THE LITTLER REPORT

DUKES v. WAL-MART:
Some Closed Doors and Open Issues

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IMPORTANT NOTICE

This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation will find the information extremely useful in understanding the issues raised and their legal context. The Littler Report is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute.

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Dukes v. Wal-Mart: Some Closed Doors and Open Issues

I. INTRODUCTION

The U.S. Supreme Court's opinion in *Wal-Mart Stores, Inc. v. Dukes*[1] is likely to change the class action landscape for the foreseeable future. *Dukes* has, of course, clarified the standard for determining commonality in class actions and narrowed the circumstances in which Federal Rule of Civil Procedure 23(b)(2) class actions may include claims for back pay. Of equal significance, *Dukes* has resolved a number of important issues that have plagued employment class actions generally. This Littler Report discusses two of those significant issues, which may provide a sounder analytical framework for determining whether employment cases should proceed on a class or collective action basis: (1) the significance of individual evidence at the certification and liability stages as well as at the damages stage; and (2) the problem with representative testimony and "Trial by Formula."

While *Dukes* resolved many issues for employers facing class actions, it has not, as some predicted, meant the end of the road for employment class actions. Discrimination class actions cases are still being filed and, as discussed below, social science testimony may still continue to be part of those cases.

Collective actions under the Fair Labor Standards Act (FLSA)[2] also continue to be filed — in droves. In fact, more than 90% of the employment class actions filed in recent years have been FLSA collective actions, and this trend appears to be continuing unabated. However, as discussed in this Report, there are strong legal and policy arguments that the principles underlying *Dukes* are equally applicable to collective actions under the FLSA.

Finally, some of the post-*Dukes* decisions that reflect the impact the Supreme Court's decision has had on employment class and collective actions are highlighted.

II. A NEW ANALYTICAL FRAMEWORK FOR CLASS ACTIONS

A. Individual Evidence Is Relevant to Certification and Liability as Well as Damages

In *Dukes* and many other employment class and collective actions, the central issue is whether an employment policy or practice that is lawful on its face is unlawful as applied by a particular employer. For example, the central claim in *Dukes* was that a company practice that permitted subjective decision-making by managers resulted in discrimination against female employees at all levels because managers exercised their discretion within a company-wide culture of gender bias. Subjective decision-making is not unlawful per se, but the claim in *Dukes* was that this discretion was applied discriminatorily and had an unlawful discriminatory effect on female employees. In response, Wal-Mart denied such a culture existed at the company, emphasized its policies expressly prohibiting discrimination, and, most pertinent to class certification, contended that whether subjective decision-making exercised by individual managers was discriminatory must be determined individually and was not susceptible to common proof.

This contrasts with typical cases outside of the realm of employment law in which the lawfulness of the matter at issue in the case, such as an allegedly unlawful statement in a securities prospectus, or a product defect, can be determined without regard to the impact on the individual class members. In such cases, individual issues may arise with respect to damages, but they figure far less prominently in determining liability.

1 131 S. Ct. 2541 (2011).

2 29 U.S.C. § 216(b).

In *Dukes*-type cases, however, where the policy or practice at issue is presumptively lawful, and the issue is its potentially unlawful application, plaintiffs must establish that discrimination in fact is the rule, not the exception. To accomplish this, plaintiffs generally offer formal statistical analyses of promotion, pay, or hiring data extracted from an employer's electronic database. The value of any statistical analysis, however, depends, in part, upon the comprehensiveness and quality of the data on which it is based. Many important qualities that may distinguish one employee from another, such as problem-solving ability, initiative, ability to get along with others, and integrity, rarely, if ever, appear in an employer's database. To get at these qualities, which may rebut the purely quantitative statistical data and determine whether the policy at issue was in fact discriminatory, requires individualized evidence and proof.

Depriving a defendant of the opportunity to present such evidence raises due process concerns at the liability stage as well as the damages stage. As the dissent stated in the Ninth Circuit's original panel opinion in *Dukes*:

> [T]he district court's management plan for this class action violates Wal-Mart's constitutional rights to due process and jury trial. The district court order establishes a first phase of the case in which a jury will determine liability (including liability for punitive damages and an injunction) on a class-wide basis, without adjudicating the merits of any class member's claim. Then in a second phase, a "special master" will determine Wal-Mart's total front and back pay for the women discriminated against on the basis of some unspecified generally applicable formula. Both phases of this plan are constitutionally defective because they are inadequately individualized.... Wal-Mart will never get a chance, for example, to prove to a jury that Dukes [one of the named plaintiffs] was tried as a manager and did not perform well, or that Arana [another named plaintiff] did indeed steal time or at least that after a good faith investigation Wal-Mart fired her for that nonpretextual reason. Under both the Seventh Amendment and the statute applicable to punitive damages in Title VII cases, Wal-Mart is entitled to trial by jury of these issues.[3]

The Supreme Court recognized this problem and the need to consider the merits of a case in determining commonality:

> [T]he crux of the inquiry is "the reason for a particular employment decision...." Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*.[4]

Implicit in the Supreme Court's analysis is the concept that individualized evidence regarding the treatment of employees is not merely relevant to damages, but is integral to proving liability. Harking back to its prior landmark decision in *General Telephone Co. of Southwest v. Falcon*,[5] the Court emphasized the wide gap between an individual claim of discrimination and "the existence of a class of *persons who have suffered the same injury*."[6] To determine whether there is a class of such individuals, there must be "significant proof that an employer operated under a general policy of discrimination."[7] Applying this analytical framework, the Court rejected the evidence presented by the plaintiffs in *Dukes* because they failed to establish the existence of a class of individuals who suffered the same injury.

Using regression analysis, plaintiffs' statistical expert concluded that "there are statistically significant disparities between men and women at Wal-Mart ... [and] these disparities ... can be explained only by gender discrimination."[8] The Court found a fundamental flaw in this conclusion: Even if the statistical evidence showed such disparities existed (which the Court concluded it did not), the decisions that allegedly caused the disparities could be explained, by managers' testimony and other evidence, as the result of gender-neutral, performance-based criteria. Thus, the Court indicated, individualized inquiry is required to determine whether the alleged gender disparities were the result of multiple completely lawful factors that differed from store to store, or the result of facially-neutral policies that had a discriminatory impact or resulted in discriminatory treatment of an entire class of female employees.

3 *Dukes v. Wal-Mart Stores, Inc.*, 509 F.3d 1168 (9th Cir. 2007).

4 *Dukes*, 131 S. Ct. at 2552 (emphasis in original).

5 457 U.S. 147 (1982).

6 *Dukes*, 131 S. Ct. at 2545 (quoting *Falcon*, 457 U.S. at 157-58) (emphasis added).

7 *Id*.

8 *Id*. at 2555.

The Court found plaintiffs' anecdotal evidence suffered from the same defects. Plaintiffs submitted 120 affidavits — about 1 for every 12,500 class members the court noted — relating to only 235 of Wal-Mart's 3,400 stores, more than half of which were from individuals in only six states. "Even if every single one of these accounts is true," the Court stated, "that would not demonstrate that the entire company 'operate[s] under a general policy of discrimination,' which is what respondents must show to certify a company-wide class."[9]

Similarly, the Court rejected the "social framework" testimony of plaintiffs' sociological expert because he could not "determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart."[10] Significantly, the court emphasized that "he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking."[11] Again, individualized evidence of actual discriminatory employment decisions would be required to establish a common practice for purposes of class certification.

Extrapolating from the Court's view of the evidence it rejected, it is clear that as early as the certification stage, *Dukes* requires individualized evidence to establish an unlawful pattern or practice. The Supreme Court and federal courts following its directives have consistently stated that the essential purpose of a class action is to promote judicial economy and efficiency in providing aggrieved persons a remedy, without sacrificing procedural fairness.[12] It would turn *Dukes* on its head, and undermine the basic premise of class action litigation, to allow a class to be certified only to find out at the end of the case, at the damages stage, that just a few individuals out of the entire class actually suffered injury.

B. The Problem with Representative Testimony and Trial by Formula

A corollary to the significance of individualized evidence at the class certification stage is the limited value of representative testimony in certain types of cases. Although *Dukes* may represent the extreme in terms of the large size of the potential class and the small percentage of potential class members who provided individual affidavits describing their experience, relying on representative testimony is questionable in all but the smallest cases when the policy or practice at issue is implicit rather than explicit. For example, if the challenged policy concerns the use of an allegedly discriminatory test that is widely applied, relatively few plaintiffs may suffice to articulate the factual predicates regarding a disparate impact claim. On the other hand, if the existence of a discriminatory policy must be inferred solely from the decisions that allegedly result from that implicit policy or practice, then the evidence required to prove class claims is vastly greater.

By definition, anecdotal evidence consists of a smattering of testimony specifically selected to support the statistical analyses presented by the parties. Because anecdotal witnesses are not randomly selected, their testimony is unlikely to reflect the entire spectrum of employment experiences pertaining to the putative class. In fact, the very purpose of their testimony is to present a single point of view. In any large company it may not be difficult to find a number of disgruntled employees who are more than willing to recount their grievances, and there is likely to be an equal number of employees who will testify about their positive employment experience. The probative value of this so-called representative testimony therefore is negligible. The problem, of course, is that in a large company the working atmosphere and employment experience is likely to vary significantly depending on the employee's work location and supervisor, and the type of work performed. The larger the company, the greater the problem. As the Supreme Court stated, the *Dukes* class members, who "held a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed … [had] little in common but their sex and this lawsuit."[13] Thus, such allegedly "representative" testimony was not representative at all.

Even in smaller potential classes, so-called representative testimony from a small percentage of employees will generally not be truly representative. For example, in *In re Chevron USA, Inc.*,[14] the trial plan required the plaintiff and defendant each to select 15 out of 3,000 plaintiffs for a representative trial. By definition, this plan left out the large majority of employees whose work experiences were likely to

9 *Id.* at 2556 (quoting *Falcon,* 457 U.S. at 159, n.15).

10 *Id.* at 2553.

11 *Id.*

12 *E.g., Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1440 (2010) (Noting that Rule 23 is "designed to further procedural fairness and efficiency"); *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 615 (1997) (The principle purpose of Rule 23 class actions is to promote "efficiency and economy of litigation… without sacrificing procedural fairness or bringing about other undesirable results."); *Mevorah v. Wells Fargo Home Mortg. (In re Wells Fargo Home Mortg.)*, 571 F.3d 953, 958 (9th Cir. 2009) (citing and quoting *Amchem* for the same principles).

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

14 109 F.3d 1016, 1017 (5th Cir. 1997).

fall somewhere in the middle between the experiences of those selected by the plaintiffs and defendant to present their positions. The work experiences of the majority of class members cannot fairly be extrapolated from the testimony of representatives from opposite ends of the spectrum any more than the shape of an elephant can be extrapolated from its trunk and tail. Accordingly, unless a case management plan, considered at the certification stage, can accommodate enough individual evidence to inform the jury of the entire contour of the class's treatment, how can the case be appropriate for class treatment? These fundamental issues lay at the heart of the *Dukes* case and the Supreme Court's decision.

The Court's rejection of a "Trial by Formula" and the trial plan followed in *Hilao v. Estate of Marcos*,[15] which the Ninth Circuit endorsed in its *en banc* decision,[16] reflects similar concerns. *Hilao* was a class action brought against former Philippine President Ferdinand Marcos, under the Alien Tort Claims Act, by victims of his alleged human rights abuses.[17] The district court in *Hilao* trifurcated the trial proceedings. First, the jury decided that the Marcos estate was liable to the class and 22 named plaintiffs. Second, the court informed class members of the proceedings and gave them an opportunity to opt in. More than 10,000 opt-in forms were returned. Third, the original jury reconvened and decided appropriate, global compensatory and exemplary awards.[18]

In *Hilao*, a special master initially supervised the compensatory damages proceedings. Relying on expert testimony, the special master determined that the "invalid claim rate"—the percentage of those falsely claiming to be victims—among the opt-ins could be determined by statistical sampling. He concluded that a random sample of 137 class members would suffice to determine the invalid claim rate for the entire class, within an acceptable margin of error. The plaintiffs deposed the 137 class members in the Philippines, in the presence of the special master. Based upon these depositions, the special master concluded that six of the 137 claims were invalid. The special master testified to his findings before the jury that was deciding compensatory damages. The district court instructed the jury that it could accept, modify, or reject these findings, and that it could reach its own independent determination of the invalid claim rate. In fact, the jury determined that just two of the 137 claims sampled were invalid. The trial court then awarded actual damages to the 135 class members the jury found had valid claims, and awarded nothing to the two whose claims the jury found to be invalid. The rest of the class members were then awarded pro-rata shares of the aggregate award determined by the special master.

The Ninth Circuit's *en banc* decision suggested that the same approach could be applied in *Dukes*:

> Because we see no reason why a similar procedure to that used in *Hilao* could not be employed in this case, we conclude that there exists at least one method of managing this large class action that, albeit somewhat imperfect, nonetheless protects the due process rights of all parties involved.[19]

In a lengthy dissent, Judge Ikuta strongly criticized this approach. She pointed out that "[u]nder Title VII, Wal-Mart has the right to raise affirmative defenses as to *each* class member's claim. This means the court must allow up to 1.5 million individual determinations of liability. On its face, a class action of this sort makes no sense." Significantly, Judge Ikuta made clear that her concern was with the liability aspect of class actions, explaining that "the second stage of individualized hearings is not remedial, but rather a second phase of liability, in which the employer is entitled to raise individual statutory defenses."[20]

In its decision, the Supreme Court also rejected the *Hilao* concept of Trial by Formula, and the use of sampling to determine liability for discrimination and back pay. The Rules Enabling Act, the Court held, prohibited an interpretation of Rule 23 that would abridge or modify any substantive right. Thus, the court concluded, "a class cannot be certified on the premise that the defendant will not be entitled to litigate its statutory defenses to individual claims."[21]

15 103 F.3d 767 (9th Cir. 1996).

16 *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 625-26 (9th Cir. 2010).

17 28 U.S.C. §1350.

18 *Hilao*, 103 F.3d at 782-84.

19 *Dukes*, 603 F.3d at 627.

20 *Id*. at 643, n.20.

21 *Dukes*, 131 S. Ct. at 2561

III. SOME OPEN ISSUES

There is no question that the Supreme Court's decision will deter certification of employment discrimination class action lawsuits. The Court seems to have generally resolved the concerns of employers, perhaps best expressed by the dissent in the Ninth Circuit's *en banc* opinion, that:

> [p]ut simply, the door is open to Title VII lawsuits targeting national and international companies, regardless of size and diversity, based on nothing more than general and conclusory allegations, a handful of anecdotes, and statistical disparities that bear little relation to the alleged discriminatory decisions.[22]

While encouraging, employers still should be mindful of creative attempts by the plaintiffs' bar to bring themselves within the Supreme Court's decision. For instance, the Supreme Court left open the possibility of plaintiffs bringing a class action based on biased testing procedures or other specific, universally-applied employment practices.

Further, while the Supreme Court rejected the evidence offered by the plaintiffs' social science expert based on his inability to identify the actual frequency of stereotyped decision-making at Wal-Mart, the question remains: Could future plaintiffs get around the *Dukes* decision by offering a social scientist's (possibly invalid) opinion that stereotyped decision-making occurs in a certain percentage (e.g., more than half) of employment decisions made throughout a company?

There also remains the question of the applicability of the principles underlying *Dukes* to FLSA collective actions, which now dominate the field of aggregate employment litigation. In sum, while the landscape has been altered, it has not been destroyed.

A. *Dukes'* Potential Impact on Social Science Evidence in Future Litigation[23]

Prior to *Dukes*, social science experts played a key role in supplying evidence of commonality. Social science experts, such as Dr. William Bielby who testified in *Dukes*, reviewed a company's practices and then testified that these practices permitted bias to enter the decision-making process. Such testimony frequently was accepted by courts and viewed as the glue holding the class theory together, establishing a pattern and practice of discrimination. With the Supreme Court's rejection of Dr. Bielby's testimony in the *Dukes* case, plaintiffs can no longer rely on general and vague claims about the operation of bias and its likely presence within some unspecified portion of a company's personnel decisions. They must now come forward with significant and specific proof that discrimination on the basis of race, sex, age, or some other impermissible ground was the company's standard operating procedure.

To meet this new challenge, two changes in plaintiff strategies are likely. First, plaintiffs' experts likely will seek to rely more heavily on implicit bias research as a foundation for their opinions. Implicit bias theorists believe that most people have an implicit, unconscious bias against minorities and others who are not like themselves. They rely on research regarding responses to questions and situations that they believe provide evidence of such widespread implicit biases. Plaintiffs' experts may invoke this body of research and then argue that it establishes that every company has a high percentage of biased managers who, as a result of their bias, engage in numerous subtle acts of discrimination against women or minorities. Based on this theory, when pressed to pick a percentage of personnel decisions affected by bias, these experts are likely to pick a high percentage.

In fact, one of the primary implicit bias researchers, Dr. Anthony Greenwald, has already offered testimony of this kind in a race discrimination class action filed in an Iowa state court against all Iowa executive agencies. Dr. Greenwald first described general research involving the Implicit Association Test (IAT) aimed at measuring implicit racial bias and then sought to connect that research to the case at hand.

> The Race IAT has been described as measuring "automatic preference" for White vs. African American. In completing the measure, respondents are asked, for one of two rapid response tasks, to press the same computer key in response to (a) words with pleasant meaning and (b) images of African American faces. More than 75% of the several million Americans who have taken this test on the Internet have

22 *Dukes*, 603 F.3d at 652.

23 This section of the Report draws heavily on King, Klein, and Mitchell, "*The Effective Use and Presentation of Social Science Evidence*," Employee Relations Law J. (forthcoming).

> discovered that they respond noticeably more slowly to that task than to the task with which this is contrasted — one that requires pressing the same computer key in response to (a) words with pleasant meaning and (b) images of European American (*i.e.*, White) faces.
>
> The 75% figure just mentioned is an approximation of the proportion of Americans who are implicitly race-biased. This large proportion was a surprise to the researchers who first discovered it in 1998. The large proportion suggested that (implicit) race biases were considerably more pervasive in American society than most scientists had previously suspected.
>
> It might be of little concern that a large proportion of Americans reveal implicit race bias on the IAT, if there were no evidence that this IAT measure had a relation to discriminatory behavior. However, as noted previously, in peer-reviewed research studies, the IAT race attitude measure has consistently been found to predict racially discriminatory judgments and actions. Because the percentage of White Americans who possess implicit biases is large (on the order of 75%), it is more likely than not that discrimination resulting from implicit biases is more societally consequential than is discrimination produced by the smaller proportion (on the order of 10%) who are explicitly biased. For workplace administrators who wish to avoid discrimination in their organizations, phenomena of implicit bias pose a severe challenge. Managers must find ways to avoid discrimination that occurs in difficult-to-detect forms …[24]

There are a number of problems with the underlying implicit bias research, and with attempts to link such general research to a specific case.[25] In addition to objections under Federal Rule of Evidence 702 or a state law equivalent, there is a question whether this testimony violates the ban on character evidence by asserting that managers at a particular company or agency are biased, without providing any specific examples of biased conduct. Often courts have admitted such testimony, not because it is based on reliable methodology, but because prior courts had admitted the testimony.[26] When confronted with claims of this sort, defendants need to present a vigorous challenge because the mere fact that an expert's testimony was admitted in a prior case is not a valid reason for admitting similar testimony in a subsequent case.

Second, plaintiffs are likely to ask the court to compel the defendants' managers to submit to implicit bias testing pursuant to Federal Rule of Civil Procedure 35. Indeed, Dr. Greenwald has advised plaintiffs' attorneys to make such requests. This request will be aimed at obtaining case-specific evidence on the percentage of biased managers in a company to respond to the claim that it is inappropriate to infer the level of bias within a company from general social science research conducted with persons outside the company.

Under Federal Rule of Civil Procedure 35, any party whose mental condition is in controversy may be compelled to submit to a mental examination by an expert.[27] But to compel a party to submit to a mental examination, that party's mental state must be "in controversy," and there must be "good cause" for the examination.[28] One party cannot put another party's mental state in controversy,[29] and whether a party's mental state is actually in controversy may be difficult to determine at times. If a defense expert disputes the scientific basis of the plaintiffs' expert's opinion that "implicit bias" was likely at work in a company, does this put the managers' mental state "in controversy"? In such cases, the trial judge must make a discretionary determination whether the "in controversy" and "good cause" requirements have been met.[30]

Even if an issue is deemed to be in controversy and there is good cause to compel an examination, the person to be examined must be a party to the action under Rule 35.[31] Few courts have addressed the question whether agents of a party are covered by Rule 35, but language

24 Expert Report of Anthony G. Greenwald, *Pippen v. State of Iowa*, Case No. CL 107038 (Dist. Ct., Polk County, Iowa 2007).

25 In addition to objections under Federal Rule of Evidence 702 or a state law equivalent, Dr. Greenwald's testimony also presents the question whether this testimony violates the ban on character evidence by asserting that all managers at Iowa agencies have the propensity to exhibit racial bias and engage in discrimination.

26 For example, the decision by the district court in *Dukes* to admit Dr. Bielby's opinions appears to have been positively influenced by the district's prior acceptance of testimony by Dr. Bielby. *See Dukes*, 222 F.R.D. at 192 ("Dr. Bielby's testimony on sex stereotyping also has been admitted in prior cases in this district." (citation omitted)).

27 Fed. R. Civ. P. 35(a)(1).

28 *Id*.

29 *Koch v. Cox*, 489 F.3d 384, 391 (D.C. Cir. 2007).

30 *Schlagenhauf v. Holder*, 379 U.S. 104, 119 (1964).

31 Fed. R. Civ. P. 35(a)(1) ("The court … may order a *party*….") (emphasis added).

in the leading Supreme Court case on Rule 35, *Schlagenhauf v. Holder*, suggests that agents of parties are not covered.[32] However, in *Beach v. Beach*, the D.C. Circuit Court of Appeals ruled that "[o]ne who is not a party in form may be, for various purposes, a party in substance,"[33] and, in *Dinsel v. Pennsylvania Railroad Co*., a federal district court relied on its inherent power to order the examination of an employee of a party.[34] In the only reported case in which an employment plaintiff moved to compel, under Rule 35, the defendant's employees to take the IAT to support her claim, the magistrate judge denied the motion on several grounds, including that the defendant's employees were not parties covered by Rule 35. The district court, in ruling on objections to the magistrate's order, did not specifically address this issue, but ruled instead that the magistrate's ruling should stand because it was not clearly erroneous or contrary to law.[35] While it appears that, so far, only one plaintiff has attempted, without success, to compel employees of a defendant to take the IAT, new attempts are likely to come.

Many experts have gone beyond the type of testimony offered by Dr. Bielby in *Dukes*, that the company was "vulnerable" to gender discrimination, and expressly stated that bias exists at a particular company or that the company's policies have, more likely than not, caused unlawful bias. For example:

From Dr. Barbara Reskin's report for the plaintiffs in *Puffer v. Allstate*:[36]

> The primary causes of the systematic gender disparities at Allstate Protection are its use of discretion in personnel decisions affecting managers at grade 63 and higher and its failure to check the biases that discretion permits—especially ingroup favoritism and sex stereotyping—through a system of monitoring and accountability.

From Dr. Susan Fiske's report for the plaintiffs in *Butler v. Home Depot*:[37]

> (I) Gender stereotyping plays a major role in Home Depot's hiring, placement, and promotion patterns …. Home Depot does not take adequate steps to control these biased individual practices.

From Dr. Eugene Borgida's report in *EEOC v. Bloomberg*:[38]

> In summary, the stereotypes about employees who are mothers and/or pregnant more likely than not influenced the perceptions, evaluations, and decisions about them at Bloomberg. The cultural and organizational context at Bloomberg more likely than not activated the gender stereotype about mothers as less competent and as less agentic and less committed to their careers. Given the subjectivity, discretion, and lack of accountability in the Bloomberg decision making process, stereotypic perceptions more likely than not influenced employment decisions about employees who are mothers and/or pregnant.

From Professor Deborah Rhode's report in *Velez v. Novartis*:[39]

> Taken as a whole, the record demonstrates a corporate culture that has tolerated and condoned pervasive gender bias. Management has been at best indifferent and at worst openly resistant to women's equal employment opportunities.

The basis for each of these opinions was not an empirical study of the company and its managers' decisions or a statistical analysis of company records. It was simply the expert's subjective or intuitive judgment after reading a portion of the discovery materials. In other words, opinions at this level of analysis are often based on the same unreliable, "read the file" method that the Supreme Court criticized in

32 *Schlagenhauf*, 379 U.S. at 115 n.12 ("Although petitioner was an agent of [the defendant], he was himself a party to the action. He is to be distinguished from one who is not a party but is, for example, merely the agent of a party."); *Kropp v. General Dynamics Corp*., 202 F. Supp. 207, 208 (E.D. Mich. 1962) (holding that the court lacked jurisdiction to compel a truck driver, a nonparty and agent of corporate defendant, to submit to a physical examination under Rule 35(a)).

33 114 F.2d 479, 481 (D.C. Cir. 1940).

34 144 F. Supp. 880, 882 (W.D. Pa. 1956).

35 *Palgut v. City of Colorado Springs*, 2008 U.S. Dist. LEXIS 123115, at *12 (D. Colo. July 3, 2008).

36 Case No. 04-05764 (N.D. Ill. 2004).

37 Case No. 94-4335 (N.D. Cal. 1994).

38 Case No. 07-08383 (S.D.N.Y. 2007).

39 Case No. 04-09194 (S.D.N.Y. 2004).

Dukes. As such, the same criticisms that applied to Dr. Bielby's opinion in *Dukes* should apply to these types of opinions, and defendants should challenge them in the same way.

However, not every case-specific descriptive or causal claim is founded on unreliable methods. In some cases, experts utilize social science methods to formulate reliable case-specific opinions. For instance, Professor Gregory Mitchell of the University of Virginia conducted an experiment on the influence of race on personnel decisions using standard social scientific methods and employees of the defendant organization as participants. A sample of managers whose actions were challenged were asked to make hypothetical personnel decisions, which closely resembled those they regularly performed, with implicit racial identifiers, such as names or neighborhood of residence, embedded in the problem.[40] And in a more recent case, Dr. James Outtz, an industrial psychologist, conducted structured reviews of the defendant organizations to provide evidence of whether class certification was appropriate. In *Gutierrez v. Johnson & Johnson*, Dr. Outtz reviewed the personnel policies and practices of various Johnson & Johnson operating companies to determine whether they shared common practices and/or operated in different labor markets.[41]

In employment class actions, another common form of case-specific evidence using social science methodology is evidence based on surveys of employees or putative class members. Such survey evidence may be reliable depending on how the survey is formulated and implemented, but conducting a reliable survey in the midst of litigation requires care. The most obvious concern with surveys is that the on-going litigation will contaminate responses or alter the behavior of those being surveyed.

This problem doomed the EEOC's survey evidence in *EEOC v. Dial Corp*., in which a researcher retained by the EEOC administered a questionnaire to assess whether a hostile work environment existed within the defendant corporation.[42] Potential respondents included a number of plaintiff class members. Survey recipients were notified of the study's purpose, but were told that their responses would be confidential.[43] The defendant moved to exclude the expert's testimony regarding the results of the survey, and the court ruled that, among other problems, apparent bias in the plaintiffs' responses made the questionnaire results unreliable.[44]

One option for avoiding this contamination problem is to conduct the study in such a way as to conceal the fact of the study or at least the study's purpose, and if possible, to have the study administered by persons who are blind to the study's purpose.[45] For instance, e-mail experiments can be conducted where the apparent race, ethnicity, or gender of the correspondent is systematically varied and responses to requests within the e-mails are measured. Or, an experiment can be embedded in an observational study, where the race or sex of an interacting partner is systematically varied and the interactions are recorded unobtrusively to test for disparate treatment. Another option is to conduct the study with similar types of employees who are not involved in the lawsuit. This approach was employed in *Whiteway v. FedEx Kinko's Office and Print Services, Inc.*, a wage-and-hour class action covering center managers employed in California.[46] Because agents of the defendant were not supposed to have contact with class members, an expert for the defendant conducted a study of the exempt and nonexempt duties performed by a sample of branch managers in other western states.[47] This approach may be possible in any large organization where other teams, units, or branches performing similar functions can be observed or assigned to different conditions of a study.[48]

There are a number of other questions raised whenever a party seeks to introduce survey evidence. Some of these questions may be addressed by a case currently pending before the California Supreme Court— *Brinker Restaurant Corp. v. Superior Court*. In that case, the plaintiff proposed to survey class members to prove violations of meal, break, and off-the-clock requirements, without survey respondents/class members being subject to individualized hearings or cross-examination. The use of survey evidence appears to be increasing in

40 Report of Gregory Mitchell, Ph.D., *Bridgewater v. Northrop Grumman Ship Systems, Inc.*, Case No. 1:06-cv-769HSO (S.D. Miss. 2006).

41 Report of Dr. James Outtz, *Gutierrez v. Johnson & Johnson*, Case No. 01-cv-5302 (D.N.J. 2001). For the court's opinion denying class certification, in part on grounds that the companies were occupationally diverse and not following common practices, *see Gutierrez v. Johnson & Johnson*, 269 F.R.D. 430 (D.N.J. 2010).

42 No. CIV.A. 99-C-3356, 2002 WL 31061088, at **1–3 (N.D. Ill. Sept. 17, 2002).

43 *Id*. at **4-5.

44 *Id*. at *9 ("[T]he inclusion of a large number of class members in the survey appears to have strongly influenced the overall results, which further supports the defendant's position that the survey data do not reliably reflect the views or experiences of the overall population of relevant employees.").

45 *See, e.g., Vita-Mix Corp. v. Basic Holding, Inc.*, 581 F.3d 1317, 1325 (Fed. Cir. 2009) (double-blind study of product users in patent infringement case); *Marlo v. UPS, Inc.*, No. CV 03-04336 DDP (RZX), 2005 WL 6197774, at *10 (C.D. Cal. Mar. 1, 2005) (double-blind survey of employees regarding their duties in wage-and-hour case).

46 2007 U.S. Dist. LEXIS 61239 (N.D. Cal. Aug. 21, 2007), *rev'd*, 319 F. App'x 688 (9th Cir. 2009).

47 *Id*. at **24 -27. The plaintiff challenged the study on grounds that it did not examine the activities of the actual class members, but the court rejected this challenge: "FedEx argues, and Whiteway does not effectively rebut, that there is no operational/functional difference between the centers in California and the centers in other western states surveyed." *Id*. at *26.

48 *See, e.g., id*. at *9 ("[T]here remains no evidence[] that … the job duties/responsibilities of any Center Manager … are any different than another.").

employment class action litigation, especially wage and hour litigation, making it likely that employment counsel will eventually encounter these issues.

B. Application of *Dukes* to Fair Labor Standards Act Collective Actions

Another significant open issue is whether the analysis used by the Supreme Court in *Dukes* can be applied to collective actions under the Fair Labor Standards Act (FLSA). This issue looms large because of the great number of such cases filed yearly. During the past year, more than 2,000 FLSA collective actions have been filed and virtually all have been, or will be, subjected to the lightest scrutiny by courts deciding whether to "conditionally certify" these cases. The argument that *Dukes'* principles apply to FLSA collective actions is compelling.

The sole indications in the FLSA regarding the manner in which a collective action is to proceed are its provision that an action may be maintained "in behalf of himself or themselves and other employees similarly situated," and its opt-in feature.[49] There is nothing in the statute or in any Supreme Court decision that states, or even suggests, that the joinder requirements of Federal Rule of Civil Procedure 20, or alternatively the certification requirements of Rule 23 (apart from the opt-out provision), do not apply to FLSA collective actions. Nor has the Supreme Court endorsed the two-step, or any other, procedure followed by the district courts in deciding whether to conditionally certify an FLSA class or assist in sending class-wide notice. Thus, neither the phrase "similarly situated," nor the FLSA's opt-in feature, invites the courts to craft a unique set of procedures, pertaining only to § 216(b) actions, that are inconsistent with the joinder principles of the Federal Rules and their insistence on common questions, capable of yielding common answers, as the touchstone.[50]

1. The Rules Enabling Act and Rule 83(b) Permit Courts to Adopt Only Those Procedures that Are Consistent with the Federal Rules

The Rules Enabling Act (REA),[51] was enacted in 1934 and establishes the primacy of the Federal Rules of Civil Procedure. The REA states, in pertinent part that "[a]ll laws in conflict with [the Federal Rules of Civil Procedure] shall be of no further force or effect after such rules have taken effect."[52] This provision, referred to as the "abrogation clause," reflects congressional intent that the Federal Rules shall supersede all pre-existing procedural rules. Laws and procedures enacted after the Federal Rules take precedence only to the extent they create an actual conflict with the Rules.[53] The Federal Rules themselves provide that "[t]hese rules govern the procedure in *all* civil actions and proceedings in the United States district courts except as stated in Rule 81."[54] Rule 81(a) (6) states that "[t]hese rules, to the extent applicable, govern proceedings under the following laws, except as these laws provide other procedures…." Rule 81, most recently amended in 2007, identifies seven statutes establishing "other procedures," including the National Labor Relations Act, but does not include the FLSA. Thus, reading Rules 1 and 81 together, there is every indication that the Federal Rules of Civil Procedure, including Rules 20 and 23, apply as much to FLSA actions as they do to any other federal statutory action not expressly exempted.

Rule 83(b) authorizes the district courts to devise procedures that are consistent with the Federal Rules. Indeed, in *Hoffmann-La Roche v. Sperling*, the Supreme Court recognized that the power of courts to assist in notifying potential opt-ins may be derived from that Rule, but not necessarily the process by which that discretion is exercised. "Under the terms of Rule 83, courts, in any case 'not provided for by rule,' may 'regulate their practice in any manner not inconsistent with' federal or local rules. Rule 83 endorses measures to regulate the actions of the parties to a multiparty suit."[55] The following sections explain why the two-step procedure is, in fact, inconsistent with the joinder principles of the Federal Rules of Civil Procedure.

2. The Two-Step Procedure Is Inconsistent with the Federal Rules Governing Joinder

When the FLSA was enacted in 1938, courts and commentators recognized that the statute provided merely for the joinder of claims. Then, as now, the FLSA permitted suit to be maintained on behalf of others "similarly situated," but as remains true, the statute was silent

49 29 U.S.C. § 216(b).

50 See *Hoffmann-La Roche v. Sperling*, 493 U.S. 165, 180-81 (1989) (Rehnquist and Scalia, JJ., dissenting) (the joinder process established by § 216(b) is comparable to the joinder process of Rule 20).

51 28 U.S.C. § 2072.

52 *Id*. at § 2072(b).

53 *Callihan v. Schneider,* 178 F.3d 800, 802 (6th Cir. 1999).

54 Fed. R. Civ. P. 1 (emphasis added).

55 *Sperling*, 493 U.S. at 172.

regarding the procedural mechanism through which these multi-party claims could be prosecuted.[56] Courts at the time turned to Rule 23 for guidance, which then presented three alternatives. These generally were referred to as "true," "hybrid," and "spurious" class actions.

In *Pentland v. Dravo Corp.*,[57] the Third Circuit, which was the first appellate court to consider which of these procedural vehicles was appropriate to a collective action under § 216(b), concluded that the case should be classified as a spurious class action. Quoting Moore's Federal Practice, the court defined a spurious class action as a "permissive joinder device. The presence of numerous persons interested in a common question of law or fact warrants its use by persons desiring to clean up a litigious situation."[58] In reaching its decision, the court systematically reviewed prior cases construing the class action rules as they related to the FLSA. Among the cases it cited as consistent with its own views was *Saxton v. W.S. Askew Co.*,[59] which it observed had been frequently cited by other courts.[60] The court quoted *Saxton* as follows:

> It seems a fair construction of the terms of the Act with reference to the collection of unpaid compensation, that it was not the intention of Congress to broaden any of the procedural and substantive rules of class actions, and it would seem that where under the Act a suit is filed by one or more employees for themselves and others similarly situated, showing violation of the statute, but different and divergent rights to plaintiffs as a result thereof, *the action is not a class action in any extent greater than permits any other employee similarly situated to intervene therein, setting up his specific claim.*[61]

In *Kainz v. Anheuser-Busch, Inc.*,[62] the Seventh Circuit, echoing *Pentland* and *Saxton*, explained that a spurious class action provides the possibility of separate relief for each class member "growing out of a common source of right to recover…. The rule clearly contemplates, we think, relief in the form of separate similar judgments, emanating from the same source in law and grounded upon common questions of fact."[63] Regarding the relationship between Rule 20(a) and the spurious class action rule, the court observed, "[i]n as much as [old] Rule 23(a) (3) is, in its essence, a permissive joinder rule rather than a rule defining a recognizable class, it is obvious that the two rules are, as to the intents and purposes involved here, equivalents."[64]

Reflecting on these and other decisions, Wright, Miller, and Kane note in Federal Practice and Procedure:

> In every case in which parties might have been joined as a spurious class under Rule 23(a) (3), it would have been possible to join each of them under Rule 20(a)…. The "spurious" class action was used extensively in Fair Labor Standards Act litigation, both by the employer for a declaratory judgment against a class of employees … and, as that Act itself specifically permits, on behalf of the employees to recover compensation due them under the statute.[65]

Accordingly, "it was generally accepted that a spurious class action was little more than a permissive joinder device, which would be binding only on the original parties to the suit and those who might subsequently intervene."[66] When, in 1947, the Portal-to-Portal Act expressly imposed an opt-in requirement,[67] it became even more apparent that FLSA collective actions were akin to "spurious" class actions under then-Rule 23.[68] Thus, any final judgment bound only those who affirmatively opted into the actions: "the real purpose of the section is to permit all similarly situated employees to join their actions in one proceeding, thus obviating a multiplicity of actions, or to permit them to intervene in an action already initiated by employees similarly situated[.]"[69]

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56 *See Fink v. Oliver Iron Min. Co.*, 65 F. Supp. 316, 318 (D. Minn. 1941) ("It seems clear, therefore, that all Congress intended under Section 16 of the Fair Labor Standards Act was a permissive joinder").

57 152 F.2d 851 (3d Cir. 1945).

58 *Id.* at 852 (quoting 2 Moore's Federal Practice 2241 (2d ed. 1938)).

59 35 F. Supp. 2d 519, 520 (N.D. Ga. 1940).

60 *Pentland*, 152 F.2d at 854.

61 *Id.* at 854 n.11 (emphasis added).

62 194 F.2d 737 (7thCir. 1952).

63 *Id.* at 743.

64 *Id.*

65 7A Charles Alan Wright, Arthur Miller, & Mary Kay Kane, Federal Practice and Procedure, § 1752 (2d ed. 2005).

66 Newberg & Conte, Newberg on Class Actions, § 1.09 (3d ed. 1992).

67 29 U.S.C. §§ 256(a), 256(b), and 257.

68 E. K. Spahn, *Resurrecting the Spurious Class: Opting-In to the Age Discrimination in Employment Act and the Equal Pay Act through the Fair Labor Standards Act,* 71 GEO. L. J. 119, 129 (1982) ("Congress in 1947 … codified in section 216(b) the spurious class action practice of the 1938 version of Rule 23.").

69 *Lofther v. First Nat'l Bank of Chicago*, 45 F. Supp. 986, 989 (N.D. Ill. 1941); *see also* J. A. Rahl, *The Class Action Device and Employee Suits Under the Fair Labor Standards Act*, 37 Ill. L. Rev. 119, 126 (1942) ("It has been said that the 'spurious' suit is really an 'invitation to intervene' extended to all persons similarly situated.").

Section 216(b), therefore, permits plaintiffs to sue on behalf of other employees, but nothing in the FLSA relieves opt-in plaintiffs of their individual burdens of proof, except to the extent that their proofs would compel a jury to enter common findings with respect to common questions. A proceeding under § 216(b) therefore should culminate in separate judgments regarding each opt-in plaintiff, as the Seventh Circuit recognized more than 50 years ago.[70] Indeed, that view was echoed by the district court in *Sperling v. Hoffmann-La Roche, Inc.*,[71] which went unchallenged in the Supreme Court. Several important consequences flow if FLSA collective actions are viewed as joinder proceedings under Rule 20 of the Federal Rules of Civil Procedure. First and foremost, each party plaintiff would retain his or her individual burden of proving an entitlement to relief. Although the plaintiffs may raise questions to which a jury could return common answers, that does not follow merely from the fact that these claims are joined in the same proceeding or allege common violations of the law.

Under Rule 20, a plaintiff may be joined to the action only upon a showing that "any question of law or fact common to all plaintiffs will arise in the action."[72] However, by facilitating notice after subjecting the plaintiff's claims to the lightest scrutiny, courts effectively have removed the burden of establishing commonality from the plaintiffs and placed the burden on defendants, who must move to decertify the class.[73]

3. The Two-Step Procedure Is also Inconsistent with the Class Action Procedures of Rule 23

In Shushan v. University of Colorado at Boulder,[74] the court exposed the inconsistency between the purpose, legislative history, and language of § 216(b) and the approach courts have taken to "conditionally certify" collective actions. Although acknowledging the need to accommodate the FLSA's opt-in provision, the court in *Shushan* concluded that "it does not follow that every other feature of Rule 23 is similarly irreconcilable," and held that representative actions under § 216(b) "must satisfy all of the requirements of [R]ule 23, insofar as those requirements are consistent with 29 U.S.C.A. § 216(b)."[75] As the court in *Shushan* properly noted, there is no reason to conclude that Congress' failure to provide any procedural guidance for collective actions under § 216(b), other than the opt-in mandate, evidences its intent to abrogate the other requirements of Rule 23. Nevertheless, courts that have declined to follow *Shushan* typically opine that: (1) the FLSA's opt-in framework makes it procedurally incompatible with Rule 23; and (2) Congress' failure to indicate that it intended Rule 23 to apply to § 216(b) actions leaves courts free to fashion their own procedures.

Regarding the first reason, courts frequently cite *LaChapelle v. Owens Illinois, Inc.*,[76] for the proposition that there is "a fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by FLSA § [2]16(b)."[77] The irreconcilable difference referred to in *LaChapelle*, however, is the obvious distinction between the opt-in requirement of § 216(b) and the opt-out requirement of Rule 23. *LaChapelle* does not address any other Rule 23 provisions or their incompatibility with § 216(b).

More illuminating is the counter-example provided by the procedural rules of the Court of Federal Claims. That court's counterpart to Federal Rule of Civil Procedure 23, Rule of Court of Federal Claims 23, provides exclusively for an opt-in class action, but retains all of the other procedural requirements of that Rule. Thus, the opt-in procedure of the FLSA is in no sense incompatible with other aspects of Rule 23.

Addressing the second reason for refusing to apply Rule 23's certification requirements to § 216(b) cases, in *O'Brien v. Ed Donnelly Enterprises, Inc.*, the Sixth Circuit observed:

> While Congress could have imported the more stringent criteria for class certification under Fed. R. Civ. P. 23, it has not done so in the FLSA .... The district court implicitly and improperly applied a Rule 23-type analysis when it reasoned that the plaintiffs were not similarly situated because individualized

70 *Kainz*, 194 F.2d at 743.

71 118 F.R.D. 392, 408 (D.N.J. 1988).

72 Fed. R. Civ. P. 20(a)(1)(B). As the Supreme Court emphasized, it is primarily those common questions that give rise to common answers that really matter. *See* note 4, *supra*.

73 *Cf. Illinois v. Ampress Brick Co.*, 67 F.R.D. 457, 460 (N.D. Ill. 1975) ("This burden is not properly upon defendants or the courts. It is the responsibility of plaintiff ... in the first instance to determine that the parties it seeks to join as named plaintiffs have suffered appropriate injury.").

74 132 F.R.D. 263 (D. Colo. 1990).

75 *Id.* at 265-66 (emphasis omitted); *accord St. Leger v. A.C. Nielsen Co.*, 123 F.R.D. 567 (N.D. Ill. 1988) (stating that certification was inappropriate because common questions did not predominate).

76 513 F.2d 286, 288 (5th Cir. 1975).

77 *See also Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1216 (11th Cir. 2001) (noting the "fundamental" difference between Rule 23 class actions and § 216(b) class actions).

> questions predominated. This is a more stringent standard than is statutorily required … applying the criterion of predominance undermines the remedial purpose of the collective action device.[78]

However, the premise that Congress must affirmatively state that the Federal Rules of Civil Procedure govern proceedings under a particular statute is itself inconsistent with the Rules.[79] In accordance with the REA and Supreme Court precedents, Congress must affirmatively *exempt* a statute from the reach of the Federal Rules.[80] Accordingly, *Dukes'* analysis of the requirements for a case to proceed as a class action under Rule 23 should apply with equal force to collective actions under the FLSA. Given the volume of FLSA collective actions filed each year, the application *Dukes* to FLSA collective actions may prove even more significant than the Court's decision regarding Rule 23 class actions.

IV. AGGREGATE LITIGATION POST-DUKES

Since *Dukes* was decided, several federal district courts, and at least two federal courts of appeals, have addressed the impact of *Dukes* on class actions raising a variety of claims in various procedural postures.

A. The Ninth Circuit Reverses Course: *Ellis v. Costco*

Among the post-*Dukes* decisions, the case that most clearly demonstrates *Dukes'* impact is the Ninth Circuit's decision in *Ellis v. Costco*.[81] Decided by the same appellate court that affirmed the *Dukes* decision that was reversed by the Supreme Court, *Ellis* reflects the Ninth Circuit's understanding of how it must modify the standards governing class certification as a result of the Supreme Court's decision.

Similar to *Dukes*, the *Ellis* plaintiffs sought to represent a class of present and former female employees who were allegedly discriminated against on the basis of gender by Costco's promotional practices. The class was certified under Rule 23(b)(2) by the district court. On appeal, post-*Dukes*, the Ninth Circuit reversed. Finding that, at best, the standard for certification applied by the district court was unclear, the Ninth Circuit stated it was "tak[ing] this opportunity to clarify the correct standard."[82] Following the principles set forth in *Dukes*, the court first explained the often critical role the merits of the underlying claims play in determining whether a case is appropriate for class certification. Emphasizing that "the merits of the class members' substantive claims are often highly relevant when determining whether to certify a class," the court stated, "it is not correct to say a district court *may* consider the merits to the extent that they overlap with class certification issues; rather, a district court *must* consider the merits if they overlap with the Rule 23(a) requirements."[83]

Next, the court addressed the district court's failure to engage in a rigorous analysis of the evidence presented. Again applying *Dukes*, the Ninth Circuit stated that simply determining the admissibility of the evidence was insufficient. Instead, the Ninth Circuit ruled that district courts are:

> required to resolve any factual disputes necessary to determine whether there was a common pattern and practice that could affect the class as a whole. If there is no evidence that the entire class was subject to the same allegedly discriminatory practice, there is no question common to the class.[84]

Thus, the court stated, if, as Costco's expert testified, any gender disparities that existed were confined to two of Costco's eight regions:

> [it] would not show that "discrimination manifested itself in … promotion practices in the same general fashion," throughout Costco — which is necessary to show commonality in a nationwide class.

78 575 F.3d 567, 584-86 (6th Cir. 2009).

79 Fed. R. Civ. P. 1.

80 *See e.g., Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010) ("like the rest of the Federal Rules of Civil Procedure, Rule 23 *automatically* applies" in all civil actions and proceedings in the United States district courts (emphasis in original); *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979) ("In the absence of a direct expression by congress of its intent to depart from the usual course of trying 'all suits of a civil nature' under the [Federal Rules]," class relief under Rule 23 is permitted).

81 657 F.3d 970 (9th Cir. 2011).

82 *Id.* at 981.

83 *Id.* at 981.

84 *Ellis*, 657 F.3d at 983 ("the district court was required to resolve any factual disputes necessary to determine whether there was a common pattern and practice that could affect the class as a whole. If there is no evidence that the entire class was subject to the same allegedly discriminatory practice, there is no question common to the class. In other words, the district court must determine whether there was 'significant proof that [the employer] operated under a general policy of discrimination.'") (citations omitted).

> If no such nationwide discrimination exists, Plaintiffs would face an exceedingly difficult challenge in proving that there are questions of fact and law common to the nationwide class.

Regarding the typicality requirement, the Ninth Circuit ruled that the appropriate inquiry is whether the named plaintiffs will be subjected to individual defenses rather than those pertaining to the class.[85]

Turning to Rule 23(b), the Ninth Circuit followed *Dukes* in rejecting the "predominance" test, assessing whether monetary issues predominate, for determining whether a class claim including monetary damages can be certified under Rule 23(b)(2). Instead, the appellate court concluded that the relevant inquiry is whether that provision provides sufficient procedural safeguards to protect the due process rights of absent class members as to the relief sought. The Ninth Circuit remanded the case to the district court to make that determination, and also instructed the lower court to consider whether claims for punitive damages could be certified under Rule 23(b)(2), and claims for monetary relief could be certified under Rule 23(b)(3).

B. Some District Courts Have Considered *Dukes* in FLSA Collective Actions

Although courts in a number of cases have declined to apply *Dukes* in FLSA collective actions, at least two district courts have recognized the relevance of the reasoning in *Dukes* to such actions. *Ruiz v. Serco, Inc.*[86] was a proposed FLSA collective action asserting misclassification claims on behalf of employees providing clerical and support services to military personnel returning from deployment and their families. The court denied conditional certification, finding there was insufficient evidence to establish that plaintiffs were similarly situated as to job duties and levels of discretion, or as to the policies used to determine their exemption classification. Significantly, the court applied the Supreme Court's analysis in *Dukes* to determine "when certification of a collective action under the FLSA is appropriate."

> Plaintiffs have not provided enough evidence to satisfy their burden at this stage. The Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes* is instructive on this point…. It is not enough for plaintiffs to raise a common question as to whether they and other employees with some similar job duties were properly classified as exempt. Rather, the answer to that question must be susceptible to proof that can be extrapolated to the class plaintiffs seek to represent. In this case, it would be difficult to generate common answers in light of the individualized inquiries arising from the wide variations in duties, experience, responsibility, discretion and supervisors on the part of the potential class members.[87]

Similarly, in *Macgregor v. Farmers Insurance Exchange*[88] the district court denied conditional certification to a potential class of property claims representatives in a case asserting the employer's pay policies and practices violated the FLSA. While noting that collective actions under the FLSA are "not subject to the provisions generally associated with class actions under FRCP 23," the court stated that the Supreme Court's reasoning in *Dukes* is "nonetheless illuminating."[89] Quoting *Dukes*, the court concluded that the employer's policy of providing discretion to managers was the opposite of a uniform employment practice and did not raise an inference of illegal conduct. Noting that "numerous district courts have reached similar results without the benefit of this clearly reasoned Supreme Court decision," the court went on to state that when there is no uniform policy or practice, "individual factual inquiries are likely to predominate and judicial economy will be hindered rather than promoted by certification of a collective action."[90]

V. CONCLUSION

Dukes provides a new analytical framework for analyzing certification in class actions, making it significantly more difficult for plaintiffs to certify nationwide classes challenging discrimination practices, unless those practices are expressly stated and uniformly applied. The type of cases that may survive the standards set by the Supreme Court will likely be those that challenge the use of a standardized test or other

85 *Id.* at 984-85.

86 2011 U.S. Dist. LEXIS 91215 (W.D. Wis. Aug. 5, 2011).

87 *Id.* at *18.

88 2011 U.S. Dist. LEXIS 80361 (D.S.C. July 22, 2011).

89 *Id.* at *13.

90 *Id.* at **13-14.

uniformly applied screening device. Thus, it is likely that future class actions will be narrower in scope, both geographically and in terms of the practices challenged and the relief that is sought.

Dukes also raises the bar for expert testimony. Experts will have to tie their opinions more closely to the facts of the case and attempt to quantify the pervasiveness of the practices attacked by the plaintiffs. Perhaps an outgrowth of that process will be more searching and detailed discovery requests, which plaintiffs will be able to justify as necessary to provide their experts the required facts.

A most interesting question that may persist for the next few years is whether *Dukes* will be extended beyond discrimination cases to FLSA collective actions. To date, the courts are divided on that questions, but we anticipate that ultimately a consensus is likely, one way or the other, until the Supreme Court resolves that important issue.

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