Wal-Mart: Everyday low prices, everyday discrimination

Will Dukes v. Wal-Mart *prove to be a detriment to the American worker?*

By Micha Star Liberty

At first glance, the Supreme Court's decision in *Dukes v. Wal-Mart Stores, Inc.*, essentially throwing out a gender discrimination lawsuit brought on behalf of approximately 1.5 million female Wal-Mart employees, reads like a purely procedural decision on class-action rules. The effect, however, is much more sinister in that the holdings shift significant power from workers to big employers under the guise of mere application of Rule 23. In reaching its tortured conclusions, the majority ignored statistics, testimony, corporate culture and corporate policy. Simply put, the conservative majority changed the rules of how plaintiffs must prove commonality in order to get a gender discrimination class action certified. The impact of this decision, for tens of thousands of women who work now, or used to work, for the company, is that each of them will have to go it alone, rather than proceed as a class. The future ramifications for groups of workers suffering discrimination are unknown. What is clear, however, is the road map laid out by the majority for how large corporations can avoid defending discrimination claims by groups of employees.

Background

The named plaintiff, Betty Dukes, has worked for Wal-Mart as a greeter and cashier in Pittsburg, California, a working class community approximately 30 miles east of San Francisco since 1994. Ms. Dukes claims that throughout the first seven years she was employed, she sought promotions, but they each went to less qualified men. According to Dukes, women were assigned to stereotypically feminine departments, such as baby clothing, and precluded from departments like hardware.

Ms. Dukes filed suit pursuant to Title VII for gender discrimination and sought to certify a class action consisting of any and all female employees who worked for Wal-Mart after December 26, 1998. The putative class was over approximately 1.5 million women. The lawsuit alleged that Wal-Mart discriminates against female employees with a "corporate culture" that permits bias against women through the discretionary decision making of local supervisors.

The district court and the Ninth Circuit Court of Appeals approved the certification of a class of current and former female Wal-Mart employees who allege that they were discriminated against in both pay and promotions. The plaintiffs sought injunctive relief, declaratory relief, and back pay. The lower courts found that the plaintiffs satisfied Rule 23(a) and also that a Rule 23(b)(2) class was appropriate because the monetary damages

sought did not predominate over the injunctive and declaratory relief sought.

Specifically, the district court found "commonality" existed based on three categories of evidence suggesting that the alleged discriminatory pay and promotion practices were common to the entire class. First, the district court concluded evidence of common company policies and practices was presented: "Plaintiffs present evidence that Wal-Mart's policies governing compensation and promotions are similar across all stores, and building in a common feature of excessive subjectivity which provides a conduit for gender bias that affects all class members in a similar fashion." Second, the plaintiffs provided expert testimony establishing statistical disparities based on gender in pay and promotion. Third, class members furnished anecdotal evidence of managers having or tolerating discriminatory attitudes. The Ninth Circuit substantially affirmed, concluding the commonality requirement had been met, and that back pay claims could be certified because those claims did not predominate over declaratory and injunctive relief requests. The Ninth Circuit also ruled that the class action could indeed be tried without depriving Wal-Mart of its right to present statutory defenses if the district court selected a random set of claims and proceeded with a "Trial by formula" approach. The Supreme Court, however, disagreed.

The Court granted certiorari to address the limited questions of: (1) whether the class certified under Rule 23(b)(2) was consistent with Rule 23(a), and (2) whether claims for monetary relief can be certified under Rule 23(b)(2) and, if so, under what circumstances? In a 5 to 4 conservative majority ruling, the Supreme Court held that plaintiffs failed to demonstrate commonality under Rule 23(a)(2), and, addressing a split in the federal circuits, unanimously held that the back-pay claims could not be properly certified under Rule 23(b)(2).

Whether this decision is viewed as a major loss for women's rights (or the rights of any other minority group) in the workplace, or merely another example of the current conservative Supreme Court majority siding with big business, one thing is certain: *Dukes* lays out a new landscape for Rule 23 certification issues, and is likely to affect employment discrimination litigation for years to come.

The focus on Rule 23[a] Commonality Issues

The majority opinion, authored by Justice Scalia and joined in by Justices Roberts, Kennedy, Thomas, and Alito focuses on whether plaintiffs adequately demonstrated a common policy of discrimination on the part of Wal-Mart under Rule 23(a)(2).

The Court framed the issue as whether the "common contention" 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 claims in one stroke." In that respect, according to the Court, commonality overlapped with the merits issue that the employer engaged in a pattern or practice of discrimination.

As an initial matter, it was previously commonly argued that district courts are to accept plaintiffs' allegations as true when analyzing whether to certify a class. Now, however, rather than assuming the validity of pleadings, the majority opined that the (now) necessary "rigorous analysis" of whether Rule 23 has been satisfied "will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." In *Dukes*, according to the Court, proof of commonality necessarily overlaps with plaintiffs' claim that Wal-Mart engages in a pattern or practice of discrimination. Yet, the Court failed to reach a determination regarding the existence of discrimination.

The Court determined that plaintiffs had to show "significant proof" that Wal-Mart operated under a general policy of discrimination, which it determined was "entirely absent here." Plaintiffs' show commonality, however, through a common Wal-Mart policy consisting of two elements: an alleged corporate culture that embodies sexual stereotypes, together with a policy that gave local managers and supervisors unfettered discretion in making personnel decisions. In reaching its conclusion, the majority ignored evidence of corporate culture and policy, statistical evidence, and testimonial evidence. In spite of the fact that the Wal-Mart women put forward a classic case of sex discrimination, apparently, the proof presented was not significant enough.

This policy is just not a policy

"I never had a policy; I have just tried to do my very best each and every day"
— Abraham Lincoln

The Court opined that the only evidence of a corporate policy was a policy allowing discretion by local supervisors over employment decisions. Taken alone, such evidence is insufficient to infer discrimination.

Demonstrating the invalidity or unlawfulness of one manager's use of discretion "will do nothing to demonstrate the invalidity of another's" according to the majority. Summarizing plaintiffs' claim, Justice Scalia stated that the claim the "corporate culture" institutionalized a bias against female workers, "thereby making every woman at the company the victim of one common discriminatory practice" failed because they were suing "about literally millions of employment decisions at once." The lawsuit lacked "some glue" holding the claims together, and that "glue" would be the actual reasons behind each of those decisions. Without that, "it will be impossible to say that examination of all class members' claims for relief will produce a common answer to the crucial question of *why was I disfavored*.

In an attempt to substantiate the holdings, the majority appears to go to great lengths to arrive at its predetermined conclusion. In an exercise of intellectual acrobatics, the Court states that Wal-Mart announced a policy against sex bias,

and the existence of that simple policy statement coupled with decentralized workplace decisions on pay and promotions "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." Without even a scintilla of evidence, Justice Scalia announces that most managers work carefully to avoid discrimination in their pay and promotion decisions when left to their own devices. Such a claim is even more puzzling when statistics show that the higher one looks at the Wal-Mart corporate hierarchy, the fewer women are seen.

In stark contrast, with an appreciation of the evidence, the dissenting justices disagree with the majority's commonality analysis finding that the evidence "suggests that gender bias suffused Wal-Mart's company culture." According to the dissent, the common question to resolve among all plaintiffs – whether the policies gave rise to unlawful discrimination – would require an examination of particular policies and practices that universally and commonly affected women employed by Wal-Mart. Justice Ginsburg said that the majority ignored that "the practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effect. Managers like all humankind, may be prey to biases of which they are unaware."

Plaintiffs paint a powerful picture that shows how sex discrimination at Wal-Mart was the inevitable byproduct of a strong and centralized corporate system that originated in headquarters of Bentonville, Arkansas, and permeated each of the company's stores.

Sam Walton's history developed Wal-Mart's corporate culture

"Those who cannot remember the past are condemned to repeat it."— George Santayana

As the nation's largest employer with 1.4 million employees, Wal-Mart has had a profound influence on the working poor because it is notorious for paying low, poverty-level wages. Further, it epitomizes the iconic big-box chain store that shutters "Main Street's" small businesses, exacerbates suburban sprawl, encourages the consumption of disposable products, and exploits the labor and land of developing countries, all for record profits.

The scofflaw culture of Wal-Mart has been around since the beginning. The first store opened in Arkansas at a time when industry was replacing agricultural labor, and Mr. Walton offered unemployed former farm laborers low-paying jobs.[1] When Congress extended the minimum wage laws to retailers, Mr. Walton responded in quintessential style. The new wage laws applied to businesses with annual revenue of $250,000 or more, so Mr. Walton divided his business into several smaller corporations that would fall under the statutory threshold. The court in *West v. Wal-Mart, Inc.* (W.D. Ark. 1967 264 F.Supp. 158,164) saw through the ploy, and ordered Mr. Walton to compensate his employees retroactively. Left with no alternative, Mr. Walton delivered the back pay, but with a warning: "I'll fire anyone who cashes the check."[2]

Mr. Walton's influence has infused the Wal-Mart culture, and bred discriminatory practices. Although Wal-Mart has faced numerous race discrimination claims,[3] sexism appears to be the biggest civil rights challenge. The company seems to have had little success in altering the patriarchal attitudes among its managers: "The Southern traditionalism of Walton and his lieutenants dictated that the stores' managers would be men and its salesclerks women."[4] For example, the EEOC sued Wal-Mart alleging that the company's London, Kentucky distribution center was denying women warehouse jobs. In 2010, Wal-Mart agreed to pay $11.7 million to settle that suit.[5] Further, over 90 percent of cashiers are women; therefore, sexism would affect more employees than any other forms of discrimination.[6]

Numbers can't be trusted

"There are three kinds of lies: lies, damned lies and statistics." — Mark Twain

The statistics showing discrimination at Wal-Mart are so overwhelming, there appears to be a clear nexus between local management employment decisions, and the promotion of men over women. Even though Wal-Mart had a single written policy against discrimination, it is fairly obvious, it was not successful because of the localized decision making.

When Patty Dukes first filed suit over a decade ago, 86 percent of Wal-Mart store managers were male. Currently, "[w]omen fill 70 percent of hourly jobs in the retailer's stores, but make up only 33 percent of the management employees."

"The higher one looks in the organization, the lower the percentage of women," noted the dissenting opinion.

The Court rejected the statistical proof (from Dr. Richard Drogin and Marc Bendick), concluding that "even if [the expert studies] are taken at face value, these studies are insufficient to establish" plaintiffs' theory of discrimination on a classwide basis. Further, although the statistical evidence and testimony of Dr. William T. Bielby pointed to a nationwide corporate culture that allowed stereotypes to influence personal choices, making "decisions about compensation and promotion vulnerable to gender bias," the Supreme Court held that fact Dr. Bielby could not say if 0.5 percent or 95 percent of the decisions were determined by stereotyped thinking meant that the sociological evidence did not satisfy the "significant proof" requirement. In doing so, the majority suggested that the testimony of expert witnesses used in support of class certification is subject to the *Daubert* standard.

Sometimes sworn testimony is not enough

"There is no truth. There is only perception." — Gustave Flaubert

The *Dukes'* plaintiffs introduced evidence of serious mistreatment, and

discrimination, like the contention that senior managers often referred to female associates as "little Janie Qs." The plaintiffs filed 120 affidavits alleging specific acts of discrimination at Wal-Mart which included testimony like the following:

- A female employee, with a master's degree who had worked for Wal-Mart for five years, was told: "You just don't have the right equipment … You aren't male, so you can't expect to be paid the same," when she asked her manager why she was paid less than a recently hired 17 year-old male.
- A female employee was told that men would always be paid more than women at Wal-Mart because "God made Adam first, so women would always be second to men."
- A female employee was told that a male employee received a bigger raise than she because he had "a family to support."

Justice Scalia noted that the 120 affidavits represented only about 1 for every 12,500 potential class members. "Even if every single one of these accounts is true, that would not demonstrate that the entire company operates under a general policy of discrimination … which is what respondents must show to certify a companywide class," Scalia wrote thereby creating a higher standard for plaintiffs to achieve. Again, according to the majority, a widely used method of submitting a sampling of evidence of class-wide treatment is no longer acceptable in this context.

No certification of monetary relief under Rule 23[b][2] here

The Supreme Court concluded that plaintiffs' claims for back pay were improperly certified under Rule 23(b)(2), and that claims for monetary relief cannot be certified pursuant to that rule unless the monetary relief is not incidental to claims for injunctive and declaratory relief. Rule 23(b)(2), the full Court ruled, is unavailable when "each class member would be entitled to an individualized award of monetary damages." Instead, such claims "belong in Rule 23(b)(3)." The impact of this is that the requirements of "predominance" and "superiority", and the right to mandatory notice to the class, along with the ability to opt out, which are features of Rule 23(b)(3) certifications, present a much more difficult showing for plaintiffs to make. Given the Court's articulated skepticism regarding the use of discretionary decision-making as a ground for the less stringent commonality requirement, this burden could have a substantial chilling effect on workers bringing employment class actions on that basis.

Finally, the Supreme Court rejected plaintiff's theory (and the Ninth Circuit conclusion) that back pay could be determined *via* "Trial by Formula," which is the notion that a sample of the class members could be selected, and statistical modeling used to yield a result for the entire classwide recovery without individual proceedings. The Court concluded that such a device would run afoul of the Rules Enabling Act, since a class cannot be certified when an employer "will not be entitled to litigate its statutory defenses to individual claims." In this far-reaching ruling, the Court held that back pay, regardless of whether it is characterized as equitable, cannot be certified under Rule 23(b)(2).

Rather than approve the "Trial by Formula," the Court held that Wal-Mart was "entitled to individualized determinations of each employee's eligibility for back pay." Not only does this mean that plaintiffs cannot certify claims of money damages under Rule 23(b)(2), but it also makes it more difficult for plaintiffs to certify claims for monetary damages under Rule 23(b)(3). Additionally, *Dukes* limits the use of Rule 23(b)(2) to obtain restitution damages or other types of money damages in different types of cases, including consumer class actions, antitrust class actions, and products-liability class actions.

The impact

It is beyond doubt that for the *Dukes*' plaintiffs the decision is a major defeat. While the individuals seeking damages for discrimination could now file individually, and many are, they are unable to challenge the prevailing discrimination systemically. Individual damage claims will not rectify the disproportionate number of women in subordinate roles.

The ramification for workers rights in the United States is even more troubling. In decertifying the *Dukes* class, the Supreme Court has set a difficult standard for any future large scale class action. It remains unclear just how far the Court will take this new rule. Does "same injury" now mean that plaintiffs must show that every single class member was denied the exact same promotion? Or that each plaintiff was underpaid in the exact same amount?

Remarkably, the majority does write that it means suffering "a violation of the same provision of the law" will no longer suffice as suffering the "same injury." It used to be that American employers were legally liable for delegating so much decision making authority to managers that the managers, because of culture and history, developed a pattern of discrimination. Now, however, employers can delegate their way out of responsibility for discrimination by adopting a meager written anti-discrimination policy and letting local managers make promotion and pay decisions based upon whatever unarticulated criteria they see fit.

When the Supreme Court can ignore policies and practices, statistics, and testimony (i.e. admissible evidence), there is not much hope for justice to prevail. Although the full effect is yet to be seen, this decision is another in a long line of pro-corporate interest rulings from the Roberts Court – all to the detriment of the American worker.


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Micha Star Liberty is a civil rights attorney specializing in litigating serious injury, civil rights, sexual abuse, and employment matters in both individual and class actions. She is a certified mediator with over 40 hours of training who performs mediation for the Contra Costa Superior Court. She is also a frequent lecturer and widely published author. Ms. Liberty is a graduate of the University of California at Los Angeles and the University of California, Hastings College of the Law. She was recently elected to serve an unprecedented third one-year term on the California State Bar Board of Governors, and was also elected to be a Vice President of the State Bar of California. She actively serves on the boards of the Consumer Attorneys of California, the Alameda-Contra Costa County Trial Lawyers Association (President 2010, Former Secretary and Treasurer, former editor of The Verdict *magazine).*

Endnotes

[1] See Nelson Lichtenstein, The Retail Resolution 117 (2010).
[2] Harold Meyerson, *In Wal-Mart's Image*, AM Prospect, Sept. 11, 2009, at 33.
[3] The EEOC has filed more than 60 discrimination lawsuits against Wal-Mart. In 2009, Wal-Mart settled a suit brought on behalf of black applicants for truck driver positions for $17.5 million. Also, in 2009, West African employees in Colorado complained that a manager said: "I don't like some of the faces I see here. There are people in Eagle County who need jobs." Dan Frosch, Immigrants Claim Wal-Mart Fired Them to Provide Jobs for Local Residents, N.Y. Times, Feb. 9, 2010, at A1.
[4] Meyerson, *supra*, at note 9.
[5] Press Release, U.S. Equal Empl't Opportunity Comm'n, (March 1, 2010), available at http://www.eeoc.gov/eeoc/newsroom.relase/3-1-10.cfm
[6] WAL-MART WATCH, LOW WAGES ALWAYS 2 (2009), available at http://action.walmartwatch.com/page/FactSheets/LowWagesFACT_SHEET_Feb09.pdf