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I. INTRODUCTION

The Federal Rule of Civil Procedure Rule 23(a)(2) states that members of a class may sue on behalf of all members if there are questions of law or fact which are common to the class.¹ Class action lawsuits may be brought under Rule 23 if a commonality of fact or law exists within the class that predominates over any matter that an individual may want to litigate on their own.² These class action lawsuits exist to benefit classes of wronged people by providing accessibility and ensuring expediency.³ With that in mind, a 23(a) class action suit is well suited for a group of individuals pursuing a racial discrimination claim.⁴

¹ See FED. R. CIV. P. 23(a) (establishing requirements for class actions). Rule 23(a) dictates that:

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

² See FED. R. CIV. P. 23(b) (considering desirability of concentrating litigation to one forum). The Supreme Court of the United States has repeatedly held that a class representative must be part of the class and possess the same interest and suffer the same injury as the class members. See also Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 156 (1982); E. Tex. Motor Freight Syst., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977) (quoting Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 216 (1974)). In East Texas Motor Freight, the class was improperly certified because the named plaintiffs were not qualified for certain positions at East Texas Motor Freight for which such positions the class action was brought. Id. at 403.

³ See Anderson v. Abbott, 61 F. Supp. 888, 902 (W.D. Ky. 1945) (stating individual member of class may proceed for benefit of total class).

⁴ See Gen. Tel. Co. of the Sw., 457 U.S. at 157 (noting distinction between ability to include racial discrimination in complaint and ability to maintain action). The plaintiff in General Telephone Company was a Mexican-American that alleged he was passed over for a promotion due to his national origin and that the petitioner’s promotion policy acted against Mexican-Americans
The Supreme Court determined that the existence of racial discrimination does not automatically qualify as class discrimination under 23(b). For a discrimination to be certified as a class, the representative for the class action must be able to prove more than the validity of her own claim. The representative of a class must prove that discrimination exists in a systemic manner affecting the class as a whole. Typically, courts look at whether data used by a class representative is reliable and probative of discrimination. In some class actions, the issues are apparent in the pleadings to determine whether the claim fairly encompasses the absent parties within the class, however, sometimes courts may find it necessary to probe the pleadings before making a determination on class certification. Case law further explaining Federal Rule 23 requires that a plaintiff bear the burden of demonstrating that the requirements of Rule 23(a) and (b) are met. In addition, courts facing a class certification motion are required to

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5 See id. at 147 ("Racial discrimination is not by definition class discrimination. An allegation that such discrimination has occurred neither determines whether a class action may be maintained . . . nor defines the class that may be certified.").

6 See Gen. Tel. Co. of the Sw., 457 U.S. at 160 (finding representative of class must carefully apply 23(a) requirements and prove more than individual claim); see also Cooper & Lybrand v. Livesay, 437 U.S. 463, 465 (1978) (explaining relationship between factual and legal issues). "The class determination generally involves considerations that are ‘enmeshed in the factual and legal issues comprising the plaintiff’s cause of action. Id. at 469 (quoting Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 558 (1963))."

7 See Gen. Tel. Co. of the Sw., 457 U.S. at 159 (stating representative’s responsibility in finding systemic discrimination before filing class action).

8 See Brown v. Nucor Corp., 785 F.3d 895, 906 (4th Cir. 2015) (finding probative value of information critical to meeting burden of proof). "The critical question is not whether the data used is perfect for purposes of establishing commonality for class certification in a discrimination matter, but instead whether it is reliable and probative of discrimination. To that end, a court must examine whether any statistical assumptions made in the analysis are reasonable.” Id. at 904.

9 See Gen. Tel. Co. of the Sw., 457 U.S. at 160 (stating need for rigorous analysis into factual evidence put forth in pleadings). Further, a judge may freely modify the certification of the class action throughout the trial if new evidence arises during the litigation process which would decertify the class, leaving commonality an open question and not a standard that only needs to be met once but continually satisfied. Id. at 160.

10 See United Steel v. ConocoPhillips Co., 593 F.3d 802, 807 (9th Cir. 2010) (stating party seeking class certification bears burden of meeting requirements of Rule 23(a) and (b)); see also Zinser v. Accufix Research Inst. Inc., 253 F.3d 1180, 1186 (9th Cir. 2001) (stating plaintiff must meet Rule 23 requirements).
conduct a rigorous analysis ensuring such requirements of Rule 23 are satisfied.\footnote{See Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969) (warning of consequences of overbroad class certifications). In Johnson, the plaintiff was seeking relief against limiting the use of company-maintained facilities on the basis of race or color. Id. However, the plaintiff did not describe the facilities or the circumstances surrounding their use. Id. The court in Johnson emphasized the need for more precise pleadings because without substantial anecdotal evidence, both the court and the defendant cannot be sufficiently advised of the charges. Id.; see also Gen. Tel. Co. of Sw., 457 U.S. at 161 (stressing need for analysis protect society from overbroad class certifications). The Supreme Court, citing Johnson had the same concerns in mind regarding overly broad and underexplained class actions. Gen. Tel. Co. of Sw., 457 U.S. at 161. The Court then goes on to state that a Title VII class action, like any other class action, may only be certified if the trial court is satisfied after a rigorous analysis that the commonality requirement has been met. Id. at 161.}

In *Wal-Mart Stores, Inc. v. Dukes*,\footnote{564 U.S. 338 (2011).} the Supreme Court determined that the plaintiffs of the class action were unable to meet the standard of certification of Rule 23(b)(3) because of a lack of statistical and anecdotal evidence.\footnote{See Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 356 (2011) (finding decentralized form of management and limited anecdotal evidence insufficient for certification).} The Supreme Court was careful to note that for the commonality of injury requirement to be met in a Rule 23(a) action does not mean that the class must suffer a violation of the same provision of law, but that the act causing the injury must be common among class.\footnote{See id. at 350 (stating injury “must be of such a nature that it is capable of class wide resolution.”).} The Fourth Circuit of Appeals, with the ruling of *Wal-Mart Stores, Inc.* in mind, found that the plaintiffs in *Brown v. Nucor Corp.* presented enough statistical evidence for a class certification, reasoning that a lack of promotions for African-American employees was sufficient.\footnote{See Brown v. Nucor Corp., 785 F.3d 895, 956 (4th Cir. 2015) (finding percentage of blacks who sought promotions was evidence of class discrimination).} This paper will focus on the consistent reasoning in both *Wal-Mart Stores v. Dukes* and *Brown v. Nucor Corp.* and explore the fine-line which the holdings present when determining what truly is an appropriate class action against discrimination.\footnote{Compare Wal-Mart Stores, Inc., 564 U.S. at 354-60 (finding need for statistical and anecdotal evidence to meet Rule 23(a)) with Brown, 576 F.3d 149, 152 (4th Cir. 2009) (requiring parties seeking class certification affirmatively demonstrate compliance with Rule 23(a)).}

## II. FACTS/PREmise OF THE PAPER

This paper will focus on the issues presented in *Brown v. Nucor Corp.*\footnote{See Brown, 785 F.3d at 956-57 (focusing on racial discrimination in steel mill company).} The case revolves around the certification of a class of African
Americans employees working in a steel mill in South Carolina. When the case was originally brought in 2007, the plaintiffs were denied a 23(a)(2) class certification. The court did not believe that a certification of the class was proper due to the lack of statistical evidence that Nucor, the steel plant, was operating under a company-wide policy of discrimination.

The plaintiffs appealed the case to the United States Fourth Circuit Court of Appeals on the grounds of an improper class certification, in which the court was swayed by the evidence presented, distinguishing that a court is not responsible to find definitive proof of discrimination, but rather that the evidence provided lends strongly to the possibility. In addition, the Appeals Court was not swayed by Nucor’s defense that it had a decentralized management system, finding it possible that Nucor could have had company-wide discrimination policies that were enforceable. The case was subsequently remanded to the district court and the court once again refused to certify the class due to a lack of evidence that there was such a company-wide policy of discrimination.

In 2015, the Fourth Circuit Appeals Court again remanded the case to the district court ordering that it certify the plaintiffs’ class. This paper will examine the ongoing argument between the District Court of South Carolina and the Fourth Circuit Court of Appeals. In addition, this paper will draw attention to case law concerning class certification for discrimination lawsuits in order to make sense of why these two levels of the justice system differ as to the proper class certification of the Nucor steel workers.

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18 See id. at 898 (highlighting ideal claims for racial discrimination law suits).
20 See id. (noting plaintiffs failed to satisfy “commonality and typicality requirements” of class claims).
21 See Brown, 576 F.3d at 152 (quoting Lilly v. Harris-Teeter Supermarket, 720 F.2d 326, 336-33) (“Certification is only concerned with the commonality (not the apparent merit) of the claims and the existence of a sufficiently numerous group of persons who may assert those claims.”).
22 See id. at 158 (showing small businesses have burden to ensure proper workplace practices).
23 See Brown v. Nucor Corp., No. 2:04-22005-CWH, 2012 U.S. Dist. LEXIS 190946, at *81-82 (D.S.C. Sept. 11, 2012) (“[T]he defendants have not identified any issues this Court has previously treated as common, but which should no longer be considered common.”).
24 See Brown v. Nucor Corp., 785 F.3d 895, 922 (4th Cir. 2015) (showing court’s desire to correct previous decision of trial court).
25 See Brown, 2012 LEXIS 190946, at *13-82 (highlighting trial court’s difference in opinion compared to appeals court).
III. HISTORY

Groups of employees bringing class actions regarding workplace discrimination, which violate the 14th Amendment and are engrained in workplace policy, are equally deserving of the chance to bring their claims as groups who seek class action suits regarding other reasons. Lawsuits alleging racial discrimination in the workplace can be, by their very nature, an appropriate example of a class action lawsuit. However, where discrimination in the workplace is only relative to an individual or a small group of people, a class action may be inappropriate to recuperate lost rights. Proof of a discriminatory motive has always been considered as a necessary element, and is often proven through statistics. If statistics are available to prove discriminatory practices and procedures, then acts of overt discrimination do not require specific evidence to prove the need for a class certification under Rule 23(b).

Class action lawsuits were designed to be an exception to the common rule that litigation may only be conducted by the parties named in


27 See Kansas City v. Williams, 205 F.2d 47, 52 (8th Cir. 1953) (finding African-Americans bringing class discrimination suit acceptable under U.S. law).


30 See United States v. County of Fairfax, 629 F.2d 932, 939 (4th Cir. 1980) (holding statistical evidence probative of commonality).

31 See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (attempting to set test to determine racial discrimination in workplace).

[Racial discrimination is proven] by showing (i) that [complainant] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.

Id.; see also Barnett, 518 F.2d at 549 (“Statistics can in appropriate cases establish a prima facie case of discrimination, without the necessity of showing specific instances of overt discrimination.”).
the case.\textsuperscript{32} The courts have repeatedly held that in order to be part of a class action, an individual must suffer the same injury as the other proposed class members.\textsuperscript{33} Title VII of the Civil Rights Act of 1964 gives the Equal Employment Opportunity Commission ("EEOC") the ability to sue in its own name for individuals that have been discriminated against, however the cases in this paper seek to bring discriminatory class actions with their own name, and not that of the EEOC.\textsuperscript{34} "An individual litigant seeking to maintain a class action under Title VII must meet 'the prerequisites of numerosity, commonality,典型ity, and adequacy of representations specified in Rule 23(a)."\textsuperscript{35}

In 1980, Fairfax County, Virginia was sued by the United States alleging that the county violated Title VII by pursuing a pattern of racially motivated hiring procedures biased against African Americans and women.\textsuperscript{36} Though the district court found that there was no proof of a common injury, the Supreme Court found that the district court should have granted injunctive relief against all future discriminatory hiring procedures.\textsuperscript{37}

In 2011, the Supreme Court wrote an opinion on one of the most expansive class actions ever brought in court against the nation’s largest private employer.\textsuperscript{38} The plaintiffs alleged that the company was discriminating against women by denying promotions and pay raises due to

\textsuperscript{32} See Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 156 (1982) (detailing that class relief is appropriate when dealing with commonality).

\textsuperscript{33} See id. (expounding on necessity of common means of injury); East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977) (finding plaintiffs lacked common injury necessary to file class action lawsuit); see also Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216 (1974) (finding that suing to avoid American Compulsory Draft is not certifiable class injury).

\textsuperscript{34} See Gen. Tel. Co. of the Sw., 457 U.S. at 156 (stating individuals may bring their own class action without EEOC).

\textsuperscript{35} See id. (noting requirements limit class claims to those encompassed by plaintiffs’ claim).

\textsuperscript{36} See United States v. County of Fairfax, 629 F.2d 932, 942 (1980) (providing injunctive relief should be granted where evidence shows discrimination against women and African-Americans).

\textsuperscript{37} See id. (finding injunctive order should have been granted in case at hand). The Supreme Court was swayed by the amount of evidence put forth by the United States which included applicant flow data that measured the available labor market of Fairfax and the surrounding area. Id. at 938. The government presented statistical evidence that showed wide disparities between the low number of African Americans and women in Fairfax County’s work force and the high number of African Americans and women in Fairfax County’s labor market. Id. at 939. Presentation of statistical figures tends to sway a court in favor of those seeking class certification. Id.

\textsuperscript{38} See Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 342 (2011) (describing suit brought against Wal-Mart by over one million current and former female employees). Further, the plaintiffs were required to affirmatively prove that gender discrimination took place. Id; see also Tex. Dep’t of Cnty. Affairs v. Burdine, 450 U.S. 248, 250 (1981). "The burden of establishing a prima facie case of disparate treatment is not onerous. Id. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." Id.
their biological sex. The Supreme Court explained that crux of the issue in determining whether certification of a class was proper was the commonality requirement of Federal Rule 23(a)(2). The Court elaborated that commonality is not a question of whether the plaintiffs have all suffered from behavior that violates Title VII, but whether they have suffered from the same vehicle of harm.

The Supreme Court stated that, "conceptually, there is a wide gap between: (a) an individual’s claim that he has been denied a promotion... on discriminatory ground, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual."

The Court offered two ways to bridge the conceptual gap between these propositions. The plaintiffs were unable to prove that there was a biased testing procedure that prevented pay raises and promotion nor that Wal-Mart operated under a general policy of discrimination. Plaintiffs bear a high burden of proof on a claim of a general policy of discrimination due to the wide nature of the claim.

The plaintiffs' only expert witness testified that he was unable to calculate whether 0.5 percent of promotions were gender biased, or if 95 percent of promotions were racially biased. The Court concluded that the

40 See Wal-Mart Stores, Inc., 564 U.S. at 350 (quoting Fed. R. Civ. P. 23(a)(2)) (“The crux of this case is commonality - the rule requiring a plaintiff to show ‘there are questions of law or fact common to the class.’”).
41 See id. (describing nuance of requirement of commonality). The plaintiffs’ claim of Title VII discrimination is not a commonality argument because there is a difference between broad discrimination under a provision of law and a singular type of discrimination that is being systematically repeated against a large class of people. Id.
42 See id. at 352-53 (examining conceptual gap between discrimination and commonality).
43 See id. at 353 (detailing suggested ways of bridging conceptual gap). First, the Court provided that if an employer were to use a testing procedure to evaluate an applicant that had a discrimination basis, then a class action brought by those affected by that procedure would satisfy the commonality and typicality requirements of Rule 23(a)(2). Id. Second, if significant proof were offered as evidence that the employer operated under a policy of discrimination that could justify a class action brought by those generally discriminated against. Id.
44 See id. at 353 (noting plaintiffs failed to present sufficient evidence).
45 See id. at 354-55 (describing insufficiency of evidence introduced by plaintiffs of general policy of discrimination). The plaintiffs’ only evidence of a discrimination policy was the testimony of a sociological expert who testified that Wal-Mart had a strong corporate culture making it vulnerable to gender bias. Id.
46 See Wal-Mart Stores, Inc., 564 U.S. at 354 (finding standards for admission of expert testimony not applicable at certification stage of class-action proceeding). The Court expressed doubt that the expert testimony had enough weight to prove whether the class was properly certified. Id.
only matter the plaintiffs’ evidence established convincingly was that Wal-Mart’s decentralized management procedures allowed for local supervisor discretion on employment matters. Commonality is a fundamental and critical piece to a successful class action under Federal Rule 23, and the plaintiffs’ inability in Wal-Mart Stores, Inc. v. Dukes, to present statistical evidence of a company-wide policy prevented them from proper class certification.

Justice Scalia stated in the majority opinion of Wal-Mart Stores, Inc. v. Dukes that there are two ways to bridge the conceptual gap between an individual’s claim that he has been denied a promotion on discriminatory grounds and the existence of a class of persons that has suffered the same injury. First, an aggrieved party would have to demonstrate that the employer used a biased testing procedure to evaluate applicants for employment, and only then would the party be able to bring a class action on behalf of all the applicants who might have been prejudiced by the biased test. The other option that Justice Scalia references provides that significant proof must be offered to show an employer operated under a general policy of discrimination. Neither option employed by the plaintiffs to bridge the gap between claims of discrimination in the workplace and the existence of a class of persons that suffered injuries that share common questions of law or fact. The Supreme Court further discussed Wal-Mart’s allowing discretion by local supervisors over employment matters which, in

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47 See id. at 355 (holding plaintiffs failed to prove commonality). “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.” Id.

48 See id. at 357 (finding regional, decentralized supervision in companies did not lend well to company-wide discrimination claims).


50 See id. at 353 (detailing one way to bridge conceptual gap).

51 See id. (finding significant burden of proof difficult to satisfy). The discrimination must manifest in the hiring or promotion practices in the same general fashion and be brought about through an entirely subjective decision-making process by supervisors and employees. Id.

52 See id. (finding plaintiffs unable to bridge conceptual gap). The plaintiffs were unable to bridge the gap via the first option because Wal-Mart was not shown to have testing procedures or any other company-wide evaluation methods that could be accused of having a bias built into its procedures. Id. In so concluding, Justice Scalia reasons that the whole point of permitting discretionary decision-making is to avoid evaluating employees under a common standard. Id. The plaintiffs also failed to bridge the gap via the second option discussed when they failed to offer significant proof of discrimination. Id. The only evidence of discrimination that was offered was a sociologist that testified who Wal-Mart had a strong corporate culture that made it vulnerable to gender bias. Id.
certain cases, can give rise to a Title VII liability under a disparate impact theory but was not a valid claim in the case at hand.\textsuperscript{53}

In 2006, six African American employees brought a class action lawsuit against Nucor-Yamato Steel Company in Arkansas alleging racial discrimination practices and procedures.\textsuperscript{54} The district court denied the motion for class certification because the plaintiffs' claims did not meet the commonality requirement of Federal Rule 23(a)(2).\textsuperscript{55} A simple assertion that racial imbalance and discrimination exist within a workplace is not enough to establish a Title VII, Rule 23 class action.\textsuperscript{56} The district court must use rigorous analysis to determine whether enough statistical evidence is presented to meet the requirements of Rule 23(a), and if appealed, the appeals court must determine if the class certification question is a clear error, not whether a reasonable court could decide in either party's favor.\textsuperscript{57} The plaintiffs were unable to prevail with their class certification due to the

\textsuperscript{53} See id. at 355 (focusing on gender discrimination in the workplace); Watson v. Fort Worth Bank & Trt., 487 U.S. 977, 990 (1988) (finding disparate impact analysis applicable under Title VII of Civil Rights Act of 1964). A corporate policy permitting discretion by supervisors is a uniform employment practice that typically dispels suspicion that a company has a uniform employment practice that contains bias. \textit{Id.} While giving discretion to low-level supervisions should raise no inference of discriminatory conduct in most cases, the Supreme Court has recognized cases in which the practice can be the basis of a disparate impact theory. \textit{Wal-Mart Stores, Inc.}, 564 U.S. at 355. While this seems counterintuitive, an employer's undisciplined system of subjective decision making can have the same effect as a system that is tainted with intentional discrimination. Watson, 487 U.S. at 491. However, this theory of liability must remain the exception and not the rule when it comes to examining policies that allow for discretion because presuming discrimination where discretion is involved would be too harsh of a burden for employers to bear. \textit{Wal-Mart Stores, Inc.}, 564 U.S. at 355.

\textsuperscript{54} See Bennett v. Nucor Corp., 656 F.3d 802, 808 (8th Cir. 2011) ("The plaintiffs asserted both disparate treatment and disparate impact theories of liability.").

\textsuperscript{55} See id. at 809 (finding evidence presented was not sufficient to prove company-wide discrimination).

\textsuperscript{56} See id. at 818 (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i)) ("The plaintiffs must show that the employer uses a particular employment practice that causes a disparate impact").

\textsuperscript{57} See Bennett, 656 F.3d at 814 (finding rigorous analysis necessary to determine claim).

The parties created an extensive record on class certification that included more than a thousand pages of expert reports, business records, sworn declarations, deposition transcripts, answers to interrogatories, and other evidentiary exhibits and materials. We cannot say that the district court, faced with this sizable and sometimes-contradictory record, clearly erred in finding that employment practices varied substantially across the plant's various production departments.

\textit{Id.} at 814. In addition, the plaintiffs offered expert testimony that included inaccurate statements regarding Nucor's hiring procedures, which led the court to discredit a large portion of the plaintiffs' argument. \textit{Id.} at 816.
lack of statistical evidence proving that Nucor had a general policy of discrimination.\footnote{See id. at 820 ("The plaintiffs do not identify evidence that specifically contradicts Nucor’s legitimate, nondiscriminatory explanation for the failure to promote ").}

In 2007, a group of African American steel plant workers brought a class action lawsuit against their employer alleging discriminatory practices and procedures.\footnote{See Brown v. Nucor Corp., No. 2:04-22005, 2007 U.S. Dist. LEXIS 57522, at *18-20 (D. S. C. Aug. 7, 2007) (finding non-centralized management system could not lead to discriminatory practices).} The plaintiffs moved for class certification under Federal Rule 23(a) to represent all African American employees at Nucor Berkeley Manufacturing Plant in Huger, South Carolina, based on patterns of disparate treatment against African-American employees, promotion procedures which had a negative impact on African American employees, and a hostile work environment at the plant.\footnote{See id. at 8 (discussing basis for plaintiffs’ claims against employer).} As evidence, the plaintiffs presented five statistical comparisons to prove the difference in promotion rates between African-American and White workers.\footnote{See id. at 9 (discussing basis for plaintiffs’ claims against employer).} The court concluded that though the plaintiffs’ presentation of evidence met the numerosity requirement of a Federal Rule 23 class action, it failed to show that the class raised a single question of law or fact that was common to all proposed members of the class.\footnote{See Brown v. Nucor Corp., 576 F.3d 149, 153 (4th Cir. 2009) (analyzing strength of statistical evidence offered by plaintiffs).} Like the District Court in Bennett, the district court in Brown decertified the class because the plaintiffs were unable to present sufficient statistical evidence of a general workplace-wide policy of discrimination.\footnote{See Brown, 2007 U.S. Dist. LEXIS 57522 at *18 (determining plaintiffs were unable to meet commonality requirement).}

The plaintiffs in Brown appealed the case to the United States Court of Appeals for the Fourth Circuit, which vacated the decision and remanded the case back to the district court with instructions.\footnote{See id. at *25 ("Because the class does not have a common claim and the plaintiffs’ claims are not typical of the class claims, the plaintiffs are not adequate representatives of the class.").} The appeals court reaffirmed the maxim of discrimination cases stating that, “a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have
been satisfied." The appeals court overruled the decision of the district court regarding the commonality of the plaintiffs. The appeals court stated that it was not the job of the district court to definitively determine the appellants had been discriminated against, rather, it was to determine whether the basis of the claims were sufficient to warrant class certification. In addition, the court ruled that while a decentralized form of management bolsters an argument against a company-wide policy of discrimination, the separate departments at Nucor were not as autonomous as they held themselves out to be. Ultimately the appeals court remanded the case to the district court.

By 2012, the district court filed a decision that once again refused to certify the class, claiming that the plaintiffs were unable to establish a common injury. While the plaintiffs could show compelling evidence that African-Americans were being discriminated against in the beam mill, the evidence presented did not account for the behavior that took place in the other departments at Nucor. The threshold of what constitutes convincing statistical evidence of discrimination and of what is considered an

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65 See id. at 152 (reviewing court’s prior decision in case for abuse of discretion in analysis).
66 See id. at 153 (finding appellants had sufficiently presented direct evidence of discrimination). The court was persuaded by the evidence presented, including the denial of promotions of African Americans when less experienced white employees were promoted, the denial of training specialization for African Americans, and statements from white supervisors expressing their unwillingness to promote African Americans. Id.
67 See id. at 156 (requiring diligence when analyzing strength of statistical evidence). Though, the appeals court discussed the rigorous analysis a district court must go through to determine if a class has commonality, the court clarified this concept by providing that it is not the court’s job to determine concretely that the plaintiffs were discriminated against. Id.
68 See Brown, 576 F.3d at 157 (finding defendant did not possess decentralized form of management). Testimony from the manager of the Nucor beam mill provide that the beam mill was separate from the other departments, however, this testimony directly conflicted with testimony from the manager of the melt shop that the beam mill was attached to the hot mill and melt shop. Id. Further the fact that all employees shared locker rooms, combined with all the other evidence, showed that Nucor-Berkeley did not possess a decentralized form of management at the time of the lawsuit. Id. at 158.
69 See id. at 160 (discussing reasons for remanding case).
70 See Brown v. Nucor Corp., 2012 U.S. Dist. LEXIS 190946, at *2 (D. S.C. 2012) (assessing strength of statistical evidence). The court wanted to ensure the public was aware that it was not discounting the gravity of the plaintiffs’ allegations, but that without the ability to prove that discrimination happened in all the departments of Nucor, to establish that there was no commonality under Rule 23(a)(2). Id. The court did not doubt that African-American employees were being discriminated against and harassed in the beam mill department of Nucor. Id. “In addition to comprising a majority of the plaintiffs’ declarations, testimony from Beam Mill employees accounts for almost all of the allegations of overtly racist behavior on the part of manager or supervisors.” Id. at *46-47. Further, beam mill managers allegedly stated, “I don’t think we’ll ever have a black supervisor while I’m here.” Id. at *47.
71 See id. at *42 (finding evidence of discrimination in one department not dispositive in proving discrimination in other departments).
overarching policy of discrimination are determinations that the federal judiciary has consistently been grappling with in the context of Rule 23 class action lawsuits. The present state of the decision in the legal battle between Brown and Nucor rests with the decision of the Fourth Circuit Court of Appeals in 2015.

IV. ANALYSIS

A. Comparisons between District and Appeals Court

Typically, an appeals court will only review a district court's certification order for abuse of discretion. However in Brown, the Fourth Circuit of the Court of Appeals decided to examine the case de novo because the district court's decertification order violated the mandate set by the Fourth Circuit of Appeals in 2009. In that 2009 decision, the court determined that the Nucor plant should have been treated as a single entity, meeting the requirements of Rule 23(b)(3), however the district court in 2012 revisited this decision that was not within the purview of the court to reexamine. A district court abuses its discretion when it materially misapplies the requirements of Rule 33 and the critical question in front of

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73 See Brown v. Nucor Corp., 785 F.3d 895, 919 (4th Cir. 2015) (finding class certification was proper).

74 See id. at 901 (discussing standard of review applied to case at hand).

75 See id. (concluding district court’s decision to reconsider class certification did not violate Brown I); see also Brown, 576 F.3d at 150 (finding plaintiff’s class certification was proper).

76 See Brown, 785 F.3d at 901-902 ("[The court finds] that the district court’s decision to reconsider the certification of the workers’ class did not itself violate our mandate in Brown I . . . . Because the district court could reexamine whether the workers met the requirement of commonality, we review those findings under the abuse of discretion standard . . . .").
the appeals court in this case was whether the district court materially 
misapplied Rule 23(a)(2)."}

B. Alternative Statistical Data Benchmark

In Walmart Stores, Inc. v. Dukes, the court determined that the class 
in question required decertification due to the Supreme Court’s interpretation 
of that Rule 23(a)(2) that emphasized analytical rigor in evaluating statistical 
evidence of commonality and the relationship between a common injury and 
how a company policy made that injury possible and the appeals court took 
a careful approach to answer each of these arguments. With regard to the 
standard of review, Wal-Mart Stores, Inc. reaffirmed that courts must 
examine whether Rule 23(a) has been met by the class at the certification 
age. The standard for examining a class is a rigorous one but it does not 
give courts free reign to consider the merits of the claims themselves. 
The merits of a case and the strength of the plaintiff’s argument are considered 
through Rule 23(a) and is often misapplied because determining whether 
there is a commonality among the potential class can often be construed as 
evaluating the strengths of a claim. The appeals court was quick to note in 
its opinion that in actuality, Rule 23 is far from a mere pleading standard.

The Plaintiffs’ statistical evidence passed muster under the Wal- 
Mart standard of review for commonality of injury related to a class. The

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court per se abuses its discretion when it makes an error of law or clearly errs in its factual 
findings.”).

was not proper due to lack of statistical evidence).

79 See id. at 340 (expounding on need for rigorous examination of merits of class). A rigorous 
examination of whether a class has met the prerequisites of Rule 23(a) will overlap with 
examination of the merits of the claim itself as the issues are often intertwined. Id.; see also FED. 
R. CIV. P. 23(a) (providing requirements of a class that may be represented in court). A class that 
has common questions of law or fact with similar legal defenses is a proper class. Id.

Rule 23 does not permit wide-ranging merit inquiries at certification stage). The court is only 
allowed to consider the merits of a claim when it is relevant in determining the proper certification 
or denial of certification of a class regarding federal Rule 23(a). Id. at 464.

81 See Gariety v. Grant Thornton, LLP, 368 F.3d 356, 366 (4th Cir. 2004) (statin evaluation of 
merits is not a part of Rule 23(a) class certification).

82 See Brown v. Nucor Corp, 785 F.3d 895, 903 (4th Cir. 2015) (“It is true that Brown I 
cautioned ‘an in-depth assessment of the merits of appellants’ claims at [the certification] stage 
would be improper.’”); Amgen Inc., 568 U.S. at 464 (refusing to allow free range merit inquiries at 
the certification stage). The Supreme Court has dictated that a court may engage in the merits of a 
claim only to the extent that it verifies that Rule 23(a) has been made. Id.

83 See Brown, 785 F.3d at 904-05 (finding alternative data is proper if available). As the court 
recognized:
appeals court made the distinction that although the Plaintiffs supplied secondary data, which was a less precise measure of hiring information, plaintiffs may rely on alternative reliable data when a company has destroyed primary evidence related to discrimination cases.\textsuperscript{84}

The question of whether or not alternative data is perfect is not the standard for the court to ask of plaintiffs, the standard is whether the alternative data is reliable and probative of discrimination in the workplace and whether or not assumptions made from the data are reasonable and probative of discrimination.\textsuperscript{85} The appeals court highlighted two incorrect assumptions that the district court made regarding the data that was provided by the steel plant workers.\textsuperscript{86} First, the district court questioned information on job forms and whether they presented the conclusion that the plaintiffs assumed.\textsuperscript{87} However, the appeals court stated this assumption was not relied upon by Plaintiffs’ experts in meeting the standard for alternative evidence produced and therefore would not be a proper reason to decertify the class.\textsuperscript{88}

\textit{C. The Necessity of Statistical Assumptions}

The appeals court criticized the district court for incorrectly analyzing the potential make up of bidding pools for the twenty seven

The parties' central dispute concerns the data used to analyze the period from December 1999 to January 2001, when Nucor failed to retain actual bidding records. For that period, the workers' expert developed an alternative benchmark that uses 27 relevant "change-of-status" forms - filled out when an employee changes positions at the plant - to extrapolate promotions data....

\textit{Id.} at 903-04.

\textsuperscript{84} See id. at 904 (finding destroyed evidence allows plaintiff to use proxy data); \textit{Lewis v. Bloomsbury Mills, Inc.}, 773 F.2d 561, 568 (4th Cir. 1985) (describing ability to use proxy data when actual data is unreliable or unavailable). In \textit{Lewis v. Bloomsburg Mills}, the Plaintiffs were allowed to use United States Census data to show an available pool of black female applicants after the company disposed of potential employment applications for the period in which the suit was brought. \textit{Id.} at 568. Similarly, the Fourth Circuit Court of Appeals has allowed plaintiffs to extrapolate data from prior employment applications that had not been destroyed. \textit{See United States v. County of Fairfax, 629 F.2d 932, 940 (4th Cir. 1980)}.

\textsuperscript{85} See \textit{Brown, 785 F.3d} at 904 (allowing court to make reasonable assumptions where data is missing). To determine whether the data provided is reliable, a court may take liberties if statistical assumptions made in the data are reasonable. \textit{Id.} at 904.

\textsuperscript{86} See id. (identifying that district court targeted two assumptions by plaintiffs as problematic).

\textsuperscript{87} See \textit{id.} at 904-905 (acknowledging the promotions represented within the forms). "The district court first questioned the assumption that the job changes described on the 27 forms represent promotions. As an example of clear factual error committed by the court it quoted... from the dissent in \textit{Brown I} to argue that the forms may represent job changes unrelated to promotions." \textit{Id} (citation omitted).

\textsuperscript{88} See id. at 905 (finding decertification would not be proper by trial court).
available positions at the steel plant. The district court believed that while the assumptions made regarding the bidding pool may have been relevant to prove discrimination, the necessity of making the assumptions undermined and diminished the probative value of the evidence of discrimination and found that the class had to be decertified. As the appeals court previously concluded a reduction in probative value, which is a characteristic of the second hand nature of proxy data, does not cause statistical data to be immediately unreliable and, therefore, is not a bar to proving a commonality to a class action discrimination law suit with regards to Rule 23(a)(2).

The assumptions the plaintiffs explicitly argued were viewed positively by the appeals court, in relation to the views of the district court, however the District Court went further in examining more statistical assumptions in the discrimination evidence that were not argued by either Plaintiffs or Defendants specifically. The Defendants did not possess records nor identified in the trial court record that the African American worker were not qualified for potential promotions and yet the District Court questioned the reliability of the statistical evidence by pondering that very assumption. The unspoken assumption made by the Plaintiffs that a majority of applicants would be qualified for the promotion, with the understanding that only a few would be grossly unqualified, is not enough to reduce the probative value of the commonality claim of the plaintiffs that the trial court was so dubious of in the previous trial.

89 See id. (detailing example of unreasonable statistical assumption). Due to discovery limitations put in place by the district court, information regarding promotions like statistical assumptions cannot be acquired through proper discovery means. Id. Therefore, the plaintiffs had to assume that there was at least one African American person applying for each position, which the district court found to be an unreasonable assumption. Id. at 906.

90 See Brown, 785 F.3d at 906 (finding that too many assumptions can degrade probative value of statistical evidence). The appeals court concluded that proxy data is too greatly reduced in probative value to prove statistics-based discrimination in the workplace, where a company has destroyed original evidence contradicting what has been set forth in previous cases. Id.; United States v. City of Fairfax, 629 F.2d 932, 940 (4th Cir. 1980) (allowing applicant data based partially on assumptions).

91 See Brown, 785 F.3d at 906 (finding secondhand data has probative value in assessing commonality). A court cannot simply bar statistical discrimination evidence from a trial because it is secondhand and is not the original data compiled by the defendant-company. Id.

92 See id. ("Specifically, the dissent suggests that the black workers may not have been qualified for higher paying jobs and that they may have been denied promotions because of disciplinary records that were not themselves the result of racial animus.").

93 See id. (assuming potential applicants met minimum job requirements). The Nucor job listing mentions only the minimum job qualifications that were required to be considered for the job. Id. Further, the appeals court suggests that it is reasonable to assume that the applicants that applied for the postings would, a large majority of the time, possess the minimum requirements for the job, otherwise they would not apply. Id.

94 See id. (discussing disciplinary records of potential applicants). In addition to suggesting the African American workers were unqualified for the promotions, the dissent suggested that it
opinion argue that alternative statistical information is not as probative as it needs to be and therefore the assumptions that are drawn from that data are more unreliable and further undermine its probative value leading critics to want to exclude the evidence altogether, however the majority opinion, due to the reasons laid out previously, do not ascribe to this philosophy and use the alternative information more readily.\textsuperscript{95}

\textbf{D. The Statistical Requirement of Proof}

Having decided the question of whether alternative statistical evidence should be allowed to prove commonality per Rule 23(a), the appeals court shifted its focus to determining whether or not the statistical proof was enough to certify the class.\textsuperscript{96} The Supreme Court previously decided the benchmark for determining what constitutes statistical evidence in favor of proving discrimination.\textsuperscript{97} The appeals court determined the statistical disparity exceeded the benchmark of proof, and that the district court abused its discretion in decertifying the class.\textsuperscript{98} The District Court, after incorrectly analyzing the statistical evidence, per the Appeals Court, incorrectly analyzed the anecdotal evidence of discrimination provided by the Plaintiffs.\textsuperscript{99} The strategy the Plaintiffs presented for anecdotal evidence was the disciplinary records of those workers that prevented them from gaining promotions. \textit{Id.} The majority opinion did not subscribe to that line of reasoning. \textit{Id.} at 907. As worker Ramon Roane has stated:

\begin{quote}
Discipline, attendance, and safety allegations are similar factors that are not equally applied and that have been used as an excuse to deny promotions to me and other persons of my race. The attitudes I have experienced with white supervisors lead me to believe that my race and that of other black employees makes a difference in how we are treated and viewed for discipline[,] promotions[,] and training.
\end{quote}

\textit{Id.} at 907 (alteration in original).

\textsuperscript{95} See \textit{Brown}, 785 F.3d 895 at 912 (finding dissenter's arguments against alternative evidence were unreasonable).

\textsuperscript{96} See \textit{id.} at 908 ("With the alternative benchmark evidence included, the statistical disparity in promotions is statistically significant at 2.54 standard deviations from what would be expected if race were a neutral factor.").


\textsuperscript{98} See \textit{Brown}, 785 F.3d at 908 ("Here, the surrounding circumstances and anecdotal evidence of discrimination, . . . are precisely what help animate the statistical findings [of discrimination].").

\textsuperscript{99} See \textit{id.} at 909 (citing Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011)) (deciding anecdotal evidence was incorrectly analyzed). The rule set down for the commonality requirement instructs that a plaintiff must present a common contention that can be proven, and thus class-wide proceedings must be able to generate common answers regarding the litigation. \textit{Id.}
of discrimination rested upon a disparate treatment theory, which coupled
with the statistical evidence of discrimination, typically satisfies the standard
of proof.\textsuperscript{100}

Although \textit{Brown}, mentions the \textit{Wal-Mart} standard of class
certification for discrimination lawsuits, there are three significant
differences between the two cases that make the District Court’s strict
adherence to \textit{Wal-Mart} problematic.\textsuperscript{101} The first problematic difference lays
in the strength of the statistical evidence provided in both cases.\textsuperscript{102} The
Plaintiffs in \textit{Wal-Mart} were unable to prove that an employee in one state
was subject to the same type of discrimination as an employee in another
state.\textsuperscript{103} In the case at hand, the Nucor plant workers numbering only one
hundred people all worked in a single steel mill in South Carolina.\textsuperscript{104} The
differences in size and scope of Wal-Mart and the Nucor Steel plant standout
and the district court was incorrect to conflate the two cases as being
identical.\textsuperscript{105}

The second difference between the two cases is that the theory of
commonality in the \textit{Wal-Mart} case relied on showing that Wal-Mart
maintained a culture in which discrimination was fused into the hiring
process.\textsuperscript{106} The Nucor steel plant plaintiffs had provided evidence seemingly

\textsuperscript{100} \textit{See} \textit{Brown}, 785 F.3d 895 at 908 (finding little value in limited anecdotal evidence when
dealing with national corporation). “In the absence of a common job evaluation procedure, \textit{Wal-
Mart} held that statistical proof of employment discrimination at the regional and national level,
coupled with limited anecdotal evidence from some states, was insufficient to show that the
company maintained a ‘general policy of discrimination’ . . . .” \textit{Id.} at 909. With this standard in
mind, the plaintiffs in the current case presented an argument with heavy statistical and anecdotal
evidence to better meet the standard. \textit{Id.} at 908.

\textsuperscript{101} \textit{See id.} at 909 (citing \textit{Wal-Mart Stores, Inc.}, 564 U.S. 338 (2011)) (showing significant
differences in levels of statistical and anecdotal evidence provided).

\textsuperscript{102} \textit{See Brown}, 785 F.3d at 909 (“\textit{Wal-Mart} discounted the plaintiffs’ statistical evidence in
large part because the statistics failed to show discrimination on a store-by-store basis.”).

\textsuperscript{103} \textit{See id.} at 909 (considering scope and size of class as roadblock to commonality). In
addition to the inability to prove that discrimination affected employees company-wide, the \textit{Wal-
Mart} case had approximately 1.5 million people in it is class action working at over 3,000 stores
nationwide. \textit{Id.} The sheer scope of the class itself served as roadblock to properly certifying the
class. \textit{Id.}

\textsuperscript{104} \textit{See id.} at 910 (“The class members shared common spaces, were in regular physical contact
with other departments, could apply for promotions in other departments, and were subject to
hostile plant-wide policies and practices.”).

\textsuperscript{105} \textit{See id.} (finding strong value in anecdotal evidence provided by plaintiffs). The trial court
held that the plaintiffs had submitted proof that the landscape of the steel plant was hostile towards
African-Americans and that the defendants failed to act to end the harassment, which was very
strong evidence pointing to a systemic tolerance of racial hostility by managers and supervisors.
\textit{Id.} at 157.

\textsuperscript{106} \textit{See Wal-Mart Stores, Inc. v. Dukes}, 564 U.S. 338, 334 (2011) (showing expert testimony
does not guaranteed class certification will be granted). Although the Supreme Court was not
without end of racism throughout the plant including racist behavior from supervisors, which the plaintiffs used to establish a claim for disparate treatment. The dissent of the appeals court rejected the idea that a racially hostile work environment helped establish a claim for disparate treatment in promotion decisions, a notion that the majority opinion was completely opposed to. The assertion, that the evidence in the record did not support a connection between racial discrimination and discrimination in hiring and promotion practices, is groundless and the majority opinion made it clear that it was not limited to what is contained in the record to make elementary judgments such as the connection between discrimination and hiring practices.

The third distinction between Wal-Mart and Nucor stems from the sheer amount of evidence that was offered by the Nucor steel workers, which was much more in depth and more probative than the evidence that was offered by the Wal-Mart employees. The Supreme Court has set precedent that a class certification for commonality with anecdotes of evidence must typically come from roughly one out every eight people contained in the class. In the Wal-Mart case, the plaintiffs offered affidavits from about 120 employees describing discrimination, meaning only one affidavit of discrimination for every 12,500 class members which is very far below the standard of one to eight established by the Supreme Court forty years

swayed, the Plaintiff had an expert witness testify that Wal-Mart’s hiring process was vulnerable to gender bias. Id. 107

See Brown, 785 F.3d at 912 (“The examples in the record are ubiquitous: bigoted epithets and monkey noises broadcast across the plant radio system, emails with highly offensive images sent to black workers, a hangman’s noose prominently displayed, . . . and abundant racist graffiti in locker rooms and shared spaces.”). In addition to vulgar displays of racism, Nucor had only one black supervisor until the Equal Employment Opportunity Commission brought charges against them. Id. 108

See id. (“It is difficult to fathom how widespread racial animus of the type alleged here, an animus that consistently emphasized the inferiority of black workers, bears no relationship to decisions whether or not to promote an employee of that race.”).

See id. (“Justice is not blind to history, and we need not avert out eyes from the broader circumstances surrounding employment decisions, and the inferences that naturally follow.”).

See Wal-Mart Stores, Inc, 564 U.S. at 353-56 (describing probative value of evidence offered by plaintiffs); see also Brown, 785 F.3d at 932-33 (showing probative value of evidence offered by plaintiffs).

See Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 338 (1977) (setting precedent of ratios of anecdote provided by class members). The plaintiffs in the Teamsters case produced roughly forty accounts of discrimination from members of the potential class. Id. Due to the class of plaintiffs that contained 334 people, there was roughly one anecdote for every eight people in the class. Id. The Court certified the class as having enough anecdotal evidence of discrimination. Id. Therefore, Teamsters is used as a benchmark when determining the appropriate amount of anecdotal evidence to certify a class. Id.
prior. In the case at hand, the Nucor steel workers provided anecdotal evidence from approximately sixteen individuals from a class that included roughly 100 past and present employees of the steel plant when the litigation commenced, giving the plaintiffs a ratio of 1 anecdote for every 6.25 members of the class. The appeals court noted that while this does not meet the standard, that many of the Nucor workers took a risk in giving these statements accusing their employer of workplace discrimination if the litigation were to be unsuccessful, these workers could lose their jobs.

E. Evidentiary differences between Wal-Mart and Nucor

There are significant differences in both the amount of statistical and anecdotal evidence presented by Nucor and Wal-Mart Stores, Inc., which when combined, proves there is a higher standard of commonality demanded by the Supreme Court in Wal-Mart Stores, Inc. The question of why the female employees at Wal-Mart were potentially discriminated against poses many answers, but the evidence presented by the employees at the Nucor steel plant leaves only one: the discrimination stems from the race of the employees. The purpose of Title VII is to achieve equal employment opportunities and remove race barriers that stand in the way of equal opportunity. Although Wal-Mart Stores, Inc. set a high standard for the commonality requirement in Rule 23, when a plaintiff has produced substantial evidence of engrained discrimination of or as an employment practice to deny commonality by wrongfully comparing it to the Wal-Mart Stores, Inc. standard weakens Title VII's bulwark against discrimination.

\[112\] See Wal-Mart Stores, Inc., 564 U.S. at 358 (discussing ratios of anecdotes of discrimination offered by plaintiffs). The affidavits provided only came from 235 of Wal-Mart's 3,400 stores. Id. In addition, there were no affidavits of discrimination provided from workers in fourteen different states at all. Id.

\[113\] See Brown v. Nucor Corp., 576 F.3d 149, 151 (4th Cir. 2009) (going into detail about size of potential class).

\[114\] See Brown, 785 F.3d at 914 (highlighting although plaintiffs did not meet ratio that they were not disqualified). Nucor intended to use the affidavits provided for every purpose under the Federal Rules of Evidence including attempts to decertify the class and impeach the witnesses. Id.

\[115\] See id. ("Such a claim requires proof of a 'system wide pattern or practice' of discrimination such that the discrimination is 'the regular rather than the unusual practice.'").

\[116\] See id. at 915 ("Unlike a disparate impact claim, a showing of disparate treatment does not require the identification of a specific employment policy responsible for the discrimination.").

\[117\] See Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971) ("The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities . . . .").

\[118\] See Brown, 785 F.3d at 915 (finding plaintiffs met standards set by Supreme Court for class certification).
Providing statistics and anecdotes is crucial to show a disparate racial impact claim to prove commonality for a desired class action, specific employment practices that caused the purported disparate racial impact must also be identified. The Supreme Court recognizes the discretion of low-level supervisors can lead to a successful disparate impact claim, however the larger the class, the more difficult it is to prove a consistent exercise of discrimination. The Nucor steel plant workers do not represent a nationwide class, but a class of approximately 100 African American workers who all work at a single facility. The Supreme Court has raised the bar for certification of a class under a disparate impact theory through the *Wal-Mart* decision, however, the Fourth Circuit Court of Appeals has provided several ways that a disparate impact claim may satisfy Rule 23 in the aftermath of *Wal-Mart*. First, an exercise of discretion must be tied to a specific employment practice that disparately affected a specific class in a uniform manner. Secondly, the employment practice must be a company-wide policy of discrimination in which high-level personnel are taking liberties to exercise.

By applying these standards, for purposes of class certification, the Nucor steel plant workers provided sufficient evidence of a discriminatory workplace policy that was exercised by high-level personnel and that

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An unlawful employment practice based on disparate impact is established under this title only if – a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.

*Id.*


121 See *Brown*, 785 F.3d at 916 (highlighting size of class as important factor in class certification). A policy of discretionary decision-making in a localized class of workers forms a basis for a disparate impact claim more easily, especially when the policy exhibits pervasive racial hostility. *Id.*


123 See id. ("[E]ven in cases where the complaint alleges discretion, if there is also an allegation of a company-wide policy of discrimination, the putative class may still satisfy the commonality requirement for certification.").

124 See id. at 115-16 (finding harm must be directly related to policies plaintiff purports discrimination as a result). The difference between discrimination policies being exercised by low-level personnel and high-level personnel is crucial to the claim because lower-level employees cannot set policies in general whereas high-level personnel have that ability, making it more likely to prove a disparate impact claim. *Id.*
combined these actions created a racially charged environment. The evidence of pervasive racial discrimination in the steel plant environment needs a common mode of application in order to be a proper claim for a class action against workplace discrimination. The presence of statistics and anecdotal evidence helps bridge the gap between discrimination and the uniform mode of application. In Wal-Mart, the court found it unlikely that managers across the country were exercising a common method of discrimination in the workplace, while it is much more probable that one hundred workers in a steel manufacturing plant could be commonly discriminated against in the present case at hand. While the most recent decision in Brown v. Nucor is relatively new, there was a 9th U.S. District Court decision that cited to Brown v. Nucor as persuasive authority to certify a class action through disparate treatment commonality.

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125 See Brown, 785 F.3d at 917 (finding that burden of proof was met by plaintiffs in case at hand). The workers provided sufficient statistical evidence that the promotions systems requiring approval from high-level personnel, created the ability for a department head to racially discriminate when going through the promotions process. Id. at 916. In addition, the appeals court concluded that the general manager of the Nucor plant should have been on notice about the pronounced racial differences in his managing class because of evidence presented by the plaintiffs. Id. There was evidence introduced at trial that Nucor employees had lodged complaints with the general manager of the plant about workplace discrimination. Id. The general manager responded by threatening to fire the employees who complained about discrimination. Id. at 917.

126 See Brown, 785 F.3d at 917 (finding plaintiffs' evidence of discrimination is link to mode of discrimination).

127 See id. (highlighting the high probative value of statistical and anecdotal evidence). The appeals court was swayed by the evidence that was presented to the Court that shows a link between the racial animosity of the supervisors and the methods of promotion that were put in place by the supervisors. Id. In addition, the appeals court points to a deposition of a high-level employee of the steel plant as an accurate representation of the environment at the steel plant, “I don’t think we’ll ever have a black supervisor while I’m here.” Id.

128 See id. (explaining easier to certify a smaller class of plaintiffs); Tabor v. Hilti, Inc., 703 F.3d 1206, 1222 (10th Cir. 2013) (“[T]he Court held that the company’s practice of leaving hiring and promotion decisions to the discretion of local supervisors without a more specific policy could not form the basis for class certification.”).

129 See Rollins v. Traylor Bros., No. C14-1414 JCC, 2016 U.S. Dist. LEXIS 7294, at *19-20 (W.D. Wash. Jan. 21, 2016) (citing Brown v. Nucor Corp., 785 F.3d 895, 917 (4th Cir. 2015)) (finding disparate treatment as a rationale for commonality requirement). The Court in Rollins stated that significant proof of a policy of discrimination can be shown entirely though statistics and anecdotal evidence that show a pattern of discrimination. Id. at 19-20. Further, the Court goes on to state that even if the pattern is a result of the company employing a policy that defers discretionary decisions to employees that can constitute a pattern of discrimination that reaches the standard of a disparate treatment which would satisfy the commonality requirement for class certification. Id. at 20.
V. CONCLUSION

The Federal Rule of Civil Procedure Rule 23(a)(2) states that members of a class may sue on behalf of all members if there are questions of law or fact common to the class. Federal Rule of Civil Procedure Rule 23(b) states that a class action lawsuit may be brought under Rule 23(a) only if a commonality of fact or law exists within the class that predominates any concern that an individual may want to litigate on their own. These class actions lawsuits exist to benefit classes of wronged people with expediency and accessibility. Naturally, a 23(a) class action suit is desirable to class action racial discrimination suits.

However, what may be naturally desirable does not always naturally translate into the law. The legal debate that has developed through Wal-Mart v. Dukes, which was furthered by Brown v. Nucor Corp. shows a divided opinion on class action lawsuits for discrimination in the workplace. Wal-Mart demonstrates a potential way for the Supreme Court to streamline class action racial discrimination lawsuits. The plaintiff must demonstrate an employer practice that is enforced by management leading to a specific harm. The plaintiffs in Wal-Mart, female employees employed across the nation at Wal-Mart stores, were unable to provide anecdotal evidence that discrimination took place in a uniform fashion and was carried out systematically by the management of the company. Thus, a rule was created by the Supreme Court to limit the ability to bring a discrimination class action. This is not a new limitation, this is merely a clarification of the commonality requirement imposed by Federal Rule of Civil Procedure 23(a)(2). General discrimination by one group of people to another does not present a class-wide claim.

The Supreme Court stated that it was looking for a way to bridge the gap between a party bringing a discrimination claim based on workplace behaviors and the group of people affected by these behaviors. The Court suggested that there are two ways to bridge this gap. Either the party must show that the employer used a biased testing procedure to evaluate applicants, or the party must show significant proof that the employer operated under a general policy of discrimination that manifested itself in the hiring process and promotion practices.

An accurate demonstration of the Wal-Mart rule of bridging the gap is demonstrated by Brown v. Nucor Corp. The plaintiffs must be able to present anecdotal and statistical evidence proving that management systematically discriminated against a specific class of people. The plaintiffs in Brown had the luxury of working in a much smaller business than the women that worked at Wal-Mart nationwide. If the facts of Brown were
taken to a national scale and the plaintiffs were still able to prove levels of racial discrimination, there is no doubt that it would remain a successful lawsuit. Commonality is key and unfortunately for the women of Wal-Mart, the difficulties in proving commonality increase as the size of the class increases. Therefore, Brown is a model of how to successfully bring a discrimination class action that will be looked at by other circuit courts or adopted by the Supreme Court if Nucor Corporation decides to appeal to the Supreme Court.

William Grigas