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# Reconsidering the Scope and Consequences of Appellate Review in the Certification Decision of *Dukes v. Wal-Mart Stores, Inc.*

Nicole Hitch

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RECONSIDERING THE SCOPE AND CONSEQUENCES OF  
APPELLATE REVIEW IN THE CERTIFICATION DECISION OF  
*DUKES V. WAL-MART STORES, INC.*

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I. INTRODUCTION

Deborah Gunter has extensive retail and management experience.<sup>1</sup> With more than 20 years total experience and three years with her current employer, she received consistent positive evaluations, and trained herself on equipment and practices when her requests for formal training were denied. During Deborah’s employment, she repeatedly applied for and was denied a promotion to a specialty division of the retailer. She observed the positions she applied for repeatedly being filled by men, some with fewer qualifications and less experience. During two years

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<sup>1</sup>Wal-Mart Class Website, Declaration of Deborah Gunter in Support of Plaintiffs’ Motion for Class Certification, [http://www.walmartclass.com/staticdata/walmartclass/declarations/Gunter\\_Debra.htm](http://www.walmartclass.com/staticdata/walmartclass/declarations/Gunter_Debra.htm) [hereinafter Declaration of Deborah Gunter].

of employment, Deborah was paid approximately two dollars less than various male colleagues in the same position. This is the story of Deborah “Dee” Gunter,<sup>2</sup> one of the seven named representatives of the plaintiff class in *Dukes v. Wal-Mart Stores, Inc.*,<sup>3</sup> currently the largest employment discrimination class action in the American legal system.<sup>4</sup>

Christine Kwapnoski, another named representative in the legal action, also has a story to tell about her employment at Wal-Mart Stores.<sup>5</sup> During her time at Wal-Mart,<sup>6</sup> Christine was given increased responsibilities, outstanding evaluations, and merit raises. However, during this tenure her repeated requests for promotion to management were denied, allegedly justified by her people problems. When finally promoted to area manager,<sup>7</sup> Christine received recommendations from her supervisor to “doll up” and “blow the cobwebs off her makeup.” Claudia Renati was hired as a marketing membership team leader and before long, she was given the tasks and responsibilities of a marketing manager.<sup>8</sup> Despite her responsibilities, she did not receive the corresponding compensation or title. After two years of increased responsibility, Claudia requested a promotion to the actual position corresponding to her responsibilities, only to be refused because she had not engaged in the formal training program. After training approximately 20 male managers, some of whom did not go through the necessary training nor were required to relocate, and continuously being passed over for promotions, Claudia came to the conclusion that her employer was engaging in discriminatory behavior based on her gender.

In 2001, seven named representatives and 114 class members filed declarations<sup>9</sup> against Wal-Mart Stores, Inc., asserting that they had been paid less than men, that they had been denied promotion or had been delayed promotion, and that they had been the subjects of various sexist acts.<sup>10</sup> Since then, the suit has grown substantially; the plaintiff class consists of approximately 1.6 million women who were employed by Wal-Mart since 1998.<sup>11</sup> *Dukes v. Wal-Mart Stores Inc.*,<sup>12</sup> is

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<sup>2</sup>The Wal-Mart class website has declarations from over 100 women across the country who were employed by Wal-Mart. These women have given declarations to provide the court with individual testimony and anecdotal evidence to further their claims. See Wal-Mart Class Website, <http://www.walmartclass.com>.

<sup>3</sup>*Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004).

<sup>4</sup>*Id.* at 142.

<sup>5</sup>See Declaration of Deborah Gunter, *supra* note 1.

<sup>6</sup>Christine Kwapnoski, a named representative is currently still employed by Wal-Mart Stores, Inc. and has worked there since 1986. See *id.*

<sup>7</sup>Shortly after the original claim was filed against Wal-Mart Stores Inc., Christine was promoted to the position of area manager. *Id.*

<sup>8</sup>See Declaration of Deborah Gunter, *supra* note 1.

<sup>9</sup>*Id.*

<sup>10</sup>See *Dukes*, 222 F.R.D. at 137.

<sup>11</sup>Wal-Mart Class Website, <http://www.walmartclass.com>.

<sup>12</sup>*Dukes*, 222 F.R.D. at 137.

currently pending as the largest employment discrimination class action suit in American history.<sup>13</sup>

The certification of the Wal-Mart suit has raised numerous questions regarding the certification of class actions. Are these seven women's personal experiences similar enough to the experiences of all 1.6 million female Wal-Mart employees such that they can fairly represent the claims in a class action suit? The defense admits that there may be "isolated instances of unfairness,"<sup>14</sup> but does not feel that the women's experiences are representative of all 1.6 million class members. Are the representatives' claims similar enough to the rest of the class to be thought of as common and typical? Did these 1.6 million women all fall victim to discriminatory practices and policies in compensation and promotion? These are some of the issues that the legal and corporate worlds are considering as they await the Ninth Circuit Court of Appeals review of the certification decision made by the District Court for the Northern District of California.

In previous decisions, the Ninth Circuit has taken a relatively lenient and liberal stance on certification of class actions, particularly in the area of employment discrimination.<sup>15</sup> Will the Ninth Circuit follow its precedent and affirm this massive class, which could lead to billions of dollars in damages or result in an enormous monetary settlement? Or will the Ninth Circuit take into account precedent from other circuit courts and apply the Federal Rules of Civil Procedure, which may cause a denial of the class and ultimately force the claims to be brought in individual trials? The decision of the Ninth Circuit will have far-reaching consequences impacting our current legal system, particularly in employment discrimination class action certification decisions. The pending decision will also influence corporate America, its policies, and employer-employee relations.

This article will explore the Federal Rules of Civil Procedure and their application in the granting or denial of certification in an employment discrimination class action. In doing so, this article will examine how the district court applied these rules in the Wal-Mart action, which resulted in the certification of the largest private class action suit in American history.<sup>16</sup> Additionally, this article will consider the consequences of the Ninth Circuit's utilization of permissive and liberal standards and, alternatively, the consequences of incorporation of stricter standards from various other circuit courts and the possible result of denial of certification.

Part II will give a general background on Wal-Mart, the pending Wal-Mart litigation, and the Civil Rights Act the plaintiffs are alleging Wal-Mart violated. Part III will provide an overview of the requirements for certification set out in Rules 23(a), 23(b), and 23(f) of the Federal Rules of Civil Procedure. This part will assert various contemporary views of class actions and their consequences. Part IV will

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<sup>13</sup>Ritu Bhatnagar, *Recent Development: Dukes v. Wal-Mart as a Catalyst for Social Activism*, 19 BERKELEY WOMEN'S L.J. 246, 247 (2004).

<sup>14</sup>Sue Reisinger, *Wal-Mart at Critical Juncture, Sex Bias Plaintiffs Seek Class Status*, NAT'L L. J., June 23, 2003, at 1.

<sup>15</sup>See *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998); *Linney v. Cellular Alaska Pshp.*, 151 F.3d 1234, 1238 (9th Cir. 1998); *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (citing *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 626 (9th Cir. 1982)).

<sup>16</sup>See *Dukes*, 222 F.R.D. at 142.

analyze the pending litigation and relate it to the factors most likely to be reviewed by the Ninth Circuit. This part will analyze the precedent of the Ninth Circuit in certification decisions and explore the possible issues that may be arise if this precedent is followed. In addition, Part IV will analyze the reasons that warrant the Ninth Circuit to expand its review and to stray from its permissive precedent in order for this case to receive a fair review. The issues and consequences of an appellate denial will also be explored.

Finally, Part V will conclude that a case of this size deserves an expansive and thorough review in order to adequately and to fairly protect the claims of the 1.6 million women in the class. Despite the probability of an affirmation by the Ninth Circuit, this article will speculate that the action may not be found to meet the Rule 23 requirements and, thus, should not go forward. A more thorough review is deserved in this case, since the Ninth Circuit's decision will invoke substantial consequences for future cases.

## II. BACKGROUND

### *A. Wal-Mart: The Largest Retailer and Employer*

There is considerable variation in opinion regarding defendant Wal-Mart, both the largest retailer and the largest employer in the world.<sup>17</sup> In 2004, Fortune magazine named Wal-Mart the "Most Admired Company" for the second consecutive year.<sup>18</sup> Despite this title, Wal-Mart is the defendant in over 5,000 lawsuits, more than any other company in the United States<sup>19</sup> and is also the object of public criticism alleging bias against women and subjection of workers to overtime work without pay.<sup>20</sup> Questions regarding Wal-Mart's influence on society were apparent when CNBC aired a television show titled "The Age of Wal-Mart: Inside America's Most Powerful Company,"<sup>21</sup> which considered whether Wal-Mart is "ultimately good or bad for America."<sup>22</sup> Likewise, concerns were apparent when the University of California at Santa Barbara conducted an entire conference to

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<sup>17</sup>*See id.* at 141.

<sup>18</sup>Wal-Mart Website, News: U.S. Operations, <http://www.walmartstores.com>.

<sup>19</sup>*The Age of Wal-Mart* (CNBC News television broadcast Nov. 10, 2004) [hereinafter *The Age of Wal-Mart*].

<sup>20</sup>*Wal-Mart's CEO on Offensive Against Critics: Wal-Mart's CEO Lee Scott Goes on Offensive Against Critics of Its Employment Policies*, ABC BUS., Jan. 13, 2005.

<sup>21</sup>*The Age of Wal-Mart*, *supra* note 19.

<sup>22</sup>*Id.*

contemplate Wal-Mart's impact on society.<sup>23</sup> In spite of the array of criticisms, Wal-Mart remains a dominant leader in the global business community.<sup>24</sup>

Sam Walton founded Wal-Mart on three principle beliefs: to show respect for the individual, to serve customers, and to strive for excellence.<sup>25</sup> The retailer's current philosophy still emphasizes these beliefs.<sup>26</sup> Wal-Mart believes that respect for the individual has substantially contributed to its current economic success and industry recognition through "a group of dedicated, hardworking, ordinary people who have teamed together to accomplish extraordinary things."<sup>27</sup> Its success is also attributed to customer service, which is emphasized within Wal-Mart's culture. Wal-Mart wants customers "to find the lowest prices with the best possible service."<sup>28</sup> Wal-Mart credits its ongoing success to constant innovations, ideas, and pushing of the boundaries promoted by Sam Walton's "concept of striving for excellence before it became a fashionable concept."<sup>29</sup>

Recently, Wal-Mart's CEO and President, H. Lee Scott, began an aggressive marketing campaign to present the "unfiltered truth" about the world's largest retailer.<sup>30</sup> On January 13, 2005, for the first time since its founding, Wal-Mart responded to public criticisms and the creation of an "urban legend"<sup>31</sup> with an open-

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<sup>23</sup>On April 12, 2004, a national conference, "Wal-Mart: Template for 21st Century Capitalism" was held at University of California, Santa Barbara. The conference discussed Wal-Mart's impact on society as well as the capitalist business world. The conference featured scholars, activists, and union officials. See Press Release, UCSB to Host National Conference on Wal-Mart as Model for 21st Century Global Capitalism (Mar. 24, 2004), at <http://www.ia.ucsb.edu/pa/Display.aspx?PKKey=1119>, March 24, 2004. See also *The Age of Wal-Mart*, *supra* note 19.

<sup>24</sup>As of January 2005, there are 1,363 Wal-Mart stores, 1,672 Wal-Mart Super Centers, 550 Sam's Clubs, and 76 Neighboring Markets, which employ over 1.2 million associates. In 2004, Wal-Mart's financial success could be observed through the generation of over \$256 billion in global sales (an increase of \$26 billion over the previous year), \$9.1 billion in net income and an increase in earnings per share by more than 15 percent. See Wal-Mart Stores Website, Wal-Mart Stores at a Glance, <http://www.walmartstores.com>.

<sup>25</sup>Wal-Mart Stores Website, The Wal-Mart Culture – The Story of Wal-Mart, <http://www.walmartstores.com>.

<sup>26</sup>*Id.*

<sup>27</sup>Wal-Mart Stores Website, The Wal-Mart Culture – Three Basic Beliefs, <http://www.walmartstores.com> (quoting Don Soderquist, former Senior Vice Chairman of Wal-Mart Stores, Inc. who is now retired).

<sup>28</sup>*Id.* (quoting Tom Coughlin the Vice Chairman of Wal-Mart Stores, Inc).

<sup>29</sup>*Id.* (quoting Lee Scott the President and Chief Executive Officer of Wal-Mart Stores, Inc).

<sup>30</sup>Lorrie Grant, *Wal-Mart CEO Vows 'Unfiltered Truth'*, USA TODAY, Jan. 13, 2005, at 1B.

<sup>31</sup>In attempts to revamp its image, Wal-Mart created the website [www.walmartfacts.com](http://www.walmartfacts.com) in order to present the facts about Wal-Mart and counter recent criticism. In a January 13, 2005 press release posted on the website, CEO and President Lee Scott is quoted stating, "There are lots of 'urban legends' going around these days about Wal-Mart, but facts are facts." These urban legends are negative opinions, statements, and criticisms regarding Wal-Mart's effect on consumers, employees, the community and the economy. Another article

letter advertisement in over 100 newspapers and a number of media interviews.<sup>32</sup> Wal-Mart also created a website, *www.walmartfacts.com*, to present statistics about the retailer, including the number and size of stores, number of associates, and average wage for full-time hourly workers.<sup>33</sup> Scott stated that the goals of 2004 were taking care of customers, associates, communications and merchandising.<sup>34</sup> The outcome of the appeal of the certification granted in the *Dukes* litigation will have a significant influence on both future legal decisions and corporate policies because of the current notoriety and cultural fascination with Wal-Mart.

#### B. *Dukes v. Wal-Mart Litigation History*

In *Dukes*, the plaintiffs allege that Wal-Mart Stores Inc. (Wal-Mart)<sup>35</sup> engaged in sex discrimination against female employees in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e.<sup>36</sup> According to the Plaintiffs' Third Amended Complaint, the class challenges the hiring, promotion, and pay practices of Wal-Mart, specifically the practices of "advancing male employees more quickly than female employees, denying female employees equal job assignments, promotions, training and compensation, and by retaliating against those who oppose its unlawful practices."<sup>37</sup> Summarily, the plaintiffs allege that through company-wide policies of discrimination against female employees, promotion and compensation variances have been created between female and male employees. The plaintiffs seek "plain class-wide injunctive and declaratory relief, lost pay, and punitive damages."<sup>38</sup> They are not seeking compensatory damages for the class members.<sup>39</sup>

On June 22, 2004, U.S. District Judge Martin Jenkins of San Francisco approved the certification of the class in *Dukes v. Wal-Mart Stores, Inc.*,<sup>40</sup> finding at least "an

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posted on the website, "Wal-Mart is Working For Everyone. Some of our Critics are only Working for Themselves," further considers that special interest groups and critics spread rumors and misfortunes about Wal-Mart for their own benefit and Wal-Mart feels that the public deserves to hear the truth and be able to see proof of the good Wal-Mart does for consumers, employees, communities, and the economy. See Press Release, Wal-Mart Launches Nationwide Campaign to Set the Record Straight, Jan. 13, 2005, at [http://www.walmartfacts.com/docs/747\\_jan13release\\_1416847257.pdf](http://www.walmartfacts.com/docs/747_jan13release_1416847257.pdf).

<sup>32</sup>*See id.*

<sup>33</sup>*See id.*

<sup>34</sup>*See id.*

<sup>35</sup>The class members consist of females who were employed by any Wal-Mart retailer during the specific years mentioned. These retailers included in the class action include Wal-Mart stores, Wal-Mart discount stores, supercenters, neighborhood stores, and Sam's Clubs. See Wal-Mart Class Website, *supra* note 11.

<sup>36</sup>*See Dukes*, 222 F.R.D. at 141.

<sup>37</sup>Plaintiffs' First Amended Complaint, *Dukes v. Wal-Mart*, (N.D. Cal. 2001) (No. C-01-2252MJJ); see also *Dukes*, 222 F.R.D. at 141.

<sup>38</sup>*Dukes*, 222 F.R.D. at 141.

<sup>39</sup>*Id.*

<sup>40</sup>The representation in this noted suit is unique, especially the plaintiffs' combination of nonprofit groups and plaintiffs' firms. The plaintiffs' representation is a mix of both three nonprofit groups and four plaintiffs' firms, which bring different perspectives, advantages, and

inference [that] Wal-Mart engages in discriminatory practices in compensation or promotion.”<sup>41</sup> The court certified the class of “all women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart’s challenged pay and management track promotions policies and practices,” for purposes of liability, injunctive and declaratory relief, punitive damages, and lost pay.<sup>42</sup>

### C. Civil Rights Act of 1964 and the 1991 Amendment

The challengers allege that retail giant Wal-Mart’s employment practices and policies were discriminatory<sup>43</sup> and that they violated Title VII of the Civil Rights Act of 1964,<sup>44</sup> which “intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex or national origin.”<sup>45</sup> The Act has a dual purpose. Its first purpose is “to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”<sup>46</sup> The second purpose is to “make whole” a victim of unlawful employment discrimination by placing the employee in as good a position as he or she would have been if the discrimination had not taken place.<sup>47</sup>

The Civil Rights Act of 1964, which only allowed for equitable relief in the form of injunctive, declaratory, and front and back pay, was amended in 1991 to allow for further monetary damages, including punitive and compensatory relief.<sup>48</sup> This amendment caused some to believe that the supposed focus of injunctive relief, to end the discriminatory behavior of the employer and to make positive changes in employment practices, had been shifted to compensating

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resources to the challengers of Wal-Mart’s policies. The three non-profit groups representing the plaintiffs are The Impact Fund, Equal Rights Advocates, and The Public Justice Center. The plaintiffs’ firms which are working together with the nonprofit groups are the following: Cohen, Milstein, Hasufeld and Toll of Washington; Davis, Cowell & Bowe of San Francisco; and Tinkler & Firth and Merit Bennett P.C., both of Santa Fe, New Mexico. Counsel defending Wal-Mart is Paul, Hastings, Janofsky & Walker of Los Angeles, which is one of the largest and most successful labor and employment firms in the nation. *See generally Dukes*, 222 F.R.D. at 137; *see also* Wal-Mart Class Website, *supra* note 1.

<sup>41</sup>Nathan Koppel, Firms, *Nonprofit Team in ‘Wal-Mart’: Is Pairing the Plaintiff’s Lawyers Merely to Hide a Motive for Profit?*, NAT’L L. J., Aug. 16, 2004, at 7.

<sup>42</sup>*Dukes*, 222 F.R.D. at 163-64.

<sup>43</sup>*Id.* at 141.

<sup>44</sup>*Id.*

<sup>45</sup>*Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976).

<sup>46</sup>*Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

<sup>47</sup>*Franks*, 424 U.S. at 763-64.

<sup>48</sup>*See* 42 U.S.C. 2000e-5(g) (2000). Congress amended the Act after finding that “additional remedies under federal law are needed to . . . deter intentional discrimination in the workplace.” *Pollard v. E.I. Du Pont De Nemours & Co.*, 532 U.S. 843, 852 (2001).



individual employees.<sup>49</sup> In *Dukes*, the plaintiffs' class action claim of a violation of the Civil Rights Act of 1964 was certified after the district court's analysis of the application of Federal Rule of Civil Procedure 23 to the case.<sup>50</sup>

### III. THE CERTIFICATION PROCEDURE OF CLASS ACTIONS AND MODERN COMMENTARY

#### *A. Background of Rule 23(a): Prerequisites to a Class Action*

Class action lawsuits are used to efficiently and effectively handle a large number of litigants through class representatives.<sup>51</sup> In order to certify a class, the plaintiff carries the burden of proving that the requirements of both Rule 23(a) and 23(b) have been sufficiently met.<sup>52</sup> When determining whether or not to certify a class, the district court has "broad discretion," which must be exercised "within Rule 23's framework."<sup>53</sup> The four requirements of 23(a) are numerosity, commonality, typicality, and adequacy of representation.<sup>54</sup> In order to certify a class action suit, the district court must conduct "a rigorous analysis" of whether the plaintiffs have adequately satisfied all the prerequisites of Rule 23(a).<sup>55</sup> The numerosity requirement is met when joinder of all members of the class would be impractical due to the large number of individuals involved in the suit.<sup>56</sup> It should be noted that the judiciary has not set a numeric standard as to how many members will satisfy the numerosity prerequisite. Instead, the court makes numerosity determinations on a case-by-case basis.<sup>57</sup> The prerequisite of commonality requires "questions of fact or law that are common to the class." This requirement is generally met "with a common nucleus of operative fact."<sup>58</sup> Rule 23(a)(3)'s typicality requirement is established only if the representatives prove that their claims are typical of the claims of the entire class.<sup>59</sup> The typicality requirement will be met when the plaintiffs' claims "arise from the same event or practice or course of conduct that gives rise to the claims of other class members."<sup>60</sup> Finally, adequacy of representation requires

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<sup>49</sup>See Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 837 (2004).

<sup>50</sup>See *Dukes*, 222 F.R.D. at 143.

<sup>51</sup>STEVEN BAICKER-MCKEE ET AL., *A STUDENT'S GUIDE TO THE FEDERAL RULES OF CIVIL PROCEDURE* 425-26 (6th ed. 2003).

<sup>52</sup>See *Palmer v. Combined Ins. Co. of Am.*, 217 F.R.D. 430, 436 (N.D. Ill. 2003).

<sup>53</sup>*Reeb v. Ohio Dep't of Rehab. And Corr.*, 81 Fed.Appx. 550, 555 (6th Cir. 2003).

<sup>54</sup>Fed. R. Civ. P. 23.

<sup>55</sup>*Reeb*, 81 Fed.App'x. at 555.

<sup>56</sup>Fed. R. Civ. P. 23(a)(1).

<sup>57</sup>BAICKER-MCKEE ET AL., *supra* note 51 at 428.

<sup>58</sup>*Palmer*, 217 F.R.D. at 436.

<sup>59</sup>Fed. R. Civ. P. 23(a)(3).

<sup>60</sup>*Palmer*, 217 F.R.D. at 436 (quoting *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998)); *see also* *Bullock v. Bd. of Educ.*, 210 F.R.D. 556, 560 (Md. D. 2002).

that the representatives fairly and adequately protect the interests of all members of the class.<sup>61</sup> Once plaintiffs meet the burden of proof for the four requirements of 23(a), they must then prove “that they fall within at least one of the subcategories of Rule 23(b).”<sup>62</sup>

*B. Background of Rule 23(b): Class Actions Maintainable*

In addition to the prerequisites of 23(a), the proposed plaintiff class must fit into one of 23(b)'s classes in order for the district court to grant certification. Certification can be granted if 23(b)(1) is sufficiently met. Rule 23(b)(1) is applied when individual litigation of the claims will result in a disposal of the interests of other potential plaintiffs or a prevention of their ability to recover.<sup>63</sup> The textbook example of a 23(b)(1) class is when relief from individual lawsuits exhausts a limited fund available for relief of the claim to the disadvantage of other future plaintiffs.<sup>64</sup> Since employment discrimination class actions have the primary purpose of ending and rectifying discriminatory behavior, rather than providing monetary relief,<sup>65</sup> most employment discrimination claims are not established on a limited fund. A class can also be certified under 23(b)(1) if the opponent to the class would be subject to incompatible duties or inconsistent standards.<sup>66</sup> In employment discrimination cases, the opponent to the class has the duty or standard not to discriminate in employment. As such, certifying because of incompatible duties or inconsistent standards is unlikely.<sup>67</sup> Rule 23(b)(1) will generally be inapplicable to certify a class in an employment discrimination setting.<sup>68</sup>

Employment discrimination class action suits typically seek certification under either the 23(b)(2) or 23(b)(3) class types.<sup>69</sup> Rule 23(b)(2) allows certification of a class when the primary relief sought by the plaintiffs is equitable.<sup>70</sup> In order for

<sup>61</sup>FED. R. CIV. P. 23(a)(4). See *Palmer*, 217 F.R.D. at 436 (stating that the two inquiries of Rule 23(a)(4) are “the plaintiffs named counsel” and “the named plaintiff’s representation in protecting the distinct interests of the class members”).

<sup>62</sup>*Elkins v. Am. Showa, Inc.*, 219 F.R.D. 414, 419 (S.D. Ohio 1996).

<sup>63</sup>BAICKER-MCKEE ET AL., *supra* note 51, at 438.

<sup>64</sup>See, e.g., *Trautz v. Weisman*, 846 F. Supp. 1160 (S.D.N.Y. 1994) (stating that the classic rule for a Rule 23(b)(1) case occurs when claims of individuals exhaust the value of a limited fund, to the detriment of subsequent plaintiffs).

<sup>65</sup>*Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975) (“It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group to the detriment of another.”).

<sup>66</sup>See BAICKER-MCKEE ET AL., *supra* note 51, at 438-39.

<sup>67</sup>*Id.*

<sup>68</sup>*Smith v. Tower Loan of Miss., Inc.*, 216 F.R.D. 338, 372 (S.D. Miss. 2003).

<sup>69</sup>See *Cooper v. Fed. Reserve Bank*, 467 U.S. 867, 869-70 (1984) (noting that an employment discrimination claim could be properly certified under Fed. R. Civ. P. 23(b)(2) and (3)); see also *Eubanks v. Billington*, 110 F.3d 87, 91 (D.C. Cir. 1997) (holding class actions alleging a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000), are frequently certified pursuant to Fed. R. Civ. P. 23(b)(2)).

<sup>70</sup>FED. R. CIV. P. 23(b)(2).

certification under 23(b)(2), the class as a whole must have a general claim against the opposing party and seek either declaratory or injunctive relief.<sup>71</sup> Furthermore, under Rule (b)(2), the relief sought must be predominantly equitable (injunctive or declaratory) in nature, which causes discrepancies in interpretation and decision-making among various courts.<sup>72</sup> Though equitable relief must be the primary relief sought, this does not exclude a class from also seeking other relief such as monetary damages.<sup>73</sup>

According to *Newberg on Class Actions*, certification through 23(b)(3) is appropriate “when a class action is superior to other available methods for adjudication of the controversy and common questions predominate over the individual ones.”<sup>74</sup> There are two requirements that must be satisfied in order for a claim to be certified under 23(b)(3). First, the class members’ common questions of law or fact must predominate over any individual member’s questions of law or fact.<sup>75</sup> Second, under Rule 23(b)(3), the class action must be the “superior means of adjudicating the controversy.”<sup>76</sup> A court may find the class action as the superior means for settling the claim by looking at various factors such as the efficiency of judicial recourses and whether individual suits will be ineffective for the members of the class.<sup>77</sup> For example, a class action is the superior method for a claim where an individual may not have even been aware of his or her potential legal claims in the absence of a class certification and notice.<sup>78</sup> However, a court’s certification decision under Rule 23(a) and (b) is not absolute; review of a district court’s decision may be appropriate on appeal under Rule 23(f).<sup>79</sup>

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<sup>71</sup>*Id.*

<sup>72</sup>*See, e.g.,* Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 164 (2nd Cir. 2001). (concluding that the court must determine whether injunctive or declaratory relief predominates); *see also* James v. City of Dallas, 254 F.3d 551, 570 (5th Cir. 2001) (holding that plaintiffs “must demonstrate that their class action suit seeks predominantly injunctive relief rather than monetary damages”).

<sup>73</sup>*In re Paxil Litig.*, 218 F.R.D. 242, 247 (C.D. Cal. 2003) (“[C]lasses are not prohibited from seeking monetary relief, but certification of such classes is inappropriate where the monetary relief sought predominates over the injunctive relief being sought.”).

<sup>74</sup>1 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 4.01(3d ed. 1992).

<sup>75</sup>*See id.* *See also* Amchen Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997) (stating that the predominance requirement is not satisfied if there are significant questions which pertain only to a subset of the class or individual members of the class).

<sup>76</sup>*See* BAICKER-MCKEE ET AL., *supra* note 51, at 442.

<sup>77</sup>*See, e.g.,* Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996).

<sup>78</sup>32B AM. JUR. 2D Federal Courts § 2001 (2004); *see, e.g.,* Abramovitz v. Ahern, 96 F.R.D. 208 (D. Conn. 1982) (noting that some class members may have had no idea that they were among individuals illegally wiretapped by the defendants, thus class members would not have been aware of potential legal claims in the absence of the class action).

<sup>79</sup>FED. R. CIV. P. 23(f).

*C. Background of Rule 23(f): Appeals*

Federal Rule of Civil Procedure 23(f) governs the right for an interlocutory appeal of a district court's decision to grant or deny certification of a claim under Rule 23.<sup>80</sup> Under 23(f), a certification decision can be appealed before the end of the litigation in district court.<sup>81</sup> Rule 23(f) does not express standards for courts to use in granting an appeal of the certification decision.<sup>82</sup> Permission to appeal may be granted or denied on the basis of any consideration that an appellate court finds persuasive.<sup>83</sup> Despite Rule 23(f)'s novelty, circuit courts have begun developing their own standards as to the appropriateness of permitting appeal to diminish the "opportunities for abuse" in class actions suits.<sup>84</sup>

There are four typical situations in which circuit courts have granted a Rule 23(f) review.<sup>85</sup> First, if an individual's claims could not realistically go forward after denial of certification and the decision was questionable, the district court's decisions is more likely to be reviewed.<sup>86</sup> This first situation is demonstrated when a district court's denial of certification creates higher costs for individual litigation, thus preventing a proposed individual member from litigating his or her claims.<sup>87</sup> Second, circuit courts have been likely to review a certification decision if the district court's decision is questionable and causes a weighted pressure for the defendant to settle the case, regardless of the case's actual merits.<sup>88</sup> Third, circuit courts may be more likely to grant review of the certification decision if it will help to further develop class action law.<sup>89</sup> Circuit courts differ in opinion as to whether

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<sup>80</sup>*See id.*

<sup>81</sup>*See id.* This rule allows the district court's decision to be appealed on an interlocutory basis, thus the parties do not have to wait until the litigation at the district court is finalized to appeal the certification decision. *See also* BAICKER-MCKEE, *supra* note 51, at 452.

<sup>82</sup>*See* Hart, *supra* note 49, at 837.

<sup>83</sup>The courts of appeals have "unfettered discretion" to grant or deny permission to appeal based on "any consideration that the court of appeals finds persuasive." FED. R. CIV. P. 23(f) advisory committee's notes.

<sup>84</sup>*Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99-100 (1981).

<sup>85</sup>BAICKER-MCKEE ET AL., *supra* note 51, at 452-53.

<sup>86</sup>*See, e.g., In re Sumitomo Copper Litig.*, 262 F.3d 134, 140 (2d Cir. 2001) (holding review of certification is likely if the denial of the certification is the "death knell" for the claim and the district court's decision was questionable); *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 81 (2d Cir. 2004) (focusing solely on the first basis for granting interlocutory review under Rule 23(f) "that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable") (emphasis added).

<sup>87</sup>*See Hevesi*, 366 F.3d at 81.

<sup>88</sup>*See, e.g., id.; see also Blair v. Equifax Check Servs.*, 181 F.3d 832, 834 (7th Cir. 1999).

<sup>89</sup>BAICKER-MCKEE ET AL., *supra* note 51, at 442. *See, e.g., Equifax Check Services*, 181 F.3d at 835. The court states that the advisory committee and the standing committee are anticipating that appeals under Rule 23(f) will further class action law through, solving certification problems and presenting others, thus making proposed amendments to Rule 23 unnecessary. *Id.* The court also states that "[w]hen the justification for interlocutory review is

the decision made by the district court in granting or denying the certification needs to be questionable to grant review.<sup>90</sup> Finally, it is probable that a circuit court will grant review when either party is able to make apparent that the decision was a clear error.<sup>91</sup> Customarily, review of the certification decision is most likely to be granted when the district court's decision was centered on a novel or unsettled question of law or when the decision is the "death knell" for the action.<sup>92</sup> Overall, 23(f) expands the options of litigants who are trying to certify or to oppose certification because many times the ultimate decision to deny certification ends the litigation entirely.<sup>93</sup> In *Dukes v. Wal-Mart Stores, Inc.*, the Ninth Circuit found that review of the Northern District of California's certification decision was appropriate under Rule 23(f).

*D. Class Action Suits and Settlements: Contemporary Opinions, Beliefs and Criticisms*

Class action lawsuits are "unique creatures with enormous potential for good and evil."<sup>94</sup> Recently, scholars have observed a "significant and increasing hostility to the class action mechanism."<sup>95</sup> Those who generally object to class actions feel that "class actions are used to force settlement of meritless claims" and class actions tend to be "tools of collusion between defendants and plaintiffs' counsel."<sup>96</sup> Another growing criticism of class actions is that if injunctive relief, theoretically the

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contributing to development of the law, it is less important to show that the district judge's decision is shaky. Law may develop through affirmances as well as through reversals. *Id.* Some questions have not received appellate treatment because they are trivial; these are poor candidates for the use of Rule 23(f). But the more fundamental the question and the greater the likelihood that it will escape effective disposition at the end of the case, the more appropriate is an appeal under Rule 23(f)." *Id.*

<sup>90</sup>*See, e.g., Equifax Check Servs.*, 181 F.3d at 835. *But see In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.C. Cir. 2002) (concluding that there should be evidence of some error of the district court to grant interlocutory appeal, even when anticipating the review will advance and develop law regarding class actions); *In re Sumitomo Copper Litig.*, 262 F.3d 134, 140 (2d Cir. 2001) (holding that there must be the possibility of a district court error before an appeal will be granted staying the district courts litigation proceedings). The court will not issue an appeal "unless the likelihood of error on the part of the district court tips the balance of hardships in favor of the party seeking the stay." *Id.*

<sup>91</sup>*See, e.g., Prado-Steiman v. Bush*, 221 F.3d 1266, 1275 (11th Cir. 2000) (concluding that despite the other factors for review not being present, clear error by the district court may be proper).

<sup>92</sup>FED. R. CIV. P. 23(f) advisory committee's note.

<sup>93</sup>Michael P. Shea, *Appealing Class Certification Rulings*, CONN. LAW TRIB., Nov. 15, 2004, at 9.

<sup>94</sup>*Johnson v. Gen. Motors Corp.*, 598 F.2d 432, 439 (5th Cir. 1979) (Fay, J., specially concurring).

<sup>95</sup>Stephen D. Susman, *Class Actions: Consumer Sword Turned Corporate Shield*, 2003 U. CHI. LEGAL F. 1, 2 (2003).

<sup>96</sup>Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 77 (2003).

main purpose of an employment discrimination class action, is not judicially enforced, then “there is often scant incentive for employers to produce substantive change.”<sup>97</sup> For example, in *Home Depot v. Butler*,<sup>98</sup> the plaintiffs received average monetary relief of \$9,683, but there were no specific positions made available for the members of the class. Essentially, Home Depot failed to meet the diversity benchmarks and judicial oversight regarding the injunctive relief has since ceased.<sup>99</sup> Noted cases such as these further the criticisms about employment discrimination class actions.

In spite of these criticisms, other scholars still regard class actions as an important litigation tool, and they believe in the ability of class actions to achieve five primary goals. These goals include (1) facilitating judicial economy, (2) affording a remedy to victims who cannot obtain relief through individual actions, (3) spreading the costs of litigation in order to enhance access to the courts, (4) protecting defendants from multiple, inconsistent verdicts, and (5) adequately protecting the interests of absent class members.<sup>100</sup>

Despite differences in opinion, class actions, especially employment discrimination class actions, tend to end in settlement. For example, employers such as Home Depot, Boeing, Winn-Dixie, Amtrak, UPS, and Pennzoil have settled class action claims in recent years for millions of dollars.<sup>101</sup> One reason why employment class action suits tend to settle is the publicity created by certification. This publicity generates pressure on the defendants to settle the claims. Despite unwarranted pressures, “[s]ettlements should reflect the relative merits of the parties’ claims, not surrender to the vagaries of an utterly unpredictable and burdensome litigation procedure.”<sup>102</sup> This recent commentary is related to the pending Wal-Mart litigation, since Wal-Mart is facing billions of dollars in backpay and punitive relief. If certification is affirmed, Wal-Mart will have to decide if the potential damages impose such an immense pressure that a settlement will be more beneficial than defending the Wal-Mart name at trial. Furthermore, if certification leads to settlement, the court will not have the opportunity to determine if Wal-Mart’s practices were truly discriminatory through the actual facts and merits of the case.

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<sup>97</sup>Bhatnagar, *supra* note 13, at 253.

<sup>98</sup>*Home Depot v. Butler*, No. C-94-4335, 1997 U.S. Dist. LEXIS 16296 (N.D. Cal. Aug. 29, 1997).

<sup>99</sup>Tristin Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 *FORDHAM L. REV.* 659, 684-85 (2003).

<sup>100</sup>*See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 427 (5th Cir. 1998) (Dennis, J., dissenting).

<sup>101</sup>Lesley Frider Wolf, *Evading Friendly Fire: Achieving Class Certification After the Civil Rights Act of 1991*, 100 *COLUM. L. REV.* 1847 (2000); *see Griffin v. Home Depot*, 168 F.R.D. 187 (E.D. La. 1996).

<sup>102</sup>*Allison*, 151 F.3d at 422.

IV. ANALYSIS: THE INTERLOCUTORY REVIEW OF THE *DUKES V. WAL-MART*  
CERTIFICATION DECISION

*A. Pending Litigation*

On August 13, 2004, the Ninth Circuit granted Wal-Mart permission to appeal the certification of the plaintiffs' class in *Dukes v. Wal-Mart Stores, Inc.*<sup>103</sup> The appeal is expected to occur in the spring of 2005.<sup>104</sup> Until the Ninth Circuit reviews the certification, trial proceedings have been stayed.<sup>105</sup> On December 29, 2004, the lead lawyer for the plaintiff's representation, Brad Seligman, advanced the pending litigation as he filed papers justifying affirmation of the certification of the Ninth Circuit.<sup>106</sup> The defense is arguing that the certification should be overturned under various rationales including "billions of dollars in backpay and punitive damages [that are sought by the plaintiff class], as well as a lack of disparity in pay in over 90% of its stores."<sup>107</sup> The importance of the Ninth Circuit's review of the certification is evident as Seligman states, "[t]he class certification decision is the most important thing that is going to happen in this case short of a jury verdict."<sup>108</sup> An affirmation of the certification will either cause the case to proceed to trial or create a "threat of exposure to . . . [an extremely large sum of] damage awards," which may cause an "overwhelming pressure to settle."<sup>109</sup>

The Ninth Circuit will review the trial court's finding that the requirements of the Federal Rules of Civil Procedure 23(a) and 23(b) were sufficiently established for certification of the class. In reviewing the prerequisites of Rule 23(a), the Ninth Circuit will have to review the determination that numerosity, commonality, typicality, and adequacy of representation were established.<sup>110</sup> If the Ninth Circuit court agrees that Rule 23(a)'s prerequisites were sufficiently established by the plaintiffs, it will proceed to review of the 23(b) requirements.

*B. Analysis: Review of Rule 23(a) Prerequisites*

The Ninth Circuit conducts a self-confessed "very limited" review and will reverse only upon a strong showing that the district court's decision was "a clear

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<sup>103</sup>*Federal Appeals Court Allows Wal-Mart Appeal Of Class Certification*, 4-12 MEALEY'S LITIG. REP. CLASS ACTIONS 22 (2004).

<sup>104</sup>*Id.*

<sup>105</sup>*Id.*

<sup>106</sup>*Court Asked To Affirm Wal-Mart Class Action*, N.Y. TIMES, Dec. 30, 2004, at C4.

<sup>107</sup>*Id.*

<sup>108</sup>*See* Shea, *supra* note 93, at 9 (quoting Brad Seligman, counsel for plaintiffs in sex discrimination suit against Wal-Mart).

<sup>109</sup>*Id.*

<sup>110</sup>*See* Poulos v. Caesars World, Inc., 379 F.3d 654, 664 (9th Cir. 2004) (noting that under Rule 23(f) the circuit court will review the determinations regarding application of Rules 23(a) and (b) to the certification decision made by the district court).

abuse of discretion.”<sup>111</sup> Perceptibly favoring plaintiffs, the Ninth Circuit will only overturn decisions if their factual findings are clearly erroneous.<sup>112</sup> Despite the Ninth Circuit’s permissiveness in reviewing certification decisions, there is precedent suggesting that Wal-Mart’s argument warrants a reversal of the certification decision. A careful and thorough review is necessary because although decisions are discretionary, “a court abuses its discretion if its certification order is premised on legal error.”<sup>113</sup> Furthermore, the *Dukes* case has such publicity and far-reaching consequences that the Ninth Circuit will need to rigorously analyze the district court’s compliance with Rule 23.<sup>114</sup>

In review of Rule 23(a)’s prerequisites, a court normally begins review with 23(a)(1)’s numerosity requirement. For numerosity to be satisfied, “[p]laintiffs do not need to state the exact number of potential class members, nor is a specific number of class members required.”<sup>115</sup> A district court is to use its best discretion and judgment in determining whether a joinder is impractical—a decision that satisfies the numerosity requirement.<sup>116</sup> However, at the district court level, Wal-Mart did not contest that numerosity was met since both parties estimated a proposed class of well over one million women.<sup>117</sup> Accordingly, the Ninth Circuit does not need to conduct a rigorous analysis of the numerosity requirement. A previous Ninth Circuit case, *Staton v. Boeing Co.*, found “no dispute that the numerosity requirement is met . . . [with] approximately 15,000 in number,”<sup>118</sup> therefore furthering the view that a class of over 1.6 million quite undeniably meets the numerosity requirements of 23(a)(1).

The Ninth Circuit will have to conduct a thorough review of the commonality requirement, which focuses on the relationship of common facts and legal issues among class members.<sup>119</sup> There are numerous factors that a court may consider when determining whether Rule 23(a)(2)’s commonality requirement can be met. These factors include:

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<sup>111</sup>*Linney v. Cellular Alaska P’ship.*, 151 F.3d 1234, 1238 (9th Cir. 1998). *See Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (citing *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 626 (9th Cir. 1982)).

<sup>112</sup>*Linney*, 151 F.3d at 1238.

<sup>113</sup>*Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1237 (9th Cir. 2001).

<sup>114</sup>*See Reeb*, 81 Fed. App’x at 555.

<sup>115</sup>*Bates v. United Parcel Serv.*, 204 F.R.D. 440, 444 (N.D. Cal. 2001).

<sup>116</sup>*Pederson v. Louisiana State Univ.*, 213 F.3d 858 n. 11 (5th Cir. 2000).

<sup>117</sup>*Dukes*, 222 F.R.D. at 144. The Court concluded that “it is beyond dispute that joinder would be impracticable in this case.” *Id.* The Court further proceeded to find that this factor is satisfied. *Id.*

<sup>118</sup>*Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003); *see also Gunnells v. Healthplan Servs.*, 348 F.3d 417, 425 (4th Cir. 2003) (finding “1400 employees plus their families covered by the Plan, with possibly 2900 unpaid claims, ‘easily’ satisfied Rule 23(a)(1)’s numerosity requirement”); ROBERT NEWBERG, *NEWBERG ON CLASS ACTIONS*, § 3:3 (4th ed. 2002). Where the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied.

<sup>119</sup>*See BAICKER-MCKEE ET AL.*, *supra* note 51, at 429.



(1) the nature of the unlawful employment practice charged and whether it particularly affects a few employees or has class-wide impact; (2) the uniformity or diversity of the employment practices, considering work force size, the number of facilities, the variety of employment conditions, occupations and work activities; (3) the uniformity or diversity of the class membership and whether the alleged discriminatory treatment involves common questions; (4) the nature of the defendant's management organization as it relates to the degree of centralization and uniformity of employment and personnel policies and practices; and (5) the length of time the claims span and whether similar claims prevailed through that period.<sup>120</sup>

In finding sufficient evidence for a "minimal"<sup>121</sup> showing of commonality, the district court in *Dukes v. Wal-Mart Stores Inc.*, examined three categories of evidence presented by the plaintiffs. Included in this evidence were "(1) facts and expert opinion supporting the existence of company-wide policies and practices; (2) expert statistical evidence of class-wide gender disparities attributable to discrimination; and (3) anecdotal evidence from class members around the country of discriminatory attitudes held or tolerated by management."<sup>122</sup> The court found that there was sufficient evidence of a common practice of compensating and promoting employees across the nation. The plaintiffs contend that this common practice was affected by "excessive subjectivity which provides a conduit for gender bias that affects all class members in a similar fashion and a strong corporate culture that includes gender stereotyping."<sup>123</sup>

The debate over facets of the commonality requirement will likely be contested and reviewed by the Ninth Circuit. One such issue is the district court's finding that the plaintiffs met the commonality requirement through an aggregation of the plaintiffs' provided evidence. The court found that evidence aggregated together creates an "inference that Wal-Mart engages in discriminatory practices in compensation and promotion that affect all plaintiffs in a common manner."<sup>124</sup> However, the linkage of evidence demonstrating a corporate culture that cultivates discrimination or gender stereotyping is minimal. Citing *Shipes v. Trinity Industries*, the court stated that the "use of entirely subjective personnel processes that operate to discriminate, satisfy the commonality . . . requiremen[t] of 23(a)," however, here the plaintiff provided no concrete evidence that Wal-Mart's subjective practices "operate to discriminate."<sup>125</sup> Instead, the plaintiffs utilized their own expert's

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<sup>120</sup>*Harriss v. Pan Am. World Airways, Inc.*, 74 F.R.D. 24, 41 (N.D. Cal. 1977).

<sup>121</sup>The Court found that, "indeed, the necessary showing to satisfy commonality is 'minimal.'" *Hanlon v. Chrysler Corp.*, 150 F.3d 1071 (9th Cir. 1998). The Ninth Circuit only required plaintiffs to demonstrate commonality through shared legal issues, but divergent facts or shared common facts, but claim for relief can be based on different legal theories. *Dukes*, 222 F.R.D. at 145.

<sup>122</sup>*Dukes*, 222 F.R.D. at 145.

<sup>123</sup>*Id.*

<sup>124</sup>*Id.* at 166.

<sup>125</sup>*Id.* at 150.

conclusion that “Wal-Mart is ‘vulnerable’ to gender bias,”<sup>126</sup> formulated through his combining of the “understanding of the scientific community with evidence of Defendant’s policies and practices.”<sup>127</sup>

Wal-Mart’s contention that “the pay and promotions [of Wal-Mart] are too decentralized to create any questions common to the class” will likely be reassessed.<sup>128</sup> Both parties generally agree that pay and promotion decisions for in-store employees are made in a largely subjective manner, but the fine points create many disagreements.<sup>129</sup> The decision that these subjective policies allow a finding of commonality may be reviewed, as many courts do not allow subjective decision-making to evince a class-wide common issue.<sup>130</sup> The members of the certified class on appeal worked at approximately 3,400 stores, in 40-53 separate departments, including eight specialty departments that operate as semi-autonomous units within the stores.<sup>131</sup> Previous decisions have utilized a more narrow designation of commonality and denied certification to large nationwide employment discrimination classes.<sup>132</sup>

In *Rhodes v. Cracker Barrel Old Country Store, Inc.*, certification was denied due to decentralized decision-making and wide geographic distribution. The court said there was “little in common with class members spread over so many stores in so many states with so many different managers responsible for making the challenged employment decisions.”<sup>133</sup> In *Rhodes*, the alleged discrimination was

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<sup>126</sup>*Dukes*, 22 F.R.D. at 154 (emphasis added).

<sup>127</sup>*Id.*

<sup>128</sup>*Id.* at 145.

<sup>129</sup>*Id.*

<sup>130</sup>*See, e.g.*, *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526, 540-42 (N.D. Ala. 2001); *Abram v. United Parcel Serv. of Am., Inc.*, 200 F.R.D. 424, 430 (E.D. Wis. 2001) (“[T]he decision to permit some consideration of subjective factors is not, in and of itself, a discriminatory practice that provides the unifying thread necessary for ‘commonality’ to exist.”).

<sup>131</sup>*Dukes*, 222 F.R.D. at 145-46.

<sup>132</sup>*See EEOC v. McDonnell Douglas Corp.*, 17 F. Supp. 2d 1048, 1054 (E.D. Mo. 1998) (“[A] decision by a company to give managers the discretion to make employment decisions, and the subsequent exercise of that discretion by some managers in a discriminatory manner, is not tantamount to a systematic, company-wide policy of intentional discrimination.”), *aff’d*, 191 F.3d 948 (8th Cir. 1999).

<sup>133</sup>*Rhodes v. Cracker Barrel Old Country Store, Inc.*, 213 F.R.D. 619, 676 (N.D. Ga. 2003). The court also listed a number of other cases where commonality was not found due to geographic diversity, an absence of centralized decision-making, or where different decision-makers made the challenged decisions. *See, e.g.*, *Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 278-80 (4th Cir. 1980); *Donaldson v. Microsoft Corp.*, 205 F.R.D. 558, 567 (W.D. Wash. 2001); *Beck v. Boeing Co.*, 203 F.R.D. 459, 463-64 (W.D. Wash. 2001); *Cooper v. S. Co.*, 205 F.R.D. 596, 611 (N.D. Ga. 2001); *Abram v. United Parcel Serv. of Am., Inc.*, 200 F.R.D. 424, 432-33 (E.D. Wis. 2001); *Wright v. Circuit City Stores*, 201 F.R.D. 526, 540-52 (N.D. Ala. 2001); *Bacon v. Honda of Am. Mfg., Inc.*, 205 F.R.D. 466, 478-79 (S.D. Ohio 2001); *Lott v. Westinghouse Savannah River Co.*, 200 F.R.D. 539, 555-56 (D.S.C. 2000); *Troupe v. Randall’s Food & Drugs, Inc.*, No. 3:98-CV-2462-p, 1999 U.S. Dist. LEXIS 11620 (N.D. Tex. July 28, 1999); *Betts v. Sundstrand Corp.*, No. 97 C 50188, 1999 U.S. Dist. LEXIS 9743,

affected by decision making in 450 stores in over 41 states,<sup>134</sup> which is slight in comparison to the approximately 3,400 Wal-Mart stores relevant to this litigation.<sup>135</sup> Another example of a denial of certification due to a failure of proving commonality is *Reed v. Lockheed Martin Aeronautics Co.*, where the court found “highly localized” employment policies did not satisfy the commonality test.<sup>136</sup> The Ninth Circuit will have to analyze the inherent tension between a finding of a common centralized employment practice utilized throughout Wal-Mart’s stores and the allegation of “excessive subjectivity” used in promotion and compensation decisions resulting in the alleged discriminatory conduct.<sup>137</sup> Within the Ninth Circuit’s limited review, the court will determine if this inherent tension, which Wal-Mart describes as “absurd and contrary to law,”<sup>138</sup> causes reason to find that commonality is not met.

A review of the district court’s finding of the commonality requirement may be appropriate with respect to promotion practices since “both parties agree that subjectivity is a primary feature of promotion decisions for in-store employees.”<sup>139</sup> Recently, the Sixth Circuit denied certification in a racial employment discrimination suit finding that differing promotion criteria to the wide array of jobs held by the class members precluded a finding of commonality.<sup>140</sup> In *Bacon*, the court required the plaintiffs to prove the defendant utilized a discriminatory promotion policy applicable to all workers “through an *entirely* subjective decision-making process.”<sup>141</sup> The court stated that when objective criteria play a role in an employer’s promotion policies, these policies are no longer subjective in nature.<sup>142</sup> Comparatively, Wal-Mart employs corporate guidelines for promotion decisions such as, “requirements that candidates 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.”<sup>143</sup> According to

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(N.D. Ill. June 21, 1999); *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 238-40 (W.D. Tex. 1999); *Bostron v. Apfel*, 182 F.R.D. 188, 195-96 (D. Md. 1998); *Reyes v. Walt Disney World Co.*, 176 F.R.D. 654, 658 (M.D. Fla. 1998); *Boykin v. Viacom, Inc.*, No. 96 CIV. 8559, 1997 U.S. Dist. LEXIS 17872 (S.D.N.Y. Nov. 12, 1997); *Abrams v. Kelsey-Seybold Med. Group, Inc.*, 178 F.R.D. 116, 130-31 (S.D. Tex. 1997); *Appleton v. Deloitte & Touche LLP*, 168 F.R.D. 221, 231-32 (M.D. Tenn. 1996); *Lumpkin v. E.I. Du Pont de Nemours & Co.*, 161 F.R.D. 480, 482 (M.D. Ga. 1995).

<sup>134</sup>*Rhodes*, 213 F.R.D. at 681.

<sup>135</sup>*Dukes*, 222 F.R.D. at 142.

<sup>136</sup>*Reid v. Lockheed Martin Aero. Co.*, 205 F.R.D. 655 (N.D. Ga. 2001).

<sup>137</sup>*See Dukes*, 222 F.R.D. at 166.

<sup>138</sup>*Id.*

<sup>139</sup>*Id.*

<sup>140</sup>*Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 572 (6th Cir. 2004).

<sup>141</sup>*Id.* at 571.

<sup>142</sup>*Id.* at 572.

<sup>143</sup>*Dukes*, 222 F.R.D. at 148.

*Bacon*, these guidelines, even if “minimum requirements of advancement,”<sup>144</sup> defeat a finding of a common practice which puts all workers “under one umbrella.”<sup>145</sup>

There were many findings and inferences made by the district court that will likely be reviewed, since other courts have held that “enormous diversity of . . . purported class[es] defeats a finding of commonality,” and classes that “include such a wide range of employees, subject to such a wide range of [evaluatory] criteria [cause] . . . any commonality which might have existed amongst a narrower class of persons [to be] defeated.”<sup>146</sup> Despite precedent that has applied a stricter commonality standard, the Ninth Circuit’s limited review may affirm the finding of sufficient commonality, creating a more lenient and broad commonality standard that may be followed in future class actions decisions.

Another area in which review by the Ninth Circuit may be pertinent is the difference between the statistical evidence presented by the plaintiffs and the statistical evidence provided by Wal-Mart. Courts’ use of statistical evidence to satisfy commonality “is well accepted”<sup>147</sup> and, therefore, the review should be on the level of analysis conducted to produce the statistical evidence. The plaintiffs’ expert analyzed data at a regional level, while the defendant’s expert analyzed the employment statistics at a store sub-unit level. The difference in the parties’ analysis caused discrepancies in the findings of compensation differences and therefore discriminatory conduct. The plaintiffs’ expert found a discrepancy in pay between men and women, which indicated a general policy of discrimination,<sup>148</sup> while the defendant’s expert found minimal discrepancies in pay between the genders.<sup>149</sup> The Ninth Circuit will analyze whether the utilization of the plaintiffs’ analysis and evidence, which is contradicted by the defense, was sufficient to facilitate the finding of commonality.

Although other commonality factors may hinder the finding of commonality, the defendant’s opposition to the aggregation of the statistical data and its utilization in satisfying Rule 23 is unlikely to influence the Ninth Circuit’s decision. The circuit courts have allowed aggregated data to influence Rule 23’s satisfaction on many occasions. In *Capaci v. Katz & Besthoff, Inc.*, the Fifth Circuit allowed aggregated statistical data, and furthermore stated that data should not be disaggregated “to the point where it was difficult to demonstrate statistical significance.”<sup>150</sup> The court found that disaggregating allowed a party to fragment the data into such small groups that the tests became less probative.<sup>151</sup> Additionally, the Seventh Circuit found that “[p]ooling data is sometimes not only appropriate but necessary, since statistical

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<sup>144</sup>*Id.*

<sup>145</sup>*Bacon*, 370 F.3d at 571.

<sup>146</sup>*Donaldson v. Microsoft Corp.*, 205 F.R.D. 558, 566 (W.D. Wash. 2001).

<sup>147</sup>*Dukes*, 222 F.R.D. at 154.

<sup>148</sup>*Id.* at 156.

<sup>149</sup>*Id.*

<sup>150</sup>*Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 654-56 (5th Cir. 1983).

<sup>151</sup>*Id.*

significance becomes harder to attain as the sample size shrinks," furthering the view that aggregated data is sufficient for use in class certifications.<sup>152</sup>

Finally, the Ninth Circuit previously stated that the plaintiff should not be required to provide disaggregated data if the disaggregated groups were smaller than the group that is allegedly "similarly situated and affected by common policies."<sup>153</sup> The Court added, the "plaintiffs' theory is that the employment practices have an identical discriminatory effect upon members of all minority groups . . . right or wrong, they are entitled to prove their case."<sup>154</sup> This precedent seems to advance the plaintiffs' argument that aggregated statistical analysis satisfies Rule 23 and therefore established certification. The defense argues that district courts have found that aggregate statistical analysis is not sufficient to satisfy the commonality requirement. The defense cites one case in particular, *Abram v. UPS of America, Inc.*, which found that an aggregate statistical analysis "masks the differences from district to district and from supervisor to supervisor that preclude a finding of 'commonality.'"<sup>155</sup> Despite the defense's argument that their statistical evidence should preclude commonality as they found no statistically significant evidence of discrimination,<sup>156</sup> the Ninth Circuit will likely affirm the district court's use of the plaintiffs' statistical evidence due to precedent from both the Ninth Circuit and other federal circuit courts.

As noted by the Supreme Court, "the commonality and typicality requirements . . . tend to merge."<sup>157</sup> The commonality and typicality requirements are used to establish whether "a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence."<sup>158</sup> When a court finds sufficient evidence to support the establishment of commonality, that finding generally tends to support a finding of typicality.<sup>159</sup> Similar to their commonality analysis, the Ninth Circuit tends to analyze the 23(a) requirement of typicality leniently.<sup>160</sup> In *Dukes*, the district court found that the named plaintiffs suffered from the same specific discriminatory practice as the proposed members of the class under "an alleged common practice . . . [of] excessively subjective decision-making in a

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<sup>152</sup>*Coates v. Johnson & Johnson*, 756 F.2d 524, 541 (7th Cir. 1985) (citing D. BALDUS & J. COLE, *STATISTICAL PROOF OF DISCRIMINATION* § 9.221, at 309 (1980)) ("All other things being equal, the test statistic and level of significance rise as the sample size increases.").

<sup>153</sup>*Paige v. State of Cal.*, 291 F.3d 1141, 1148-49 (9th Cir. 2002) (quoting D. BALDUS & J. COLE, *STATISTICAL PROOF OF DISCRIMINATION* § 7.0-7.2 (1980 & 1986 Supp.)).

<sup>154</sup>*Id.*

<sup>155</sup>*Abram*, 200 F.R.D. at 431.

<sup>156</sup>*See Dukes*, 222 F.R.D. at 164-65.

<sup>157</sup>*Id.* at 144.

<sup>158</sup>*Id.*

<sup>159</sup>*Von Colln v. County of Ventura*, 189 F.R.D. 583, 591 (C.D. Cal. 1999); *see Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 158 (1982) ("[T]he commonality and typicality requirements of Rule 23(a) tend to merge.").

<sup>160</sup>*Hanlon*, 150 F.3d at 1020.

corporate culture of uniformity and gender stereotyping,” satisfying the typicality requirement.<sup>161</sup> If the Ninth Circuit follows the same lenient methodology regarding typicality, the deliberation on review of the standard will be minimal.

There are prior decisions, however, that may cause debate and the potential for review regarding 23(a)(3)’s typicality prerequisite. One area in which review may be pertinent is ensuring that the proposed members have similar claims, which are not overly fact-specific so as to defeat typicality. In *Staton v. Boeing Co.*, “[t]he named plaintiffs . . . include[d] a very broadly selected cross-section of the different categories of Boeing employees” and with this wide variety of employees in the proposed class, “this cross-section of Boeing employees suffice[d] to insure that the interests of these sub-groups . . . [met] the typicality requirement of Rule 23(a).”<sup>162</sup> The named plaintiffs in the Wal-Mart case are primarily hourly employees, with one representative in a lower-level salaried managerial position and no representatives in high-level managerial positions.<sup>163</sup> Another facet of the typicality requirement in which review may be pertinent is in the plaintiffs’ allegation of characteristic class-wide discriminatory practices. According to *Stevens v. Harper*, the “plaintiffs may not obtain class certification based on unsupported allegations of system wide violations, especially when they rely on such allegations not only to establish commonality and typicality under Rule 23(a) but also to demonstrate the propriety of class certification under Rule 23(b)(2).”<sup>164</sup> The Ninth Circuit may review the evidence presented regarding the alleged discriminatory practices and policies due to the finding that they are “vulnerable” to gender bias by the plaintiffs’ expert.<sup>165</sup> The plaintiffs’ expert declared Wal-Mart vulnerable to gender bias, but did not actually confirm or substantiate a finding that Wal-Mart is gender biased. This lack of material evidence may raise similarities to *Steven v. Harper*, which may weaken or preclude a finding of typicality.

The final Rule 23 prerequisite that the Circuit Court may conduct review upon is 23(a)(4), adequacy of representation. The Ninth Circuit must verify that the “representative parties will fairly and adequately protect the interests of the class.”<sup>166</sup> In reviewing 23(a)(4), there are two inquiries on which the court will focus: first, that the named counsel adequately protects the named interests of the class members, and second, that the named plaintiffs represent the distinct interests of the unnamed class members.<sup>167</sup> The Supreme Court found that the named plaintiffs representing a class

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<sup>161</sup>*Dukes*, 222 F.R.D. at 167-68.

<sup>162</sup>*Staton*, 327 F.3d at 957.

<sup>163</sup>*Dukes*, 222 F.R.D. at 167-68.

<sup>164</sup>*Stevens v. Harper*, 213 F.R.D. 358, 378 (E.D. Cal. 2002).

<sup>165</sup>*Dukes*, 222 F.R.D. at 154; *see, e.g., J.B. v Valdez*, 186 F.3d 1280, 1289 (10th Cir. 1999) (declining to allow general allegations of systematic failures to meet the requirements of 23(a)).

<sup>166</sup>FED. R. CIV. P. 24(a)(4); *see Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 389 (9th Cir. 1992).

<sup>167</sup>*Palmer*, 217 F.R.D. at 46; *see also In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2nd Cir. 1992) (holding that adequacy of representation under Rule 23(a)(4) is measured with regard to both class counsel and class representatives).

“must be part of the class and possess the same interest and suffer the same injury as the class members.”<sup>168</sup> The Ninth Circuit will have to appraise the 23(a)(4) requirement in order to verify the district court’s finding that there are not conflicts of interest within the case, which reduces the chances of certification or precludes certification of the class.<sup>169</sup> Wal-Mart asserts that there are potential conflicts of interest that may bar the class from certification.<sup>170</sup> The Ninth Circuit will likely review potential conflicts, such as a conflict between the alleged victims of discrimination and possible alleged discriminators being represented in the same class,<sup>171</sup> as well as both management and non-management employees included in the plaintiff class.<sup>172</sup>

Precedent varies about whether potential conflicts within the class such as those mentioned herein are adequate to deny certification. Courts have found that a “conflict of interest may arise where a class contains both supervisory and non-supervisory employees.”<sup>173</sup> The courts have also considered the situation where members of the proposed class were accountable for the evaluation and decisions such as compensation or promotions, which the class is alleging as discriminatory, much like the situation in the pending Wal-Mart litigation.<sup>174</sup> In some situations, the courts have found that “concern about this potential conflict of interest is another factor that weighs against certification.”<sup>175</sup>

However, other courts have held that “the question of whether employees at different levels of the internal hierarchy have potentially conflicting interests is context-specific and depends upon the particular claims alleged in a case.”<sup>176</sup> The Ninth Circuit will have to determine if the specific context of the litigation seems to create substantial occasion for conflict within the plaintiffs’ class. The district court was not “persuaded that there [were] any substantive conflicts between supervisory

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<sup>168</sup>E. Tex. Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 403 (1977).

<sup>169</sup>Rule 23(a)(4)’s adequacy requirement inquires into conflicts of interest which exist between named parties and that classes they represent. Thus a conflict of interest shows that the class representative may not possess the same interest and suffer the same injury’ as the class members weighing against certification of the class. See Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157-58 n.13 (1982).

<sup>170</sup>Wal-Mart claims that a conflict of interest exists among the female in-store managers who made the decisions, which were alleged discriminatory and also are part of the plaintiff class. *Dukes*, 222 F.R.D. at 168.

<sup>171</sup>A female employee who held a position which took part in the alleged subjective decision making of compensation or promotion decisions would qualify as a member of the plaintiff class. This member of the class would be seeking relief from their own employment actions. *Id.*

<sup>172</sup>See *Dukes*, 222 F.R.D. at 168.

<sup>173</sup>See, e.g., *Donaldson v. Microsoft Corp.*, 205 F.R.D. 558, 568 (W.D. Wash. 2001); *Gonzalez v. Brady*, 136 F.R.D. 329, 333 (D.C. 1991); *Appleton v. Deloitte and Touche, LLP*, 168 F.R.D. 221, 233 (M.D. Tenn. 1996).

<sup>174</sup>*Appleton*, 168 F.R.D. at 233.

<sup>175</sup>*Id.*

<sup>176</sup>*Staton*, 327 F.3d at 958.

and non-supervisory employees that would preclude certification.”<sup>177</sup> The Ninth Circuit’s perception about the significance of the potential conflicts will bear substantial importance because it previously held that “[s]peculative potential conflicts rarely form the basis of denial of class certification.”<sup>178</sup> If the Ninth Circuit perceives these conflicts as conceivable, but without substantial threat of occurrence, they will likely not weigh against certification.

The second inquiry of 23(a)(4) adequacy of representation, the adequacy of counsel, will not go under review by the Ninth Circuit.<sup>179</sup> The court will not have to review the qualifications of the plaintiffs’ counsel, since the defense did not contest this portion of the requirement. The district court noted that the plaintiffs’ counsel has the experience, capacity, willingness and dedication required to bring a claim of this magnitude.<sup>180</sup>

### C. Analysis: Review of Rule 23(b) Requirements

If the Ninth Circuit finds that the “prerequisites of Rule 23(a) are satisfied,” the court will proceed to review the district court’s finding that the “plaintiffs . . . fall within at least one of the subcategories of Rule 23(b).”<sup>181</sup> The district court was satisfied that the “proposed class was maintainable under . . . Rule 23(b)(2),”<sup>182</sup> concluding that “equitable relief predominates over the claim for punitive damages”<sup>183</sup> and that the liability and remedy phases of the litigation are “not rendered unmanageable by the size of the proposed class.”<sup>184</sup> It is likely that both of these (b)(2) findings will be reviewed during the interlocutory appeal, as the defense urges that the “[d]istrict court misapplied Rule 23(b).”<sup>185</sup> The Ninth Circuit will also evaluate whether the class seeks “predominately” injunctive or declaratory relief, which is necessary for certification under Rule 23(b)(2).<sup>186</sup> In the present action, the plaintiffs seek injunctive relief, backpay, and punitive damages,<sup>187</sup> causing debate over which form of relief predominates. The district court found that the plaintiffs were primarily seeking to change Wal-Mart’s allegedly discriminatory policies and practices, rather than seeking to obtain punitive damages.<sup>188</sup> In the past,

<sup>177</sup>*Dukes*, 222 F.R.D. at 168.

<sup>178</sup>*Cummings v. Connell*, 1999 WL 1256772, 4 (E.D. Cal. 1999); see *Social Servs. Union, Local 535 v. County of Santa Clara*, 609 F.2d 944, 948 (9th Cir. 1979); *Blackie v. Barrack*, 524 F.2d 891, 909 (9th Cir. 1975).

<sup>179</sup>*Palmer*, 217 F.R.D. at 46.

<sup>180</sup>See *Dukes*, 222 F.R.D. at 169.

<sup>181</sup>*Elkins*, 219 F.R.D. at 419.

<sup>182</sup>*Dukes*, 222 F.R.D. at 170.

<sup>183</sup>*Id.* at 171.

<sup>184</sup>*Id.* at 173.

<sup>185</sup>*Dukes*, 222 F.R.D. at 137.

<sup>186</sup>*Beck v. Boeing Co.*, 203 F.R.D. 459, 465 (D. Wash. 2001).

<sup>187</sup>See *Dukes*, 222 F.R.D. at 170.

<sup>188</sup>*Id.* at 171.



proposed 23(b)(2) employment discrimination class actions regularly have been rejected because courts have found that monetary relief predominates over injunctive relief.<sup>189</sup> The Fifth Circuit found that injunctive relief predominating over equitable relief serves a dual purpose: “first, it protects the legitimate interests of potential class members who might wish to pursue their monetary claims individually; and second, it preserves the legal system’s interest in judicial economy.”<sup>190</sup> Furthermore, the Fifth Circuit found monetary relief should be incidental to injunctive or declaratory relief and ideally available only when “class members automatically would be entitled once liability to the class (or subclass) as a whole is established.”<sup>191</sup>

Further inconsistencies are evident as the Supreme Court indicated the possibility of certification under (b)(2) as being per se unavailable when monetary damages are sought,<sup>192</sup> while the Second Circuit has utilized a more flexible approach.<sup>193</sup> The Second Circuit focuses on “the positive weight or value to the plaintiffs of the injunctive or declaratory relief” and compares this to the weight and value of the compensatory or punitive damages also sought.<sup>194</sup>

The Ninth Circuit’s previous decisions regarding certification under Rule 23(b)(2) have tended to be permissive compared to those of other circuit courts. In a recent decision, the Ninth Circuit applied a different test to Rule 23(b)(2), allowing certification when monetary damages were sought, as long as they were “secondary” to claims for injunctive or declaratory relief.<sup>195</sup> The *Molski* court defined secondary as when damages “flow directly from liability to the class as a whole on the claims forming the basis of injunctive relief.”<sup>196</sup> During interlocutory appeal of the Wal-Mart litigation, the court will have to analyze the evidence that compensation and promotion decisions were made by thousands of local managers across the company and whether this subjective decision making affected the class members uniformly, thus entitling them to injunctive or declaratory relief. The Ninth Circuit will also have to decide if it wants to maintain use of this “secondary” test, or instead use a more bright-line predominance test commonly utilized in other circuit courts.<sup>197</sup>

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<sup>189</sup>*Alison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998).

<sup>190</sup>*Id.* at 415.

<sup>191</sup>*See id.* *See Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 898 (7th Cir. 1999); *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001).

<sup>192</sup>*Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (suggesting the possibility that in actions where monetary damages are sought, certification may only be permissible through 23(b)(3)).

<sup>193</sup>*See Hart, supra* note 49, at 829.

<sup>194</sup>*Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 164 (2nd Cir. 2001).

<sup>195</sup>*Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003).

<sup>196</sup>*Id.* at 949.

<sup>197</sup>*Allison*, 151 F.3d at 415. *But see Molski*, 318 F.3d 937, 949-50 (9th Cir. 1998) (indicating that the ninth circuit would not adopt a bright-line standard and instead utilized the “secondary” test).

The Ninth Circuit will also have to review the fact that the class consists of both former and current employees and determine what effect this has on the satisfaction of a predominance or secondary test. Other courts interpreting decisions such as the pending Wal-Mart litigation have denied certification for failing a predominance requirement when both current and former employees sought monetary damages.<sup>198</sup> In *Morgan v. Metropolitan District Commissioner*, the court found that former employees could not “meaningfully benefit from the declaratory relief” the proposed class sought.<sup>199</sup> In *Morgan*, the plaintiff class conceded that injunctive and declaratory relief were more suitable for “present employees looking into the future to prevent future harm”<sup>200</sup> rather than for former employees. Additionally, the court found that the primary incentive for former employees to join a class action was monetary damages, which weighs against satisfaction of the predominance requirement.<sup>201</sup> The Wal-Mart action includes both former and present employees,<sup>202</sup> thus the court will have to question whether a class including former employees has a primary incentive of injunctive or declaratory relief. Utilizing the Ninth Circuit’s “secondary test,”<sup>203</sup> the district court found that the main goal of the litigation was obtaining new policies and practices at Wal-Mart, in seeming disregard of the fact that former employee class members cannot benefit from this injunctive and declaratory relief.<sup>204</sup> The Ninth Circuit will need to closely scrutinize the fact that many former employees are included in this class and will further need to decide how other circuit courts’ decisions will affect their analysis.

For certification to be granted under Rule 23(b), the judicial proceedings of the class action must be manageable. A court must have the ability to oversee the case in a responsible and reasonable manner,<sup>205</sup> and a court has wide discretion in its determination of whether it possesses this ability.<sup>206</sup> Rule 23(b) does not have an express requirement of manageability,<sup>207</sup> but the district court found manageability is

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<sup>198</sup>See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *Faibisch v. Univ. of Minn.*, 304 F.3d 797, 801 (8th Cir. 2002); *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1007 (11th Cir. 1997); *Morgan v. Metro. Dist. Comm’n*, 222 F.R.D. 220, 236 (D. Conn. 2004).

<sup>199</sup>*Morgan v. Metro. Dist. Comm’n*, 222 F.R.D. 220, 236 (D. Conn. 2004).

<sup>200</sup>*Id.*

<sup>201</sup>*Id.*

<sup>202</sup>See *Dukes*, 222 F.R.D. at 141.

<sup>203</sup>*Id.* at 171.

<sup>204</sup>*Id.*

<sup>205</sup>*Id.* at 173.

<sup>206</sup>*Id.* (citing *Blackie v. Barrack*, 524 F.2d 891, 906 n.22 (9th Cir. 1975)).

<sup>207</sup>Federal Rule of Civil Procedure 23(b)(3) has an express requirement of class actions being the superior method for fair and efficient adjudication of the controversy. The Rule expresses that “the difficulties likely to be encountered in the management of the class action,” are pertinent to the certification decision. FED. R. CIV. P. 23(b)(3). However, 23(b)(2) does not have an express requirement of manageability, but some courts, specifically the Ninth Circuit in the Wal-Mart action, have found this requirement implicit and thus it must be met for certification under Rule 23(b)(2). See also *United States Fidelity & Guaranty Co. v. Lord*,

“implicit in any type of class certification.”<sup>208</sup> The Ninth Circuit will have to analyze whether the class, massive in both number and geographic size,<sup>209</sup> is manageable. The district court analyzed the manageability of the Wal-Mart action in two stages, the liability stage and the remedy stage.<sup>210</sup> The court found that at the liability stage the plaintiffs must prove that the defendant, against the class as a whole, entered into a practice or policy of discrimination.<sup>211</sup> The district court determined that the liability stage would be manageable because statistical evidence could provide the evidence and proof needed for a continuation to the remedy stage of the case.<sup>212</sup> The Ninth Circuit will need to review this decision and determine if contested statistical evidence is sufficient to determine liability in a case of this magnitude. If the Ninth Circuit affirmed the finding that the statistical and anecdotal evidence used to satisfy 23(a) was sufficient, it is likely that this same evidence will be admissible in proving that the defendants entered into a policy of discrimination against the class as a whole.

In the remedy stage, the court must determine whether there are manageability issues regarding relief to the plaintiff class. The district court found that distribution of relief, whether injunctive or backpay, will be manageable if the defendant is found liable. However, the court found that relief for discriminatory promotion practices will be manageable only to a distinct group of class members and will not be distributed class-wide. Since Wal-Mart did not contest the finding that an injunctive remedy is manageable, the Ninth Circuit will not conduct review of this portion of relief. Wal-Mart argues that providing backpay<sup>213</sup> to the plaintiff members would be

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585 F.2d 860, 866 (8th Cir. 1978) (assuming that there is an implied condition of manageability in class actions under paragraph (b)(2) also).

<sup>208</sup>*Dukes*, 222 F.R.D. at 173, (citing *Robinson*, 267 F.3d at 164) (noting that a district court may allow (b)(2) certification if “class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy”); see also *Piva v. Xerox Corp.*, 70 F.R.D. 378, 388 (N.D. Cal. 1975) (noting that proposed 23(b)(2) class of employees in western region “directly involves important considerations of manageability”).

<sup>209</sup>In a Letter Brief *Amicus Curiae* of the Equal Employment Advisory Council Supporting Petition for Permission to Appeal From Order Granting Class Certification, the unprecedented sheer size of the class was specifically addressed. The EEAC stressed that the class should be found unmanageable, as the “potential size of the class is so large that the case becomes virtually unmanageable, denying to both plaintiffs and defendant any prospect that their claims will receive a fair and prompt resolution.” The EEAC also addresses immense size of the class through the following comparisons. First, there are more members of the class than there are persons in the United States Armed Forces. See Directorate for Information Operations and Reports, Armed Forces Strength Figures, <http://www.dior.whs.mil/mmid/military/ms0.pdf>. Second, there are more members than total resident populations of 12 of the 50 states. See U.S. Census Bureau, Population Estimates, <http://eire.census.gov/popest/data/states/tables/NST-EST2003-01.pdf>. Finally, the class is approximately the same size as combined paid attendance for the last twenty Super Bowls. See Super Bowl Website, <http://www.superbowl.com/history/boxscores>.

<sup>210</sup>See *Dukes*, 222 F.R.D. at 173; see also *Robinson*, 267 F.3d at 158.

<sup>211</sup>See *Dukes*, 222 F.R.D. at 173.

<sup>212</sup>*Id.* at 174.

<sup>213</sup>Backpay is usually awarded in order to “effectuate the statutory goal [of Title VII] of compensating the victimized employee and placing him in as good a position as he would

completely unmanageable.<sup>214</sup> However, the district court and plaintiffs agree that backpay is manageable by using of a formula approach.<sup>215</sup> A formula approach allows a court to utilize objective data to determine which individuals deserve a remedy and the amount of the remedy to be distributed. The Ninth Circuit must address whether the formula approach to awarding backpay is acceptable, and if it is not, if the traditional method that is normally used would render the backpay remedy unmanageable.

Wal-Mart strongly contests awarding backpay using a formula method. According to Wal-Mart, use of the formula approach completely disregards the defense's right to "demonstrate that it would have taken the same action in the absence of the impermissible motivating factor" and, thus, that "the court...[should] not award damages." In *International Brotherhood of Teamsters v. U.S.*, the Supreme Court stated that the defendant employer is given the opportunity to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.<sup>216</sup> Wal-Mart believes that since the *Teamster* approach is "impractical" and "unfeasible"<sup>217</sup> on a class-wide basis, the remedy phase is unmanageable or unfeasible.<sup>218</sup> The Ninth Circuit will have to review the district court's finding that the remedy phase, while utilizing a formula approach, is fair and manageable. The Ninth Circuit will most likely follow precedent and state that "'individualized hearings' are not required in all Title VII class actions." In *Kraszewski v. State Farm General Insurance Co.*, the court found that a class-wide formula for determination of damages is available to "avoid a 'quagmire of hypothetical judgments' or the strain of a multitude of separate fact-finding hearings."<sup>219</sup> If the Ninth Circuit affirms the district court's findings at the remedy phase, such a decision will enhance the probability of the certification being affirmed under 23(b)(2).

#### *D. Analysis: What Will the Ninth Circuit Decide and the Impending Consequences*

After examining previous Ninth Circuit decisions, it is apparent that precedent favors the plaintiffs in *Dukes v. Wal-Mart*. Both the Northern District of California

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have been had he not been subject to discrimination." See *Dukes*, 222 F.R.D. at 174 (citing to *Stewart v. General Motors Co.*, 542 F.2d 445, 451 (7th Cir. 1976)).

<sup>214</sup>See *Dukes*, 222 F.R.D. at 174.

<sup>215</sup>*Id.* at 166-67.

<sup>216</sup>*Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 362 (1977); see *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 778-79 (1976).

<sup>217</sup>The plaintiff found that individual hearing for the members of the class who may be entitled to backpay is impractical. The defense argues that if they are not entitled to this defense to show that policies were lawful, the remedy phase in unmanageable. *Dukes*, 222 F.R.D. at 176.

<sup>218</sup>See *Beck*, 203 F.R.D. at 467 (stating that regarding backpay damages, a class action cannot fairly and economically resolve the issue without individualized hearings into the specific circumstances of each person's employment and what the discrimination to which they have been subjected).

<sup>219</sup>*Id.* See *Kraszewski v. State Farm Gen. Ins. Co.*, 1986 U.S. Dist. LEXIS 22604 (N.D. Cal. 1986).

and the Ninth Circuit tend to favor leniency in application of the certification standards of Rule 23.<sup>220</sup> According to precedent, the Ninth Circuit will review the district court's decision and affirm the decision unless there was a clear abuse of discretion.<sup>221</sup> If the district court applied the proper standards and did not make any clearly erroneous findings of fact, its decision will stand.<sup>222</sup> As such, in order for certification to be denied on appeal, Wal-Mart must prove that either the court analyzed the evidence against an incorrect legal standard or that the district court committed clear error in the fact finding process. To the dismay of Wal-Mart, the Ninth Circuit will conduct an "extremely limited" review, which will hinder Wal-Mart's argument that a clear error was committed and that the certification decision must be overturned.

If the Ninth Circuit conducts a more expansive review of the district court's findings, it may realize that the certification rests upon legal uncertainties. For example, in review of the commonality standard, is there a class wide policy of discrimination in both compensation and promotion decisions? Without any hard evidence of a strong corporate culture infused with policies encouraging or even tolerating discrimination,<sup>223</sup> can every store have managers in decision making positions that practice discrimination in both promotion and compensation decisions? The district court found commonality was met as Wal-Mart utilized subjective decision-making at the store level.<sup>224</sup> Yet, there is no evidence of a nation-wide policy to be permeated into every store and every decision maker at the stores.<sup>225</sup> This is one area in which more extensive review is warranted since the claims could have been brought against the separate store locales instead of all Wal-Mart locations across the country. Claims brought on a smaller scale, such as against a specific store, will be more likely to establish whether there is a clear discriminatory practice or policy detrimental to the women employees at that retail location.

Moreover, a broad review of the commonality standard may be warranted when analyzing the evidence used to satisfy the requirement. The Ninth Circuit will have to decide if a nation-wide aggregate analysis of compensation and promotion policies is proper when the decisions allegedly at issue were primarily made at the store level. Aggregate analyses may be appropriate when the decisions are made at a centralized corporate level, but when the decisions are subjectively made by management employees at the sub-unit level, an unaggregated analysis may be more appropriate.

More extensive review of the district court's finding that there were no conflicts of interest precluding Rule 23(a)(4)'s satisfaction may also be appropriate. Other circuit courts have found that a conflict of interest, such as a certifying a class where

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<sup>220</sup>See *supra* note 15.

<sup>221</sup>See *Molski*, 318 F.3d at 947-48.

<sup>222</sup>*Id.* at 953 (citing *Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 458 (9th Cir. 2000)).

<sup>223</sup>See *Dukes*, 222 F.R.D. at 151. The district court finds a nexus between a strong emphasis on uniform corporate culture and an environment that *may* include gender stereotyping. *Id.* However, hard evidence of gender bias or stereotyping was not presented. *Id.*

<sup>224</sup>See *id.* at 150.

<sup>225</sup>*Id.* at 152-53.

the alleged discriminatory decision makers are also entitled to relief as class members, precludes or hinders Rule 23(a)(4) being met.<sup>226</sup> The Ninth Circuit should conduct a thorough review on this requirement as the plaintiff class includes those who made the contested compensation and promotion decisions.

Review of this certification decision is imperative due to the immense consequences associated with certification. First, an affirmation of certification may encourage the filing of class actions, specifically employment discrimination claims. Certification of a class this large, using permissive analysis favorable to the plaintiffs makes class action suits more attractive litigation options. Also, these permissive standards used by the district court will more likely be applied to future class action decisions. If the certification decision is affirmed, this case may be followed in the future allowing huge monetary damages to be remedied in employment discrimination suits to become the norm. Certification of a discrimination suit with potential relief in the billions of dollars is unprecedented<sup>227</sup> and may cause a trend of leniency in the allowance of monetary relief sought. Furthermore, monumental monetary damages are seemingly contradictory to the main purpose of an employment discrimination lawsuit, stopping the discriminatory behavior and preventing it from future reoccurrence.<sup>228</sup> An affirmation of certification may cause the intentions of the Civil Rights Act of 1964 to be diminished, as monetary damages may begin to take a larger role in the claims for relief.

A thorough review that precludes certification may also be appropriate due to the trend towards settlement of claims involving classes of this size. As legal commentary has revealed, there is an apparent tendency for defendants to settle class actions to avoid the possibility of vast monetary relief and extensive negative media attention.<sup>229</sup> If this case is settled, Wal-Mart will have potential monetary and injunctive outlays, without a finding that they actually committed the alleged discriminatory conduct. A settlement will contradict the plaintiffs' purpose of discontinuing the allegedly discriminatory practices and creating a workplace that values gender equality.

#### V. CONCLUSION

The review of the certification decision in *Dukes v. Wal-Mart* will significantly influence how employment discrimination class actions are managed in the American legal system. This case is deserving of a thorough review, as it will influence the application of Rule 23 in future class action certification decisions. *Dukes v. Wal-Mart* warrants that the Ninth Circuit diverge from the precedented "limited review" since there are many discrepancies regarding the application of certification requirements within the various circuit courts. If the certification is granted upon a permissive review, consequences such as a trend toward certification when monumental monetary relief is sought, settlement without basis on the merits of the case, and a trend toward leniency in certification of employment discrimination class action lawsuits may soon follow. The many inconsistencies in

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<sup>226</sup>*Id.* at 167-68.

<sup>227</sup>*Id.* at 142.

<sup>228</sup>*See supra* note 65 and accompanying text.

<sup>229</sup>*See supra* note 101 and accompanying text.

employment discrimination decisions described above make apparent the possibility of misapplication of Rule 23 or the use of an incorrect legal standard. Therefore, the certification decision in *Dukes v. Wal-Mart* should be given a well-deserved thorough review to avoid substantial inadvertent consequences.

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