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# Defeating Employment Class Certification After Wal-Mart v. Dukes

Leveraging the Decision to Defeat Certification and Minimize Class Action Exposure

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*Wal-Mart Stores, Inc. v. Dukes*

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## District Court Certification Order (June 21, 2004)

- Certified mandatory class under Rule 23(b)(2) of “[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart’s challenged pay and management track promotions policies and practices.”
- “The Court recognizes that there is a tension inherent in characterizing a system as having both excessive subjectivity at the local level and centralized control.”
- Concluded that “in-store pay and promotion decisions are largely subjective and made within a substantial range of discretion by store or district level managers, and that this is a common feature which provides a wide enough conduit for gender bias to potentially seep into the system.”
- Declined to resolve contested factual issues, citing *Eisen*.
- *Daubert* does not apply to expert testimony at class certification.



## Ninth Circuit Procedural History

- 23(f) petition granted (August 13, 2004)
- First panel opinion (2-1 split) (February 6, 2007)
- Revised panel opinion (2-1 split again) (December 11, 2007)
- En banc opinion affirming in part and reversing in part (6-5 split) (April 26, 2010)

# Ninth Circuit En Banc Decision

Affirmed in substantial part

- Rule 23(a) requirements of commonality, typicality, and adequacy were satisfied.
- Commonality:
  - 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.”
  - “Evidence of Wal-Mart’s subjective decision-making policies suggests a common legal or factual question regarding whether Wal-Mart’s policies or practices are discriminatory.”
  - Rejected Supreme Court’s decision in *Falcon* that a plaintiff seeking class treatment in this context must offer “[s]ignificant proof that an employer operated under a *general policy of discrimination*” as a “hypothetical in clear dicta.”

## Ninth Circuit En Banc Decision (continued)

- Rule 23(b)(2) satisfied in large part even though plaintiffs sought billions of dollars in backpay.
  - Majority expressly created three-way circuit split regarding when monetary relief allowed under 23(b)(2) and concluded that monetary relief was not “superior in strength” to injunctive relief sought.

### Reversed in part

- Employees no longer employed when original complaint filed lacked standing to seek injunctive relief and could not remain in certified (b)(2) class.
- Remanded punitive damages claims to district court for consideration in a possible (b)(3) class



## Ninth Circuit Dissent

- Judge Ikuta “Never before has such a low bar been set for certifying such a gargantuan class.”
  - “Put simply, the door is now open to Title VII lawsuits targeting national and international companies, regardless of size and diversity, based on nothing more than general and conclusory allegations, a handful of anecdotes, and statistical disparities that bear little relation to the alleged discriminatory decisions.”
- Chief Judge Kozinski
  - Class members “have little in common but their sex and this lawsuit.”

## Supreme Court Decision (June 20, 2011)

- Questions Presented:
  - Whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2) and, if so, under what circumstances.
  - Whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a).
- Unanimously reverses the Ninth Circuit and decertifies the Class (opinion by Justice Scalia)
  - Claims for individualized relief, such as the backpay sought by plaintiffs, cannot be brought under Rule 23(b)(2)
  - “Trials by formula” are prohibited
- 5-vote majority holds that commonality is not satisfied
  - Evidence was “worlds away” from showing a discriminatory policy

## Rigorous Analysis and Rejecting *Eisen*

- “Rule 23 does not set forth a mere pleading standard.”
- “A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.”
- “Frequently that ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s underlying claim. That cannot be helped.”
- “A statement in one of our prior cases, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), is sometimes mistakenly cited to the contrary[.]”

## Definition of Commonality

- “What matters to class certification . . . is not the raising of common ‘questions’—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.” (Quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N. Y. U. L. Rev. 97, 132 (2009)).
- “That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”
- “Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question *why was I disfavored*.”

## “Significant Proof” and *Daubert*

- “Conceptually, there is a wide gap between (a) an individual’s claim that he has been denied a promotion [or higher pay] on discriminatory grounds, 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, such that the individual’s claim and the class claim will share common questions of law or fact and that the individual’s claim will be typical of the class claims.”
- One “manner of bridging the gap requires ‘significant proof’ that [the employer] ‘operated under a general policy of discrimination.’”
- “The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so, but even if properly considered, Bielby’s testimony does nothing to advance respondents’ case.”

## Relief Under Rule 23(b)(2)

- “Our opinion in *Ticor Title Ins. Co. v. Brown*, 511 U. S. 117, 121 (1994) (*per curiam*) expressed serious doubt about whether claims for monetary relief may be certified under [Rule 23(b)(2)]. We now hold that they may not, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.”
- “[W]e think that, at a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule.”
- Rule 23(b)(2) “does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.”
- “We think it clear that individualized monetary claims belong in Rule 23(b)(3).”



## No “Trials by Formula”

- An employer “will have 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.”
- “The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula. . . . We disapprove that novel project.”
- “[A] class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims.”

## Excessive Subjectivity Claims

- “[A]llowing discretion by local supervisors over employment matters . . . . ‘should itself raise no inference of discriminatory conduct.’” (Quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988).)
- “[L]eft to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all.”
- “In such a company, demonstrating the invalidity of one manager’s use of discretion will do nothing to demonstrate the invalidity of another’s.”
- “A party seeking to certify a nationwide class will be unable to show that all the employees’ Title VII claims will in fact depend on the answers to common questions.”

## Concurrence in Part and Dissent in Part

- Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan
- Joins the unanimous opinion holding 23(b)(2) does not permit claims for individualized relief and that Trials by Formula are not permitted.
- Argues that the majority imposed a heightened requirement for commonality under Rule 23(a) by emphasizing dissimilarities in the class.
- Would have allowed the plaintiffs to try to certify a class under the stricter 23(b)(3) standards, but partial dissent did not say that the plaintiffs could meet those standards.

# Defeating Employment Class Certification After *Wal-Mart v. Dukes*

Leveraging the Decision to Defeat Certification and  
Minimize Class Action Exposure

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# Agenda

## New Standards for Establishing Class Certification

- Commonality standard under FRCP 23(a)
- “Significant Proof” standard
- Consideration of the merits
- Application of *Daubert*
- Impact on future employment class actions

## Overview

- *Dukes* Plaintiffs alleged unequal pay and promotional opportunities for women
  - DOL statistics show gender pay disparity persists in U.S. workplaces, across all industries and professions
  - White House Report (April 2011): Women earn on average about 77% of their male counterparts
- Litigation trend has been to obtain class certification based on company-wide statistics, expert opinions and limited anecdotal evidence
- *Dukes* shifts focus back to the employer's policies and decisions, reinforces that certification requires a "rigorous analysis" and issues common to all class members

## *Dukes*: Protection of Absent Class Members

- Certification requirements test whether the named plaintiff’s claims and class claims are “so interrelated that the interests of the class members will be fairly and adequately protected in their absence.”
- Court was wary of “perverse incentives for class representatives to place at risk potentially valid claims for monetary relief.”
  - Plaintiffs certified the class under FRCP 23(b)(2), monetary claims were limited to backpay, no ability to opt out
  - Certification created the possibility that individual class members’ compensatory damages claims would be precluded by litigation they had no power to hold themselves apart from

## Class Certification Requirements (part 1)

FRCP 23(a): Plaintiff must prove:

1. numerosity;
2. common questions of law or fact;
3. claims of representative plaintiffs are typical of class claims;  
**and**
4. representative plaintiff will fairly and adequately protect interests of the class

## Class Certification Requirements (part 2)

FRCP 23(b): Plaintiffs also must prove:

1. Separate actions would create risk of inconsistent or varying adjudications, impair or impede ability of others to protect their interests;
2. Action for declaratory or injunctive relief based on acts that apply generally to the class; **or**
3. Common issues predominate, and class action is superior to other available methods for fairly and efficiently adjudicating the controversy

# Dukes: Class Certification Evidence

## 1. Statistics

- Plaintiffs: regression analyses for each of 41 regions, finding women earned 5 to 15% less than similarly situated men, took 1 ½ years longer to be promoted to higher management
- Wal-Mart: decisions made within each store department, 7,500 separate regression analyses showed lack of broad-based gender differential

## 2. Social Sciences Expert

- Plaintiffs: gender stereotypes especially likely to influence personnel decisions if subjective, more likely biased if no clear objective criteria
- Wal-Mart: opinions are imprecise and unfounded; expert could not say if 0.5% or 95% of decisions were impacted by gender bias

## 3. Anecdotal Evidence

- Plaintiffs: 120 declarations from women around the country
- Wal-Mart: 239 declarations from store managers describing different individual factors they each consider in deciding pay and promotions

## Dukes: Commonality

- “Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question *why was I disfavored*.”
- “Wal-Mart’s ‘policy’ of *allowing discretion* by local supervisors over employment matters ... is just the opposite of a uniform employment practice that would provide the commonality needed for a class action .... It is also a very common and presumptively reasonable way of doing business ....”

## Standardization v. Discretion

- *Wal-Mart v. Dukes* (2011): Broad discretion, but not absolute
  - Pay and promotion decisions were “generally” committed to local managers’ discretion, exercised “in a largely subjective manner”
  - Objective criteria for management training program: above-average performance rating, at least one year’s tenure in current position, willingness to relocate
- *Ricci v. DeStefano* (2009): No discretion
  - Standardized test used for promotion decisions
  - White employees would have received 17 of 19 promotions, none to African-Americans, company concerned about disparate impact
  - Held: Employer lacked “strong basis in evidence” for disparate treatment of white employees by throwing out test results

## “Common” Policy Applicable to All Class Members

- *Bell v. Farmers* (Cal. 2001): Statewide class of claims representatives held misclassified as exempt from OT
  - Regional Claims Manual: “We have made a deliberate decision to vest the responsibility of our operations upon the branch and regional claims managers.... [T]he actual handling of the *routine and unimportant* may be delegated, but questions of importance must be decided by the [manager].”

## Standardization: Practical Considerations

### – Pros

- Ideally will provide a basis for establishing decisions were properly made using legitimate, lawful criteria
- Provides a check against contentions that subjective decisions were made for improper reasons

### – Cons

- Disparate Impact: facially neutral policy that adversely impacts a protected class
- Possible “glue” that binds together a large class of similarly situated employees

## *Dukes*: Class Certification Standards

- Class certification requires a “rigorous analysis” that frequently will “entail some overlap in the merits of the plaintiff’s underlying claim.”
- “[S]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion ....”
- “The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. ... We doubt that is so ....”

## *Dukes*: Individualized Determinations

- “Wal-mart is entitled to individualized determinations of each employee’s eligibility for backpay.”
- The company has “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.”
- The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula. ... We disapprove that novel approach.”

## Takeaways

- The law is in flux, significant further developments on the horizon interpreting *Dukes* and other recent opinions
- No “one size fits all” solution, the key is developing an effective strategy that is right for your organization
- Recent developments create great opportunities
  - Clear, well-implemented policies
  - Strategic approach to managing risk, controlling costs



## III. Strategies for Defeating Certification and Minimizing Class Action Exposure

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Preventive Strategies and  
Positive Solutions for the Workplace

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## Strategies for Defeating Certification and Minimizing Class Action Exposure

- A. Interplay of managers' discretion and objective criteria regarding pay and promotion
- B. Creating and distributing well-drafted EEO policies, training executives and management on EEO policies, and advising executives regarding documents that may be considered evidence of EEO policies
- C. Self-audits and use of statistics
- D. Other strategies including arbitration and class action waivers

## Strategies for Defeating Certification and Minimizing Class Action Exposure

### **A. Interplay of managers' discretion and objective criteria regarding pay and promotion**

- “[Allowing managers discretion] is ... a very common and presumptively reasonable way of doing business” which should raise no inference of discriminatory conduct.
- Allow managers discretion but do so within a paradigm setting forth certain demonstrable criteria:
  - Sales
  - Attendance (beware of ADA pitfalls)
  - Quotas
  - Meeting plan objectives

## Strategies for Defeating Certification and Minimizing Class Action Exposure

### **A. Interplay of managers' discretion and objective criteria regarding pay and promotion**

- Have policies on factors to consider, but do not limit decision to such factors, i.e., “You should consider the proscribed objective factors but you should also use your discretion, based on your business unit’s needs and your managerial experience, to evaluate subjective factors, which might include....”
- Consider forms documenting the factors considered and the weight assigned to such factors
- Use job postings or other methods of communicating open positions. You don’t want promotions to be a “tap on the shoulder,” especially if management is disproportionately male and/or white.

## Strategies for Defeating Certification and Minimizing Class Action Exposure

### **A. Interplay of managers' discretion and objective criteria regarding pay and promotion**

- Beware factors that may be viewed as inherently prejudicial:
  - Willingness to relocate (Ginsburg's dissent), entertain clients, work nights
  - Lifting or other physical requirements that might not really be necessary
  - Degree requirements that are not completely necessary to the job or do not allow for "comparable work experience"
  - Computer proficiency that is either not really necessary or can be taught

## Strategies for Defeating Certification and Minimizing Class Action Exposure

- B. Creating and distributing well-drafted EEO policies, training executives and management on EEO policies, and advising executives regarding documents that may be considered evidence of EEO policies**
- The *Dukes* decision placed great significance on Wal-Mart's policy against sex discrimination. Make sure your EEO policies are up to date, widely and consistently disseminated, given to employees, and included in training for current employees. You should not rely on your handbook only.
  - Give more in-depth training to managers regarding EEO policies, than to rank and file. Emphasize that “managing” is what distinguishes them from those they supervise and that failing to address EEO concerns or enforce EEO policies is a serious management performance deficiency.

## Strategies for Defeating Certification and Minimizing Class Action Exposure

- B. Creating and distributing well-drafted EEO policies, training executives and management on EEO policies, and advising executives regarding documents that may be considered evidence of EEO policies**
- Consider alternative or multiple training options: in person, online, interactive, completion of stepped training marked by notations to personnel records.
  - Enhanced grievance procedures not just “open door” policy but hotlines and review panels.

## Strategies for Defeating Certification and Minimizing Class Action Exposure

### **B. Creating and distributing well-drafted EEO policies, training executives and management on EEO policies, and advising executives regarding documents that may be considered evidence of EEO policies**

- Make managers and executives aware that the EEO policies are not the only ones that will be considered. Also at issue will be:
  - Leave policies (are they consistent with the position being taken by the EEOC)
  - Light duty (is it only available to those on the job injuries; is it freely given or typically denied)
  - Qualification Tests (do they test the truly necessary attributes)
  - Personality Tests (if used, make sure they are appropriately validated)
  - Fitness or Physical Tests
  - Benefits (what things are covered, e.g. Viagra but not birth control)
  - Wage and Hour concerns
  - Credit checks/Criminal Background checks
  - English only or literacy requirements

## C. Self-audits and the use of statistics

- Consider scheduling self audits on regular intervals, or rotating by division or geographic region.
- Conduct self audits under the auspices of counsel to protect potentially negative findings.
- It's not just about sex based pay disparities. Consider analysis of other EEO factors.
- Do not limit the analysis to pay bands but look for disparities within those bands.

### C. Self-audits and the use of statistics

- Affirmative Action Plans
  - Can be a good tool if you are required to do one.
  - Use counsel for privilege purposes.
  - Don't just do a cursory plan to meet OFCCP requirements, actually drill down on why you have deviation from industry standards and applicable geographic demographics.
  
- Do Not Just Take the First Step
  - Once you have done the analysis, take steps to address the perceived causes. Review and revise hiring practices, promotional guidelines and other related policies. Increase training. Enhance recruiting efforts, including job fairs and advertising in targeted periodicals.

## **D. Other strategies including arbitration and class action waivers**

- Arbitration Agreements, including class action waivers (*AT&T Mobility v. Conception Et.*, 131 S. Ct. 1740 (2011))
  - If implementing now, must give consideration to extant employees, and promise of continued employment may not be adequate.
  - Consider jury trial and class action waivers, outside the arbitration context.
- Plaintiffs' counsels are creative; they will find a way.
  - A series of divisional or geographic class actions is not a good thing. Beware of the "rogue" division or managers as that can still result in significant class litigation.

# Questions?

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