

TOXIC TORTS

Expert Analysis

What Now? Commonality after *Dukes*

By Brian S. Kabateck, Esq., Kabateck Brown Kellner LLP, and Jacob H. Seropian

On June 20, in one swift move, the U.S. Supreme Court issued an opinion that effectively closed the courtroom doors to more than 1.5 million class plaintiffs in a historic gender discrimination suit.

In addition, the holding in *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011), seems to have elevated one of the elemental standards required to file a successful class-action lawsuit. With this change, the court has probably made fact finding a much larger part of the class-certification stage, thereby increasing the costs of filing class-action lawsuits and obstructing employee access to this often lone form of viable relief.

The implications of this decision will have far-reaching and dismal effects in class-action lawsuits filed against corporate giants such as Wal-Mart.

Yet, there are solutions to this predicament. Proven methods have helped to overcome the constraints placed upon class actions after *Dukes*. Although the decision was, as CNN put it, “a powerful, multipronged victory for business,” class-action litigation is still the best form of relief for U.S. workers.

The case began in 2000, when 54-year-old Betty Dukes filed a gender discrimination claim against Wal-Mart, claiming that she was denied the opportunity to advance to higher positions within the company. By June 2001, a class-action lawsuit was filed in federal court in San Francisco, where the plaintiffs sought to represent a class of more than 1.5 million women who had worked at the company since 1998.

The plaintiffs alleged that because Wal-Mart allowed local store managers to make decisions on pay and promotion on the basis of their own subjective criteria, these managers unconsciously favored men over women to receive pay increases and promotions. The plaintiffs based their claims upon a statistical study showing disparities in pay and promotions between male and female employees.

In June 2004 U.S. District Judge Martin Jenkins of the Northern District of California ruled in favor of class certification. Wal-Mart appealed the decision, which the 9th U.S. Circuit Court of Appeals affirmed in February 2007.

Wal-Mart filed for a rehearing *en banc*, claiming that the majority erred in finding that the elements of class certification had been met. In December 2007 the 9th Circuit withdrew its original opinion and made a superseding opinion, nevertheless affirming the class-certification order.

In Dukes the Supreme Court likely made fact-finding a much larger part of the class certification stage, thereby increasing the costs of filing class-action lawsuits.

The court also dismissed Wal-Mart's petition for rehearing as moot, indicating that the revised opinion addressed the errors the company claimed. Still, Wal-Mart filed another rehearing *en banc*, which was ultimately granted.

In April 2010, in a 6-5 holding, the *en banc* court affirmed in part and reversed in part Judge Jenkins' certification of the class.

The court upheld certification for the plaintiffs who were still employed when the complaint was filed for their claims of injunctive and declaratory relief, as well as back pay. Conversely, the court remanded the claims for punitive damages so as to allow the lower court to consider whether to certify the class under Federal Rule of Civil Procedure 23(b)(2) or Rule 23(b)(3):

- Rule 23(b)(2) requires that the party opposing certification "acted or refused to act on grounds that apply generally to the class, so that final *injunctive relief or corresponding declaratory relief* is appropriate respecting the class as a whole."
- Rule 23(b)(3) requires that the court hearing certification finds "that the questions of law or fact common to class members predominate over any questions affecting only individual members and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

The court also remanded the claims of putative class members who no longer worked for Wal-Mart when the complaint was filed. Ultimately, the District Court certified the class under Rule 23(b)(2).

Wal-Mart then appealed to the Supreme Court.

The first issue for the court was whether claims for monetary relief could be certified under Rule 23(b)(2), which is ordinarily reserved for suits seeking only injunctive or corresponding declaratory relief. The second was whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a), which requires numerosity, commonality, typicality and adequacy of representative class members' claims. In this case, the key issue was whether the plaintiffs' claims were common to all women in the class.

Justice Antonin Scalia, joined by Chief Justice John Roberts and Justices Anthony Kennedy, Clarence Thomas and Samuel Alito, instituted an elevated burden required to establish commonality, which until this time had been "construed permissively."¹ According to the court, the purpose of this heightened standard is to produce cohesion among the class.

"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," the majority wrote.

Ultimately, the majority held that the 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 forb[ade] sex discrimination."

The court held that "[b]ecause respondents provide no convincing proof of a companywide discriminatory pay and promotion policy ... they ha[d] not established the existence of any common question."

Justice Ruth Bader Ginsburg, joined in the dissent by Justices Steven Breyer, Sonia Sotomayor and Elena Kagan, argued that the plaintiffs should have been allowed to plead their case under another of the class-action rules. 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 the proffered evidence.

Specifically, the dissent stated that the evidence “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. According to the dissent, “the court’s emphasis on differences between class members mimics the Rule 23(b)(3) inquiry into whether common questions ‘predominate’ over individual issues.”

As Lyle Denniston of SCOTUSblog put it, “For 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.”

Because of the *Dukes* decision, a higher Rule 23 commonality threshold has probably been established for all class-action plaintiffs, not just those proceeding under Rule 23(b)(3).

As an example of the type of claim that might today be denied certification, the dissent cites to an earlier case involving black truck drivers who sought and obtained injunctive relief under Rule 23(b)(2) despite differences in “qualification[s] and performance” among the class members.

In addition, because the majority rejected the attempts of the *Dukes* plaintiffs to establish discrimination through statistical evidence that demonstrated the disparities in pay and promotion across all of Wal-Mart’s 41 regions, 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*, No. 07-2050 SC, 2011 WL 2682967 (N.D. Cal. July 8, 2011), a group of current and former store managers for the company’s California stores alleged that because of a misclassification as exempt employees, they were owed compensation. Shortly after the Supreme Court issued the *Dukes* holding, a federal judge in the Northern District of California decertified the *Dollar Tree* class.

In responding to the *Dukes* decision, the judge 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 judge applied this requirement to the plaintiffs’ claim and found that the plaintiffs “failed to provide 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.”

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Limiting this powerful instrument deprives society of a way to enforce corporate accountability and fundamentally change a company-wide practice or culture for the better.

In cases against national employers, the prognosis is not great. 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, the company will probably not be held liable in light of *Dukes*.

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.²

Even if these individual claimants did have viable claims, the damages available would probably make bringing the suit worthless for most attorneys.

If these large civil-rights class actions cannot proceed through the courts, then the last remaining entity capable of bringing suit for company-wide patterns of discrimination is the government.

Fortunately, courts across the nation are using *Dukes* as a distinguishing case, bolstering many employees' class claims.³

Wal-Mart's victory in *Dukes* was at least to some extent attributable to the fact that the alleged gender discrimination victims were located all across the country, had different managers, worked in different regions and reported diverse damages. Using *Dukes* as a distinguishing case is perhaps the strongest argument for inapplicability of the Supreme Court's holding.

To this same effect, in a recent New York Times article, 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, since it might not be as hard to show that local managers had engaged in age or sex discrimination. Thus, if plaintiffs were all injured by the same management in the same regional office, a court might easily distinguish *Dukes* and permit class certification.

In that same article, the Times reported that several class-action litigation experts suggest that the *Dukes* holding will have little effect on securities fraud cases, since misrepresentation by corporate executives is commonly seen as injuring the company's whole class of shareholders. There is not yet a post-*Dukes* case testing this proposition.

In the BaileyDaily blog discussing recent class-action issues, Matt Bailey asserts that although 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)."⁴ In other words, a court's Rule 23(b)(3) analysis absorbs the Rule 23(a)(2) analysis.⁵

Class actions are crucial to protect victims of corporate misconduct who generally do not have the means or abilities to bring their own individual lawsuits. Limiting this powerful instrument deprives society of a way to enforce corporate accountability and fundamentally change a company-wide practice or culture for the better.

The *Dukes* decision has undoubtedly altered the landscape for large class-action lawsuits. Of course, we need to see how the lower courts will interpret the opinion. Yet, even in the face of the limitations imposed by *Dukes*, the class-action lawsuit remains one of the most powerful tools employees have to combat corporate misconduct. And that is worth fighting for.

NOTES

- ¹ See *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998).
- ² See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993) (holding that the employer does not have to prove that there was a good reason for its decision, just a lawful one).
- ³ See, e.g., *Ramos v. SimplexGrinnell*, 2011 WL 2471584 (E.D.N.Y. June 21, 2011) (certifying, just one day after the *Dukes* decision, a class lawsuit filed by 600 employees for underpayment); *Hernandez v. Starbucks Coffee Co.*, 2011 WL 2710772 (S.D. Fla. July 8, 2011) (denying motion to decertify a class of 700 workers seeking overtime pay); *Roberts et al. v. C.R. England Inc.*, No. 3:11-cv-02586-EL (N.D. Cal. 2011) (denying motion to decertify class of 1,000 plaintiffs in a wage and hour action); *Krawiec v. HCR ManorCare et al.*, No. 3:10-cv-00417-JZ (N.D. Ohio 2011) (certifying class in a similar case).
- ⁴ *In re Educ. Testing Serv. Praxis Principles of Learning & Teaching: Grades 7-12 Litig.*, No. 2:04-md-01643-SSV-AL (E.D. La. Mar. 13, 2006).
- ⁵ See *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998) (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)").



Brian S. Kabateck (left), a consumer rights and personal injury partner at **Kabateck Brown Kellner LLP** in Los Angeles, represents plaintiffs in mass-torts litigation, personal injury lawsuits and wrongful-death cases, as well as class actions, insurance litigation and commercial contingency litigation. **Jacob H. Seropian** (right), a J.D. candidate at Loyola Law School, class of 2012, began his career in plaintiff-side civil litigation as a law clerk at the firm.

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