



Adapting class actions

Putting the Wal-Mart v. Dukes decision in context: While there are new roadblocks to class certification, there are possible ways around them

BY BRIAN S. KABATECK

In a time when union presence and utility has all but dwindled, class action lawsuits have prospered, allowing employees to organize and redress corporate violations and mistreatment by management. In fact, according to Nelson Lichtenstein, a labor historian at the University of California, Santa Barbara, “[t]he class-action lawsuit was really a substitute for unionism.” Indeed, Wal-Mart and many companies like it have never been unionized, leaving class-action lawsuits as one of the only viable methods to promote justice in the workplace.

With more than 1.5 million class plaintiffs, *Dukes (Wal-Mart Stores, Inc. v. Dukes, et al.* (2011) 131 S.Ct. 2541) is the largest civil rights class-action lawsuit in United States history. While the stakes could not have been higher, in analyzing the merits of certification of the class, the Supreme Court ignored 45 years of jurisprudence on the issue.

Through its corporate-friendly analysis, the conservative majority effectively raised the threshold for class certification, forcing potential class plaintiffs to make evidentiary showings traditionally reserved for later stages of litigation. With this change, the Court has likely made fact-finding a much larger part of the certification stage, increasing costs and stakes of filing a class-action lawsuit, and obstructing employees’ access to redress. The decision was, as CNN put it, “a powerful, multipronged victory for business.”

Background

The plaintiffs in *Dukes* filed a class-action complaint against Wal-Mart on

behalf of more than 1.5 million women who worked at the company since 1998. The plaintiffs alleged that because Wal-Mart allowed local store managers to make decisions on pay and promotion based on their own subjective criteria, that these managers – who were more than likely male – unconsciously favored males over females to receive pay increases and promotions. The plaintiffs based their claims upon a statistical study finding disparities in pay and promotions between male and female employees. A San Francisco federal judge certified the *Dukes* class, and in April of 2010, after partly reducing the class, the Ninth Circuit permitted the class to proceed as certified.

There were thus two issues to be decided upon review by the Supreme Court. The first was whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2), which is ordinarily limited to injunctive or corresponding declaratory relief. The second was whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a). In other words, whether plaintiffs’ claims – as evidenced by statistical proof of disparities between men and women, regression analyses showing disparities in pay and promotion, anecdotal evidence in the form of affidavits, and expert material on social framework analysis indicating a vulnerability to discrimination within the company’s management structure – were ones that could have been common to all women in the class.

Opinions

The Majority Opinion

The Court unanimously held that claims for monetary relief may not be certified under Rule 23(b)(2), asserting that

the claims for backpay were not incidental to the requested injunctive or declaratory relief. The court thus held that a class seeking monetary compensation will ordinarily not be able to bring its case under the lenient procedural requirements that the Federal Rules of Civil Procedure afford lawsuits seeking only injunctive or declaratory relief.

More importantly, however, Justice Scalia, joined in the majority by Chief Justice Roberts and Justices Kennedy, Thomas and Alito, established an elevated burden required to establish commonality, which until this time had been “construed permissively.” (*See Hanlon v. Chrysler Corp.* (9th Cir. Cal. 1998) 150 F.3d 1011, 1019.) According to the Court, the purpose of this heightened standard is to produce cohesion amongst the class. The majority wrote that “[w]ithout 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”

Ultimately, the Majority held that the *Dukes*’ plaintiffs did not have enough in common to move forward as a class. According to the majority, the women could not show that Wal-Mart “operated under a general policy of discrimination.” After all, “Wal-Mart’s announced policy [forbade] sex discrimination.” The Court held that “[b]ecause [the] respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, [it] concluded that they have not established the existence of any common question.”

The Dissenting Opinion

Justice Ginsburg, joined in the Dissent by Justices Breyer, Sotomayor, and



Kagan, argued that the plaintiffs should have been afforded the opportunity to plead their case under another of the class-action rules. The Dissent suggested that a “common issue” for Rule 23(a) purposes is just that: a “common issue.” Justice Ginsburg argued that the *Dukes* plaintiffs did allege a discriminatory company-wide payment and promotion procedure influenced by unconscious bias and fully substantiated by proffered evidence. Specifically, the Dissent stated that the evidence the plaintiffs offered “suggests that gender bias suffused Wal-Mart’s company culture,” and that the difference in pay and promotions between male and female workers could only be explained by bias, not “neutral variables.”

Justice Ginsburg further stated that the Majority’s approach of focusing on differences within the class transforms the Rule 23(a) commonality inquiry into the Rule 23(b)(3) requirement that common issues predominate over individualized ones. The dissent articulated this concern as such: “The Court’s emphasis on differences between class members mimics the rule 23(b)(3) inquiry into whether common questions ‘predominate’ over individual issues.”

The significance of *Dukes*

The Majority has likely rewritten Rule 23, by setting a higher “commonality” threshold for class-action plaintiffs, not just those proceeding under Rule 23(b)(3). As an example of the type of claim which might today be denied certification, the Dissent cites to an earlier case involving African-American truck drivers who sought and obtained injunctive relief under Rule 23(b)(2) despite differences in “qualification and performance” among the class members.

As Lyle Denniston of SCOTUSblog put it, “[f]or large companies in general, the ruling in *Dukes* offered [the message that] the bigger the company, the more varied and decentralized its job practices, the less likely it will have to face a class-action claim.” Additionally, because the majority rejected the *Dukes* plaintiffs’ attempt

to establish discrimination through statistical evidence that the disparities in pay and promotion across all of Wal-Mart’s 41 regions “can only be explained by gender discrimination,” the Court’s holding has the potential to invalidate disparate-impact cases in which the allegations suggest that subjective decision-making led, over time, to company-wide disparities in the workforce.

Some cases have even broadened the application of *Dukes* to other areas of the law. For example, in *Cruz v. Dollar Tree Stores* (N.D. Cal. 2011) Ca. No. 07-2050 SC, the plaintiffs, a group of current or former store managers for the company’s California store, brought a putative class alleging that due to a misclassification as exempt employees, they were owed compensation. Ultimately, the Ninth Circuit decertified the class. In responding to the *Dukes* decision, the Ninth Circuit described the holding as providing “a forceful affirmation of a class action plaintiff’s obligation to produce common proof of class-wide liability in order to justify class certification.” The court interpreted this requirement as one of “common proof to serve as the ‘glue’ that would allow a class-wide determination of how class members spent their time on a weekly basis.”

Heidi Li Feldman, a professor at Georgetown Law Center, said similar reasoning might make it tougher for plaintiffs to bring a class action against a mortgage lender accusing it of having a nationwide policy of defrauding borrowers. She stated that a “big mortgage broker might . . . have policies [that] abide by all of the rules and regulations that are applicable, [while] delegate[ing] a lot of discretion to [its] branches.”

Impact on employees and consumers

Marcia D. Greenberger, co-president of the National Women’s Law Center stated that the Supreme Court decision “strikes a blow to those who face discrimination in the workplace to be able to join together and hold companies, especially

large companies, accountable for the full range of discrimination they may be responsible for.” Elizabeth B. Wydra of the Huffington Post asks: “Should [the *Dukes* plaintiffs] be penalized simply because Wal-Mart is a massive company and its corporate practices occur on a massive scale?” Ken Jacobs, the chair of the Labor Center at University of California-Berkeley articulates his concern: “Basically if you’re saying that the overall corporation is off the hook for what local managers are doing, that removes the incentive for corporate headquarters to really pay attention and to set up structures to make sure you do have the law being followed.”

In cases for national employers (i.e., cases against Costco, Bayer, Goldman Sachs, Toshiba, and Cigna), the prognosis is not great. (See *Costco Women’s Suit May be Imperiled by Supreme Court’s Wal-Mart Decision*, Margaret Cronin Fisk and Karen Gullo, <http://www.bloomberg.com/news/2011-06-23/costco-women-s-suit-may-be-imperiled-by-supreme-court-s-wal-mart-decision.html>) (“Bottom line: Under *Dukes*, a class cannot be certified for this case as framed.”) Thus, if a defendant can show that each individual store has its own distinct policies – which may nevertheless amount to discrimination – short of a general company-wide policy clearly articulating discrimination, in light of *Dukes*, the company will likely not be held liable.

Ultimately, the *Dukes* decision will limit employees’ access to justice. Most of the women in the *Dukes* class action would never have brought nor will they bring an individual lawsuit for discrimination. And in any event, winning an individual discriminatory action is very difficult. (See *St. Mary’s Honor Center v. Hicks* (1993) 509 U.S. 502 (holding that the employer does not have to prove that there was a good reason for its decision; it needs only to claim that there was one.)) Even if these individuals claimants did have viable claims, the damages available would likely make bringing the suit worthless for most attorneys. If these large civil rights class actions cannot



push through the courts, then the only remaining entity able to sue for company-wide patterns of discrimination may be the government.

Limitations of the *Dukes* decision

Factually Distinguishing Dukes

Courts across the nation are using *Dukes* as a distinguishing case, bolstering many employees' class claims. (See, e.g., *Tyco Electronics*) (holding, just days after *Dukes* that a class lawsuit filed by 600 employees for underpayment was valid); (*Starbucks* (FL) (same); (*C.R. England Inc.*) (CA) (same for 1,000 plaintiffs); (*HCR Manor Care*) (motion to decertify denied.) The key for these employees seeking to distinguish their case from *Dukes* was to lay out reasons why their cases factually differed from *Dukes* and should be awarded class-action status despite the holding. For instance, Wal-Mart's victory in its case is at least to some extent attributable to the fact that alleged sex discrimination victims were located all across the country, had different managers, worked in different regions, and reported diverse damages.

Pursue Class Actions at the Local Level

To this same effect, "Joseph Sellers, one of the top lawyers for the plaintiffs in *Dukes*, said that as a result of the ruling, there would be more class actions at the store or regional level, where it might not be hard to show that local managers had engaged in sex or age discrimination." (New York Times, *Wal-Mart Case Is a Blow for Big Cases and Their Lawyers*, http://www.nytimes.com/2011/06/21/business/21class.html?_r=2&pagewatned=all)

Thus, if plaintiffs were all injured by the same management in the same regional office, the court might easily distinguish *Dukes* and permit class certification.

Securities Fraud Cases Likely Unaffected

According to the New York Times, "[s]everal experts said the [*Dukes*] ruling would have little effect on securities fraud

cases because a misrepresentation by a corporate executive is commonly seen as injuring a company's whole class of shareholders." There is not yet a post-*Dukes* case testing this proposition.

Dukes Does not Apply in State Court Class Actions

Since the *Dukes* decision seeks to clarify the meaning of a federal court rule, there is likely no due process implication upon class-action lawsuits brought in state court. But *Dukes* has encouraged tobacco companies to file for Supreme Court review of a settlement agreed to under a state class action, arguing that the Court's interpretation of Rule 23 should have due process implications upon states. (See *Philip Morris USA, Inc., et al., v. Jackson.*)

FRCP 23(b)(3) Cases Likely Unaffected

In his blog discussing recent class action issues, Matt Bailey asserts that while the Court's elevated standard "likely will substantially impact certification under Rule 23(b)(1) and (b)(2) moving forward, it is unlikely to have significant impact [on] Rule 23(b)(3) certification." Fundamentally, "the commonality element is of less importance in a Rule 23(b)(3) class action . . . because the class must also meet the more stringent predominance requirement of Rule 23(b)(3)." (See *In re Educ. Testing Serv. Praxis Principles of Learning & Teaching: Grades 7-12 Litig.*, 2006 U.S. Dist. LEXIS 9726, *10 (E.D. La. Mar. 13, 2006). In other words, a court's Rule 23(b)(3) analysis absorbs the Rule 23(a)(2) analysis. (See *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1022 (holding that a court's "[Rule 23(b)(3) predominance] analysis presumes that the existence of common issues of fact or law have been established pursuant to Rule 23(a)(2).")

Conclusion

Class actions serve many important goals. They save judicial resources by allowing courts to hear the same claims

together. They make claims redressing small-dollar values worthwhile. But most importantly, class actions are crucial for victims of corporate misconduct who may not have the means to bring their own individual lawsuits. Taking away this powerful instrument of justice is taking away a means to fundamentally change a corporate practice or culture for the better.

The *Dukes* decision has undoubtedly awarded corporations a proverbial hall pass, so long as they commit their wrongdoings through localized delegation of critical payment and promotion decisions. Ultimately, perhaps we must wait to see how the lower courts will interpret the extent of this recent holding. Yet even with its changed circumstances, the class-action lawsuit remains one of the most powerful tools consumers and employees have to band together and fight corporate misconduct.

Acknowledgement

The author thanks Jacob H. Seropian, Loyola Law School Juris Doctor Candidate, class of 2012, for his outstanding work and efforts, without which this article would not have been possible.



Kabateck

Brian S. Kabateck is a consumer rights and personal-injury attorney, and a founding partner at Kabateck Brown Kellner, LLP in Los Angeles. He represents plaintiffs in mass torts litigation, personal injury, and wrongful death cases, as well as class actions, insurance bad faith, insurance litigation, and commercial contingency litigation.

