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Wal-Mart Stores, Inc. v. Dukes, et al.: Justices Find No Glue in Aisle 23

The most sweeping putative employment-discrimination class action in history was *not* too big to fail. The United States Supreme Court has rejected an effort by three female employees of Wal-Mart to represent a class of some 1.6 million women who had been employed by the company at its 3,400 stores nationwide at any point since 1998 and who allegedly had experienced gender discrimination in the areas of promotions and compensation. The class, proceeding on both disparate-impact and disparate-treatment theories, sought billions of dollars in backpay, as well as injunctive and declaratory relief, to redress Wal-Mart's alleged violations of Title VII. After the case was filed in 2001, the United States District Court for the Northern District of California certified the class in 2004. The Ninth Circuit affirmed in a 2010 *en banc* ruling.

For a case to proceed as a class action in federal court, plaintiffs must demonstrate all four requirements of Rule 23(a) of the Federal Rules of Civil Procedure: that (1) the class is sufficiently numerous that "joinder of all members is impracticable," (2) questions of law or fact are "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." Additionally, they must satisfy *one* of three standards under Rule 23(b). The *Dukes* class was certified under Rule 23(b)(2), which requires a showing that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

A unanimous Supreme Court reversed the grant of class certification on June 20, 2011. The Court did not decide whether Wal-Mart had, in fact, discriminated against the women, only whether they could proceed as a class. Justice Scalia authored the opinion of the Court, concluding that class certification was improper under Rules 23 (a)(2)—the "commonality" requirement—and (b)(2). Four Justices joined the Court's opinion with respect to Rule 23(b)(2) while dissenting on the commonality issue.

Plaintiffs bear a significant burden of proof

As a threshold matter, the Court emphasized, for the first time, that Rule 23 "does not set forth a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes, et al.,* No. 10-277, at 10 (June 20, 2011). Rather, the party seeking certification must "affirmatively demonstrate" compliance with all requirements of the Rule. *Id.* Plaintiffs, like those in *Dukes,* whose discrimination claims are based on allegations

of excessive discretion in employment decision-making must provide "significant proof" of a common policy of discrimination. Moreover, courts must undertake a "rigorous analysis" of all available evidence, not merely the pleadings. *See id*. at 10, 13.

Prior to *Dukes,* plaintiffs typically had argued, with some success, that they were required to make only "some showing" that the Rule 23 requirements were met. Although the Court does not say so explicitly, *Dukes* appears to endorse the "preponderance of the evidence" approach that recently has gained traction in the circuit courts. *See id.* at 10.

Commonality means common *answers,* not common *questions*

Perhaps the most significant aspect of the ruling is the Court's clarification of the scope of the Rule 23(a)(2) commonality requirement, which it characterized as "the crux of this case." Id. at 8. (Indeed, in our experience, commonality and the related Rule 23(b)(3) predominance requirement are the "crux" of the certification fight in virtually every employment class action.)

Plaintiffs did not argue that Wal-Mart had any express corporate policy against advancement of women. Rather, they argued that they had proven a common policy of discrimination through a "strong and uniform corporate culture" that allegedly permitted bias to infect personnel decisions, coupled with policies that gave local managers broad discretion in pay and promotion determinations, which, Plaintiffs claimed, resulted in an unlawful disparate impact on women. *Id.* at 4. They offered three types of evidence to support their theory: statistical evidence regarding pay and promotion disparities between men and women, anecdotal statements from 120 of the 1.6 million putative class members, and testimony from an expert witness on the "social framework" of Wal-Mart's "culture." *Id.* at 5-6.

In affirming class certification, the Ninth Circuit concluded that Plaintiffs had established a common question: "whether Wal-Mart's female employees nationwide were subject to a single set of corporate policies (not merely a number of independent discriminatory acts) that may have worked to unlawfully discrimination against them in violation of Title VII." *Id.* at 6 (quoting *Dukes, et al. v. Wal-Mart Stores, Inc.,* 603 F.3d 571, 612 (9th Cir. 2010) (*en banc*)). Addressing the Ninth Circuit's framing of the issue, the Supreme Court observed that it is "easy to misread" the language of the commonality requirement because virtually any class action complaint drafted by competent counsel "literally raises common 'questions'" and emphasized that the mere recital of questions that cover all class members is insufficient to discharge Plaintiffs' burden to "affirmatively demonstrate" each Rule 23 requirement:

> Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean merely that they have all suffered a violation of the same provision of law. . . . Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once.

Id. at 9 (internal quotations and citations omitted). In other words, Rule 23(a)

commonality exists *only* where there is a "common contention" that is "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each of the [Plaintiffs'] claims in one stroke." *Id.* A question is truly "common" only where its *answer* will impact all class members alike, such that proof of one individual's discrimination claim will necessarily prove others' claims. *See id.* In the Court's view, Wal-Mart's policy of allowing local managers discretion over employment decisions was insufficient to establish a common question because a showing that one manager's exercise of discretion was invalid "will do nothing to demonstrate the invalidity of another's." *Id.* at 15.

According to the Court, common questions of fact do not arise in intentional discrimination claims without some link to bind those decisions together in a discriminatory way. In Justice Scalia's words, "Without some glue holding all those decisions together, it will be impossible to say that examination of all class members' claims for relief will produce a common answer to the crucial question *why was I disfavored." Id.* at 12. In other words, plaintiffs must link the common policy, practice, or decision to the alleged discrimination to win class certification.

Courts can and should consider the merits at class certification

The Court's observations about the nature of commonality led it to clarify the meaning of two decisions that feature in virtually every class-certification fight: *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156 (1974), and *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982). Each decision addresses the crucial issue of the extent to which a court addressing class certification is permitted to consider the merits of underlying factual and legal disputes. In our experience, plaintiffs cite language in *Eisen* suggesting that courts may never address the merits at the class-certification stage. *See* 417 U.S. at 177 ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."). Companies cite language in *Falcon* stressing that courts performing their "rigorous analysis" of all available evidence must sometimes "probe behind the pleadings before coming to rest on the certification question." *See* 457 U.S. at 160. The circuit courts had recently rejected plaintiffs' reading of *Eisen* (*see, e.g., Hohider v. United Parcel Serv., Inc.,* 574 F.3d 169, 175-76 (3d Cir. 2009)), and the Supreme Court knocked it out. *Dukes* unequivocally endorses *Falcon*, noting that *Eisen's* statement was "the purest dictum" that had been "sometimes mistakenly cited." *Dukes,* No. 10-277, at 10 n.6.

Going forward, there is no question that "rigorous analysis" will require courts to evaluate merits-related factual or legal disputes that go to the Rule 23 requirements. *Id.* at 10. The *Dukes* majority recognized that, in Title VII pattern-or-practice cases, the merits of the legal claim *always* will overlap with the commonality requirement because "the crux of the inquiry is 'the reason for a particular employment decision.'" *Id.* at 11 (quoting *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984)). To resolve certification, courts must examine whether there is any "glue" to bind together the reasons for those decisions, which requires analysis of the parties' evidence on the merits. *Id.* at 12. The Court was careful to observe, however, that factual findings at the certification stage are not binding in future dispositive hearings.

Bridging the commonality gap

Relying on *Falcon*, the Court noted two ways in which a discrimination class may "bridge" the conceptual "gap" between an individual's claim that she has been denied a promotion on discriminatory grounds and her allegation that the company has a policy of discrimination. First, the class could satisfy commonality if it could point to biased evaluation criteria that were used to make the challenged employment decision. Second, the class could satisfy commonality if it could offer "significant proof that an employer operated under a general policy of discrimination" that could manifest itself "through entirely subjective decisionmaking processes." *Id.* at 12-13 (discussing *Falcon*). Neither method was viable in *Dukes*. To the contrary, Wal-Mart had an announced policy forbidding discrimination, and Plaintiffs' expert opined that processes were "vulnerable" to "gender bias" but could not determine how (or if) gender stereotypes might actually play a role at Wal-Mart. *Id.* at 13-14.

The Court found that the only "corporate policy" Plaintiffs had identified was the "policy" of allowing discretion by local managers 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." *Id.* at 14 (emphasis in original).

The Court clarified that local discretion is a "presumptively reasonable way of doing business" that does not by itself raise an inference of discriminatory conduct. The Court took pains to clarify another previous decision, *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 990 (1988), to which the plaintiffs' bar long has pointed as establishing a rule that a "policy" of excessive discretion alone provides a basis for class certification. Notably, the Court emphasized that, although a system of excessive discretion "can" be a basis of Title VII disparate-impact liability, this does not necessarily mean that "every employee in a company using a system of discretion has such a claim in common." *Id.* at 15. Rather, it is difficult to prove commonality in an excessive-discretion case because "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's." *Id.* at 15. Plaintiffs could establish nationwide commonality under a theory of excessive discretion only by identifying a "common mode of exercising discretion that pervades the entire company," which they failed to do through their statistics and limited anecdotal evidence. *Id.* at 15. The Court also stressed that it is not enough to prove that an excessively subjective system has produced a sex-based disparity in pay or promotions; rather, the class must identify a specific employment practice it is challenging. *Id.* at 17.

At its heart, the Court's clarification of commonality is all about common proof and managing cases. If legal issues are truly and pervasively common, then one or two class representatives who prove their individual cases will prove discrimination for the entire class. If, on the other hand, proof of the class representatives' cases will not prove discrimination for the entire class, then commonality will be deemed lacking.

Expert and anecdotal evidence must be scrutinized

In concluding that Plaintiffs had not shown the requisite "significant proof" that Wal-Mart "operated under a general policy of discrimination," *id.* at 12-13, the Court weighed in on an issue with respect to which the Ninth Circuit had split from a

plurality of the federal circuits: whether the expert-witness reliability standard of *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), applies at the class-certification stage. The Ninth Circuit held that the district court had not abused its discretion in denying Wal-Mart's motion to exclude the testimony of the plaintiffs' sociological expert as unreliable or in declining to hold a *Daubert* hearing. *Dukes,* 603 F.3d at 602-03. In rejecting the expert's opinion as unsupportive of class certification, the Court registered its "doubt" as to the district court's conclusion that *Daubert* does not apply at the class-certification stage. *Dukes,* No. 10-277, at 14. However, the Court all but ridiculed the data and the expert Plaintiffs provided and rejected the expert's opinion on the alternative grounds that it was "worlds away from 'significant proof' that Wal-Mart 'operated under a general policy of discrimination,'" and it offered "no answer" to the "essential question on which [Plaintiffs'] theory of commonality depends." *Id.*

Plaintiffs' anecdotal proof also was rejected. The Court found that the 120 class-member declarations were neither representative nor sufficiently numerous. The Court chastised the lower courts' reliance on the declarations, which it found "too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory," *id.* at 17, and held that the declarations were not remotely representative of the sprawling class. The Court stated that the class members had "little in common but their sex and this lawsuit." *Id.* at 19 (quoting *Dukes,* 603 F.3d at 652 (Kozinski, J., dissenting)).

"Individualized" monetary claims are not viable under Rule 23(b)(2)

Though the Court split 5-4 on the issue of commonality, all nine Justices agreed that, were the Rule 23(a) requirements satisfied, class certification would be inappropriate under Rule 23(b)(2) because of Plaintiffs' prayer for backpay. Due to its focus on injunctive or declaratory relief, Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Fed. R. Civ. P. 23(b)(2) advisory committee's notes to 1966 amendments. Rule 23(b)(3), by contrast, provides that a class may be maintained where "questions of law or fact common to class members predominate over any questions affecting only individual members," and a class action would be "superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23(b)(3) affords procedural protections to class members, such as notice and the opportunity to opt out, that Rule 23(b)(2) does not provide. In recent years, the plaintiffs' bar increasingly has pursued certification of claims for monetary relief under Rule 23(b)(2), under which aggregation of a larger class is easier. *See Randall v. Rolls-Royce Corp.,* No. 10-3446 , at 12-13 (7th Cir. Mar. 18, 2011) (observing that, due to absence of notice and opt-out requirements, "[p]laintiff's counsel effectively gathers clients—often thousands of clients—by a certification under (b)(2)"). Several federal circuits recently have thwarted this strategy. *See id.* at 14 (describing pursuit of backpay under Rule 23(b)(2) as "[t]he monetary tail . . . wagging the injunction dog"); *Hohider*, 574 F.3d at 198-99 (declining to certify ADA class action seeking backpay and compensatory and punitive damages under Rule 23(b)(2)).

In *Dukes*, the Court held that claims for monetary relief may *not* be certified under Rule 23(b)(2), at least where the monetary relief sought would be "individualized." *Dukes,* No. 10-277, at 20. The Court expressed concern that certification under Rule

23(b)(2) of individualized claims for monetary relief would run afoul of due process, since class members could be barred by claim or issue preclusion from pursuing monetary relief independently without notice or an opportunity to opt out. *Id.* at 23. With respect to the putative *Dukes* class in particular, the Court reasoned, Rule 23 (b)(2) certification could unfairly prevent class members from pursuing individual claims for compensatory damages, which Plaintiffs had eschewed in an attempt to gerrymander their claims to fit within Rule 23(b)(2). *Id.* at 24. Rule 23(b)(2) certification also could result in backpay awards, the Court observed, to class members who would not benefit from any accompanying injunctive relief—namely, former employees of Wal-Mart—demonstrating that the requested monetary remedy was not merely "incidental" to the requested injunctive remedy and raising broader doubts about the compatibility of monetary claims with Rule 23(b)(2). *See id.*

In addition to the textual and constitutional concerns described above, the Court registered its disapproval of the "Trial by Formula" approach endorsed by the district court and the Ninth Circuit, whereby a special master would decide a sample set of claims and the percentage of claims determined to be valid would be extrapolated to determine class damages. *See id.* at 27; *Dukes*, 603 F.3d at 625-26. Again citing due process concerns—this time for defendants—the Court concluded that Wal-Mart was "entitled to individualized determinations of each employee's eligibility for backpay." *Dukes,* No. 10-277, at 26. The Court clarified that its "established . . . procedure for trying pattern-or-practice cases," as opposed to the lower courts' novel approach, "gives effect to" the defenses available under Title VII. *See id.* at 25-26 (citing 42 U.S.C. § 2000e-5(g)). Under that procedure, "[w]hen the plaintiff seeks individual relief such as reinstatement or backpay after establishing a pattern or practice of discrimination," an employer "ha[s] the right to raise any individual affirmative defenses it may have, and to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id.* (quotations omitted). The lower courts' attempted modification of this procedure violated the Rules Enabling Act, which provides that the Federal Rules of Civil Procedure may not "abridge, enlarge or modify any substantive right." *Id.* at 27 (citing 28 U.S.C. § 2072 (b)). The Court's rejection of the lower courts' approach to damages evinces broader skepticism as to plaintiffs' typical proposals to remedy apparent manageability problems through the use of sampling and math.

Dissent: excessive discretion itself may create a common question

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, concurred with the majority's conclusion that class certification was inappropriate under Rule 23(b)(2) but dissented on commonality. Fundamentally, in the dissent's view, the Court set the bar for commonality too high. According to the dissent, the majority's focus on the existence of "common *answers*" to the question of whether discrimination has occurred conflates the commonality inquiry under Rule 23(a)(2), which should be "easily satisfied," with Rule 23*(b)(3)*'s more stringent requirements that common questions "predominate" over individual issues and that a class action be "superior" to other modes of adjudication. *Wal-Mart Stores, Inc. v. Dukes, et al.,* No. 10-277, at 9 (June 20, 2011) (Ginsburg, J., concurring in part and dissenting in part) (emphasis added; some quotations omitted). Plaintiffs, in the dissent's view, had adequately demonstrated the existence of a common *question:* "whether Wal-Mart's pay and promotions policies gave rise to unlawful discrimination." *Id.* at 8.

Further, according to the dissent, Wal-Mart's "practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards" *itself* could constitute a "policy" that created a question common to the class. See id. at 6. In contrast to the majority, the dissent interpreted *Watson* as establishing that an "undisciplined system of subjective decision-making" may alone constitute an "employment
practic[e] that may be analyzed under the disparate impact approach." *Id.* at 7 (citing *Watson,* 487 U.S. at 990-91). The dissent further observed that Wal-Mart's discretionary employment practices were "sufficiently similar across regions and stores" to be addressed on a class-wide basis, citing an alleged company-wide "tap on the shoulder" promotion process and $2 bands for each hourly position's rate of pay. *Id.* at 4-6. Plaintiffs' evidence suggested, in the dissent's view, that "gender bias suffused Wal-Mart's company culture," such that the discretion afforded to supervisors and the prevalence of male supervisors permitted subconscious biases to pervade employment decisions. *See id.* at 5-6. The dissent would have remanded the case for a determination of whether certification under Rule 23(b)*(3)*—which Plaintiffs had advanced as an alternative argument in the district court—was in order. *Id.* at 1 n.1.

The employment class action post-*Dukes*

Although we view rumors of the demise of the employment class action to be greatly exaggerated, *Dukes* undoubtedly represents a substantial victory for employers. The decision's implications for class-action litigation strategy and employment practices are likely to include the following:

- *Smaller and more creative representative actions.* As *Dukes* raises the bar with respect to the commonality inquiry, an obvious upshot is that class actions that are broad in terms of geography, time, the class members' positions, and/or the alleged adverse employment action(s) challenged will be more difficult to maintain. However, *Dukes* does not strike the death knell for representative actions generally. It is expected that plaintiffs' lawyers will seek certification of smaller, more focused classes (as the attorneys for the *Dukes* Plaintiffs already have suggested they will do). In the employment context, this trend may lead to an uptick in charges of discrimination, as each smaller class will need to be grounded in its own representative charge(s). Alternatively or additionally, *Dukes* may prompt greater cooperation between the plaintiffs' bar and the EEOC, which can pursue representative pattern-or-practice actions free of Rule 23's constraints.

- *Monetary claims relegated to Rule 23(b)(3). Dukes* makes clear that monetary claims under Rule 23(b)(2) will be the exception, not the rule. Given the Court's suggestion that any monetary relief available under that subsection must track class-wide injunctive or declaratory relief, monetary claims will be particularly difficult to maintain where changed circumstances do not permit a unitary injunction, as may be the case with respect to a termination class, a lengthy liability period, or an employer (like Wal-Mart) with a high turnover rate. In most circumstances, plaintiffs will have to pursue monetary relief under Rule 23(b)(3) and, thus, will be constrained by the additional requirements of predominance and superiority and the procedural protections of notice and opt-out rights, which is likely to curtail the dollar value of any single class action.

- *Greater scrutiny of experts at class certification. Dukes* should rein in judicial reliance on questionable expert analysis and extrapolation from representative class members' accounts in considering class certification. The Court's expression of "doubt" regarding the district court's *Daubert* decision, albeit *dicta*, should put to rest any contention that expert opinions need not satisfy a reliability threshold at the class-certification stage. Additionally, the Court's rejection of the 120 class-member declarations as neither representative nor sufficiently numerous may require plaintiffs' counsel to invest additional time and expense to cultivate putative class members earlier in the litigation.

- *Potentially limiting effect under opt-in regimes. Dukes,* of course, arose under Title VII and Rule 23 and therefore is not binding with respect to opt-in collective actions under the ADEA and FLSA, where plaintiffs need only be "similarly situated." However, it is likely that courts will analogize to *Dukes* in the opt-in context, particularly in actions involving a potentially sweeping putative class or allegations of excessive discretion.

- *Importance of anti-discrimination policies.* As is evident from the observations above, *Dukes* has greater implications for class-action litigation strategy than it does for day-to-day employment decision-making. However, worth noting is the Court's reliance on Wal-Mart's "announced policy forbid[ding] sex discrimination" and "penalties for denials of equal employment opportunity" to refute Plaintiffs' expert's opinion that the company had a "strong corporate culture that makes it vulnerable to gender bias." *Dukes,* No. 10-277, at 13 (quotations omitted). Employers that, like Wal-Mart, afford individual managers substantial discretion in making employment decisions should ensure that their anti-discrimination policies are up to date and widely communicated.

The authors will present a Webinar on the implications of the *Dukes* decision, "*Wal-Mart Stores, Inc. v. Dukes, et al.:* the New Landscape for Employment-Discrimination Class Actions," on Wednesday, July 20, 2011, at 11:00 CDT. Please click here to register.