue an administrative subpoena during the investigation and seek enforcement of its subpoena in federal court.²²⁵ The EEOC's investigation may consist of interviews of the charging parties and witnesses, on-site inspections, and requests for information and production of other evidence.²²⁶ Once the EEOC's investigation is under way, it is not limited to the allegations in the charge but may include any additional violations of federal employment discrimination law it uncovers.²²⁷ The EEOC is also authorized to

222. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 372 n.32 (1977).

223. *See, e.g., EEOC v. Pioneer Hotel, Inc.*, No. 2:11 CV 1588, 2013 WL 129390, at *3 (D. Nev. Jan. 9, 2013) (finding that the EEOC notified the employer during the investigation that the class was alleging discrimination based on "national origin, Mexican, and . . . color, brown," and that the EEOC's class allegations based on "Latino and dark-skinned employees" in litigation were accordingly "reasonably related to the underlying EEOC charge" and determination).

224. *See, e.g., EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1100 (6th Cir. 1984) (finding that the district court erred in undertaking a review of the sufficiency of the EEOC's investigation); *EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 370 n.31 (4th Cir. 1976) (holding that EEOC investigations are not reviewable because the EEOC has no adjudicatory power and its proceedings are not binding). Even when courts do allow employers to challenge an EEOC investigation, the courts afford the EEOC great deference. *See, e.g., EEOC v. NCL Am., Inc.*, 536 F. Supp. 2d 1216, 1221–23 (D. Haw. 2008) (explaining "that challenges to the adequacy of [EEOC investigations] are subject to a deferential standard of review"); *EEOC v. James Julian, Inc.*, 736 F. Supp. 59, 60 (D. Del. 1990) (reiterating that "a court shall only disallow a suit by the Commission if it is evident that the Commission failed to even undertake an investigation" or failed to meet one of its other procedural prerequisites).

225. 42 U.S.C. § 2000e-9 (incorporating 29 U.S.C. § 161 and thereby granting the EEOC administrative subpoena power in conducting its investigations); *EEOC v. Fed. Express Corp.*, 558 F.3d 842, 854–56 (9th Cir. 2008) (observing that broad requests at the outset of an investigation are necessary to allow the EEOC to draft future requests for information from the employer).

226. *See* 42 U.S.C. § 2000e-8 (conferring to the EEOC a broad right to access relevant evidence); 29 C.F.R. § 1601.16 (supplying the EEOC with the power to subpoena witnesses and witness testimony, documents and other records in the possession or under the control of the person subpoenaed, and evidence for examination and duplication); *see also The Charge Handling Process*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/employers/process.cfm> (last visited Oct. 12, 2013) (communicating the duties and rights of the charging party and the investigator after a charge has been filed against an employer).

227. *See EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005) ("The charge incites the investigation, but if the investigation turns up additional violations the

seek information related to potential systemic discrimination when investigating individual charges of discrimination.²²⁸ It can continue to investigate a charge even after the charging party has settled with the employer and requested to withdraw the charge of discrimination.²²⁹

At the end of the investigation, the EEOC must make a reasonable cause determination via a letter of determination to the employer and charging party.²³⁰ If the EEOC has found no reasonable cause exists to support the charge, it dismisses the charge.²³¹ The EEOC's reasonable cause determination (or no reasonable cause determination) is not evidence of discrimination in any subsequent litigation.²³² "If the Commission determines . . . that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and

Commission can add them to its suit."); *see also* EEOC v. Hearst Corp., Seattle Post-Intelligencer Div., 553 F.2d 579, 580 (9th Cir. 1977) (per curiam) (clarifying that even though an EEOC investigation was based on an underlying charge of individual discrimination brought by a white male, the investigation uncovered evidence of discrimination against women and minorities and that the EEOC was allowed to litigate a claim on behalf of women and minorities); EEOC v. Gen. Elec. Co., 532 F.2d 359, 365 (4th Cir. 1976) ("The charge merely provides the EEOC with a jurisdictional springboard to investigate whether the employer is engaged in any discriminatory practices . . ." (quoting EEOC v. Huttig Sash & Door Co., 511 F.2d 453, 455 (5th Cir. 1975)) (internal quotation marks omitted)).

228. EEOC v. Konica Minolta Bus. Solutions U.S.A., Inc., 639 F.3d 366, 369 (7th Cir. 2011) ("Racial discrimination is by definition class discrimination, and information concerning whether an employer discriminated against other members of the same class for the purposes of hiring or job classification may cast light on whether an individual person suffered discrimination." (internal quotation marks omitted)); *see also* EEOC v. UPS, Inc., 587 F.3d 136, 137 (2d Cir. 2009) (per curiam) (holding that the district court erred by refusing to enforce an EEOC administrative subpoena seeking nationwide information on UPS employment guidelines).

229. *See, e.g.*, EEOC v. Watkins Motor Lines, Inc., 553 F.3d 593, 597 (7th Cir. 2009) (highlighting that the EEOC's "powers are independent of any resolution between employer and employee"); *cf. Fed. Express Corp.*, 558 F.3d at 854 (holding that the EEOC still had authority to issue an administrative subpoena even though it had issued the employee a right to sue letter, and the employee had joined a class action against FedEx).

230. *See* 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1601.14(a).

231. 42 U.S.C. § 2000e-5(b) ("If the Commission determines after such an investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the [employer] . . ."). A finding of no reasonable cause does not preclude the charging party (the employee) from filing suit; he or she may do so within ninety days of the notice from the EEOC. *Id.* § 2000e-5(f)(1).

232. *Gen. Elec. Co.*, 532 F.2d at 370 n.31 ("The Commission's determination does not establish rights or obligations; the [employer] is entitled to a trial *de novo* in the district court." (quoting EEOC v. E.I. DuPont de Nemours & Co., 373 F. Supp. 1321, 1339 (D. Del. 1974))); *see also Caterpillar, Inc.*, 409 F.3d at 833 ("The existence of probable cause to sue is generally and in this instance not judicially reviewable."); *Georator Corp. v. EEOC*, 592 F.2d 765, 767 (4th Cir. 1979) (same).

persuasion.”²³³ The EEOC may bring a lawsuit within thirty days after the charge is filed if the EEOC cannot secure an acceptable conciliation agreement from the employer.”²³⁴

The conciliation process offers the employer an opportunity to resolve the charge confidentially and prior to public litigation.²³⁵ A circuit split exists as to the amount of deference a district court must give in subsequent EEOC litigation to the EEOC’s determination that conciliation has failed. Courts that adopt the majority view—the Sixth, Seventh, Eighth, and Tenth Circuits, as well as nearly all district courts within the Ninth Circuit—defer to the EEOC’s discretion and find that the EEOC has met its conciliation obligation if it provides the employer an opportunity to confront all the issues.²³⁶ Under this standard, the EEOC must only make an attempt to conciliate, and the acceptability of the terms of the conciliation is within the discretion of the EEOC.²³⁷ The minority view, adopted by the Eleventh and Fifth Circuits, examines the sufficiency of the conciliation process and requires the EEOC to “(1) outline to the employer the reasonable cause for its belief that Title VII has been violated; (2) offer an opportunity for voluntary compliance; and (3) respond in a

233. 42 U.S.C. § 2000e-5(b).

234. *Id.* § 2000e-5(f)(1).

235. *See id.* § 2000e-5(b) (setting forth penalties for disclosing information revealed during conciliation).

236. *See, e.g.,* *Serrano v. Cintas Corp.*, 699 F.3d 884, 905 (6th Cir. 2012) (holding that “[t]he EEOC is under no duty to attempt further conciliation after an employer rejects its offer” (quoting *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1101–02 (6th Cir. 1984))), *cert. denied*, No. 12-1347, 2013 WL 1951616 (Oct. 7, 2013); *EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 669 (8th Cir. 1992) (same); *EEOC v. Saint Anne’s Hosp. of Chi., Inc.*, 664 F.2d 128, 131 (7th Cir. 1981) (same); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978) (stating that Title VII requires the EEOC to seek conciliation, but “court[s] should not examine the details of offers and counteroffers”); *see also* *EEOC v. Timeless Invs., Inc.*, 734 F. Supp. 2d 1035, 1053–54 (E.D. Cal. 2010) (finding that the EEOC must attempt conciliation but the details of the conciliation are not reviewable); *EEOC v. Hometown Buffet, Inc.*, 481 F. Supp. 2d 1110, 1114–15 (S.D. Cal. 2007) (same); *EEOC v. Scolari Warehouse Mkts., Inc.*, 488 F. Supp. 2d 1117, 1129 (D. Nev. 2007) (same). However, at least one court in the Ninth Circuit has reached a different conclusion. *See EEOC v. La Rana Haw., LLC*, 888 F. Supp. 2d 1019, 1046 (D. Haw. 2012) (staying the EEOC’s suit and ordering the EEOC to “redo” conciliation with defendants because the EEOC had not given the defendants “the number or identity of Claimants [or] . . . specific instances of harassment or discrimination”).

237. *See EEOC v. Prudential Fed. Sav. & Loan Ass’n*, 763 F.2d 1166, 1169 (10th Cir. 1985) (stating that the district court should only determine whether the EEOC made an attempt at conciliation rather than judging the sufficiency of the conciliation efforts); *Keco Indus.*, 748 F.2d at 1102 (same); *Saint Anne’s Hosp.*, 664 F.2d at 131 (same). Most of these courts do not require that the EEOC identify particular class members or “disclose all of the underlying evidence or information to the employer.” *EEOC v. PBM Graphics Inc.*, 877 F. Supp. 2d 334, 361–62 (M.D.N.C. 2012) (quoting *EEOC v. Cal. Psychiatric Transitions, Inc.*, 725 F. Supp. 2d 1100, 1115 (E.D. Cal. 2010)).

reasonable and flexible manner to the reasonable attitudes of the employer.”²³⁸ Further, under this view, if the court finds that the EEOC did not conciliate in good faith, the court may stay later litigation or even dismiss the EEOC’s suit and impose attorneys’ fees.²³⁹ The Second Circuit examines the sufficiency of the EEOC’s conciliation efforts except where the employer “refuses the invitation to conciliate or responds by denying the EEOC’s allegations, the EEOC need not pursue conciliation and may proceed to litigate the question of the employer’s liability for the alleged violations.”²⁴⁰

Despite the distinctive aspects of the EEOC’s investigative and litigation authority, some courts have treated EEOC pattern or practice claims similar to private class actions or even individual claims. This treatment is demonstrated by recent decisions that dismiss the EEOC’s pattern or practice claim and by decisions that significantly limit the EEOC’s claim in terms of its scope or for whom the EEOC can seek relief.²⁴¹ For example, some courts have equated the EEOC’s right to seek relief to that of the individuals for whom the EEOC seeks the relief. In such instances, courts have held that because individuals must file their charges of discrimination within 180 days of the discriminatory act,²⁴² the EEOC cannot seek relief for individuals against whom the discrimination occurred more than 180 days prior to the filing of the charge that triggered the EEOC’s investigation.²⁴³

238. *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003); *see also EEOC v. Agro Distrib., LLC*, 555 F.3d 462, 468 (5th Cir. 2009) (noting that these factors must be met to demonstrate that the EEOC made a good-faith attempt at conciliation).

239. *Agro Distrib., LLC*, 555 F.3d at 469.

240. *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1535 (2d Cir. 1996) (citations omitted).

241. Despite these restrictions, in FY 2012, the EEOC’s litigation docket saw its largest number of systemic cases since the EEOC started collecting the data. *See SEYFARTH SHAW LLP, EEOC ABANDONS SHOTGUN APPROACH, FOCUSES ON SYSTEMIC DISCRIMINATION SUITS (2013)*, available at <http://www.workplaceclassaction.com/files/2013/07/EEOC-Infographic.pdf>. The EEOC filed 122 merits suits, 20% of which were systemic. *Id.* This was an increase of 14% and 13% from the previous two years, respectively. *Id.* This may suggest that one of the reasons there have recently been more decisions limiting the EEOC’s pattern or practice lawsuit is simply that the EEOC has filed more pattern or practice suits.

242. 42 U.S.C. § 2000e-5(e)(1) (2012). This 180-day time period lengthens to 300 days when a state or local agency is charged with enforcement of state anti-discrimination laws. *Id.*

243. *See EEOC v. Presrite Corp.*, No. 11 CV 260, 2012 WL 3780351, at *4 (N.D. Ohio Aug. 30, 2012) (“The EEOC is time-barred from challenging employment decisions made by [the employer] more than 300 days prior to the Commissioner’s charge”); *EEOC v. PBM Graphics Inc.*, 877 F. Supp. 2d 334, 351–54 (M.D.N.C. 2012) (finding that when the EEOC seeks relief for individuals more than 180 days before the triggering charge, the EEOC’s claims as to the individuals “are presumptively barred and subject to dismissal”); *EEOC v. Bass Pro Outdoor World*,

Still other courts have placed limitations on the EEOC's ability to bring pattern or practice claims in ways that are inconsistent with the legislative history and the EEOC's role as a litigator in the public interest. Some courts, for example, have found that the EEOC may only bring a pattern or practice claim pursuant to section 707, and that the EEOC is therefore limited to declaratory, injunctive, and other equitable relief if it establishes a pattern or practice.²⁴⁴ To seek individual relief under this view, the EEOC must allege individual discrimination claims under section 706 and prove disparate treatment as to each aggrieved individual.²⁴⁵ Further, other courts, including the Eighth Circuit in *EEOC v. CRST Van Expedited, Inc.*,²⁴⁶ have found that to seek individual relief for persons harmed by the pattern or practice, the EEOC must have given the employer an opportunity to conciliate each aggrieved person's claim during the administrative processing.²⁴⁷ This Article next explains why courts are misguided to treat EEOC claims as being identical to those of

LLC, 884 F. Supp. 2d 499, 523 (S.D. Tex. 2012) (concluding that "the EEOC is bound by the 300 day limitations period"); *cf.* *EEOC v. Global Horizons, Inc.*, 904 F. Supp. 2d 1074, 1092 (D. Haw. 2012) (finding that "pattern-or-practice claims brought by the EEOC under § 707 are in fact limited by the 300-day charge-filing period set forth in § 706").

244. *See, e.g.*, *EEOC v. IPS Indus., Inc.*, 899 F. Supp. 2d 507, 517 (N.D. Miss. 2012) (explaining that because the EEOC brought its claims under section 706, the court declined to consider the claims "in the aggregate" and instead "analyze[d] each class member's claim individually"); *see also* Bent, *Systemic Harassment*, *supra* note 9, at 185–92 (arguing that only section 707 authorizes the EEOC to bring pattern or practice claims, and it does not permit the EEOC to recover compensatory or punitive damages). Some courts, however, have found that the EEOC may bring a pattern or practice claim under section 706 as well. *See, e.g.*, *Serrano v. Cintas Corp.*, 699 F.3d 884, 894–96 (6th Cir. 2012) (reversing the lower court's determination that the EEOC could not proceed under the *Teamsters* framework in a sex discrimination case because the EEOC had only asserted claims under section 706 in its complaint), *cert. denied*, No. 12-1347, 2013 WL 1951616 (Oct. 7, 2013); *EEOC v. Pitre, Inc.*, 908 F. Supp. 2d 1165, 1174 (D.N.M. 2012) (permitting the EEOC to proceed using the *Teamsters* framework for the pattern or practice claims it had alleged pursuant to section 706 (citing *Serrano*, 699 F.3d at 894–96)).

245. *See Bass Pro Outdoor World*, 884 F. Supp. 2d at 518–21; *see also* *EEOC v. Hotspur Resorts Nev., Ltd.*, No. 2:10-cv-2265-RCJ-GWF, 2011 WL 4737409, at *4–5 (D. Nev. Oct. 5, 2011) (recognizing that the EEOC may seek relief on behalf of a group of aggrieved individuals without obtaining class certification, but nevertheless requiring the EEOC to "plead the claims of each aggrieved person").

246. 679 F.3d 657 (8th Cir. 2012).

247. *See id.* at 671–77 (holding that the trial court did not err in dismissing the EEOC's systemic discrimination claim under section 706 for failure to conciliate); *Bass Pro Outdoor World*, 884 F. Supp. 2d at 521–22 (requiring the EEOC to plead that conciliation efforts have failed as a condition precedent to its filing of a section 706 claim). One of the curious aspects of these decisions is that while the courts decide that section 706 and section 707 are basically separate causes of action, such that the EEOC cannot allege pattern or practice under section 706 or seek compensatory and punitive damages if it alleges a section 707 violation, the courts still apply the limitations period from section 706 to the EEOC's section 707 pattern or practice claim. *See, e.g., id.* at 518–20, 523.

private litigants and how the EEOC's public interest mission elevates the Agency's role to that of a "fist" in the *Duke*-out over the pattern or practice.

V. THE EEOC AS FIST

A. *The EEOC Enjoys Procedural Advantages in Litigation*

The EEOC's pattern or practice litigation is distinct from that of private pattern or practice litigation because the EEOC enjoys three important procedural advantages that private litigants do not: the EEOC is not required to obtain class certification to bring a pattern or practice claim, the EEOC's claims are not subject to a statute of limitations, and the EEOC may still bring suit in its own name even if the victim of discrimination has agreed to mandatory arbitration.

In *General Telephone Co. of the Northwest, Inc. v. EEOC*,²⁴⁸ the Supreme Court held that Title VII does not require the EEOC to obtain class certification under Rule 23 to seek class-wide relief pursuant to 42 U.S.C. § 2000e-5(f)(1).²⁴⁹ The EEOC brought a lawsuit against General Telephone Company after it investigated charges of sex discrimination filed by four female employees.²⁵⁰ The EEOC alleged that the company's practices discriminated on the basis of sex with regard to maternity leave, access to certain classes of jobs, and promotion to managerial positions.²⁵¹ The EEOC sought injunctive relief and backpay for the women affected by the discriminatory practices.²⁵² When the EEOC moved to "bifurcate[e] the issue of class liability from the issue of individual damages," General Telephone Company opposed the bifurcation and moved to dismiss the "class action aspects of the complaint."²⁵³ The Court found support for its holding that Rule 23 did not apply to EEOC enforcement actions in the text of Title VII, the legislative history surrounding the 1972 amendments, the enforcement procedures prior to these amendments, and the distortions of common interpretations of the Rule 23 requirements that would result if EEOC actions were forced into the Rule 23 model.²⁵⁴ First, the Court found that section 706(g) specifically authorizes the EEOC "to bring suit in its own name for the purpose, among others, of securing relief

248. 446 U.S. 318 (1980).

249. *Id.* at 333–34.

250. *Id.* at 320.

251. *Id.* at 321.

252. *Id.*

253. *Id.* at 322 (internal quotation marks omitted).

254. *See id.* at 323–31.

for a group of aggrieved individuals.”²⁵⁵ The EEOC’s “authority to bring such actions is in no way dependent upon Rule 23, and the Rule has no application to a § 706 suit.”²⁵⁶ The Court determined that the language, “the Commission may bring a civil action,”²⁵⁷ authorized the EEOC to file suit²⁵⁸ and “to secure appropriate relief, including ‘reinstatement or hiring . . . , with or without back pay,’ for the victims of the discrimination.”²⁵⁹ Further, the Court found that the text of section 706(g) authorized the procedure by which the EEOC had brought suit, i.e., investigating claims that the General Telephone Company discriminated against female employees, finding reasonable cause, and then filing suit to remedy the discrimination.²⁶⁰

Second, the Court turned to the purpose of the 1972 amendments, which the Court concluded “was to secure more effective enforcement of Title VII.”²⁶¹ Third, the Court determined that the Attorney General’s authority to bring a pattern or practice suit under section 707 without first obtaining class certification was transferred to the EEOC through the 1972 amendments.²⁶² Moreover, the Attorney General could recover backpay for individuals and seek individual injunctive relief such as reinstatement under section 707.²⁶³ Congress did not differentiate between the EEOC’s ability to bring a class suit and that of the Attorney General’s prior to the amendments.²⁶⁴ Nor did Congress limit the EEOC’s ability to seek individual or class relief.²⁶⁵ According to the Court, because Congress transferred the Attorney General’s authority to enforce Title VII in federal court to the EEOC, and because the Attorney General “did not sue as a representative of the persons aggrieved” and could proceed without Rule 23 certification, “Congress intended the EEOC to proceed in the same manner.”²⁶⁶

255. *Id.* at 324.

256. *Id.*

257. 42 U.S.C. § 2000e-5(f)(1) (2012).

258. *Gen. Tel. Co. of the Nw.*, 446 U.S. at 323–24.

259. *Id.* at 324 (quoting 42 U.S.C. § 2000e-5(g)).

260. *Id.*

261. *Id.* at 325.

262. *Id.* at 327–29; *see also supra* text accompanying notes 194–202 (explaining that prior to 1972, the U.S. Attorney General through the DOJ, rather than the EEOC, had the authority to bring suit in federal court against employers under section 707).

263. *Gen. Tel. Co. of the Nw.*, 446 U.S. at 327–28.

264. *Id.* at 328–29 (citing 118 CONG. REC. 4081–82 (1972)).

265. *See id.* at 329 n.12 (citing 118 CONG. REC. 4081).

266. *Id.* at 329.

Fourth, the Court found that forcing the EEOC to seek Rule 23 certification would “distort” the Rule 23 model.²⁶⁷ The Court was concerned that the Rule 23(a) requirements would force the EEOC to join all aggrieved individuals in smaller cases, interfering with the EEOC’s ability to bring suit in its own name.²⁶⁸ Similarly, the Court determined that under Rule 23(a) the EEOC would have to stand in the shoes of the charging party and thus be limited in its suit “to claims typified by those of the charging party,” rather than any claim that arose out of the investigation of the charge.²⁶⁹ Accordingly, based on the legislative history and the EEOC’s role of litigating in the public interest, the EEOC is not required to seek class certification when bringing a pattern or practice claim.

The Court, in *Occidental Life Insurance Co. v. EEOC*,²⁷⁰ confirmed that the EEOC also is not subject to any statute of limitations, unlike private litigants who must receive a right to sue notice and file their suit within ninety days of the notice.²⁷¹ In 1970, a female employee of Occidental Life Insurance Company filed a complaint of sex discrimination with the EEOC.²⁷² Three years and two months later, the EEOC filed suit in federal district court in its own name.²⁷³ Prior to filing suit, the EEOC had served the original charge of discrimination on the company, investigated the charge, found cause, and attempted conciliation.²⁷⁴ The district court granted Occidental’s motion for summary judgment, reasoning that Title VII required the EEOC to file suit within 180 days of a charge of discrimination being filed with the EEOC, and alternatively that the one-year state statute of limitations barred the suit.²⁷⁵ The Supreme Court, affirming the Ninth Circuit’s reversal, held that the only temporal restriction on the EEOC’s ability to bring an enforcement action in federal district court is that “the EEOC may not invoke the judicial power to compel compliance with Title VII until at least 30 days after a charge has been filed.”²⁷⁶ The Court relied on the legislative history of the 1972 amendments and the purposes behind Title VII to support its conclusion.²⁷⁷ It determined that Congress

267. *Id.* at 329–30.

268. *Id.* at 330–31.

269. *Id.* at 331.

270. 432 U.S. 355 (1977).

271. *Id.* at 361 (citing 42 U.S.C. § 2000e-5(f)(1)).

272. *Id.* at 357.

273. *Id.* at 358.

274. *Id.* at 357.

275. *Id.* at 358.

276. *Id.* at 360.

277. *Id.* at 366, 369.

included the 180-day period to ensure the aggrieved individual's ability to pursue a prompt remedy in light of the Agency's backlog of cases and lack of resources, not as a temporal limitation on the EEOC's ability to bring suit.²⁷⁸ The lack of a statute of limitations places the EEOC in a more advantageous position than that of private litigants. One benefit is that the EEOC can marshal its evidence and, as discussed below, develop a narrative that places the pattern or practice of discrimination firmly within a legal theory well before filing its complaint.²⁷⁹ It can also use the extra time to ensure the employer has notice of its liability and to try to resolve the case prior to filing suit.

Finally, in *EEOC v. Waffle House Inc.*,²⁸⁰ the Court held that the EEOC may still bring an action even if the employee whose charge formed the basis of the EEOC's action had agreed to binding arbitration.²⁸¹ As a practical matter, the absence of three procedural hurdles—class certification, statute of limitations, and mandatory arbitration clauses—in EEOC pattern or practice litigation means that the EEOC is in a better position to bring systemic claims than private litigants who must seek class certification and are subject to a statute of limitations and mandatory arbitration. These advantages also mean that the EEOC may be the only plaintiff that can bring a claim, particularly in light of the restrictions on the ability of private plaintiffs to obtain class certification following *AT&T Mobility LLC v. Concepcion*²⁸² and *Wal-Mart Stores, Inc. v. Dukes*.²⁸³

B. *The EEOC's Position as an Agency Protects Employers' Due Process Rights*

The EEOC's status as a federal agency protects employers' due process rights in ways that litigation by private litigants does not. First, the EEOC's administrative processing provides notice to employers well in advance of any potential litigation. Second, the EEOC's political accountability means that employers who are

278. *Id.* at 369.

279. *See infra* notes 361–367 and accompanying text.

280. 534 U.S. 279 (2002).

281. *Id.* at 297–98.

282. 131 S. Ct. 1740, 1746, 1753 (2011); *see Sternlight, supra* note 70, at 88 (stating that the Supreme Court's decision in *Concepcion* “allows companies to use arbitration clauses to insulate themselves from exposure to plaintiffs' class actions”); *Sternlight, supra* note 80, at 719–20 (explaining that “*Concepcion* and its progeny will affect putative named plaintiffs by requiring them to pursue their claims individually in arbitration rather than as part of a class in either litigation or arbitration”).

283. *See supra* Part III (discussing the challenges posed to systemic discrimination claims by *Wal-Mart*).

dissatisfied with its handling of a case or its enforcement efforts can use the political process to advocate for their interests.

1. *Conditions precedent address concerns about notice for employers*

The EEOC's conditions precedent and administrative processing put to rest any issues regarding whether an employer receives adequate notice. The Fourth Circuit explained, that the EEOC's conditions precedent to bringing a lawsuit ensure, in part, that "the employer is fully notified of the violation."²⁸⁴ In contrast to a litigant in a private pattern or practice suit, the EEOC must give notice to the employer in a letter of determination and through the conciliation process that the allegations are class-wide before it can bring a pattern or practice suit in federal court.²⁸⁵ As a result, a defendant would have the opportunity to gather and preserve evidence before it grew stale.²⁸⁶

For example, in *Serrano v. Cintas Corp.*,²⁸⁷ the Sixth Circuit noted the EEOC's letter of determination that stated, "like and related charges growing out of this investigation, there is reasonable cause to believe that [Cintas] has discriminated against females as a class by

284. *EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1185 (4th Cir. 1981); *see also Occidental Life Ins. Co.*, 432 U.S. at 372-73 (finding that the notice provided to potential defendants of the charge and the course of the EEOC litigation relieved the concerns that not imposing time limitations on the EEOC would prejudice Title VII defendants and deprive them of due process by allowing stale claims); *EEOC v. Original Honeybaked Ham Co. of Ga., Inc.* 918 F. Supp. 2d 1171, 1180 (D. Colo. 2013) (observing that because the EEOC had disclosed "the nature, extent, location, time period, and persons involved in the alleged unlawful conduct," the employer was "able to reasonably estimate the number and identities of the persons who may have been impacted," and that the EEOC therefore did not have to disclose each individual to later seek relief for that employee). In a recent case in Arizona, in which it appears the EEOC was not alleging a pattern or practice claim but rather asserting individual claims of discrimination, the district court dismissed twenty-one claimants the EEOC identified during litigation because the EEOC had not disclosed them during conciliation. *EEOC v. Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005, 1044 (D. Ariz. 2013). The outcome likely would have been different—or at least should have been different—if the EEOC had proceeded under a pattern or practice claim, which would not have required the EEOC to identify each individual affected by the practice, but merely required it to identify the pattern or practice at issue.

285. *See, e.g., Occidental Life Ins. Co.*, 432 U.S. at 359-60, 368 (indicating that the EEOC cannot assert a claim in federal court without first "discharg[ing] its administrative duties" of notice, investigation, reasonable cause determination, and conciliation); *see also Waffle House*, 534 U.S. at 290 n.7 ("Unlike individual employees, the EEOC cannot pursue a claim in court without first engaging in a conciliation process.")

286. *Occidental Life Ins. Co.*, 432 U.S. at 372; *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 79 (1984) (noting that, in addition to ensuring that relevant records are not destroyed, notice to the employer of a pattern or practice charge also allows the employer "to undertake its own inquiry into its employment practices").

287. 699 F.3d 884 (6th Cir. 2012), *cert. denied*, No. 12-1347, 2013 WL 1951616 (Oct. 7, 2013).

failing to hire them as Route Sales Drivers/Service Sales Representatives in violation of Title VII,” and as well as similar language in the EEOC’s offer of conciliation, provided notice to the employer of the class-wide claims giving it an opportunity to conciliate the claims before suit.²⁸⁸ Some courts have gone further by requiring the EEOC to identify each victim of the discriminatory practice during the administrative processing and to provide the employer an opportunity to conciliate as to each individual and by prohibiting the EEOC from uncovering additional class members through discovery.²⁸⁹

These procedural requirements are in contrast to those in the private class action context. In *United Airlines, Inc. v. McDonald*,²⁹⁰ the Supreme Court considered whether an individual who did not file a charge of discrimination could intervene after the lower court had dismissed a private suit seeking class certification.²⁹¹ Until 1968, United Airlines policy required its female flight attendants to remain unmarried but did not require the same of men.²⁹² A female employee, Mary Sprogis, filed a charge with the EEOC alleging individual discrimination, and after receiving her notice of right to sue, brought an individual lawsuit in federal court.²⁹³ She won.²⁹⁴ While United was appealing the case, another female employee, Carole Romasanta, filed a charge of discrimination with the EEOC alleging United had fired her because she had married.²⁹⁵

When Ms. Romasanta filed suit in federal court, unlike Ms. Sprogis, she filed her suit as a class action even though she had filed an

288. *Id.* at 904.

289. *See, e.g.*, *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 674–75 (8th Cir. 2012) (stating that the EEOC may seek relief for individuals it identifies during the course of investigation, but an employer must have an opportunity to conciliate with those individuals). As previously mentioned, the Eighth Circuit in *CRST* did not treat the EEOC’s claim as a pattern or practice claim and instead assumed that when the EEOC alleges a section 706 violation, it must prove up each victim’s individual disparate treatment claim. *See supra* notes 208, 246–247 and accompanying text. Nonetheless, this view seems inconsistent with *General Telephone Co. of the Northwest* and *Waffle House*, *see supra* Part V.A and *infra* Part V.E, as well as the nature of class allegations. Not even a private class action claim under Rule 23(b)(3) must name each potential class member pre-certification or even before a determination of liability on a *Teamsters*-style claim. Further, private class action claimants are allowed to seek additional class members through discovery and the post-judgment class notification process.

290. 432 U.S. 385 (1977).

291. *Id.* at 387.

292. *Id.*

293. *Id.*

294. *Id.* at 387–88.

295. *Id.* at 388.

individual charge of discrimination with the EEOC.²⁹⁶ The district court denied the certification, and the case was later settled, leading the court to dismiss the suit.²⁹⁷ A third female employee, Liane McDonald, who had not filed a charge of discrimination with the EEOC, found out about the dismissal of the suit and sought intervention to appeal the denial of class certification.²⁹⁸ The district court denied intervention because of the length of time (five years) that had passed since Ms. Romasanta had filed her suit.²⁹⁹ After the Seventh Circuit reversed, United petitioned for and was granted certiorari, whereupon the Supreme Court upheld the Seventh Circuit decision.³⁰⁰ The key issue for the Court was that Ms. McDonald could not even appeal the denial of class certification until the judgment was final, making her motion for intervention timely.³⁰¹ However, in addressing whether intervention would prejudice United, the Court found that because Ms. Romasanta had filed her suit as a class action, “United was put on notice . . . of the possibility of classwide liability.”³⁰² Therefore, the EEOC’s litigation of pattern or practice claims provides better and earlier notice to employers than private class action claims because the EEOC must let the employer know during the administrative processing that it is investigating, has reasonable cause to believe, and seeks to conciliate a pattern or practice claim.

2. *As an agency, the EEOC has political accountability*

The EEOC is an independent agency, yet it is politically accountable. Congress can provide a check on the EEOC’s actions in a number of ways should the Agency abuse employers’ process rights. Congress can exercise some control over the EEOC both through its oversight function and through the annual budget resolution and appropriations process.³⁰³ The EEOC also must follow public notice

296. *Id.*

297. *Id.* at 388–89.

298. *Id.* at 389–90.

299. *Id.* at 390.

300. *Id.* at 395–96.

301. *Id.*

302. *Id.* at 395.

303. *Congressional Oversight*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/legislative/oversight.cfm> (last visited Oct. 12, 2013); *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2258 (2001) (describing a fire alarm system backed by “powerful legislative sanctions” through which Congress exercises control over federal agencies and which allows “citizens and interest groups to monitor an agency and report any perceived errors” (internal quotation marks omitted)). Recently, Republican members of the House Education and the Workforce’s Subcommittee on Workforce Protections questioned the EEOC Chair, Jacqueline Berrien, about the EEOC’s litigation authority and the EEOC’s litigation

and comment rules before enacting new regulations.³⁰⁴ Such accountability is not present for private litigants.

For example, in the mid-1990s, the EEOC launched an investigation into the hiring practices of the Hooters restaurant chain, resulting in a finding that the restaurant discriminated on the basis of sex (male) in hiring.³⁰⁵ After receiving a conciliation offer from the EEOC that it found unacceptable, Hooters went public and engaged in an extensive media campaign.³⁰⁶ Employees of Hooters even marched on Washington.³⁰⁷ As a result of Hooters' public relations effort, "Congress was flooded 'with hundreds and hundreds of letters,'" and "the controversy prompted a congressional inquiry into the [investigation]."³⁰⁸ The largely negative public reaction to the investigation of Hooters likely led to the EEOC's letter to Representative Harris Fawell, the then-Chairman of the House Subcommittee on Employer-Employee Relations, announcing its intention to withdraw the charge.³⁰⁹

priorities. Kevin P. McGowan, *House Panel Quizzes EEOC's Berrien About Recent Developments at Agency*, 99 Daily Lab. Rep. (BNA) No. 99, at AA-1, (May 22, 2013) (reporting that members questioned the delegation of litigation authority to the EEOC General Counsel, the EEOC's focus on systemic cases, and the EEOC's guidelines regarding the use of arrest and conviction records by employers).

304. Kagan, *supra* note 303, at 2262 (stating that the Administrative Procedure Act subjects agency rulemaking "to stringent procedural requirements" and that later "enhancement of these procedures . . . provide[d] still greater public participatory rights"). For examples of some of the EEOC's more recent proposed rulemakings and requests for public input, see *EEOC Regulations*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/laws/regulations/index.cfm> (last visited Oct. 12, 2013). Besides the rulemaking process for enacting regulations, the EEOC also engages in a process of public notice and comment for internal operations documents like its most recent strategic plan. EEOC STRATEGIC PLAN FOR FY 2012–2016, *supra* note 11, at 1, 4–5.

305. Kenneth L. Schneyer, *Hooting: Public and Popular Discourse About Sex Discrimination*, 31 U. MICH. J.L. REFORM 551, 567–68 (1998). The EEOC did not release information about its investigation or its eventual conciliation offer because of the statutory provision prohibiting such disclosure, and so all of the information about the investigation and settlement offer came from Hooters's press kit. *Id.* at 568 & n.68.

306. *Id.* at 568; see also Jeannie Sclafani Rhee, *Redressing for Success: The Liability of Hooters Restaurant for Customer Harassment of Waitresses*, 20 HARV. WOMEN'S L.J. 163, 165 n.7 (1997) ("Hooters itself launched a successful media campaign against the EEOC, culminating in an advertisement taken out in major newspapers, mocking the EEOC with a picture of an unshaven man dressed up as a 'Hooters Girl.' The caption read in part, 'Washington—Get a Grip!'").

307. Russell K. Robinson, *Casting and Caste-Ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CALIF. L. REV. 1, 43 (2007).

308. *Id.* at 42; Chuck Hutchcraft, *Hooters Case Won't Get a Second Look: EEOC Chairman Cites Limited Resources*, CHI. TRIB. (May 2, 1996), http://articles.chicagotribune.com/1996-05-02/business/9605020273_1_hooters-girls-hooters-restaurants-eeoc (internal quotation marks omitted).

309. Schneyer, *supra* note 305, at 568 & n.72, 575. In the letter, the EEOC stated that it had made the decision due to limited resources and the fact that a private

Similarly, Congress can express its approval or disapproval of the EEOC's enforcement goals through its control of the EEOC's budget. In 2012, for example, the House Appropriations Committee approved an amendment to its appropriations bill for the EEOC that prohibited the EEOC from using any of its funds to enforce the EEOC's regulations concerning the Age Discrimination in Employment Act due to the burden the regulations imposed on businesses.³¹⁰ The Senate Appropriations Committee did not include a similar amendment in its appropriations bill, but it expressed concern over the EEOC's guidance on employers' use of criminal background checks because it could "limit the ability of conscientious employers to hire with confidence."³¹¹

The EEOC's policy is to refuse to enter settlements post-suit that contain confidentiality provisions, in part, to maintain its political accountability.³¹² The EEOC's Regional Attorneys' Manual provides that "[t]he principle of openness in government dictates that Congress, the media, stakeholders, and the general public should have access to the results of the agency's litigation activities, so that they can assess whether the Commission is using its resources appropriately and effectively."³¹³ This includes the ability of the EEOC to fully answer inquiries about its activities post-litigation and to provide all non-privileged case-related documents.³¹⁴

This is in contrast to the private, plaintiffs' bar, which lacks the "institutional commitment to civil rights enforcement and nondiscrimination" and "may be tempted to compromise organizational change for larger money settlement funds with the hope of signaling greater success and leading to judicial approval of larger attorneys' fees."³¹⁵ The EEOC's political accountability, then,

class action had been filed in the case, obviating the need for EEOC involvement. Robinson, *supra* note 307, at 42–43.

310. Ilyse Wolens Schuman, *House Committee Approves EEOC Budget with Amendment Blocking ADEA Rule*, LITTLER MENDELSON (Apr. 30, 2012), <http://www.littler.com/dc-employment-law-update/house-committee-approves-eec-budget-amendment-blocking-adea-rule>.

311. *Id.*; cf. Christopher J. DeGroff & Gerald R. Maatman, Jr., *Budget Woes May Significantly Impact EEOC—But Should Employers Worry Too?*, LEXOLOGY (Feb. 1, 2013), <http://www.lexology.com/library/detail.aspx?g=653ce773-c51b-4865-bf6c-c18b3f0eafe5> (explaining that although Congress may limit the EEOC's budget, employers should still be cautious because the Agency has placed an emphasis on bringing large-scale claims and partnering with other agencies).

312. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, REGIONAL ATTORNEYS' MANUAL, pt. 3, § IV.A.2.e (2005) [hereinafter EEOC REGIONAL ATTORNEYS' MANUAL], *available at* http://www.eeoc.gov/eeoc/litigation/manual/upload/regional_attorney_fullversion.pdf.

313. *Id.*

314. *Id.*

315. Green, *supra* note 6, at 717. The EEOC has experienced its own issues in

should reassure courts that the risk of “in terrorem” settlement suits or interference with businesses’ ability to run their business as they see fit would not be present in an EEOC suit.³¹⁶

C. *EEOC Litigation Provides Enhanced Due Process Protections to Employees and Employers*

Unlike the unnamed class members in a Rule 23(b)(2) class, who will be bound by the mandatory nature of the suit, potential claimants in an EEOC action have several procedural protections. First, employees who file a charge of discrimination with the EEOC may intervene as of right in the EEOC’s subsequent lawsuit.³¹⁷ Intervenors may allege additional claims, including state claims, and make different requests for relief.³¹⁸ This addresses, in part, concerns about commonality and the risk that class members with higher value claims will have their claims unfairly discounted by class counsel and the named plaintiffs.³¹⁹ The EEOC also operates under its own set of

implementing a program to address systemic litigation, including administrative backlog in processing charges of discrimination, which has narrowed the EEOC’s focus to individual discrimination rather than systemic discrimination in both investigation and litigation. *Id.* at 679–80. There are signs that the EEOC is successfully addressing these concerns beginning with its Systemic Initiative in 2006 and its reaffirmation this year in the EEOC Strategic Plan for FY 2012–2016 and the EEOC Strategic Enforcement Plan for FY 2013–2016. *See infra* notes 352–354 and accompanying text (explaining that the EEOC’s commitment to combating systemic discrimination is a top priority); *see also* DeGroff & Maatman, *supra* note 311 (warning employers that the EEOC’s Systemic Initiative has resulted in lawsuits with greater numbers of claimants and bigger damages).

316. At the same time, the EEOC should maintain its status as an independent agency and Congress should be wary of placing the kind of political pressure on the EEOC that will overly politicize the Agency and make it too accountable to special interests. Rather than leading to greater political accountability, politicization has led to polarization in the Agency confirmation process that increases executive control over the Agency. Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 491 (2008). This in turn can affect “the agency’s annual regulatory agenda submissions [because] agencies ‘tend not to put on those lists things that are controversial, because if you do, then you’re going to get problems.’” Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 823 (2013) (quoting Symposium, *Independent Agencies—Independent from Whom?*, 41 ADMIN. L. REV. 491, 504 (1989) (statement of R. Gaull Silberman, former Vice-Chairman, EEOC))).

317. 42 U.S.C. § 2000e-5(f)(1) (2012) (“The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission . . .”).

318. *See, e.g.*, EEOC v. Coley’s No. 101, Ltd. Liab. Co., No. 11-CV-3465-VEH, 2012 WL 2856512, at *7 (N.D. Ala. July 9, 2012) (permitting two individual plaintiffs to intervene in the EEOC’s lawsuit alleging a pattern or practice of sexual harassment and bring separate individualized claims against the defendant). *But see* EEOC v. JBS USA, L.L.C., No. 8:10CV318, 2012 WL 5906537, at *9 (D. Neb. Nov. 26, 2012) (denying intervention by plaintiffs in Phase I of the EEOC’s suit, upon plaintiffs’ seeking to assert individual rights but permitting intervention in Phase II should the EEOC prove the pattern or practice).

319. One of the reasons that plaintiffs may intervene in EEOC lawsuits is to

internal guidelines designed to protect the interests of individual victims of discrimination and to make sure that they are aware of their individual interests and rights.³²⁰ Before filing suit, EEOC attorneys should interview potential claimants, and may seek nonpecuniary compensatory damages “only for individuals who have given their express consent following a thorough discussion with a legal unit attorney regarding the possible consequences of such a claim, and who have had at least a week to think about the matter.”³²¹ The attorney should also discuss the EEOC’s “public interest role in the litigation, the possibility that the Commission’s and the claimant’s interests may diverge during the litigation, and the claimant’s individual suit and intervention rights.”³²²

Second, if the EEOC reaches a settlement with the employer, the court must approve the settlement, and the consent decree is public.³²³ And, although the EEOC is not subject to Rule 23, when the settlement includes a class fund, the EEOC will often request a fairness hearing.³²⁴ A fairness hearing is a public hearing, held by the district court, in which the district court determines the “fairness, adequacy, and reasonableness” of the proposed settlement and

protect their individual claims of relief because the EEOC must pursue the public interest through its litigation. In *General Telephone Co. of the Northwest*, the Court specifically noted that intervention as of right was granted because the EEOC seeks “the most satisfactory overall relief,” which involves weighing competing interests and considering the potential for “particular groups . . . to be disadvantaged.” *Gen. Tel. Co. of the Nw., v. EEOC*, 446 U.S. 318, 331 (1980). Indeed, the Court noted that the EEOC’s mission to act in the public interest means it must make “the hard choices where conflicts of interest exist.” *Id.*

320. See generally EEOC REGIONAL ATTORNEYS’ MANUAL, *supra* note 312.

321. *Id.* pt. 2, § II.C.

322. *Id.*

323. See *EEOC v. Erection Co.*, 900 F.2d 168, 172 (9th Cir. 1990) (Reinhardt, J., concurring in part and dissenting in part) (“[T]he public has a right to know whether the courts are properly resolving discrimination claims. Since it is important for people to be able to assess the conduct of public institutions, the presumption weighs even more heavily in favor of public access than in the ordinary civil case.”); *EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985) (“[A] district court must determine whether a proposed decree is lawful, fair, reasonable, and adequate.”); see also EEOC REGIONAL ATTORNEYS’ MANUAL, *supra* note 312, pt. 3, § IV.A.2.e (stating that resolutions of Commission suits must be filed in the public court record).

324. See, e.g., *EEOC v. Wal-Mart Stores, Inc.*, No. 6:01-CV-339-KKC, 2011 WL 6400160, at *4 (E.D. Ky. Dec. 20, 2011) (stating that the court held a fairness hearing to determine how the settlement would be distributed); *EEOC v. Polycon, Indus.*, No. 2:09-CV-141, 2011 WL 4816230, at *1 (N.D. Ind. Oct. 11, 2011) (same); *EEOC v. Astra USA, Inc.*, No. CIV.A. 98-40014-NMG, 1999 WL 342043, at *1–2 (D. Mass. May 20, 1999) (same); see also EEOC REGIONAL ATTORNEYS’ MANUAL, *supra* note 312, pt. 3, § IV.A.2.f, C, D.4 (noting that it may be appropriate to request a fairness hearing before the court approves a consent decree and describing the procedures involved in doing so).

consent decree.³²⁵ The EEOC will request a fairness hearing, in part, because it can “generate publicity, which can serve several important functions, including reaching ‘lost’ aggrieved persons.”³²⁶ The fairness hearing can also be beneficial to defendants, as resolution through a fairness hearing “may diminish the likelihood of further litigation by anyone who is included in the definition of persons who can recover under the decree.”³²⁷

Third, because the EEOC cannot recover attorneys’ fees and all monetary relief goes directly to the individuals subject to the pattern or practice,³²⁸ the concerns over EEOC counsel padding their pockets to benefit themselves to the detriment of the classes’ recovery is nonexistent. Moreover, the EEOC foots the bill for depositions, expert witnesses, and other litigation costs, which means not only are those costs not deducted from the class members’ eventual recovery, but EEOC counsel is also free to conduct the discovery necessary for the case and to engage in robust pre-trial litigation.³²⁹ Indeed, at least one court has commented that “extensive motion practice and discovery” is indicative of a lack of fraud or collusion in the settlement of the class.³³⁰

Fourth, when the EEOC settles a claim that involves class-based relief, it treats the class as an opt-in class and tries to provide notice of the settlement to all aggrieved individuals.³³¹ Besides a copy of the proposed consent decree, the EEOC includes in its notice to “all persons covered by or affected by the lawsuit” a statement regarding the claims in the lawsuit, an explanation of the EEOC’s efforts to resolve the lawsuit, an explanation as to why the particular person received the notices, a summary of the relief included in the decree, an explanation of how the EEOC computed damages and determined their allocation, the steps an aggrieved individual must take to claim relief under the settlement, and notice of any fairness

325. *Binker v. Pennsylvania*, 977 F.2d 738, 748 (3d Cir. 1992); *see also id.* at 743–44 (describing the fairness hearing that took place in district court and examined the EEOC’s proposed settlement and consent decree).

326. EEOC REGIONAL ATTORNEYS’ MANUAL, *supra* note 312, pt. 3, § IV.D.4.

327. *Id.*

328. 42 U.S.C. § 2000e-5(k) (2012).

329. *See* EEOC REGIONAL ATTORNEYS’ MANUAL, *supra* note 312, pt. 4, § I (discussing how to obtain expert and other litigation support services, such as court reporters, copying services, or process servers); *cf.* Sternlight, *supra* note 70, at 122 (“Government agencies can also protect consumers in situations where extensive resources are needed to present and prove a claim. They can hire experts, gather data, analyze statistics, and so on.”).

330. *EEOC v. Wal-Mart Stores, Inc.*, No. 6:01-CV-339-KKC, 2011 WL 6400160, at *7 (E.D. Ky. Dec. 20, 2011).

331. *See* EEOC REGIONAL ATTORNEYS’ MANUAL, *supra* note 312, pt. 3, § IV.D (discussing the EEOC’s notice and claims procedures in the settlement of class claims).

hearing and how to object to the settlement.³³² Additionally, the EEOC will provide notice of the settlement through other means such as newspaper advertisements, a posting at the employer's facility or union hall, or on the internet (including on the EEOC's website).³³³

Nor are all individuals who were affected by the illegal employment action necessarily bound by "EEOC judgment or settlement against the employer."³³⁴ *That EEOC lawsuits do not have the same preclusive effect as private class actions, is necessary* "given the possible differences between the public and private interests involved."³³⁵ It is one of the reasons that the Court in *General Telephone of the Northwest* found the EEOC was exempt from the requirements of Rule 23(a).³³⁶ The Court recognized that "the EEOC is authorized to proceed in a unified action and to obtain the most satisfactory overall relief even though competing interests are involved."³³⁷ Indeed, "[t]he individual victim is given [the] right to intervene for this very reason."³³⁸

The EEOC has also instructed its attorneys that any "consent decree should never contain language waiving [individual claimants'] rights to pursue their individual claims" since the EEOC does not represent them.³³⁹ And, if the EEOC reached conciliation with the employer prior to filing a lawsuit, an employee who was not a party to the conciliation and did not receive individual relief from the conciliation, is not proscribed from filing her own charge of discrimination or suit.³⁴⁰ Nonetheless, employers are still protected from having to pay out double recoveries to individuals.³⁴¹ Anyone

332. *Id.* pt. 3, § IV.D.1.

333. *Id.* pt. 3, § IV.D.1.a. See www.eeoc.gov for postings of recent EEOC settlement notices.

334. *Gen. Tel. Co. of the Nw., v. EEOC*, 446 U.S. 318, 333 (1980).

335. *Id.*

336. *Id.* at 331.

337. *Id.*

338. *Id.*

339. EEOC REGIONAL ATTORNEYS' MANUAL, *supra* note 312, pt. 3, § IV.A.2.c.

340. See, e.g., *Reed v. Arlington Hotel Co.*, 476 F.2d 721, 724-25 (8th Cir. 1973) (finding that even though the EEOC and the employer had entered into a settlement agreement, it did not prevent an employee who rejected relief under the agreement from bringing his own claim); *Domingo v. New England Fish Co.*, 445 F. Supp. 421, 424-25 (W.D. Wash. 1977) (noting that the employee, who was not a party to the conciliation agreement between the EEOC and employer, was able to file suit in federal court), *aff'd* 743 F.2d 520 (9th Cir. 1984).

341. *Gen. Tel. Co. of the Nw.*, 446 U.S. at 333; see also *EEOC v. Mitsubishi Motor, Mfg. of Am., Inc.*, 990 F. Supp. 1059, 1088 (C.D. Ill. 1998) (explaining that although individuals who had filed their own lawsuit in federal court would be part of the EEOC's pattern or practice claim, they could not continue "to the individual relief stage[] if the pattern or practice case is successful").

who receives relief pursuant to a judgment in an EEOC lawsuit also “relinquish[es] his right to bring a separate private action.”³⁴² This addresses due process concerns for both employees and employers. Employees with higher value claims are not forced to give up their right to full recovery, while employers can be assured that if someone obtains relief through an EEOC suit, the employer will not be forced to defend itself again in a separate action.

Finally, just as private class action claims can provide protection to class members who fear retaliation or the emotional costs of coming forward, EEOC litigation can provide similar protections to class members. As the Supreme Court has noted, the EEOC may file a charge of discrimination to instigate an investigation “when a victim of discrimination is reluctant to file a charge himself because of fear of retaliation.”³⁴³ Further, at least one court has allowed individuals to intervene anonymously in an EEOC pattern or practice claim.³⁴⁴ In *EEOC v. ABM Industries Inc.*,³⁴⁵ the EEOC alleged that the company engaged in a pattern or practice of subjecting employees to a hostile work environment based on sex.³⁴⁶ Eight women sought permission of the court to intervene anonymously in the suit because not only did they fear “embarrass[ment]” given the sexual nature of the allegations, but they also feared retaliation and “serious physical harm” at the hands of one of the company’s employees whom they alleged was a registered sex offender and had sexually assaulted three of the women in the workplace.³⁴⁷ The court noted that the women were vulnerable to retaliation because of the allegations that the harasser “was afforded access to them at the workplace as a consequence of his job as a supervisor.”³⁴⁸ EEOC litigation, then, can

342. *Gen. Tel. Co. of the Nev.*, 446 U.S. at 333.

343. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (citing 42 U.S.C. § 2000e-6(b) (1982); 29 C.F.R. §§ 1601.7, 1601.11 (1983)). The EEOC has also adopted as one of its national priorities the protection of vulnerable workers, including migrant and immigrant workers. See U.S. EQUAL EMP’T OPPORTUNITY COMM’N, STRATEGIC ENFORCEMENT PLAN FOR FY 2013–2016, at 1 (2012) [hereinafter EEOC STRATEGIC ENFORCEMENT PLAN FOR FY 2013–2016], available at <http://www.eeoc.gov/eeoc/plan/upload/sep.pdf> (stating that “[t]he EEOC will target disparate pay, job segregation, harassment, trafficking and discriminatory policies affecting vulnerable workers who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them”).

344. See *EEOC v. ABM Indus. Inc.*, 249 F.R.D. 588, 590, 593–94 (E.D. Cal. 2008) (acknowledging the claimants’ concerns that they may suffer embarrassment or face a danger of serious physical injury if their identities were disclosed).

345. 249 F.R.D. 588 (E.D. Cal. 2008).

346. *Id.* at 590.

347. *Id.* at 593–94.

348. *Id.* at 594. In another case, *EEOC v. Scolari Warehouse Markets, Inc.*, the defendant argued that because the EEOC had only named seventeen women who alleged they suffered a hostile work environment based on sex in a company with

provide enhanced protections to employees and employers that often are not available in private litigation.

D. The EEOC's Institutional Role Gives It Expertise in Pattern or Practice Litigation

When Congress amended Title VII in 1972 to expand the EEOC's enforcement authority, it did so because there was "a need for an administrative agency with acknowledged expertise in the area of discrimination."³⁴⁹ Part of what motivated Congress to recognize this was the systemic nature of discrimination:

Congress was aware that employment discrimination was a "complex and pervasive" problem that could be extirpated only with thoroughgoing remedies; "[u]nrelenting broad-scale action against patterns or practices of discrimination" was essential if the purposes of Title VII were to be achieved. The EEOC, because "[i]t has access to the most current statistical computations and analyses regarding employment patterns" was thought to be in the best position "to determine where 'pattern or practice' litigation is warranted" and to pursue it.³⁵⁰

In *General Telephone Company of the Southwest v. Falcon*, the Court emphasized Title VII's recognition of the EEOC's "special authorization" to remedy systemic discrimination by pointing to the statute's different treatment of suits brought by the EEOC as compared to those brought by private individuals:

5,200 employees, the EEOC could not demonstrate that the defendant had engaged in a pattern or practice of subjecting female employees to a hostile work environment. 488 F. Supp. 2d 1117, 1130 (D. Nev. 2007). The court rejected the argument, recognizing that only seventeen employees may have stepped forward because the rest feared retaliation, and accepted as true for purposes of the summary judgment motion that there was a class of unnamed women for whom the EEOC sought relief. *Id.* at 1130–31.

349. Hart, *supra* note 9, at 1952. Professor Hart also notes that when the Court has rejected the EEOC's interpretation of statutes, thereby ignoring the EEOC's expertise, Congress has reacted by "revers[ing] the Court's decisions and essentially . . . enact[ing] the EEOC's interpretation directly into law." *Id.* at 1950. Since Professor Hart's article, Congress enacted the Lily Ledbetter Fair Pay Act of 2009 in reaction to the Court's rejection of the EEOC's interpretation of a discriminatory act in pay in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, (2007), Lily Ledbetter Fair Pay Act of 2009, Pub. L. No. 111–2 § 2, 123 Stat. 5, 5. This provides further support for Professor Hart's contention that Congress views the EEOC as having expertise in interpreting Title VII.

350. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 69 (1984) (footnote omitted) (quoting H.R. REP. NO. 92-238, at 8, 14 (1971)); *see also* Hart, *supra* note 9, at 1952 (stating that employment discrimination as viewed today is a far more "complex and pervasive" phenomenon, one whose resolution requires expert assistance and technical perception that the problem exists in the first place and the system complained of is unlawful (quoting S. Rep. No. 92-415, at 5 (1971))).

[T]he Commission may seek relief for groups of employees or applicants for employment without complying with the strictures of Rule 23. Title VII, however, contains no special authorization for class suits maintained by private parties. An individual litigant seeking to maintain a class action under Title VII must meet “the prerequisites of numerosity, commonality, typicality, and adequacy of representation” specified in Rule 23(a).³⁵¹

The EEOC’s institutional role in addressing pattern or practices of discrimination was specifically contemplated by Congress and reaffirmed by the Supreme Court as having special authorization.

As an agency, the EEOC recently has recommitted itself to that role. In 2006, the EEOC adopted a Systemic Initiative that “makes the identification, investigation, and litigation of systemic discrimination cases—pattern or practice, policy, and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic area—a top priority.”³⁵² The Initiative recognized the unique position the EEOC occupies in combating systemic discrimination.³⁵³ The EEOC reaffirmed its commitment to its Systemic Initiative through its Strategic Plan for Fiscal Years 2012–2016 and its Strategic Enforcement Plan for Fiscal Years 2013–2016.³⁵⁴

The EEOC also has internal units to provide analytic support for pattern or practice claims.³⁵⁵ One unit, Research and Analytic Services (RAS) focuses on providing support for large, complex pattern or practice claims in litigation.³⁵⁶ The other unit, the Office of Research, Information and Planning (“ORIP”) provides support during the investigation of systemic cases and administers the Equal

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

352. EEOC STRATEGIC PLAN FOR FY 2012–2016, *supra* note 11, at 14; *see also* LESLIE E. SILVERMAN ET AL., SYSTEMIC TASK FORCE REPORT TO THE CHAIR OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (2006) [hereinafter EEOC SYSTEMIC INITIATIVE], available at http://www.eeoc.gov/eeoc/task_reports/upload/systemic.pdf (providing recommendations to ensure a coordinated strategic and nationwide program to combat systemic discrimination).

353. *See* EEOC SYSTEMIC INITIATIVE, *supra* note 352, at 2 (recognizing that the EEOC’s access to substantial data regarding employment discrimination allegations provides the Agency with a unique ability to identify potential systemic cases).

354. *See* EEOC STRATEGIC ENFORCEMENT PLAN FOR FY 2013–2016, *supra* note 343, at 7–8; EEOC STRATEGIC PLAN FOR FY 2012–2016, *supra* note 11, at 14 (pointing to enforcement priorities as originating with the Systemic Initiative).

355. *See* EEOC REGIONAL ATTORNEYS’ MANUAL, *supra* note 312, pt. 4, § I.B–C (outlining services provided by the Research and Analytic Services and the Office of Research, Information and Planning).

356. *See id.* pt. 4, § I.B.1 (describing RAS senior staff as consisting typically of social scientists with advanced degrees, such as psychologists, economists, statisticians, and social scientists, who are highly skilled in managing large computerized data).

Employment Opportunity Survey programs (“EEO surveys”).³⁵⁷ ORIP provides the data it collects from the EEO surveys to Commissioners, Congress, local fair employment practice agencies, and the public.³⁵⁸

From October 1, 2011 through September 30, 2012, the EEOC received 71,578 charges alleging discrimination under Title VII.³⁵⁹ This places the EEOC in the role of “serv[ing] as the national repository for virtually all formal allegations of employment discrimination brought under federal law.”³⁶⁰ Combined with its access to data through the EEO surveys, the EEOC’s ability to employ a wide variety of investigative tools means that the Agency can identify and investigate potential pattern or practices of discrimination.³⁶¹

For example, unlike private litigants who have access only to their own administrative processing files, the EEOC is able to look at and review the evidence in all the charges it receives.³⁶² Without such information, the private litigant is not only hampered in his ability to file a complaint in federal court alleging sufficient facts for a pattern or practice, but also might not even realize that his allegation of discrimination was not an isolated instance. In contrast, the EEOC can expand the scope of its investigation and even pursue enforcement of a subpoena seeking additional information to

357. See *id.* pt. 4, § I.C. (describing the Survey Program as requiring “[n]early every employer in the United States with 100 or more employees . . . to file an Equal Employment Survey with the Commission”).

358. *Id.*

359. *Title VII of the Civil Rights Act of 1964 Charges*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm (last visited Oct. 12, 2013).

360. EEOC SYSTEMIC INITIATIVE, *supra* note 352, at 2.

361. *Id.* (“The agency has access to substantial data, including information on employment trends and demographic changes, that can help identify possible systemic discrimination. . . . This information, combined with the Commission’s ability to use either a Commissioner Charge . . . or a Directed Investigation . . . provides the EEOC with the crucial tools needed to uncover systemic employment discrimination.”); see also EEOC STRATEGIC ENFORCEMENT PLAN FOR FY 2013–2016, *supra* note 343, at 13 (listing the “wide range of enforcement tools at the EEOC’s disposal, including investigations, mediation, conciliation, litigation, directed investigations, commissioners charges, amicus curiae participation, federal sector oversight, federal sector hearings and appeals, policy development, research, staff training, communications, outreach and education, and state, local, and federal agency collaboration”).

362. The EEOC may review, but not disclose, much of this evidence. In *EEOC v. Associated Dry Goods Corp.*, the Supreme Court found that the EEOC may not reveal information about the content of one charging party’s investigative file to another charging party, even when both employees have brought charges of discrimination against the same employer. 449 U.S. 590, 603–04 (1981). Instead, the EEOC is limited to disclosure of “[s]tatistics and other information about an employer’s general practices.” *Id.* at 604.

determine whether the employer has engaged in a pattern or practice of discrimination.³⁶³

The EEOC's extensive investigative tools in conjunction with its access to employer-specific data and labor-market specific data, means that the EEOC occupies an advantageous position to allow it accurately to assess backpay and other monetary relief that will make whole the victims of systemic discrimination.³⁶⁴ It also puts the EEOC in a better position to place the statistical data in context to prove a pattern or practice of discrimination.³⁶⁵ One problem that Professor Selmi identified with how the *Wal-Mart* plaintiffs presented their case was the failure to "explain the meaning of the regression [analysis] in a descriptive fashion—what it is that the regression demonstrates rather than simply emphasizing the variables that have been controlled for and the statistically significant results."³⁶⁶ Further, the EEOC's litigation department can begin to situate its narrative of the meaning of the statistics in a recognized legal theory before filing suit.³⁶⁷

However, private litigants must get data from the employer after they file their complaint but before certification without the benefit

363. For example, in *EEOC v. Konica Minolta Business Solutions U.S.A., Inc.*, an African American employee had filed a charge of discrimination in which he alleged that his employer had disciplined him for not meeting his quotas while failing to discipline white employees in the same position. 639 F.3d 366, 367 (7th Cir. 2011). During the investigation, the EEOC discovered the employer hired only six African Americans out of 120 employees, and all six were at the same facility. *Id.* This led the EEOC to broaden the scope of its investigation into the employer's hiring practices. *Id.* It issued a subpoena requesting additional information about the employer's hiring practices. *Id.* at 368. The employer resisted the subpoena, and the EEOC sought to enforce it in federal court. *Id.* In affirming the district court's decision to enforce the subpoena, the Seventh Circuit noted that the information was relevant to the initial charge of discrimination, and "that should the agency later conclude that a broader investigation is warranted, the Commission is entitled to file its own charge, see 42 U.S.C. § 2000e-5(b), in which it can allege a pattern or practice of discrimination and calibrate its investigation accordingly." *Id.* at 371.

364. *Cf.* Malveaux, *supra* note 7, at 635 (explaining that backpay had been uncontroversial in Rule 23(b)(2) suits because the relief could be calculated on a class-wide basis "using an employer's own personnel data and statistics . . . for each class member based on a formula that approximates over time what salary an employee would have received but for an employer's discrimination"). At a minimum, the EEOC has access to this sort of information.

365. *Cf.* Selmi, *supra* note 2 (discussing the need for plaintiffs to not only present the statistical data but also to place the data in a narrative context).

366. *Id.* at 509.

367. *See* Weiss, *supra* note 2, at 123 (stating that the *Wal-Mart* "[p]laintiffs nominally advanced both a disparate impact and a disparate treatment claim but made no serious effort to situate their conduit theory within these traditional legal categories"). The number of EEOC trial attorneys nationwide also means that they can brainstorm with each other and benefit from other attorneys' experience and insights.

of full discovery.³⁶⁸ This necessarily means that they will not be able to obtain all the data and access to witnesses they need to explain to the court why the statistics matter. They will also be limited both in terms of time and resources in their ability to hire experts to analyze their data. The EEOC, however, can gather data through its investigation and through the regularly collected EEO surveys. It also has internal resources in RAS and ORIP to analyze the payroll data and the resources to hire outside experts, if needed. EEOC investigators can interview the victims of discrimination, witnesses, and managerial employees and build a narrative context for the data. Moreover, the EEOC can do all of this and more fully develop its legal theory before filing suit. These are important functions given the skepticism expressed by the Court about the use of statistical modeling in awarding damages and as proof of the pattern or practice.³⁶⁹ The EEOC, then, benefits from its role as an institution vested with the expertise to eradicate patterns or practices of discrimination in the workplace.

E. The EEOC Litigates in the Public Interest

The EEOC's lawsuit is not "merely derivative" of the individual victims of discrimination, and the "EEOC does not stand in the employee's shoes."³⁷⁰ "The EEOC exists to advance the public interest in preventing and remedying employment discrimination . . ."³⁷¹ Congress authorized the EEOC to file suit to "implement the public interest as well as to bring about more effective enforcement of private rights."³⁷² Although the EEOC can seek individual relief, "the agency is guided by 'the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement."³⁷³ As the Court in *Waffle House* noted, the EEOC "is in command of the process" once a charge of discrimination is filed with the Agency.³⁷⁴ Part of the reason for this is that Title VII grants the EEOC the authority to represent the public

368. See Malveaux, *supra* note 7, at 627 (providing that a private litigant must put facts in a complaint but cannot get facts until after submitting a complaint and discovery begins).

369. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2555–56, 2561 (2011); see also *supra* notes 135–138 and accompanying text (discussing the Court's doubt that disparate impact claims and discretionary policies could lead to a successful class-wide discrimination case).

370. *EEOC v. Waffle House, Inc.* 534 U.S. 279, 297 (2002).

371. *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 331 (1980).

372. *Id.* at 325–26.

373. *Id.* at 326 (quoting 118 CONG. REC. 4941 (1972)).

374. *Waffle House*, 534 U.S. at 291.

interest in eradicating discrimination and assigns to the EEOC the responsibility of determining when public resources should be devoted to seeking relief in federal court.³⁷⁵

Similarly, the EEOC can seek broad relief under Title VII because, by design, Congress authorized the EEOC to vindicate the rights of individual victims of discrimination as well as litigate in the public interest.³⁷⁶ The legislative history behind the 1972 amendments suggests that Congress viewed the EEOC as the primary enforcer of Title VII. In its conference report on the bill, the Senate wrote:

It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC. . . . However, as the individual's rights to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief.³⁷⁷

This also highlights the importance of Title VII's remedial scheme, in particular, the grant to the EEOC of "broad enforcement powers."³⁷⁸ In *General Telephone Co. of the Northwest*, the Court recognized that the expansion of the EEOC's enforcement authority, permitting it to file suit in federal court, was driven by Congressional concern that the "failure to grant the EEOC meaningful enforcement powers ha[d] proven to be a major flaw in the operation of Title VII."³⁷⁹ One of the flaws was that the EEOC could not go to court "to back up its findings of discrimination" leaving a pattern or practice suit brought by the Department of Justice as the sole enforcement mechanism absent individual victims of discrimination going to court to obtain relief and taking on the associated burdens of litigation.³⁸⁰

Further, in 1991, Congress amended Title VII to allow the EEOC (and private plaintiffs) to recover compensatory and punitive damages.³⁸¹ The Court subsequently affirmed that the EEOC's role in acting in the public interest requires it to have access to the full

375. *See id.* at 291–92 (finding that Title VII "makes the EEOC master of its own case" and, "absent textual support for a contrary view, it is the public agency's province—not that of the court—to determine whether public resources should be committed to the recovery of victim-specific relief").

376. *Id.* at 296.

377. S. REP. NO. 92-415, at 7168, 7565 (1971)).

378. *Gen. Tel. Co. of the Nw.*, 446 U.S. at 333.

379. *Id.* at 325 (quoting S. REP. NO. 92-415, at 4).

380. *Id.* at 325 n.7 (quoting S. REP. NO. 92-415, at 4).

381. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072 (codified at 42 U.S.C. § 1981a (a) (2012)).

array of remedies under Title VII.³⁸² In *Waffle House*, the EEOC sought injunctive relief and “specific relief designed to make [the aggrieved individual] whole, including backpay, reinstatement, and compensatory damages; and [to award] punitive damages for malicious and reckless conduct.”³⁸³ The employer sought to dismiss the complaint or stay the EEOC’s case for arbitration, arguing that the employee had agreed to binding arbitration.³⁸⁴ The lower court found that the EEOC could proceed with its suit because it was not a party to the arbitration agreement, however, it held that the EEOC could not seek “victim-specific relief.”³⁸⁵ Its reasoning was that the EEOC acts in the public interest when it seeks “large-scale injunctive relief,” but when it seeks individual relief, it “seeks primarily to vindicate private, rather than public, interests.”³⁸⁶ The Supreme Court reversed the Fourth Circuit.³⁸⁷ It found that “Congress expanded the remedies available in EEOC enforcement actions in 1991.”³⁸⁸ The Court noted that punitive damages “serve an obvious public function in deterring future violations.”³⁸⁹ And, by seeking make-whole relief for individual victims of discrimination, the EEOC “may be seeking to vindicate a public interest.”³⁹⁰ It also reasoned that limiting the EEOC to injunctive relief, would discourage employees from filing a charge of discrimination thereby “jeopardiz[ing] the EEOC’s ability to investigate and select cases from a broad sample of claims.”³⁹¹

While monetary sanctions against discriminatory employers serve an important role in deterring future discrimination,³⁹² the EEOC’s ability to effectively obtain injunctive and declaratory relief may provide the best method to prevent future discrimination. In many cases where the EEOC has obtained a favorable decision,³⁹³ it has

382. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 287–88 (2002) (finding that Congress expanded the EEOC’s enforcement actions to include compensatory and punitive damages).

383. *Id.* at 283–84. Although the underlying action was one seeking relief under the ADA, the same remedies are available as under Title VII, and the EEOC uses the enforcement mechanisms set forth in Title VII. *Id.* at 285–86 (citing 42 U.S.C. § 12117(a) (1994)).

384. *Id.* at 284.

385. *Id.*

386. *Id.* at 284–85 (quoting *Waffle House v. EEOC*, 193 F.3d 805, 812 (4th Cir. 1999)).

387. *Id.* at 285.

388. *Id.* at 288.

389. *Id.* at 295.

390. *Id.* at 296.

391. *Id.* at 296 n.11.

392. *Selmi*, *supra* note 6, at 1316.

393. Professor Modesitt has noted that the EEOC has higher success rates in litigation than private attorneys: the EEOC’s loss rate in pre-trial dispositive motions

sought not only monetary relief but also broad injunctive relief. When the EEOC settles, it directs its trial attorneys to “ensure that every case is treated as unique and that the settlement contains carefully drafted provisions designed to provide full redress for the discriminatory practices at issue and to minimize the likelihood of their recurrence.”³⁹⁴ At the same time, Professor Selmi cautions against overreliance on nonmonetary sanctions, in part, because of the lack of enforcement of injunctive and equitable relief.³⁹⁵

The EEOC’s continued monitoring answers some of the concerns raised about the effectiveness of injunctive and equitable relief, and

is 5.9%, but private attorneys’ loss rate is 13.2%. Modesitt, *supra* note 9, at 1248. The EEOC’s win rate at trial is 50.8%, but private attorneys’ win rate is 38.3%. *Id.* Nonetheless, Professor Modesitt does not believe the EEOC is successful because these rates do not take into account the amount of recovery, which, in her view, is a better measure of success. *Id.* To support her conclusion, she cites to Professor Selmi’s empirical study of the EEOC undertaken nearly two decades ago. *Id.* (citing Selmi, *supra* note 9). Professor Modesitt also states that the EEOC’s litigation recovery rate as compared to the EEOC mediation program’s recovery rate is illustrative of the failure of the EEOC’s litigation efforts. *Id.*

There are two analytical problems with this comparison. The first is that it looks at the ratio of the dollars spent to the total amount of money recovered as the measure of the recovery rate. *Id.* at 1249. A better measure would be the number of individuals (or even charges per cases handled) and the amount recovered per individual (or charge per case). For example, in FY 2012, the EEOC litigated 122 merits suits (for all statutes, not just Title VII) and recovered a total of \$44.2 million, or an average of \$362,295 per case. *EEOC Litigation Statistics FY 1997 Through FY 2012*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm> (last visited Oct. 12, 2013) [hereinafter *EEOC Litigation Statistics*]. In contrast, during the same time frame, the EEOC mediated 11,376 charges and recovered \$153.25 million, or an average of \$13,471 per mediation. *EEOC Mediation Statistics FY 1999 through FY 2012*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, www.eeoc.gov/eeoc/mediation/mediation_stats.cfm (last visited Oct. 12, 2013). The takeaway should be that litigation is expensive and requires a much greater outlay of resources, not that the EEOC litigation department is ineffective and not serving victims of discrimination. The second problem with Professor Modesitt’s argument is that the amount of recovery should not be determinative of the effectiveness of the EEOC’s litigation efforts, whose value may not be reflected in the amount of damages awarded to victims of discrimination.

394. EEOC REGIONAL ATTORNEYS’ MANUAL, *supra* note 312, pt. 3, § IV.A.2.b(7). An example of the creativity and range of injunctive relief that the EEOC can obtain to prevent future violations of Title VII appears in *EEOC v. KarenKim, Inc.*, 698 F.3d 92, 94 (2d Cir. 2012) (per curiam). A jury found that the employer, a grocery store operator, had subjected a class of female employees to a hostile work environment and awarded compensatory damages and significant punitive damages. *KarenKim*, 698 F.3d at 97. The EEOC sought and obtained injunctive relief requiring KarenKim Inc. to (1) refrain from creating a hostile work environment, (2) not employ or compensate the harasser, (3) bar the harasser from entering the grocery store building, and (4) produce and distribute copies of a notice with a photograph of the harasser indicating that the harasser was barred from entering the building. *Id.* at 98.

395. See Selmi, *supra* note 6, at 1317, 1321–24. At the same time, Professor Selmi argues that putting a price on discrimination does not adequately deter discrimination and does not require defendants “to bear the full costs of their discrimination.” *Id.* at 1321.

can prevent future violations of Title VII.³⁹⁶ Once the court signs off on a consent decree, the EEOC continues to monitor the employer's compliance with the terms of the consent decree.³⁹⁷ The EEOC's continued oversight also provides protection to claimants who subsequently experience discrimination but otherwise might not have stepped forward out of fear of being subjected to retaliation.³⁹⁸

That the EEOC litigates in its own name also speaks to the Rule 23(b)(2) requirement that monetary relief sought by the class seeking certification be only "incidental" to the injunctive or declaratory relief.³⁹⁹ The Court in *Wal-Mart* cited to the Fifth Circuit's clarification that "incidental damage should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new substantial legal or factual issues, nor entail complex individualized determinations."⁴⁰⁰ Because the EEOC is able to bring suit in its own name and does not stand in the shoes of individual litigants, its pattern or practice suit does not rely on the merits of individual claims.⁴⁰¹ Courts trying the EEOC's case can also bifurcate the proceedings to determine whether the employer is liable for the pattern or practice in the first instance, and then once liability for the pattern or practice of discrimination is established, hold proceedings on the appropriate remedy in which individual claims for damage are presented.⁴⁰²

396. *Cf. id.* at 1330–31 (suggesting that EEOC oversight of consent decree implementation in class action settlements "might help restore public accountability").

397. EEOC REGIONAL ATTORNEYS' MANUAL, *supra* note 312, pt. 3, § IV.E.

398. *See supra* notes 343–348 and accompanying text (discussing how EEOC litigation can provide protection to class members who fear retaliation).

399. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2560 (2011).

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

401. *Cf. Green, supra* note 2, at 452 (acknowledging that "the systemic nature of disparate treatment law does raise questions about the relationship between private litigation and public enforcement" and that systemic theories defy "rigid adherence to individualized inquiries . . . of culpability . . . [and] relief").

402. *See, e.g., Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 361–62 (1977) (stating once a pattern or practice is demonstrated, the court should conduct additional proceedings to determine individual remedies); *EEOC v. Burlington Med. Supplies, Inc.*, 536 F. Supp. 2d 647, 656 (E.D. Va. 2008) (recognizing that courts generally bifurcate the trial into two phases); *EEOC v. Dial Corp.*, 156 F. Supp. 2d 926, 957–58 (N.D. Ill. 2001) (describing the bifurcated trial as including Phase I, in which "the jury will be instructed to find whether Dial engaged in a pattern or practice of maintaining an environment sexually hostile to women," and Phase II, in which "the jury will be asked to determine (1) whether particular plaintiffs subjectively perceived the environment to be hostile or abusive, and (2) if so, whether such plaintiffs can establish a basis for individual liability"); *see also Bent, Systemic Harassment, supra* note 9, at 171–75 (discussing the different approaches courts have taken to bifurcation in hostile work environment cases).

Moreover, because the EEOC is a public institution, it can bring pattern or practice cases that the private bar might be unwilling or unable to bring. Such cases could include claims “where the monetary relief might be limited, the focus is on injunctive relief, or the victims are in underserved communities.”⁴⁰³ The EEOC also can focus its efforts on emerging or cutting edge issues that the private bar might be hesitant to take on.⁴⁰⁴ In its most recent Strategic Enforcement Plan, the EEOC asserted that it “will target emerging issues in equal employment law, including issues associated with significant events, demographic changes, developing theories, new legislation, judicial decisions and administrative interpretations.”⁴⁰⁵

Since the EEOC litigates in the public interest, it does so in the public eye. As discussed above, the EEOC will not agree to confidentiality provisions when settling⁴⁰⁶ and will usually issue press releases when it files a lawsuit, achieves a favorable dispositive ruling, settles a case, or wins at trial or on appeal.⁴⁰⁷ The EEOC’s role in litigating in the public interest and its attendant obligations to do so in public view can result in better public oversight of necessary organizational changes that can eliminate systemic causes of discrimination within workplaces.⁴⁰⁸ The EEOC’s ability to garner media attention also means that employers and employees are educated about the law, “preventing future violations, and encouraging victims of discrimination in other settings to step forward.”⁴⁰⁹

403. EEOC SYSTEMIC INITIATIVE, *supra* note 352, at 2; *see also* Waterstone, *supra* note 9, at 462 (asserting that “few private lawyers can match the government’s resources when it decides to use them in a particular direction”).

404. *Cf.* Waterstone, *supra* note 9, at 459 (noting the impact the DOJ’s early litigation efforts made on the development of disparate impact theory).

405. EEOC STRATEGIC ENFORCEMENT PLAN FOR FY 2013–2016, *supra* note 343, at 1.

406. *See supra* notes 312–313 and accompanying text (discussing the importance of political accountability through oversight).

407. *See, e.g., EEOC Sues Prestige Transportation Service for Pattern and Practice of Hiring Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (Feb. 26, 2013), www.eeoc.gov/eeoc/newsroom/release/2-26-13.cfm (announcing that the EEOC sued a Miami transportation company for subjecting African Americans to race discrimination); *Jury Rules for EEOC in Sexual Harassment Case Against the Finish Line*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (Feb. 1, 2013), www.eeoc.gov/eeoc/newsroom/release/2-1-13a.cfm (announcing that a jury found that a thirty-eight-year-old general manager subjected three female subordinates to severe sexual harassment); *Owners of Albuquerque-Area IHOPs to Settle EEOC Sexual Harassment Suit for \$1 Million*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (Nov. 13, 2012), www.eeoc.gov/eeoc/newsroom/release/11-13-12b.cfm (announcing a settlement with two IHOP restaurants in a class sex discrimination lawsuit for \$1 million).

408. *See Green, supra* note 6, at 717–18 (discussing the lack of public safeguards and investment in long-term institutional reform by private firms).

409. EEOC REGIONAL ATTORNEYS’ MANUAL, *supra* note 312, pt. 3, § IV.D.4.

Of course, the EEOC's ability to bring suit is limited by its resources.⁴¹⁰ And, the number of suits brought by individual, private plaintiffs under Title VII substantially eclipsed the sixty-six Title VII suits brought by the EEOC in fiscal year 2012.⁴¹¹ Additionally, some scholars have been concerned about either administrative capture in public enforcement generally or the "behavioral incentives of [the EEOC's] attorneys" as undermining the EEOC's public interest model.⁴¹² Still, as Professor Waterstone noted in the context of enforcement of the American with Disabilities Act, "for several reasons, none [of the concerns] should be conversation stoppers."⁴¹³ In making the case generally for public enforcement of civil rights laws, Professor Waterstone observed that the "expressive function of the law cannot be completely outsourced to private actors and is lost when civil rights lawsuits become profit-driven enterprises."⁴¹⁴ This is particularly true in light of the challenges to private Title VII class actions, as discussed above. The EEOC's public interest mission means that it serves to educate the public, deters future discrimination, and crafts remedies in a manner that private litigants cannot. It is this aspect of the EEOC's litigation authority that provides the strongest response to concerns about the private pattern or practice and provides the best support for preserving the EEOC's litigation authority.

CONCLUSION

Although the private pattern or practice is under attack and may not survive post-*Wal-Mart*, the EEOC has an essential role in the enforcement of Title VII, which can address many of the concerns expressed about private pattern or practice litigation. The pattern or practice claim has several advantages and provides benefits to

410. For an overview of some of the challenges facing the EEOC, see Modesitt, *supra* note 9.

411. *EEOC Litigation Statistics*, *supra* note 393. During the same time period, the EEOC resolved an additional 162 suits involving Title VII claims. *Id.* While the statistics for private Title VII actions filed in federal courts are unavailable, between March 31, 2011, and March 31, 2012, 12,709 "federal question" employment cases were filed in United States District Courts. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 48 tbl. C-2 (2012), *available at* <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/C02Mar12.pdf>; *see also* EEOC v. Waffle House, Inc., 534 U.S. 279, 291 n.7 (2002) (noting that "the EEOC files fewer than two percent of all antidiscrimination claims in federal court," and "the EEOC files suit in less than one percent of the charges filed each year").

412. Waterstone, *supra* note 9, at 451.

413. *Id.* at 452-53.

414. *Id.* at 454 (footnote omitted); *see also* Green, *supra* note 6, at 716-17 (discussing concerns over "private co-option of larger public antidiscrimination goals").

employees, employers, the courts, and the public. Most importantly, pattern or practice claims can address the problem of systemic discrimination, whether caused by conscious or unconscious biases, in a way that individual disparate treatment cases cannot. Because the concerns expressed about the private pattern or practice claim, in large part, disappear or are addressed when the EEOC brings a systemic claim in its own name, courts that treat the EEOC as just another litigant vindicating a private right misapprehend the EEOC's vital role.

In turn, the EEOC should carefully guard its role as an independent agency that litigates in the public interest. To that end, the EEOC should embrace its position as a leading litigator of Title VII claims and follow through on its commitment, as expressed in its most recent Strategic Enforcement Plan, to bring more systemic claims.⁴¹⁵ Congress, too, should tread carefully to avoid the problems of over-politicization that it has imposed on other independent agencies.⁴¹⁶ Moreover, given the EEOC's vital role in enforcing Title VII, it is imperative that Congress provide the EEOC with adequate resources to investigate and litigate systemic cases.⁴¹⁷ Because the EEOC is different from a private litigant, for the same reasons discussed above that support courts' respect for the EEOC's status as a public actor. Congress should likewise keep in mind the Agency's purpose. As we approach the fiftieth anniversary of the Civil Rights Act of 1964, the EEOC remains a powerful fist in the fight against systemic discrimination.

415. See *supra* notes 354–355 and accompanying text (discussing the EEOC's enforcement priorities as outlined in its Strategic Enforcement Plan). See generally EEOC STRATEGIC ENFORCEMENT PLAN FOR FY 2013–2016, *supra* note 343.

416. See, e.g., Devins & Lewis, *supra* note 316, at 489 (noting that in the last two decades, appointments to several independent regulatory commissions—including the Federal Communications Commission, Federal Election Commission, Nuclear Regulatory Commission, and National Labor Relations Board—have suffered from “batching,” a situation in which “the opposition party demands that the President nominate a party loyalist to an opposition-party slot in exchange for the opposition party supporting the President’s same-party nominations”).

417. See *supra* notes 310–311 (noting that Congress expresses approval or disapproval of the EEOC's enforcement goals through its control of the EEOC's budget).