The Impact of *Wal-Mart v. Dukes* on Employment Law Class Actions and FLSA Collective Actions

By R. Paul Yetter, Christian J. Ward, and Dori Kornfeld Goldman[1]

In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the Supreme Court added more teeth to the requirements for actions to proceed as class actions under the Federal Rules of Civil Procedure. *Dukes*, which itself involved a putative nationwide class of 1.5 million women alleging workplace discrimination, shifted the landscape for Rule 23 class action litigation in general and in the labor and employment law context in particular. Courts and litigators have also had to grapple with whether the case has any relevance to opt-in collective actions under the Fair Labor Standards Act.

Little more than two years out from *Dukes*, the new landscape is still forming. In this paper, we briefly survey the current state of the law applying *Dukes*, with a particular focus on the case's application in employment law class actions in the Fifth Circuit and the debate over its meaning in the FLSA context, and also offer some practical pointers for litigators.

[1] The authors are partners of Yetter Coleman LLP, a Houston-based litigation boutique that handles high-stakes business and technology trials, appeals, and arbitrations in Texas and around the country.

Rule 23 Requirements

Rule 23 of the Federal Rules of Civil Procedure governs class actions in federal courts. Under Rule 23(a), the party seeking certification must demonstrate that:

> (1) the class is so numerous that joinder of all members is impracticable;
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> (2) there are questions of law or fact common to the class;
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> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
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> (4) the representative parties will fairly and adequately protect the interests of the class.

The proposed class must also satisfy at least one of the three requirements listed in Rule 23(b):

> (1) prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications . . . [or] (B) adjudications . . . that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
(3) questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Wal-Mart Stores, Inc. v. Dukes

The Supreme Court's watershed opinion in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), marked the advent of a new era in class actions, heightening the threshold for certification. The case addressed "one of the most expansive class actions ever," consisting of 1.5 million current and former female employees and supervisors who alleged gender discrimination in pay and promotions. *Id.* at 2546. The "crux" of the Supreme Court's opinion was commonality. *Id.* at 2550.

The *Dukes* plaintiffs "held a multitude of different jobs, at different levels of Wal–Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed." *Id.* at 2557 (quoting *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 652 (9th Cir. 2010) (en banc) (Kozinski, J., dissenting)). Their litigation "theory" was that "a strong and uniform 'corporate culture' permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal–Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice." *Id.* at 2548. The Supreme Court was unswayed, finding that the "discretionary decisionmaking of each one of Wal-Mart's thousands of managers" precluded a uniform employment practice and, in turn, commonality. *Id.*

The Court explained that "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" not "merely that they have all suffered a violation of the same provision of law." *Id.* at 2551 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). Plaintiffs' "claims must depend upon a common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 2551. A class proceeding must have the capacity to "generate common *answers* apt to drive the resolution of the litigation." *Id.* at 2551 (quoting Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. REV. 97, 132 (2009) (orig. emph.)). "Without some glue holding the alleged *reasons*" for all of the employment decisions together, "it will be impossible to say that examination of all the class members' claims for relief will produce a

common answer to the crucial question *why was I disfavored*." *Id.* at 2552 (orig. emph.).

The Court found "significant proof" of a common policy "entirely absent," because the "only evidence of a 'general policy of discrimination' respondents produced was the testimony of" their sociological expert as to Wal–Mart's "strong corporate culture." *Id.* at 2553. And anecdotal and statistical evidence of gender-based disparities at the national and regional level could not establish "the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends." *Id.* at 2555-56.

The Court underlined that the "conceptual gap" could have been "bridged" and an evidentiary assessment foreclosed if the plaintiffs had alleged an "express corporate policy against the advancement of women." *Id.* at 2548. For example, Wal-Mart could have a "biased testing procedure to evaluate both applicants for employment and incumbent employees." *Id.* at 2553 (quoting *Falcon*, 457 U.S. at 159 n.15). In the context of pattern-or-practice discrimination cases alleging disparate treatment, "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." *Id.* at 2553 (quoting *Falcon*, 457 U.S. at 159 n.15).

Similarly, "'in appropriate cases,' giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory—since 'an employer's undisciplined system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination.'" *Id.* at 2554 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990–91 (1988)). However, a proposed class must identify a "specific employment practice" under which the discretion operates to assert a disparate impact claim. *Id.* at 2555 (quoting *Watson*, 487 U.S. at 994).

In *Dukes*, the company had an "announced policy" that prohibited sex discrimination. *Id.* at 2553. Further, the "only corporate policy that the plaintiffs' evidence convincingly" established was one of allowing discretion, which was merely "a policy *against having* uniform employment practices." *Id.* at 2554 (orig. emph.). Because some individuals might exercise discretion in permissible ways while others may not, plaintiffs must identify "a common mode of exercising discretion that pervades the entire company." *Id.* at 2554–55. In a company "of Wal–Mart's size and geographical scope," the Court found it "quite unbelievable that all managers would exercise their discretion in a common way without some common direction" from upper management. *Id.* at 2555.

The plaintiffs sought back pay, injunctive and declaratory relief, and punitive damages. The Court ruled unanimously that plaintiffs cannot bring

a claim for back pay in a Rule 23(b)(2) class if the monetary relief is not incidental to the injunctive or declaratory relief. *Id.* at 2557. Instead, Rule 23(b)(2) "applies only when a single injunction or declaratory judgment would provide relief." *Id.* at 2557.

Aftermath of *Dukes*

Commentators have debated the significance of the *Dukes* decision. *See, e.g.*, John M. Husband & Bradford J. Williams, Wal-Mart v. Dukes Redux: The Future of the Sprawling Class Action, 40 COLO. LAW. 53, 59 (2011) (characterizing *Dukes* as a "watershed case for employment law practitioners and class action litigators" and asserting that the decision "ensures that future class certifications will prove far more infrequent—and more expensive—than in the pre-*Dukes* era"); Andrew J. Trask, Wal-Mart v. Dukes: Class Actions and Legal Strategy, 2010-2011 CATO SUP. CT. REV. 319, 355 (2011) (*Dukes* "has not doomed the class action" but instead has simply made "the game of certification a little fiercer").

- ***Prevalence of Class Litigation***

Within six months of the *Dukes* ruling, hundreds of cases cited the decision in denials of requests for certification. *See* Melissa Lipman, Plaintiffs' Bar Reboots Class Strategy in Wake of Dukes, Law360 (Jan. 9, 2012), http://www.law360.com/articles/298335/plaintiffs-bar-reboots-class-strategy-in-wake-of-dukes ("From the time the much-watched decision came down in June until the end of 2011, courts have cited the ruling tightening the standards for class certification more than 260 times," either denying certification or decertifying previous classes "in roughly two-thirds of those cases."). The top ten settlements in employment discrimination cases in 2012 totaled $48.65 million, significantly lower from 2010, the year before *Dukes*, when the total was $346.4 million. "Dramatic Halo Effect" of Wal-Mart Ruling Seen Spurring Change in Workplace Suits, Bloomberg (Jan. 18, 2013).

Nevertheless, class action litigation remains a significant threat to employers. One survey found that, on average, corporate legal departments handled 5.1 class actions per company in 2012, "representing a 16 percent increase from 2011, when that number was 4.4." The 2013 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation 4 (2013). The survey further reported that labor and employment, along with consumer fraud, matters "account for more than 50 percent of all class actions, making them the most prevalent." *Id.* According to Seyfarth Shaw's 2013 class action report, "employment law class action and collective action litigation is becoming ever more sophisticated and will continue to be a source of significant financial exposure to employers well into the future." Seyfarth Shaw LLP, Annual Workplace Class Action Litigation Report i (2013).

- ***Fifth Circuit***

Dukes "has heightened the standards for establishing commonality under Rule 23(a)(2)" in the Fifth Circuit. *M.D. v. Perry*, 675 F.3d 832, 839 (5th Cir. 2012).[2] Before *Dukes*, the "test for commonality" in the Fifth Circuit was "not demanding." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999). The test "provided that in order to satisfy commonality '[t]he interests and claims of the various plaintiffs need not be identical" but instead there should be "'at least one issue whose resolution *will affect all or a significant number of the putative class members.*'" *M.D.*, 675 F.3d at 839-40 (quoting *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir.1993)) (orig. emph.)). However, in the wake of the Supreme Court ruling, the Fifth Circuit has cautioned that "Rule 23(a)(2)'s commonality requirement demands more than the presentation of questions that are common to the class." *Id.* at 840.

The Supreme Court's ruling on back pay is less significant because the Fifth Circuit has long held that a (b)(2) class permits monetary relief only if it is "incidental to requested injunctive or declaratory relief," meaning that the damages "flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998) (orig. emph.).

- ***Employment Class Actions***

Courts throughout the nation have continued to certify class actions in employment cases since *Dukes*, but the analyses have often turned on the existence of common policies and practices promulgated by higher management. Several recent decisions are instructive:

<u>*Ellis v. Costco Wholesale Corp.*</u>

In *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492 (N.D. Cal. 2012), *appeal dismissed* (2013), the trial court certified a nationwide class of current and former female Costco employees claiming that the company had discriminated against them in promotions to the general manager and assistant general manager positions. *Id.* at 496.

Finding commonality satisfied, the court distinguished the proposed class from that in *Dukes* in three important ways. First, the class size was 700, "a mere fraction" of the 1.5 million *Dukes* claimants. *Id.* at 509. While acknowledging that "class size has no *per se* bearing on commonality," the court noted that "when the claims focus in part on the exercise of managerial discretion, it is reasonable to suspect that the larger the class size, the less plausible it is that a class will be able to demonstrate a common mode of exercising discretion." *Id.*

[2] The authors' firm serves as co-counsel for the plaintiffs in *M.D. v. Perry*.

Second, the court found the scope of the proposed class and its claims to be "worlds away" from *Dukes* as the *Ellis* putative class covered promotions to "only two closely-related, management-level positions," whereas the proposed class in *Dukes* "covered women in *all* positions at Wal–Mart in thousands of stores and raised claims based on both pay and promotion policies." *Id.* at 509 (orig. emph.).

Third, "and most important," the *Ellis* plaintiffs could "identify specific employment practices Costco implements companywide under the influence and control of top management," unlike the "mere general delegation of authority" and "absence of a policy" in *Dukes*. *Id.* at 509.

McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.

In *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir.), *cert. denied*, 133 S. Ct. 338 (2012), the Seventh Circuit affirmed certification of a class of 700 African American brokers claiming racial discrimination on the basis of two company-wide policies: a "teaming" policy that permitted brokers in the same office to form their own teams, and an "account distribution" policy that used past performance as a basis for awarding the accounts of brokers who left the company. *Id.* at 488-89. The claimants alleged that minority brokers were denied the advantages of the teaming policy because teams tended to form along racial lines—much like "little fraternities"—and brokers on better teams had better prospects in the competition for account distribution, leading to a "vicious cycle" that exacerbated racial discrimination. *Id.* at 488-90.

Certification would be improper, the court explained, if local managers had been permitted to exercise their own discretion in the teaming and account distribution decisions. *Id.* at 488. However, the company-wide policies permitting broker-initiated teaming and awarding account distributions to the already successful were "practices of Merrill Lynch, rather than practices that local managers can choose or not at their whim." *Id.* at 490. The court noted that *Dukes* "helps . . . to show on which side of the line that separates a company-wide practice from an exercise of discretion by local managers this case falls." *Id.* The court concluded that the "incremental causal effect" of the "company-wide policies—which is the alleged disparate impact—could be most efficiently determined on a class-wide basis." *Id.* at 490.

Chen-Oster v. Goldman, Sachs & Co.

In *Chen-Oster v. Goldman, Sachs & Co.*, 877 F. Supp. 2d 113 (S.D.N.Y. 2012), the plaintiffs sought to certify a class of former female associates, vice presidents, and managing directors of Goldman Sachs who had allegedly been subject to gender discrimination and retaliation. Goldman Sachs argued that *Dukes* foreclosed certification because plaintiffs' claims were based on the "assertion that Goldman Sachs permits individual managers unbridled freedom

to make employment decisions regarding their subordinates." *Id.* at 117. The trial court disagreed, noting that plaintiffs had identified several discrete employment practices and testing procedures, including the "360-degree review" process, forced-quartile rankings, and the "tap on the shoulder" system of selection. *Id.*

The court explained that the "hiring and promotion at Wal–Mart" was "committed to 'local managers' broad discretion,' based on managers' 'own subjective criteria,' and 'exercised in a largely subjective manner,'" whereas the employment practices at Goldman Sachs "might well—with the benefit of discovery—comprise a 'common mode of exercising discretion that pervades the entire company.'" *Id.* at 118 (quoting *Dukes*, 131 S. Ct. at 2547, 2554-55). The court further noted that the exercise of discretion by an individual manager "does not doom a class, since this discretion would have been exercised under the rubric of a company-wide employment practice." *Id.*

Also significant to the court was the narrow "scale" of the proposed class, in comparison to that in *Dukes*. *Id.* at 119. The allegations all concerned the company's New York office, and all plaintiffs were "members of a circumscribed category of Goldman employees." *Id.* Accordingly, plaintiffs' claims could be based on a "common contention," unlike the "scattershot claims" in *Dukes*. *Id.*

Bennett v. Nucor Corp.

Affirming the denial of certification, the appeals court in *Bennett v. Nucor Corp.*, 656 F.3d 802 (8th Cir. 2011), *cert. denied,* 132 S. Ct. 1807 and 132 S. Ct. 1861 (2012), found that plaintiffs could not show that common policies pervaded the personnel decisions. The proposed class of African American employees at a large steel plant alleged disparate treatment and disparate impact as a result of the denial of promotion and training opportunities, as well as a hostile work environment. The court concluded that the evidence showed a "decentralized management structure" and "autonomous" departments, coupled with "a wide variety of promotion, discipline, and training policies" and "similarly stark inter-departmental variations in job titles, functions performed, and equipment used." *Id.* at 814-15.

Criticizing the hostile work environment claim, the court noted that the employees' evidence pertained to only one department of a plant, "so their observations do little to advance a claim of commonality across the entire plant." *Id.* at 816. The court analogized *Dukes*, where the "affidavits alleging discriminatory acts were of little value in the commonality analysis regarding a nationwide class, in part because the majority of the affidavits were concentrated in only six States, while half of all States had only one or two anecdotes and fourteen States had no anecdotes at all." *Id.*

Bolden v. Walsh Construction Company

Likewise, in *Bolden v. Walsh Constr. Co.*, 688 F.3d 893 (7th Cir. 2012), the Seventh Circuit reversed the certification of proposed classes of all African American individuals employed over a ten-year period at Walsh's at least 262 construction sites in the Chicago area. *Id.* at 895-96. Plaintiffs alleged that Walsh's superintendents practiced or tolerated racial discrimination in the assignment of overtime work and in working conditions. *Id.* at 894.

Noting the large number of sites, "and the fact that plaintiffs' experiences differ," the court determined that "[t]o evaluate plaintiffs' grievances … a court would need site-specific, perhaps worker-specific, details, and then the individual questions would dominate the common questions (if, indeed, there turned out to be any common questions)." *Id.* at 896. Walsh had no relevant company-wide policy, aside from "its rule against racial discrimination." *Id.* at 898. The court further noted that the company's "policy of on-site operational discretion" was "the precise policy that *Wal-Mart* [*v. Dukes*] says cannot be addressed in a company-wide class action," regardless of "how cleverly lawyers may try to repackage local variability as uniformity." *Id.* at 898.

- ***Clarification on Evidentiary Assessments***

The *Dukes* Court found that the evidence provided by the plaintiffs—statistics showing gender disparities in pay and promotions, affidavits from female employees reporting discrimination, and testimony from a sociologist—did not establish commonality for their claim of discriminatory bias. However, the evidentiary "gap" could have been closed if plaintiffs had identified a companywide policy that discriminated against women. *Id.* at 2548, 2556-57. *Dukes* noted that while a class certification analysis may involve some overlap with the merits, this "preliminary inquiry" is limited to issues necessary "to determine the propriety of certification." *Id.* at 2552 n.6.

In a fraud-on-the-market decision issued earlier this year, the Supreme Court erased any doubt about the limited authority a district court possesses to inquire into the merits for class certification purposes. The Court in *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013), made clear that plaintiffs' burden is only to show that the elements of Rule 23 are satisfied, not to prove the merits of their claims.

Clarifying any questions left by *Dukes*, the *Amgen* Court observed, "Although we have cautioned that a court's class-certification analysis must be 'rigorous' and may 'entail some overlap with the merits of the plaintiff's underlying claim,' Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Id.* at 1195 (quoting *Dukes*, 131 S. Ct. at 2551). Moreover, "a district court has no 'authority to conduct a preliminary inquiry into the merits of a suit' at class certification unless it is necessary 'to

determine the propriety of certification.'" *Id.* (quoting *Dukes*, 131 S. Ct. at 2552 n.6; *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974)).

"Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* And "an evaluation of the probable outcome on the merits is not properly part of the certification decision." *Id.* (quoting Advisory Committee's 2003 Note on subd. (c)(1) of Fed. Rule Civ. Proc. 23, 28 U.S.C.App. 144). Quite simply, to obtain certification, plaintiffs need not establish that they "will win the fray." *Id.* at 1191.

Lessons from *Dukes*

Dukes transformed the landscape of class action litigation. Practitioners can take heed from the holdings of *Dukes* and its progeny in formulating strategies to either achieve or defeat class certification.

- ***Keep class size limited.***

Dukes presented "one of the most expansive class actions ever," with 1.5 million plaintiffs. 131 S. Ct. at 2547. The "sheer size of the class and the vast number and diffusion of challenged employment decisions was key to the commonality decision" in *Dukes*. *Chen–Oster*, 877 F. Supp. 2d at 119. The suit concerned "literally millions of employment decisions" regarding 1.5 million employees in approximately 3,400 stores, leaving the class members with "'little in common but their sex and this lawsuit.'" *Dukes*, 131 S. Ct. at 2552, 2556 n.9, 2557 (quoting *Dukes*, 603 F.3d at 652 (Kozinski, J., dissenting)).

Unlike Wal-Mart, 99.7% of the employers in the United States have fewer than 500 employees. Matthew Grimsley, *What Effect Will Wal-Mart v. Dukes Have on Small Businesses?*, 8 OHIO ST. ENTREPREN. BUS. L.J. 99, 115 (2013). Plaintiffs can point to the relatively small size of their proposed classes when seeking certification. *See, e.g.*, *Ellis*, 285 F.R.D. at 509; *Chen–Oster*, 877 F. Supp. 2d at 119.

- ***Identify a discrete policy or practice.***

In the aftermath of *Dukes*, an important criterion for certification is the existence of a companywide policy or practice that is common across the class. *See McReynolds*, 672 F.3d at 490 (noting that the controlling inquiry, post-*Dukes*, is whether a challenged policy is a company-wide practice or an exercise of discretion by local managers). As large corporations tend to operate across broad geographic areas and utilize numerous regional managers, plaintiffs may face challenges proving that each division is following the same objective corporate policy.

One of the best defenses to a class action alleging employment discrimination could be a companywide policy prohibiting discrimination or a directive to supervisors to follow the law. Indeed, the *Dukes* Court reasoned that "left to their own devices most managers in any

corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all." 131 S. Ct. at 2554. On the flip side, plaintiffs can cite the absence of a nondiscrimination policy to distinguish their cases from *Dukes*.

- ***Link the discrimination to company executives.***

A helpful means of establishing commonality is to link alleged discrimination to executives rather than class members' immediate supervisors. Even if the supervisors had some discretion, plaintiffs might show that the executives made or reviewed the decisions. For example, in *Ellis*, plaintiffs established that the company's management, including the CEO, devised the promotion criteria and actively participated in promotion decisions. 285 F.R.D. at 497-99.

Defense counsel, on the other hand, can cite the delegation of decision-making authority to local managers and supervisors to defeat certification. For example, corporations can grant independent discretionary authority to division managers to thwart the existence of a "common answer" that will "glue" together common questions. *Dukes*, 131 S. Ct. at 2552. The *Dukes* Court indicated that allocating regional and district managers discretion in decisionmaking "is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy against having uniform employment practices." *Id.* at 2554. Although some businesses are too small to allocate discretionary authority across departments and managers, smaller companies are less likely to face class actions due to the numerosity requirement.

- ***Streamline pleadings.***

Plaintiffs' attorneys should frame pleadings to keep the class definitions and claims simple and streamlined. For example, the claims in *McReynolds* and *Ellis* focused on a single type of personnel decision affecting employees in similar positions. *See McReynolds*, 672 F.2d at 488; *Ellis*, 285 F.R.D. at 496. While the plaintiffs were geographically dispersed, the claims were sufficiently streamlined. But if the claims are not sufficiently concentrated, courts can simply liken the circumstances to *Dukes*. As the *Bolden* court explained, "One class per store may be possible; one class per company is not. And that's equally true of Walsh's 262 (or more) sites." 688 F.3d at 897.

In *M.D.*, the Fifth Circuit remanded a class certification decision that had been issued before *Dukes* for the district court to determine, pursuant to *Dukes*, whether plaintiffs had proven the Rule 23 factors. *M.D.*, 675 F.3d at 848. Noting that "some of the proposed class's sub-claims could potentially be certified under Rule 23(b)(2)," the Fifth Circuit observed that the original complaint had aggregated multiple systemic deficiencies into a "super-claim," precluding classwide

resolution and classwide relief. *Id.* at 842, 846.

- ***Create subclasses.***

Another means of achieving certification may be the creation of subclasses. *See* FED. R. CIV. P. 23(c)(5) ("When appropriate, a class may be divided into subclasses that are each treated as a class under this rule."). For example, the court in *Calloway v. Caraco Pharm. Lab., Ltd.*, 287 F.R.D. 402 (E.D. Mich. 2012), certified two subclasses of pharmaceutical employees who alleged that they were laid off without sufficient notice. *Id.* at 408-09. Subclasses can aid in the simplification and unification of claims.

Dukes **In The FLSA Context**

In addition to its more obvious implications for Rule 23 class actions, courts and litigators have had to address whether, and to what extent, *Dukes* plays any role in collective actions under the Fair Labor Standards Act (FLSA).

The FLSA requires that "no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of [forty hours] at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. §207(a)(1). The FLSA grants employees a private right of action to enforce §207's overtime provision and provides that employers who violate its requirements "shall be liable to the employee or employees affected in the amount of . . . their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages." 29 U.S.C. §216(b). Employees who sue to enforce these rights may proceed either individually or in a collective action "for and in behalf of . . . themselves and other employees similarly situated." *Id.* Unlike class actions under Rule 23, §216(b) expressly requires that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." *Id.* In other words, under §216(b) "no person can become a party plaintiff and no person will be bound by or may benefit from judgment unless he has affirmatively 'opted into' the class; that is, given his written, filed consent." *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975). Thus, "Rule 23 actions are fundamentally different from collective actions under the FLSA." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2013); *id.* at 1528 n.1 (noting "significant differences between certification under [Rule] 23 and the joinder process under § 216(b)").

Given those differences, a strong majority of federal courts have long regarded the standard for certifying an FLSA collective action as different from—and more lenient than—that for certifying a Rule 23 class action. *See, e.g.*, *LaChapelle*, 513 F.2d at 288 ("There is a fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by FLSA §16(b)."). Those differences have implications for

whether and to what extent *Dukes* should affect FLSA litigation, both in cases presenting only FLSA collective-action claims and in so-called "hybrid" actions in which plaintiffs seek Rule 23 class certification to pursue state labor law claims alongside collective-action certification for FLSA claims.

Hoffman-LaRoche Inc. v. Sperling, 493 U.S. 165 (1989) confirmed that district courts adjudicating FLSA actions have the authority to facilitate notice to potential plaintiffs, after determining that those potential plaintiffs are similarly situated. *Id.* at 169-70. Most federal courts "use the 'two-step *ad hoc* approach' [of *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987),] as the preferred method for the similarly situated analysis." *McKnight v. D. Houston, Inc.*, 756 F. Supp. 2d 794, 800-01 (S.D. Tex. 2010) (collecting cases). FLSA "collective actions typically proceed in two stages" including the "notice" stage (sometimes referred to as the "conditional certification" stage) and "decertification" stage. [3] *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 915 n.2 (5th Cir. 2008). At the first stage the district court "makes a decision, usually based only on the pleadings and any affidavits which have been submitted, whether notice of the action should be given to potential class members" to allow them the opportunity to opt in. *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213-14 (5th Cir. 1995), *overruled on other grounds by Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). If so, the case "proceeds as a representative action throughout discovery." *Id.* at 1214. Thereafter, the at the second stage, the defendant may seek to dissolve the collective action in favor of individual proceedings by a motion, "usually filed after discovery is largely complete and the matter is ready for trial." *Id.* It is not until this later stage, at which "the court has much more information on which to base its decision," that it "makes a factual determination on the similarly situated question." *Id.*

In an FLSA action (or a hybrid FLSA/Rule 23 action), *Dukes* may have implications for either stage, or at least defendants may argue that it should. The case law is still developing in this area, but a few early observations can be

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[3] Those terms are derived from "the vernacular of the Rule 23 class action," and are often used to simplify discussion of the FLSA notice stage. *Kelley v. Alamo*, 964 F.2d 747, 747 n.1 (8th Cir. 1992). But the "expedient adoption of Rule 23 terminology," which has "no mooring in the statutory text of §216(b)" has "injected a measure of confusion into . . . FLSA jurisprudence." *Symczyk v. Genesis HealthCare Corp.*, 656 F.3d 189, 194 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 26 (2012). Indeed, as other courts have noted, "the 'certification' we refer to here is only the district court's exercise of [its] discretionary power, upheld in *Hoffman-LaRoche*, to facilitate the sending of notice to potential class members." *Myers v. Hertz Corp.*, 624 F.3d 537, 555 n.10 (2d Cir. 2010).

drawn from FLSA cases citing *Dukes* so far:

- Of the courts explicitly addressing the issue, most have concluded that *Dukes* has little or no relevance to the FLSA notice stage similarly situated inquiry or is generally inapposite to the wage-and-hour context.
- The couple of cases finding *Dukes* applicable to FLSA conditional certification are from district courts within the Seventh Circuit, which has staked out the unique position that Rule 23 standards apply equally to FLSA actions.
- In several hybrid actions, courts have cited *Dukes* in connection with the Rule 23 certification inquiry while not mentioning it in addressing FLSA collective action certification.

This case law is summarized below.

- ***FLSA vs. Rule 23***

The following cases are from district courts within circuits whose precedent holds that there is a clear distinction between the standards to be applied to conditional certification of an FLSA opt-in collective action and those applied to an opt-out Rule 23 class action. In light of that precedent, these courts found that *Dukes* was not applicable to the FLSA notice stage:

- *In re Wells Fargo Wage & Hour Employment Practices Litig. (No. III)*, 2012 WL 3308880 (S.D. Tex. 2012)[4]: The court granted conditional certification of a nationwide FLSA collective action on behalf of home mortgage consultants claiming they were misclassified as exempt employees by defendant banks. Defendants argued that Rule 23 standards should be applied and that *Dukes* barred granting notice to the potential plaintiffs. In a detailed analysis, relying in part on the Fifth Circuit's rejection of applying Rule 23 standards to FLSA actions in *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975), the court rejected that argument. The Fifth Circuit summarily denied a mandamus petition by the defendant banks.
- *Blake v. Hewlett-Packard Co.*, 2013 WL 3753965 (S.D. Tex. 2013): In this FLSA action alleging that IT developer/engineers were misclassified, the court denied conditional certification of a nationwide collective action because of lack of evidence of a common plan. But, in doing so, it rejected the defendant's argument that *Dukes* and Rule 23 standards applied, relying on *LaChapelle v. Owens–Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975).
- *Fracasse v. People's United Bank*, 2013 WL 3049333 (D. Conn. 2013): Plaintiff mortgage

[4] The authors' firm serves as lead counsel for the plaintiffs in *In re Wells Fargo Wage & Hour Employment Practices Litig*.

underwriters claiming they were misclassified as exempt employees sought conditional certification of an FLSA collective action and Rule 23 certification for claims under Connecticut law. Citing *Myers v. Hertz Corp.*, 624 F.3d 537, 556 (2d Cir. 2010), the court noted that in the Second Circuit the standards for FLSA and Rule 23 certification are distinct and granted the FLSA conditional certification without mentioning *Dukes*. Invoking *Dukes*, it applied "a more demanding legal standard" for Rule 23 certification and denied it on numerosity grounds. *Fracasse*, 2013 WL 3049333, at *3.

- *Hurt v. Commerce Energy, Inc.*, No. 2013 WL 4427255 (N.D. Ohio 2013): Door-to-door solicitors for an energy company brought minimum wage and overtime claims and sought to pursue an FLSA collective action and a Rule 23 class action for Ohio state law claims. After finding that the action satisfied *Dukes* and granting class certification, the court noted that "the Sixth Circuit has said that courts should not apply the more stringent criteria for class certification under Rule 23" to the FLSA determination, *see O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567, 584 (6th Cir. 2009), and granted FLSA conditional certification also.

- *Walthour v. Chipio Windshield Repair, LLC*, 2013 WL 1932655 (N.D. Ga. 2013): Plaintiff employees sought to pursue an FLSA collective action for misclassification claims and defendant sought to compel arbitration. In the course of granting defendant's motion, the court quoted its own previous decision in which it noted that "the Eleventh Circuit has long recognized critical distinctions between certification of a collective action under § 216(b) of the FLSA and class certification under Fed.R.Civ.P. 23(b). *See, e.g., Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 n. 12 (11th Cir.1996)" and thus determined that *Dukes* does not apply to FLSA determinations.

- *Alequin v. Darden Restaurants, Inc.*, 2013 WL 3939373 (S.D. Fla. 2013): Plaintiff restaurant workers moved for FLSA collective action conditional certification for backpay claims. In partially granting the motion, the court explained, "While a showing of a general corporate policy in violation of the law might be required to prove the commonality required of a Rule 23 class action, *see Wal–Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2546 (2011), collective actions under the FLSA carry no such requirement. Plaintiffs at the conditional-certification stage are therefore not required to demonstrate a unified, explicit

scheme of FLSA violations, but rather must show only that they are similarly situated with respect to general workplace policies and practices."

- *Amador v. Morgan Stanley & Co.*, 2013 WL 494020 (S.D.N.Y. 2013): Plaintiff client services associates sought FLSA conditional certification for unpaid overtime claims. Rejecting defendants' argument that *Dukes* applied, the court stated "to make a modest factual showing that they were subject to a 'common policy or plan that violated the law,' [P]laintiffs need not demonstrate that they meet the commonality requirement of Rule 23[,] as articulated in *Dukes*," (quoting *Winfield v. Citibank, N.A.*, 843 F. Supp. 2d 397, 409-10 (S.D.N.Y. 2012) (alterations in original)), and granted the motion for notice of the FLSA collective action.

- *Castro v. M & B Rest. Group*, 2013 WL 3982766 (C.D. Cal. 2013): FLSA collective action conditional certification was granted in this case by plaintiff restaurant workers over unpaid breaks. Responding to defendant's argument that Rule 23 standards and thus *Dukes* applied, the court noted that "certification requirements for FLSA collective actions are more lenient than those required for class actions under Rule 23," but went on to find that "even under a 'commonality' approach, certification would be appropriate" given plaintiff's showing that defendant employer may have had constructive knowledge of the uncompensated work.

- *Motley v. W.M. Barr & Co.*, 2013 WL 1966444 (W.D. Tenn.), *report and recommendation adopted in part, rejected in part,* 2013 WL 1966442 (W.D. Tenn. 2013): The magistrate judge recommended conditional certification of an FLSA collective action by warehouse workers for overtime violations. The magistrate rejected defendant's argument that *Dukes* applied to bar the certification, stating, "Barr argues that the two-step procedure is invalid because it 'ignores the Federal Rules of Civil Procedure and the teaching of [*Dukes*].' The Court of Appeals for the Sixth Circuit has rejected this argument, stating that '[w]e have, however, implicitly upheld the two-step procedure in FLSA actions.'" (quoting *In re HCR ManorCare, Inc.*, 2011 WL 7461073, at *1 (6th Cir. 2011)).

- *Roach v. T.L. Cannon Corp.*, 2013 WL 1316397 (N.D.N.Y.), *report and recommendation adopted as modified,* 2013 WL 1316452 (N.D.N.Y. 2013): In this hybrid action by employees of Applebee's restaurants, the magistrate judge found plaintiffs had satisfied "their modest burden" for FLSA collective action certification, but failed to

meet "their more demanding" Rule 23 burden for all but one of their New York state-law claims. Having noted that, for the first stage of the FLSA determination, the "plaintiffs' burden at this preliminary juncture is minimal," the magistrate found that the FLSA action should be conditionally certified and did not refer to *Dukes* until the Rule 23 analysis.

The Seventh Circuit recently split with the majority of circuits in appearing to suggest that Rule 23 and FLSA certification standards should be similar or even interchangeable. *See Espenscheid v. DirectSat USA, LLC,* 705 F.3d 770, 772 (7th Cir. 2013) (stating that "despite the difference between a collective action and a class action and the absence from the collective-action section of the Fair Labor Standards Act of the kind of detailed procedural provisions found in Rule 23, there isn't a good reason to have different standards for the certification of the two different types of action, and the case law has largely merged the standards, though with some terminological differences") (internal cite omitted). *Espenscheid* does not cite *Dukes*, and its broad language is tempered somewhat by suggestions that the interchangeability may be limited to "this case" or at least "the present context," *id.*, which was a hybrid action. However, following *Espenscheid*, some district courts within the Seventh Circuit have begun applying *Dukes* in the FLSA certification context:

- *Boelk v. AT & T Teleholdings, Inc.*, 2013 WL 261265 (W.D. Wis. 2013): This case was a hybrid action over unpaid meal breaks in which plaintiffs sought FLSA conditional certification and parallel Rule 23 class action certification for Wisconsin state law claims. In this order issued *before* the Seventh Circuit's opinion in *Espenscheid*, the court noted that the FLSA conditional certification standard was typically more modest than that for Rule 23 certification but applied an "intermediate level of scrutiny" in this case because the parties had already conducted significant discovery. The court denied both Rule 23 and FLSA certification, having relied explicitly on *Dukes* only in its Rule 23 analysis.
- *Fosbinder-Bittorf v. SSM Health Care of Wisconsin, Inc.*, 2013 WL 3287634 (W.D. Wis. 2013): This was a hybrid action in which nurses claiming unpaid meal periods sought to proceed in an FLSA collective action and in a Rule 23 class action for Wisconsin state-law claims. Although issued *after* the Seventh Circuit's opinion in *Espenscheid*, the court purported to still apply a "fairly lenient" standard at the first step of the FLSA collective action process, and appeared to distinguish that standard from the "rigorous standards of [Rule] 23" applied in *Dukes*.

- *Clark v. Honey-Jam Cafe, LLC*, 2013 WL 1789519 (N.D. Ill. 2013): In this hybrid action, plaintiff restaurant worker sought to pursue an FLSA collective action and an Illinois-law Rule 23 class action for violations of tip credit provisions. Applying *Dukes*, the court granted Rule 23 certification. Citing *Espenscheid*, the court noted that in a hybrid action it applies the same standard for both certifications, and because plaintiff showed commonality under Rule 23 she also satisfied her burden to show that the other potential plaintiffs were similarly situated under the FLSA.
- *Viveros v. VPP Group, LLC*, 2013 WL 3733388 (W.D. Wis. 2013): This case was a hybrid action in which employees at a meat processing plant claimed workers were not paid for time spent donning, doffing, and cleaning equipment. The FLSA collective action had previously been conditionally certified but defendants had since adduced evidence indicating that liability determinations were likely to vary widely for individual employees, e.g., because they started and stopped work at different times based on their places in the production line. Invoking *Espenscheid* and *Dukes*, the court denied Rule 23 certification and decertified the FLSA collective action.

Finally, a recent opinion from the First Circuit, *Manning v. Boston Med. Ctr. Corp.*, 2013 WL 3942925 (1st Cir. 2013), splits the difference. In that hybrid action alleging that health care employees were required to work through meal and rest periods, the court of appeals noted that neither the district court nor the parties had drawn a distinction between the Rule 23 and FLSA standards, and it proceeded to apply a combined analysis in which it applied *Dukes*. In a footnote, however, the court disclaimed any intention to suggest that applying the same standard to both determinations would be appropriate in all circumstances. The court vacated the district court's order striking class and collective action allegations.

- ***Cases finding* Dukes *inapplicable to the wage-and-hour context***

Most courts have found *Dukes* to be inapplicable on its facts to the wage-and-hour disputes typical of FLSA litigation. The basic rationale is that, while the discrimination alleged in *Dukes* was premised on discretionary decisions by thousands of individual decisionmakers, the wage-and-hour collective actions are necessarily premised on allegations of common policies and practices affecting all of the relevant employees. However, the Supreme Court's later holding in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), has prompted some courts to conclude that the damages stage of wage-and-hour cases (at least in Rule 23 class actions) must be dealt with on an individualized, not classwide, basis.

- *Meyer v. U.S. Tennis Ass'n*, 2013 WL 1777556 (S.D.N.Y. 2013): This case presented both FLSA claims and New York state-law claims for overtime compensation by tennis umpires against the U.S. Tennis Association. In this order granting certification of the Rule 23 class, the court distinguished the commonality holding in *Dukes* regarding the *Dukes* plaintiffs' claims of discretionary discriminatory conduct as not inconsistent with finding commonality when the umpires' claims here were based on the fact none of them received overtime pay.
- *Morris v. Alle Processing Corp.*, 2013 WL 1880919 (E.D.N.Y. 2013): In this hybrid action involving claims for time spent donning and doffing, the court had previously conditionally certified the FLSA collective action. In this order granting Rule 23 class certification, the court noted: "the weight of authority rejects the argument that *Dukes* bars certification in wage and hour cases. In wage and hour cases, courts in this Circuit have focused on whether the employer had company-wide wage policies that injured the proposed class. Moreover, claims by workers that their employers have unlawfully denied them wages to which they were legally entitled have repeatedly been held to meet the commonality prerequisite for class certification.") (internal quotation marks and citations omitted).
- *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 616 (S.D.N.Y. 2012) (collecting cases): This case approved a settlement class in a hybrid action alleging that marketing representatives worked off the clock with the defendant's knowledge and encouragement. Collecting cases, the court notes that "[t]he weight of authority rejects the argument that *Dukes* bars certification in wage and hour cases."
- *Jacob v. Duane Reade, Inc.*, 289 F.R.D. 408 (S.D.N.Y. 2013) [*Jacob I*] *on reconsideration in part*, 2013 WL 4028147 (S.D.N.Y. 2013) [*Jacob II*]: In *Jacob I*, the court granted Rule 23 class certification for plaintiffs' claims under New York law based on defendant's alleged misclassification of pharmacy assistant store managers as exempt from FLSA overtime requirements, distinguishing *Dukes* in this wage-and-hour context. In *Jacob II*, however, the court partially decertified the class, finding that the Supreme Court's opinion in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), meant that the class must be decertified for damages purposes, although it could remain certified as to liability.

- ***Clues from the hybrid cases***

In addition to the cases discussed above in which courts explicitly determined that *Dukes* does not apply to FLSA certification, orders and opinions from several hybrid actions implicitly suggest the same conclusion. In these cases, courts applied *Dukes* in the Rule 23 determination, while appearing to believe it had no or little relevance to the FLSA portion of the case. In at least some of the cases, that distinction appears to make a difference. For example, in *Tamas v. Family Video Movie Club, Inc.*, 2013 WL 4080649 (N.D. Ill. 2013), the FLSA collective action on behalf of allegedly misclassified video store managers was conditionally certified but Rule 23 certification as to their Illinois-law claims was denied. *Siegel v. Bloomberg L.P.*, 2013 WL 4407097 (S.D.N.Y. 2013), is another example.

In *Wang v. Chinese Daily News, Inc.*, 2013 WL 4712728 (9th Cir. 2013), the district court had certified, before *Dukes*, both an FLSA collective action and a Rule 23 class action on behalf of newspaper employees, and the Ninth Circuit had affirmed. The Supreme Court vacated and remanded for reconsideration in light of *Dukes*. On remand, the Ninth Circuit vacated the Rule 23 certification without addressing or disturbing the FLSA collective action.

Other hybrid cases referencing *Dukes* in relation to Rule 23 class action certification but not the FLSA collective action portion include: *Edelen v. Am. Residential Services, LLC*, 2013 WL 3816986 (D. Md. 2013); *Glatt v. Fox Searchlight Pictures Inc.*, 2013 WL 2495140 (S.D.N.Y. 2013); *Johnson v. Arkansas Convalescent Centers, Inc.*, 2013 WL 3874774 (E.D. Ark. 2013); *Jones v. Agilysys, Inc.*, 2013 WL 4426504 (N.D. Cal. 2013); *Ribot v. Farmers Ins. Group*, 2013 WL 3778784 (C.D. Cal.), *certificate of appealability denied*, 2013 WL 4479275 (C.D. Cal. 2013); *Roach v. T.L. Cannon Corp.*, 2013 WL 1316397 (N.D.N.Y.) *report and recommendation adopted as modified*, 2013 WL 1316452 (N.D.N.Y. 2013); *Tracy v. NVR, Inc.*, 2013 WL 1800197 (W.D.N.Y. 2013); *Lounibos v. Keypoint Gov't Solutions Inc.*, 2013 WL 3752965 (N.D. Cal. 2013); *McKeen-Chaplin v. Provident Sav. Bank, FSB*, 2013 WL 4056285 (E.D. Cal. 2013).