

NINTH CIRCUIT DISCRIMINATION CASE COULD
CHANGE THE GROUND RULES FOR EVERYONE

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I. INTRODUCTION

There is an important struggle underway in the Ninth Circuit over sex discrimination and the proper scope of Rule 23 of the Federal Rules of Civil Procedure in certifying a class action. Wal-Mart is returning to the Ninth Circuit to argue that a sex-discrimination lawsuit against it should not proceed as a class-action case covering more than 1.5 million women.¹ Wal-Mart argues that refusing to allow it to defend itself against the discrimination claims on an individual basis is a violation of due process that would also result in payouts to people who were not harmed. The plaintiffs argue for a class action theory that, if successful, would result in: (i) the balance of power shifting substantially in favor of employees and against employers and (ii) significant additional cost to United States businesses, employees, and consumers. The potential liability of all employers will shrink dramatically if Wal-Mart prevails and this expanded class-certification procedure is denied, requiring plaintiffs to proceed individually and actually show that the harm was done and the discrimination suffered in order to prove discrimination on the part of Wal-Mart.

The case began in 2001 when Betty Dukes, a fifty-four-year-old female and Wal-Mart employee from California filed a discrimination claim alleging that she was denied the training needed to obtain a higher-paying job, solely because she was a woman.² This lawsuit cites studies showing that female Wal-Mart workers earn 5%–15% less than their male counterparts in the same jobs—differences that could not be explained by seniority or performance reviews.³ Wal-Mart denied the allegations of sex discrimination. In June of 2004, the California District Court issued an order certifying the proposed class as it related to issues of alleged discrimination, including liability for punitive damages as well as injunctive and declaratory relief; and concluded that statistical disparities in pay and promotion were enough to justify class treatment.⁴ Wal-Mart appealed, contending that the court erred by “(1) concluding that the class met [Fed. R. Civ. Pro.] Rule 23(a)’s commonality and typicality requirements; (2) eliminating Wal-Mart’s ability to

1. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 142 (N.D. Cal 2004).

2. *Id.* at 141.

3. *Id.* at 156.

4. *Id.* at 142–43.

respond to individual Plaintiff's claims; and (3) failing to recognize that Plaintiffs' claims for monetary relief predominated over claims for injunctive or declaratory relief."⁵

After a San Francisco federal district court judge granted class-action status,⁶ the class grew to more than 1.6 million women who were employed at one or more of Wal-Mart's 3,400 stores across the U.S. on a salary or an hourly basis, with a range of positions including women who had worked at Wal-Mart since December 1998.⁷ The plaintiffs' claim that thousands of local managers intentionally discriminated against these 1.6 million women in making literally millions of individualized, allegedly subjective, pay, training, and promotion decisions. The plaintiffs seek billions of dollars in back pay and punitive damages under Title VII of the Civil Rights Act of 1964.⁸ These dollar amounts and the number of employees involved make the *Dukes* case the largest class action sexual discrimination case in the history of the United States.⁹

A three-member panel of the Ninth Circuit upheld the class status decision in 2007.¹⁰ Wal-Mart asked for a rehearing, arguing that even if the plaintiffs prevail in getting class certification, punitive damages and back pay must be awarded on an individual basis rather than in the aggregate. The Ninth Circuit agreed to revisit the case en banc,¹¹ which was heard by eleven members of the twenty-four judge Ninth Circuit Court of Appeals on March 31, 2009.¹²

If the Ninth Circuit does not reverse the three-member panel and correct this class certification, the Supreme Court will likely intervene. The *Dukes* decision is important because the district court's order certifying the proposed class is more permissive than most labor/discrimination class-action decisions. True, some courts have certified some of these labor class-action cases more freely than precedents in other fields of law allow.¹³

5. *Dukes v. Wal-Mart Stores, Inc.*, 509 F.3d 1168, 1175 (9th Cir. 2007).

6. *Dukes*, 222 F.R.D. at 143.

7. *Id.* at 142.

8. 42 U.S.C. § 2000 (1964).

9. Alexandria Sage, *Wal-Mart Sex Discrimination Case Back in Court*, REUTERS, Mar. 25, 2009, <http://www.reuters.com/article/topNews/idUSTRE52O0P820090325>.

10. *Dukes*, 509 F.3d at 1168.

11. *Dukes v. Wal-Mart, Inc.*, 556 F.3d 919, 919 (9th Cir. 2009).

12. Ninth Circuit Court, Pending En Banc Cases 4 (2009) <http://www.ca9.uscourts.gov/datastore/enbanc/2009/10/14/10-12-09.pdf>.

13. *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003); *Robinson v. Metro-North*

However, this labor class-action exception does nothing to advance judicial efficiency. Rather, it simply creates a gigantically burdensome and threatening legal weapon useful only in coercing big settlements and bountiful plaintiff bar legal winnings regardless of the merits of the individual claims. The Supreme Court's class-action decisions, however, cut in a more conservative direction.¹⁴ One would think that the current Roberts' Court would want to settle these differences between the circuits and between labor and other areas of the law sooner rather than later. Usually, the stories involved in these cases have little in common with each other and each claim would require a full trial on its own merits to reach the fact-intensive questions about motivation, facts and circumstances, and adverse impact involved.¹⁵ In such cases, the plaintiffs' lawyer usually attempts to argue the case to a jury using broad generalities in order to get some sweeping condemnation of the "atmosphere" of the employer, using isolated cases of bad facts to generate even worse law, and offering some expert's opinion that all plaintiffs were adversely affected by the discriminatory culture. It is virtually impossible to defend against abstract claims of that kind; there is just not an effective defense and hence the battle becomes one-sided. Federal Rule of Civil Procedure 23 was not intended to water down an individual's

Commuter R.R. Co., 267 F.3d 147 (2d Cir. 2001); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999).

14. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147 (1982).

15. *See Int'l Bhd. Of Teamsters v. United States*, 431 U.S. 324, 361–62 (1977) (where plaintiffs seek individual monetary relief, a district court must conduct individualized hearings at which an employer "can demonstrate that the individual applicant was denied an employment opportunity for lawful reasons"); *Love v. Johanns*, 439 F.3d 723, 729 (D.C. Cir. 2006) (noting that the plaintiffs' claims "differ widely, and . . . are interspersed with nondiscriminatory evidence and innocuous explanations," the court found that while each plaintiff had standing to bring an individual lawsuit, they could not gather together their very different fact patterns into a common claim by "[t]he bald allegation that [they] . . . are unified by a 'common policy' of gender discrimination"); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 318–24 (4th Cir. 2006) (affirming denial of class certification because a statute of limitations defense required "individualized adjudication," and emphasizing that "to protect . . . the right of the defendant to present facts or raise defenses that are particular to individual class members, district courts must conduct a 'rigorous analysis' to ensure compliance with Rule 23" (quoting *Gen. Tel. Co.*, 457 U.S. at 161)); *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 651 (6th Cir. 2006) ("[I]n a Title VII case, whether the discriminatory practice actually was responsible for the individual class member's harm, the applicability of nondiscriminatory reasons for the action, showings of pretext, and any affirmative defense all must be analyzed on an individual basis."); *In re Allstate Ins. Co.*, 400 F.3d 505, 508 (7th Cir. 2005) (reversing 23(b)(2) certification based in part on the prospect of "more than a thousand individual hearings" on entitlement to damages).

substantive legal rights or defenses, but that is precisely the result of these inappropriate class certifications.¹⁶ In fact, the new rules allow an immediate interlocutory appeal when a class is certified in recognition of the fact that a class certification almost always dictates the outcome in these cases—a forced settlement.¹⁷

There is also a new player on the scene that may tip the balance of power. Until now, the Equal Employment Opportunity Commission (EEOC) has not been involved. However, this has changed since the Obama Administration took office. On March 19, 2009, the EEOC filed an amicus brief in support of Betty Dukes and the plaintiffs.¹⁸ In its amicus brief, the EEOC does not defend the district court's class-certification order *in toto*, but the EEOC does support the argument that a claim seeking billions of dollars in punitive damages and back pay may be decided on a class basis without individual hearings.¹⁹ Specifically, the EEOC now argues that it is appropriate to impose substantial monetary damages on companies without giving them an opportunity to demonstrate that their employees were treated fairly.

II. CASELAW AFTER *DUKES*

Almost five years have passed since the district court certified the class in the *Dukes* case. Since that time, federal courts of appeals have decided numerous cases that directly undermine the most critical elements of the district court's certification analysis.²⁰ This intervening case law makes it plain that, whatever its possible merit in 2004, the district court's certification decision in *Dukes* is now wrong as a matter of law. In the past five years, federal courts have clarified principles that confirm that the district court's Rule 23 analysis was manifestly

16. FED. R. CIV. P. 23.

17. *Id.*

18. Brief for Equal Employment Opportunity Commission as Amicus Curiae Supporting Plaintiffs on Rehearing En Banc, *Dukes v. Wal-Mart, Inc.*, 556 F.3d 919 (2009) (No. 04-16720), 2009 WL 872875.

19. *Id.*

20. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008); *Thorn*, 445 F.3d 311; *Reeb*, 435 F.3d 639; *Browning v. Dep't of the Army*, 436 F.3d 692 (6th Cir. 2006); *Bell v. Ascendant Solutions, Inc.*, 422 F.3d 307 (5th Cir. 2005); *Unger v. Amedisys, Inc.*, 401 F.3d 316 (5th Cir. 2005); *In re Allstate Ins. Co.*, 400 F.3d 505 (7th Cir. 2005).

erroneous in at least four critical respects: (1) the court failed to subject *Dukes*' class-certification arguments to rigorous scrutiny, simply because doing so would have required some examination into the merits of plaintiffs' claims; (2) the court applied the wrong standards in assessing Federal Rule of Civil Procedure 23's commonality requirement and improperly invoked the concept of "excessive subjectivity" to find that requirement to be satisfied; (3) the court incorrectly declined to subject the plaintiffs' expert testimony to the admissibility analysis of *Daubert v. Merrell Dow Pharms., Inc.*²¹ and mistakenly failed to weigh that testimony against the contrary testimony of Wal-Mart's experts; and (4) the court erred by certifying, under Rule 23(b)(2), an unmanageable class in which claims for declaratory and injunctive relief plainly do not predominate.

In conducting its Rule 23 analysis, the district court failed to subject the plaintiffs' claims to rigorous scrutiny.²² To justify this refusal, the court relied heavily on the Second Circuit's opinion in *Caridad*, which, the court reasoned, stood for the proposition that a court should not examine the merits of the claims at the class-certification stage.²³

This refusal to scrutinize the plaintiffs' claims was incorrect. As courts have consistently recognized, a district court must subject the plaintiffs' class claims to rigorous scrutiny, even if such an inquiry overlaps with the merits.²⁴ In perhaps the most thorough discussion of this issue to date, the Fifth Circuit explained that the decision to certify a class calls for findings by the court, not merely for a threshold showing by a party, that each requirement of Rule 23 is met.²⁵

21. 509 U.S. 579 (1993).

22. *E.g.*, *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 142, 144, 153–55, 159–60, 164–66 (N.D. Cal. 2004).

23. *Id.* at 155 n.21, 159 n.29.

24. *In re IPO Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006) (expressly disavowing relevant parts of *Caridad*); *Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219, 232 (2d Cir. 2006) (noting that a number of other circuits have determined more broadly than *Caridad* that "an inquiry into the merits of a claim is appropriate to the extent necessary to determine whether the requirements of Rule 23 have been met."); *Bowe v. PolyMedica Corp.*, 432 F.3d 1, 5 (1st Cir. 2005) (agreeing with the majority of courts of appeals that on class certification, a district court should "make whatever legal and factual inquiries are necessary to an informed determination of the certification issues").

25. *See Oscar Private Inv. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 268 (5th Cir. 2007) (holding that a district court "must give full and independent weight to each Rule 23 requirement, regardless of whether that requirement overlaps with the merits").

The district court applied the wrong standards in assessing Rule 23's commonality requirement when the court stated that the necessary showing to satisfy commonality is minimal. Courts of appeals have repeatedly rejected this assertion, holding instead that plaintiffs who seek class certification must make a significant showing of commonality.²⁶ Here, Dukes has failed to make such a showing: the record established that women at Wal-Mart were promoted and demoted for a variety of different reasons, including individual performance issues.

Moreover, the court improperly invoked the concept of "excessive subjectivity" to find that the commonality requirement was satisfied. The district court simply erred in finding that the commonality requirement was satisfied in part based on the concept of "excessive subjectivity." As the Supreme Court has held, and as Wal-Mart has argued consistently, the mere presence of subjectivity in an employer's decision-making processes does not, in itself, raise an automatic inference of discriminatory conduct.²⁷ As a result, the notion that a decision-making process can be suspect because it contains "too much" subjectivity is just plain wrong, as no amount of subjectivity can be *per se* "excessive."

Further, the district court was incorrect to conclude that Wal-Mart's compensation and promotion policies consistently permit managers to utilize a great deal of subjectivity and thus support a finding of commonality. In fact, courts have rejected the argument that a common policy of discrimination exists whenever significantly subjective decision-making operates on a national basis with discriminatory results.²⁸ Instead, courts have recognized that establishing commonality for a disparate treatment class is particularly difficult "where, as here, multiple decisionmakers [sic] with significant local autonomy exist."²⁹

The presence of subjectivity in this case cuts sharply *against* a finding of commonality, as evidenced by the number of different subjective decision-makers involved in many different locations, over many different years, dealing with many different

26. *E.g.*, *Garcia v. Johanns*, 444 F.3d 625, 632 (D.C. Cir. 2006) (holding that the plaintiff must "make a significant showing [of commonality] to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the defendant's challenged employment decisions") (citation omitted).

27. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988).

28. *Garcia*, 444 F.3d at 632.

29. *Id.*

facts and circumstances.³⁰ In the *Dukes* case, the putative class members were not exposed to the subjective judgments of the same decision-maker, but instead worked under *thousands* of *different* managers in *thousands* of *different* stores across the country. In such a situation, any finding of commonality would be difficult at best.³¹

The district court erred in its treatment of expert evidence in at least two respects. First, it accepted the plaintiffs' aggregated nationwide statistics without giving weight to Wal-Mart's disaggregated store-by-store statistical evidence. In so doing, the district court made the precise error the Third Circuit unequivocally warned against in *Hydrogen Peroxide*, where the court admonished that "[w]eighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands."³² Courts simply may not decline to resolve a genuine legal or factual dispute—including a dispute among experts—"because of concern for an overlap with the merits."³³ Other courts now uniformly agree that a district court must weigh *all* competing evidence and cannot ignore the evidence submitted by the defendant.³⁴ Indeed, commentators have concluded that aggregated statistics—like those offered by the plaintiffs—*cannot* provide persuasive evidence of commonality in a multiple-facility class action like this one.³⁵

Second, the district court erred in refusing to analyze the admissibility of the plaintiffs' expert sociological evidence under *Daubert*. Since the district court's opinion was issued, multiple

30. See *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 159 (1982) (finding that, even in a single facility, there was a wholly subjective decision-making process and "[i]f one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action. [There is] nothing in the statute to indicate that Congress intended to authorize such a wholesale expansion of class-action litigation").

31. See *Garcia*, 444 F.3d at 632 (holding that denial of class certification of Hispanic loan applicants with varied eligibility criteria in over 2,700 counties nationwide over a twenty-year period based on the geographic spread of the local decision-makers was not an abuse of discretion).

32. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 323 (3d Cir. 2008).

33. *Id.* at 324; See also *id.* at 312–15, 325 (analyzing defendants' expert's rebuttal to plaintiffs' expert's testimony).

34. *E.g.*, *Stuebler v. Xcelera.com*, 430 F.3d 503, 512 (1st Cir. 2005); *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005).

35. *E.g.*, Daniel S. Klein, Note, *Bridging the Falcon Gap: Do Claims of Subjective Decisionmaking in Employment Discrimination Class Actions Satisfy Rule 23(A) Commonality and Typicality Requirements*, 25 REV. LITIG. 131, 165–76 (2006).

federal courts of appeals have made it clear that district courts must evaluate the admissibility of expert evidence and apply rigorous standards of proof even at the class-certification stage.³⁶ In *Hydrogen Peroxide*, for example, the Third Circuit made it clear that expert opinions with respect to class certification, like any matter relevant to a Rule 23 requirement, called for rigorous analysis.³⁷ Opinion testimony should not be uncritically accepted as meeting a Rule 23 requirement merely because the court holds that the testimony should not be excluded under *Daubert* or for any other reason; rather, the court must consider its persuasiveness, and the persuasiveness of testimony from any opposing experts, as it decides whether Rule 23 is satisfied.³⁸

And it is clear that the sociological evidence that the plaintiffs offered—the “social framework analysis” provided by Dr. William Bielby—would not stand up to this kind of scrutiny. Even the founders of social framework analysis, upon whose research Dr. Bielby relied, concluded that his testimony “in *Dukes* . . . clearly exceeds the limits of proper social framework testimony” and should have been excluded.³⁹

Decisions issued since the *Dukes* class was certified expose the district court’s clear error in certifying a class under Rule 23(b)(2) in a case in which the potential punitive damages amount to *billions* of dollars and injunctive or declaratory relief are entirely unavailable.⁴⁰ It is undisputed that Rule 23(b)(2) does not extend to cases in which the appropriate final relief relates predominantly to money damages.⁴¹

A split has developed among circuits on how a court determines whether monetary relief predominates in a Rule 23(b)(2) class suit.⁴² Following the Fifth Circuit’s lead in *Allison v. Citgo Petroleum, Corp.*,⁴³ at least five circuits have adopted an incidental damages test, which prohibits certification under

36. *E.g.*, *Bell v. Ascendant Solutions, Inc.*, 422 F.3d 307, 311–14 (5th Cir. 2005); *See also, Unger v. Amedisys, Inc.*, 401 F.3d 316, 319 (5th Cir. 2005).

37. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 323.

38. *Id.*

39. John Monahan et al., *Contextual Evidence of Gender Discrimination: The Ascendance of “Social Frameworks,”* 94 VA. L. REV. 1715, 1745 (2008).

40. *E.g.*, *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 331 (4th Cir. 2006).

41. *See* FED. R. CIV. P. 23 Advisory Committee’s note to 1966 amend.; *See also Thorn*, 445 F.3d 311, 331 (“Rule 23(b)(2) . . . authorizes class treatment only when the plaintiff seeks predominantly ‘injunctive’ or ‘declaratory’ relief.”).

42. *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 531 n.8 (D.C. Cir. 2006).

43. 151 F.3d 402 (5th Cir. 1998).

Rule 23(b)(2) where plaintiffs seek monetary relief unless the relief sought will “flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief.”⁴⁴

The Ninth Circuit, however, has expressly refused to adopt the approach set forth in *Allison*, rejecting the incidental damages test or any “particular bright-line rule”—in an abrupt shift from a previously consistent line of cases, the Ninth Circuit panel’s second decision in *Molski* endorsed the ad hoc approach adopted by the Second Circuit in *Robinson*.⁴⁵ Since *Molski*, no other circuit has adopted this approach, and the Second Circuit, in *In re IPO* disavowed *Robinson* and the line of Second Circuit cases to which it belongs.⁴⁶

III. *DUKES* SHOULD NOT BE CERTIFIED AS A CLASS ACTION

In *Dukes*, under any standard, the conclusion that declaratory and injunctive relief predominate is simply untenable. All but two plaintiffs in this case are no longer Wal-Mart employees, and thus do not even have standing to seek declaratory or injunctive relief.⁴⁷ Back pay is not a form of “declaratory or injunctive”

44. *Id.* at 415; *See* *Reeb v. Ohio Dep’t of Rehab. & Corr.*, 435 F.3d 639, 649–50 (6th Cir. 2006); *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1121 (8th Cir. 2005); *Thorn*, 445 F.3d at 330 n.25; *Cooper v. S. Co.*, 390 F.3d 695, 720 (11th Cir. 2004); *Lemon v. Int’l Union of Operating Eng’rs*, 216 F.3d 577, 580–81 (7th Cir. 2000).

45. *Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003).

46. *Reeb v. Ohio Dep’t of Rehab. & Corr.*, 81 Fed. Appx. 550, 554 (6th Cir. 2003) (“[W]e . . . decline to determine on this record the proper standard for class certification under Rule 23(b)(2) where plaintiffs seek monetary as well as equitable relief.”); *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 552 (5th Cir. 2003) (“Certification under Rule 23(b)(2) is appropriate where ‘the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole’”); *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 446 (6th Cir. 2002) (“This court has not explicitly addressed the question of whether compensatory damages are recoverable by a Rule 23(b)(2) class.”); *Hohider v. United Parcel Serv., Inc.*, 243 F.R.D. 147, 236 (W.D. Pa. 2007) (“The incidental damages approach, however, has been rejected by courts of appeals in at least two circuits in part because those courts of appeals reason that it amounts to a *per se* prohibition of the recovery of compensatory damages in Title VII antidiscrimination Rule 23(b)(2) class action lawsuits and strips district courts of discretion traditionally vested in them under Rule 23.”); *Thompson v. Merck & Co., Inc.*, No. C.A. 01-1004, 2004 WL 62710, at *4 (E.D. Pa. Jan. 6, 2004) (“Such damages, awarded on the basis of intangible injuries and interests, are uniquely dependent on the subjective and intangible differences of each class member’s individual circumstances.”).

47. *See, e.g.*, *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (discussing standing in class-action certifications).

relief capable of supporting certification under Rule 23(b)(2).⁴⁸ The panel's first opinion in *Molski* cited *Allison* approvingly and held that under Ninth Circuit precedent, injunctive and declaratory relief do not predominate, and a class is therefore not certifiable under Rule 23(b)(2) unless monetary damages are merely "incidental" as defined in *Allison*.⁴⁹ It was only on rehearing that the panel withdrew its first opinion and issued an amended opinion that expressly rejected *Allison* and adopted the subjective test articulated by *Robinson*.⁵⁰

The Fourth Circuit recently found that 23(b)(2) certification is "improper when the predominant relief sought is not injunctive or declaratory, even if the relief is equitable in nature."⁵¹ And, perhaps most obviously, the massive amount of monetary punishment that the plaintiffs seek in *Dukes* flatly invalidates any claim that pecuniary claims are "incidental" to their case or that their requests for injunctive relief are predominant. The due process concerns raised whenever 23(b)(2) certification involves monetary relief⁵² are heightened where, as here, a plaintiff class seeks penalties.⁵³

Recent decisions also highlight the district court's error in failing to recognize the insurmountable manageability problems presented by trying to resolve the liability and damages claims in the putative 23(b)(2) class.⁵⁴ This class already included 1.5 million women over a five year period when it was certified in 2004. Now, in 2009, the class has vastly expanded, and is still growing, as are the potential damages. Furthermore, determination of punitive damages is an inherently particularized inquiry that is not susceptible to class-wide determination giving rise to the need for tens of thousands, if

48. *Allison*, 151 F.3d at 415 ("The underlying premise of the (b)(2) class . . . 'begins to break down when the class seeks to recover back pay or other forms of monetary relief to be allocated based on individual injuries.'") (citing *Eubanks v. Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997)).

49. *Molski v. Gleich*, 307 F.3d 1155, 1167–68 (9th Cir. 2002), *withdrawn*, No. 00-57099, 2003 U.S. App. LEXIS 2055 (9th Cir. 2003).

50. *Molski v. Gleich*, 318 F.3d 937, 949–50 (9th Cir. 2003) (citing *Robinson v. Metro-North Commuter Railroad Co.*, 267 F.3d 147, 163–64 (2d Cir. 2001)).

51. *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 331 (4th Cir. 2006).

52. *Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577, 581 (7th Cir. 2000).

53. *Allison*, 151 F.3d at 418 (finding that punitive damages are non-incidental—requiring proof of how harm was inflicted on each plaintiff, introducing new and substantial legal and factual issues, and not being capable of computation by reference to objective standards).

54. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 319–20 (3d Cir. 2008).

not millions, of individualized hearings to determine eligibility for damages. Since the district court issued its opinion, federal courts of appeals have recognized that the manageability problems presented by analogous—though far smaller and less unwieldy—classes are insurmountable.⁵⁵

The district court's class-certification order should also be reversed because its proposed trial plan would violate the requirements of due process, Title VII, and the Rules Enabling Act inasmuch as the proposed trial plan purports to eliminate Wal-Mart's right to present individualized defenses at trial.⁵⁶ It is well established that every employer is entitled to put on evidence showing that particular plaintiffs are not entitled to relief because they were "denied an employment opportunity for lawful reasons."⁵⁷

Under the district court's decision, however, plaintiffs will be permitted to proceed directly from demonstrating a prima facie case of class-wide discrimination based on statistical and anecdotal evidence to a "remedy phase" that addresses injunctive relief and calculates back pay pursuant to a "formula"—all without the individualized hearings required by *Teamsters*.⁵⁸ The district court's trial plan thus affords Wal-Mart no opportunity whatsoever to put on individualized evidence in its defense.

The alternative "procedure" proposed in the Ninth Circuit panel's revised opinion would similarly deny Wal-Mart this fundamental right. In that opinion, the Ninth Circuit panel suggests that the unprecedented procedure discussed in *Hilao v. Estate of Marcos*⁵⁹ could be used to try this case.⁶⁰ According to the panel, the *Hilao* plan "would allow Wal-Mart to present individual defenses in the randomly selected 'sample cases'

55. See, e.g., *In re Allstate Ins. Co.*, 400 F.3d 505, 508 (7th Cir. 2005) (reversing 23(b)(2) certification based in part on the prospect of more than a thousand individual hearings on entitlement to damages); *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1121–22 (8th Cir. 2005) (recognizing that 23(b)(2) classes must be cohesive).

56. 28 U.S.C. § 2072(a)-(b) (2006).

57. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 362 (1977); see also *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 148 (2000) (finding that an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision).

58. *Dukes v. Wal-Mart Stores, Inc.*, 509 F.3d 1168, 1190 n.16 (9th Cir. 2007); *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 174–78 (N.D. Cal. 2004).

59. 103 F.3d 767, 782–87 (9th Cir. 1996).

60. *Dukes*, 509 F.3d at 1191–93.

...⁶¹ Setting aside the myriad problems in the *Hilao* decision, *Teamsters* alone requires that an employer have the right to present rebuttal evidence as to *each individual* seeking relief, which the panel's proposal does not permit.⁶² This evident disregard of a defendant's right to present individualized defenses in both the district court's and the panel's trial plans violates Title VII, *Teamsters*, and fundamental principles of due process.⁶³ Furthermore, because these plans would impose liability for employment decisions Wal-Mart could readily defend if the claims were brought in individual actions, they would fundamentally alter the substantive rights and burdens that would otherwise arise in an individual action. That is impermissible under the Rules Enabling Act, which provides that general rules of practice and procedure—such as the class-action device—“shall not abridge, enlarge or modify any substantive right.”⁶⁴

This conclusion is confirmed by the Second Circuit's recent decision in *McLaughlin v. Am. Tobacco Co.*,⁶⁵ which rejected a proposed aggregated method for awarding damages to a class of tobacco users. In that case, the district court's trial plan called for the total number of class members injured and the total amount of damages to be determined in a single class-wide adjudication, and then for individual damages to be awarded

61. *Id.* at 1192 n.22.

62. See *Teamsters*, 431 U.S. at 361–62 (where plaintiffs seek individual monetary relief, a district court must conduct individualized hearings at which an employer can demonstrate that the “individual applicant was denied an employment opportunity for lawful reasons”); *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 651 (6th Cir. 2006) (“When determining whether the discriminatory practice in a Title VII case “was responsible for the individual class member's harm, the applicability of nondiscriminatory reasons for the action, showings of pretext, and any affirmative defense all must be analyzed on an individual basis.”); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 318–24 (4th Cir. 2006) (affirming denial of class certification because a statute of limitations defense required “individualized adjudication,” and emphasizing that “to protect . . . the right of the defendant to present facts or raise defenses that are particular to individual class members, district courts must conduct a ‘rigorous analysis’ to ensure compliance with Rule 23 . . .”).

63. See, e.g., *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (due process requires that a defendant have an opportunity to present every available defense); Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 3–10, *Philip Morris USA*, 549 U.S. 346 (2007) (No. 05-1256), 2006 WL 2153777; See also *id.* at 12–14 (explaining that both the district court's and the panel's decisions would encourage employers to adopt the kinds of quota-like policies that Title VII was enacted to prevent).

64. 28 U.S.C. §§ 2072(a)–(b) (2006).

65. 522 F.3d 215, 220 (2d Cir. 2008).

through a “simplified proof of claim procedure.”⁶⁶ As the Second Circuit explained, “such an aggregate determination is likely to result in an astronomical damages figure that does not accurately reflect the number of plaintiffs actually injured by defendants and that bears little or no relationship to the amount of economic harm actually caused by defendants.”⁶⁷ As such, the Second Circuit concluded that the plan offended the Rules Enabling Act and violated due process.⁶⁸

In the *Dukes* case, the district court opined that Wal-Mart was not entitled to individualized hearings because its allegedly discriminatory decisions were “largely subjective.”⁶⁹ As a result, the district court reasoned, it would be “virtually impossible” to determine which actions were, in fact, discriminatory. Thus, there would be “little point in going through the exercise of individual hearings.”⁷⁰ Numerous federal courts of appeals have since rejected the misplaced notion that subjective decision-making alone is sufficient to deprive defendants of their right to present individualized defenses.⁷¹

Finally, even if individualized hearings are not required for Title VII injunctive relief and back pay, they are indisputably required for punitive damages.⁷² Accordingly, the district court plainly erred in concluding that such damages could be awarded absent an individualized determination of entitlement to relief.

66. *Id.* at 231.

67. *Id.*

68. *Id.* at 231–32.

69. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 176–77 (N.D. Cal. 2004).

70. *Id.*

71. See *Browning v. Dep’t of the Army*, 436 F.3d 692, 696–97 (6th Cir. 2006) (holding that plaintiffs must demonstrate both a discriminatory motive on the part of the employer and a “reliance on subjective matrix criteria does not support an inference of discrimination.”); *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 769 (11th Cir. 2005) (showing subjective evaluations are “properly articulated as part of the employer’s burden to produce a legitimate race-neutral basis for its decision.”); *Green v. New Mexico*, 420 F.3d 1189, 1195 (10th Cir. 2005) (“[W]e have consistently recognized that such criteria ‘must play some role’ in certain management decisions and accordingly have reviewed the use of subjective factors on a case-by-case basis.”).

72. See *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (finding punitive damages may not be imposed unless the defendant has an “opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant’s statements to the contrary”); *In re Simon II Litig. v. Phillip Morris USA, Inc.*, 407 F.3d 125, 139 (2d Cir. 2005) (recognizing that due process counsels against imposing punitive damages for acts of a “broad . . . scope” with respect to a class of plaintiffs).

The EEOC's brief is in direct conflict with the federal government's own defense against discrimination suits. The class action against Wal-Mart was certified under a provision of the law that allows for injunctive relief, not for large monetary awards. Class claims for monetary relief must meet a higher standard to be certified, consequently, one of Wal-Mart's arguments is that the plaintiffs are seeking billions of dollars in damages while they never met the more rigorous threshold for class certification. The EEOC's amicus brief never mentions that the federal government has successfully defended itself in the past by making the same argument as Wal-Mart does.⁷³ Apparently, the EEOC would allow the government to play by a set of rules that are off limits to private companies trying to defend themselves against massive class actions.

IV. CONCLUSION

In summary, employers are watching closely as Wal-Mart awaits a ruling from the Ninth Circuit. If Wal-Mart should lose, the impact will be dramatic on employers, employees, and consumers, and have substantial and deep-reaching unintended consequences. The EEOC has changed course and now supports the notion that a claim seeking billions of dollars in punitive damages and back pay may be decided on a class basis without individual hearings that would permit a company to defend itself. The *Dukes* decision is important because the district court's class-certification order certifying the proposed class is more permissive than most labor and discrimination class-action decisions. It is important for the Roberts' Court to settle the existing differences between the circuits as well as the differences between labor and other areas of law in the very near future. If this struggle ends by permitting class-actions that impose huge monetary and punitive damages on companies without giving the companies an opportunity to demonstrate that the employees were treated fairly across multiple stores, with multiple managers, and involving multiple facts and circumstances, employment growth will slow, outsourcing will increase, and form over substance will acquire an entirely new

73. Brief for Equal Employment Opportunity Commission as Amicus Curiae in Support of Plaintiff, *Dukes v. Wal-Mart, Inc.*, 556 F.3d 919 (9th Cir. 2009) (No. 04-16688), 2009 WL 872875.

meaning. The *Dukes* case should reach the Supreme Court. In the meantime, we will likely experience a jarring ride with regard to employment, labor and discrimination litigation, and regulation.