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A Classless Act: The Ninth Circuit's Erroneous Class Certification in *Dukes v. Wal-Mart*, Inc.

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A Classless Act

THE NINTH CIRCUIT'S ERRONEOUS CLASS CERTIFICATION IN *DUKES v. WAL-MART, INC.*

INTRODUCTION

In June of 2004, the United States District Court for the Northern District of California certified the largest private civil rights lawsuit in United States history – *Dukes v. Wal-Mart, Inc*.[1] The proposed class is comprised of at least 1.5 million women,[2] all of whom work or have worked at one of approximately 3,400 Wal-Mart stores across the United States.[3] The plaintiffs claim that Wal-Mart sexually discriminated against them because they were paid less than men "in comparable positions," "receive[d] fewer promotions to in-store management than d[id] men" and those who received promotions "wait[ed] longer than their male counterparts to advance."[4] The plaintiffs are seeking class-wide injunctive and declaratory relief, lost pay and punitive damages pursuant to 42 U.S.C. § 2000(e) *et seq*. ("Title VII").[5]

The district court certified the class in *Dukes* using the criteria set forth in the Federal Rules of Civil Procedure.[6] Rule 23(a), governing class certification, contains four requirements[7] that must be met in order for a class to be certified. These requirements are: (1) "the class is so numerous that joinder of

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[1] Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 142 (N.D. Cal. 2004); David Kravets, *Class Action Against Wal-Mart Approved*, THE LEGAL INTELLIGENCER, June 23, 2004, at 4.

[2] *See Dukes*, 222 F.R.D. at 142. The 1.5 million women are represented by six plaintiffs: Betty Dukes, Patricia Surgeson, Christine Kwapnoski, Deborah Gunter, Edith Arana, and Cleo Page. *See* Pl.'s Mot. for Class Certification, at 3 n. 1, Dukes v. Wal-Mart, Inc. (N.D. Ca. 2003) (No. C-01-2252 MJJ).

[3] *Dukes*, 222 F.R.D. at 142, n.1. Wal-Mart operates four types of stores: Discount Stores, Supercenters, Sam's Clubs and Neighborhood Markets. *Id.* at 141, n.1.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 143. FED. R. CIV. P. 23(a), 23(b)(2).

[7] *Dukes*, 222 F.R.D. at 143 (citing Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001), *amended* 275 F.3d 1266 (9th Cir. 2001)).

all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class."[8] These factors are also known as: numerosity, commonality, typicality and adequacy.[9] Rule 23(b) provides that the class must fulfill one of three additional requirements: (1) that separate actions by individual members of the class would produce inconsistent judgments; (2) that the party opposing the class "has acted or refused to act on grounds generally applicable to the class" making injunctive and/or declaratory relief appropriate; or (3) that any issues pertaining to individual members of the class are outweighed by issues that pertain to the class as a whole and that a class action lawsuit is the best method to adjudicate the issue or issues.[10]

Class action lawsuits are an exception to the rule that litigation is normally conducted only on behalf of individuals and not individuals representing a group and, as such, a class must be carefully evaluated before it is certified.[11] In *General Telephone Co. of the Southwest v. Falcon*,[12] the Supreme Court concluded that in a Title VII class action lawsuit, a court must conduct a "rigorous analysis"[13] to ensure "that the prerequisites of Rule 23(a) have been satisfied."[14] The *Dukes* court, however, deemphasized the importance of the Supreme Court's "rigorous analysis" standard and held that a court maintains "broad discretion [in] determin[ing] whether a class should be certified."[15] By stressing the court's ability to use "broad discretion,"[16] the *Dukes* court found that the class met all of the requirements of Rule 23(a). In doing so, the court pointed to

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[8] FED. R. CIV. P. 23(a).

[9] *Dukes*, 222 F.R.D. at 143.

[10] FED. R. CIV. P. 23(b).

[11] Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 155 (1982) (quoting Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979)).

[12] *Id.*

[13] *Id.* at161. *See also* Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001), *amended by* 275 F.3d 1266 (9th Cir. 2001).

[14] *Falcon*, 457 U.S. at 161. *See also In re* Domestic Air Transp. Antitrust Litig., 137 F.R.D. 677, 684 (N.D. Ga. 1991) (stating that the court would "scrutinize the evidence plaintiffs propose to use in proving their claims without unnecessarily reaching the merits of underlying claims.").

[15] *Dukes*, 222 F.R.D. at 143 (citing Armstrong v. Davis, 275 F.3d 849, 871 n.28 (9th Cir. 2001)).

[16] *Id.*

evidence of a strong and centralized corporate culture[17] at Wal-Mart, which enabled it to control all of the stores and their operations.[18] Such control laid the groundwork for the entire class to suffer an injury, which resulted from a specific discriminatory practice.[19] Because the class possibly contains 1.5 million women, neither side challenged the class's ability to meet Rule 23(a)'s numerosity requirement. Such a large class, though, can backfire against a class, as will be discussed in Section IV.[20] The court also held that the class met the requirement of Rule 23(b)(2), finding that the primary purpose of the litigation is to seek injunctive and declaratory relief, even though class members are seeking punitive damages.[21] According to Rule 23(b)(2), injunctive relief must outweigh any punitive damages sought in order to maintain class action status.[22] In this case, the court held that the injunctive relief related to ending sexual discrimination at Wal-Mart "predominates"[23] over any possible punitive award, even one that could be in the billions of dollars.[24]

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[17] As evidence of Wal-Mart's strong corporate culture, the *Dukes* court noted that "every new employee nation-wide goes through the same orientation process and . . . is trained about the Wal-Mart culture. Thereafter, employees at Wal-Mart stores attend a daily meeting . . . where managers discuss company culture and employees do the Wal-Mart cheer. Employees also receive weekly training on culture topics at mandatory store meetings." *Id*. at 151 (citations omitted). While the court pointed to these characteristics as evidence of a strong corporate culture, there is no connection between a corporation maintaining a strong corporate culture, on the one hand, and, making local store managers responsible for hiring and promotion decisions, on the other hand.

[18] *Id.* at 145-53. This evidence was used to satisfy the commonality requirement of FED. R. CIV. P. 23(a). *Id.* at 145.

[19] *Id.* at 167-68. This evidence was used to satisfy the typicality requirement of FED. R. CIV. P. 23(a). *Id.* at 166-68.

[20] *See infra* Section IV.

[21] *Dukes*, at 170-71. FED. R. CIV. P. 23(b)(2) only provides for injunctive and declaratory relief and not punitive damages. *See* FED. R. CIV. P. 23(b)(2). A 1991 Amendment to Title VII allowed for punitive damages if the plaintiff could prove that the employer discriminated "with malice or with reckless indifference . . . ." 42 U.S.C. §1981a(b)(1) (1991).

[22] The monetary damages must be "secondary to the primary claim for injunctive or declaratory relief." Molski v. Gleich, 318 F.3d 937, 947 (9th Cir. 2003) (citing Probe v. State Teachers' Ret. Sys., 780 F.2d 776, 780 (1986)).

[23] *Dukes*, 222 F.R.D. at 171.

[24] Given the potential size of the class, it would seem quite obvious that any punitive damages award would be in the billions of dollars and would clearly outweigh any declaratory or injunctive relief that would be granted to the class. One can assume that this case would result in an award in the billions of dollars given the fact that in 1999 a 10,000 employee sexual discrimination lawsuit settled for $25 million; if this award was divided equally among claimants, each claimant received $2,500. *See* William C. Martucci et. al., *Class Action Litigation in the Employment Arena – the Corporate Employers' Perspective*, 58 J. MO. B. 332, 336 (2002). Assuming an

This Note will argue that the Northern District of California incorrectly certified the class in *Dukes v. Wal-Mart Stores*.[25] Part II proceeds with an in-depth description of *Dukes*. Part III then continues with a discussion of Rule 23 and its requirements. Part IV discusses why the court was incorrect in finding that the class in *Dukes* met the requirements of commonality and typicality. Because this Note only challenges the court's finding in *Dukes* regarding commonality and typicality, any issues regarding numerosity and/or adequacy of representation are not discussed. Part IV also discusses the court's use of expert witness testimony in certifying the class, and the importance of using a *Daubert* analysis in order to analyze potential expert witness testimony to certify a class. Part V discusses the Title VII issues which are present in this case, and explains why the court should have denied class certification based on these issues. Part VI argues that the court incorrectly ignored the issue of blackmail settlements and that the class should not have been certified because of the concern regarding blackmail settlements.[26] Part VII proposes a method for certifying class action lawsuits similar to the *Dukes* case. More specifically, the proposal will suggest that certification not be granted for "wall to wall" or "across the board" class action lawsuits. Keeping in line with many other cases involving corporate parents, the proposal will limit the instances in which a class action lawsuit can be brought to cases where, unlike in *Dukes*, specific corporate policies existed that promoted a definite practice and where the corporate parent actively engaged in the day to day hiring, firing and promoting of employees. The method will finally

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equivalent settlement per person here, the total award in this case would be $3.75 billion. At the high end of the scale, a 1992 sexual discrimination case against State Farm involving 814 women settled for $157 million. *Id.* at 336, Appendix. Therefore, each claimant received $192,874.69. *Id.* Extrapolating this value to the Wal-Mart case would result in a total settlement value of $289,312,039,312. Wal-Mart's market capitalization is only around $182,000,000,000. *See* Summary of WAL MART STORES, *available at* http://finance.yahoo.com/q?s=WMT&d=t (last visited Oct. 2, 2005). Therefore, any award approaching the high end of the scale would bankrupt Wal-Mart and possibly force Wal-Mart to layoff thousands of employees. This result cannot be considered secondary to any injunctive or declaratory relief sought by the class.

[25] Pursuant to FED. R. CIV. P. 23(f), the Ninth Circuit agreed to hear Wal-Mart's appeal of the lower court's class certification. A decision in that case is pending. Principal Br. For Wal-Mart Stores, Inc., Dukes v. Wal-Mart Stores, Inc. at 1-2 (9th Cir. 2004) (Nos. 04-16688 & 04-16720).

[26] Briefly, blackmail settlements occur when a group of plaintiffs try to gather as many potential class members as possible in order to scare the defendant into settling, rather than risk facing a jury award. *See infra* nn. 253-58.

propose that allegations of sexual discrimination are best left to be heard on a more individual level, or at the very least, that class action lawsuits should be brought on a smaller scale, rather than as one class action lawsuit encompassing 1.5 million women.

I. *DUKES V. WAL-MART*: AN IN-DEPTH OVERVIEW

In *Dukes*, the named plaintiffs include six women, each of whom worked for Wal-Mart either as an hourly or salaried worker in stores across the country.[27] Despite claiming to represent women across the country, all of the representative plaintiffs worked in stores in California, three of whom worked at stores outside of California before moving to California.[28] Additionally, only one of the lead plaintiffs, Christine Kwapnoski, briefly occupied a salaried position.[29] All of the women worked at a Wal-Mart store since at least 1997.[30]

All of the named plaintiffs describe a set of policies which, they allege, point to a general policy by Wal-Mart to sexually discriminate against women.[31] More specifically, the plaintiffs claim that as females, Wal-Mart's policies hindered their ability to receive promotions.[32] Plaintiffs also claim that female Wal-Mart employees received less pay than men for performing the same tasks.[33] As a general basis for their claims, plaintiffs argue that Wal-Mart employed an excessively subjective decision-making process regarding their employment and possible promotions, which created an environment for sexual discrimination.[34] Wal-Mart's policy mandated that an hourly worker could only become a manager by participating in the Management Training Program.[35] The plaintiffs allege

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[27] *See* Def.'s Opp'n to Mot. for Class Certification, at 17-18, n.9, Dukes v. Wal-Mart, Inc. (N.D. Cal. 2003) (No. C-01-2252 MJJ).

[28] *Id.* Plaintiff Page worked in a Supercenter in Oklahoma before moving to California. Plaintiff Gunter worked in a Discount Store in Texas before moving to California and Plaintiff Kwapnoski worked in a Sam's Club in Missouri before transferring to a Sam's Club in California. *See id.*

[29] *Id*. at 17-18 n.9. It should be noted that she only held an entry-level managerial position as a Receiving Area Manager. *Id.*

[30] *See* Pl.'s Mot. for Class Certification, at 1, Dukes v. Wal-Mart, Inc. (N.D. Cal. 2003) (No. C-01-2252 MJJ).

[31] *See id*. at 1-4.

[32] *Id*.

[33] *Id.*

[34] *See Dukes*, 222 F.R.D. at 149-50.

[35] *See id*. at 148. In order to participate in the Management Training Program, an hourly employee must rise to the level of a Support Manager. *See id*.

that, until recently, managers chose which employees would participate in the Program through a "tap on the shoulder" system.[36] Under this system, managers chose candidates to participate in the Management Training Program by deciding for themselves who might make a good manager, rather than by relying on set guidelines.[37] The named plaintiffs allege that this type of system suffered from "excessive subjectivity"[38] in that male managers would pick male hourly employees to participate in the Management Training Program, more frequently than female employees.[39]

Wal-Mart claims that, as the corporate parent, it cannot be held responsible for decisions made by store managers because the managers made decisions based on a certain amount of subjectivity.[40] Moreover, despite the plaintiffs' contentions regarding the nexus between excessive subjectivity and sexual discrimination, Wal-Mart cited a Ninth Circuit case, *Coleman v. Quaker Oats Co.*, to show that excessive subjectivity is not necessarily evidence of sexual discrimination.[41] In *Coleman*, plaintiffs claimed that Quaker Oats committed age discrimination when, in the process of carrying out a large-scale layoff, it laid off two-thirds of workers over age forty.[42] In determining whom to lay off, Quaker Oats considered an employee's rankings in six areas and his overall ranking.[43] The Ninth Circuit held in *Coleman* that Quaker Oats did not use an excessively subjective evaluation system in order to mask its true intention of firing the older employees.[44] Similarly, Wal-Mart argues that even

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[36] *See* Pl.'s Mot. for Class Certification, at 2, Dukes v. Wal-Mart, Inc. (N.D. Cal. 2003) (No. C-01-2252 MJJ). The plaintiff's allege that this policy existed until recently citing that in January 2003, Wal-Mart moved from a "tap on the shoulder" program to posting job vacancies in the Management Program. *See Dukes*, 222 F.R.D. at 149.

[37] *See* Pl.'s Mot. for Class Certification, at 2, Dukes v. Wal-Mart, Inc. (N.D. Cal. 2003) (No. C-01-2252 MJJ).

[38] *Dukes*, 222 F.R.D. at 149.

[39] *See* Pl.'s Mot. For Class Certifcation at 2, Dukes v. Wal-Mart Stores, Inc. (N.D. Cal. 2003) (No. C-01-2252 MJJ).

[40] *See* Def.'s Opp'n to Mot. for Class Certification, at 4, 6-7, 14-15, 23-24, Dukes v. Wal-Mart, Inc. (N.D. Cal. 2003) (No. C-01-2252 MJJ).

[41] *See id.* at 32 n. 19 (citing Coleman v. Quaker Oats Co., 232 F.3d 1271, 1285 (9th Cir. 2000) ("While a subjective evaluation system can be used as a cover for illegal discrimination, subjective evaluations are not unlawful *per se* and 'their relevance to proof of discriminatory intent is weak'")) (quoting Sengupta v. Morrison-Knudson Co., 804 F.2d 1072, 1075 (9th Cir. 1986)).

[42] *Coleman*, 232 F.3d 1271, 1278-79.

[43] *Id*. at 1278.

[44] *Id*. at 1285.

though it used a subjective system to evaluate employees, such a system does not necessarily mean that it maintained sexually discriminatory practices.

At Wal-Mart, managers are given a certain amount of leeway with regard to some aspects of pay and promotion.[45] Wal-Mart asserts that when making decisions regarding pay, although it sets a range for each class of employee, store managers are able to depart from that scale.[46] Wal-Mart argues, therefore, that because store managers control their individual stores as they see fit, Wal-Mart, as the corporate parent, cannot be held responsible for the individual pay decisions made by each store manager.[47]

Similarly, Wal-Mart also claims that it cannot be held responsible for promotion decisions, because store managers make those decisions on a store-by-store basis.[48] The plaintiffs even admit that store managers make promotion decisions on their own by choosing which hourly employees will participate in the Management Training Program.[49] Wal-Mart claims that the purpose of this policy is to allow store managers to identify those people who they believe will make the best managers.[50] Wal-Mart argues that managers are best equipped to determine who would make a good manager, not a corporate officer who has virtually no knowledge of each of the stores' employees.[51]

In looking at the *Dukes* case, the court faced a number of issues that speak to the heart of Rule 23 and class certification. Issues of subjectivity in hiring, promotion and pay practices at Wal-Mart raise concerns as to whether a class

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[45] *See generally Dukes*, 222 F.R.D. 137 (N.D. Cal. 2004).

[46] *See* Def.'s Opp'n to Class Certification, at 14-15, Dukes v. Wal-Mart, Inc. (N.D. Cal. 2003) (No. C-01-2252 MJJ). After store managers decide to depart from the pay scale, the district manager can then question the store manager's decision, after the fact, if the hourly rate departs from the standard minimum by more than 6%. *See* Pl.'s Mot. For Class Certification at 17 (N.D. Cal. 2003) (No. C-01-2252 MJJ)

[47] *See* Def.'s Opp'n to Mot. for Class Certification, at 4, 6-7, 14-15, 23-24, Dukes v. Wal-Mart, Inc. (N.D. Cal. 2003) (No. C-01-2252 MJJ).

[48] *Dukes*, 222 F.R.D. at 150.

[49] *Id.* at 148.

[50] *See id*. at 148. Wal-Mart only sets minimum standards for promoting employees to the Management Training Program. Those standards include the employee: "have an 'above average' evaluation, have at least one year in their current position, be current on training, not be in a 'high shrink' department or store, be on the company's 'Rising Star' list, and be willing to relocate." *Id*.

[51] *Id*. The court later faults Wal-Mart for not overseeing promotion decisions made by store managers given its ability to oversee such things as the type of music played in each store. *Id.* at 151-53.

can meet all the requirements of Rule 23. If in fact Wal-Mart maintained excessively subjective practices in hiring, promotion, and pay, then proving commonality and typicality would appear to be quite difficult. Given the "increased skepticism – particularly among members of the federal judiciary – toward the class action as an effective dispute-resolution mechanism in the employment context,"[52] courts must carefully consider all of Rule 23's requirements before certifying a class.

II. RULE 23

A. An Overview

Rule 23 of the Federal Rules of Civil Procedure provides the framework for class action litigation.[53] A class action lawsuit is a unique form of litigation because it seeks relief on behalf of a large group of people not limited to the named plaintiffs.[54] The reasons for allowing class action litigation are fourfold: 1) it promotes judicial economy; 2) it provides a single remedy for a group when it is uneconomical to seek multiple remedies in individual lawsuits; 3) it provides greater plaintiff access to courts through spreading of litigation costs; and 4) it protects defendants from inconsistent jury verdicts.[55]

As discussed earlier, Rule 23(a) contains four requirements that a class must meet in order to be certified: numerosity, commonality, typicality and adequacy.[56] If a class meets all four of these requirements, it then must meet one of the three further requirements of Rule 23(b).[57] Typically, civil rights lawsuits fall under the rubric of Rule 23(b)(2) where the "party opposing the class has acted or refused to act on grounds generally applicable to the class,"[58] as described by the Advisory Committee notes to Rule 23,[59] because all the class

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[52] Melissa Hart, *Will Employment Discrimination Class Actions Survive?* 37 AKRON L. REV. 813 (2004).

[53] FED. R. CIV. P. 23.

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

[55] *See* 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.02 (3d ed. 2005).

[56] *See* FED. R. CIV. P. 23(a).

[57] *See* FED. R. CIV. P. 23(b).

[58] *See* FED. R. CIV. P. 23(b)(2).

[59] *See* FED. R. CIV. P. 23 advisory committee's note ("This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding

members are claiming that the defendant has wronged them in a common way.[60]

In determining if a class meets the requirements of Rule 23 for certification, courts are split as to how they should evaluate the class's allegations. In *General Telephone. Co. of the Southwest v. Falcon*,[61] the Supreme Court held that courts should perform a "rigorous analysis" to ensure that a class meets each of the requirements of Rule 23(a).[62] In an earlier decision, though, the Court held in *Eisen v. Carlisle & Jacquelin*[63] that a judge cannot go so far as to "conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."[64] It has been noted, though, that judges apply this holding inconsistently.[65] Since *Falcon*, courts have had a difficult time finding a middle ground between *Eisen* and *Falcon*.[66] One court went so far as to require a party seeking to certify a class to show "under a strict burden of proof, that all requirements of [Fed. R. Civ. P.] 23(a) are clearly met."[67]

B. Commonality

The commonality requirement of Rule 23(a)(2) is meant to ensure that all potential class members have their case adequately heard when joinder of all plaintiffs would be "impracticable."[68] In determining whether a particular class

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declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate . . . . Illustrative are various actions in the civil-rights field where party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.").

[60] *See* FED. R. CIV. P. 23(b)(2).

[61] 457 U.S. 147 (1982).

[62] *Id*. at 161.

[63] Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

[64] *Id.* at 177.

[65] Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1254 (2002). In fact, Bone and Evans argue that rather than apply the requirements of Rule 23, judges decide certification based on "the value of the class action" and that "[j]udges seem more willing to overlook evidentiary weaknesses and certify a class the more strongly they believe in the importance of the class action for enforcement of the substantive law." *Id*. at 1272.

[66] "We have noted that the 'boundary between a class determination and the merits may not always be easily discernible.'" Retired Chicago Police Ass'n v. City of Chi., 7 F.3d 584, 599 (7th Cir. 1993) (quoting Eggleston v. Chicago Journeyman Plumbers' Local Union No. 130, 657 F.2d 890, 895 (7th Cir. 1981)).

[67] Reed v. Bowen, 849 F.2d 1307, 1309 (10th Cir. 1988) (quoting Rex v. Owens *ex rel*. Okla., 585 F.2d 432, 435 (10th Cir. 1978)).

[68] FED. R. CIV. P. 23(a)(1).

meets this requirement, the Supreme Court directed lower courts to focus on whether there are common facts and legal issues among class members.[69] A class can satisfy this requirement by sharing only one common legal issue or fact.[70]

Courts have acknowledged that class action cases concerning sexual discrimination in the employment context generally meet the commonality requirement when decisions regarding employment are centralized to a particular place or within a particular group.[71] In *Dean v. Boeing Co.*, the plaintiff sued Boeing on behalf of female employees at a limited number of plants in the United States.[72] The District Court of Kansas held that the commonality requirement was met in part because there was a common question of law or fact to all plaintiffs in that all of the women worked at Boeing's Kansas operations.[73] Likewise, in *Penk v. Oregon State Board of Higher Education*,[74] the proposed class consisted of "all women faculty members who have taught or are teaching at Oregon's eight institutions of higher education . . . ."[75] Given the centralized nature of a public school system, the District Court of Oregon found that "the Board, [and] not each individual institution, assure[s] compliance with Oregon's law against educational discrimination."[76]

On the other hand, when the decision-making process is decentralized or stratified, courts tend to find that commonality does not exist because the employees are dealt with on a more local level, rather than by a corporate parent. In *Droughn v. FMC Corp.*,[77] the defendant comprised three different areas of employment, each engaged in distinct tasks,

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[69] *See* 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.23 (3d ed. 2005).

[70] *Id.*

[71] *See* Talley v. ARINC, Inc., 222 F.R.D. 260, 267 (D. Md. 2004) (stating that finding commonality is more prevalent in an employment discrimination lawsuit when, "the alleged pattern or practice was sufficiently centralized and defined so as to eliminate the need for individualized inquiries on liability."). The court cited cases where commonality existed when there was a centralized decision-making process in a single location or evidence of a corporate wide policy of discrimination. *See, e.g.*, Newsome v. Up-To-Date Laundry, Inc., 219 F.R.D. 356, 361-62 (D. Md. 2004); Hewlett v. Premier Salons Int'l, Inc., 185 F.R.D. 211, 216-17 (D. Md. 1997).

[72] Dean v. Boeing Co., No. 02-1019-WEB, 2003 U.S. Dist. LEXIS 8787, at *4 (D. Kan., Apr. 24, 2003).

[73] *Id.* at *47.

[74] Penk v. Or. State Bd. of Higher Educ., 93 F.R.D. 45 (D. Or. 1981).

[75] *Id.* at 48.

[76] *Id*. at 50.

[77] Droughn v. FMC Corp., 74 F.R.D. 639 (E.D. Pa. 1977).

with 48,000 employees across thirty-two states and thirteen countries.[78] FMC employees alleged that FMC engaged in sexual and racial discrimination.[79] The Eastern District Court of Pennsylvania held that the proposed class could not be certified, because "FMC, consistent with its structurally diverse and geographically widespread organization, has adopted a decentralized approach to personnel practices. Not only is there no evidence of employment practices emanating from national corporate headquarters, but there is also nothing to suggest that the Chemical Group maintains a firm grip on employment policy within different segments of the division."[80] Similarly, in *Talley v. ARINC, Inc.*,[81] the District Court of Maryland rejected plaintiffs' class, because no "cohesive pattern" of discrimination existed to find that the class satisfied the commonality requirement.[82] By highlighting the stratified nature of these company's employment practices, these courts show that maintaining a practice of making employment decisions at the local level is a legitimate defense for a corporate parent.

C. Typicality

When evaluating whether or not a class has met the typicality requirement of Rule 23(a)(3),[83] courts often note that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge,"[84] because "[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated

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[78] *Id.* at 641.

[79] *Id*.

[80] *Id*. at 642.

[81] 222 F.R.D. 260 (D. Md. 2004).

[82] *Id*. at 267. *See infra* notes 108-11 and accompanying text for a more detailed discussion of the *Talley* case.

[83] Rule 23(a)(3) requires that "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(a)(3).

[84] Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 158 n.13 (1982). *See also* Rowe v. Phila. Coca-Cola Bottling Co., No. 01-6965, 2003 U.S. District LEXIS 19561, at *17 (E.D. Penn. Sept. 30, 2003); Campos v. INS, 188 F.R.D. 656, 659 (S.D. Fla. 1999); Adames v. Mitsubishi Bank, Ltd., 133 F.R.D. 82, 90 (E.D.N.Y. 1989); Thonen v. McNeil-Akron, Inc., 661 F. Supp. 1271, 1273-74 (N.D. Ohio 1986). All of these cases cite *Falcon* for the proposition that the commonality and typicality requirements of Rule 23 "tend to merge."

that the interests of the class members will be fairly and adequately protected in their absence."[85] However, this is not to say that courts do not evaluate typicality independently or that the typicality requirement does not have its own set of criteria.[86] When evaluating typicality, courts look to see whether "other members of the class . . . have the same or similar grievances as the plaintiff."[87] Put otherwise, "the typicality requirement assesses the sufficiency of the named plaintiff."[88] By focusing on the plaintiff's claims, courts can discern between claims that have a common basis from those that require an individual evaluation, and therefore, are inappropriate for class action status.

Historically, courts have held that "across-the-board" employment class action lawsuits fulfilled the typicality requirement of Rule 23.[89] "Across-the-board" class action lawsuits consist of claims by a group of people that a system-wide policy of discrimination exists, and that the entire system must be challenged and not an individual part of it.[90] This means that a representative plaintiff could bring a class action lawsuit implicating an employer's discriminatory practice, even if the representative plaintiff was only affected by one instance of such practice.[91] However, in *Falcon*, the Supreme Court rendered "across-the-board" employment discrimination lawsuits obsolete "by insisting on actual, not presumed, compliance with the typicality . . . provisions of Rule 23."[92] In

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[85] *Falcon*, 457 U.S. at 157 n.13.

[86] But it is true that some courts view the typicality requirement as being redundant. *See, e.g.*, Bullock v. Bd. of Ed. of Montgomery County, 210 F.R.D. 556, 560 (D. Md. 2002) (stating that the typicality requirement "has been observed to be a redundant criterion.").

[87] Paxton v. Union Nat'l Bank, 688 F.2d 552, 562 (8th Cir. 1982). *See* Carpe v. Aquila, Inc., No. 02-0388-CV-W-FJG, 2004 U.S. Dist. LEXIS 21590, at *6 (W.D. Mo. Sept. 13, 2004); Evans v. Am. Credit Sys., 222 F.R.D. 388, 394 (D. Neb. 2004); Bullock v. Bd. of Ed. of Montgomery County, 210 F.R.D. 556, 560 (D. Md. 2002).

[88] *In re* Chrysler Corp. Paint Litig., No. 1239, 2000 U.S. District LEXIS 2332, at *16 (E.D. Pa. March 2, 2000).

[89] Miller v. Hygrade Food Prods. Corp., 89 F. Supp. 2d 643, 648 (E.D. Pa. 2000) (discussing the history of across the board employment lawsuits).

[90] *See* Johnson v. Ga. Highway Express, Inc., 417 F.2d 1122, 1124 (5th Cir. 1969) (reversing the lower court's decision to narrow the scope of the case because even though different facts and circumstances applied to different employees, the named plaintiff challenged system-wide discrimination on behalf of all African-American workers.).

[91] *Miller*, 89 F. Supp. at 648.

[92] Goodman v. Lukens Steel Co., 777 F.2d 113, 122 (3d Cir. 1985), *aff'd* 482 U.S. 656 (1987) (citing *Falcon*, 457 U.S. 147 (1982)).

distinguishing between an individual's claim of discrimination and classwide discrimination, the Court stated:

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim will be typical of the class claims. For [plaintiff] to bridge the gap, he must prove much more than the validity of his own claim.[93]

Ultimately, for a class to meet the typicality requirement, the court must determine that the potential class members' interests are "fairly encompassed" with the named plaintiffs' interests.[94]

Turning to post-*Falcon* class actions in the employment context, courts have found that an employment class has fulfilled the typicality requirement of Rule 23 when the discrimination emanated from a "centrally administered policy."[95] This is demonstrated in *Mathers v. Northshore Mining Co.*,[96] where the District Court of Minnesota held that a group of women who "work[ed] in eight particular departments"[97] met the typicality requirement.[98] By specifying that the class members worked in a limited number of departments within the company's mining operation, the court emphasized that it certified the class because of a policy administered by the corporation.[99] It should be noted that many courts have stated that "typicality is not demanding,"[100] and, as such, courts sometimes give little or no explanation regarding this requirement of class certification. Additionally, the opposing party sometimes does not attempt to challenge the class's assertion that it meets the typicality requirement.[101]

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[93] *Falcon*, 457 U.S. at 157-58.

[94] *Id*. at 160.

[95] Resnick v. Am. Dental Ass'n, 90 F.R.D. 530, 539 (N.D. Ill. 1981).

[96] Mathers v. Northshore Mining Co., 217 F.R.D. 474 (D. Minn. 2003).

[97] *Id.* at 486.

[98] *Id.*

[99] *Id.*

[100] Stirman v. Exxon Corp., 280 F.3d 554, 562 (5th Cir. 2002) (citing James v. City of Dallas, 254 F.3d 551, 571 (5th Cir. 2001)). *See also* Forbush v. J.C. Penney Co., 994 F.2d 1101, 1106 (5th Cir. 1993)).

[101] 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1764 (2d ed. 1986).

Despite the low threshold that courts demand for the typicality requirement, given the issues raised by the Court in *Falcon*, courts have denied class certification based on a classes' inability to meet the typicality requirement.[102] As mentioned earlier, in cases where a class did not satisfy the typicality requirement, the representative plaintiff or plaintiffs often had a unique claim[103] or attempted to implicate an individual incident of discrimination as indicative of a companywide policy of discrimination.[104] In both *ARINC* and *Abrams v. Kelsey-Seybold Medical Group*, the representative plaintiffs attempted to take their individual claims and apply them to all members of a similarly situated group of people.[105] In *Abrams*, Kelsey-Seybold operated twenty outpatient clinics in the Houston area. The plaintiffs alleged racial discrimination in employment decisions regarding promotions and layoffs.[106] Although the plaintiffs reduced the class size three times, the Southern District Court of Texas still found that, based on the Supreme Court's holding in *Falcon*, the claims were individual in nature and not applicable to the whole class.[107]

Likewise, ARINC was a government contractor with over 3,000 employees in twenty-four states.[108] All of the plaintiffs in the lawsuit worked either at ARINC's headquarters in Annapolis, Maryland or in its Washington, D.C. office.[109] The plaintiffs attempted to represent all African-American employees, alleging racial and sexual discrimination in promotions and layoffs.[110] The District Court of Maryland held, however, that the plaintiffs improperly attempted to

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[102] *See generally ARINC*, 222 F.R.D. at 268; Abrams v. Kelsey-Seybold Med. Group Inc., 178 F.R.D. 116, 129 (S.D. Tex. 1997).

[103] *See* Boyce v. Honeywell, 191 F.R.D. 669, 676 (M.D. Fla. 2000) (stating that "the claims asserted by the eight named plaintiffs . . . cover a vast array of individual circumstances" and therefore "this case does not appear to implicate a common, general policy . . . which has a discriminatory impact on the class.").

[104] *See ARINC*, 222 F.R.D. at 268 ("This case does not present the factual scenario of a discriminatory practice being applied so as to broadly discriminate against persons in the identical manner"); *Abrams*, 178 F.R.D. at 129 (S.D. Tex. 1997) ("[I]n cases alleging classwide disparate treatment in particular employment actions, plaintiffs must show a company-wide policy or practice, beyond individualized claims of discrimination.").

[105] *See generally ARINC*, 222 F.R.D 260; *Abrams*, 178 F.R.D. 116.

[106] *Kelsey-Seybold Med. Group, Inc.*, 178 F.R.D. at 119.

[107] *Id*. at 129.

[108] *ARINC*, 222 F.R.D. at 263.

[109] *Id.* at 265.

[110] *Id.* at 263.

combine several individual claims of sexual and racial discrimination, when in reality, each plaintiff's claim required individualized proof.[111]

III. THE COURT'S DECISION IN *DUKES V. WAL-MART*

A. The Finding of Commonality

As discussed above, commonality focuses on whether there are common facts and legal issues among class members.[112] In *Dukes*, the court held that commonality existed between the class representatives and the potential class members because they all suffered from the same subjective corporate policies regarding compensation and promotion.[113] The class representatives presented three types of evidence to prove this allegation.[114] First, they pointed to Wal-Mart's "excessive[ly] subjectiv[e]"[115] policies regarding compensation and promotions.[116] Second, they offered "expert statistical evidence"[117] which demonstrated a connection between gender disparities and discrimination.[118] Finally, they presented the court with "anecdotal evidence"[119] regarding management's tolerance for or promulgation of discrimination.[120] The court stated that considered together, "this evidence more than satisfies plaintiffs' burden"[121] in meeting Federal Rule of Civil Procedure 23's commonality requirement.

Notwithstanding the court's holding, the plaintiffs failed to meet the commonality criteria. Just because class representatives worked for the same corporation as potential class members, it does not follow that they all suffered from a common policy of discrimination. As discussed earlier, plaintiffs alleged that Wal-Mart policies prevented them from receiving promotions and that Wal-Mart awarded greater compensation for men who performed the same tasks as

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111 *Id.* at 268.

112 *See* 5 JAMES WM. MOORE ET AL., Moore's Federal Practice ¶ 23.23 (3d ed. 1999).

113 Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 145 (N.D. Cal. 2004).

114 *Id*.

115 *Id*.

116 *Id*.

117 *Id*.

118 *Id*.

119 *Dukes*, 222 F.R.D. at 145.

120 *Id*.

121 *Id*.

women.[122] There is a significant difference, though, between an individual allegedly suffering from corporate-wide discrimination in promotion and pay practices and a group of people all suffering from the same injury such that there are common questions of law and fact pertaining to all of the plaintiffs.[123]

This idea is especially apparent in a corporation like Wal-Mart, "the largest employer in the world,"[124] because it would be very difficult for an employee in Maine, for example, to suffer from the same discrimination as an employee in Oregon. Wal-Mart utilizes a tiered managerial system,[125] which makes it virtually impossible for corporate headquarters to control decisions made at the local level.[126] Individual Wal-Mart store managers are solely responsible for setting compensation levels for hourly positions and "are granted substantial discretion in making salary decisions."[127] In fact, in *McCree v. Sam's Club*,[128] which involved Sam's Club, one of the four types of Wal-Mart stores,[129] the Middle District Court of Alabama recognized Sam's Club's policy whereby store managers determined the eligibility criteria for Sam's Clubs' management training program.[130] In deciding whether the plaintiffs could show that this policy was discriminatory, the court stated, "Plaintiffs do not attempt to show that this policy is in itself . . . discriminatory, but merely argue that it must allow for discriminatory practices by local stores because of the raw statistics furnished. Such speculation does not satisfy the court that this case is an appropriate one for class action."[131] On the contrary, the *Dukes* court certified the class relying on

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[122] *See generally supra* Part II.

[123] Hart, *supra* note 52, at 819 (quoting Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, at 157 (1982)).

[124] *Dukes*, 222 F.R.D. at 141.

[125] *Id.* at 146. At the bottom of the managerial system are assistant managers and specialty department managers. *Id.* These managers report to the store manager, who in turn reports to the district manager. *Id.* at 145. Wal-Mart operates four different types of stores and all stores are divided into seven divisions. *Id.* at 145. Each division is divided into regions, for a total of 41 regions nationwide, with each region containing roughly 80-85 stores. *Id.* This results in a total of almost 3,500 stores. *Id.*

[126] *See* Def.'s Opp'n to Mot. for Class Certification at 4, Dukes v. Wal-Mart, Inc. (N.D. Cal. 2003) (No. C-01-2252 MJJ).

[127] *Dukes*, 222 F.R.D. at 146.

[128] McCree v. Sam's Club, 159 F.R.D. 572 (M.D. Ala. 1995).

[129] *Dukes*, 222 F.R.D. at 141 n.1.

[130] *See McCree*, 159 F.R.D. at 577.

[131] *Id*.

statistics regarding the percentage of women who held hourly positions versus the percentage of women who held salaried positions, as well as statistical evidence of discrimination and statistical evidence regarding compensation.[132] It is surprising, therefore, that the *Dukes* court did not follow the court's decision in *McCree* and deny certification based on a lack of evidence of a national policy of discrimination at Wal-Mart.

Another way that courts have described the commonality requirement is that all of the plaintiffs must suffer from a common policy which results in a common injury.[133] In cases where courts certified a class in an "across-the-board" case, plaintiffs all suffered from the same policy and suffered a common injury.[134] An example of this is found in *Newsome v. Up-to-Date Laundry*. Plaintiffs, were denied the opportunity to work overtime and received less pay.[135] Although no explicit policy forbidding African-Americans from working overtime existed, defendants openly used racial slurs, and plaintiffs presented statistical evidence that they were subject to less favorable conditions and terms than other workers.[136] In effect, the plaintiffs suffered from an unspoken policy that amounted to racial discrimination. Unlike the plaintiffs in *Newsome*, who suffered from a common policy, the *Dukes* plaintiffs cannot point to a Wal-Mart policy, latent or overt, that encourages sexual discrimination. Plaintiffs in *Dukes* rely on the argument that Wal-Mart's policies contained "excessive subjectivity," which, in effect, led to sexual discrimination.[137] However, the Ninth Circuit held in *Coleman*, that "subjective evaluations are not unlawful *per se* and their relevance to proof of discriminatory intent is weak."[138]

Other courts have also held that when promotion decisions were made on a local level, the parent company was

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[132] *Dukes*, 222 F.R.D. at 146, 154-56.

[133] *See* Talley v. ARINC, Inc., 222 F.R.D. 260, 268 (N.D. Md. 2004) (stating that for a class to be certified it must "present the factual scenario of a discriminatory practice being applied so as to broadly discriminate against persons in the identical manner.").

[134] *See, e.g.*, Newsome v. Up-to-Date Laundry, Inc., 219 F.R.D. 356, 361-62 (N.D. Md. 2004); Buchanan v. Consolidated Stores Co., 217 F.R.D. 178, 187 (D. Md. 2003); Hewlett v. Premier Salons Int'l, 185 F.R.D. 211, 216-17 (D.C. Md. 2003).

[135] *Newsome*, 219 F.R.D. at 360.

[136] *See id.*

[137] *Dukes*, 222 F.R.D. at 151.

[138] Coleman v. Quaker Oats Co., 232 F.3d 1271, 1285 (9th Cir. 2000) (quoting Sengupta v. Morrison-Knudson Co., 804 F.2d 1072, 1075 (9th Cir. 1986)).

not liable and the class was not certified.[139] In those cases, the courts held that although corporate headquarters determined hiring and promotion guidelines, because local managers implemented those policies, "the circumstances of each proposed class representative's case will depend on how a specific manager treated that proposed class representative at his or her store."[140] Plaintiffs' attempt to hold Wal-Mart responsible for decisions made on a local level is misguided because district managers had the ability to oversee pay and promotion decisions made by store managers,[141] and therefore, they should be held responsible for any sexual discrimination, not corporate headquarters.

The court in *Dukes* further emphasized that the "subjective manner" in which store managers made hiring and promotion decisions militated for class certification.[142] The court pointed to the "considerable discretion"[143] given to store managers to make those decisions and the fact that this discretion was "deliberate and routine,"[144] which made Wal-Mart "susceptible to being infected by discriminatory animus."[145] In describing Wal-Mart's employment practices as discriminatory,[146] the court neglected to discuss *Reid v. Lockheed Martin Aeronautics*.[147] In *Reid*, plaintiffs sued Lockheed Martin on behalf of African-American employees working in facilities across the country, claiming that the

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[139] *See, e.g.*, Rhodes v. Cracker Barrel Old Country Store, Inc., 213 F.R.D. 619, 682 (N.D. Ga. 2002); Reid v. Lockheed Martin Aeronautics Co., 205 F.R.D. 655, 670 (N.D. Ga. 2001); Donaldson v. Microsoft Corp., 205 F.R.D. 558, 567 (W.D. Wash. 2001).

[140] *Rhodes*, 213 F.R.D. at 676 (stating that "[s]everal other courts have found that the commonality requirement is not satisfied where geographic diversity or an absence of centralized decision-making exists, or where different decision-makers made the challenged decisions"). *See also Donaldson*, 205 F.R.D. at 567; *Reid*, 205 F.R.D. at 669; Zachery v. Texaco Exploration & Prod., Inc., 185 F.R.D. 230, 238 (W.D. Tex. 1999) (stating, "[t]he fact that [employment] decisions are handled by one's immediate supervisor based on subjective criteria would be useful evidence in an *individual* disparate *treatment* claim, but works against *class certification* of a disparate *impact* claim when the proposed class is subject to the same local autonomy in geographically dispersed facilities.").

[141] *See* Def's Opp. to Class Certification, at 14-15, Dukes v. Wal-Mart, Inc. (N.D. Cal. 2003) (No. C-01-2252 MJJ).

[142] *Dukes*, 222 F.R.D. at 145.

[143] *Id.* at 153.

[144] *Id.* at 149.

[145] *Id.*

[146] *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990-91 (1988); Sengupta v. Morrison-Knudsen Co., 804 F.2d 1072, 1075 (9th Cir. 1986); Casillas v. United States Navy, 735 F.2d 338, 345 (9th Cir. 1984) (cases where courts rejected plaintiffs' attempts to attack employment practices as discriminatory).

[147] Reid v. Lockheed Martin Aeronautics Co., 205 F.R.D. 655 (N.D. Ga. 2001).

company engaged in racial discrimination by allowing facility managers to use subjective criteria when making employment decisions.[148] The Northern District of Georgia denied certification, because the *Reid* plaintiffs, like the plaintiffs in *Dukes*, had essentially claimed that Lockheed Martin had a "centralized policy of decentralization"[149] under which facility managers had the autonomy to use subjective criteria when making employment decisions.[150] The court held that this is an insufficient basis to maintain a multi-facility class action lawsuit because "Title VII prohibits discriminatory employment *practices*, not an abstract policy of discrimination."[151] *Reid* and *Dukes* are factually and legally analogous: both involve an abstract claim of discrimination whereby the plaintiffs attempted to hold a corporate parent liable, when in reality, no substantive corporate policy existed that could implicate the corporate parent.

Furthermore, *Dukes* cited *Watson v. Fort Worth Bank & Trust*[152] as proof that subjective decision-making is a basis for class certification when the factual scenario in *Watson* should have led the *Dukes* court to the exact opposite conclusion.[153] In *Watson*, a woman sued an individual bank for racial discrimination on the grounds that the bank used subjective criteria in its employment decisions that led to discrimination.[154] A key fact in *Watson*, which the *Dukes* court failed to mention, was that *Watson* did not involve a class action lawsuit. Apart from this, the *Reid* court emphasized the fact that claims of subjective decision-making give rise to *individual* claims, and not class action lawsuits.[155] The *Dukes*

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[148] *Id.* at 657-59.

[149] *Id.* at 670.

[150] *Id*.

[151] *Id*. at 670 (citing Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 159 n.15 (5th Cir. 1982) (emphasis in original)).

[152] Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

[153] *See Dukes* at 149.

[154] *See id.* at 977.

[155] *See Reid*, 205 F.R.D. at 670 (stating that using subjective criteria "does not mean that subjective employment practices necessarily give rise to a broad, multi-facility class; rather, it leads to the opposite conclusion."). The *Reid* court cited a number of cases where other courts emphasized this point. *See, e.g.*, Stastny v. S. Bell Tel. & Tel. Co., 628 F.2d 267, 279 (4th Cir. 1980) (stating that "evidence of subjectivity in employment decisions may well serve to bolster proof on the merits of individual claims of disparate treatment . . . it cuts against any inference for class action commonality purposes that local facility practices were imposed or enforced state-wide with respect to a statewide class"); Zachery v. Exploration & Prod., Inc., 185 F.R.D. 230, 238 (W.D. Tex. 1999) (stating that "[t]he fact that [employment] decisions are

court, therefore, incorrectly cited *Watson* and the proposition that it stands for – that claims of subjective decision-making are appropriate in cases involving a single facility or location and not multi-facility – to support "across-the-board" class action lawsuits.

Although the Dukes court held that a subjective decision-making process could serve as a basis for a discrimination claim, there are cases where courts rejected the use of this argument even when the case involved an individual plaintiff. In *Sengupta v. Morrison-Knudsen Co.*, the Ninth Circuit rejected the claim that subjective decision-making alone can be used to prove discrimination.[156] In *Sengupta*, the plaintiff claimed that Morrison-Knudsen utilized subjective criteria in its employee evaluations, which led to racial discrimination and plaintiff's discharge.[157] In dismissing the plaintiff's claim, the court in *Sengupta* held that subjectivity is not grounds for proving discrimination, because "[its] relevance to proof of a discriminatory intent is weak."[158] Furthermore, in *Casillas v. United States Navy*, the plaintiff claimed that the Navy used subjective decision-making practices as a cover for national origin discrimination and that the Navy used these practices to prevent his promotion.[159] The Ninth Circuit flatly rejected plaintiff's claim, stating that "[w]e have explicitly rejected the idea that an employer's use of subjective employment criteria has a talismanic significance."[160]

As the final basis for deciding that the plaintiffs fulfilled the commonality requirement of Rule 23, the *Dukes* court noted Wal-Mart's "strong . . . distinctive, centrally controlled, corporate culture."[161] The court claimed that this strong corporate culture led to "uniformity of operational and personnel practices,"[162] and that these practices "[include]

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handled by one's immediate supervisor based on subjective criteria would be useful evidence in an *individual* disparate *treatment* claim, but works against *class certification* of a disparate *impact* claim when the proposed class is subject to the same local autonomy in geographically dispersed facilities") (emphasis in original).

[156] Sengupta v. Morrison-Knudsen Co., 804 F.2d 1072, 1075 (9th Cir. 1986). (stating "[t]he use of subjective employment criteria is not unlawful per se" and "their relevance to proof of a discriminatory intent is weak.").

[157] *Id*. at 1073-75.

[158] *Id.* at 1075.

[159] Casillas v. United States Navy, 735 F.2d 338, 340-42 (9th Cir. 1984).

[160] *Id.* at 345.

[161] *Dukes*, 222 F.R.D. at 151 (N.D. Cal. 2004).

[162] *Id*.

gender stereotyping."[163] There is an inherent tension, though, with claiming, on the one hand, that the decision-making process at Wal-Mart is subjective, and on the other hand, that a strong corporate culture existed at Wal-Mart that led to a "uniformity of operational and personnel practices."[164] The court even acknowledged this contradiction,[165] but attempted to reconcile it by holding that the subjective decision-making on the local level allows gender bias to become a common part of the Wal-Mart system.[166] This holding was in direct contrast with the *Reid* court's more reasonable summary of similar plaintiffs' arguments, in which it was observed that, "[t]he best characterization of Plaintiffs' theory is that Defendants had a centralized policy of decentralization, which is insufficient on these facts to satisfy commonality . . . with respect to Plaintiffs' proposed multi-facility cases."[167] In certifying the class, the *Dukes* court effectively acknowledged that subjective decision-making practices are not grounds for a class action lawsuit, and used animus against Wal-Mart's "strong corporate culture" as a way of glossing over the legal gaps in the court's reasoning.[168]

B. The Typicality Finding

Turning to Rule 23's typicality requirement, the *Dukes* court found that, although the plaintiffs worked in Wal-Mart stores across the country, they fulfilled this requirement because they were subject to "excessively subjective decision-making in a corporate culture of uniformity and gender stereotyping."[169] In other words, even though one plaintiff worked in a store in New York and another in a store in

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[163] *Id*. at 150.

[164] *Id.* at 151.

[165] "The Court recognizes that there is a tension inherent in characterizing a system as having both excessive subjectivity at the local level and centralized control." *Id.* at 152.

[166] *Id.*

[167] *Reid*, 205 F.R.D. at 670.

[168] There are numerous websites whose sole purpose is to portray Wal-Mart as an evil corporate giant. *See, e.g.*, Walmart Sucks, http://www.walmartsucks.org (last visited Dec. 30, 2004); Walmart Blows, http://www.walmart-blows.com (last visited Oct. 15, 2005); Walmart Watch, http://www.walmartwatch.com (last visited Dec. 30, 2004). Cities have also gone on the offense against Wal-Mart by passing zoning laws that prevent "big box" stores such as Wal-Mart from opening. *See, e.g.*, Wake-Up Wal-Mart, *Zoning changes prohibit big-box stores*, at http://wakeupwalmart.com/news/20050527-tcre.html (last visited Oct. 31, 2005).

[169] *Dukes*, 222 F.R.D. at 167.

California, both suffered from a "common practice,"[170] and thereby fulfilled Rule 23's requirement that "claims or defenses of the representative parties are typical of the claims or defenses of the class."[171]

A problem with the *Dukes* court's decision regarding typicality is that, on the one hand, it held that the named representatives and all possible plaintiffs suffered from typical claims, but on the other hand, acknowledged that the claims are "individual-specific."[172] This leads to a serious problem: if the plaintiffs' claims were "individual-specific," then the court will have to examine each plaintiff's claim, which defeats the purpose of a class action lawsuit.[173] Courts have routinely denied class certification where the court deemed necessary a review of each plaintiff's individual claims.[174] Moreover, the court in *Abrams v. Kelsey-Seybold Medical Group, Inc*., went as far as to say that "[a] class may not be based on discrimination occurring in different departments, involving different decision makers."[175]

While the representative plaintiffs could conceivably bring a claim against their individual store managers, or even possibly against all Wal-Mart stores in California, "the consensus among other courts . . . is that a plaintiff may represent a multi-facility class *only* when centralized and uniform employment practices affect all facilities in the same

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[170] *Id*. at 167-68.

[171] FED. R. CIV. P. 23(a)(3).

[172] *Dukes*, 222 F.R.D. at 167. In acknowledging defendant's objection based on the individual-specific nature of the plaintiffs' claim, the court responded that "[s]ome degree of individualized specificity must be expected in all cases." *Id*.

[173] *See* Rhodes v. Cracker Barrel Old Country Store, Inc., 213 F.R.D. 619, 682 (N.D. Ga. 2003) (in discussing one reason for not certifying the class, the court stated that "the proposed class representatives' and members' disparate treatment claims will require individualized factual determinations. Plaintiffs consequently cannot satisfy the typicality requirement with respect to their disparate treatment claims.").

[174] *See id.* (concluding its analysis of the typicality requirement by stating that "Plaintiffs consequently cannot satisfy the typicality requirement with respect to their disparate treatment claims."). *See also* Talley v. ARINC, Inc., 222 F.R.D. 260, 268 (D. Md. 2004) ("Plaintiffs have aggregated several individual complaints that require individualized proof and give rise to individualized defenses . . . . This case does not present the factual scenario of a discriminatory practice being applied so as to broadly discriminate against persons in the identical manner."); Abrams v. Kelsey-Seybold Med. Group, Inc., 178 F.R.D. 116, 129 (S.D. Tex. 1997) ("[T]he courts have made it clear that in cases alleging classwide disparate treatment in particular employment actions, plaintiffs must show a company-wide policy or practice, beyond individualized claims of discrimination.").

[175] *Abrams*, 178 F.R.D. at 129.

way."[176] In situations where "employment practices were set by a plant manager located at each [division] facility . . . the court held that the plaintiffs could only represent those . . . employees employed at the first facility, and it excluded . . . those . . . employees that worked at the other three facilities."[177]

As mentioned earlier, the situation in *Reid* is extremely similar to the situation in *Dukes* whereby plaintiffs attempted to represent class members at several locations in several different states.[178] In *Reid*, the court denied the plaintiffs' motion for class certification, because each plant determined employment practices and, in a multi-facility case, a plaintiff can only represent workers from his own facility, unless centralized policies existed.[179] It would only seem logical, therefore, that in a case like *Dukes*, which involves over 3,400 stores and in which each store manager had "substantial discretion"[180] regarding employment decisions, that the court should have denied class certification as well. This assertion is further bolstered by the court's decision in *ARINC*, where the court held that "[a] class may not be based on discrimination occurring in different departments, involving different decision makers."[181] Surely, if a class cannot be certified when discrimination occurs in different departments, then a class cannot be certified when discrimination allegedly occurred in over 3,400 stores across the country. Accordingly, the *Dukes* court erroneously and without reason ignored the rulings of its sister courts.

In order for a class to satisfy the typicality requirement, the named plaintiffs must represent the interests of all other potential plaintiffs.[182] Whereas the *Dukes* court cited cases that have allowed different types of plaintiffs to represent an entire class,[183] the *Dukes* case is in fact different from those cases.

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[176] Reid v. Lockheed Martin Aeronautics Co., 205 F.R.D. 655, 667-68 (N.D. Ga. 2001) (emphasis added).

[177] *Id*. (citing Webb v. Westinghouse Elec. Co., 78 F.R.D. 645, 651 (E.D. Pa. 1978)).

[178] *Id.* at 659.

[179] *See id.* at 669.

[180] *Dukes*, 222 F.R.D. at 153 (N.D. Cal. 2004).

[181] *Abrams*, 178 F.R.D. at 129 (S.D. Tex. 1997).

[182] Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 157 n.13 (1982).

[183] *See* Hartman v. Duffey, 19 F.3d 1459, 1471 (D.C. Cir. 1994); Meyer v. MacMillan Publ'g Co., 95 F.R.D. 411, 414 (S.D.N.Y. 1982); Taylor v. Union Carbide Corp., 93 F.R.D. 1, 6 (S.D. W. Va. 1980).

The plaintiffs' class in *Dukes* is composed of hourly and salaried employees, even though the hourly employees' case is based on discrimination allegedly perpetrated by the salaried mangers.[184] In other cases where the plaintiffs sought to be certified as a class comprised of members with competing interests, the courts have held that the competing class members could not be in the same class.[185]

Another issue raised during the court's discussion of typicality in *Dukes* is whether the class representatives could represent the entire class even though only one of the representatives held a managerial position in a Sam's Club store.[186] The plaintiffs arranged their class so that Christine Kwapnoski, the only plaintiff to have held a managerial position, represented other managers, even though she only held an entry-level managerial position at a Sam's Club.[187] The *Dukes* court asserted that it is irrelevant whether or not there is a representative for each level of management,[188] and specifically that Kwapnoski, as an entry-level manager,[189] was not a member of upper management.[190] Other courts have said that if there are conflicts between different managerial positions, then one manager cannot represent a different managerial position.[191] Once again, rather than apply a "rigorous analysis"[192] to the typicality requirement of Rule 23,

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[184] *See* Def.'s Opp'n to Mot. for Class Certification at 34, Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (2004) (No. 01-2252).

[185] *See id.* (citing Donaldson v. Microsoft Corp., 205 F.R.D. 558, 568 (W.D. Wash. 2001) (denying class certification and holding that "[a] conflict of interest may arise where a class contains both supervisory and non-supervisory employees.")); Appleton v. Deloitte & Touche L.L.P., 168 F.R.D. 221, 233 (M.D. Tenn. 1996) (preventing plaintiffs from representing class members, the court stated, "members of the proposed class who are supervisors have likely been responsible for evaluating the performances of other members of the class – evaluations these nonsupervisory personnel may challenge as discriminatory.").

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

[187] *See* Def.'s Opp'n to Mot. for Class Certification at 17-18 n.9, Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (2004) (No. 01-2252).

[188] *See Dukes*, 222 F.R.D. at 167 (N.D. Cal. 2004) (citing Taylor v. Union Carbide Corp., 93 F.R.D. 1, 6 (S.D. W. Va. 1980).

[189] *See supra* note 29.

[190] *Id*. at 166-67.

[191] *See* Def.'s Opp'n to Mot. for Class Certification at 34 (citing Clayborne v. Omaha Pub. Power Dist., 211 F.R.D. 573, 587-88, 597-98 (D. Neb. 2002)); Morgan v. United Parcel Serv. of Am., 169 F.R.D. 349, 357-58 (E.D. Mo. 1996) (holding that center managers could not adequately represent higher-level managerial employees due to potential conflicts of interest).

[192] *Falcon*, 457 U.S. at 159 n.15 (1982); Zinser v. Accufix Research Inst., 253 F.3d 1180, 1186 (9th Cir. 2001).

the court chose to emphasize the "permissive"[193] nature of the typicality requirement. The court failed to recognize that while class actions should be certified when appropriate, the Court in *Falcon* demanded "rigorous analysis"[194] of all applications for class action status because class action lawsuits are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."[195]

In sum, the *Dukes* court found a basis for holding that the plaintiffs met the commonality and typicality requirements of Rule 23 based on the "broad discretion to determine whether a class should be certified"[196] and the "permissive"[197] nature of the typicality requirement.

IV. THE COURT'S USE OF EXPERT WITNESSES AND THE LACK OF A *DAUBERT* ANALYSIS

Courts rely on expert witnesses to determine if the assertions made by plaintiffs seeking class action status are accurate.[198] Federal Rules of Evidence 702 and 703 govern the admissibility of expert witness testimony.[199] In *Daubert v. Merrell Dow Pharmaceuticals*, plaintiffs claimed that their children were born with birth defects as a result of a drug

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[193] *Dukes*, 222 F.R.D. at 167 (citing Staton v. Boeing Co., 327 F.3d 938, 957 (9th Cir. 2003)).

[194] *Falcon*, 457 U.S. at 159 n.15; *Zinser*, 253 F.3d at 1186.

[195] *Falcon*, 457 U.S. at 155 (quoting Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979)).

[196] *Dukes*, 222 F.R.D. at 143 (citing Armstrong v. Davis, 275 F.3d 849, 871 n.28 (9th Cir. 2001).

[197] *See id.* at 167 (citing *Staton*, 327 F.3d at 957).

[198] *See* Daubert v. Merrell Dow Pharm., 509 U.S. 579, 589 (1993) (citing FED. R. EVID. 702) ("'If *scientific*, technical, or other specialized *knowledge will assist the trier of fact* to understand the evidence or to determine a fact in issue' an expert 'may testify *thereto*.'") (emphasis in original); L. Elizabeth Chamblee, *Between "Merit Inquiry" and "Rigorous Analysis": Using Daubert to Navigate the Gray Areas of Federal Class Action Certification*, 31 FLA. ST. U. L. REV. 1041, 1050 (2004).

[199] *See* FED. R. EVID. 702, 703. The Advisory Committee Notes list five factors to determine the reliability of expert witness testimony.

> (1) [W]hether the expert's technique or theory can be or has been tested – that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.

FED. R. EVID. 702 advisory committee's note.

manufactured by Merrill Dow Pharmaceuticals.[200] Merrell Dow challenged expert witness testimony presented by the plaintiff regarding the link between the drug and birth defects on the grounds that the testimony did not meet the criteria set forth in the precedental case of *Frye v. United States*.[201] In *Frye*, the Court held that expert witness testimony is only admissible if the witness uses techniques that "have gained general acceptance" by the scientific community.[202] In *Daubert*, however, the Court held that Federal Rule of Evidence 702 allows judges "some gatekeeping responsibility" in admission of expert testimony.[203] This "gatekeeping" role is meant to ensure that expert testimony is relevant to the issue and that the expert witness meets certain qualifications.[204] In addition to being relevant to the issue and the expert witness being qualified, the evidence must also assist the fact-finder.[205]

In *Dukes*,[206] the court held a *Daubert* hearing regarding the admissibility of the testimony of the plaintiffs' expert witness relating to the presence of stereotypes and discrimination at Wal-Mart[207] and concluded that only part of one witness's testimony should be stricken.[208] At the separate hearing, the court, in stating the legal standard for reviewing expert witness testimony at the class certification stage, held "'that a lower *Daubert* standard should be employed at this [class certification] stage of the proceedings.'"[209] The plaintiffs relied on three expert witnesses in order to prove that gender stereotyping and disparities exist at Wal-Mart.[210] The testimony of one of the expert witnesses, Dr. Bielby, a sociologist, is especially troubling for a number of reasons. Dr.

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[200] *Daubert*, 509 U.S. at 582.

[201] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

[202] *Id*. at 1014.

[203] *Daubert*, 509 U.S. at 589 n. 7 (quoting Rehnquist's opinion, concurring in part, dissenting in part, *id*. at 600).

[204] *Id*. at 589. The Supreme Court clarified this requirement to apply to all expert witnesses and not testimony just based on science. *See* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147-48 (1999).

[205] *See* FED. R. EVID. 702.

[206] *See* Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 189 (N.D. Cal. 2004).

[207] *Id*. at 191-93.

[208] *Id*. at 195 (excluding part of the evidence submitted by Dr. Richard Drogin because he made an error in his mathematical computations).

[209] *Id.* at 191 (quoting Thomas & Thomas Rodmakers, Inc., v. Newport Adhesives & Composites, Inc., 209 F.R.D. 159, 162 (C.D. Cal. 2002)).

[210] *See Dukes*, 222 F.R.D. at 153-56. More specifically, the court used the expert witness's testimony to conclude that the plaintiffs met the commonality requirement of Rule 23(a)(1). *Id*. at 166.

Bielby assessed various Wal-Mart policies based on "subjective belief[s],"[211] rather than "the methods and procedures of science."[212] In looking at various Wal-Mart policies, Dr. Bielby concluded that "managers make decisions with considerable discretion and little oversight"[213] and "that subjective decisions such as these, as well as discretionary wage decisions are likely to be biased 'unless they are assessed . . . with clear criteria and careful attention to the integrity of the decision-making process.'"[214] Dr. Bielby based his opinion on what the court termed "social science research."[215]

In turning to the issue of social science research, other social scientists have reached the exact opposite conclusion than that of Dr. Bielby, though Wal-Mart surprisingly did not use this evidence in its case.[216] One group of researchers found that the "distinction between [an] 'objective' and 'subjective' [evaluative] measurement is neither meaningful nor useful in human performance."[217] Another group of researchers found that "the distinction between subjective and objective is problematic and somewhat arbitrary."[218] The most persuasive statement against Dr. Bielby, though, is that of the *Dukes* court itself. In addressing the defendant's objections to Dr. Bielby's testimony, the court stated:

> Defendant also challenges Dr. Bielby's opinions as unfounded and imprecise. It is true that Dr. Bielby's opinions have a *built-in degree of conjecture*. He does not present a quantifiable analysis; rather, he combines the understanding of the scientific community with evidence of Defendant's policies and practices, and concludes that Wal-Mart is "vulnerable" to gender bias. Defendant rightly points out that Dr. Bielby *cannot definitively state* how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart.[219]

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[211] *Daubert*, 509 U.S. at 590.

[212] *Id*.

[213] *Dukes*, 222 F.R.D. at 153 (citing Bielby Decl. ¶¶ 37-41).

[214] *Id*. (quoting Bielby Decl. at ¶ 39).

[215] *Id.*

[216] *See* David Copus, *Beware the Power of Junk Science*, 177 N.J.L.J. 764 (2004).

[217] Fredrick Muckler & Sally A. Seven, *Selecting Performance Measures: 'Objective' versus 'Subjective' Measurement*, 34 HUMAN FACTORS 441 (1992).

[218] J. Kevin Ford et al., *Study of Race Effects in Objective Indices and Subjective Evaluations of Performance: A Meta-Analysis of Performance Criteria*, 99 PSYCHOL. BULL. 330, 331 (1986).

[219] *Dukes*, 222 F.R.D. at 154 (emphasis added) (citations omitted).

This statement indicates that Dr. Bielby's testimony should fail under the *Daubert* analysis because it was based on "subjective belief or unsupported speculation."[220] Amazingly, however, at the special hearing, the *Dukes* court decided that Dr. Bielby's testimony "[was] sufficiently probative to assist the Court in evaluating the class certification requirements at issue in this case."[221]

In reaching its conclusion, the court cited previous cases where the court admitted expert witness testimony, even though the testimony could not definitively state a conclusion.[222] A majority of the cases relied on by the court dealt with a single employee or a group of employees suing an employer and not a class action lawsuit.[223] Taking into account the fact that class action lawsuits are the exception to the rule,[224] the court should have rejected Dr. Bielby's testimony on account of its "built-in degree of conjecture,"[225] and the fact that it resembles "junk science"[226] and not "scientifically valid principles."[227]

V. THE COURT'S DECISION REGARDING TITLE VII ISSUES

Congress amended Title VII with the Civil Rights Act of 1991.[228] As part of the amendment, Congress granted victims of alleged intentional discrimination the right to seek compensatory and punitive damages.[229] Whatever the intentions of Congress, the 1991 Amendment created

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[220] *Daubert*, 509 U.S. at 590 (1993).

[221] *Dukes*, 222 F.R.D. at 192.

[222] *Id.* (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 235-36 (1989); Costa v. Desert Palace Inc., 299 F.3d 838, 861 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003).

[223] *Dukes*, 222 F.R.D. at 192. (citing Price Waterhouse v. Hopkins and Butler v. Home Depot, Inc. to show that courts have admitted expert witness testimony based on social science) (citations omitted).

[224] Gen. Tel. Co. of the Southwest. v. Falcon, 457 U.S. at 155 (quoting Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979)).

[225] *Dukes*, 222 F.R.D. at 154 (citing Bielby Decl. ¶63). "Conjecture" is defined by Merriam-Webster's On-Line dictionary as an "inference from defective or presumptive evidence" or "a conclusion deduced by surmise or guesswork." Merriam-Webster's On-Line, available at http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=conjecture (last visited Oct. 15, 2005).

[226] Lust v. Merrell Dow Pharm., Inc., 89 F.3d 594, 597 (9th Cir. 1996).

[227] Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1316 (9th Cir. 1995). [hereinafter *Daubert II*]. *See also* Chamblee, *supra* note 198, at 1048 (stating that courts normally use a low threshold when deciding on class certification, but that "they should use a higher standard to filter unreliable evidence.").

[228] *See* The Civil Rights Act of 1991, 42 U.S.C. § 1981a(a)(1) (1991).

[229] *See* 42 U.S.C. § 1981a(b)(1) (1991).

significant difficulties for plaintiffs involved in a class action employment discrimination lawsuit seeking compensatory and/or punitive damages.[230] As stated in Rule 23(b)(2) of the Federal Rules of Civil Procedure, plaintiffs who seek class certification pursuant to Rule 23(b)(2), can do so only if they are seeking "final injunctive relief or corresponding declaratory relief with respect to the class as a whole."[231]

These competing provisions result in a difficult situation for classes seeking to be certified while also requesting monetary damages. As a result, the Advisory Committee for the Federal Rules of Civil Procedure, in looking at the Civil Rights Act of 1991 in conjunction with Rule 23(b)(2), stated that class certification pursuant to Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or *predominantly* to monetary damages."[232] Despite this explicit warning, the *Dukes* court overlooked possible Title VII issues and permitted the plaintiffs to proceed with their claims.[233] In fact, the court concluded that it had "little difficulty"[234] holding that the equitable relief predominated over the monetary relief sought.[235]

This result is surprising given the outcome in *Allison v. Citgo Petroleum Corp*. which some have described as "[t]he best-known articulation"[236] regarding employment class actions following the passage of the Civil Rights Act of 1991. In *Allison*, plaintiffs sued Citgo Petroleum Corporation, claiming that the supervisors at one plant engaged in racial discrimination in their employment decisions.[237] The Fifth

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[230] *See* Hart, *supra* note 52, at 813.

[231] FED. R. CIV. P. 23(b)(2).

[232] FED. R. CIV. P. 23 advisory committee's notes (emphasis added).

[233] Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 170-71 (N.D. Cal. 2004).

[234] *Id*. at 171.

[235] *Id*. The court's conclusion is even more surprising, because the court relied on *Young v. Pierce*, 544 F. Supp. 1010, 1028 (E.D. Tex. 1982). It would appear that the court incorrectly relied on this decision given that there is a more recent case which dealt with the Civil Rights Amendment of 1991. *Young* was decided before Congress passed The Civil Rights Act of 1991. Although the *Dukes* plaintiffs seek injunctive and declaratory relief, they also seek monetary damages, a remedy unavailable in *Young*. The *Dukes* court, therefore, should have relied on cases after 1991 in order to determine if the injunctive and declaratory relief outweighed the monetary relief sought by the plaintiffs. *See infra* note 141 for post-1991 cases involving the Civil Rights Act of 1991. Once again, it would appear that the *Dukes* court went to great lengths to certify this class, despite clear case precedent that would appear to point to the opposite result.

[236] Hart, *supra* note 52, at 821-22.

[237] *See* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 407 (5th Cir. 1998).

Circuit denied class certification because the monetary damages sought by the plaintiffs "[were] not incidental"[238] to the injunctive or declaratory relief being sought.[239] As a basis for its holding, the court wrote that

> The underlying premise of the [23](b)(2) class – that its members suffer from a common injury properly addressed by class-wide relief – "begins to break down when the class seeks to recover back pay or other forms of monetary relief to be allocated based on individual injuries." Thus, as claims for individually based money damages begin to predominate, the presumption of cohesiveness decreases while the need for enhanced procedural safeguards to protect individual rights of class members increases . . . .[240]

Therefore, it is difficult to understand the court's findings on this issue in *Dukes*. Even though the plaintiffs were seeking punitive damages in the form of lost pay,[241] the court had "little difficulty"[242] in determining that the claim for punitive damages was incidental to the injunctive or declaratory relief sought. This was so, despite the fact that based on prior cases, a jury award has the potential to bankrupt Wal-Mart.[243]

The *Dukes* court's stated rational for dismissing any Title VII damages problem is a further demonstration of its disregard for precedent and its intense desire to certify the *Dukes* class.[244] In making its decision, the court in *Dukes* relied

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[238] *Id.* at 425. In laying the foundation for denying class certification, the court stated:

> [T]he recovery of incidental damages should typically be concomitant with, not merely consequential to, class-wide injunctive or declaratory relief. Moreover, such damages should at least be capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances.

Id. at 415.

[239] *Id*. The factual situation in *Allison* is quite similar to the one in *Dukes*. The *Allison* court described the situation as follows:

> [P]laintiffs seek to certify a class of a thousand potential plaintiffs spread across two separate facilities . . . working in seven different departments, challenging various policies and practices . . . . Some plaintiffs may have been subjected to more virile discrimination than others: with greater public humiliation, for longer periods of time, or based on more unjustifiable practices, for example.

Id. at 417.

[240] *Id*. at 413 (citations omitted).

[241] *See supra* note 5 and accompanying text.

[242] *See supra* note 233 and accompanying text.

[243] *See supra* note 26 and accompanying text.

[244] The *Dukes* court stated that it based its findings on "ample legal precedent." *Dukes*, 222 F.R.D. at 142 (N.D. Cal. 2004). The contention of this Note is

solely on the depositions of the *class representatives* in determining that the punitive damages being sought were secondary to the equitable or injunctive relief being sought.[245] It would seem almost inconceivable that a court would rely so heavily on the affidavits of the very people seeking class certification in deciding whether or not to certify what would be largest private civil rights lawsuit in United States legal history.[246] The court in *Allison* spent almost ten pages[247] discussing various Title VII issues when deciding whether or not to certify a class of "more than 1,000 potential members,"[248] a class that the court described as a "potentially huge and wide-ranging class."[249] The court in *Dukes* devoted only three pages[250] to its discussion of any potential Title VII issues, despite the fact that *Dukes* involved a "proposed class [that] covers at least 1.5 million women"[251] which the court called "historic in nature."[252] The court did not discuss whether damages would have to be determined on an individual basis or could be calculated based on "objective standards."[253] This disparity is only a further indication that the *Dukes* court casually dismissed significant legal issues in favor of certifying the class.

VI. BLACKMAIL SETTLEMENTS

The concern over blackmail settlements is an additional policy reason for supporting the denial of class certification in a case involving such a large number of plaintiffs and a possibly enormous award. The idea behind a blackmail settlement is that a class will seek to be certified in order to "coerc[e] the

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that the court either misapplied legal precedent or construed it in such a way, so as to guarantee that the class would be certified.

245 *See id.* at 171.

246 *See supra* note 1 and accompanying text.

247 *See Allison*, 151 F.3d at 409-18.

248 *Id.* at 407.

249 *Id*.

250 *See Dukes*, 222 F.R.D. at 170-72.

251 *Id*. at 142.

252 *Id*.

253 *See Allison*, 151 F.3d at 425. Even when other courts have certified class actions in Title VII cases, the courts considered the approach taken in *Allison*. *See, e.g.*, Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 163-67 (2d Cir. 2001); Warnell v. Ford Motor Co., 189 F.R.D. 383, 388-89 (N.D. Ill. 1999); Faulk v. Home Oil Co., 186 F.R.D. 660, 662-65 (M.D. Ala. 1999).

defendant into settlement."[254] In a speech in 1972, Judge Henry Friendly coined the term "blackmail settlement."[255] The concern regarding blackmail settlements is one that many courts and authors have recognized[256] and courts began raising concerns surrounding blackmail settlements shortly after Judge Friendly coined the phrase.[257] In 1998, Congress passed Rule 23(f) of the Federal Rules of Civil Procedure, which allows defendants to seek an interlocutory appeal of a district court's class certification.[258] The Advisory Committee Notes state that one reason for allowing an interlocutory appeal is that "[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."[259] Courts have used Rule 23(f) and the guidance provided by the Advisory Committee notes to decertify classes when it appeared that class certification would pressure a defendant into settling.[260]

As this Note mentioned earlier,[261] the potential award in this case could be in the billions of dollars given the fact that in

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[254] Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1241 n.21 (11th Cir. 2000).

[255] Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003) (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)).

[256] *See, e.g.*, Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978); Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 167-69 (3d Cir. 2001); Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996). *See also* THOMAS E. WILLGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 60 (Federal Judicial Center 1996) (in looking at class actions across four federal district courts, the authors found that "a substantial majority of certified class actions were terminated by class-wide settlements.").

[257] One of the earliest examples of a court discussing pressure to settle was in Kline v. Coldwell, Banker & Co., where the court stated: "I doubt that plaintiffs' counsel expect the immense and unmanageable case that they seek to create to be tried. What they seek to create will become (whether they intend this result or not) an overwhelmingly costly and potent engine for the compulsion of settlements, whether just or unjust." Kline v. Coldwell, Banker & Co., 508 F.2d 226, 238 (9th Cir. 1974). The Seventh Circuit has notably been at the forefront of not certifying or decertifying class action lawsuits because of the issue of blackmail settlements. *See generally In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1015-16 (7th Cir. 2002); West v. Prudential Sec., Inc., 282 F.3d 935, 937 (7th Cir. 2002); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298-99 (7th Cir. 1995).

[258] *See* FED. R. CIV. P. 23(f).

[259] FED. R. CIV. P. 23(f) advisory committee's note.

[260] "The raison d'être for Rule 23(f) . . . provides a mechanism through which appellate courts, in the interests of fairness, can restore equilibrium when a doubtful class certification ruling would virtually compel a party to abandon a potentially meritorious claim or defense before trial." Waste Mgmt. Holdings, Inc., v. Mowbray, 208 F.3d 288, 293 (1st Cir. 2000).

[261] *See supra* note 24.

1999 a sexual discrimination lawsuit brought by 10,000 employees settled for $25 million, which means that if divided equally, each claimant received $2,500.[262] Assuming a jury awarded each claimant in *Dukes* $2,500, the total award in this case would be $3.75 billion. Therefore, although neither the defense nor the court in *Dukes* raised the issue of blackmail settlements, it is an important issue, which should be discussed given the magnitude of the case and possible size of the settlement.

Although Rule 23(a)(1) requires that "the class [be] so numerous that joinder of all members is impracticable,"[263] an excessively large class can prove to be a double-edged sword when it comes to blackmail settlements. In *Coopers & Lybrand v. Livesay*, plaintiffs sued an accounting firm, because they purchased securities based on a faulty prospectus certified by the firm.[264] In denying class certification, the Supreme Court said that "certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."[265] Picking up on the Court's ruling in *Livesay*, the Third Circuit, in *Newton v. Merrill Lynch*,[266] held that where "there are hundreds of thousands of class members,"[267] "the size of the class and number of claims may place acute and unwarranted pressure on defendants to settle."[268] A number of other courts have also discussed the problems of an excessively large class and blackmail settlements.[269] In recognizing that the pressure to settle is

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[262] *See id*. Also see *supra* note 24 for an extreme example of a possible settlement amount ($289,312,039,312); however, a settlement for such an extreme amount would be unlikely as it would easily bankrupt Wal-Mart. A recent article reported that Wal-Mart is seeking to settle this case, but no settlement amounts have been made public. *See* Justin Scheck, *Wal-Mart Said to Be in Talks to Settle Huge Class Action*, at http://www.law.com/jsp/article.jsp?id=1110202461600 (last visited Oct.15, 2005).

[263] FED. R. CIV. P. 23(a).

[264] Coopers & Lybrand v. Livesay, 437 U.S. 463, 465 (1978).

[265] *Id*. at 476.

[266] Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154 (3d Cir. 2001).

[267] *Id*. at 182.

[268] *Id*. at 168 n.8.

[269] *See, e.g.*, Parker v. Time Warner Entm't. Co., 331 F.3d 13, 22 (2d Cir. 2003) ("It may be that the aggregation in a class action of large numbers of statutory damages claims . . . could create a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements.") (emphasis in original); *In re Bridgestone/Firestone Inc*., 288 F.3d at

problematic in class action lawsuits, it is surprising, to say the least, that neither the defense nor the court in *Dukes* addressed the issue in motions filed or the opinion rendered. However, in June 2004, the Ninth Circuit, agreed to hear an interlocutory appeal of this case[270] pursuant to Rule 23(f), so it is possible, if not quite likely, that the Ninth Circuit will address this issue given the purpose of Rule 23(f) as described in the Advisory Committee Notes.[271]

VII. A PROPOSED GUIDE FOR CERTIFYING EMPLOYMENT CLASS ACTIONS

The guide which I propose for class certifications is based on the holdings of other circuits. By way of a brief outline, I propose five issues that courts should address when deciding whether or not to certify a class. The first issue deals with why courts should utilize a standard closer to "rigorous analysis"[272] than to "broad discretion"[273] when deciding whether or not to certify a class. The second issue involves whether or not a court should hold a parent company liable for the actions of individual managers if the individual manager is responsible for decision-making. I identify examples of cases where individuals brought successful and unsuccessful lawsuits against Wal-Mart for sexual discrimination and explain why such an avenue is more appropriate than a class action lawsuit. Next, I recommend that courts consider the realities of certifying a huge class in relation to the commonality requirement. I then propose that courts carefully consider the requirements for typicality in the context of large class action lawsuits so as to ensure that the requirements are truly met. Finally, I discuss the importance of considering the possible impact that class certification can have on settlement negotiations and the issue of blackmail settlements.

1012, 1015-16 ("Aggregating millions of claims . . . makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable.").

[270] Bob Egelko, *Review OKd in Wal-Mart Case: Court to Rule on Class-Action Status of Sex-Bias Lawsuit*, S. F. CHRON., Aug. 14, 2004, at A-14.

[271] FED. R. CIV. P. 23(f) advisory committee's note.

[272] Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 162 (1982); Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001), *amended* 275 F.3d 1266 (9th Cir. 2001).

[273] Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 143 (N.D. Cal. 2004) (citing Armstrong v. Davis, 275 F.3d 849, 871 n.28 (9th Cir. 2001)).

A number of courts have proposed various levels of scrutiny when making a decision regarding class certification. The levels range from "broad discretion,"[274] which the *Dukes* court used, to "rigorous analysis,"[275] as the Supreme Court prescribed. When deciding between these two extremes, the Court gave lower courts guidance by stating that class action lawsuits are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."[276] This note proposes that, because class action lawsuits are the exception to the rule, courts should utilize a higher degree of scrutiny than "broad discretion."[277] The *Dukes* court tries to leave itself some breathing room by stating that it could reconsider "certification throughout the legal proceedings before the court."[278] In a study sponsored by the Federal Judicial Center, though, the Center strongly suggested that once a court certifies a class, it is unlikely that a court will go back and decertify it based on "traditional rulings on motions or trials."[279] Therefore, rather than relying on an escape hatch, courts should acknowledge the purpose of a class action lawsuit and rigorously analyze a motion for class certification.

In numerous cases, courts have declined to certify the class either when a class attempted to hold a corporate parent liable for the actions of an individual store, or when the corporate parent had little or no control over the individual store or unit.[280] In each of these cases, the corporation had a policy of decentralized decision-making and the courts found that as a result of this policy, it was inappropriate to hold the corporate parent liable for decisions made in an individual store. A more appropriate method of adjudication in these types of cases is for individual plaintiffs to bring individual lawsuits against a particular store.

Several cases exist where Wal-Mart employees successfully sued individual stores for sexual harassment. In

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[274] *Id.*

[275] *Falcon*, 457 U.S. at 162; *Zinser*, 253 F.3d at 1186.

[276] *Id.* at 155 (quoting Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979)).

[277] *Dukes*, 222 F.R.D. at 143 (citing Armstrong v. Davis, 275 F.3d 849, 872 n.28 (9th Cir. 2001)).

[278] *Id.*

[279] *See* WILLGING ET AL., *supra* note 256, at 80.

[280] *See* Rhodes v. Cracker Barrel Old Country Store, Inc., 213 F.R.D. 619 (N.D. Ga. 2003); Reid v. Lockheed Martin Aeronautics Co., 205 F.R.D. 655 (N.D. Ga. 2001); Donaldson v. Microsoft Corp., 205 F.R.D. 558 (W.D. Wash. 2001); Zachery v. Texaco Exploration & Prod., Inc., 185 F.R.D. 230 (W.D. Tex. 1999).

Dudley v. Wal-Mart Stores, *Inc.*, the court consolidated thirteen plaintiffs' cases, all of whom alleged racial discrimination against a single Wal-Mart store.[281] At trial, a jury found in favor of two of the eleven plaintiffs, awarding them a total of $375,000.[282] Of course, a number of employees' claims failed, but that is to be expected, just as in any other lawsuit. In *Moulds v. Wal-Mart Stores, Inc*., plaintiffs alleged racial and sexual discrimination against a Wal-Mart store.[283] The Eleventh Circuit found for Wal-Mart on the grounds that it had a legitimate reason for choosing another employee for promotion over plaintiff.[284] It is apparent, therefore, that plaintiffs do have the ability to challenge Wal-Mart's practices and win, but on a scale that is far more manageable than 1.5 million women.

The numerosity requirement appears to act as a double-edged sword. A class wants to be sufficiently large so as to satisfy the numerosity requirement; however, if a class is too large, there are potential issues of manageability and commonality which could preclude certification. Many other courts have identified class diversity as, at least, a partial reason for denying certification.[285] As the class size gets larger, there is less of a chance that every class member suffered from the same discrimination. The court in *Donaldson* stated that "where a putative class involves extensive diversity in terms of geography, job requirements, and/or managerial responsibilities"[286] commonality does not exist.[287] By tying the issue of commonality to numerosity, the *Donaldson* court demonstrated that, while a large class fulfilled the numerosity requirement of Rule 23,[288] it was ultimately class diversity that caused the court to find that the class lacked commonality.

In the employment context, it is very difficult to fulfill the typicality requirement, as it is nearly impossible to prove that a large class of plaintiffs all suffered from a common policy of discrimination. This is especially true when a corporation uses a decentralized subjective decision-making process. If a

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[281] Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1319 (11th Cir. 1999).

[282] *Id.*

[283] Moulds v. Wal-Mart Stores, Inc., 935 F.2d 252 (11th Cir. 1991).

[284] *Id*. at 256-67.

[285] *See Reid*, 205 F.R.D. at 666; *Donaldson*, 205 F.R.D. at 567; *Zachery*, 185 F.R.D. at 239-40.

[286] *Donaldson*, 205 F.R.D. at 567.

[287] *Id*.

[288] *Id*. at 565.

plaintiff claims that he was subjected to discrimination on a local level, due to subjective decision-making procedures, then that is evidence of an "individual disparate treatment claim,"[289] but insufficient for class action status.[290] The Supreme Court raised the legal standard by requiring "significant proof"[291] if the subjective decision-making process is used as a basis for class certification.[292] If courts are to certify a class based on a claim that a corporation used subjective decision-making procedures, then plaintiffs should either have to offer evidence revealed during discovery or present expert witness testimony that is scrutinized using a *Daubert* analysis. In this way, a court would fulfill the directive of the Supreme Court to obtain "significant proof"[293] of the plaintiffs' claims.

Courts finally must acknowledge that if they certify a large class, most plaintiffs will settle the case, rather than leave their fate to the flip of a coin. A number of courts have refused to certify or have even decertified a class when they believed that certification would force the defendant to settle.[294] Courts, therefore, must ensure that the plaintiffs have viable claims, and if they do, that the parties have exhausted all settlement possibilities before deciding on class certification.[295]

VIII. CONCLUSION

The Ninth Circuit's decision in *Dukes* is an excellent example of a class action certification gone wrong. In certifying the class, the court ignored the Supreme Court's decree that class action lawsuits are the exception to the rule.[296] The court mischaracterizes Wal-Mart's intentions as trying to "insulate"[297] itself merely because of the lawsuit's size, when, in

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[289] *Zachery*, 185 F.R.D. at 238.

[290] *Id*.

[291] *Falcon*, 457 U.S. at 159 n.15 (1982).

[292] *Id*. *See also* Chamblee, *supra* note 198.

[293] *Falcon*, 457 U.S. at 159 n.15.

[294] "'Hydraulic pressure . . . to settle' is now a recognized objection to class certification." Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1358 (2003) (quoting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 164 (3d Cir. 2001)).

[295] *See* FED. R. CIV. P. 1 (The purpose of the Rules is "to secure the just, speedy, and inexpensive determination of every action.") Encouraging parties to settle avoids a long, drawn-out litigation process.

[296] *Falcon*, 457 U.S. at 155 (citing Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979)).

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

reality, Wal-Mart's main concern is the manageability of the case.[298] Protecting and ensuring women's rights is a noble and worthy cause, but it does not outweigh legal precedent. Rather than certifying the class, which will most likely force Wal-Mart to settle, unless the class is decertified on appeal, the court would have better served these women by denying class certification and suggesting that they pursue their cases on a smaller, more manageable scale. By bringing their actions individually, these plaintiffs would have their claims heard and the litigation would be conducted in its normal fashion, namely "by and behalf of the individual named parties only."[299]

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[298] *See* Def.'s Opp'n to Mot. For Class Certification, at 5, Dukes v. Wal-Mart, Inc. (N.D. Ca. 2003) (No. C-01-2252 MJJ).

> Even if Plaintiffs could survive Rule 23(a), they cannot survive Rule 23(b). Plaintiffs essentially argue that it is irrelevant whether this litigation is manageable or not because they are invoking Rule 23(b)(2). Plaintiffs are wrong. The Ninth Circuit, in a discrimination case involving a class of 15,000 (just 1% of the alleged class herein), disapproved a settlement and remanded, directing the district court to consider manageability if the case proceeded at all: 'We have some concerns, largely relating to litigation management, as to whether the case could be maintained as a class action if the litigation continues.'

Id. (quoting Staton v. Boeing Co., 327 F.3d 938, 953 (9th Cir. 2003)).

[299] *Falcon*, 457 U.S. at 155 (citing *Califano*, 442 U.S. at 701).

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