Wal-Mart v. Dukes Redux: The Future of the Sprawling Class Action

by John M. Husband and Bradford J. Williams

This article analyzes the U.S. Supreme Court's watershed decision in Wal-Mart Stores, Inc. v. Dukes *in light of previously unsettled questions under the federal class action device. It suggests how the Court's resolution of evidentiary and interpretative issues will render nationwide employment discrimination class actions far less successful, and even less desirable, than in the pre-*Dukes *era.*

On June 20, 2011, the U.S. Supreme Court handed down its most highly anticipated employment law decision in a decade.[1] The Court's first major pronouncement on Federal Rule of Civil Procedure (Rule) 23 prerequisites in twelve years, *Wal-Mart Stores, Inc. v. Dukes*, rejected a proposed class of 1.5 million employees alleging widespread sex discrimination at Wal-Mart stores.[2] The Court rejected this class as too unwieldy to satisfy the Rule 23(a)(2) requirement of "commonality."[3] The Court also curtailed the types of relief available under Rule 23(b)(2) class actions, effectively mandating that all future employment class action plaintiffs must proceed under a far more rigorous section of Rule 23.[4]

As the authors of this article presented in a May 2011 *The Colorado Lawyer* article, *Dukes* exemplified a growing trend toward high-profile, high-stakes litigation brought against large U.S. companies.[5] Indeed, the number of class actions filed against U.S. companies—and particularly those filed under Rule 23(b)(2)—has recently grown apace.[6] Nonetheless, the Supreme Court's decision has reinvigorated the Rule 23(a) and (b) prerequisites, and arguably halted the advance of nationwide employment class actions. In short, *Dukes*'s effect on employers can hardly be overstated.

This article analyzes *Dukes* in light of previously unsettled questions under the federal class action device and describes the decision's anticipated effects on employers and class action litigators. The article answers many questions the authors identified in their May 2011 article. It suggests that future employment class actions—even those sought to be certified under Rule 23(b)(3)—may prove far less successful, and even less desirable, than many plaintiffs' attorneys currently anticipate.

Overview

Dukes involved "one of the most expansive class actions ever."[7] Betty Dukes and six other plaintiffs sought to represent a class of around 1.5 million women who were current and former Wal-Mart employees working at stores throughout the United States.[8] Wal-Mart is the country's largest private employer, and it operates Discount Stores, Supercenters, Neighborhood Markets, and Sam's Clubs in seven nationwide divisions.[9] The divisions comprise forty-one regions, and each region contains eighty to eighty-five stores.[10] Each store has as many as fifty-three departments and 500 employees.[11]

Plaintiffs' Theory and the Certification Motion

Local Wal-Mart store managers enjoy broad discretion over pay and promotion decisions, although they must act within broad guidelines and defined salary bands.[12] Dukes and the other named plaintiffs filed suit in 2001, alleging that Wal-Mart's delegation of discretion to local store managers resulted in widespread pay and promotion discrimination against women.[13] Specifically, they

Coordinating Editor

John M. Husband, Denver, of Holland & Hart LLP—(303) 295-8228, jhusband@hollandhart.com

About the Authors

John M. Husband is the Chair of Holland & Hart LLP's Management Committee. He is a Fellow of the College of Labor and Employment Lawyers, and has a nationally recognized practice and extensive experience in nationwide class and collective actions—jhusband@hollandhart.com.

Bradford J. Williams is an associate in Holland & Hart LLP's Denver office. He is a member of the firm's Labor and Employment Practice Group, and has extensive experience counseling employers and assisting in labor and employment litigation—bjwilliams@hollandhart.com.

Labor and Employment Law articles are sponsored by the CBA Labor and Employment Law Section to present current issues and topics of interest to attorneys, judges, and legal and judicial administrators on all aspects of labor and employment law in Colorado.

alleged that local managers' discretion was exercised disproportionately in favor of men, resulting in disparate treatment under Title VII of the Civil Rights Act of 1964 (Title VII).[14] They also alleged that Wal-Mart was aware of this effect, and that its refusal to cabin managers' discretion constituted disparate treatment.[15] Notably, plaintiffs did not allege that Wal-Mart had any express corporate policy against the advancement of women.[16]

In 2003, the *Dukes* plaintiffs sought an order certifying a Rule 23(b)(2) class of all women employed by the company since 1998 who may have been subjected to alleged discriminatory practices.[17] They sought injunctive and declaratory relief, punitive damages, and backpay, but did not request compensatory damages.[18] To satisfy Rule 23(a)(2)'s commonality requirement, the plaintiffs relied principally on three types of evidence. First, they invoked statistical evidence regarding pay and promotion disparities between men and women at Wal-Mart.[19] Second, they offered anecdotal reports of alleged discrimination from approximately 120 Wal-Mart employees.[20] Third, they relied on a "social framework analysis" of Wal-Mart's "culture," which concluded that the company was "vulnerable" to sexism.[21]

Class Certification and Appeal

In 2004, the district court certified the plaintiffs' proposed class with minor variations not relevant here.[22] In 2007, a Ninth Circuit panel twice affirmed the district court's order, albeit while remanding for consideration of whether technical standing issues barred certain plaintiffs from pursuing injunctive or declaratory relief.[23] After agreeing to hear the case *en banc* in 2009, the Ninth Circuit issued a long-awaited decision in 2010, again substantially affirming the class certification.[24] As indicated below, the Ninth Circuit nonetheless reached controversial conclusions regarding Rule 23's evidentiary standard, Rule 23(a)(2)'s commonality requirement, the types of relief available under Rule 23(b)(2), and how to determine monetary damages in a Title VII class action.

In 2010, the Supreme Court granted a petition for *certiorari*, agreeing to decide whether claims for monetary relief could be certified under Rule 23(b)(2) and, if so, under what circumstances.[25] The Court also enigmatically ordered the parties to brief whether "the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)."[26] As the authors of this article noted in their previous article, this ambiguous direction provided a "virtually blank slate" on which the Supreme Court could "write the future of the Rule 23 class action device."[27] The Court did not disappoint.

Rule 23 Evidentiary Standard

As discussed in the authors' previous article, federal courts long have been flummoxed by the appropriate evidentiary standard for class certification, disagreeing about whether allegations in class complaints must be accepted as true; whether courts may consider merits issues in ruling on certification questions; and whether courts may weigh, or perhaps even bar, parties' proffered expert testimony.[28] Indeed, the district court in *Dukes* declined to resolve a *Daubert*[29] challenge to the plaintiffs' proffered social framework analysis testimony, and the Ninth Circuit effectively declined to resolve various merits issues that it felt were coterminous with Rule 23(a)(2)'s commonality requirement.[30] The Supreme Court's June 20, 2011 decision resolved many of these uncertainties.

Pleading Standard Versus Proof

As presented in the May 2011 article, the Supreme Court's pre-*Dukes* jurisprudence long had been torn between *Eisen v. Carlisle and Jacquelin*, which suggested that courts had no "authority to conduct a preliminary inquiry into the merits of a suit," and *General Telephone Company of the Southwest v. Falcon*, which suggested that courts must conduct a "rigorous analysis" at the class certification stage.[31] The Tenth Circuit has exhibited a variety of this judicial uncertainty, alternately holding that class action plaintiffs bear a "strict burden of proof" at the certification stage, and that courts must "accept the substantive allegations of the complaint as true."[32]

The *Dukes* decision conclusively resolved this dispute. The Court unambiguously held that Rule 23 does not provide a "mere pleading standard," but instead requires putative class action plaintiffs to be "prepared to prove" all the elements required for class certification.[33] Moreover, the Court expressly reaffirmed *Falcon*'s "rigorous analysis" requirement, dismissing *Eisen*'s contrary pronouncement as "the purest dictum."[34]

In short, Supreme Court jurisprudence is now fully aligned with certain vanguard cases from recent years holding that putative class action plaintiffs must prove all Rule 23 elements by a preponderance of the evidence.[35] The *Dukes* decision thus completes an evolution toward a more searching class certification inquiry that was facilitated by the 2003 amendments to the federal rules, which both eliminated conditional class certifications and effectively permitted courts to order more discovery before deciding certification issues.[36]

The *Dukes* decision's likely effects on employers include fewer unmeritorious cases being filed, because plaintiffs' attorneys now will have to invest significant resources in discovery before moving for certification. The higher evidentiary burden also likely will cause fewer unmeritorious cases to be certified, thus limiting the settlement leverage plaintiffs' attorneys enjoy following certification under less demanding standards. Notably, many cases—including those from the Tenth Circuit—that have anticipated the Supreme Court's repudiation of *Eisen* have declined to certify proposed plaintiff classes.[37]

Consideration of Merits Issues

The *Dukes* decision also banished any residual notion—again derived from *Eisen*—that courts were barred from considering merits issues during the class certification stage. Specifically, the Court distinguished *Eisen* as a case involving the cost of class notification, not the propriety of class certification, and noted that class certification analyses will frequently "entail some overlap with the merits of the plaintiff's underlying claim."[38] As the Court related: "That cannot be helped."[39]

In reaching this decision, the Court followed the lead of *Falcon* and earlier Supreme Court cases, and implicitly rebuked the Ninth Circuit for concluding otherwise.[40] The Ninth Circuit had purported to distinguish other circuit court cases sanctioning a merits inquiry at the class certification stage on the basis that such cases tended to involve securities class actions, and were decided in reference to Rule 23(b)(3)'s requirements, not Rule 23(a)(2)'s commonality requirement.[41] The Ninth Circuit had purported to carve out a limited exception for Title VII class actions, noting that plaintiffs' proffered statistical evidence in such actions "does not *overlap* with the merits, it largely *is* the merits."[42]

The Supreme Court completely rejected this dichotomizing. The Court freely acknowledged that "proof of commonality necessarily overlaps with [plaintiffs'] merits contentions that Wal-Mart engages in a *pattern or practice* of discrimination."[43] It also noted that proof of both commonality and discrimination required evidence of the reasons for Wal-Mart's challenged employment decisions, and held that plaintiffs had to produce "some glue holding the alleged *reasons*" for these decisions together to obtain class certification.[44] Such glue, of course, also is necessary for plaintiffs' pattern or practice claim.

Daubert *Challenges*

As noted above, the district court in *Dukes* declined to resolve a *Daubert* challenge to the plaintiffs' proffered social framework analysis testimony.[45] The Supreme Court did not disturb this decision, but instead dismissed the challenged testimony as irrelevant to plaintiffs' claims.[46] Nonetheless, the Court poignantly noted that it "doubt[ed]" that the district court had properly eschewed a full *Daubert* analysis.[47]

Although not controlling, the Supreme Court's *dicta* strongly suggests support for the approach of *American Honda Motor Company, Inc. v. Allen*, and similar circuit courts cases that hold that "the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants."[48] It also arguably suggests that the primary competing standard—that a court must accept proffered expert testimony that is not "fatally flawed"—may be moribund.[49] Tellingly, the district court in *Dukes* had assumed the applicability of this competing standard.[50]

Weighing Expert Testimony

Beyond touching on the admissibility of expert testimony, the *Dukes* decision also arguably demonstrated—albeit only through example—that courts may weigh competing expert testimony during the certification stage. Specifically, the Court rejected plaintiffs' statistical evidence regarding pay and promotion disparities, in part by adopting the logic espoused by Wal-Mart's competing expert in the district court.[51] Understandably, this drew a rebuke in Justice Ginsburg's dissent, charging the appellate Court with improper fact finding.[52]

By effectively weighing expert testimony, however, the Supreme Court may have signaled its approval of cases such as *In re Hydrogen Peroxide Antitrust Litigation*, which hold that: "Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands."[53] *In re Hydrogen Peroxide* also noted that fact finding at the class certification stage need not bind the ultimate fact finder at trial.[54] The *Dukes* decision echoed this sentiment in a slightly different context.[55] In sum, by both directly and indirectly shoring up Rule 23's evidentiary standard, the *Dukes* decision ensures that future class action plaintiffs likely will face a more costly and demanding class certification fight than in the pre-*Dukes* era.

The Rule 23(a)(2) Commonality Requirement

Dukes's most conspicuous and contested feature easily was its strengthening of Rule 23(a)(2)'s commonality requirement. Rule 23(a)(2) requires that all class action plaintiffs show "questions of law or fact common to the class."[56] *Dukes*'s construction of this element affects both employment discrimination and other class action plaintiffs.

Construction of the Commonality Requirement

The Ninth Circuit had construed the commonality requirement literally, concluding that plaintiffs need show only "common *questions* of law or fact" and not "proof of answers to those questions or the likelihood of success on the merits."[57] Justice Ginsburg's dissent echoed this sentiment, arguing that the mere question, "whether Wal-Mart's pay and promotions policies gave rise to unlawful discrimination," was sufficient under Rule 23(a)(2).[58]

The Court completely disagreed. Noting that all competently crafted complaints literally raise common questions, it held that the key to Rule 23(a)(2)'s commonality requirement lay in a class action's ability to provide common answers to issues central to each class member's claims.[59] In other words, class members must make common falsifiable contentions whose resolution will decide critical issues affecting "each one of the claims in one stroke."[60] Dissimilarities within the proposed class may impede the generation of common answers.[61]

This demanding standard may require proof of class claims at the certification stage. Indeed, the Court stated that plaintiffs must demonstrate that they "have suffered the same injury."[62] It further held:

> Because [plaintiffs] provide no convincing proof of a company-wide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question.[63]

The effects of the Court's commonality ruling will be far-reaching. The heightened standard will affect all future class action plaintiffs, because establishing commonality is a threshold requirement under Rule 23. *Dicta* regarding the types of cases that may pass Rule 23(a)(2) muster suggest that future employment discrimination class action plaintiffs may have to identify policies or decision makers that affect each class member identically.[64] In other words, they may have to focus on individual stores or departments, at least barring express discriminatory policies applying across an entire company.

Commonality in Title VII Actions

Beyond commenting broadly on the Rule 23(a)(2) commonality requirement, *Dukes* also revitalized decades-old precedent applying that requirement within the specific Title VII context. Invoking *Falcon*, the Court held that, at least absent companywide biased evaluation procedures, plaintiffs must provide "[s]ignificant proof that an employer operated under a general policy of discrimination" to prove commonality.[65] Notably, the plaintiffs' proffered evidence fell significantly short.

For instance, the Court dismissed plaintiffs' social framework analysis testimony as irrelevant because their expert could not identify the percentage of challenged employment decisions that had allegedly been determined by sexual stereotypes.[66] Instead, he had merely opined that Wal-Mart's culture was vulnerable to sexism.[67] Similarly, the Court dismissed plaintiffs' anecdotal reports of alleged discrimination because they had offered only one anecdote for every 12,500 class members, and even those anecdotes did not fairly encompass all Wal-Mart stores.[68]

As noted above, the Court also rejected plaintiffs' statistical evidence regarding pay and promotion disparities, in part after implicitly accepting the testimony of Wal-Mart's competing expert.[69] The Court nonetheless provocatively stated that, even if nationwide disparities had been proven, the combination of such disparities with widespread managerial discretion still would not suffice to establish commonality.[70] As Justice Ginsburg noted in dissent, this holding arguably gutted the Court's landmark decision in *Watson v. Fort Worth Bank and Trust*, which sanctioned disparate impact claims premised on subjective or discretionary promotion systems.[71]

In sum, the Court's novel construction of Rule 23(a)(2) will profoundly affect all future class action plaintiffs. Because the Court could have resolved the case on narrow Title VII grounds, its strengthening of Rule 23(a)(2)'s commonality requirement suggests conviction regarding the proper scope of a Rule 23 class action.

Rule 23(b)(2) Relief

In its second core holding, *Dukes* determined that individualized monetary relief is not recoverable under Rule 23(b)(2) class actions.

Rule 23(b)(2) is one of three sections under which class actions may be certified. It permits certification where "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[72] Beyond holding that the Rule precludes recovery of backpay, the Court left important Rule 23(b)(2) questions unanswered.

Rule 23(b)(2) and Backpay

Before *Dukes*, most courts had considered backpay to be an equitable remedy under Title VII.[73] This understanding may have derived from the desire to avoid triggering Seventh Amendment jury trial rights in the South during Title VII's early years.[74] Regardless, most courts permitted the recovery of backpay—along with injunctive and declaratory relief—in Rule 23(b)(2) class actions.[75]

In the May 2011 article, the authors noted that the availability of compensatory and punitive damages under the Civil Rights Act of 1991 caused circuit court authority to split regarding the appropriate test for determining when, if ever, monetary damages might be recoverable in a Rule 23(b)(2) class action.[76] The Ninth Circuit's *Dukes* decision created a three-way split on the issue.[77]

Resolving this split was critical. If Rule 23(b)(2) certification were unavailable, plaintiffs requesting monetary relief would have to seek certification under Rule 23(b)(3).[78] This Rule requires proof that common questions predominate over individual questions, and that a class action is superior to other methods of adjudicating the dispute.[79] It also requires that notice and opt-out rights be provided to absent class members.[80] In short, it makes class certification less certain and less desirable than under Rule 23(b)(2).

In *Dukes*, the Supreme Court unambiguously held that claims for "*individualized* relief," including backpay, are unavailable under Rule 23(b)(2).[81] This holding confirmed *dicta* from *Ticor Title Insurance Company v. Brown* and earlier Supreme Court cases.[82]

In reaching this decision, the Court analyzed historical antecedents to Rule 23(b)(2), noting that most had involved challenges to segregation in which plaintiffs had requested classwide orders, but not individualized relief.[83] The Court also acknowledged that any contrary rule might yield "perverse incentives," because class representatives could be tempted to eschew certain types of monetary relief to secure class certification.[84] *Res judicata* then might bar absent class members from pursuing such relief, despite having never received notice or opt-out rights.[85]

Notably, the Court easily dismissed lower court jurisprudence holding that backpay was recoverable as an equitable remedy under Title VII.[86] Acknowledging that backpay may, in fact, be equitable, the Court nonetheless declared: "The Rule does not speak of 'equitable' remedies generally, but of injunctions and declaratory judgments."[87]

Rule 23(b)(2) and Due Process

Dukes's Rule 23(b)(2) decision also was premised on prior case law holding that the Due Process Clause requires notice and opt-out rights in class actions predominantly seeking monetary damages.[88] These rights are mandated under Rule 23(b)(3), but not under Rule 23(b)(2).[89]

Interestingly, the *Dukes* Court noted, in passing, a "serious possibility" that the Due Process Clause may require notice and opt-out rights even in class actions where monetary claims do not predominate.[90] This tracks critical commentary arguing that justifications for the absence of such rights in Rule 23(b)(2) class actions—including the alleged alignment of class members' interests and the indivisibility of injunctive relief—may be infirm.[91] For instance, class members' interests may not always align in Rule 23(b)(2) class actions, and notice may be required to help courts craft appropriate injunctive relief.[92]

In short, *Dukes* may presage a future class action jurisprudence focused more directly on due process concerns. It also might augur the eventual invalidation of Rule 23(b)(2) on constitutional grounds.

Rule 23(b)(2) and Punitive Damages

Due to its procedural posture, *Dukes* did not have to address whether punitive damages also were "*individualized* relief" that was unavailable under Rule 23(b)(2).[93] Although the plaintiffs had re-

quested such relief, the district court exercised its discretion to order opt-out rights with respect to this claim.[94] The Ninth Circuit had remanded for consideration of whether punitive damages were compatible with a Rule 23(b)(2) class action, and whether this claim instead should be certified under Rule 23(b)(3).[95]

Given this posture, the Supreme Court expressly reserved the question of whether all forms of monetary relief are incompatible with its interpretation of Rule 23(b)(2) and the Due Process Clause.[96] As such, future class action plaintiffs may attempt to certify Rule 23(b)(2) classes seeking only injunctive relief and punitive damages. The success of such efforts likely will hinge on whether punitive damages may be calculated on a classwide—as opposed to an individualized—basis. Current case law on this issue is conflicted.[97]

Determining Damages in a Title VII Class Action

The Ninth Circuit endorsed a bifurcated trial plan in *Dukes* consisting of a liability and a remedies phase.[98] The plan provided for calculation of individual damages based on a series of randomly selected "sample cases."[99] The Ninth Circuit earlier had endorsed a similar plan in *Hilao v. Estate of Marcos*.[100]

Dukes flatly rejected this "Trial by Formula."[101] Noting that Title VII provides a detailed remedial scheme, and that the Rules Enabling Act forbids any interpretation of Rule 23 that abridges substantive rights, it held that Wal-Mart was entitled to individual hearings on "each employee's eligibility for backpay."[102] It further held: "[A] class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims."[103]

In place of *Hilao*, *Dukes* reaffirmed the continued vitality of *Int'l Brotherhood of Teamsters v. United States*.[104] Under *Teamsters*, a district court generally must conduct additional proceedings to determine individual relief after class plaintiffs establish a pattern or practice of discrimination.[105] Defendants may present affirmative defenses and attempt to prove that individuals were denied employment opportunities for non-discriminatory reasons.[106]

Dukes's reinvigoration of *Teamsters* could have profound consequences. Class actions for individual relief—including those certified under Rule 23(b)(3)—now unquestionably require individualized hearings once plaintiffs prove a pattern or practice of discrimination. The settlement calculus in such actions thus may become much more akin to that in repeated, single-plaintiff lawsuits. *Dukes*'s reinvigoration of *Teamsters* also may impede certification of Rule 23(b)(3) classes in the first instance, because minitrials on damages may be inconsistent with the Rule's superiority and predominance requirements.[107]

A Possible Legislative Solution

Together with the 2011 decision in *AT&T Mobility LLC v. Concepción*, *Dukes* may signal a growing Supreme Court hostility toward class actions.[108] *AT&T Mobility* held that the Federal Arbitration Act preempts a California state rule finding class arbitration waivers in consumer contracts to be unconscionable, and thus unenforceable, under certain circumstances.[109] Critics have decried both cases as excessively pro-business.[110]

Because it rests primarily on an interpretation of Rule 23, *Dukes* is vulnerable to legislative reversal. In Congressional hearings to discuss the decision, witnesses have urged legislative action.[111] How legislation might reverse *Dukes*'s holdings without running afoul of the Due Process Clause or Wal-Mart's substantive Title VII rights is unclear.

Conclusion

Wal-Mart Stores, Inc. v. Dukes is a watershed case for employment law practitioners and class action litigators. By strengthening the Rule 23(a) and (b) prerequisites, along with the Rule's evidentiary standard, *Dukes* ensures that future class certifications will prove far more infrequent—and more expensive—than in the pre-*Dukes* era. Nationwide employment discrimination class actions in particular may prove far less successful, and even less desirable, than many plaintiffs' attorneys currently anticipate.

Notes

1. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. __, 2011 WL 2437013 (June 20, 2011).
2. *See id*. *See also Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).
3. *See Wal-Mart Stores, Inc., supra* note 1 at *7-*12. *See also* F.R.C.P. 23(a)(2).
4. *See Wal-Mart Stores, Inc., supra* note 1 at *12-*15.
5. *See* Husband and Williams, "The Sprawling Class Action After *Dukes v. Wal-Mart*: Unsettled Questions," 40 *The Colorado Lawyer* 49, 49 (May 2011), available at www.cobar.org/tcl/tcl_articles.cfm?articleid=7017.
6. *See* Poon *et al.*, "Class Distinctions," 33 *Los Angeles Lawyer* 18, 18-20 (Feb. 2011).
7. *Wal-Mart Stores, Inc., supra* note 1 at *3.
8. *See id.* at *3-*4.
9. *See id.* at *3.
10. *See id*.
11. *See id.*
12. *See id.*
13. *See id.* at *3-*4.
14. *See id.* at *4.
15. *See id.*
16. *See id.*
17. *See id.* at *5. *See also Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D.Cal. 2004).
18. *See Wal-Mart Stores, Inc., supra* note 1 at *4; *Dukes, supra* note 17 at 141.
19. *See Wal-Mart Stores, Inc., supra* note 1 at *5; *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 600 (9th Cir. 2010) (*en banc*).
20. *See Wal-Mart Stores, Inc., supra* note 1 at *5; *Dukes, supra* note 19 at 600.
21. *See id*.
22. *See Dukes, supra* note 17 at 143.
23. *See Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007); *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168 (9th Cir. 2007).
24. *See Dukes v. Wal-Mart, Inc.*, 556 F.3d 919 (9th Cir. 2009); *Dukes, supra* note 19.
25. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 795 (2010). *See also* Petition for a Writ of *Certiorari* at i, *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277 (U.S., Aug. 25, 2010).
26. *Wal-Mart Stores, Inc., supra* note 25.
27. Husband and Williams, *supra* note 5 at 55.
28. *See id.* at 53-54.
29. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).
30. *See Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 189, 191-92 (N.D.Cal. 2004). *See, e.g., Dukes, supra* note 19 at 590-94.
31. Husband and Williams, *supra* note 5 at 53. *See also Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177 (1974); *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 161 (1982).

32. *Reed v. Brown*, 849 F.2d 1307, 1309 (10th Cir. 1988) (internal quotation marks and citation omitted); *Shook v. El Paso County*, 386 F.3d 963, 968 (10th Cir. 2004), *citing Eisen, supra* note 31 at 178.
33. *Wal-Mart Stores, Inc., supra* note 1 at *7 ("A party seeking class certification must affirmatively demonstrate his compliance with the Rule.").
34. *Id.* at *7 and n.6.
35. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2009). *See also Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 201-04 (2d Cir. 2008).
36. *See* F.R.C.P. 23(c)(1)(A); *In re Hydrogen Peroxide Antitrust Litig., supra* note 35 at 318-20 (discussing 2003 amendments to Rule 23).
37. *See, e.g., Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372 (5th Cir. 2007); *Vallario v. Vandehey*, 554 F.3d 1259 (10th Cir. 2009).
38. *Wal-Mart Stores, Inc., supra* note 1 at *7.
39. *Id.*
40. *See Falcon, supra* note 31 at 160; *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978).
41. *See Dukes, supra* note 19 at 590-94.
42. *Id.* at 591 (emphasis in original).
43. *Wal-Mart Stores, Inc., supra* note 1 at *7 (emphasis in original).
44. *Id.* (emphasis in original).
45. *See Dukes, supra* note 30 at 191-92.
46. *See Wal-Mart Stores, Inc., supra* note 1 at *8.
47. *Id.*
48. *Am. Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 816 (7th Cir. 2010). *See also Sher v. Raytheon Co.*, No. 09-15798, 2011 WL 814379 at *3 (11th Cir. March 9, 2011) (calling district court's refusal "to conduct a *Daubert*-like critique of the proffered expert's qualifications . . . error").
49. *See In re Visa Check/Mastermoney Antitrust Litig.*, 192 F.R.D. 68, 76 (E.D.N.Y. 2000). *See also In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 36 (2d. Cir. 2006) (discussing "fatally flawed" standard).
50. *See Dukes, supra* note 30 at 191-92.
51. *See Wal-Mart Stores, Inc., supra* note 1 at *10.
52. *See id*. at *18 n.5 (Ginsburg, J., dissenting).
53. *In re Hydrogen Peroxide Antitrust Litig., supra* note 35 at 323. *See also Reed v. Advocate Health Care*, 268 F.R.D. 573, 593 (N.D.Ill. 2009).
54. *See In re Hydrogen Peroxide Antitrust Litig., supra* note 35 at 324.
55. *See Wal-Mart Stores, Inc., supra* note 1 at *7 n.6 (noting that in securities class actions plaintiffs generally have to prove the existence of an "efficient market" at both the class certification stage and "*again* at trial in order to make out their case on the merits" (emphasis in original)).
56. F.R.C.P. 23(a)(2).
57. *Dukes, supra* note 19 at 590 (emphasis in original).
58. *Wal-Mart Stores, Inc., supra* note 1 at *19 (Ginsburg, J., dissenting).
59. *See id*. at *7.
60. *Id.*
61. *Id.* (internal quotation marks and citation omitted).
62. *Id.* (internal quotation marks and citation omitted).
63. *Id.* at *11.
64. *See id.* at *7 (a sufficient common contention may be "the assertion of discriminatory bias on the part of the same supervisor").
65. *Id.* at *8, *quoting Falcon, supra* note 31 at 159 n.150.
66. *See id.*
67. *Id.*
68. *See id.* at *10.
69. *See id*.
70. *See id.*
71. *See id.* at *19, *21 (Ginsburg, J., dissenting). *See also Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988).
72. F.R.C.P. 23(b)(2).
73. *See, e.g., Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 423 n.19 (5th Cir. 1998). *See also* 42 U.S.C. § 2000e-5(g).
74. *See* Burch, "Introduction: *Dukes v. Wal-Mart Stores, Inc.*," 63 *Vand. L.Rev. En Banc* 91, 99 (Oct. 19, 2010).
75. *See, e.g., Reeb v. Ohio Dep't of Rehab & Corr.*, 435 F.3d 639, 650 (6th Cir. 2006); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 896 (7th Cir. 1999) (Easterbrook, J.).
76. *See* Husband and Williams, *supra* note 5 at 51-52.
77. *See id. See also Allison, supra* note 73 at 415; *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 164 (2d Cir. 2001); *Dukes, supra* note 19 at 616-17.
78. *See* Husband and Williams, *supra* note 5 at 52-53.
79. F.R.C.P. 23(b)(3).
80. *See* F.R.C.P. 23(c)(2)(B).
81. *Wal-Mart Stores, Inc., supra* note 1 at *12 (emphasis in original).
82. *See Ticor Title Ins. Co. v . Brown*, 511 U.S. 117, 121 (1994); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 and n.3 (1985).
83. *See Wal-Mart Stores, Inc., supra* note 1 at *12.
84. *See id.* at *14.
85. *See id.*
86. *See id.*
87. *Id.*
88. *See id.* at *13, *citing Shutts, supra* note 82 at 812.
89. *See* F.R.C.P. 23(c)(2)(A) and (B).
90. *See Wal-Mart Stores, Inc., supra* note 1 at *13.
91. *See, e.g.*, Marcus, "Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action," 63 *Fla. L.Rev.* 657, 664-65 (May 2011).
92. *See id.*
93. *Wal-Mart Stores, Inc., supra* note 1 at *12.
94. *See Dukes, supra* note 17 at 173. *See also* F.R.C.P. 23(c)(2)(A).
95. *See Dukes, supra* note 19 at 620-23.
96. *See Wal-Mart Stores, Inc., supra* note 1 at *12, *15.
97. *Compare, e.g., Colindres v. QuitFlex Mfg.*, 235 F.R.D. 347, 381 (S.D.Tex. 2006), *with Ellis v. Costco Wholesale Corp.*, 240 F.R.D. 627, 643 (N.D.Cal. 2007). *See also Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (juries cannot use punitive damages to punish defendants for harms allegedly visited on nonparties).
98. *See Dukes, supra* note 19 at 624-28 and n.49.
99. *See id.* at 627 n.56.
100. *See Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996).
101. *Wal-Mart Stores, Inc., supra* note 1 at *15.
102. *Id.*
103. *Id.*
104. *See Int'l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977).
105. *See id.* at 361.
106. *See id.* at 361-62.
107. *See, e.g., Rhodes v. Cracker Barrel Old Country Stores, Inc.*, No. Civ. A 4:99-CV-217-H, 2002 WL 32058462 at *62 (N.D.Ga. Dec. 31, 2002); *Miller v. Hygrade Food Prods. Corp.*, 198 F.R.D. 638, 643-44 and n.10 (E.D.Pa. 2001).
108. *See AT&T Mobility LLC v. Concepción*, 563 U.S. __, 131 S.Ct. 1740 (2011).
109. *See id.* at 1753.
110. *See, e.g.*, BNA, "Senate Panel Discusses Wal-Mart Case as Part of High Court's 'Pro-Business' Tilt," *Daily Labor Report* (June 29, 2011).
111. *See id.* ■