Work in Progress: Civil Rights Class Actions After *Wal-Mart v. Dukes*

*Katherine E. Lamm**

TABLE OF CONTENTS

* Formerly Senior Litigation Counsel, Sanford Heisler, LLP. J.D. Harvard Law School, 2010; A.B. Brown University, 2007. I am grateful to the staff of the *Harvard Civil Rights-Civil Liberties Law Review* for working with me on this piece. Many thanks to my colleagues at Sanford Heisler for their support, and in particular to Thomas Henderson, Kate Mueting, Matthew Schmid, and Aubrey Smith for their feedback. Jeremy Heisler and Andrew Melzer's materials for the Pennsylvania Bar Institute's 20th Annual Employment Law Institute, "From a Plaintiff's Perspective: Selecting Viable Employment Discrimination and Wage-and-Hour Class and Collective Actions" (2014) (on file with author), also serve as an excellent resource on the many of the topics discussed in this article. Much credit goes to Ashley Anderson for her research assistance and input. Finally, completing this project would not have been possible without the help and patience of Nicholas Morales. The views expressed in this article are my own and do not necessarily represent the views of any past or current employer.

I. Introduction

Class actions have long been a vehicle for public protection and social change in the United States. Two years after Congress passed the Civil Rights Act of 1964,[1] the landmark federal antidiscrimination law, Federal Rule of Civil Procedure 23 was amended to define the modern class action device, including provisions for actions seeking injunctive and declaratory relief as well as individual relief, such as monetary awards.[2] The 1966 Amendment expanded opportunities for plaintiffs to aggregate claims that might be infeasible or uneconomical to pursue individually,[3] with an aim of encouraging the enforcement of federal rights.[4] As a result, the Rule 23 class action has provided crucial opportunities for Americans to raise their voices to halt injustice, from the seminal civil rights cases of the mid-twentieth century to recent blockbusters producing systemic change and monetary relief for thousands of claimants.

Wal-Mart v. Dukes[5] was recognized as a potentially game-changing case well before the Supreme Court issued its opinion in 2011.[6] The suit was one of unprecedented scale in the civil rights field, including more than one million employees at all levels of the nation's largest employer.[7] Further, it posed fundamental questions regarding the nature of the claims and relief that can be pursued under Rule 23. The Court's decision — denying class action status to women alleging gender discrimination at Wal-Mart[8] — was no less remarkable than the factual scenario presented: it set a higher bar for showing that plaintiffs' contentions are sufficiently common to justify class treatment, tightened the circumstances in which monetary damages can be sought for class members, and called into question how plaintiffs may

---

[1] 42 U.S.C. §§ 2000a–2000h-6 (2012).

[2] *See* Fed. R. Civ. P. 23; Fed. R. Civ. P. 23 advisory committee's note (1966) (describing purposes of newly-created Rules 23(b)(1), (b)(2), and (b)(3)).

[3] Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. Pa. L. Rev. 1439, 1487–89 (2008) (analyzing records of the work of the drafters of the 1966 Amendment).

[4] Judith Resnik, Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: "The Political Safeguards" of Aggregate Translocal Actions, 156 U. Pa. L. Rev. 1929, 1938–39 (2008) (citing Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356 (1967)).

[5] 131 S. Ct. 2541 (2011).

[6] *See, e.g.*, Andrew Cohen, *Welcome to Walmart: The Biggest Case of the Term*, The Atlantic, Mar. 27, 2011. http://www.theatlantic.com/business/archive/2011/03/welcome-to-walmart-the-biggest-case-of-the-term/73061/, *archived at* http://perma.cc/UK6L-C6N5; Lyle Denniston, *Argument Preview: Wal-Mart and Workers' Rights*, Scotusblog (Mar. 28, 2011, 2:12 PM), http://www.scotusblog.com/2011/03/argument-preview-wal-mart-and-workers-rights/, *archived at* http://perma.cc/P6FR-KZTL.

[7] 131 S. Ct. at 2547.

[8] *Id.* at 2556–57.

prove such damages. Coming two months after the Court ruled that the Federal Arbitration Act[9] preempts state law that would otherwise render unenforceable class-action waivers in arbitration agreements,[10] *Dukes* stoked fears that the power of the class action to redress mass harm was in jeopardy.

This Article seeks to outline areas of success and opportunity for civil rights plaintiffs after the *Dukes* decision, as well as the significant challenges plaintiffs must address in order to continue pursuing civil rights claims on a class basis. Part II provides background regarding the procedural rules governing the certification of class actions and the relief available to class plaintiffs. It also presents examples of the historical power of the class vehicle to create social change. Part III then explains the context and substance of the *Dukes* ruling itself. In Part IV, the Article describes how *Dukes* impacts various stages of the litigation process, revealing some areas of great success as well as key hurdles that remain for potential litigants. The question for civil rights plaintiffs going forward is not necessarily whether they can win certification; post-*Dukes* decisions show that plaintiffs may prevail when they assert focused class allegations supported by a well-developed and tailored factual record. It appears that plaintiffs are most likely to prevail where they make allegations centered on a specific decisionmaker or a consistently implemented policy or practice. Instead, the crucial post-*Dukes* question is whether class proceedings can continue to provide a reasonable opportunity for victory on the merits along with sufficient reward to justify the tremendous amount of time and resources required of plaintiffs to litigate such actions. In Part V, the Article concludes that plaintiffs must innovate further in order for the class action to remain a viable vehicle for vindicating civil rights. These efforts, however, must be coupled with advocacy outside the context of litigation in order to level an increasingly uneven playing field between civil rights plaintiffs and defendants.

II. Rule 23: Procedure and Significance

Although aggrieved individuals may lack the power to seek redress alone, Rule 23 allows them to proceed collectively, pooling resources to balance against the financial might of corporate or government defendants. This section provides context for understanding the importance of Rule 23 and how *Dukes* alters the legal landscape.

A. What Is Rule 23?

Rule 23 requires that plaintiffs seeking to proceed collectively meet certain requirements to show that their claims are properly heard together rather than separately or as joined parties. Rule 23(a) tests four elements:

---

[9] 9 U.S.C. §§ 1–16 (2012).
[10] AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1753 (2011).

(1) the numerosity of the class; (2) the commonality of factual or legal questions the class presents; (3) the typicality of the class representatives' claims with respect to the class; and (4) the adequacy of class representatives to proceed on behalf of the class.[11] Of these four factors, it is usually the second — the commonality requirement of Rule 23(a)(2) — that drives courts' decisions on Rule 23(a).

A court must also find that the proposed class fits within one of the forms prescribed in Rule 23(b). Of significance to this Article are the types of actions set forth in Rules 23(b)(2) and (b)(3). Broadly speaking, Rule 23(b)(2) is for actions seeking class-wide injunctive relief, while Rule 23(b)(3) allows for individual monetary recovery and thus carries with it more stringent standards for certification.

Rule 23(b)(2) applies where the "party opposing the class has 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." Under this rule, a court is not constrained in deciding whether class members should be notified of their rights in the action or if they must be allowed to opt out of the action. Prior to *Dukes*, it was accepted that certification under Rule 23(b)(2) was appropriate where an injunction was the primary relief sought, but the circuit courts differed as to when claims for monetary relief prevented (b)(2) certification.[12] As described below, *Dukes* resolved this split.

Rule 23(b)(3), by contrast, does not require plaintiffs to seek injunctive or declaratory relief but does require that common questions predominate over individual ones and that a class action is a superior method of adjudicating individual lawsuits.[13] If class plaintiffs meet these heightened requirements, then the court must issue notice to class members informing them of their rights in the action and their ability to opt out.[14]

B. What Does Rule 23 Let You Do?

Even prior to the *Dukes* ruling, the Rule 23 certification process was a demanding one, typically requiring extensive discovery, briefing, and patience, as the implications of a certification decision for both plaintiffs and defendants are significant. If, however, plaintiffs are able to meet the requirements of Rule 23, they are armed with a powerful tool: the opportunity

---

[11] FED. R. CIV. P. 23(a)(1)–(4).

[12] *Compare, e.g.*, Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998) (holding that "monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief," and explaining that where incidental damages may be recovered, they "should be only those to which class members automatically would be entitled once liability to the class . . . is established"), *with* Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 164 (2d Cir. 2001) (rejecting the "incidental damages standard" in favor of an "ad hoc" approach to assessing whether injunctive relief predominates).

[13] FED. R. CIV. P. 23(b)(3).

[14] FED. R. CIV. P. 23(c)(2)(B).

to establish class-wide liability, which may justify systemic relief designed to change the defendant's behavior and, in some cases, monetary compensation for injuries suffered by the class.[15] Although private enforcement of civil rights claims on a class basis is not without its problems,[16] the mechanism enables individuals with relatively little power or resources to hold employers and institutions accountable for their actions.

The historical importance of the class action to enforcing civil rights is hard to ignore. For example, *Brown v. Board of Education*,[17] the landmark case where the Supreme Court reversed its "separate but equal" doctrine and found that school segregation violated the Equal Protection Clause of the Fourteenth Amendment,[18] combined class actions brought in several states.[19] After *Brown*, plaintiffs continued to use the class action vehicle to attempt to force school boards to implement plans to effectuate desegregation, such as busing.[20] *Roe v. Wade*,[21] where the Supreme Court found criminal laws against abortion unconstitutional, was also brought as a class action.[22]

Cases resolved in the years leading up to the *Dukes* decision illustrate the power of the class action to deliver monetary relief to individuals affected by discrimination and systemic changes designed to reduce the prospect of discrimination in the future. For example, the plaintiffs in *Velez v. Novartis*[23] secured a settlement of $175 million on behalf of a class of over 6,000 female pharmaceuticals sales representatives challenging gender discrimination at Novartis, after seven years of litigation and a successful seven-week trial.[24] The settlement included not only backpay to class members and service awards to class representatives but also several forms of

---

[15] *See, e.g.*, Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 682–89, 712–15 (2003) (describing trend toward seeking institutional reform in addition to monetary relief in class actions raising claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2012) [hereinafter Title VII]); *see also* Suzette M. Malveaux, *Fighting to Keep Employment Discrimination Class Actions Alive: How* Allison v. Citgo*'s Predomination Requirement Threatens to Undermine Title VII Enforcement*, 26 BERKELEY J. EMP. & LAB. L. 405, 408–10 (2005).

[16] *See* Green, *supra* note 15, at 688–89 (noting that power of Title VII class actions to "trigger meaningful institutional reform" may be limited because, inter alia, pursuit of such actions is increasingly in hands of private law firms and cases are often resolved outside of court, "rais[ing] particular concern about the risk of private co-option of larger public antidiscrimination goals").

[17] 347 U.S. 483 (1954).

[18] *Id.* at 495.

[19] *Id.*

[20] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[21] 410 U.S. 113 (1973).

[22] *Id.* at 124.

[23] No. 04 Civ. 09194, 2010 U.S. Dist. LEXIS 125945 (S.D.N.Y. Nov. 30, 2010).

[24] *Id.* at *3–4, *13 (approving settlement following jury verdict in favor of plaintiffs). Notably, the case was certified under Rule 23(b)(2), with the court finding in its application of the *Robinson* test that "there can be little question that reasonable plaintiffs would sue to obtain the injunctive relief sought. The central goal of this lawsuit is to alter practices at [Novartis] that plaintiffs believe are discriminatory." 244 F.R.D. 243, 271 (S.D.N.Y. 2007). The court deferred ruling on the plaintiffs' satisfaction of Rule 23(b)(3) until liability was determined. *Id.*

programmatic relief: the strengthening of internal complaint processes and improvement of employment policies; the conducting of annual adverse impact analyses relating to pay, promotion, and performance ratings; and three years of monitoring for compliance with the settlement.[25]

Plaintiffs have obtained meaningful individual and class-wide relief in cases that required even less extensive litigation than *Velez*. Only fourteen months after the filing of a complaint challenging discrimination on the basis of race in promotions, compensation, and performance evaluations, the parties in *Ingram v. Coca-Cola Co.*[26] reached a settlement valued at over $190 million.[27] "Programmatic relief [was] far-reaching," including changes to company principles, the creation and enforcement of diversity goals, and the establishment of "an outside, independent task force . . . to oversee Coca-Cola's compliance with the terms of the settlement."[28] The task force issued annual reports for five years, and in its final report in 2006, noted improvements in the representation of women and minorities, as well as meaningful changes in the way Coca-Cola managed performance evaluations, staffing, and compensation, and an augmentation of the human resources function.[29]

This is merely a handful of the high-profile class actions that have shaped Americans' civil rights. But they reflect the unique power of the class action not only to change the law substantively, but also to change the lives of individual plaintiffs and the practices of companies and institutional actors.

III. The *Dukes* Decision: Context and Holdings

This section describes the *Dukes* decision, beginning with its factual and procedural context. It then describes the opinion's key holdings, focusing on the issues of commonality and damages.

A. Factual and Procedural Background

In 2001, Betty Dukes sued Wal-Mart on behalf of a class of 1.5 million current and former female employees, alleging that the company had denied them pay and promotions on the basis of their sex in violation of Title VII of the Civil Rights Act of 1964.[30] Ms. Dukes and the two other lead plaintiffs held different roles at different Wal-Mart stores during their employment, but they "claim[ed] that the discrimination to which they [had] been subjected [was] common to *all* Wal-Mart's female employees" and that "a

[25] *Velez*, 2010 U.S. Dist. LEXIS 125945, at *5–6, *13–14.
[26] 200 F.R.D. 685 (N.D. Ga. 2001).
[27] *See id.* at 687.
[28] *Id.*
[29] Alexis M. Herman et al., Fifth Annual Report of the Task Force 6 (2006) *available at* http://assets.coca-colacompany.com/0f/3e/3440fe72403fa4cca717712d4585/task_force_report_2006.pdf, *archived at* http://perma.cc/6PHN-KXQU.
[30] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011).

strong and uniform 'corporate culture'" had "permit[ted] bias . . . to infect [managers'] discretionary decision-making."[31] They asserted that local managers' exercise of discretion in pay and promotion decisions had an unlawful disparate impact on women and that the company was aware of (but chose not to control) this discretion, supporting a theory of disparate treatment.[32] The plaintiffs sought "injunctive and declaratory relief, punitive damages, and backpay."[33]

In 2004, the plaintiffs were granted certification under Rule 23(b)(2), including claims for some class members' punitive and backpay damages.[34] The United States Court of Appeals for the Ninth Circuit ultimately heard the case en banc, issuing a divided ruling that largely affirmed the district court's order.[35] Of note, the court upheld the district court's refusal to strike certain components of plaintiffs' evidence, which included statistical evidence of gender disparities, anecdotal evidence from 120 employees, and a sociological analysis of Wal-Mart's culture.[36] The Ninth Circuit also found that individual monetary awards could be determined manageably, and without offending due process interests.[37] This approach involved selecting a subset of claims and defenses for valuation by a special master and extrapolating the results to the class.[38]

After this decision, Wal-Mart petitioned the Supreme Court for a writ of certiorari.

B. The Court's Ruling

The Court's opinion is stated in relatively sweeping terms with respect to Rule 23's commonality requirement and the certification of claims for monetary damages. It is evident, however, that the ruling is rooted in the Court's assessment of the case's facts. The very first line of the opinion states: "We are presented with one of the most expansive class actions ever."[39] The Court went on to describe the various stores, divisions, and regions that comprise Wal-Mart's 3,400 locations across the United States.[40]

---

[31] *Id.* at 2548.

[32] *Id.* Title VII plaintiffs may establish liability under theories of disparate treatment (unequal treatment with respect to decisions in hiring, compensation, and other terms and conditions of employment on the basis of membership in a protected class) or disparate impact (where an employment practice impacts a protected class differently from others). 42 U.S.C. § 2000e-2(a), (k) (2012).

[33] *Dukes*, 131 S. Ct. at 2548.

[34] Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 188 (N.D. Cal. 2004).

[35] *See* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 577 (9th Cir. 2010) (en banc).

[36] *Id.* at 600–12.

[37] *Id.* at 625–26 (using sampling method similar to that set out in *Hilao v. Estate of Marcos*, 103 F.3d 767, 782–787 (9th Cir. 1996), of selecting a subset of claims and defenses for valuation by a special master and extrapolating the results to the class).

[38] *Dukes*, 603 F.3d at 625–26.

[39] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011).

[40] *Id.*

The Court was also quick to point out blemishes and irregularities in the employment histories and claims of the three lead plaintiffs, including that two of the three had been subject to discipline (one terminated); one had been promoted, then demoted; one had, in fact, held supervisory positions; and the third had never applied for management training after being rebuffed in an initial attempt at advancement.[41]

The Court's immediate focus on the size of the class and the particulars of the class representatives' experiences at Wal-Mart reflects a skepticism about the merits of the plaintiffs' claims and the typicality of their experiences that pervades the opinion. After such an introduction, it is not surprising that the Court emphasized that judges must perform a "rigorous analysis" at class certification that "entail[s] some overlap with the merits."[42]

1. Commonality.

The first major component of the decision (written by Justice Scalia and joined by four other Justices) addressed commonality, "the crux of this case."[43] The majority explained that Rule 23(a)(2) requires class members to "have suffered the same injury," not simply a violation of the same law.[44] In a Title VII class action, there must be "some glue holding the alleged *reasons* for all those decisions together [or else] 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*."[45] To bridge the gap between individual and class claims, plaintiffs must either assert a mechanism, such as a biased testing procedure, that affected all class members, or otherwise produce "significant proof that an employer operated under a general policy of discrimination . . . ."[46] Such language underscores that, after *Dukes*, plaintiffs must present courts with a full and focused evidentiary record at class certification.

The *Dukes* plaintiffs had not alleged a biased testing procedure, and the majority was wholly unconvinced by the plaintiffs' proof, performing a detailed review of the sociological, statistical, and anecdotal evidence put

---

[41] *Id.* at 2548.
[42] *Id.* at 2551.
[43] *Id.* at 2550.
[44] *Id.* at 2551 (citing Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 157 (1982)).
[45] *Id.* at 2552.
[46] *Id.* at 2553 (quoting *Falcon*, 457 U.S. at 159 n.15). Although the majority relied heavily on *Falcon*, that case was an "across the board" action where the plaintiff, an employee, sought to represent both employees and job applicants who were not hired. It is not surprising that the *Falcon* Court would be concerned with ensuring that a "general policy of discrimination" existed to bind potential class members who were in (arguably) very different positions and possessed different claims (non-hire as opposed to non-promotion). In *Dukes*, however, there was no such gap between the lead plaintiffs and potential class members. The Court's reliance on *Falcon* suggests a heightening of plaintiffs' burden to establish commonality rather than a reinvigoration of existing law.

forth. First, the majority reversed the courts below and decided that the testimony of the plaintiffs' expert sociologist should be disregarded, as it did not purport to explain how often stereotyped thinking affected discretionary decisionmaking.[47] Next, the Court made another factual finding: "The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's policy of *allowing discretion* . . . ."[48] While the policy of discretion *could be* the basis for certification in some cases, the Court opined, managers "left to their own devices" generally do not discriminate and Dukes had not "identified a common mode of exercising discretion" at Wal-Mart.[49] Further, the Court found that the plaintiffs' statistical evidence of company-wide gender disparities could not establish localized disparities and, moreover, the existence of a disparity alone was "*not enough*" to justify certification without identification of a "specific employment practice."[50] The plaintiffs' anecdotal evidence of discrimination (120 employee affidavits on behalf of a class of over one million, regarding 235 of 3,400 stores), also failed to support commonality, as it was too thin and uneven.[51]

In sum, the majority wanted more, and more explicit, evidence of discrimination at Wal-Mart, pinpointing both the cause and effect of discrimination — not just evidence of a statistical disparity and narratives of isolated mistreatment drawn together by general social science research on bias in the workplace. This outcome seems driven both by the majority's skepticism of the existence of systemic bias in society and by the great leap the plaintiffs were asking the Court to make: a finding that discretionary decision-making caused discrimination at every level of the nation's largest employer.[52]

2. Monetary Relief.

The next section of the opinion, joined by all the Justices, put to rest the question whether claims for monetary relief may be certified under Rule 23(b)(2). The Court found that "where (as here) the monetary relief is not incidental to the injunctive . . . relief," it may not be certified under Rule

---

[47] *Id.* at 2553. The majority also "doubt[ed]" the district court's conclusion that a *Daubert* analysis of the admissibility of expert testimony need not occur at class certification, creating another potential evidentiary hurdle prior to trial. *Id.* at 2553–54 (citing Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993)).

[48] *Id*. at 2554.

[49] *Id*. The Court cited no authority for its pronouncement about managers' behavior in the absence of corporate direction.

[50] *Id.* at 2555.

[51] *Id.* at 2556.

[52] *See* Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After* Wal-Mart v. Dukes, 32 BERKELEY J. EMP. & LAB. L. 477, 503 (2011) ("[S]tatistical showing can only do so much of the work, and the social framework evidence, without a specific tie to the defendant, fails to add a meaningful narrative. Rather, there has to be some agency, an active agent, in order to establish discrimination; passively facilitating discrimination will not rise to the level of unlawful discrimination.").

23(b)(2), and that "claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule" in light of its history and structure.[53] The Court also expressed concern that certifying individual claims for monetary relief under Rule 23(b)(2) would circumvent the protections of Rule 23(b)(3) (requiring findings of predominance and superiority, as well as notice and the right to opt out).[54] In so holding, the Court invoked risk to class members' due process interests in the absence of these protections,[55] even though it is undoubtedly true that many aggrieved individuals lack the resources necessary to raise their rights in litigation outside of a class action.

The Court also invoked defendants' procedural rights as prohibiting the certification of backpay claims under Rule 23(b)(2), rejecting the notion that monetary relief could be rendered incidental through the use of the *Hilao* sampling method[56] rather than individual proceedings.[57] Failing to make individualized determinations, the Court held, would run afoul of the Rules Enabling Act — which bars federal procedural rules from abridging, enlarging, or modifying substantive rights — by preventing Wal-Mart from litigating statutory defenses.[58] The Court noted, however, that "the procedure for trying pattern-or-practice cases that gives effect to these statutory requirements" is found in *Teamsters v. United States*.[59] Under this long-standing model, once plaintiffs have established a pattern or practice of discrimination, the trial court may conduct additional proceedings on individual remedies, including affirmative defenses.[60]

The Court's rejection of what it called a "Trial by Formula" sampling method[61] creates complicated questions regarding the nature and scope of a class action defendant's right to be heard on individual claims. At the same time, the explicit preservation of the *Teamsters* model may point the way forward for civil rights plaintiffs in a range of cases.

IV. Mixed Results: *Dukes*' Aftermath

The *Dukes* decision inspired much public debate, and many commentators expressed concern that the ruling would hinder, or even foreclose, plaintiffs' use of the class action as a vehicle for redress.[62] It is no surprise that

---

[53] *Dukes*, 131 S. Ct. at 2557.
[54] *See id.* at 2559.
[55] *Id.*
[56] *See supra* note 37 and accompanying text.
[57] *Dukes*, 131 S. Ct. at 2561.
[58] *See id.* (quoting 28 U.S.C. § 2072(b) (1988)).
[59] *Id.* (citing Teamsters v. United States, 431 U. S. 324, 361 (1977)).
[60] *Id.*
[61] *Id.*
[62] *See, e.g.*, Suzette M. Malveaux, *How Goliath Won: The Future Implications of* Dukes v. Wal-Mart, 106 Nw. U. L. Rev. Colloquy 34, 37 (2011) ("The *Dukes* class certification standard jeopardizes potentially meritorious challenges to systemic discrimination. By redefining the class certification requirements for employment discrimination cases . . . the Court compromises employees' access to justice."); Judith Resnick, Comment, *Fairness in Numbers: A*

the well-funded defense bar has argued that *Dukes* is a barrier to class plaintiffs' success at every step of the case.

The following section describes how *Dukes* has come into play at various stages of the civil rights class action, including motions to dismiss, the discovery process, and class certification. Results thus far suggest that the class action as a vehicle for civil rights claims is not dead after *Dukes*,[63] but that an aggressive defense bar and an uncertain legal landscape will make such actions increasingly burdensome to litigate. Unless civil rights advocates can pave a clear path for achieving class status and recovering monetary damages in the wake of *Dukes*, plaintiffs and their counsel may be deterred from proceeding on a class basis in the future.

A. Dukes *at the Pleading Stage: Motions to Dismiss or Strike*

After *Dukes*, many defendants sought the early termination of class actions through motions to dismiss or to strike class claims. In such motions, defendants argued that *Dukes* had not only altered plaintiffs' burden at class certification, but also that the decision essentially created a higher burden of pleading in class cases.

These motions were largely unsuccessful, as district courts were unwilling to conduct an analysis similar to the one that would be performed at class certification prior to discovery. One of the first such motions to be resolved — in plaintiffs' favor — came in *Chen-Oster v. Goldman Sachs*,[64] a class action which, like *Dukes*, alleged a pattern of discrimination against female employees in violation of Title VII.[65] The judge found that the motion was premature "where the issues raised in the motion to strike are

---

Comment on AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 79–80 (2011) (*Dukes* and other recent cases inhibit necessary exploration of fair, regulated methods of resolving aggregated claims); Elizabeth Tippett, *Robbing a Barren Vault: The Implications of* Dukes v. Wal-Mart *for Cases Challenging Subjective Employment Practices*, 29 HOFSTRA LAB. & EMP. L.J. 433, 434–35 (2012) (describing *Dukes* as a "setback to the plaintiff's bar" and "problematic for those who view subjective decision-making as the prime suspect for continued discrimination in the workplace," but finding that the case's impact might be limited). The *New York Times* ran a series of opinion pieces on the day the *Dukes* opinion was issued questioning whether it constituted a "death blow." *See A Death Blow to Class Action?*, N.Y. TIMES (June 20, 2011), http://www.nytimes.com/roomfordebate/2011/06/20/a-death-blow-to-class-action, *archived at* http://perma.cc/M7TR-J2MJ.

[63] *See, e.g.*, Dustin Massie, *Too Soon for Employers to Celebrate?: How Plaintiffs Are Prevailing Post*-Dukes, 29 ABA J. LAB. & EMP. L. 177, 178 (2013) (describing challenges plaintiffs face after *Dukes* and highlighting victories that suggest *Dukes* will be limited to its specific circumstances); Jocelyn D. Larkin, *Has the Dust Settled? Certification of Title VII Class Actions After* Wal-Mart v. Dukes, Conference Paper, ABA EEO Committee Mid-Winter Meeting (Mar. 28, 2014) (on file with author) (arguing that while *Dukes* clearly prohibits certification of backpay or damages under Rule 23(b)(2), the impact of the opinion's holding on commonality determinations remains to be seen, as subsequent interpretations have been mixed).

[64] No. 10 Civ. 6950 (LBS) (JCF), 2012 U.S. Dist. LEXIS 12961, at *13–14 (S.D.N.Y. Jan. 19, 2012), *aff'd in relevant part*, 877 F. Supp. 2d 113 (S.D.N.Y. 2012).

[65] *Id.* at *13–14 (magistrate judge's report and recommendation).

the same ones that would be decided in connection with determining the appropriateness of class certification."[66] Further, acknowledging the evidentiary bar suggested in *Dukes*, the court found that the motion must be denied because "whether the plaintiffs can successfully obtain class certification despite *Dukes* depends upon facts obtainable in the course of discovery."[67]

Subsequent decisions went further than the *Chen-Oster* ruling, explicitly refusing to impose a higher burden of pleading on plaintiffs in light of *Dukes*.[68] The district court in *Kassman v. KPMG*,[69] another gender discrimination action, explained:

> [T]he relevant question is not, as it was in *Dukes*, whether Plaintiffs have "*prove*[*d*] that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.," for purposes of Rule 23 . . . . [but] whether, based on the allegations . . . "it is plausible that plaintiffs will come forth with sufficient evidence at the class certification stage to demonstrate commonality."[70]

In assessing the pleadings with respect to commonality, courts generally have not dismissed class allegations that identify localized discretion as a mechanism for discrimination, emphasizing *Dukes*' explicit instruction that such contentions may support commonality "in appropriate cases."[71]

These rulings show that while *Dukes* provides defendants with a powerful tool, the "rigorous analysis" at class certification may deter courts from granting prediscovery motions to dismiss class claims. Thus, although plaintiffs have not been successful in opposing every such motion,[72] they can be seen primarily as an overreach by the defense bar.

---

[66] *Id.* at *12–13.

[67] *Id.* at *13–14. A federal district judge in New Jersey came to the same conclusion on a motion to dismiss and to strike in another gender discrimination case, which was pending at the time the magistrate judge's opinion was issued in *Chen-Oster*. *See* Barghout v. Bayer Healthcare Pharms., No. 11-CV-1576, 2012 U.S. Dist. LEXIS 46197, at *26 (D.N.J. Mar. 30, 2012) (declining to "dismiss[ ] the class theory of liability . . . on so little evidence," and also acknowledging the "exhaustive Rule 23 analysis" the court must undertake at class certification).

[68] *See, e.g.*, Kassman v. KPMG LLP, 925 F. Supp. 2d 453 (S.D.N.Y. 2013); Calibuso v. Bank of Am. Corp., 893 F. Supp. 2d 374 (E.D.N.Y. 2012) (denying motion to strike class allegations); Grogan v. Holder, No. 08-1747(BJR), 2012 U.S. Dist. LEXIS 179057 (D.D.C. Sept. 27, 2012); Johnson v. Flakeboard Am. Ltd., No. 4:11-2607-TLW-KDW, 2012 U.S. Dist. LEXIS 83702 (D.S.C. Mar. 26, 2012).

[69] 925 F. Supp. 2d 453 (S.D.N.Y. 2013).

[70] *Id.* at 464 (quoting Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) and *Calibuso*, 893 F. Supp. 2d at 390).

[71] *Dukes*, 131 S. Ct. at 2554. *See Kassman*, 925 F. Supp. 2d at 463–64; *Calibuso*, 893 F. Supp. 2d at 377; *Grogan*, 2011 U.S. Dist. LEXIS 179057 at *10; *Johnson*, 2012 U.S. Dist. LEXIS 83702 at *17.

[72] For example in *Scott v. Family Dollar Stores*, another gender discrimination class action, a district judge granted a *Dukes*-based motion to dismiss class claims. No. 08-CV-540, 2012 U.S. Dist. LEXIS 4669, at *13–14 (W.D.N.C. Jan. 13, 2012). Even there, however, the court emphasized the importance of having a sufficient factual record on which to consider the motion, explaining that plaintiffs, whose case had been pending since 2008, "had adequate

B. Developing a Factual Record in Discovery After Dukes

Because *Dukes* requires courts to perform a "rigorous analysis" at class certification, plaintiffs' development of a sufficient factual record in discovery is crucial. This raises the stakes for plaintiffs and defendants in discovery, an effect consistent with broader trends in federal jurisprudence that have increased the contentiousness and cost of pretrial litigation. The following section describes and contextualizes the discovery disputes that have arisen in this climate.

Emboldened by *Dukes*, some defendants have sought to shrink their discovery obligations in light of the view that certification is no longer possible under certain theories of commonality or liability.[73] Others have contended that *Dukes* entitles them to greater discovery into the specifics of plaintiffs' claims.[74] Such arguments, if accepted by the courts, threaten plaintiffs' ability to obtain the evidence to support certification and expose class plaintiffs to increasingly intrusive discovery, which may discourage individuals from pursuing litigation. Plaintiffs, by contrast, have argued that *Dukes* necessitates broader discovery in order to marshal the "significant proof" required at the certification stage of the case, also finding some success. In *Chen-Oster*, for example, the court granted a motion to compel disclosure of individualized personnel data from the defendant because "*Dukes* illustrates the need to develop the record fully before a class motion is considered."[75] The court refused to adopt the defendant's proposal — to limit precertification discovery to the company's "general policies" — because without data analysis, "the link that *Dukes* requires between an employment policy and discriminatory impact . . . can neither be proved nor disproved."[76]

---

time to conduct discovery" but could not "'identif[y] a common mode of exercising discretion . . . .'" *Id.* at *13 (quoting *Dukes*, 131 S. Ct. at 2554–55).

[73] *See, e.g.*, Bell v. Lockheed Martin Corp., No. 08-6292, 2011 U.S. Dist. LEXIS 143657, at *25–26 (D.N.J. Dec. 14, 2011) (granting motion to deny certification in race discrimination case; rejecting plaintiffs' argument that they needed additional discovery prior to ruling on class certification on the basis that enough discovery had been conducted and "exhaustive discovery" was not necessary in light of failure to identify a common mode of exercising discretion); Artis v. Deere, 276 F.R.D. 348, 351–52 (N.D. Cal. June 29, 2011) (considering, but rejecting, defendant's argument that under *Dukes*, plaintiffs may not obtain individualized information regarding members of a putative class in gender discrimination case without evidence of a biased evaluation practice or general policy of discrimination).

[74] Lindell v. Synthes USA, No. 1:11-CV-02053, 2013 U.S. Dist. LEXIS 85636, at *13–14 (E.D. Cal. June 18, 2013) (rejecting defendant's argument that *Dukes* requires plaintiffs to provide citations to evidence in the record in response to interrogatories seeking the bases of their claims).

[75] Chen-Oster v. Goldman, Sachs & Co., 285 F.R.D. 294, 298 (S.D.N.Y. 2012).

[76] *Id.* at 300; *see also Lindell*, 2013 U.S. Dist. LEXIS 85636, at *14 ("[I]n light of *Dukes*' requirement that putative plaintiffs affirmatively demonstrate his [sic] compliance with Rule 23, Courts must liberally apply discovery rules during a bifurcated class discovery phase to permit plaintiff to meet that burden." (citation omitted)); Burton v. District of Columbia, 277 F.R.D. 224, 230 (D.D.C. 2011) ("[P]re-certification discovery should ordinarily be available where a plaintiff has alleged a potentially viable class claim because *Wal-Mart* emphasizes that

Although *Dukes* does not purport to articulate a new standard of pleading or persuasion, it subjects plaintiffs to heightened scrutiny at class certification consistent with a broader trend of forcing litigants to bring more to the table in order to get to trial, including an increased burden of pleading and procedural hurdles throughout the pretrial process.[77] Even though plaintiffs have been able to use *Dukes* as leverage in some discovery disputes, the decision complicates a process that can drain litigants' resources and time, warping the natural progress of a case from complaint, to certification, to trial. Given the often lengthy timeline and high cost of pursuing a class action prior to *Dukes*,[78] the need to amass and process more evidence and to litigate more disputes prior to certification may push the pursuit of a class action beyond the reach of all but the best-resourced public interest organizations and private firms.

At least one recent case, however, may offer plaintiffs comfort in terms of the factual record to be developed in precertification discovery. In *Stockwell v. City & County of San Francisco*,[79] the Ninth Circuit reversed a district court's denial of class certification in a case where plaintiffs alleged that the San Francisco Police Department abandoned the use of a promotion examination to the detriment of older officers, in violation of state law prohibiting age discrimination.[80] Relying on the Supreme Court's 2013 decision in *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*,[81] which admonished courts to limit their review of merits questions to those that affect the satisfaction of Rule 23,[82] *Stockwell* criticized the district court for digging

---

the district court's class certification determination must rest on a 'rigorous analysis' to ensure '[a]ctual, not presumed, conformance' with Rule 23." (quoting *Dukes*, 131 S. Ct. at 2551–52)); *Artis*, 276 F.R.D. at 352 (finding where information regarding companywide policies sufficient to support class certification is in defendant's control, plaintiffs may propound requests necessary to obtain this material).

[77] Professor Marcia L. McCormick argues that *Dukes* follows the lead of *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (heightening plaintiffs' burden of pleading) by "eviscerati[ng] . . . the formerly deferential standard of review for certification decisions . . . ." *Implausible Inquiries:* Wal-Mart v. Dukes *and the Future of Class Actions and Employment Discrimination Cases*, 62 DEPAUL L. REV. 711, 716–22 (2013). Similarly, Professor Arthur Miller places *Dukes*' heightening of plaintiffs' burden in the context of the "deformation of federal procedure" — the federal judiciary's creation of a "sequence of procedural stop signs" which burden litigants and run the risk of "leav[ing] public policies underenforced and large numbers of citizens uncompensated." *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 309, 322 (2013).

[78] By way of example, the order approving settlement in *Velez* reflects that more than seven years had passed since the initiation of the action and that plaintiffs' counsel had "expended 36,996.77 hours in attorney time and expect to devote further, substantial hours overseeing the Settlement." Velez v. Novartis Pharms. Corp., No. 04 Civ. 9194 (CM), 2010 U.S. Dist. LEXIS 125945, at *52 (S.D.N.Y. Nov. 30, 2010). In *Dukes* itself, three years passed between the filing of the complaint and class certification, and a full decade had elapsed by the time the Supreme Court finally issued its decision.

[79] 749 F.3d 1107 (9th Cir. 2014).

[80] *Id.* at 1109–10.

[81] 133 S. Ct. 1184 (2013).

[82] *Id.* at 1195–96.

too deeply into the merits in assessing commonality.[83] Plaintiffs had satisfied an initial burden by "identify[ing] a single, well-enunciated, uniform policy that, allegedly, generated all the disparate impact of which they complain: the SFPD's decision to make investigative assignments using [a new exam]."[84] The district court erroneously denied certification in spite of this showing, according to the Ninth Circuit, by finding that plaintiffs presented insufficient statistical evidence in support of their disparate impact claim.[85] Citing *Amgen*, the court reasoned that "whatever the failings of the class's statistical analysis, they affect every class member's claims uniformly."[86] Accordingly, the Ninth Circuit reversed the district court's determination on commonality.[87]

Stockwell's application of *Amgen* in the civil rights context is encouraging, as it appears to roll back the merits-intensive assessment that *Dukes* might otherwise seem to sanction. This approach could help to relieve a potentially daunting burden on plaintiffs to collect merits-oriented proof prior to certification.

C. Dukes *at Certification: Common Questions, Inconsistent Answers*

In spite of the heightened scrutiny that plaintiffs face after *Dukes*, the limited set of civil rights cases that have gone through the Rule 23 class certification analysis thus far indicate that such actions are not doomed. This section will review some of these opinions to provide an overview of the current landscape. First, although *Dukes*' pronouncements on Rule 23(a)(2)'s commonality requirement may have seemed to carry the greatest case-killing potential, many plaintiffs have distinguished *Dukes* and reframed claims of subjectivity or discretion to meet the Court's requirements. Second, this section will address an area where plaintiffs have yet to make meaningful strides: the handling of monetary relief. Although corporate and government defendants may be able to withstand years of costly litigation, civil rights plaintiffs and their counsel may be deterred from pursuing class actions if recovering damages is only a remote possibility.

It is important to keep in mind that many of the class actions that have gone through certification to date after *Dukes* were filed prior to the issuance of the opinion, including all but one case discussed below. The true test of *Dukes*' impact may be in several years, once cases filed after *Dukes*, with full knowledge of *Dukes*' holdings, have been litigated more fully.

---

[83] 749 F.3d at 1107, 1111
[84] *Id.* at 1114.
[85] *Id.* at 1115.
[86] *Id.*
[87] *Id.* at 1117.

1. Commonality after Dukes.

Civil rights plaintiffs have achieved mixed outcomes on the issue of commonality after *Dukes*, including victories at the circuit level in cases such as *Stockwell* and *McReynolds v. Merrill Lynch*[88] that create avenues for certification going forward. Where plaintiffs can assert a common policy that affects a class in the same way, certification remains possible. If the record reveals discretion in decisionmaking, however, plaintiffs are at risk of losing certification unless they identify "plus factors" explaining why discretion is exercised consistently in one way. These include the existence of centralized policies and expert testimony tailored to the facts of the case. Simply repackaging localized discretion as a "policy" will not do, nor will identifying a statistical disparity or a common "culture," without more.

(a) No Discretion, No Problem.

After *Dukes*, class plaintiffs have succeeded in civil rights cases where they identify a policy or practice unaffected by discretionary decisionmaking that has a common impact on the class. For example, in *DL v. District of Columbia*,[89] the district court granted certification of four subclasses challenging the District of Columbia's provision of special education services as required by the Individuals with Disabilities Education Act[90] ("IDEA").[91] The subclasses were limited to specific legal violations (for example, all children of a certain age who were not timely evaluated), such that "each subclass alleges a uniform practice of failure that harmed every subclass member in the same way."[92] Unlike *Dukes*, the court explained, the case did not depend on the reasons for decisions made with respect to each class member but instead on "whether the District generally met its statutory obligations to disabled children under the IDEA."[93] DL's case was also distinguishable from *Dukes* in that control of the challenged procedures was "centralized in two closely-related agencies" rather than dispersed across millions of decisionmakers.[94] Courts have come to similar conclusions in other cases where plaintiffs challenge a government entity's compliance with legal obligations or its administration of government programs.[95]

---

[88] 672 F.3d 482 (7th Cir. 2012).

[89] No. 05-1437, 2013 U.S. Dist. LEXIS 160018 (D.D.C. Nov. 8, 2013), *petition denied*, *In re* District of Columbia, No. 13-8009, 2014 U.S. App. LEXIS 1919 (D.C. Cir. Jan. 30, 2014).

[90] 20 U.S.C. § 1400–1482 (2012).

[91] *DL*, 2013 U.S. Dist. LEXIS 160018, at *17.

[92] *Id.* at *17, *24.

[93] *Id.* at *27.

[94] *Id.* at *28–29.

[95] *See, e.g.*, Kenneth R. v. Hassan, 293 F.R.D. 254, 268 (D.N.H. 2013) (certifying class in case, filed after *Dukes*, alleging that state unnecessarily institutionalized people with serious mental illnesses, in violation of the ADA, 42 U.S.C. § 12131(2) (2012), and the Rehabilitation Act, 29 U.S.C. § 794 (2012), and noting that "in disability cases both pre- and post-*Wal-Mart*, the commonality requirement has been held to be met where, as here, plaintiffs challenge more

Plaintiffs have had some success in the employment discrimination context, too, where it might seem most difficult to distinguish *Dukes*. In *Parra v. Bashas'*,[96] for example, the plaintiffs succeeded in certifying a class challenging Bashas' practice of paying the predominantly Hispanic workforce at its Food City stores on a lower wage scale than what was in place at the company's other stores.[97] The court emphasized that, unlike in *Dukes*, the plaintiffs sought to certify a limited group of employees and challenged only the defendant's "decision to pay its employees pursuant to its two-tiered wage scale" rather than "millions of employment decisions."[98] Plaintiffs also have prevailed in cases like *Stockwell*,[99] where the allegations focus on a testing or evaluation procedure that has a disparate impact on a protected class,[100] an avenue for certification that *Dukes* explicitly reaffirmed.[101]

This is not to say, however, that plaintiffs have been wholly successful in post-*Dukes* cases where they challenge a nondiscretionary policy, as the "rigorous analysis" requirement sharpens scrutiny of the record at class certification. In *Amador v. Baca*,[102] for instance, the district court granted certification of a class of female inmates who had been subject to humiliating strip searches at the Los Angeles County Jail.[103] The court found that the plaintiffs had established commonality with respect to some elements of the search process that were not meaningfully in dispute (for example, being forced to strip publicly and undergo a cavity inspection).[104] The court refused to find the existence of common questions about other treatment during the searches (filthy conditions, demeaning language) that were supported only by plaintiffs' 168 varying declarations, which the court faulted as com-

---

than a single service deficiency and seek more than one service enhancement or improvement as part of the remedy") (citing cases); Connor B. v. Patrick, 278 F.R.D. 30, 34 (D. Mass. 2011) (denying motion to decertify) ("Unlike the plaintiffs in *Wal-Mart* . . . Plaintiffs have alleged specific and overarching systemic deficiencies within DCF that place children at risk of harm. These deficiencies, rather than the discretion exercised by individual case workers, are the alleged causes of class members' injuries, because they undermine DCF's ability to timely and effectively implement case workers' decisions.").

[96] 291 F.R.D. 360 (D. Ariz. 2013).

[97] *Id.* at 403.

[98] *Id.* at 376 (quoting *Dukes*, 131 S. Ct. at 2552). Notably, by the time the court was asked to rule on the certification motion in question, the plaintiffs had dropped some of their original claims, which included, *inter alia*, claims regarding subjectivity in pay decisions. *Id.* at 373.

[99] Stockwell v. City & Cnty. of San Francisco, 749 F.3d 1107, 1117 (9th Cir. 2014).

[100] *See also* Easterling v. Conn. Dep't of Corr., 278 F.R.D. 41, 51 (D. Conn. 2011) (denying motion to decertify class action alleging that fitness test had a disparate impact on female corrections department applicants); Houser v. Pritzker, No. 10-CV-3105-FM, 2014 U.S. Dist. LEXIS 91451, at *86–87 (S.D.N.Y. July 1, 2014) (allowing certification of class challenging U.S. Census Bureau's applicant screening process).

[101] *Dukes*, 131 S. Ct. at 2553 (indicating that a "testing procedure or other companywide evaluation" may be sufficient for class certification in a Title VII case).

[102] 299 F.R.D. 618, 637–38 (C.D. Cal. 2014).

[103] *Id.* at 637–38.

[104] *Id.* at 624–25.

prising too small a proportion of the class and unlikely to constitute a statistically valid sample.[105]

Amador might not have come out differently prior to *Dukes*, but courts' in-depth assessments of the quantity and quality of evidence presented at class certification is to be expected in the current climate. Opinions like *Amador* reveal that plaintiffs will likely do best where they can narrow their claims to a specific policy and, if possible, minimize reliance upon testimonial evidence that might be challenged as insufficiently broad or inconsistent.

(b) Discretionary Difficulties.

In light of the facts presented in *Dukes*, plaintiffs have faced more formidable challenges where discretionary decisionmaking is embedded in the practices they seek to challenge. The cases discussed below illustrate that where claims of this nature are supported by a clear factual record that focuses on a specific mechanism of harm to the class, they may succeed; where theories are less precise and the evidence is not sufficiently tailored, then *Dukes* may bar certification.

McReynolds v. Merrill Lynch[106] was perhaps the first major victory for civil rights plaintiffs after *Dukes*. McReynolds represented a class of African American brokers challenging race discrimination at Merrill Lynch under Title VII and 42 U.S.C. § 1981.[107] The plaintiffs brought a renewed motion for class certification after *Dukes*, which the district court denied with encouragement to appeal.[108] Judge Posner, writing for the Seventh Circuit, acknowledged that the case was like *Dukes* in that brokers and managers had discretion in effectuating company policies.[109] Here, however, the plaintiffs challenged two specific policies: (1) management's authorization of brokers to create "teams," which the court likened to "little fraternities" into which members were most likely to admit brokers of their same racial background; and (2) the distribution of accounts on the basis of brokers' past success.[110] Both policies affected employees' evaluations, pay, and promotions.[111] While they did entail some exercise of discretion, the "plaintiffs argue[d] that these company-wide policies exacerbate racial discrimination by brokers."[112] Although the court found no indication that Merrill Lynch intended to discriminate, these policies and their potentially compounding effect on African American brokers presented common questions sufficient to justify class treatment, as corporate intent need not be shown in disparate

---

[105] *Id.* at 635–37 (citing *Dukes*, 131 S. Ct. at 2650).
[106] 672 F.3d 482 (7th Cir. 2012).
[107] *Id.* at 483.
[108] *Id.* at 487–88.
[109] *Id.* at 488.
[110] *Id.* at 488–89.
[111] *Id.* at 489.
[112] *Id.*

impact cases.[113] Accordingly, the court allowed for class treatment of liability under Rule 23(c)(4), which permits certification of particular issues for class resolution, and of injunctive relief under Rule 23(b)(2).[114]

An order granting certification to female employees in *Ellis v. Costco Wholesale Corp.*,[115] a gender discrimination class action, further illustrates the ways in which discretionary decisionmaking can be framed and challenged after *Dukes* under both disparate impact and treatment theories. Acknowledging the existence of discretion in the promotion practices the plaintiffs challenged, the district court took pains to distinguish *Ellis* from *Dukes*, including: (1) class size (700 rather than 1.5 million); (2) the scope of the challenge (promotion to two management-level positions, with a uniform job description); and (3) the identification of "specific employment practices [such as not posting available jobs and using a 'tap on the shoulder' selection system] under the influence and control of top management."[116] Plaintiffs strengthened their case with testimony from a sociologist who identified biased thinking at the top levels of Costco management as well as company practices susceptible to bias.[117] Plaintiffs' statistical evidence of gender disparities, like their sociological evidence, was closely tailored to their theory of liability, and the court found the plaintiffs' expert's aggregation of nationwide data convincing in light of testimony from the company's CEO averring company-wide promotion practices.[118] This showing of "purported common 'causes' and common 'effects' " supported certification of plaintiffs' disparate treatment claims.[119]

Relying on *McReynolds*, *Ellis* also approved certification under a disparate impact theory. The court likened the compounding effect of Costco's tainted promotion practices to the effect of Merrill Lynch's "teaming" and "account distribution" practices.[120] Moreover, "the exercise of discretion [was] confined and guided by companywide policies and practices and directed by upper management" — facts the court found were even more strongly in favor of certification than those presented in *McReynolds* itself.[121]

The logic of *McReynolds* has helped plaintiffs achieve class certification in cases outside the realm of employment law, too. In a suit alleging that the stop-and-frisk policies of the New York Police Department had a disparate effect on racial minorities, the district court's order granting class certification relied on *McReynolds* in finding that the plaintiffs had met Rule 23(a)'s commonality requirement.[122] *McReynolds*, the court stated, "stands

---

[113] *Id.* at 490.
[114] *Id.* at 492.
[115] 285 F.R.D. 492 (N.D. Cal. 2012).
[116] *Id.* at 511–12.
[117] *Id.* at 520–21.
[118] *Id.* at 523.
[119] *Id.* at 531.
[120] *Id.* at 532.
[121] *Id.*
[122] Floyd v. City of N.Y., 283 F.R.D. 153, 172–75 (S.D.N.Y. 2012).

for the proposition that, even after [*Dukes*], Rule 23(b)(2) suits remain appropriate mechanisms for obtaining injunctive relief in cases where a centralized policy is alleged to impact a large class of plaintiffs, even when the magnitude (and existence) of the impact may vary by class member."[123] The court found that the city had a "single stop and frisk program," generated from a "centralized source" and enforced through a "hierarchical supervisory structure," including training on and monitoring of officers' stop-and-frisk efforts.[124] In light of *McReynolds* and this record, the court rejected the city's argument that officer discretion in conducting stops defeated commonality.[125]

While there is a way forward in cases involving discretionary decision-making, other examples illustrate the difficulties plaintiffs face unless they present a focused challenge supported by consistent documentary and testimonial evidence, as well as expert opinion tailored to the facts. For example, roughly six months after *McReynolds*, the Seventh Circuit ruled in *Bolden v. Walsh Construction Co.*[126] that African American construction workers who challenged the discriminatory assignment of overtime and working conditions failed to meet Rule 23(b)(2)'s requirements. The court identified a number of perceived flaws in the plaintiffs' evidence, including that testimony about conditions from worksite to worksite varied greatly and that their statistical expert lacked support for his unit of analysis and failed to control for factors other than race.[127] Moreover, the court found that there was no common policy except for a rule against discrimination and a policy of discretion, even though the plaintiffs identified fourteen practices that they believed created common questions, such as the "assign[ment of] work hours and overtime without reference to any objective criteria."[128] Although these allegations do not sound far different from what was asserted in *McReynolds*, the *Bolden* court rejected the comparison: "[the policies] boil down to the policy affording discretion to each site's superintendent — and [*Dukes*] tells us that local discretion cannot support a company-wide class, no matter how cleverly lawyers may try to repackage local variability as uniformity."[129]

---

[123] *Id.* at 173.

[124] *Id.* at 173–74.

[125] Later, following *Floyd*, the same court certified a class alleging that the police department discriminatorily enforced trespass policies in public housing buildings. Davis v. City of N.Y., 296 F.R.D. 158 (S.D.N.Y. 2013).

[126] 688 F.3d 893 (7th Cir. 2012).

[127] *Id.* at 896–97.

[128] *Id.* at 898.

[129] *Id.* Following *Bolden*, another district court in the Seventh Circuit denied class certification where it perceived that the plaintiffs, African American employees who alleged pay discrimination, had simply "repackaged" claims of discretion. Jones v. Nat'l Council of Young Men's Christian Ass'ns of the U.S., No. 09 C 06437, 2014 U.S. Dist. LEXIS 43866, at *30 (N.D. Ill. Mar. 31, 2014). The court began by striking the plaintiffs' expert's opinions on implicit bias, noting that there was no connection between the general principles about which the expert was to testify and the specifics of the case. *See id.* at *4–13. Although the plaintiffs

Similarly, in *Tabor v. Hilti, Inc.*,[130] the Tenth Circuit distinguished *McReynolds* in affirming the denial of class certification in a case alleging gender discrimination in the promotion of sales representatives.[131] Plaintiffs challenged Hilti's formal performance management process (called the "Global Develop and Coach Process," or "GDCP"), which was the "official method" for selecting internal candidates for promotion.[132] The court found that the plaintiffs had made out a prima facie case that the GDCP had a disparate impact on women, reversing the district court on this point.[133] In spite of this, the court determined that *Dukes* precluded certification, finding that the process was not applied uniformly and involved "broad discretion," unlike the "limited discretion" in *McReynolds*.[134] In coming to this conclusion, the court gave weight to divergence in the plaintiffs' own experiences: only one of the two lead plaintiffs had ever become eligible for promotion under the GDCP, while the other had not and was cited for performance problems.[135]

This is by no means an exhaustive list of civil rights cases where courts have assessed commonality after *Dukes*. Nevertheless, they illustrate a complex, changing landscape for certification, where courts may evaluate the sufficiency of plaintiffs' theories of commonality and evidentiary support differently from case to case.

2. *Damages After* Dukes.

The question of damages in post-*Dukes* class action civil rights cases remains a difficult and unresolved one that requires further exploration. Where plaintiffs have secured certification victories after *Dukes*, damages often have not been part of the picture, either because the plaintiffs did not seek certification of these claims or because the courts declined to allow it. This is hardly a surprise given *Dukes*' indication that monetary damages should be certified only where plaintiffs meet Rule 23(b)(3)'s more stringent predominance and superiority requirements.

Plaintiffs' prospects for recovering monetary damages in class cases are further complicated by *Dukes*' prohibition on "Trial by Formula" in fashioning class members' individual awards and suggestion that defendants must be allowed to present individual defenses. Although the *Dukes* Court's concern was with litigating statutory defenses, not with the question of damages

challenged a "forced performance grading policy," the court found there was nothing to this policy beyond a requirement that each employee's performance be graded numerically on subjective criteria, and that the policy had no consistent interaction with similarly discretionary and subjective pay and promotion decisions. *Id.* at *19–30.

[130] 703 F.3d 1206 (10th Cir. 2013).

[131] *Id.*

[132] *Id.* at 1212.

[133] *Id.* at 1226.

[134] *Id.* at 1229.

[135] *Id.* at 1213–15.

generally, both liability and damages were entangled in the *Dukes* plaintiffs' proposed method of classwide damages approximation. *Dukes* confirmed that the *Teamsters* model, described above in section III.B.2, properly effectuates a defendant's right to raise individual defenses in a pattern-or-practice case, but conducting individual *Teamsters* proceedings for a class as large as that in *Dukes* might be impossible. While the *Hilao* sampling approach is not an option, it remains to be seen what might be permissible, and feasible, after *Dukes*.

(a) Early Opinions.

To date, most civil rights cases that have been certified under Rule 23(b)(3) after *Dukes* have not gone through the resolution of individual monetary claims. Some of these matters are still pending, without meaningful discussion of damages proceedings,[136] while others have been resolved through settlement.[137] A few cases, however, have provided glimpses into how individual awards may be addressed after *Dukes*.

Where plaintiffs propose proceedings similar to what was laid out in *Teamsters*, they have had some success. *Ellis*, discussed above in section IV.C.1.(b) with respect to commonality, ultimately settled.[138] But the district court had granted "hybrid" certification of classes seeking injunctive relief under Rule 23(b)(2) and monetary relief under Rule 23(b)(3), providing for individualized hearings in the second phase of *Teamsters* proceedings to assess each employee's "rightful place, back pay and compensatory damages and [to] adjudicate individual defenses."[139] In *Easterling v. Connecticut Department of Corrections*,[140] the court also granted hybrid certification, under Rules 23(b)(2) and (b)(3), of a class of women who claimed they were improperly denied positions due to the Department of Corrections' use of a biased testing mechanism (a fitness exam).[141] The court acknowledged that it would be "impossible" to determine which class members would have been hired but for the test, and thus awarded *aggregate* backpay to be distributed on a pro rata basis and identified a number of priority hiring slots, leaving individual class members to establish their eligibility for such relief and mitigation efforts.[142]

---

[136] *See, e.g.*, Moore v. Napolitano, 926 F. Supp. 2d 8 (D.D.C. 2013) (certifying Rule 23(b)(3) class alleging race discrimination in promotions within the U.S. Secret Service without specifying means for assessing damages), *review denied sub nom. In re* Johnson, No. 13-8002, 2014 U.S. App. LEXIS 14758 (D.C. Cir. Aug. 1, 2014).

[137] *See* Ellis v. Costco Wholesale Corp., No. 04-CV-3341, ECF No. 791 (N.D. Cal. Mar. 27, 2014).

[138] *See id.*

[139] Ellis v. Costco Wholesale Corp., 285 F.R.D. 492, 546 (N.D. Cal. 2012).

[140] 278 F.R.D. 41 (D. Conn. 2011).

[141] *Id.*

[142] *Id.* at 48–50 (citing, *inter alia*, United States v. City of N.Y., 276 F.R.D. 22, 22–23, 26 (E.D.N.Y. 2011), a case in which plaintiffs alleged that the New York Fire Department used a biased testing mechanism, and the court granted hybrid certification of class liability issues

Without individualized proceedings built into their trial plan in some fashion, civil rights plaintiffs have had limited success in certifying damages classes under Rule 23(b)(3).[143] One notable exception is *Parra*, the pay discrimination case where the defendant used different pay scales at its stores.[144] The court found that damages could be calculated "mechanical[ly]," using only payroll records and the wage scales applied.[145] While *Parra* is a positive outcome, the factual scenario presented there is somewhat unusual in the context of modern-day civil rights claims, which typically involve subtler mechanisms of discrimination than a lower pay scale for certain employees.

Overall, *Dukes* creates a significant challenge for plaintiffs who seek to vindicate class members' interest in monetary recovery, even if *Teamsters* does present a way forward. Having to conduct hundreds, or thousands, of individualized hearings or claims proceedings might be feasible for well-funded corporate counsel, but for civil rights advocates, *Dukes* militates in favor of bringing far more modest challenges. Moreover, the concern with avoiding "Trial by Formula" may well stamp out the creativity courts have often used, in their rightful discretion, in conducting proceedings to achieve just and efficient results in cases alleging mass harms.

(b) Laying New Foundations.

Plaintiffs may be able to make headway on the question of damages by relying on a developing body of scholarship that critiques *Dukes*' analysis of litigants' due process rights in fashioning individual awards. Professor Mark Moller rejects as ahistorical defendants' arguments that due process entitles them to defend against class actions with any evidence, in any way they choose.[146] Outside of a brief period during the *Lochner* era in which courts understood due process to provide each party an opportunity to present all the evidence they choose, courts have had the power to "refine, and sometimes restrict, opportunities to present probative evidence."[147] Highlighting other flaws, Professor Melissa Hart argues that *Dukes*' conclusions on "Trial

under Rule 23(b)(2) and of individualized liability and damages issues under Rule 23(b)(3)). Ultimately, *Easterling* settled. *See* Easterling v. Conn. Dep't of Corr., No. 3:08-CV-00826, ECF No. 253 (D. Conn. Sept. 10, 2013).

[143] *See, e.g.*, Davis v. Cintas Corp., 717 F.3d 476, 490–91 (6th Cir. 2012) (after affirming ruling that Rule 23(a) was not satisfied, rejecting as "Trial by Formula" the plaintiffs' proposal that a statistician assess the shortfall in women hired by facility to determine overall backpay liability, with individual awards to be distributed pro rata); *Amador*, 2014 U.S. Dist. LEXIS 61344, at *34–51 (after certifying injunctive relief class, declining to certify 23(b)(3) class seeking "general damages" for each class member based on testimony of a portion of the class, citing doctrine relating to assessing damages for constitutional violations that cause "actual" harm, but paralleling reasoning of *Dukes* regarding due process and "Trial by Formula").

[144] *See supra* section IV.C.1.(a).

[145] Parra v. Bashas', Inc., 291 F.R.D. 360, 393 (D. Ariz. 2013).

[146] Mark Moller, *Class Action Defendants' New Lochnerism*, 2012 UTAH L. REV. 319 (2012).

[147] *Id.* at 389.

by Formula" represent a misapplication of the Rules Enabling Act, arising from a misreading of the remedial provisions of Title VII and *Teamsters* (which, by its own terms and subsequent interpretation, allows courts flexibility in crafting second-phase proceedings).[148] Hart asserts that *Dukes*' pronouncements on "Trial by Formula" were unnecessary to its holding and thus nonprecedential, but ultimately advocates, *inter alia*, for pursuing "issue" or "hybrid" certification to "preserve the possibility of looking at the systemic claim at the liability phase" with individual claims to follow.[149]

Taking a different tack, rooted in the context of mass tort, Professor Alexandra Lahav argues that *Dukes*' disparagement of "Trial by Formula" reflects the Supreme Court's preference for "liberty of individual adjudication over equality."[150] Lahav posits that outcome equality — "a comparative right that requires judges to give legally valid reasons for treating similarly situated people differently" — is supported by procedural doctrines such as preclusion and collective litigation, as well as by constitutional principles embedded in the Due Process and Equal Protection Clauses.[151] "Trial by Formula," or the use of sampling to extrapolate damages to a group of similarly situated people, achieves outcome equality in tort law by "distribut[ing] awards equally among those who are (more or less) equally harmed."[152] Although there are meaningful differences between mass tort and civil rights class actions, Lahav's justifications are rooted in fundamental legal and constitutional principles that easily might be drawn into the civil rights context.

Presenting counterarguments to the barriers *Dukes* places on obtaining individual awards may be a powerful tool in convincing courts to exercise their discretion to adopt creative case management strategies to fully and fairly compensate injured class members.

D. Summary

Several observations can be made from the preceding review of the post-*Dukes* case law. First, the "rigorous analysis" *Dukes* requires places a burden on plaintiffs to develop a detailed and nuanced factual record before class certification. Acknowledging this, courts are generally unwilling to eliminate class claims prior to discovery at defendants' behest in motions to dismiss. Plaintiffs, however, must conduct aggressive discovery and expect that this process may be contentious and lengthy. Second, *Dukes*' bar for establishing commonality is not insurmountable, but it is most easily met

---

[148] Melissa Hart, *Civil Rights and Systemic Wrongs*, 32 BERKELEY J. EMP. & LAB. L. 455, 474–76 (2011).

[149] *Id.* at 476.

[150] Alexandra D. Lahav, *The Case for "Trial by Formula"*, 90 TEX. L. REV. 571, 574 (2012).

[151] *Id.* at 578.

[152] *Id.* at 616.

where plaintiffs challenge a discrete policy or practice and present tailored evidence that shows how this policy or practice affects the class in a consistent manner. Cases regarding the failure to meet statutory obligations and nondiscretionary practices fall most clearly within *Dukes*' realm of acceptability, but plaintiffs may be successful where their theories (and evidence) show how practices incorporating discretion consistently produce an improper result. Statistics alone, or general social science research, are unlikely to pass muster. Finally, damages remain a key challenge for civil rights plaintiffs. Few courts have certified classes seeking monetary awards in civil rights cases after *Dukes*, and those that have required individualized proceedings, which represent a way forward in some cases but may prove infeasible in others.

Although the post-*Dukes* landscape is not as grim as some might have predicted, many questions and hurdles remain.

V. Conclusion: Making a Future for Civil Rights Class Actions

There is a future for civil rights class actions, but plaintiffs must proceed cautiously in selecting and framing their cases. Further, civil rights advocates should seek to change the legal landscape by promoting legal reform and contributing to academic discourse.

A. Choosing Carefully

As explored above, plaintiffs have had some success in pursuing class actions after *Dukes*, even though many of the cases addressed thus far were pled and substantially litigated without the benefit of knowing the dramatic changes the Court would make. Moving forward, these cases provide certain guidelines about how to increase chances for success: making focused class allegations, centered on a discrete policy or action, which are supported by a tailored and clean factual record.

Dukes shows that the size and scope of a class action are of the utmost importance. It surely did not help the *Dukes* plaintiffs to be bringing "one of the most expansive class actions ever."[153] Although their allegations were not so different from those asserted in cases like *Velez* and *Ingram*, both of which challenged the effects of unchecked discretion in employment decisions, the latter cases involved classes numbering under ten thousand, not over one million.[154]

---

[153] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011).

[154] The *Velez* plaintiffs rested their claims in significant part on subjective decisionmaking as a mechanism for gender discrimination, albeit with some greater specificity, but the defendant employed roughly 6,000 people *in total* and the class only included women in "sales-related positions." Velez v. Novartis, 244 F.R.D. 243, 249, 258 (S.D.N.Y. 2007). In *Ingram*, the plaintiffs also targeted subjective employment practices and unchecked discretion as the source of race discrimination at Coca-Cola, and the settlement class included 2,200 members. Ingram v. Coca-Cola Co., 200 F.R.D. 685, 697–98 (N.D. Ga. 2001).

Beyond limiting the size of the classes they seek to certify, plaintiffs should, to the extent possible, bring narrow claims that challenge discrete sources of harm, such as a specific promotion practice, a directive to conduct policing in a particular fashion, or the failure to meet a certain statutory obligation. Whether plaintiffs are alleging that they are victims of disparate impact or disparate treatment discrimination, it is helpful to conceive of the challenged behavior as a policy or practice. In addition to providing the "glue" lacking in cases like *Dukes* itself, such framing gives the defendant agency, allowing a casting of blame that is helpful in any case alleging a civil rights violation and essential in proving a disparate treatment case.[155]

Plaintiffs should also put forth evidence that tells a clear and consistent story about how the challenged policy or practice in question operates with respect to the class, which requires extensive discovery as well as thoughtful narrowing. Lead plaintiffs' stories should exemplify the trouble caused by the challenged practice or policy as clearly and cleanly as possible. Cases like *Dukes* and *Tabor* show that courts are not compelled by lead plaintiffs with exceptional experiences or glaring problems, such as a record of disciplinary infractions, even if these issues are not clearly material to the claims at hand. Moreover, although anecdotal evidence still plays an important role after *Dukes*, plaintiffs can rely on such evidence only if it is well dispersed across a class and consistent in nature. If not, individual stories may undermine rather than bolster the appearance of common issues across a class.

Expert testimony, too, must be tailored to the claims plaintiffs raise. Statistical evidence of disparities is not enough by itself to support class certification, but it will be far stronger if, as in *Ellis*, the unit of analysis is supported by other evidence and plaintiffs' theory of the case. Generalized sociological analysis, like that used in *Dukes*, will not assist a finding of commonality, either. But tailored testimony about the specific policies in question — again, as in *Ellis* — may contribute to the "glue" that binds a class suitable for certification.

Finally, plaintiffs should consider partial or hybrid certification in order to comply with *Dukes*' bar on certification of monetary relief claims under Rule 23(b)(3) to maximize their opportunity for certification on one or all issues presented in a case. Certification of an injunctive or declaratory relief class only, as in *McReynolds*, can create the foundation for a favorable settlement without the complications of addressing claims for monetary relief. Alternatively, hybrid certification under Rules 23(b)(2) and (b)(3) has been a successful tactic where plaintiffs do seek to adjudicate all claims on a class basis. Plaintiffs should take advantage of the inroads made in cases like *Ellis* and *Easterling*, which provide models for how a class case can proceed to resolution after *Dukes*, including approaches for determining awards to individual class members consistent with the method set out in *Teamsters*.

---

[155] *See* Selmi, *supra* note 52, at 510.

Plaintiffs also should consider bringing collective actions that need not be certified under Rule 23. For example, claims under certain statutes that overlap with Title VII are certified using a mechanism embedded in the Fair Labor Standards Act ("FLSA").[156] This is true of both the Age Discrimination in Employment Act ("ADEA"),[157] which prohibits various forms of age discrimination, and the Equal Pay Act ("EPA"),[158] which prohibits paying men and women differently for performing substantially the same work.[159] Although defendants have argued that the heightened standards set out in *Dukes* should apply beyond the Rule 23 context, plaintiffs have continued to obtain conditional certification in such cases.[160] Once conditional certification is granted, possibly early in the case, notice may be issued to potential plaintiffs so that they can join the collective action, creating additional pressure on the defendant and a base of individuals who may provide evidence in support of final collective action certification, or even class certification if Rule 23 claims have been raised as well.

B. Legal Reform, Legal Scholarship

Practitioners' innovations in their own cases, however, may not be enough to ensure that class actions can continue to serve their historical purpose as a vehicle for achieving social justice. Civil rights plaintiffs and their advocates must respond to efforts to further curtail access to justice and affirmatively sponsor efforts for change.

One recent example proves that such efforts can be effective. In 2013, the Advisory Committee on Civil Rules took under consideration changes proposed to the Federal Rules of Civil Procedure, including reduction of the presumptive number and duration of depositions and the number of interrogatories allowed. These changes would be particularly problematic in class

---

[156] 29 U.S.C. §§ 201–219 (2012). Many circuit and district courts have endorsed a two-step mechanism for certifying collective actions under the FLSA's enforcement procedure. Under this approach, there is an initial process known as "conditional certification," where plaintiffs have a relatively low burden to show that they may be "similarly situated" to a group of potential plaintiffs. After further proceedings, courts make a final certification decision, often upon a "decertification" motion, as to whether the plaintiffs are in fact "similarly situated." *See, e.g.*, Myers v. Hertz Corp., 624 F.3d 537, 554–55 (2d Cir. 2010); Morgan v. Family Dollar Stores, 551 F.3d 1233, 1260–62 (8th Cir. 2008).

[157] 29 U.S.C. §§ 621–634 (2012).

[158] *Id.* § 206(d).

[159] The EPA is embedded within the FLSA, while the ADEA provides for enforcement using the FLSA mechanisms laid out in 29 U.S.C. § 216. *See* 29 U.S.C § 626(b) (2012).

[160] *See* Kassman v. KPMG LLP, No. 1:11-CV-03743, 2014 U.S. Dist. LEXIS 93022 (S.D.N.Y. July 8, 2014) (granting conditional certification of collective action of roughly 7,000 female employees); Wellens v. Daiichi Sankyo, Inc., No. 13-CV-00581, 2014 U.S. Dist. LEXIS 70628 (N.D. Cal. May 22, 2014) (granting conditional certification of collective action of roughly 1,500 female sales employees, without reference to *Dukes*); Da Silva Moore v. Publicis Groupe, No. 11 Civ. 1279, 2012 U.S. Dist. LEXIS 92675, at *36–37 (S.D.N.Y. June 29, 2012) (rejecting defendants' argument that Rule 23's commonality requirement should inform the "similarly situated" analysis of the conditional certification process after *Dukes*, and granting conditional certification of EPA collective action).

actions, where plaintiffs must seek broad discovery, especially after *Dukes*. Significant efforts were made to encourage members of the plaintiffs' bar to participate in the formal public comment process, and civil rights attorneys — including plaintiffs' counsel from *Dukes* — testified in public hearings on the changes. Ultimately, these proposed changes were withdrawn in April 2014.[161]

Civil rights advocates should also try to instigate legislative reform. Such efforts were successful in the wake of another major civil rights case of the past decade, *Ledbetter v. Goodyear Tire & Rubber Co.*,[162] which held that the statute of limitations for claims of unequal pay under Title VII began to run when the initial decision about the employee's pay was made.[163] Practically speaking, this meant that Ledbetter could not recover for ongoing pay disparities once she had learned of her underpayment decades later due to the running of the statute of limitations. The decision produced a public outcry and made Ms. Ledbetter a feature of Barack Obama's 2008 presidential campaign,[164] leading to the passage of the Lily Ledbetter Fair Pay Act of 2009.[165] The Act "clarif[ied]" that the statute of limitations on a claim of discriminatory pay under Title VII (and related statutes) begins to run each time the compensation is paid, not just when the decision to underpay the employee is made, thereby extending into the future the date by which an employee may make a claim for discriminatory pay.[166]

Both *Ledbetter* and *Dukes* limited the ability of female employees to challenge workplace discrimination, and both received significant media attention when handed down. Yet *Dukes* has not inspired the major reform that followed *Ledbetter*. It is undoubtedly true that the story presented by Ms. Ledbetter's case has a certain clarity and inherent appeal — a grandmother nearing retirement discovers a gender-based pay disparity, but cannot seek redress due to a legal technicality — that is hard to replicate in a class case, where the lead plaintiff's experience must mirror that of her proposed class. But by telling plaintiffs' stories in the media and further humanizing class actions, advocates may be able to create momentum behind legal reform, in addition to creating pressure for defendants to change their practices and settle high-profile cases.

---

[161] Roberta L. Steele, *A Tour de Force: Draconian Proposed Changes To The Federal Rules Of Civil Procedure Withdrawn*, Nat'l Emp't Lawyers Ass'n Blog (Apr. 22, 2014, 5:31 PM), http://exchange.nela.org/blogs/roberta-steele/2014/04/22/fedrulesupdate, *archived at* http://perma.cc/9CGC-JQJL.

[162] 550 U.S. 618 (2007).

[163] *Id.*

[164] *See* Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. Times (Jan. 29, 2009), http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html, *archived at* http://perma.cc/BY6B-WTGN.

[165] Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 and 42 U.S.C.).

[166] *See id.*

Although the moment for a major legislative response to *Dukes* may have passed — nor is it clear what sort of change might best ease plaintiffs' ability to bring class civil rights claims — *Ledbetter* shows that it is possible. There is not a vibrant debate about class action reform within the plaintiffs' bar at present, but there could and should be. President Obama's recent Executive Order reversing the impact of *Concepcion*, described in Part I, *supra*, for employees of federal contractors who might seek to litigate discrimination claims, suggests that there is at least some public appetite for such change.[167]

Senator Al Franken offered one option for addressing *Dukes* in the Equal Employment Opportunity Restoration Act of 2012, a bill that aimed to "restore employees' ability to challenge, as a group, discriminatory employment practices, including subjective employment practices."[168] The mechanism proposed was a new "group action" similar to a class action, only to be used for employment cases under Title VII and related statutes.[169] This bill did not succeed, and, of course, it would not address problems posed by *Dukes* for non-employment civil rights cases.

Another response might be to adopt the "unitary standard" proposed by Professor Mollie A. Murphy, which would do away with the distinctions of Rule 23(b) and ask the court to answer only the questions of whether a class should be certified and, if so, what protections should be put in place for class members.[170] Murphy's proposal is aimed at resolving incoherence and confusion in the case law surrounding Rule 23(b) and simplifying the certification process,[171] not undoing *Dukes*. But doing away with the predominance standard of Rule 23(b)(3) would surely be a boon to plaintiffs who hope to recover monetary damages after *Dukes.* Moreover, by erasing the distinction between actions seeking naturally related forms of equitable relief like injunction and backpay, courts in their discretion might be able to fashion simpler, and more coherent, certification orders, driven by the overall propriety of class treatment.

At the very least, those committed to maintaining the vitality of the class action as a vehicle for social change should write more — for the public, for legal academics, and for each other — to educate non-practitioners, exchange strategies for success, and provide courts with sources supporting a nuanced reading of cases like *Dukes*. Although practitioners may be wary of citing law review articles to the courts, the *Dukes* decision itself is proof that legal scholarship can encourage courts to make new law: in

---

[167] Fair Pay and Safe Workplaces Exec. Order No. 13,673, 79 Fed. Reg. 45,309 § 6 (Aug. 5, 2014) (limiting the ability of federal government contractors to require employees to sign class actions waivers for "claims arising under Title VII . . . or any tort related to or arising out of sexual assault or harassment").

[168] S. 3317, 112th Cong. § 2(b) (2012).

[169] *Id.* § 3.

[170] Mollie A. Murphy, *Rule 23(b) After* Wal-Mart*: (Re) Considering a "Unitary" Standard*, 64 Baylor L. Rev. 721, 725 (2012).

[171] *Id.*

coming to its conclusions regarding Rule 23(a)(2)'s commonality requirement and certification of monetary damages under Rule 23(b)(2), the Court relied heavily on two law review articles by the late Professor Richard Nagareda.[172]

Civil rights plaintiffs must strive to focus and refine their cases and to raise public awareness of, and interest in, the class action as a tool for achieving social justice. With further effort, plaintiffs may be able to create their own *Dukes* moment.

[172] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551, 2556 (2011) (citing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131–32 (2009); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 176 n.110 (2003)).