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Implausible Wrongs and Dissimilarities: The Supreme Court Continues Its Anti-Litigation Trend, This Time With a Class Action Focus in *Wal-Mart v. Dukes*

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The Supreme Court's decision this term in *Wal-Mart v. Dukes*,[2] has broad implications for the future of class actions, particularly where the defendant's state of mind matters to the claim or where the case involves potentially complicated questions of causation. And when the decision is combined with the Court's recent decisions about pleadings in *Twombly*[3] and *Iqbal*[4] and judges' views on how people are motivated, the future of class actions seems very uncertain. The Court has invited lower court judges to consider what kinds of legal wrongs they think people are likely to engage in and to focus on what makes members of a putative class different rather than what makes them alike. That invitation will inevitably result in fewer class actions.

The case began in 2001, when Betty Dukes and five other women sued Wal-Mart, the country's largest private employer, for sex discrimination in pay, promotions to salaried management positions, and job assignments. The plaintiffs sought to represent a class of all women currently employed by Wal-Mart or who had worked for the company since 1998 and who had been subject to the policies. The plaintiffs presented evidence that Wal-Mart had no formal policies on promotion, but only policies on hourly-paid department manager positions, rates of pay within a range, and job assignments. They left other decisions to the discretion of individual managers and provided no information to the employees on how pay, promotion, or job assignments would be determined. At the same time, the company maintained a very strong corporate culture that promoted many traditional values, and there was evidence that gender stereotypes permeated the company at all levels. This combination, plaintiffs alleged, allowed gender stereotypes to operate, resulting in a gender pay gap across all regions in the company's stores at every pay level and a gender gap in promotions, where well over two-thirds of employees eligible for promotion were women, but only about one-third were in management.

The plaintiffs argued that they had shown that the class they proposed to represent met Rule 23(a)(2)'s requirement that the class present common issues of law or fact by showing that members of the class were all injured by discrimination against women caused by Wal-Mart's policies and culture. The plaintiffs provided evidence from three experts: a statistician who analyzed pay and personnel data, documented the gender gap within stores and across stores, regions, and positions, and who demonstrated that the gap could not be caused by neutral factors; a labor economist who documented the gender gap in management at Wal-Mart compared to its competitors and whose statistical analysis demonstrated that the gender gap could not be due to chance; and a sociologist who analyzed Wal-Mart's personnel practices and culture and explained how the unfettered discretion and strong corporate culture could allow

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[2] *Wal-Mart v. Dukes*, No. 10-277 (June 20, 2011).
[3] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).
[4] *Ashcroft v. Iqbal*,[4] 556 U.S. ___, 129 U.S. 1937 (2009).

discrimination to operate. In addition to the statistical evidence, the plaintiffs provided evidence of many incidents where decisions were made on the basis of gender or where comments or actions by management revealed that gender stereotypes permeated their thinking. The plaintiffs also argued that because the relief they sought was primarily equitable, injunctive relief prevailed over sought monetary relief, and so the class could be certified under Rule 23(b)(2).

Wal-Mart's defense disputed both the 23(a)(2) and 23(b)(2) issues. Regarding 23(a)(2)'s commonality requirement, Wal-Mart focused primarily on the expert evidence: its admissibility and validity. But it also argued that the class lacked commonality because not every woman in the class was affected the same way (or maybe at all) by the promotion, pay, and job assignment policies. The defense emphasized the complexity of the case: the hugeness of the class (somewhere between 500,000 and 1.5 million women), the large number of stores, the different types of stores, the large number of departments, the large number of job classifications, and the number of potential nondiscriminatory reasons that could have been considered in making these decisions. Wal-Mart also argued against certification under Rule 23(b)(2), stating that because backpay was sought for the class, monetary relief predominated over injunctive relief.

The district court certified the class for the pay and promotion claims, and the Ninth Circuit, with some small variations on the definition of the class, affirmed and affirmed again *en banc*, with five judges dissenting on the ground, essentially, that the case was too complex for the putative class to be certified.

The Supreme Court essentially agreed with the dissenting judges and reversed the certification of the class. All nine of the justices thought that the class could not be certified under 23(b)(3), holding that the backpay claims of the class members were monetary relief and would predominate over the injunctive relief sought. On the question of certification under 23(a)(2), the split was 5-4 on the ideological lines we've come to expect: Justice Scalia, with Justices Alito, Kennedy, Thomas, and Chief Justice Roberts in the majority; Justices Ginsburg, with Justices Breyer, Kagan, and Sotomayor in dissent.

In the unanimous part of the opinion, the Court held that claims for monetary relief may not be certified under Rule 23(b)(2), at least where the monetary relief is not incidental to the requested injunctive or declaratory relief. And, because Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay, those claims are not incidental to the requested injunctive or declaratory relief in this case. Based on the Rule's history and structure, the Court held, Rule 23(b)(2) applies only when a single, indivisible remedy would provide relief to each class member, and issues of predominance do not apply. Individualized monetary claims belong instead in Rule 23(b)(3), which provides extra procedural protections for class members. The Court declined to decide whether monetary claims can ever be certified under 23(b)(2). The dissent would have remanded to allow the district court to determine whether the class could be certified under Rule 23(b)(3).

On the Rule 23(a)(2) issue, the Court reversed the certification entirely, holding that the putative class failed to meet the commonality requirement of Rule 23(a)(2). That rule requires a party seeking class certification to prove that the class has common "questions of law or fact," which, the majority reasoned, means that the claims must depend upon a common contention that once decided will resolve an issue that is central to the validity of each one of the claims in one stroke. The majority further held that plaintiffs in a class action need "significant proof" of commonality, which means they also must have significant proof of their claim, because proof of commonality necessarily overlaps with proof of the merits of the plaintiffs' claim.

Here, the claim was that Wal-Mart engaged in a pattern or practice of discrimination. Discrimination claims require an inquiry into the reasons for particular employment decisions and, in this action, the plaintiffs were essentially suing for millions of employment decisions. A common question required there to be some element that held together the alleged reasons for those decisions, and putting it all together, the majority reasoned, meant that plaintiffs needed significant proof that Wal-Mart operated under a general policy of discrimination.

The majority found that the plaintiffs had failed to provide that significant proof through their expert testimony and the anecdotal evidence. Wal-Mart had a written policy that prohibited discrimination, which the Court found undermined any inference that the company had a pattern or practice of discrimination. And the other evidence of a pattern or practice of discrimination failed to show a de facto policy necessary to show commonality.

Although it did not cite to *Twombly* or *Iqbal*, the majority seemed to draw very heavily upon the plausibility principle from those cases in analyzing whether the evidence demonstrated commonality. The majority reasoned that the expert testimony that Wal-Mart's corporate culture was *vulnerable* to gender bias—that it was possible—did not show that the employment decisions at issue were *caused* by gender bias—that it was proven true or at least probable. The majority further reasoned that in a company of Wal-Mart's size and geographical scope, it is unlikely that all managers would exercise their discretion in a common way without some common direction.

On this point, the majority's worldview and assumptions about behavior proved central to its conclusions about what was plausible. The majority reasoned that it would be very difficult to prove commonality where a company's official policy was for individual decision makers to exercise their discretion because "left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all," even if some would select criteria that would cause a disparate impact and some would use sex to decide. Similarly, the statistical proof of pay disparities on a regional or national level could not be used to prove that those same disparities existed equally at the store level where the pay decisions were made. And the anecdotal evidence was too little for the size of the class.

The dissent disagreed with this view of the evidence, painting a different picture the dissenting justices found equally or even more plausible than the majority's. The sociologist had shown how the policy of discretion, combined with the strong corporate culture and the high level of gender stereotyping, made sex discrimination possible, while the statistician and the labor economist showed how that discrimination played out in a pattern of pay and promotion disparities, including at the store level. The anecdotal evidence gave life to the numbers by providing evidence of how individual supervisors made their decisions.

The dissent also called the majority out for ignoring prior class-action decisions and criticized the majority for effectively revisiting facts the district court had found. Most important to the class-action component, the dissent sharply criticized the majority for importing a "dissimilarities" approach from 23(b)(3) into the issue of commonality under 23(a)(2). The rules in 23(a) were meant to establish a threshold of criteria necessary to certification but are not sufficient by themselves for that certification. The rules in 23(b), on the other hand, were designed to provide the sufficiency rules for certification and procedural protections for different types of classes. And it was this dissimilarities approach that allowed the majority to focus on

what divides members of the class rather than on what unites them, magnifying the former to the point that they eclipsed the latter.

Clearly this case came down to the size and complexity of both Wal-Mart's operation and the potential class. A majority of the Court simply did not believe that all of the class members could possibly be injured in the same way given the multitude of decision makers at issue—even for the disparate impact claim, which doesn't require intent. Second, a majority of members of the Court do not seem to believe that causation can be proven by statistical analysis, something that is evident not just in employment discrimination cases, but in other areas of law as well. Moreover, important in employment discrimination cases at least, a majority of the Court seems very suspicious of the idea that implicit bias could support a claim for disparate treatment—that doesn't seem the right kind of bias that those Justices seem to think must form the basis for a disparate treatment case.

The dissimilarities approach now a part of the Rule 23(a)(2) commonality question will prove an especially high hurdle in the types of cases that present facts that conflict with judges' worldview. It was evident in this case, as it has been in many other employment discrimination cases at every level of court, that the majority of judges do not believe that employment discrimination occurs very often. And it was this worldview that prompted the majority to find the claims of commonality essentially implausible. For other legal wrongs that courts find unlikely to occur, like the antitrust claim in *Twombly* and the civil rights claim in *Iqbal*, the chances of framing a successful class action seem very slim.