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What Do 1.5 Million Wal-Mart Women Have in Common?: *Dukes v. Wal-Mart* Class Action Certification

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WHAT DO 1.5 MILLION WAL-MART WOMEN HAVE IN COMMON?: *DUKES V. WAL-MART* CLASS ACTION CERTIFICATION

Abstract: On April 26, 2010, the U.S. Court of Appeals for the Ninth Circuit, sitting en banc in *Dukes v. Wal-Mart*, held that Rule 23 commonality and typicality existed among 1.5 million female employees of Wal-Mart claiming gender discrimination in the company's hiring and promotion practices. This Comment addresses the commonality prong and argues that courts should be reluctant to certify a class of plaintiffs in employment cases when a company's hiring practices are as subjective and localized as Wal-Mart's.

Introduction

On June 8, 2001, Betty Dukes, an African-American Wal-Mart employee from California, along with five other named plaintiffs and a class of similarly situated female Wal-Mart employees, filed a sexual discrimination case against their employer.[1] They alleged that women employed by Wal-Mart were paid less than men in comparable positions and received less frequent promotions to in-store management positions than their male colleagues, in violation of Title VII of the Civil Rights Act of 1964.[2] The class included in the complaint encompassed all women employed at any Wal-Mart store "who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices."[3] The plaintiffs, a class of approximately 1.5 million women, sought injunctive and declaratory relief, back pay, and punitive damages, but not traditional compensatory damages.[4]

Wal-Mart argued that class certification was inappropriate because, among other reasons, the class of women failed to meet the commonality requirement of Rule 23(a)(2) of the Federal Rules of Civil Proce-

[1] Dukes v. Wal-Mart Stores, Inc. (*Dukes II*), 603 F.3d 571, 577 (9th Cir. 2010); Plaintiffs' Third Amended Complaint at 3, Dukes v. Wal-Mart Stores, Inc., 2001 WL 1902806 (N.D. Cal. 2001) (No. C01-2252 MJJ).

[2] *Dukes II*, 603 F.3d at 577; Dukes v. Wal-Mart Stores, Inc. (*Dukes I*), 222 F.R.D. 137, 141 (N.D. Cal. 2004); *see* 42 U.S.C. § 2000e (2006).

[3] *Dukes I*, 222 F.R.D. at 141–42.

[4] *Dukes II*, 603 F.3d at 578.

dure.[5] In 2004, a federal district court in *Dukes v. Wal-Mart Stores, Inc.* (*Dukes I*) certified the plaintiffs as a class.[6] In 2010, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's decision in a sharply divided 6–5 en banc decision in *Dukes v. Wal-Mart Stores, Inc.* (*Dukes II*).[7] On December 6, 2010 the Supreme Court granted certiorari to answer two questions: (1) whether and under what circumstances claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2), which is limited to injunctive and declaratory relief; and (2) whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a).[8]

Part I of this Comment briefly reviews the commonality requirement for class action certification as discussed by the Ninth Circuit in *Dukes II* and the evidence the plaintiffs presented to satisfy this requirement.[9] Part II examines and discusses the plaintiffs' theory of commonality based principally on decentralized and subjective decision making.[10] Finally, Part III questions whether the plaintiffs' theory was sufficient to satisfy the commonality requirement of Rule 23(a)(2).[11]

I. Rule 23(a)(2) Commonality Through Subjectivity and Decentralization

Plaintiffs seeking to certify a class have the burden of proving that all four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b) have been met.[12] Rule 23(a) authorizes class action certification only when: (1) the class is so numerous that joinder is impractical; (2) there are common questions of law or fact; (3) the

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[5] Fed. R. Civ. P. 23(a); *Dukes II*, 603 F.3d at 578–79; *Dukes I*, 222 F.R.D. at 150. Wal-Mart also opposed class certification because (1) the number of women in the class alone makes the case unmanageable, (2) pay and promotion decisions made locally by store managers necessarily defeat a finding of commonality, and (3) inclusion of a claim for punitive damages renders the case unsuitable for certification under Rule 23(b)(2). *Dukes II*, 603 F.3d at 579; *Dukes I*, 222 F.R.D. at 150, 170.

[6] *Dukes I*, 222 F.R.D. at 188.

[7] *Dukes II*, 603 F.3d at 577.

[8] Wal-Mart Stores, Inc v. Dukes, 131 S. Ct. 795 (U.S. Dec. 6, 2010) (No. 10-277). Under 23(b)(2), a class action may be maintained if Rule 23(a) is satisfied and "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b).

[9] *See infra* notes 12–52 and accompanying text.

[10] *See infra* notes 53–69 and accompanying text.

[11] *See infra* notes 70–86 and accompanying text.

[12] Fed. R. Civ. P. 23; Dukes v. Wal-Mart Stores, Inc. (*Dukes I*), 222 F.R.D. 137, 143 (N.D. Cal. 2004)

claims of the representatives are typical of the class; and (4) the representatives will fairly and adequately protect the interests of the class.[13] The class must also meet one of the three types of class actions under Rule 23(b).[14] On appeal to the Ninth Circuit, Wal-Mart argued that the class in *Dukes* did not meet the commonality and typicality requirements of Rule 23(a)(2) and 23(a)(3).[15]

Commonality requires a common issue of law or fact.[16] Typicality ensures that the class representative possesses the same interests and suffered the same injury as all class members.[17] Rule 23's commonality and typicality requirements are closely related, and their analyses tend to merge.[18] As the U.S. Supreme Court has explained, both commonality and typicality serve as guides by which to determine whether a class action is economical and whether the named plaintiff's claims and the class claims are so interrelated that the interests of all class members will be fairly represented and protected.[19]

After reviewing Ninth Circuit and Supreme Court precedent, the *Dukes II* court clarified the standard to determine whether to grant class certification.[20] The court looked to the 1982 decision *General Telephone Co. v. Falcon*, the only U.S. Supreme Court case addressing Rule 23(a) in the context of Title VII discrimination and directly on point in *Dukes II*.[21] The Ninth Circuit explained that, under *Falcon*, district courts must perform rigorous analysis to ensure that the prerequisites of Rule 23 have been satisfied and that the analysis will often require looking beyond the pleadings to issues overlapping with the merits of underlying claims.[22] *Falcon* requires district courts to ensure that Rule 23's requirements are actually met rather than presumed from the plead-

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[13] Fed. R. Civ. P. 23(a).

[14] *Id.* 23(b).

[15] Dukes v. Wal-Mart Stores, Inc. (*Dukes II*), 603 F.3d 571, 578–79 (9th Cir. 2010). Another question raised by Wal-Mart's appeal was under what circumstances a claim for monetary relief can be certified under Rule 23(b)(2). *Id.* at 579. Rule 23(b)(2) is not appropriate in cases where monetary relief predominates over injunctive or declaratory relief. *Dukes II*, 603 F.3d at 618. Wal-Mart argued that the plaintiffs' request for back pay—claims for monetary relief—predominated. *Id.* The court reasoned, however, that back pay is equitable relief under Title VII and therefore a "make-whole remedy in employment class actions notwithstanding its monetary nature." *Dukes I*, 222 F.R.D. at 170.

[16] *Dukes I*, 222 F.R.D. at 144; *see* Fed. R. Civ. P. 23(a)(2).

[17] *Dukes I*, 222 F.R.D. at 144–45; *see* Fed. R. Civ. P. 23(a)(3).

[18] Gen. Tel. Co. v. Falcon, 457 U.S. 147, 157 n.13 (1982).

[19] *Id.*; *see* Fed. R. Civ. P. 23(a)(3).

[20] *Dukes II*, 603 F.3d at 580–98.

[21] *Id.* at 633; *see Falcon*, 457 U.S. at 155–61.

[22] *Dukes II*, 603 F.3d at 594; *see Falcon*, 457 U.S. at 160.

ings.[23] The district court may only consider merit issues related to the class certification requirements.[24] At the class certification stage, plaintiffs must present a theory regarding common questions of law or fact to satisfy the commonality requirement of Rule 23(a)(2), but the court should not consider whether the plaintiffs' theory will ultimately succeed on the merits.[25] When reviewing the decision to certify a class, the appeals court then must defer to the district court's factual findings regarding the applicability of Rule 23 criteria.[26]

In *Falcon*, the Supreme Court stated that there is a wide gap between an individual's claim that he or she has been denied a promotion on discriminatory grounds and the existence of a class of people that have suffered the same injury giving rise to common questions of law or fact.[27] To bridge that gap, plaintiffs must provide evidence to support an inference that (1) discriminatory treatment is typical of the defendant's promotion practices, (2) the practices are motivated by a policy of discrimination that pervades the company, or (3) the policy of discrimination is reflected in other employment practices.[28]

In light of the *Falcon* standard, the Ninth Circuit determined that the commonality requirement of Rule 23(a)(2) was met in *Dukes II*.[29] The court ruled that the plaintiffs' evidence tended to show a common question of fact: "Does Wal-Mart's policy of decentralized, subjective employment decision making operate to discriminate against female employees?"[30] To establish this common question of fact, the plaintiffs presented sociological, statistical, and anecdotal evidence of company policies and practices.[31]

First, based on expert testimony from sociologist Dr. William Bielby, the court determined that control and culture were sufficiently centralized to support the plaintiffs' theory that Wal-Mart's pattern or

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[23] *Dukes II*, 603 F.3d at 582; *see Falcon*, 457 U.S. at 160.

[24] *Dukes II*, 603 F.3d at 594.

[25] *Id.* at 587; *see* United Steel Workers v. ConocoPhillips Co., 593 F.3d 802, 808–09 (9th Cir. 2010).

[26] *Dukes II*, 603 F.3d at 579.

[27] *Falcon*, 457 U.S. at 157.

[28] *Id.* at 158.

[29] *Dukes II*, 603 F.3d at 600.

[30] *Id.* at 603.

[31] *Id.* at 600. Wal-Mart unsuccessfully tried to exclude Dr. Bielby's testimony under the *Daubert* test. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 595 (1993); *Dukes II*, 603 F.3d at 602. The Ninth Circuit noted that at the class certification stage, it is enough that the expert presents scientifically reliable evidence that tends to show a common question of fact. *Dukes II*, 603 F.3d at 603.

practice of discrimination affects all class members in the same way.[32] Dr. Bielby presented factual evidence of Wal-Mart's company-wide policies and practices, including its uniform personnel and management structure, centralized corporate culture, and consistent gender-related disparities in every region.[33] Wal-Mart's corporate culture is constantly reinforced through a national orientation program, daily meetings, a Wal-Mart cheer, and centralized communication, including "Wal-Mart TV."[34] The testimony also supported a culture of gender stereotyping.[35]

Second, Dr. Bielby's testimony supported the commonality determination even though Wal-Mart's pay and promotion decisions rely on subjective factors and local managerial discretion.[36] According to Dr. Bielby's research, personnel decisions are particularly susceptible to gender biases when based on subjective factors because decisionmaker discretion provides an opportunity for people to seek out stereotype-conforming information and minimize non-conforming information.[37] For example, Wal-Mart pays its hourly employees according to the same general pay structure; local store managers, however, are allowed to depart from the minimum rates, within a two-dollar per hour range, with limited oversight and no need to cite objective criteria for the differences.[38] With the average Wal-Mart employee earning $18,000 a year, two dollars per hour makes a significant difference in pay.[39]

Third, a statistics expert, Dr. Richard Drogin, presented statistical evidence of class-wide gender disparities that he found attributable to discrimination.[40]

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[32] *Dukes II*, 603 F.3d at 612; *see* Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 15 Lab. Law. 415, 437 (2000) (noting that decentralized decision making normally defeats class action commonality).

[33] *Dukes II*, 603 F.3d at 612.

[34] *Dukes I*, 222 F.R.D. at 151–52. Wal-Mart is so centralized that the home office controls the temperature and music in each store throughout the country. *Id.* The Wal-Mart cheer is particularly enthusiastic: "Give me a W! Give me an A! Give me an L! Give me a squiggly! Give me an M! Give me an A! Give me an R! Give me a T! What's that spell? Walmart! Whose Walmart is it? It's my Walmart! Who's number one? The customer! Always!" *Walmart Cheer*, Walmartstores.com, http://walmartstores.com/AboutUs/320.aspx (last visited Apr. 5, 2011).

[35] *Dukes II*, 603 F.3d at 600–01.

[36] *Dukes I*, 222 F.R.D. at 146–47.

[37] *Dukes II*, 603 F.3d at 601.

[38] *Dukes I*, 222 F.R.D. at 146–47. One store manager explains: "There's [a presumptive limit of two dollars above the base], but I can do what I want. I mean, if I start throwing money around, I mean, eventually the phone is going to ring. But the store manager has the flexibility to do what he needs to do to run the building." *Id.* at 147.

[39] *Id.* at 147.

[40] *Dukes II*, 603 F.3d at 603–04.

Finally, the plaintiffs used circumstantial and anecdotal evidence from class members throughout the country of discriminatory attitudes held or tolerated by management.[41] Betty Dukes, for example, often expressed interest in becoming a manager but never had the opportunity to train for a management position.[42] Instead, Ms. Dukes was demoted and punished more harshly than her male co-workers for performance issues.[43] When Ms. Dukes became eligible for promotion again a year after her demotion, at least four managerial positions were filled by men.[44] These positions were never posted or otherwise announced.[45]

Plaintiffs also presented anecdotal evidence of managers harboring gender bias.[46] In one case, a male store manager told an employee, "Men are here to make a career and women aren't. Retail is for housewives who just need to earn extra money."[47] Another male support manager stated: "We need you in toys . . . you're a girl, why do you want to be in hardware?"[48] A female store manager gave a sporting goods position to a male employee because she "needed a man in the job."[49] The court found that this anecdotal evidence supported the hypothesis that Wal-Mart's culture includes gender stereotyping.[50]

Although none of these factors alone would support a finding of commonality, the district court found that all of the evidence taken together raised an inference that Wal-Mart's system of decentralized, subjective employment decision making operated to discriminate against female employees in compensation and promotion.[51] The court found that this subjective system of decision making affects all plaintiffs in a common manner, especially when coupled with Wal-Mart's centralized corporate culture.[52]

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[41] *Id.* at 600.

[42] Plaintiffs' Third Amended Complaint, *supra* note 1, at 10.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *See Dukes I*, 222 F.R.D. at 166.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Dukes II*, 603 F.3d at 600; *Dukes I*, 222 F.R.D. at 166.

[51] *See Dukes II*, 603 F.3d at 600; *Dukes I*, 222 F.R.D. at 166; s*ee also* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988).

[52] *Dukes I*, 222 F.R.D. at 166.

II. Commonality Without a Specific Discriminatory Policy

In order to meet the commonality and typicality requirements of Rule 23(a)(2), plaintiffs usually identify and challenge a specific employment practice.[53] In *Dukes*, however, the plaintiffs argued that Wal-Mart's diffuse structure and subjective in-store pay and promotion decisions, made at the discretion of local store or district level managers, are discriminatory.[54] They argued that Wal-Mart's decentralized structure and subjective decision making allowed gender bias to seep into the system.[55] The court acknowledged "the absence of a specific discriminatory policy promulgated by Wal-Mart" yet accepted the argument that the case presents a common question of fact.[56]

Wal-Mart argued that the plaintiffs failed to meet their burden because discretionary decision making alone is insufficient to establish commonality.[57] Managers' discretionary authority, the company argued, does not support a finding of commonality because "[d]ecentralized, discretionary decisionmaking is not inherently discriminatory."[58] The district court acknowledged that managerial discretion and excessive subjectivity alone may not create a common question, but where it is part of a consistent corporate policy and supported by other evidence giving rise to an inference of discrimination, it can support a finding of commonality.[59]

The Ninth Circuit cited *Shipes v. Trinity Industries*, a 1993 decision by the U.S. Court of Appeals for the Fifth Circuit, for the proposition that entirely subjective personnel processes that operate to discriminate can satisfy the commonality and typicality requirements of Rule 23.[60] Forest Shipes, a black employee who was laid off, claimed that his employer's all white supervisory force discriminated against him and other similarly situated employees in employment decisions.[61] Trinity, a railroad and steel company, argued that Shipes should not be in the same class as blacks employed at different plants because that class would fail

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[53] *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988).

[54] Dukes v. Wal-Mart Stores, Inc. (*Dukes II*), 603 F.3d 571, 601 (9th Cir. 2010); Dukes v. Wal-Mart Stores, Inc. (*Dukes I*), 222 F.R.D. 137, 152 (N.D. Cal. 2004).

[55] *Dukes II*, 603 F.3d at 601; *Dukes I*, 222 F.R.D. at 152.

[56] *Dukes II*, 603 F.3d at 603.

[57] *Id.* at 612.

[58] *Id.*

[59] *Dukes I*, 222 F.R.D. at 148–50.

[60] *Dukes II*, 603 F.3d at 612; *see* Shipes v. Trinity Indus., 987 F.2d 311, 316 (5th Cir. 1993).

[61] *Shipes*, 987 F.3d at 315.

to satisfy the commonality requirement.[62] The Fifth Circuit held that because the two plants used the same subjective criteria in making personnel decisions and have other centralized employee programs, such as retirement plans and a common employee handbook, the commonality and typicality requirements were met.[63]

The *Dukes II* court also found support for class action certification in a footnote in the 1982 U.S. Supreme Court decision *General Telephone Co. of Southwest v. Falcon*, which reads: "Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision-making processes."[64] Wal-Mart and the dissenting judges contended that the plaintiffs did not provide "significant proof" that the alleged discriminatory injury affected employees throughout the country because their expert testimony failed to indicate a general policy of discrimination.[65] The Ninth Circuit majority stated in response that any "significant proof" requirement was "hypothetical," a demonstrative example, and "in clear dicta."[66]

The courts disagree as to exactly what level of commonality is required to satisfy Rule 23 and the significance of the *Falcon* footnote.[67] Courts are split in particular over whether a policy of subjective decision making can satisfy the commonality requirement of Rule 23(a).[68] Inconsistencies in the application of Rule 23 will continue in light of the lack of Supreme Court guidance, fact-specific application of the commonality requirement, and trial court discretion.[69]

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[62] *Id.* at 315–16.

[63] *Id.* at 316. The district court found that, in addition to using the same subjective criteria in making personnel decisions: white supervisors at both plants applied the subjective criteria; employees were transferred between the plants; the plants had the same insurance plan, retirement program, and administrative forms; and the two plants used the same hourly employee handbook. *Id.*

[64] 457 U.S. 147, 157 n.15 (1982).

[65] *Dukes II*, 603 F.3d at 594–95, 633–34.

[66] *Id.* at 595 & n.15; *see Falcon*, 457 U.S. at 160 n.15. In response, the dissent in *Dukes II* noted, "We are bound by the Supreme Court's instructions whether they are stated in the first sentence of an opinion or in the final footnote." *Dukes II*, 603 F.3d at 633 (Ikuta, J., dissenting).

[67] Kramer, *supra* note 32, at 430–31.

[68] *See* Daniel S. Klein, *Bridging the Falcon Gap: Do Claims of Subjective Decisionmaking in Employment Discrimination Class Actions Satisfy the Rule 23(a) Commonality and Typicality Requirements?*, 25 Rev. Litig. 131, 133 (2006).

[69] *See id.*

III. Decentralized and Subjective Decision Making to Establish Commonality

By allowing the certification of a class of 1.5 million female Wal-Mart employees in *Dukes II*, the Ninth Circuit created an unmanageable class and undermined the efficiency and fairness goals of Rule 23's commonality requirement.[70] Class action can be a useful procedural tool to address broad-based grievances fairly and efficiently.[71] The commonality requirement ensures that the class action is economical and that the claims are so interrelated that the interests of all class members will be fairly and adequately protected in a single lawsuit.[72] Although granting class certification to the plaintiffs in *Dukes* may appear to serve both the class action device's fairness and efficiency goals and Title VII's antidiscrimination objectives, the class is likely to prove unmanageable and, if followed in other circuits, unfair to defendants.[73]

The Ninth Circuit should not have certified the class based entirely on Wal-Mart's subjective decision making absent evidence of a specific discriminatory policy promulgated by the employer.[74] Although the Ninth Circuit acknowledged that subjective decision making alone does not warrant class certification, the court relied heavily and almost exclusively on the plaintiffs' subjective and decentralized decision-making theory to rule that the commonality requirement was satisfied and to certify the class.[75] In addition, even though the plaintiffs emphasized that the subjective decision-making theory was supported by other evidence giving rise to an inference of discrimination (such as statistical evidence of gender inequality), this evidence should not supplant evidence of a specific discriminatory practice.[76]

Wal-Mart, like most employers, must be able to use subjective judgments in employment decisions because they are useful and promote legitimate business goals.[77] Although social science research may indicate that subjectivity can lead to discriminatory decision making, class action plaintiffs should be required to show more than statistical

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[70] *See* Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971); Dukes v. Wal-Mart Stores, Inc. (*Dukes II*), 603 F.3d 571, 603, 628 (9th Cir. 2010); Klein, *supra* note 68, at 137.

[71] Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 155 (1982).

[72] *Id.* at 157 n.13.

[73] *See infra* notes 77–81 and accompanying text.

[74] *See Dukes II*, 603 F.3d at 628.

[75] *See id.* at 612.

[76] *Id.*; Dukes v. Wal-Mart Stores, Inc. (*Dukes I*), 222 F.R.D. 137, 149–50 (N.D. Cal. 2004).

[77] *See Dukes I*, 222 F.R.D. at 149.

evidence of gender disparities.[78] A class action would be appropriate, for example, even for a class as large as 1.5 million people, if Wal-Mart had a nationwide policy of paying women ten percent less than men in the same positions or another uniform policy that affected all plaintiffs in a similar manner.[79]

Furthermore, Wal-Mart cannot raise a compelling defense to an amorphous claim of discrimination based on subjective decision making.[80] Because the plaintiffs did not claim that Wal-Mart took affirmative steps to discriminate, affecting all class members in a similar way, it is hard to imagine how Wal-Mart would be able to raise a defense to the plaintiffs' nebulous claim of discrimination through subjective decision making and lack of sufficient authority over individual managers' discretionary employment and promotion decisions.[81]

The Ninth Circuit described the plaintiffs' burden to establish commonality as "permissive and minimal," but the 1982 U.S. Supreme Court decision *General Telephone Co. v. Falcon* suggests a more rigorous analysis to determine that the prerequisites of Rule 23(a) have been met, including "significant proof" to support a claim of discrimination through subjective decision making.[82] By lowering the standards (or adopting "permissive standards") for class action certification, the court appeared comfortable placing the onus on the jury to decide whether it accepts the plaintiffs' theory of commonality and expert testimony.[83] Class action lawsuits, however, are expensive to litigate, and most defendants will settle as soon as the class is certified rather than take the case to trial and risk an expensive judgment.[84] As then-Judge Sotomayor acknowledged when she sat on the U.S. Court of Appeals for the Second Circuit, class action certification provides plaintiffs with powerful leverage during settlement negotiations, and the sheer size of the class can enhance this effect.[85] Because courts do not consider mer-

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[78] *See Dukes II*, 603 F.3d at 603. Plaintiffs' burden of establishing an employment discrimination case goes beyond showing there are statistical disparities in the workforce. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988).

[79] *See* FED. R. CIV. P. 23.

[80] *See Dukes I*, 222 F.R.D. at 149.

[81] *See* Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 651 (6th Cir. 2006).

[82] *Falcon*, 457 U.S. at 160 n.15, 161; *see Dukes II*, 603 F.3d at 600.

[83] *See Dukes II*, 603 F.3d at 600.

[84] Brief for Equal Employment Advisory Council as Amicus Curiae Supporting Petitioner at 17, Home Depot U.S.A., Inc. v. Butler, 520 U.S. 1103 (1997) (No. 96-943).

[85] *In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 145 (2d Cir. 2001).

its issues at the class certification stage, cases such as *Dukes* may settle before the merits of the claims are even decided.[86]

Conclusion

In *Dukes II*, the Ninth Circuit held that the commonality requirement of Rule 23 can be met absent evidence of a specific discriminatory policy or practice. The court determined that evidence of a uniform corporate culture, coupled with decentralized and subjective decision making, establishes a common question of law. The court's reading of the commonality requirement of Rule 23(a)(2) could potentially broaden the scope of potential employment discrimination class action litigation. In order to meet the commonality requirement of Rule 23(a)(2), plaintiffs should be required to identify a specific aspect of corporate culture or decision making that is discriminatory.

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[86] *See* Bejan Fanibanda, Dukes v. Wal-Mart*: The Expansion of Class Certification as a Mechanism for Reconciling Employee Conflicts*, 28 Berkeley J. Emp. & Lab. L. 591, 597 (2007).