

Attention Female Workers: Will Wal-Mart Roll Back the Largest Employment Discrimination Class Action Ever?

CASE AT A GLANCE

In the largest and most closely watched employment discrimination class action in decades, the Supreme Court will determine whether millions of female Wal-Mart employees are entitled to billions of dollars of back pay through the enforcement of a mandatory class action.

Wal-Mart Stores, Inc. v. Dukes
Docket No. 10-277

Argument Date: March 29, 2011
From: The Ninth Circuit

by Linda S. Mullenix
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ISSUES

(1) Did the certification of an employment discrimination class action involving millions of female Wal-Mart employees throughout the United States violate the Rule 23(a) threshold class certification requirements for commonality, typicality, and adequacy?

(2) May the Wal-Mart class claimants recover monetary damages in a Rule 23(b)(2) injunctive class action?

FACTS

Six female Wal-Mart employees, including Edith Arana, Betty Dukes, and Christine Kwapnoski, sued Wal-Mart Stores, Inc., in 2001 in California federal court alleging gender discrimination. At the time the complaint was filed, Wal-Mart employed approximately 500,000 women spread across 41 regions. Since then, Wal-Mart has employed more than three million women.

As class representatives, the women filed on behalf of “all women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who may have been or may be subjected to Wal-Mart’s challenged pay and management track promotions and policies and practices.” The class action suit alleged two types of Title VII violations: disparate impact and disparate treatment claims. See Title VII, 42 U.S.C. §§ 2000e et seq.

Wal-Mart is the nation’s largest private employer, with millions of employees working in over 3,400 stores. Each Wal-Mart employs between 80 to 500 people and hourly workers are assigned to 53 departments in 170 job classifications. While there are several departments within each store, most hourly workers fall within five job positions (support manager, department manager, cashier, sales associate, and stockers). Women comprise over 80 percent of hourly workers and hold only one-third of managerial store management jobs. The numbers of women diminish at each successive step of the corporate hierarchy.

Wal-Mart historically and currently has a company-wide policy that bars workplace discrimination based on sex. According to Wal-Mart, company policy is intended to promulgate and enforce equal opportunity policies, foster diversity, ensure fair treatment, and prohibit unlawful discrimination.

Notwithstanding this company-wide policy, individual Wal-Mart store managers had and continue to have substantial discretion in making salary and promotion decisions for employees in each individual store. Wal-Mart limited that local discretion through objective standards and salary ranges that managers were to apply when making employment decisions.

On behalf of the class, the women complained that they had been subjected to an array of discriminatory actions at their Wal-Mart stores, including but not limited to denial of management training, retaliation for initiating internal grievance procedures, failure to promote, harassment, and denial of equal pay. The complaint alleged that Wal-Mart “fosters or facilitates gender stereotyping and discrimination, . . . and that this discrimination is common to all women who work or have worked in Wal-Mart stores.”

The plaintiffs sought certification of a mandatory Rule 23(b)(2) class action, seeking injunctive and declaratory relief, back pay, and punitive damages on behalf of every female Wal-Mart employee since 1998. The class action did not seek traditional compensatory damages under Rule 23(b)(3). The plaintiffs did not identify a specific discriminatory policy promulgated by Wal-Mart, but premised their motion for class certification on statistics, sociology, and anecdotal evidence.

In support of class certification, the plaintiffs relied on two expert opinions and the affidavits of over 100 female Wal-Mart employees. One expert provided a statistical analysis demonstrating regional

and national pay and promotion disparities. In response, Wal-Mart offered its own statistical expert who conducted a store-by-store analysis, which showed that in 90 percent of the stores there were no statistically significant salary disparities between men and women. The plaintiffs also offered the testimony of a sociological expert who opined that Wal-Mart institutionally was vulnerable to gender bias. Wal-Mart moved to strike this expert's opinions as unreliable and inadmissible, but the court rejected this motion. Finally, the plaintiffs offered affidavits of 112 current and former Wal-Mart employees, which detailed anecdotal instances of discriminatory actions. In response, Wal-Mart submitted declarations from other female Wal-Mart employees refuting the contention of a company-wide policy of discrimination.

The district court certified the Rule 23(b)(2) injunctive relief class action, including relief for back pay and punitive damages. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004). In an eighty-four page decision, the court ordered that notice be given to class members and that they be afforded the opportunity to opt-out of the litigation. At that time, the class definition covered at least 1.5 million women, making the Wal-Mart class action the largest employment discrimination lawsuit in history. The district court accepted the plaintiffs' theory that Wal-Mart fostered or facilitated gender stereotyping and discrimination, relying on the plaintiffs' two expert opinions and the affidavits of numerous female employees describing anecdotal discriminatory experiences.

Wal-Mart appealed the district court's decision, which the Ninth Circuit affirmed. *Dukes v. Walmart, Inc.*, 474 F.3d 1214 (9th Cir. 2007). The Ninth Circuit's opinion affirming the class certification subsequently was withdrawn and superseded by another opinion affirming the certification. *Dukes v. Wal-Mart Inc.*, 509 F.3d 1168 (9th Cir. 2007). On a rehearing en banc by the entire Ninth Circuit, the Court's majority upheld that class certification in substantial part. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010). The Ninth Circuit agreed that the plaintiff class satisfied the Rule 23(a) threshold class certification requirements for commonality, typicality, and adequacy. The court concluded that the plaintiffs' evidence was sufficient to raise the common question whether Wal-Mart's female employees nationwide were subjected to a single set of corporate policies that may have worked to unlawfully discriminate against them in violation of Title VII. The court also found the plaintiffs' claims sufficiently "typical" because the claimed discrimination occurred through alleged common practices: that is, subjective decision making in a corporate culture of gender stereotyping. Finally, the court found that adequacy was not lacking merely because the class included non-supervisory and supervisory employees.

The Ninth Circuit also upheld certification of the proposed class pursuant to Rule 23(b)(2) for back pay but remanded the plaintiffs' punitive damage claims for further consideration. In so doing, the court rejected other appellate standards for certification of Rule 23(b)(2) damage class actions, instead setting forth a new standard. Two Ninth Circuit judges dissented to the class certification.

CASE ANALYSIS

Class actions embody an exception to traditional litigation, which provides each litigant with his or her own day in court. Instead,

class litigation is representative litigation whereby a few designated "class representatives" prosecute the lawsuit on behalf of hundreds or thousands of absent class members. Because class members are not actually present in the litigation to protect their own interests, class action jurisprudence requires that courts ensure substantial due process protections to unnamed class members. Among these due process protections are early class certification, adequate representation, notice and the right to opt-out of any damage class action, and approval of any class action settlement.

Rule 23 class action jurisprudence also is intended to protect the rights of class action defendants. Class action jurisprudence has long recognized that the class action is a purely procedural mechanism to aggregate claims for resolution in a fair and expeditious manner. However, the Rules Enabling Act indicates that the class actions may not be used to abridge, modify, or enlarge substantive rights. See 28 U.S.C. § 2072(b). Thus, any proposed class action may not effectively deny a defendant's due process rights to present defenses to claims, or deny defendants of their Seventh Amendment right to trial by jury.

Among the many protections that class action litigation affords class members is the requirement that a judge, at the outset of the litigation, make a determination that the lawsuit may properly be maintained as a class action. Fed. R. Civ. P. 23(c)(1). The certification process requires that a judge find that a proposed class action satisfy threshold requirements of numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a)(1)-(4). If the proponents for class certification satisfy these criteria, they also must demonstrate that the proposed class action may be maintained under a provision of Rule 23(b). See Fed. R. Civ. P. 23(b)(1)-(3).

In evaluating whether a proposed class action is suitable for certification, the Supreme Court has indicated that judges must apply a "rigorous analysis" to ascertain whether the class certification requirements are met. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147 (1982). Federal courts generally agree that the "rigorous analysis" test requires a judge to "probe beyond [the class action pleadings]" and to evaluate the underlying claims, defenses, and substantive law involved in the litigation to determine whether those issues may be adjudicated on a classwide basis. In addition, in an emerging consensus, federal courts agree that judges during the class certification process are not only authorized but are obligated to resolve factual disputes at the certification stage relating to Rule 23 factors. See *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008); *In re IPO Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006). This includes the mandate that judges consider and resolve disputes among conflicting expert witness testimony.

The Supreme Court has indicated that courts must pay careful attention to Rule 23 requirements in evaluating proposed employment discrimination class actions and that a Title VII 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. *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977); *Falcon*. Generally, federal courts have distinguished between "disparate impact" and "disparate treatment" claims. In the former, the plaintiff must prove a discriminatory motive or intent on the employer's part. In the latter, the plaintiff only needs to show that an employment practice had a discriminatory impact on a protected group, regardless of motive.

Federal courts are split concerning their approach to certifying so-called “pattern-and-practice” discrimination class actions. Thus, some courts have certified class actions by dividing the case into two phases: liability and damages. If the court finds a pattern or practice of discrimination justifying an injunction, this establishes a rebuttable presumption that individual class members were victims of discrimination. In this approach, individual differences among class members are irrelevant to establishing the defendant’s discriminatory practice. Other courts, however, have refused to certify employment discrimination cases where a discriminatory pattern and practice is alleged, because such a finding only establishes a rebuttable presumption, and therefore individualized issues still will exist at the remedial stage.

The Rule 23(a)(1) requirement for a showing of numerosity is not challenged by the parties here given the huge size of the purported class. Wal-Mart does contest whether the plaintiff class can satisfy the other three threshold requirements of commonality, typicality, and adequacy of representation.

Rule 23(a)(2) requires a finding that the class shares “common questions of law or fact,” known as the “commonality” requirement. This requirement focuses on the composition of those who make up the class and asks whether they share one or more factual or legal issues that may be adjudicated on a collective basis. Federal courts have formulated different standards to assess whether sufficient commonality exists across a class. Some courts have indicated that the threshold for finding commonality is not high; other courts are more demanding and suggest that in order to find commonality on an issue or claim, “to answer the question as to one, must answer the question as to all.” The underlying purpose of the commonality requirement is to achieve efficiency and economy in adjudicating mass claims. On the other hand, if a proposed class is diverse with respect to crucial facts or based on dissimilar legal theories, then commonality may not be satisfied and classwide adjudication might be inefficient and unfair.

Rule 23(a)(3) provides that the claims or defenses of the representative parties must be typical of the claims or defenses of the entire class, the typicality requirement. Many federal courts, including the Supreme Court, have suggested that the typicality requirement overlaps with the threshold commonality and adequacy requirements. In assessing whether typicality is satisfied, courts will evaluate the claims and defenses of the designated class representatives, in comparison to members of the proposed class. In general, courts agree that a class representative’s claims need not be identical to those of every other class member, but courts will look at the underlying events giving rise to the class representative’s claims, to ascertain whether these events are in some way idiosyncratic or unlike other class members. Some courts have refused to find typicality where there are factual differences from one class member to another. In addition, courts pay attention to whether a proposed class representative is subject to unique defenses that might become the focus of litigation, and therefore detract from classwide resolution of claims.

Finally Rule 23(a)(4) requires that a court find that “the representative parties will fairly and adequately protect the interests of the class.” This requirement, the adequacy of representation requirement, encompasses the adequacy of the named class representatives, as well as class counsel. The adequacy of class counsel is not challenged in this litigation, but Wal-Mart does challenge the adequacy

of the class representatives. In general, in order to establish that class representatives are adequate, courts will assess whether the representatives will vigorously represent the interests of absent class members and are free from conflicts of interest.

If proponents of class certification are able to establish that the Rule 23(a) requirements are satisfied, then the plaintiffs must next demonstrate that the proposed class may be maintained under a Rule 23(b) category. The district court certified this case as a Rule 23(b)(2) class action. Historically, courts have certified employment discrimination cases either under Rule 23(b)(2) or Rule 23(b)(3). The Rule 23(b)(2) class is for declaratory or injunctive relief, and it is mandatory and does not permit class members to opt-out. Since 2003, Rule 23(c) was amended to permit judges in their discretion to order notice in Rule 23(b)(2) classes.

The Rule 23(b)(3) class is known as the “damage” class action and requires notice to class members as well as the opportunity to opt-out of the class. In addition, parties seeking certification under Rule 23(b)(3) must show that common issues predominate over individual issues and that proceeding as a class action is a superior means of resolving the dispute. Rule 23(b)(3) classes, then, typically are more difficult to certify and consequently, some parties chose to seek certification under the less-restrictive (b)(2) provision (as in this case).

Courts have certified employment class actions pursuant to Rule 23(b)(2) where the remedy sought was an injunction either prohibiting an employer from engaging in discriminatory practices, or requiring an employer to take certain remedial measures. Federal courts have agreed that back pay may be recovered in Rule 23(b)(2) employment class actions seeking injunctive relief. Compensatory damages, however, usually were not recoverable in Rule 23(b)(2) employment discrimination cases, because Rule 23(b)(3) is the category for damage class actions.

Since 1998, however, the federal circuit courts have split on whether employment discrimination class actions seeking damages may be maintained under Rule 23(b)(2). In 1991, Congress amended the Civil Rights Act to permit the recovery of compensatory and punitive damages in Title VII cases. In the wake of this amendment, federal courts have now articulated three different and conflicting approaches to whether courts may certify Rule 23(b)(2) class actions that also seek monetary relief.

Thus, the Fifth Circuit held that when damages are not merely incidental to injunctive relief, then certification of a Rule 23(b)(2) employment discrimination case is inappropriate. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998). The *Allison* Court defined “incidental” damages as damages to which class members who could establish liability automatically would be entitled. If, however, an employment discrimination case seeking damages would require additional hearings to resolve the disparate merits of each individual’s case, then certification under Rule 23(b)(2) would be inappropriate. The Third and Eleventh Circuits have adopted the *Allison* approach to determine whether a court may certify a Rule 23(b)(2) employment discrimination class that includes monetary damages.

In response to the Fifth Circuit’s *Allison* decision, however, other circuit courts have explicitly refused to follow *Allison*’s “incidental damages” approach. Thus, the Second Circuit has indicated that

when plaintiffs seek certification of a Rule 23(b)(2) class for both injunctive and nonincidental monetary damages, a court must assess whether (b)(2) certification is justified in light of “the relative importance of the remedies sought, given all the facts and circumstances of the case.” *Robinson v. Metro North Commuter R.R.*, 267 F.3d 147 (2d Cir. 2001). Courts that have adopted the so-called *Robinson ad hoc* approach consider whether: (1) reasonable plaintiffs would pursue the case for injunctive or declaratory relief even in absence of a monetary recovery, and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits. In this view, so long as the injunctive relief is predominant in value to the class, a court may certify a class that also seeks compensatory and punitive damages, even if the damages cannot be characterized as incidental to the injunctive relief.

Finally, and similar to the Second Circuit’s approach, the Ninth Circuit has eschewed the *Allison* approach and more liberally permitted the recovery of monetary and punitive damages in Rule 23(b)(2) employment discrimination classes, focusing on the plaintiffs’ subjective intent in seeking recovery. *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003). In affirming the district court’s certification order of a Rule 23(b)(2) class for back pay, the Ninth Circuit announced a modified “superior in strength” approach to determining the circumstances in which courts may certify Rule 23(b)(2) class actions that include requests for damages.

ARGUMENT OF THE PARTIES

Wal-Mart argues that the Supreme Court should conduct a de novo review of whether the proposed Title VII employment discrimination class is suitable for certification. Wal-Mart contends that the district court and Ninth Circuit’s affirmation of class certification is inconsistent with Rule 23, eviscerates fundamental due process protections for class action defendants, violates the Seventh Amendment right to a trial by jury, and transgresses the Rules Enabling Act, which mandates that procedural rules not abridge, modify, or enlarge substantive rights.

Wal-Mart asserts that the proposed class cannot satisfy the threshold Rule 23(a) requirements of commonality, typicality, and adequacy. Furthermore, Wal-Mart argues that in seeking back pay and punitive damages, the class is not suitable for certification under Rule 23(b)(2) because the rule was not intended to permit the recovery of damages but rather intended for declaratory and injunctive relief actions. Finally, Wal-Mart points out that no court has ever before suggested that punitive damages could be certified under Rule 23(b)(2), and that in upholding certification of a punitive damage class, the Ninth Circuit has broken ranks with every other federal circuit.

Regarding the Rule 23(a)(2) commonality requirement, Wal-Mart argues that the plaintiffs needed to provide significant proof that Wal-Mart operated under a general policy of discrimination, in order to establish classwide commonality. The commonality requirement was not satisfied, according to Wal-Mart, because the plaintiffs failed to identify a specific company-wide discriminatory policy and failed to offer proof that Wal-Mart implemented its policies in a discriminatory fashion common to all female employees. Focusing on the discretionary actions by local store managers, Wal-Mart notes that the millions of discretionary decisions by thousands of individual managers defy common treatment under Rule 23(a). Wal-Mart refutes the plaintiffs’

expert statistical evidence, contending that statistical evidence on national or regional levels cannot serve to establish commonality regarding the numerous decisions by local store managers. Wal-Mart argues that the court failed to properly weigh and acknowledge its counterevidence of nondiscrimination at the store level.

In addition, Wal-Mart indicates that the affidavits submitted by class members defeat a showing of commonality rather than support it. Thus, the testimony of the female employees demonstrates the unique factual stories of alleged unequal treatment experienced by each individual woman rather than commonality across the class. The affidavits set forth singular facts and circumstances relating to each individual employee, even in the small sample of women who supplied statements.

Moreover, proof of the plaintiffs’ disparate impact and disparate treatment claims would require store-by-store proof of both company-wide practices and intent, inquiries which would defeat the commonality requirement argues Wal-Mart. Where a multifacility discrimination Title VII class action requires proof of intentional discrimination by managers in separate facilities, as in this case, the class cannot be certified. Finally, Wal-Mart suggests that isolated instances of discrimination are not sufficient to satisfy the commonality requirement in a Title VII case.

Wal-Mart argues that the typicality and adequacy requirements similarly are not satisfied by the proposed class, because the claims and defenses of the three class representatives are atypical of the millions of class members. For example, Wal-Mart notes that Ms. Dukes’s alleged claims are based on race, sex, and retaliation (the race and retaliation claims were eventually dropped). Similarly, Wal-Mart points out that the plaintiffs’ affidavits, as well as those provided by Wal-Mart, demonstrate a lack of typicality across the millions of women embraced by the class definition. Some women claim retaliation; some claim unequal treatment; some women thrived at Wal-Mart, while others did not.

The proposed class representatives have failed to adequately protect the interests of absent class members, Wal-Mart contends, because in order to accomplish class certification, the class representatives waived any claims for compensatory damages, thereby forfeiting the rights of individual class members to receive damages Congress authorized. In addition, the class is encumbered by conflicts of interest because the class includes both women managers and hourly employees: one set of plaintiffs in effect accusing others of discrimination. These conflicts of interest are exacerbated because the female employees cannot opt-out of the mandatory (b)(2) class.

Title VII codifies certain defenses. Relying on Title VII disparate-treatment precedents, Wal-Mart argues that if plaintiffs carry the burden of proving discriminatory policy, then a rebuttable presumption arises that each class member is entitled to relief. This would require a second-stage proceeding to determine the scope of individual relief. However, the district court held that individualized hearings would not be feasible and would be impracticable. Wal-Mart contends that the class certification order therefore violated Wal-Mart’s ability to present its defenses to the class members’ claims, violated its due process rights, and denied it the right to a trial by jury. Moreover, the presence of such defenses also precludes findings of commonality and

typicality, because the presentation of those defenses would require individualized hearings.

Regarding the Rule 23(b)(2) class certification, Wal-Mart suggests the Court is required to look to both historical precedents for the Rule 23(b) categories, and to eschew novel and innovative use of these categories. Wal-Mart argues that the Fifth Circuit's *Allison* approach to Title VII employment discrimination cases has been adopted by most circuits and is the appropriate standard for certifying Title VII classes that seek monetary and punitive damages. Thus, Wal-Mart indicates that the substantial monetary sums sought by the millions of class members predominate over their claims for injunctive relief. Because these damages are not "incidental" to the predominant form of relief, Wal-Mart concludes that the class is not appropriate for certification under Rule 23(b)(2).

Moreover, the Rule 23(b)(2) category historically has not permitted claimants to opt-out of the action. Wal-Mart contends that even though the district court authorized an opt-out procedure for this class action, Rule 23 does not authorize such a procedure, and the Supreme Court "has repeatedly warned the lower courts against rewriting the rule."

Dukes responds to Wal-Mart's arguments by contending that the appropriate standard of review is deference to the lower courts' rulings, and that class certification decisions are reversible only for an abuse of discretion. Wal-Mart is not entitled, Dukes argues, to a de novo evaluation of whether the plaintiffs have satisfied the requirements for class certification. Dukes suggests that the plaintiffs made an ample evidentiary record at class certification and that the district court appropriately certified the class pursuant to Rule 23.

Generally, Dukes argues that Wal-Mart incorrectly seeks to impose heightened class certification standards on Title VII employment discrimination cases. In so doing, Wal-Mart's theories are radical, far-reaching, and have no support in Rule 23, class action jurisprudence, or Title VII discrimination cases. The plaintiffs contend that subjective decision making by local store managers legitimately may be challenged in a Title VII class action and that Wal-Mart is incorrect to suggest otherwise. The plaintiffs further argue that Wal-Mart would eliminate the methods of proof that federal courts have approved in pattern-and-practice discrimination cases, but that nothing in the Court's decisions supports Wal-Mart's claim that pattern-and-practice discrimination cases are subject to unique requirements under Rule 23.

Finally, Dukes argues that Wal-Mart seeks to cabin the Rule 23(b)(2) class action exclusively to cases seeking injunctive and declaratory relief, which the plaintiffs argue is a misinterpretation and misapplication of the Rule 23(b)(2) category.

Much of Dukes's argument focuses on a repetition of the district court's findings with regard to the Rule 23(a) requirements. Regarding satisfaction of the threshold commonality requirement, Dukes contends that the plaintiffs documented very well Wal-Mart's centralized corporate culture, rife with demeaning gender stereotyping, which led to discriminatory decisions by local managers. According to the plaintiffs, courts have long accepted local decision making under prevailing pattern-and-practice Title VII jurisprudence, and

the Supreme Court has recognized that subjective criteria, while not themselves unlawful, can be a conduit for biased decision making.

Dukes argues, moreover, that federal courts have certified class actions based on subjective employment practices, in both disparate impact and disparate treatment cases, for more than three decades. The district court, then, appropriately found that the Rule 23(a) commonality requirement was satisfied by the plaintiffs' identification of common subjective policies implemented by Wal-Mart managers at all corporate levels.

The plaintiffs note that the district court's commonality findings were bolstered by statistical evidence of gender disparities caused by discrimination and anecdotal evidence of gender bias. Dukes suggests that the court properly weighed the competing expert evidence in making its findings on the Rule 23(a) requirements. Thus, Dukes points out that the district court properly credited the plaintiffs' statistical analyses, holding that the analyses raised an inference of company-wide discrimination in pay and promotions. In contrast, Wal-Mart's expert statistical analysis was based on faulty factual premises, and therefore the district court properly struck this evidence from the record as unreliable. In addition, Dukes argues, the district court properly relied on the anecdotal testimony of 120 class members in declarations that confirmed the uniformity of pay and promotion practices and the pervasiveness of gender stereotyping in the Wal-Mart corporate culture.

With regard to the Title VII claims, Dukes argues that the district court made appropriate findings of the need for a classwide approach. Dukes contends that Wal-Mart seeks to eliminate the pattern-and-practice method that federal courts have long recognized as a legitimate approach to Title VII employment class actions and would instead require that systemic discrimination cases be litigated on an individualized, store-by-store basis. No court, the plaintiffs argue, has ever required individualized hearings in every Title VII pattern-and-practice case. Dukes contends that this rewriting of Title VII precedents would require plaintiffs to prove the motive for every single discretionary pay and promotion decision affecting every class member. Moreover, disparate impact claims require no proof of intent. The plaintiffs argue that Wal-Mart's suggested approach is untenable, inconsistent with prevailing doctrine, and counterproductive to the efficiency goals of the class action rule.

Dukes further argues that the lower federal courts made proper findings of typicality and adequacy of representation. The district court evaluated the testimony of six class representatives and found that testimony to be reasonably coextensive with the experience of class members. Dukes contends that Wal-Mart has presented no legal issue regarding the court's typicality findings. In addition, Dukes asserts that to defeat adequacy of representation, defendants must point to a conflict that is fundamental and goes to the heart of the litigation. Dukes suggests that there is no inherent conflict in the class merely because some members are supervisors and others not. Moreover, Dukes points out, Wal-Mart offered no evidence that any class members endorsed the discriminatory gender-based bias or practices.

Regarding certification pursuant to Rule 23(b)(2), Dukes contends that Wal-Mart seeks to limit the (b)(2) class solely to cases seeking declaratory and injunctive relief, which the plaintiffs suggest is

inconsistent with the text of the Rule, the Advisory Committee Note, and decisions of every circuit court. *Dukes* points out that federal courts consistently have permitted back pay to be recovered in Rule 23(b)(2) employment discrimination class actions seeking injunctive relief, including those circuits that have adopted the Fifth Circuit's *Allison* test for "incidental damages." Therefore, the district court's certification of a Rule 23(b)(2) class was amply supported by precedent.

In contrast to Wal-Mart's position, *Dukes* argues that the Advisory Committee on Civil Rules never intended to limit the class action rule to its historical antecedents. Furthermore, Rule 23(c) was amended in 2003 to authorize judges to exercise discretion to order notice and an opt-out right in Rule 23(b)(1) and (b)(2) classes. According to *Dukes*, the district court judge's decision to certify the *Dukes* class was completely appropriate.

Finally, the plaintiffs argue that the Supreme Court need not resolve whether a court may certify a punitive damage class under Rule 23(b)(2), because the Ninth Circuit vacated this portion of the district court's class certification order and remanded that claim. However, *Dukes* nonetheless contends that there is no support for Wal-Mart's argument that a punitive damage class may never be certified.

SIGNIFICANCE

As the largest employment discrimination case involving millions of female Wal-Mart employees, there can be no doubt that the Court's decision in *Dukes* will garner massive media attention. This case pits millions of female Wal-Mart employees alleging company-wide gender-based discrimination claims against the country's largest retail establishment. Whether the Supreme Court upholds this class certification is being closely watched by not only female employees throughout the country but by corporate America as well. The presence of large numbers of friend-of-the-courts briefs, on both sides of the appeal, demonstrates the high stakes involved in the fate of this class certification decision.

Corporate America is concerned that if the class certification decision is upheld, almost every large American corporation will be vulnerable to sweeping allegations of employment discrimination based on generalized theories of discriminatory corporate culture and subjective local decisions. Corporate America views the *Dukes* class certification as a watering down of class certification standards that will enable class litigation to proceed on the most sweeping assertions of discriminatory behavior. This liberalization of class certification requirements is inappropriate, it is argued, where hundreds of thousands of individualized employment decisions are involved and class certification effectively denies defendants their due process and jury rights.

Women's groups, on the other hand, are concerned that the Court may seize the *Dukes* appeal as a platform for tightening class certification requirements in Title VII employment discrimination cases, thereby increasing the difficulty for female employees to seek recovery in discrimination cases. For women workers, if the Court reverses class certification and narrowly interprets Title VII requirements for class certification, the *Dukes* case could signal a significant regression in women's rights in the workplace.

The Supreme Court's resolution of the *Dukes* appeal will largely turn on the Court's evaluation of the underlying Title VII claims, defenses, and substantive law, as this affects a rigorous analysis of Rule 23(a) class certification requirements. Because the class is not seeking compensatory damages, and the punitive damage claim has been remanded to the lower courts, the Court is less likely to elaborate on the Rule 23(b)(2) class certification issue. Whether federal courts may certify a Rule 23(b)(2) punitive damage class is an important issue, but that problem will remain for another day and another case.

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A number of briefs have come in for *Wal-Mart v. Dukes* since I sent the article over.

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