Onward and Upward After Wal-Mart v. Dukes

Supreme Court has given plaintiff lawyers a tortuous to follow, but employment discrimination class actions survive—if you think small and target your case.

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Wal-Mart

Since the Supreme Court decided *Wal-Mart Stores, Inc. v Dukes*[1] in 2011, the case undoubtedly has made class certification more difficult in equal employment opportunity (EEO) cases. But, as post-*Wal-Mart* decisions demonstrate, class certification is still achievable as long as plaintiff lawyers adjust their strategies.

Wal-Mart was filed in 2001 as a class action against the company, the largest private employer in the United States, claiming pay and promotion discrimination affecting all the company's female employees in the nation. The most ambitious proposed EEO class in U.S. history, *Wal-Mart* grew to 1.5 million women by the time it reached the Supreme Court.[2] In 2011, the Supreme Court reversed the lower courts' certification of the proposed class in a decision authored by Justice Antonin Scalia. The decision contained three key rulings.

The class did not satisfy the commonality requirement. A class action in federal court must satisfy the four requirements of Federal Rule of Civil Procedure 23(a) and one of the three alternative conditions of Rule 23(b). Among the Rule 23(a) requirements, the "commonality" requirement of Rule 23(a)(2)—that "there are questions of law or fact common

to the class"—was critical in *Wal-Mart*.

The Court held that to satisfy Rule 23(a)(2), plaintiffs need identify only one common question of law or fact, but it emphasized that the question must be central to the validity of each class member's claim. "[S]ome glue" must hold the case together, making it productive to litigate the question on a classwide basis; generally, common questions must be susceptible to common proof to arrive at common answers.[3] Plaintiffs must show "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation."[4]

Scalia looked to *General Telephone Co. of the Southwest v. Falcon*[5] to identify two types of questions that generate the sort of common answers that may satisfy the commonality requirement. *Falcon* states in footnote 15 that an EEO class action may be viable if a plaintiff shows that an employer used a "biased testing procedure to evaluate" employees and applicants, or presents "significant proof that an employer operated under a general policy of discrimination . . . if the discrimination manifested itself . . . in the same general fashion, such as through entirely subjective decisionmaking processes."[6] The *Wal-Mart* Court interpreted the footnote as requiring a plaintiff to "begin by identifying the specific employment practice that is challenged."[7]

The Court held that the *Wal-Mart* plaintiffs, who asserted that the company allowed managers to engage in excessively subjective decision-making, failed to make the showing *Falcon* required. Neither testimony from the plaintiffs' three experts (a statistician, a corporate benchmarking expert, and a sociologist) nor their anecdotal evidence constituted "significant proof" that the managers used their discretion to engage in "a general policy of discrimination."[8] The commonality requirement was not satisfied.

The class could not be certified because it sought individual monetary relief. Rule 23(b)(2) allows certification if the defendant's actions "apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[9] Although the rule does not mention monetary relief, the advisory notes refer to the possibility of monetary relief under Rule 23(b)(2) if that relief does not predominate,[10] and they describe "various actions in the civil-rights field" as illustrative of the types of claims to be certified under the rule.

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The *Wal-Mart* decision "reduced to rubble more than forty years of precedent in the Courts of Appeals," all of which had permitted EEO classes to seek back pay in addition to injunctive relief under Rule 23(b)(2),[11] by holding that individualized relief, including back pay, is not recoverable in employment discrimination class actions certified under Rule 23(b)(2).[12] This ruling is reckless in overturning settled law.

Nonetheless, until it is reversed, plaintiff lawyers who are seeking individualized monetary relief must meet the more demanding requirements of Rule 23(b)(3) or pursue partial certification as to particular issues under Rule 23(c)(4).

The lower courts' approach was unacceptable to satisfy Rule 23(b)(3). For a class to be certified under Rule 23(b)(3), "the questions of law or fact common to class members [must] predominate over any questions affecting only individual members," and the class action must be "superior to other available methods for fairly and efficiently adjudicating the controversy," including with respect to case management. The Court established a two-phase trial plan for managing pattern-or-practice cases 35 years ago in *International Brotherhood of Teamsters v. United States*: The first phase establishes liability and the right to classwide relief (generally injunctive) and, if plaintiffs prevail, "additional proceedings," often called mini-trials, in which there is a rebuttable presumption of discrimination "to determine the scope of individual relief."[13]

These mini-trials would have been unmanageable in *Wal-Mart*, with its 1.5 million potential class members, so the lower courts had expressed openness to using formulas to determine the scope of individual relief. But the Supreme Court unanimously rejected the formulaic approach the Ninth Circuit endorsed and held that Title VII conferred on the defendant the right to contest each class member's presumption of back pay.[14]

Strategies in Response

Class certification decisions since *Wal-Mart* have fleshed out the case's

implications and help to reveal a new paradigm for successful, albeit more focused, EEO class actions.[15]

Identify a selection procedure. Claims should flow directly out of one of the two examples in Falcon's footnote 15: a "testing/selection procedure" or a "general policy of discrimination" that applies to the class in a common manner. As is clear in the federal Uniform Guidelines on Employee Selection Procedures, a selection procedure encompasses all methods by which employees are singled out for rewards or punishments, not just performance appraisal systems. In *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, the Seventh Circuit held that Merrill Lynch's teaming and account distribution policies, both of which applied throughout the country and were applied locally, resulted in African-American brokers being awarded accounts at a disproportionately lower rate.[16] As a result, the brokers received lower compensation. The court certified the proposed class.

Similarly, a district court refused to decertify a class certified pre-*Wal-Mart* that challenged the use of a 1.5-mile run as an employment test in *Easterling v. Connecticut Department of Correction*.[17] And another district court certified a nationwide class of women bringing claims of gender discrimination in promotions to two management positions in *Ellis v. Costco Wholesale Corp.*,[18] where the plaintiffs identified several company-wide policies that reduced their chances of being selected for promotions.

These cases contrast with three post-*Wal-Mart* class certification denials based on records largely created before *Wal-Mart* was decided. In those cases, the plaintiffs failed to identify a policy or practice that resulted in class members receiving less overtime work or fewer promotion or training opportunities, and they failed to show that the alleged general policies of discrimination were common throughout the class.[19]

Keep it simple. Plaintiff lawyers should frame their pleadings so that the class definitions, claims, and supporting proof are as simple and streamlined as possible. Except in highly unusual cases, you should not seek to represent classes comprised of all female or minority employees in all positions and locations, challenging multiple types of personnel decisions.

For example, a proposed nationwide class of most salaried female employees at Lockheed Martin was rejected,[20] and in *Bennett v. Nucor Corp.*, the Eighth Circuit affirmed the denial of certification of a class of African-Americans employed at a particular plant.[21] In *Bennett*, the plaintiffs presented compelling evidence concerning the department in which they worked that led to awards for each of them, but not for the class, because they had little evidence of discrimination in other departments and the company was able to show that that the departments worked independently.[22]

The *McReynolds*, *Easterling*, and *Ellis* plaintiffs kept it simple by challenging only a single type or constellation of personnel decisions affecting people in similar positions: compensation for brokers, hiring for a single position, and promotions to two positions. Because of this streamlining, classes were approved in *McReynolds* and *Ellis* even though the classes encompassed employees in multiple facilities across the nation. The broader the class, the more important it is to "glue" it together with one or more of the strategies discussed below.

Link claims arising from local managers' decisions to a common policy or practice. *Wal-Mart* characterizes *Watson v. Fort Worth Bank & Trust* (which held that giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory)[23] as a "landmark case," but it emphasizes that for class certification, plaintiffs cannot rely only on the existence of discretion but must tie that discretion to a specific employment practice.[24] Thus, a failure to challenge a specific practice in which discretion is exercised—such as account assignment and an explanation for why that discretion regularly is exercised to the detriment of class members generally—is likely to result in class certification denial.[25]

You may want to offer testimony from an industrial psychologist or other expert to identify the deficiencies in a particular practice. In view of *Wal-Mart*'s criticism of the testimony of William Bielby,[26] a sociologist whose testimony previously had been valuable in numerous class cases, a more general analysis of corporate culture or implicit bias may no longer suffice.[27]

Tie the discrimination to company executives. Whether plaintiffs claim that the defendant employed a discriminatory selection process or that it engaged in a general policy of discrimination, one of the best means of proving commonality is linking the discrimination to executives instead of focusing only on class members' immediate supervisors. You can show that executives made or actively reviewed

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the challenged decisions or that they created a discriminatory atmosphere in which the supervisors operated. In addition, as Chief Justice John Roberts indicated during oral argument in *Wal-Mart*, a plaintiff can show that management received reports of discrimination or disparities in the workforce and refused or failed to respond adequately.[28]

In *Ellis*, the district court on remand certified the proposed class, largely because the plaintiffs showed that regional management or national management—up to the level of Costco's CEO—established promotion criteria and made or actively reviewed all the promotion decisions in question.[29] Plaintiffs in recent cases in which class certification was denied were unable to establish this type of link. If the evidence does not support involvement by top executives, plaintiffs can seek to proceed on behalf of one or more classes defined by the highest-level executives known to be involved in the decision-making process. For example, if regional managers but not headquarters executives made or reviewed the challenged decisions, the proposed class could encompass employees in one or more regions rather than employees across the country.

Avoid relying only on "bottom line" statistics. Before *Wal-Mart*, at the class certification stage, plaintiffs' statistical experts often presented only bottom-line statistics showing statistically significant disparities in outcomes between class members and other employees. *Wal-Mart* holds that, if sufficient data are available, plaintiffs should conduct additional studies. First, if the case involves separate, independent decision-makers, plaintiffs should show, if possible, that the decisions of each were generally consistent with the overall pattern.[30] In two cases in which certification was denied, plaintiffs did not attempt to do this.[31] In contrast, the *Ellis* plaintiffs showed that women received fewer promotions than expected in each region for which there had been sufficient decisions to yield dependable results, even if the regional disparities generally were not statistically significant.[32]

Courts have not adopted a test or standard for determining whether the decisions of multiple decision-makers are consistent with an overall pattern, which permits experts to be creative in their analyses. Defense experts frequently have advocated use of a "Chow" or "F" test, but courts have been reluctant to adopt the test as definitive.[33] Second, if the data permit, the expert should attempt to show the nexus between the challenged practices and the statistical disparities.[34]

For example, if the claim is that women are undercompensated because of the perpetuation of disparities in starting salaries, plaintiffs should present an analysis (data permitting) showing the existence of disparities in starting salaries and the way in which those disparities continue throughout employees' careers, not just an analysis showing that women currently are paid less than men.

> Whether plaintiffs claim that the defendant employed a discriminatory selection process or engaged in a general policy of discrimination, one of the **best means of proving commonality** is linking the discrimination to executives instead of focusing only on class members' immediate supervisors.

Provide a detailed trial plan. *Wal-Mart*'s underlying theme is unmanageability, as recognized in *McReynolds*.[35] The plaintiff lawyer must address manageability, especially now that any class seeking individualized relief for class members must obtain certification under Rule 23(b)(3), if at all. You should present a reasonably detailed trial plan to the court no later than the class certification brief that identifies the common issues to be tried in the first phase and the types of common evidence that plaintiffs will introduce as to those issues, as well as the individualized issues that may remain for the second phase of trial.[36] If defendants file futile motions to strike class allegations based on *Wal-Mart*, plaintiffs have an opportunity to present the court with a detailed plan early in the proceedings.

Consider partial certification. Careful identification of the class, as well as the sections of the federal rules under which certification is sought, may help overcome Rule 23(b)(3)'s more stringent requirements. If policy, anecdotal,

or statistical evidence indicates that the pattern of claimed discrimination is less broad than originally alleged, you should consider seeking leave to file an amended complaint narrowing the proposed class. At least in some circuits, a class may be certified under Rule 23(b)(2) to pursue injunctive relief and under (b)(3) to pursue monetary relief.[37] If even a narrow class could not meet the Rule 23(b)(3) standards, you can seek to have the class certified to pursue liability and injunctive relief under Rule 23(b)(2) and/or specified common issues pursuant to Rule 23(c)(4). You can then ask to have class members intervening into the suit to pursue individualized relief, thus bypassing the need for Rule 23(b)(3) certification entirely.[38]

By adopting these strategies, you can clear the new hurdles to class certification that the Supreme Court erected in *Wal-Mart*. However, even if classes are now smaller on average than they were before *Wal-Mart*, the cases will likely be even more difficult and complex than they were before that decision. Understand the challenges at the outset, plan your case, allocate the resources and staff to the task, and you will be prepared to take on *Wal-Mart*.

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Notes

1. 131 S. Ct. 2541 (2011).
2. *Id.* at 2547.
3. *Id.* at 2551, 2552.
4. *Id.* at 2551 (citing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).
5. *Id.* at 2553 (quoting *Falcon*, 457 U.S. 147 (1982)).
6. *Falcon*, 457 U.S. at 157–58 n.15. Scalia distorted *Falcon* to arrive at his chosen outcome in *Wal-Mart*. *Falcon*'s footnote 15 addressed instances in which employees of a company also could represent rejected applicants; *Wal-Mart* limited employees' ability to represent other employees to the same instances without acknowledging that this is an extension of *Falcon*.
7. *Wal-Mart*, 131 S. Ct. at 2555 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988)).
8. *Id.* at 2553–54.
9. Fed. R. Civ. P. 23(b)(2).
10. Fed. R. Civ. P. 23 (advisory committee notes to 1966 amendment). The advisory committee notes state that Rule 23 "does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages."
11. *U.S. v. City of N.Y.*, 276 F.R.D. 22, 33 (E.D.N.Y. 2011).
12. The Court left open the possibility of 23(b)(2) certification if a back pay award would "not require additional hearings to resolve the disparate merits of each individual's case." 131 S. Ct. at 2560; *see Johnson v. Meriter Health Servs. Empl. Ret. Plan*, 702 F.3d 364, 371 (7th Cir. 2012) (Posner, J.) (explaining that 23(b)(2) certification is appropriate if monetary remedy for each class member can be mathematically calculated).
13. *Wal-Mart*, 131 S. Ct. at 2561 (quoting *Teamsters*, 431 U.S. 324, 361 (1977)).
14. *Id.*
15. Decisions rejecting defense motions to strike or dismiss EEO class allegations shed little light on the likelihood of success on a class certification motion because courts almost uniformly regard such motions as premature. *See Chen-Oster v. Goldman, Sachs & Co.*, 2012 WL 205875 (S.D.N.Y. Jan. 19, 2012), *aff'd in part, rev'd in part*, 877 F. Supp. 2d 113 (S.D.N.Y. 2012); *see also Bush v. Ruth's Chris Steak House, Inc.*, 277 F.R.D. 214 (D.D.C. 2011). Denials of defense efforts to extend *Wal-Mart* to wage-and-hour cases and outside the employment context also are of limited use in analyzing the impact of *Wal-Mart* on EEO class certification motions. *See Ramos v. SimplexGrinnell LP*, 796 F. Supp. 2d 346 (E.D.N.Y. 2011). *Ramos*, the first post-*Wal-Mart* class certified, was prosecuted by our firm.
16. 672 F.3d 482 (7th Cir.), *cert. denied*, 133 S. Ct. 338 (2012).
17. 278 F.R.D. 41 (D. Conn. 2011).
18. 285 F.R.D. 492 (N.D. Cal. 2012).
19. *See Bolden v. Walsh Constr. Co.*, 688 F.3d 893 (7th Cir. 2012); *Bennett v. Nucor Corp.*, 656 F.3d 802 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1807, 1861 (2012); *Bell v. Lockheed Martin Corp.*, 2011 WL 6256978 (D.N.J. Dec. 14, 2011).
20. *Bell*, 2011 WL 6256978 at *6–7.
21. 656 F.3d 802.
22. *Id.* at 814–16.
23. 487 U.S. 977 (1988).
24. *Wal-Mart*, 131 S. Ct. at 2555 (extending *Watson*'s disparate-impact principles to the certification context for the first time).
25. *See e.g. Bolden*, 688 F.3d at 898 (explaining that merely identifying "the policy of on-site operational discretion" is not sufficient, especially when the evidence focuses on only a small percentage of the managers who were exercising discretion).
26. *Wal-Mart*, 131 S. Ct. at 2553–54.
27. *See* Barry Goldstein, *Using Social Science Experts in Employment Discrimination Class Actions After Wal-Mart*, paper delivered at Natl. Empl. Law. Assoc. Conf., at 2–4, 11–15, 26–27 (Oct. 2012) (on file with authors).
28. *Dukes* Tr. 3:7–4:9 (Mar. 29, 2011).
29. *Ellis*, 285 F.R.D. 492, 511–12 (N.D. Cal. 2012).
30. *See Wal-Mart*, 131 S. Ct. at 2555.
31. *See Bolden*, 688 F.3d at 896; *Bennett*, 656 F.3d at 815–16.
32. *Ellis*, 285 F.R.D. 492, 521–23.
33. *See e.g. Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 608 n.32 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (2011); *Taylor v. Dist. of Columbia Water & Sewer Auth.*, 241 F.R.D. 33, 43 (D.D.C. 2007). "F" tests are "statistical tests for whether two or more sets of data may [properly] be grouped as a single sample in a statistical model." *Coates v. Johnson & Johnson*, 756 F.2d 524, 542 (7th Cir. 1985).
34. *See Wal-Mart*, 131 S. Ct. at 2555–56; *see* Goldstein, *supra* n. 27, at 21–23 (discussing statistical evidence after *Wal-Mart*).
35. *McReynolds*, 672 F.3d at 488.
36. This type of presentation also is prudent so that the court may meet its obligations under Rule 23(c)(1)(B) and Rule 23(d)(1)(A). *See Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591–92 (3d Cir. 2012).
37. *See e.g. Johnson*, 702 F.3d 364, 369–71; *Easterling*, 278 F.R.D. at 51–52.
38. *See McReynolds*, 672 F.3d at 491 (certifying class to pursue injunctive relief pursuant to 23(b)(2) and (c)(4) and leaving open whether there are common issues as to monetary relief or whether brokers would have to sue individually); *Gulino v. Bd. of Educ.*, 2012 WL 6043803 at **9–11 (S.D.N.Y. Dec. 5, 2012) (certifying class for purposes of declaratory and injunctive relief under Rule 23(b)(2) and (c)(4) and directing further proceedings as to 23(b)(3) certification for individualized relief); *Ellis*, 285 F.R.D. 492, 544 (explaining that, even if class certification were not appropriate as to the monetary relief claims, "the Court would utilize the mechanism under Rule 23(c)(4) to adjudicate those issues [relevant to monetary relief] capable of classwide resolution separately").