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The Power and Promise of Procedure: Examining the Class Action Landscape After Wal-Mart v. Dukes

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INTRODUCTION

When we think about the Federal Rules of Civil Procedure, the issues can seem very technical, and the topic dry and difficult. But procedural issues are extremely important and have a tremendous impact on all of us. Whether it is everyday folks (like employees and consumers who are trying to enforce their rights) or multi-national corporations (who are central to the economic well-being of our society), the process that we use to resolve disputes really matters. This Article discusses the power and promise of procedure, focusing on a particular procedural device—the class action—and the Supreme Court's recent interpretation of Rule 23[1] (the class action rule) in *Wal-Mart Stores, Inc. v. Dukes*.[2]

I. CLASS ACTIONS IN CONTEXT

To understand the power and promise of aggregate litigation, we need to put it in context. As a former civil rights attorney who represented employees challenging alleged discrimination (based on disability, gender, race, and national origin), I found the one thing all my clients had in common was courage. While my clients were not perfect, they were brave. It is not easy to challenge your employer, much less the largest retailer in the world.

It took great courage for Betty Dukes, a greeter at Wal-Mart, to challenge a giant like Wal-Mart. It involved serious professional risk and personal sacrifice. But she did not have to do it alone. She was

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1. FED. R. CIV. P. 23(a).

2. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011). For a procedural history and analysis of *Dukes*, see Suzette Malveaux, *Class Actions at the Crossroads: An Answer to* Wal-Mart v. Dukes, 5 HARV. L. & POL'Y 375 (2011).

empowered to challenge a goliath like Wal-Mart by uniting with other women with similar complaints and pursuing her case as a class action.

Whether an employee can aggregate her case with others is, in some ways, a *civil rights issue.* When we think of civil rights, we often think of voting, education, housing, or employment; we do not often consider *procedure* and its importance to the enforcement of civil rights laws. Procedure is really an issue of access to justice.[3]

Historically, class actions have been the basis for the most important civil rights cases, addressing school desegregation, prisoners' rights, and employment discrimination, among other issues.

Indeed, one of the most important Supreme Court cases of the twentieth century—*Brown v. Board of Education*[4]—was a class action. In fact, it was the combination of five different class action cases brought in Delaware, Kansas, South Carolina, Virginia, and Washington D.C. That consolidated class action, of course, resulted in the Supreme Court's unanimous decision that the "separate but equal" doctrine was unconstitutional.[5]

A class action, however, is an exception to the usual rule that an individual brings a case on his or her own behalf.[6] Typically, the plaintiff is the master of his or her own claim. Because a representative action runs counter to this fundamental principle, the courts and Congress have appropriately established rigorous criteria to ensure that departure from the norm is justified. The federal class action rule, Rule 23, sets out the requirements for when a party can represent others so that efficiency and due process are both served. The courts must conduct a "rigorous analysis" to make certain the Rule's requirements are met.[7]

One of the challenges to aggregate litigation is determining what due process requires, especially when claims for monetary relief are involved. When seeking back pay or monetary damages, class members' interests may start to diverge, breaking down the cohesiveness of the group. A court must be very careful not to deprive due process to class members in a mandatory class action. As the Supreme Court stated in *Ortiz v. Fibreboard Corp.*, "[t]he inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damages claims gathered in a mandatory class," in which class

3. For further discussion of procedure as an access to justice issue, see Suzette Malveaux, *Clearing Civil Procedure Hurdles in the Quest for Justice*, 37 OHIO N.U. L. REV. 621 (2011).

4. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

5. *Id.* at 495.

6. *See, e.g.*, Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979).

7. *See* Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160–61 (1982).

members need not consent to the lawsuit, or even be made aware of it.[8]

Moreover, when certifying a class action, a court must also be careful not to deprive a defendant of due process. A defendant must be able to adequately defend itself from individual claims whose aggregation may mask important distinctions and available defenses. As long as those safeguards are in place, the class action device plays a critical role in the American civil justice system.

II. WHY THE *DUKES* CASE IS IMPORTANT

The *Dukes* decision, while silent on the actual merits of whether Wal-Mart engaged in systemic gender discrimination, was a major blow to the plaintiffs' case because of the unique and powerful role of the class action. There is strength in numbers, especially when that number is 1.5 million women. But there is also strength in due process, especially when billions of dollars are at stake and the defendant is being accused of massive wrongdoing.

The *Dukes* decision is important because it attempts to draw a boundary line. On the one hand, the class action is a procedural asset that promotes efficiency and court access, thereby enabling plaintiffs with small claims and limited resources to jointly challenge widespread misconduct in a single suit. On the other hand, the class action is a procedural anomaly that is granted only under limited circumstances. This rigorous standard allows defendants to adequately defend themselves and gives class members an opportunity to bring individual cases when their interests diverge. *Dukes* is critical because the Court drew a boundary line that favors large, powerful employers over everyday workers alleging systemic discrimination.

Going forward, the new *Dukes* class certification standard jeopardizes potentially meritorious challenges to systemic discrimination. By redefining the class certification requirements for employment discrimination cases in two major areas, this ruling compromises employees' access to justice.

III. HOW THE *DUKES* RULING COMPROMISES ACCESS TO JUSTICE

A. Commonality

The first issue in *Dukes* was commonality. At the outset, the majority decertified the class by determining that there was not enough glue to hold the case together as a class action—the commonality required

8. Ortiz v. Fibreboard Corp., 527 U.S. 815, 846–47 (1999).

under Rule 23(a)(2) was not met.[9] In a 5–4 decision written by Justice Scalia, the majority raised the bar for commonality, which was arguably one of the easiest class action thresholds to satisfy. Conceding that all it takes is a single common question to satisfy the requirement, the Court concluded that this criterion was not met.[10] However, not surprisingly, the Court appropriately reiterated that the class certification standard is tough; a judge must rigorously analyze whether a case should be a class action, including deciding merits issues if they overlap with issues of class certification.[11] Additionally, the party moving for class certification must actually prove that the Rule 23 requirements are met.[12]

The Court surprised many and went one step further by requiring the plaintiffs to prove, with significant evidence, that there existed a general policy of discrimination as a condition of class certification. Specifically, to demonstrate commonality, the *Dukes* plaintiffs needed to have "'significant proof' that Wal-Mart 'operated under a general policy of discrimination.'"[13] This interpretation of commonality goes far beyond prior Title VII[14] class action jurisprudence and is now even being applied outside of the Title VII context.[15]

1. Evidentiary Shortcomings

The Court did not find "significant proof" of a policy of discrimination for several troubling reasons. First, in applying the new standard, the majority found that the evidence provided by the plaintiff class did not establish a common claim of discriminatory bias.[16] For example, plaintiffs proffered 120 affidavits from female employees alleging discrimination.[17] Despite this sworn testimony of discrimination by over one hundred employees in a half dozen states, the Court concluded that this evidence fell woefully short because of the sheer size and geographic dispersion of the class.[18] The Court cited *International Brotherhood of Teamsters v. United States*, in which there was one anecdote for every eight class members,[19] to demonstrate an acceptable

9. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2556–57 (2011).
10. *Id.*
11. *Id.* at 2551–52.
12. *Id.* at 2551.
13. *Id.* at 2553; *see also* Suzette Malveaux, *How Goliath Won: The Future Implications of* Dukes v. Wal-Mart, Colloquy, 106 Nw. U. L. REV. 34, 37–45 (2011).
14. 42 U.S.C. §§ 2000e-1 to -17 (2006).
15. *See infra* notes 47–49 and accompanying text.
16. *Dukes*, 131 S. Ct. at 2556–57.
17. *Id.* at 2549.
18. *Id.* at 2555.
19. *See id.* at 2556 (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 338 (1977)).

ratio of anecdotes to plaintiffs. For the *Dukes* plaintiffs to have collected affidavits in the same proportion, they would have had to produce 187,500 affidavits for a class of 1.5 million members.

This suggested proportion (or one even in the ballpark) effectively ensures that no plaintiff will be able to allege nationwide systemic discrimination against an employer the size of Wal-Mart by using anecdotal evidence. Even the most affluent class counsel cannot realistically finance and staff a case requiring this kind of showing merely to cross the commonality threshold.

Plaintiffs also proffered testimony from a sociologist, who concluded that Wal-Mart was vulnerable to gender discrimination because of its corporate culture and personnel practices. But this expert testimony—the "only evidence of a 'general policy of discrimination'" according to the Court—was disregarded on the grounds that the expert could not discern the extent to which stereotyped thinking and bias influenced pay and promotion decisions at Wal-Mart nationwide.[20] In other words, the sociologist could not answer the question of how prevalent the alleged gender discrimination was at Wal-Mart. Because the Court insisted that the *answer* to this question, rather than the question itself, was the basis for plaintiffs' commonality theory, the Court found the sociologist's testimony useless.[21]

But the answer to this "essential question" is not only unknown, but also probably unknowable. Given the subtle, complex, and sometimes even unconscious nature of modern discrimination, it would be practically impossible to determine with any specificity how much gender bias infected a workplace. Regardless, courts are now also erecting this hurdle outside of the Title VII context.

2. *How Can Discretion Be a Uniform Practice?*

The notion that the company's policy was to give local supervisors unfettered discretion over employment decisions called into question whether there was a uniform employment practice that could be challenged on a classwide basis. The notion that unchecked, subjective decision making at 3,400 separate stores across the country could provide the common thread for a single lawsuit is admittedly counterintuitive.

This is true, of course, if one focuses on the trees rather than the forest. Commonality depends on the locus of analysis. If the locus is

20. *Id.* at 2553–54 ("[The expert's testimony] is worlds away from 'significant proof' that Wal-Mart 'operated under a general policy of discrimination.'").

21. *Id.* at 2554 ("If [the expert] admittedly has no answer to that question, we can safely disregard what he has to say.").

the thousands of supervisors in the field making myriad decisions that affect 1.5 million separate employees, it is easy to conclude that there is no common question to be answered that would help resolve the case.

But if the locus is the company, which gives its agents the authority to make biased employment decisions while looking the other way, it is easier to see how the case can be resolved on a classwide basis. By focusing on the corporate employer, the entity culpable under Title VII and the one responsible for systemic harm, the uniform employment practice becomes apparent. The various ways the discrimination plays out as a result of this practice becomes a red herring, which is irrelevant to the threshold commonality determination under Rule 23(a)(2).[22]

3. *How Can Gender Discrimination Be Rampant?*

Even assuming Wal-Mart operated an "undisciplined system of subjective decisionmaking," the Court found that this did not satisfy commonality.[23] This seemed to stem from the majority's skepticism, if not disbelief, that a majority of Wal-Mart's managers might act—even subconsciously—in a way that disfavors women's employment prospects.[24] The Court insisted that plaintiffs must identify a "common mode" of how supervisors exercise their discretion, but the Court then rejected the evidence indicating that gender bias might be the answer.[25] This suggests that a plausibility test may be at work, much like the one established by the Court in the pleadings context.[26]

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22. *See Dukes*, 131 S. Ct. at 2567 (Ginsburg, J., concurring in part and dissenting in part) ("Wal-Mart's delegation of discretion over pay and promotions is a policy uniform throughout all stores. The very nature of discretion is that people will exercise it in various ways. A system of delegated discretion . . . is a practice actionable under Title VII when it produces discriminatory outcomes.").

23. *See id.* at 2555–56 (majority opinion).

24. *Id.* at 2554 ("[L]eft 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.").

25. *Id.* at 2554–55.

26. *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007) (holding that a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face"); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." (citing *Twombly*, 550 U.S. at 556)).

4. How Can There Be a Policy of Discriminatory Conduct When There Is a Written Policy to the Contrary?

The Court juxtaposed Wal-Mart's official antidiscrimination policy with its policy of giving local supervisors unfettered discretion to make employment decisions, and then concluded that the plaintiffs failed to show "significant proof" of a policy of discrimination at Wal-Mart.[27] But surely the mere presence of a written antidiscrimination policy should not be able to destroy commonality. Otherwise, all employers could bulletproof themselves from class liability by inserting boilerplate language into their employee handbooks. In fact, given contemporary societal attitudes about flagrant gender discrimination, one would expect most employers to have an official antidiscrimination statement in their personnel materials. It would be naive to presume that just because there is a written policy in place, no gender bias exists in the workplace. In contrast, the dissent, comprised of all the female justices and Justice Breyer, had no problem concluding that Wal-Mart's discretionary policy may have resulted in systemic gender bias.[28]

B. Back Pay and Other Monetary Relief

The second issue in *Dukes* was back pay, which compensates employees for earnings they would have received in the absence of discrimination. A particularly serious challenge to employees in a class action brought under Rule 23(b)(2), the class action rule often used in civil rights cases, is whether they can seek monetary relief as well as injunctive relief.[29]

Back pay not only makes victims of discrimination "whole" but, more importantly, it also encourages defendants to voluntarily comply with the law.[30] When discrimination is established, there is even a

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27. *Dukes*, 131 S. Ct. at 2553.

28. *Id.* at 2564 (Ginsburg, J., concurring in part and dissenting in part) ("The practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects.").

29. *See* Malveaux, *supra* note 13, at 45–50.

30. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 419–21, 420 n.12 (1975); *see also* 1 NAT'L EMP'T LAWYERS ASS'N, EMPLOYEE RIGHTS LITIGATION: PLEADING AND PRACTICE § 2.10(2)(a)(i) (Janice Goodman & Christopher Bello eds., 2011) ("Back pay is the most common form of monetary relief in Title VII cases. [It is] routinely granted barring extraordinary circumstances."); *id.* ("[T]he denial of back pay to prevailing plaintiffs is a minor exception rather than the rule.").

presumption in favor of back pay, which is essential to enforcement of the law.[31]

Nonetheless, the Court unanimously held that back pay was not appropriate under Rule 23(b)(2) in this case.[32] This is surprising because the decision effectively reversed almost a half century of Title VII jurisprudence permitting back pay under similar circumstances.[33] Courts have regularly allowed back pay for civil rights cases under Rule 23(b)(2) on the grounds that this monetary relief is equitable and critical to Title VII's remedial scheme.[34] Even those appellate courts with the toughest class certification standards have recognized that back pay is consistent with Rule 23(b)(2).[35] Yet, despite this history, the Court found the equitable nature of back pay irrelevant.[36] Instead, the question was whether back pay was nonincidental to the injunctive or declaratory relief sought.[37]

The Court also concluded that Wal-Mart was entitled to have back pay determined individually rather than based on a formula, and that under Title VII the company had a right to raise individual affirmative

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31. *See* 118 CONG. REC. 7168 (1972) (statement of Sen. Harrison Williams) (providing a section-by-section analysis of The Equal Employment Opportunity Act of 1972); *see also* United States v. N. L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973) (describing the compensatory and deterrent functions of back pay).

32. *Dukes*, 131 S. Ct. at 2557.

33. *See, e.g.*, United States v. City of New York, 276 F.R.D. 22, 33 (E.D.N.Y. 2011) ("[*Dukes*] reduced to rubble more than forty years of precedent in the Courts of Appeals, which had long held that back pay is recoverable in employment discrimination class actions certified under Rule 23(b)(2).").

34. *See* 5 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 92.11(1) & n.4 (2d ed. 2012) (citing cases to support the assertion that "the majority of courts have had little difficulty fitting an action for back pay and injunctive relief into Rule 23(b)(2)").

35. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 618–19 n.40 (9th Cir. 2010) (en banc), *rev'd*, 131 S. Ct. 2541 (2011) ("[It] is . . . well accepted, even by circuits that are generally restrictive in certifying classes seeking monetary damages under Rule 23(b)(2), that a request for back pay in a Title VII case is fully compatible with the certification of a Rule 23(b)(2) class."); *see, e.g.*, Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 331 (4th Cir. 2006) ("[W]e do not hold, nor have we ever held, that monetary relief is fundamentally *incompatible* with Rule 23(b)(2)."); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998) (concluding that Rule 23(b)(2) permits monetary relief that is equitable, and "[b]ack pay, of course, had long been recognized as an equitable remedy under Title VII"); Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211, 257 (5th Cir. 1974) (" '[T]he award of back pay, as one element of the equitable remedy, conflicts in no way with the limitations of Rule 23(b)(2).' " (quoting Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir. 1971)); Johnson v. Ga. Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969) ("The demand for back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy, to be determined through the exercise of the court's discretion, and not by a jury.").

36. *Dukes*, 131 S. Ct. at 2560.

37. *Id.* at 2557 (holding that monetary relief may not be certified under Rule 23(b)(2) if such relief is *not* "incidental to the injunctive or declaratory relief"). The Court, however, refrained from prohibiting all forms of incidental monetary relief under its interpretation. *See id.* at 2560.

defenses to each class member's claim following a finding of a pattern or practice of discrimination.[38] According to the Court, it was the individualized—not the monetary—nature of back pay that made it inappropriate for Rule 23(b)(2) certification. Once the Court concluded that back pay had to be calculated individually, it was not a stretch for the Court to find that back pay was nonincidental and therefore inappropriate for Rule 23(b)(2) certification.[39]

C. *Rule 23(b)(3) Is Not a Great Solution*

This shift in Title VII jurisprudence is significant because employees will have greater difficulty in bringing their monetary claims under the alternative class action rule—Rule 23(b)(3). Civil rights plaintiffs have historically challenged systemic discrimination under Rule 23(b)(2), in part because of the more onerous burdens and costs associated with (b)(3).

Rule 23(b)(3) certification is available if common issues predominate over individual ones and a class action is a superior mechanism for resolving the dispute.[40] Not surprisingly, if a court decides that monetary relief has to be calculated on an individualized basis, the court is more likely to conclude that individual issues predominate over common ones, thereby foreclosing Rule 23(b)(3) certification.

Additionally, Rule 23 also requires that (b)(3) class members receive notice of the litigation and the right to opt out.[41] Thus, even when plaintiffs may be able to clear the (b)(3) certification hurdle, the cost of sending out class notices, which can reach hundreds of thousands of dollars, may be prohibitive. This means that some employees alleging systemic discrimination may not be able to successfully bring a class action at all.

IV. THE IMPACT OF *DUKES*

So what is the impact of *Dukes*? Is it a sea change or merely a clarification of the law? Is this a catastrophic blow for the plaintiffs or just another change to which plaintiffs' counsel will simply adjust? The truth is that it is too soon to know. It would be tempting henceforth to attribute every class decertification or class certification denial to *Dukes*. However, we need to ask ourselves whether *Dukes* is

38. *Id.* at 2560–61.
39. *Id.* at 2561.
40. FED. R. CIV. P. 23(b)(3).
41. FED. R. CIV. P. 23(c)(2)(B).

being cited because it is a change in the law or because it is simply the latest Supreme Court statement on class certification. It is not as if employment discrimination cases were easy to certify before now. So what impact might *Dukes* have?

A. The Impact of the Commonality Ruling

The implications of this close, highly controversial portion of the *Dukes* opinion are varied. On the one hand, the Court's ruling may have little impact on employment discrimination class actions given the size and scope of the *Dukes* class. Classes the size of *Dukes* are rare and, as a result, the *Dukes* decision was very fact specific. With 1.5 million potential class members challenging discrimination nationwide, this case unquestionably tested the outer bounds of what it takes to hold a class together. Smaller classes are bound to be more successful, for both Title VII and other cases.

Plaintiffs' counsel are already adapting by bringing smaller cases that are geographically limited to create a tighter connection between the decision makers and the alleged discrimination. However, the smaller sample size will be less likely to yield empirical data that is statistically significant, which creates litigation challenges for plaintiffs.

Other ways that plaintiffs' counsel can adjust, and are adjusting, to the *Dukes* commonality standard include seeking issue certification under Rule 23(c)(4),[42] creating subclasses,[43] defining the class more

42. FED. R. CIV. P. 23(c)(4) ("When appropriate, an action may be brought or maintained as a class action with respect to particular issues."); *see, e.g.*, McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 491–92 (7th Cir. 2012) (certifying a Rule 23(c)(4) class on the issue of whether Merrill Lynch's employment policies had a disparate impact on African-American employees); United States v. City of New York, 276 F.R.D. 22, 34 (E.D.N.Y. 2011) ("Issue certification of bifurcated liability-phase questions is fully consistent with *Wal-Mart*'s careful attention to the distinct procedural protections attending (b)(2) and (b)(3) classes.").

43. FED. R. CIV. P. 23(c)(5) ("When appropriate, a class may be divided into subclasses that are each treated as a class under this rule."); *see, e.g.*, Calloway v. Caraco Pharm. Lab., Ltd., No. 2:11-cv-15465, 2012 WL 3568800, at *1, *4 (E.D. Mich. Aug. 17, 2012) (certifying two subclasses of pharmaceutical employees who alleged that they were laid off without receiving proper notice); Ugas v. H & R Block Enters., LLC, No. CV 09-6510-CAS, 2011 WL 3439219, at *7–12 (C.D. Cal. Aug. 4, 2011) (certifying two subclasses of tax professionals who alleged that they were not paid overtime and did not receive meal breaks in violation of the Fair Labor Standards Act).

narrowly,[44] distinguishing *Dukes*,[45] and filing class actions in state court.[46]

On the other hand, the Court's ruling may have a big impact in other ways. For example, *Dukes* may cut short a number of employment discrimination class actions premised on the theory of excessive subjectivity as a discriminatory policy. Although *Dukes* seems extraordinary because of its size, it is not extraordinary when it comes to the plaintiffs' underlying theory of liability—the vehicle for discrimination is a policy of excessive subjectivity. In this way, *Dukes* is the norm rather than the exception. This means that the ruling has the potential to impact many cases premised on the same theory, including those outside of the Title VII context. Cases brought under the Equal Credit Opportunity Act,[47] the Fair Housing Act,[48] and § 1981[49] that challenged lenders' discretionary pricing policies as discriminatory have already suffered this fate.[50]

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44. *See, e.g.*, *In re* Rodriguez, 695 F.3d 360, 362–63 (5th Cir. 2012) (affirming the bankruptcy court's grant of certification for plaintiffs' redefined class). Additionally, following *Dukes*, the plaintiffs narrowed their class definition to female employees in the California area. The United States District Court in the Northern District of California rejected Wal-Mart's motion to dismiss and stated that it would later consider the motion for certification. *See* Dukes v. Wal-Mart Stores, Inc., No. C 01–02252 CRB, 2012 WL 4329009, at *2, *10 (N.D. Cal. Sept. 21, 2012). Similar regional actions have been filed in Texas, Plaintiffs' First Amended Complaint, Odle v. Wal-Mart Stores, Inc., 3:11-CV-02954-O (N.D. Tex. filed Jan. 19, 2012), Florida, Class Action Complaint and Demand for Jury Trial, Love v. Wal-Mart Stores, Inc., 9:12-CV-81084-XXXX (S.D. Fla. filed Oct. 4, 2012), and Tennessee, Class Action Complaint, Phipps v. Wal-Mart Stores, Inc., No. 3:12-CV-01009 (M.D. Tenn. filed Oct. 2, 2012).

45. *See, e.g.*, Connor B. v. Patrick, 278 F.R.D. 30, 31–33 (D. Mass. 2011) (denying defendant's motion to decertify a class of 8,500 children in custody of the Massachusetts Department of Children and Families alleging constitutional violations, and noting that the *Dukes* decision "did not change the law for all class action certifications"); Gray v. Golden Gate Nat'l Recreation Area, 279 F.R.D. 501, 518–19 (N.D. Cal. 2011) (certifying a 23(b)(2) class of disabled citizens seeking an injunction under the Rehabilitation Act, 29 U.S.C. § 701, and stating that "[t]hough the Supreme Court did not expressly limit its holding in [*Dukes*] to Title VII employment discrimination cases, Plaintiffs' arguments [that the decision should not apply to injunctive actions under the Rehabilitation Act] are generally persuasive"); Churchill v. Cigna Corp., No. 10-6911, 2011 WL 3563489, at *1–4 (E.D. Pa. Aug. 12, 2011) (granting certification of a portion of a class of insurance policyholders who were denied coverage for autism treatment, distinguishing the facts of the case from *Dukes*, noting Cigna had a clear nationwide policy to deny certain autism treatments, and thus finding the *Dukes* holding "inapposite" in the present case).

46. *See, e.g.*, Jackson v. Unocal Corp., 262 P.3d 874, 890 (Colo. 2011) (certifying two classes of plaintiffs alleging harm from release of asbestos during pipeline removal); Desselle v. Acadian Ambulance Serv., Inc., 83 So. 3d 1243, 1245 (La. Ct. App. 2012) (granting certification of a class asserting that a health care provider "impermissibly demanded and/or collected sums in excess of the discounted rates negotiated with the plaintiffs' health insurance providers").

47. 15 U.S.C. §§ 1691–1691f (2006).

48. 42 U.S.C. §§ 3601–3619 (2006).

49. 42 U.S.C. § 1981 (2006).

50. *See, e.g.*, *In re* Countrywide Fin. Mortg. Lending Practices Litig., No. 08-MD-1974, 2011 WL 4862174, at *1–4 (W.D. Ky. Oct. 13, 2011) (denying certification of a putative class of plain-

Another significant impact that will likely play out is more discovery at the class certification stage. The Supreme Court confirmed the importance of a rigorous analysis, including resolving merits questions that overlap with class certification issues.[51] But the extent to which merits should be considered and the amount of proof necessary at class certification stage is still being debated. For example, courts disagree over the propriety of subjecting experts to the *Daubert* test[52] and of using a preponderance of the evidence standard at class certification.[53] More inquiry into the merits of a case means more expensive and time-consuming discovery at the class certification stage.

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tiffs alleging that Countrywide violated the antidiscriminatory lending provisions of the Equal Credit Opportunity Act, the Fair Housing Act, and the Civil Rights Act because the plaintiffs failed to show that defendant's discretionary policy of allowing brokers to exercise autonomy to form "teams" to sign up new clients and share and service existing clients amounted to a common method of discrimination); Rodriguez v. Nat'l City Bank, 277 F.R.D. 148, 155 (E.D. Pa. 2011) (denying class certification in a case alleging violations of the Fair Housing Act and Equal Credit Opportunity Act and explaining that "[p]laintiffs would likely have to show the disparate impact and analysis for each loan officer or at a minimum each group of loan officers working for a specific supervisor" (citing Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2554 (2011))); *In re* Wells Fargo Residential Mortg. Lending Discrimination Litig., No. 08-MD-01930, 2011 WL 3903117, at *1–5 (N.D. Cal. Sept. 6, 2011) (denying certification of a putative class alleging that Wells Fargo's discretionary pricing program violated the Fair Housing Act and the Equal Credit Opportunity Act because plaintiffs did not establish that the discretionary pricing program amounted to a common mode of discrimination as required by *Dukes*).

51. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551–53 (2011) (citing Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147 (1982)).

52. *See* Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 597 (1993) (holding that for expert testimony to be admissible, the trial judge must determine "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand"); *see also* Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 812–14 (7th Cir. 2012) (holding that a district court must apply a full *Daubert* analysis at the class certification stage if the expert testimony is "critical" to certification); *In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 614 (8th Cir. 2011) ("We concluded that the district court did not err by conducting a focused *Daubert* analysis which scrutinized the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence."); Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011) (requiring a full *Daubert* analysis at class certification stage and additionally requiring the trial judge to determine the "persuasiveness" of the expert's testimony); Behrend v. Comcast Corp., 655 F.3d 182, 204 n.13 (3d Cir. 2011) (recognizing the need "to evaluate whether an expert is presenting a model which could evolve to become admissible evidence," but not requiring a full *Daubert* analysis); Franklin v. Gov't Emps. Ins. Co., No. C10-5183BHS, 2011 WL 5166458, at *4 (W.D. Wash. Oct. 31, 2011) (expressing doubt that the plaintiff's evidence had met the *Daubert* standard in a motion for class certification, but excluding plaintiffs' expert testimony because it had "no bearing on the elements of [his] cause of action under Washington law").

53. *Compare In re* Am. Int'l. Grp., Inc. Sec. Litig., 689 F.3d 229, 238 (2d Cir. 2012) (citing Myers v. Hertz Corp., 624 F.3d 537, 547 (2d Cir. 2010)) (requiring the party seeking certification to establish the Rule 23 requirements by a preponderance of the evidence), *and In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008) ("Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence."), *with* CE Design Ltd. v. Cy's Crabhouse N., Inc., 259 F.R.D. 135, 140 (N.D. Ill. 2009) (citing Szabo v. Bridgeport

B. The Impact of the Back Pay Ruling

The implications of this unanimous portion of the *Dukes* opinion are mixed. The Supreme Court may have made class certification harder for employees seeking monetary relief under Rule 23(b)(2), but it did not eliminate Title VII class actions altogether.

The Court's ruling will make it more difficult for employees alleging systemic misconduct under Title VII to seek back pay and other types of monetary relief. This is because it is now harder for plaintiffs to use Rule 23(b)(2)—the federal class action rule that was designed to stop systemic discrimination—if they are also seeking monetary relief (including back pay). Therefore, it is unlikely that classes seeking back pay can be certified under (b)(2), but monetary relief that is "indivisible"—like statutory damages—probably could.

Because of this more difficult certification standard, employees may decide to pursue various alternatives, including only injunctive and declaratory relief under Rule 23(b)(2); injunctive and declaratory relief under Rule 23(b)(2), and monetary relief under Rule 23(b)(3) (a hybrid); or all relief under Rule 23(b)(3). The most drastic alternative would be foregoing class relief altogether.

These alternatives raise their own set of problems. First of all, money matters. Deciding not to pursue monetary relief altogether because it is too difficult compromises law enforcement. Back pay not only makes victims of discrimination "whole," but it also encourages voluntary compliance with the law. Second, using Rule 23(b)(3) brings its own challenges, as discussed previously. Rule 23(b)(3) is useful in that it requires that class members be provided notice of the litigation and the right to opt out of a class whose cohesion is admittedly compromised by varied monetary interests, thereby addressing any due process concerns. But requiring proof of common issues and payment for notice may foreclose aggregate litigation altogether.[54] These outcomes increase the risk of underenforcement.

Given that the *Dukes* ruling on back pay was anchored in Title VII, however, it may have a limited impact on cases brought in other substantive areas and under different statutes. For example, many courts are rejecting the notion that there must be individualized back pay

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Machs., Inc., 249 F.3d 672, 675–76 (7th Cir. 2001)) (rejecting defendant's argument that plaintiffs must establish every element of Rule 23 by a preponderance of the evidence).

54. *See* John C. Coffee, Jr., *"You Just Can't Get There from Here": A Primer on* Wal-Mart v. Dukes, 80 U.S. L. Wk. 93 (2011) ("In all circuits, the predominance standard has long been the Grim Reaper of putative class actions, and the sprawling character of the [*Dukes*] class . . . doomed it from the start—if the predominance standard applied.").

determinations in collective actions brought under the Fair Labor Standards Act.[55]

V. CONCLUSION

We know that the *Dukes* decision has redefined the class certification requirements for Title VII cases in ways that may jeopardize potentially meritorious challenges to systemic employment discrimination. Although the ultimate scope and magnitude of the decision's impact is unclear, it is apparent that everyday workers like Betty Dukes will have a higher hurdle to clear to obtain access to justice.

What does the *Dukes* decision mean in a broader context? The Supreme Court's treatment of class actions has not been uniform. On the one hand, class actions have taken a hit; *Dukes* is a case in point. Another example is *AT&T Mobility LLC v. Concepcion*, which makes it easier for corporations to eradicate class actions by inserting class action bans in their arbitration agreements.[56]

On the other hand, class action plaintiffs have enjoyed success. For example, in *Erica P. John Fund, Inc. v. Halliburton Co.*, the Supreme Court held that the Fifth Circuit was wrong to require securities fraud plaintiffs to prove "loss causation" at the class certification stage to meet the predominance requirement under Rule 23(b)(3).[57] In addition, in *Smith v. Bayer Corp.*, the Supreme Court unanimously held that putative class members may get another bite at the apple in state court if a federal court denies class certification first.[58] So the jury is

55. 29 U.S.C. § 201 (2006); *see* Gilmer v. Alameda-Contra Costa Transit Dist., No. C 08-05186 CW, 2011 WL 5242977, at *7–8 (N.D. Cal. Nov. 2, 2011) (denying defendant's motion to decertify a conditional class of employees alleging a violation of the Fair Labor Standards Act on the grounds that the employer was not entitled to an individualized determination of each employee's claim for back pay, and noting that *Dukes* "does not stand for the proposition that an employer is entitled to an individualized determination of an employee's claim for back pay in all instances in which a claim is brought as a collective or class action"); Faust v. Comcast Cable Commc'ns Mgmt., LLC, No WMN-10-2336, 2011 WL 5244421, at *1 n.1 (D. Md. Nov. 1, 2011) (conditionally certifying a class of employees alleging Fair Labor Standards Act violations, and noting that because *Dukes* was a Title VII case, it did not control cases brought under the Fair Labor Standards Act); Troy v. Kehe Food Distribs., Inc., 276 F.R.D. 642, 657 (W.D. Wash. 2011) ("*Dukes* does not . . . prevent plaintiffs from seeking certification of a Rule 23(b)(3) class—as opposed to a Rule 23(b)(2) class—where the amount of damages for each class member may depend on an individualized analysis.").

56. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (holding that predispute arbitration clauses prohibiting class actions were enforceable under the Federal Arbitration Act, 9 U.S.C. § 2).

57. Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179, 2186 (2011).

58. Smith v. Bayer Corp., 131 S. Ct. 2368 (2011).

still out on class actions, and this is just one part of an even broader picture.

The class action rulings take place in a larger context that indicates that plaintiffs in general are facing greater challenges bringing civil rights suits because of procedural hurdles in the civil litigation system. For example, claimants now have a more difficult time gaining access to the federal courts, as the criteria for a complaint to survive dismissal are more strenuous after *Twombly* and *Iqbal*.[59] The Court has continued the trend of consistently deferring to the enforcement of arbitration agreements, which force many individuals to rely on a private arbitrator to resolve their disputes without a variety of important court procedural protections. Moreover, we see more summary judgment dispositions and fewer cases ever making it to a jury trial.

So why should we care about this? Class actions are just one example of the power and promise of procedure. Procedure requires us to balance competing interests like justice with efficiency (as stated in the very first rule of civil procedure) and to defend fundamental values such as due process. But most importantly, procedure is a vehicle that empowers people, and gives them the courage to fight injustices, if only we let them.

59. *See* Malveaux, *supra* note 13, at 623–31 (explaining that civil rights plaintiffs are particularly disadvantaged by the *Twombly* and *Iqbal* decisions because, without the opportunity to conduct discovery, plaintiffs may lack sufficient facts to make a "plausible" case that they suffered discrimination and, additionally, that the plausibility standard is overly subjective and unpredictable because its determination relies on an individual judge's "experience and common sense").