Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

10 Years Of Dukes: Workplace Bias Class Claims Are Still Alive

By **Joseph Sellers and Christine Webber** (June 17, 2021, 2:56 PM EDT)

Joseph Sellers

Christine Webber

In Wal-Mart Stores Inc. v. Dukes,[1] the U.S. Supreme Court on June 20, 2011, decertified a class of approximately 1.5 million women, depriving the group of the chance to vindicate claims of systemic workplace discrimination.

In doing so, the Supreme Court revised the requirements for establishing commonality, reversed decades of unanimous circuit authority permitting certification pursuant to Federal Rule of Civil Procedure 23(b)(2) for employment discrimination cases seeking back pay, in addition to injunctive relief, and required that any Title VII class action provide the employer with the opportunity to raise individual defenses.[2]

While at the time some believed that Dukes would totally preclude pursuit of employment discrimination class actions, the last decade has shown that Dukes was not a death knell for employment class actions, although some features of the ruling have impeded progress more than others, and it has driven up the expense of such litigation significantly.

Commonality

Regarding commonality under Rule 23(a), and related consideration of predominance under Rule 23(b)(3), courts have certified a variety of discrimination class claims, under both disparate impact and disparate treatment theory.

Policies incorporating discretionary decision-making may demonstrate commonalty in disparate impact cases.

The Dukes court reaffirmed its 1988 holding in Watson v. Fort Worth Bank & Trust[3] that a system of delegated discretion may give rise to liability under Title VII in appropriate cases.[4] In order for such claims to demonstrate commonality where discretion had been delegated to multiple decision makers, the court required demonstrating a common mode of exercising discretion and identifying a specific employment practice.[5]

In McReynolds v. Merrill Lynch Pierce Fenner & Smith Inc.,[6] the U.S. Court of Appeals for the Seventh Circuit in 2012 reversed a denial of class certification. As Judge Richard Posner explained for a

unanimous panel, the existence of a companywide personnel policy distinguished the case from the delegation of discretion in Dukes, which failed to qualify as a discrete, company personnel policy.[7]

The Seventh Circuit found dispositive that the discretion permitted by the challenged policies was exercised "within a framework established by the company."[8] The policies at issue in McReynolds — one that permitted brokers to form teams pursuant to criteria of their choice and another that permitted the allocation of departing brokers' accounts pursuant to criteria of the remaining brokers' choice — constituted discrete personnel policies that permitted those administering them broad discretion in how to implement them.[9]

The Seventh Circuit concluded that challenges to these policies presented questions about their adverse effect that could generate answers common to the class.[10]

Similarly, in Ellis v. Costco Wholesale Corp.,[11] the U.S. District Court for the Northern District of California in 2012 certified challenges to policies permitting discretion. Like McReynolds, the Ellis court found that exercising discretion pursuant to discrete company policies satisfied the commonality requirement of Rule 23.[12]

A constellation of policies formed the framework for discretion: a promotion-from-within preference, a practice against posting management job vacancies, and the absence of a formal application process for promotions to certain management positions.[13]

As the U.S. District Court for the Eastern District of New York explained in Calibuso v. Bank of America Corp. in 2012:

Dukes did not foreclose all class action claims where there is a level of discretion afforded to individual managers … here plaintiffs allege that the implementation of companywide procedures [including the compensation system] results in a disparate impact on women.[14]

Where decision makers exercise their discretion in an environment polluted by gender stereotypes, that only reinforces the conclusion that they exercised their discretion in a common manner.[15]

Disparate impact challenges to nondiscretionary policies continue to easily satisfy commonality.[16]

For example, courts have found commonality based on disparate impact challenges to "tap on the shoulder" employee promotion systems, as in the U.S. District Court for the Southern District of New York's 2012 decision in Chen-Oster v. Goldman, Sachs & Co.[17] In other cases, policies in which pay increases are set as a percentage of existing salary can not only perpetuate but also increase disparities in pay.[18]

Recently, challenges to reliance on prior salary in setting starting pay have been a focus of successful class certification rulings.[19] Relocation requirements have similarly been found to raise common questions.[20]

And of course written exams or physical abilities tests used for hiring or promotion continue to present clear cases for certification, as in the U.S. District Court for the District of Connecticut's 2011 decision in Easterling v. State of Connecticut Department of Correction.[21]

The existence of a single decision maker helps demonstrate commonality in both disparate impact and disparate treatment claims.

The Dukes court noted that one way plaintiffs can identify a common mode of exercising discretion is to show that the discretion was exercised through some common direction.[22] The court also provided the example of "the assertion of discriminatory bias on the part of the same supervisor" as a type of claim that is dependent upon a common contention capable of classwide resolution.[23]

Subsequent courts have found that where decisions are made by a single person or small group, a common mode of exercising discretion or operation of a general policy of discrimination are more readily apparent.

For example in Ellis, the court found that "[t]op management's involvement in the promotion process [was] … consistent, and pervasive, classwide."[24]

And in Scott v. Family Dollar Stores Inc., the U.S. Court of Appeals for the Fourth Circuit noted that "discretionary authority exercised by high-level corporate decision-makers, which is applicable to a broad segment of the corporation's employees, is more likely to satisfy the commonality requirement."[25]

Commonality for a disparate treatment claim may be proved through statistical and anecdotal evidence.

Although the Supreme Court has not explained precisely what constitutes "significant proof" of a general policy of discrimination,[26] sufficient to satisfy the commonality requirement for class certification under a disparate treatment theory, multiple courts have addressed this issue.

In Brown v. Nucor Corp.,[27] the Fourth Circuit in 2015 held that statistical and anecdotal evidence could provide the "glue" satisfying the commonality standard set by Dukes, and therefore could be sufficient to show a general policy of discrimination causing injury across the class. The Brown court noted that unlike a disparate impact claim, "a showing of disparate treatment does not require the identification of a specific employment policy responsible for the discrimination."[28]

Thus, statistical and anecdotal evidence showing a pattern of discrimination "can alone support a disparate treatment claim, even where the pattern is the result of discretionary decision-making."[29]

As the Supreme Court explained in International Brotherhood of Teamsters v. United States in 1977, a decision the Dukes court reaffirmed,[30] pattern or practice claims may establish liability upon showing that discrimination was the "regular rather than the unusual practice."[31]

Statistically significant disparities between the observed and expected results in the challenged personnel practices are sufficient to establish liability, although individual accounts of discrimination bring "the cold numbers convincingly to life."[32]

Statistical analyses must account for the decision maker to ensure that observed disparities are not the result of just a few bad apples.[33] And while an analysis at the decision maker level may be required for some claims, courts examining disaggregated results must consider the pattern of those results.[34]

A company's response to disparities as a classwide issue demonstrates commonality.

In Ellis, the court found that the plaintiffs had provided sufficient proof of commonality in part by showing that the defendant regarded gender disparities as a companywide issue, and had taken steps to increase diversity within the company in response to those widespread disparities.[35]

Thus, when a company addresses a lack of diversity as a classwide problem, this itself demonstrates the existence of a common issue capable of classwide resolution.

Rule 23(b) Issues

The Walmart v. Dukes decision has proved a bigger obstacle to satisfying Rule 23(b). For all but the simplest cases, the ruling bars certification under Rule 23(b)(2) of claims to back pay.

Thus, most class certifications have proceeded either under Rule 23(b)(3), when common questions can be shown to predominate, or certification of issues common to the class under Rule 23(c)(4).[36]

With respect to predominance, courts have expressed relatively little concern about the formulation of damages in evaluating predominance,[37] but have exhibited somewhat greater concern over whether individual defenses will predominate.[38] The existence of some individual defenses does not necessarily defeat predominance.[39]

Moreover, some defenses that may be raised individually can be resolved with common evidence for everyone in the class as to whom the defense is raised.[40] If the liability finding or other classwide evidence can resolve whether a certain factor is a legitimate basis for a difference in pay or denial of promotion, then the availability of that factor as a defense to individual remedial claims may be addressed with evidence common to the class that satisfies the predominance standard.

For those courts that have been hesitant to certify the class claims in their entirety, they have with increasing frequency certified those issues that can be adjudicated with evidence common to the class pursuant to Rule 23(c)(4).

While the plaintiffs in the Dukes case sought certification of their claims under Rule 23(b)(2) and, as a backup, under Rule 23(b)(3), they never pursued, and the Supreme Court never addressed, certification of discrete issues under Rule 23(c)(4). Courts have considerable discretion to certify issues pursuant to Rule 23(c)(4) when doing so would materially advance the resolution of the action.[41]

And an earlier split in the circuits has largely been resolved in confirming that only those issues subject to Rule 23(c)(4) need satisfy the Rule 23(b)(3) predominance requirement, not the entirety of the case.[42] As a result, certification is often sought pursuant to Rule 23(b)(3) and Rule 23(c)(4) in the alternative.[43]

The Legacy of Walmart v. Dukes

While the Walmart v. Dukes decision did not bring an end to certification of employment discrimination claims, it raised the bar for certification, making certification more expensive and time-consuming to achieve.

Courts applying the Dukes decision have wrestled with the meaning of the new standards it announced,

such as what qualifies as "significant proof" of a pattern of discrimination, the common mode of exercising discretion, and what was meant by "trial by formula" — which the Supreme Court clarified in Tyson Foods Inc. v. Bouaphakeo in 2016.[44]

Class certification was once addressed early in the litigation, but regrettably, the Dukes decision has typically delayed it to a much later stage, where it now resembles adjudication of the merits.

More discovery is needed before class certification can even be fairly presented to the court, driving up the cost of class certification, which has made pursuit of those claims prohibitively expensive for some. Moreover, in what must be a development welcomed by employers, after the Dukes decision, class claims have typically been smaller in scope, as they seek to follow guidance by the court to focus their claims challenging discretionary decision-making on a single or small group of decision makers.

Of course, those more narrowly focused class claims can be pursued in multiple actions, each challenging discriminatory decisions in discrete units of the employers' organization. As the substantive protections against employment discrimination are only as effective as the procedures available to enforce them, the Walmart v. Dukes decision has left some workers aggrieved by employment discrimination unable to secure the rights provided by Congress.

While the Walmart v. Dukes decision has made certification of employment discrimination claims more challenging and expensive, jurisprudence from the past decade shows that discrimination claims can still be pursued collectively.[45]

Joseph M. Sellers is a partner, and chair and founder of the civil rights and employment practice group, at Cohen Milstein Sellers & Toll PLLC.

Christine E. Webber is a partner at the firm.

Disclosure: Sellers and Webber represented Dukes and the plaintiff class in Wal-Mart Stores v. Dukes, and Sellers argued the case before the Supreme Court.

[1] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

[2] Id. at 352-53, 360-61, 366-67.

[3] 487 U.S. 977 (1988).

[4] Dukes, 564 U.S. at 355 (quoting Watson, 487 U.S. at 990-91).

[5] Id. at 356-57.

[6] 672 F.3d 482 (7th Cir. 2012).

[7] Id. at 488.

[8] Id.

[9] Id. at 488-89.

[10] Id. at 490-91. See also Chen-Oster v. Goldman, Sachs & Co., 877 F. Supp. 2d 113, 118 (S.D.N.Y. 2012) ("360–degree review" process, a forced-quartile ranking of employees, and a "tap on the shoulder" system for selecting employees for promotion, in combination with managerial discretion, could comprise a "common mode of exercising discretion") (citing Dukes, 131 S. Ct. at 2554-55). In In re Countrywide Financial Mortgage Lending Practices Litigation, 708 F.3d 704 (6th Cir. 2013), the Sixth Circuit held that the plaintiffs had failed to satisfy the requirements for commonality laid down in Dukes. However, as the Sixth Circuit noted, its decision is not at odds with McReynolds. Id. at 708.

[11] 285 F.R.D. 492 (N.D. Cal. 2012), appeal dismissed, 657 F.3d 970 (9th Cir. 2013).

[12] Id. at 518-19.

[13] Id. at 510, 511.

[14] 893 F. Supp. 2d 374, 390 (E.D.N.Y. 2012). See also Moore v. Napolitano, 926 F. Supp. 2d 8, 29-31 (D.D.C. 2013); Scott, 733 F.3d at 113-14 ("[E]ven where company-wide subjective decision-making or discretion is alleged in the employment discrimination context, [Dukes] indicates that if another company-wide policy is also alleged, courts must also consider it.") (citing Dukes, 131 S.Ct. at 2553); Calibuso, 893 F. Supp. 2d at 381, 390 (challenging compensation practices, including criteria that were "not adequately communicated to employees" and "not consistently and/or even-handedly applied"; whereas "in Dukes, the plaintiffs merely alleged a strong corporate culture of gender discrimination, here plaintiffs allege that the implementation of company-wide procedures, i.e. the compensation … systems, results in a disparate impact on women ...").

[15] See Ellis, 285 F.R.D at 532.

[16] See Dukes, 564 U.S. at 353; Scott v. Family Dollar Stores, Inc., 733 F.3d 105, 110, 116-17 (4th Cir. 2013); Scott v. Family Dollar Stores, Inc., No. 308-CV-00540-MOC-DSC, 2016 WL 9665158, at *6 (W.D.N.C. June 24, 2016).

[17] 2012 WL 205875, at *5; see also Ellis, 285 F.R.D. at 531.

[18] The Scott, Ellis and Chen-Oster courts have all recognized this dynamic. Scott, 2016 WL 9665158, at *6 (company's salary range policy could be reinforced by the annual pay raise percentage policy to perpetuate pay disparities throughout a class member's career); Ellis, 285 F.R.D. at 532 ("the derivative effects of a companywide policy could themselves present issues common to the class."); Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950(LBS)(JCF), 2012 WL 205875, at *3 (S.D.N.Y. Jan. 19, 2012) ("Because Goldman Sachs compensates its finance professionals in each year as a percentage increase from the prior year's [total compensation,] each discriminatory compensation decision further widens the pay gap.") (internal quotation marks omitted).

[19] See Redacted Order Granting Plaintiffs' Motion for Class Certification, Ellis v. Google, LLC, Case No. CGC-17-561299, slip op. at 10-11 (Cal. App. Dep't Super. Ct., Cnty. S.F. May27, 2021); [Proposed] Order Granting Representative Plaintiffs' Motion for Class Certification, Jewett v. Oracle America, Inc., Case No.

17-CIV-02669, slip op. at 2 (Cal. App. Dep't Super. Ct., Cnty. San Mateo Jan. 18, 2019).

[20] See Ellis, 285 F.R.D. at 531 ("a premium on schedule flexibility and ability to relocate" were common and specific employment practices).

[21] 783 F. Supp. 2d 323 (D. Conn. 2011).

[22] 564 U.S. at 341.

[23] Id. at 350.

[24] 285 F.R.D. at 511-14.

[25] 733 F.3d at 114. See also Chicago Teachers Union, Local No. 1 v. Bd. of Educ., 797 F.3d 426, 440 (7th Cir. 2015) (finding commonality where facts showed "one decision-making body, exercising discretion as one unit, with the ultimate decision in the hands of one single person"); Moore v. Napolitano, 926 F. Supp. 2d 8 (D.D.C. 2013).

[26] Dukes, 564 U.S. at 353.

[27] 785 F.3d 895, 909 (4th Cir. 2015).

[28] Id. at 915 (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.16 (1977)).

[29] Id. See also Scott, 2016 WL 9665158, at *7 ("[P]laintiffs' pattern-or-practice claim looks to the pattern alleged rather than the individualized decisions …. Here, plaintiff has produced multiple regression analysis studies indicating gender-based pay disparities, amounting to considerable evidence of a classwide pattern-or-practice of discrimination.") (citing Bazemore v. Friday, 478 U.S. 385, 400 (1986); Rollins v. Traylor Bros., No. C14-1414 JCC, 2016 WL 258523, at *7 (W.D. Wash. Jan. 21, 2016) ("Significant proof of … a policy [of discrimination] can be shown entirely through statistics and anecdotal evidence that demonstrate a pattern of discrimination even where the pattern is the result of discretionary decision-making. The required discriminatory intent may be inferred upon such a showing.").

[30] 564 U.S. at 352 n.7.

[31] Teamsters, 431 U.S. at 336.

[32] Id. at 339.

[33] Dukes, 564 U.S. at 357.

[34] Ellis, 285 F.R.D. at 523-24 (finding commonality satisfied although statistically significant disparities not present in every region); McReynolds v. Sodexho Marriot Servs., Inc., 349 F. Supp. 2d 1, 14-16 (D.D.C. 2004) (plaintiffs' expert found commonality where "73.7% (84 out of 114) of the [sub-units] show[ed] a disparity (although not a statistically significant one)"); Ramona L. Paetzold and Steven L. Willborn, The Statistics of Discrimination: Using Statistical Evidence in Discrimination Cases 169-171 (West, 2012-2013 ed.); Joseph L. Gastwirth et al., Some Important Statistical Issues Courts Should Consider in Their Assessment of Statistical Analyses Submitted in Class Certification Motions:

Implications for Dukes v. Wal–Mart, 10 Law, Probability & Risk 225, 228, 234-35 (2011).

[35] 285 F.R.D. at 501-02. See also id. at 515–16 ("Costco's own briefing touts its companywide efforts as effective in increasing diversity through various companywide policies. Costco thus implicitly concedes that its promotion practices are subject to companywide control and adjustment depending upon senior management's goals and instructions.").

[36] See, e.g., Moore v. Napolitano, 926 F. Supp. 2d 8, 33 (D.D.C. 2013) ("Here, the common issues of whether the MPP promotions process discriminates against African–American SAs and whether the Secret Service has a pattern and practice of race discrimination which the plaintiffs will try to prove through their statistical evidence predominate over individual issues."); Brown v. City of Detroit, No. 10-CV-12162, 2014 WL 7074259, at *3 (E.D. Mich. Dec. 12, 2014) ("[B]ifurcation pursuant to Rule 23(c)(4) continues to provide a viable solution if damages cannot be determined on a class-wide basis, so long the proposed class satisfies the requirements of Rule 23(a) and (b) with respect to liability.").

[37] See, e.g., Parra v. Bashas', 291 F.R.D. at 391 ("[T]he amount of damages is invariably an individual question and does not defeat class action treatment.") (quoting Leyva v. Medline Indus. Inc., 716 F.3d 510, 514 (9th Cir. 2013)).

[38] See, e.g., Id. at 390 (finding that Rule 23(b)(3) "is designed for situations in which class-action treatment is not as clearly called for," which explains "the court's duty to take a 'close look' at whether common questions predominate over individual ones") (quoting Comcast Corp. v. Behrend, 569 U.S. 27, 34 (2013)).

[39] See, e.g., Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453 (2016) ("When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'" (quoting 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1778, pp. 123–124 (3d ed. 2005)).

[40] See, e.g., Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 815 (7th Cir. 2012) (quoting Blades v. Monsanto Co., 400 F.3d 562, 566 (8th Cir. 2005) ("If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question."); In re Processed Egg Prod. Antitrust Litig., 312 F.R.D. 171, 183 (E.D. Pa. 2015) ("These defenses will succeed or fail on evidence and questions of law common to the class. Accordingly, with respect to whether there was an antitrust violation, the questions common to the classes predominate over questions individual to the class members."); United States v. City of New York, No. 07-CN-2067(NGG)(RLM), 2011 WL 3174084, at *26, 31 (E.D.N.Y. July 8, 2011) (determining which hiring criteria qualify as nondiscriminatory reasons for the City's adverse employment action presented common question, even though City could raise different reasons for different class members).

[41] See, e.g., Gonzalez v. Owens Corning, 885 F.3d 186, 203 (3d Cir. 2018), as amended Apr. 4, 2018 ("The District Court therefore correctly determined that a Rule 23(c)(4) class would not 'materially advance resolution of the underlying claims.'"); In re Johnson, 760 F.3d 66, 73 (D.C. Cir. 2014) ("Because there is a good deal of commonality in the way all those promotion decisions were made, the district court did not manifestly err in finding the class claims could be moved together toward

resolution."); Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1229 (9th Cir. 1996) (where district court "did not discuss whether the adjudication of the certified issues would significantly advance the resolution of the underlying case," the district court did not properly consider Rule 23(c)(4)).

[42] In Castano v. Am. Tobacco Co., the Fifth Circuit described Rule 23(c)(4) in a footnote as merely "a housekeeping rule that allows courts to sever the common issues for a class trial. " F.3d 734, 745 n.21 (5th Cir. 1996). But it has since taken a different approach. See In re Deepwater Horizon, 739 F.3d 790, 806, 816 (5th Cir. 2014); Steering Comm. v. Exxon Mobil Corp., 461 F.3d 598, 603 (5th Cir. 2006) (explaining that problems with predominance may be avoided through a manageable trial plan that bifurcates class-wide liability issues from individual issues); see also, e.g., In re Nassau County Strip Search Cases, 461 F.3d 219, 226 (2d Cir. 2006) (explaining that the Castano footnote would make Rule 23(c)(4) a nullity); Martin v. Behr Dayton Thermal Prods. LLC, 896 F.3d 405, 412 (6th Cir. 2018) (rejecting the interpretation that predominance must be satisfied for certification under Rule 23(c)(4)); In re Allstate Ins. Co., 400 F.3d 505, 508 (7th Cir. 2005) (same); Gunnells v. Healthplan Servs., Inc ., 348 F.3d 417, 438–45 (4th Cir. 2003).

[43] See, e.g., Buchanan v. Tata Consultancy Servs., Ltd., No. 15-CV-01696-YGR, 2017 WL 6611653 (N.D. Cal. Dec. 27, 2017) (certifying a class in a discriminatory termination case under 23(b)(3) where plaintiffs argued for certification under 23(b)(3) and 23(c)(4) in the alternative); Chicago Tchrs. Union, Loc. No. 1 v. Bd. of Educ. of City of Chicago, 797 F.3d 426 (7th Cir. 2015) (declining to consider a 23(c)(4) claim because the class could be certified under 23(b)(2) and (3)).

[44] Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 458-59 (2016).

[45] See, e.g., Redacted Order Granting Plaintiffs' Motion for Class Certification, Ellis v. Google, LLC, Case No. CGC-17-561299, slip op. (Cal. App. Dep't Super. Ct., Cnty. S.F. May27, 2021); [Proposed] Order Granting Representative Plaintiffs' Motion for Class Certification, Jewett v. Oracle America, Inc., Case No. 17-CIV-02669, slip op. (Cal. App. Dep't Super. Ct., Cnty. San Mateo Jan. 18, 2019).
