Texas Wesleyan Law Review

Volume 19 | Issue 3 Article 4

3-1-2013

Put Up Your Dukes: The Fight Over Commonality in the Era of Wal-Mart v. Dukes

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PUT UP YOUR *DUKES*: THE FIGHT OVER COMMONALITY IN THE ERA OF *WAL-MART V. DUKES*

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I. INTRODUCTION

1.5 million current and former employees spread out across 3,400 stores across the United States. It would have been, in Justice Scalia's words, "one of the most expansive class actions ever."[2] But the Supreme Court, in a decision that reverberated through American courts, refused to certify the class proposed by former Wal-Mart employee Betty Dukes.[3]

This Article evaluates the impact of *Wal-Mart v. Dukes* on class action litigation.[4] Part II outlines the Court's analysis and Justice Gins-

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2. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011).

3. Dukes proposed a class of "all women employed at any Wal-Mart domestic retail store at any time since December 26, 1998" allegedly subject to gender discrimination in pay and promotions. *Id.* at 2562 (Ginsburg, J., dissenting).

4. The Federal Rules of Civil Procedure provide that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members only if . . . there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). If a purported class satisfies the requirements of Rule 23(a), which include—in addition to commonality—numerosity, typicality, and adequacy of representation, a 23(b)(2) class action may be maintained if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive

DOI: https://doi.org/10.37419/TWLR.V19.I3.2

burg's dissenting opinion in *Dukes*. Part III discusses three themes or issues gleaned from class-action cases post *Dukes*: (1) the blurring of the 23(a)(2) commonality and 23(b)(3) predominance standards, with the result that 23(a)(2), heretofore an "easily satisfied" standard "construed permissively" by courts, is now substantially more difficult to satisfy; (2) the interpretation of *Dukes* in the employment context, with courts using the existence of a general corporate policy (official or unofficial) to satisfy the *Dukes* requirement that defendant employers have a common mode of operating upon each employee; and (3) the use of the 23(c)(4) hybrid class to counter defendants' arguments that where plaintiffs' claims include those for individualized relief, *Dukes* precludes certification of any portion of the case under 23(b)(2).

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

A. *"A Common Contention Capable of Classwide Resolution"*

The Supreme Court's analysis in *Dukes* centered on the Rule 23 commonality requirement[5]—that there must be "questions of law or fact common to the class."[6] The Court began by asserting that this language is "easy to misread."[7] Not just *any* common question will do. For example, "Do all of us plaintiffs work for Wal-Mart?" or "Do our managers have discretion over pay?" would not satisfy the commonality requirement.[8] Class members must have "suffered the same injury," and this means more than that they "suffered a violation of the same provision of law."[9] Class members' claims, the Court maintained, "must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor," and that common contention must be "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[10]

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relief or corresponding declaratory relief is appropriate respecting the class as a whole," and a 23(b)(3) class action may be maintained if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(2), 23(b)(3).

5. *Dukes*, 131 S. Ct. at 2550 ("[T]he crux of this case is commonality . . . .").

6. FED. R. CIV. P. 23(a)(2).

7. *Dukes*, 131 S. Ct. at 2551.

8. *Id.*

9. *Id.* ("Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once.").

10. *Id.* This language is almost universally quoted by courts citing *Dukes*.

https://scholarship.law.tamu.edu/txwes-lr/vol19/iss3/4
DOI: 10.37419/TWLR.V19.I3.2

In the Title VII context, the Court explained, there are two sets of circumstances in which a plaintiff could plausibly assert that class members had "suffered the same injury" within the meaning of Rule 23(a): (1) where the employer had "used a biased testing procedure to evaluate . . . applicants for employment" or (2) where there was "significant proof that an employer operated under a general policy of discrimination . . . [and] the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes."[11] Because the plaintiffs in *Dukes* did not allege a biased testing procedure, they had to offer "significant proof" that Wal-Mart operated under a general policy of discrimination and that the discrimination manifested itself in similar hiring and promotion practices.

Dukes, however, did not allege that Wal-Mart had an explicit corporate policy against the advancement of women.[12] Rather, she alleged that local managers' discretion over pay and promotions had been exercised disproportionately in favor of men, resulting in an unlawful disparate impact on women.[13] She sought class certification on the theory that "a strong and uniform 'corporate culture' [had] permit[ted] bias against women to infect . . . the discretionary decisionmaking of each one of Wal-Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice."[14]

The Court was skeptical. "On its face," the Court explained, a policy of delegating discretionary decisionmaking authority to local supervisors is "just the opposite of a uniform employment practice that would" satisfy the Rule 23 commonality requirement.[15] Indeed, companies often permit discretionary decisionmaking so as "to avoid evaluating employees under a common standard."[16]

The Court was careful to acknowledge that such a "policy" could give rise to Title VII liability under a disparate-impact theory and that such a case could conceivably be litigated on a classwide basis—but only where the plaintiffs could identify "a common mode of exercising discretion that pervade[d] the entire company."[17] In other words, the plaintiffs would have to offer "significant proof" that all managers had exercised their discretion in a common way.[18]

11. *Id.* at 2553 (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 159 n.15 (1982)).

12. Dukes could not have alleged as much. As the Court underscored, Wal-Mart had an express corporate policy *against* gender discrimination. *Id.*

13. *Id.* at 2548; *see* 42 U.S.C. § 2000(e)–2(k) (2011).

14. *Dukes*, 131 S. Ct. at 2548.

15. *Id.* at 2554.

16. *Id.* at 2553.

17. *Id.* at 2554–55.

18. *Id.*

That is a staggering burden, and the plaintiffs in *Dukes* did not carry it.[19] Dukes and fellow named plaintiffs Christine Kwapnoski and Edith Arana offered sociological, statistical, and anecdotal evidence to support their claims. But this evidence fell far short of demonstrating that thousands of managers across thousands of Wal-Mart stores had exercised their discretion in a common way. Indeed, how could one make such a demonstration at the class certification stage in the absence of an express corporate policy?

B. *23(b)(2) and Claims for Monetary Relief*

After the Court concluded that the *Dukes* plaintiffs had not proffered a common question, it moved on to address whether the Ninth Circuit had properly certified their claims for backpay under Rule 23(b)(2), which allows class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[20] The Court pointed out that one could interpret the Rule to mean that it authorized *only* injunctive or declaratory relief.[21] But the Court did not reach that broader question, because it determined that claims for individualized relief—like backpay—do not satisfy the rule: "the key to the (b)(2) class is 'the individualized nature of the injunctive or declaratory relief warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'"[22]

The plaintiffs contended that their claims for backpay were appropriately certified under 23(b)(2) because they did not "predominate" over their claims for injunctive or declaratory relief.[23] In support of their argument, they cited the Advisory Committee's statement that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."[24] Because the plaintiffs' claims for relief did not "relate exclusively or predominantly" to backpay, they must satisfy Rule 23(b)(2)'s requirements. The Court rejected this "negative-inference" argument.[25] First, the Rule itself, and not the Advisory Committee's interpretation

19. *Id.* at 2553 ("'[S]ignificant proof' that Wal-Mart 'operated under a general policy of discrimination' . . . is entirely absent here.").

20. FED. R. CIV. P. 23(b)(2).

21. *Dukes*, 131 S. Ct. at 2557.

22. *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)). The Court explained that (b)(2) is meant to capture, for example, "[c]ivil rights cases against parties charged with unlawful, class-based discrimination." *Id.* (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997)).

23. *Id.* at 2559.

24. *Id.*

25. *Id.*

of it, would govern its determination.[26] Second, to accept the plaintiffs' argument would "do violence to [Rule 23's] structural features."[27] Rules 23(b)(1) and (b)(2) allow class litigation where individual adjudication would be impossible or where relief sought would affect the entire class at once. These are thus mandatory classes with no notice or opt-out provisions. Rule 23(b)(3), on the other hand—an "adventuresome innovation" that allows class litigation under a wider set of circumstances—provides for notice, allows potential class members to opt out, and requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[28] Where class claims for relief include individualized claims for money, a judge must make findings about predominance and superiority before certifying the class, and potential class members must be given notice and opt-out rights.[29]

Last, the Court dismissed the plaintiffs' argument that their claims for backpay were merely "incidental to requested injunctive or declaratory relief" under *Allison v. Citgo Petroleum.*[30] The Fifth Circuit held in *Allison* that where claims for monetary relief "flow directly from liability to the class as a whole," there should be "no need for additional hearings to resolve the disparate merits of each individual's case" and thus such claims could be subjected to classwide litigation under 23(b)(2).[31] Without deciding whether there were, in fact, any forms of "incidental" monetary relief that satisfied the requirements of 23(b)(2), the Court pointed out that the Title VII remedial scheme entitled Wal-Mart to individualized determinations of each employee's eligibility for backpay; that a "Trial by Formula"—whereby an average backpay award would be determined for a sample set of class members and then extrapolated to other members—would not substitute for such determinations; and thus that the *Dukes* class could not be certified "even assuming" incidental monetary relief could be awarded to a 23(b)(2) class.[32]

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26. *Id.*
27. *Id.*
28. *Id.* at 2558 (quoting *Amchem Prods., Inc.*, 521 U.S. at 614); FED. R. CIV. P. 23(b)(3).
29. *Dukes*, 131 S. Ct. at 2258–59.
30. *Id.* at 2560 (citing Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998)).
31. *Id.* at 2560–61.
32. *Id.* at 2561.

C. *Ginsburg's Dissent: Must 23(a)(2) Mean More Than it Says?*

Justice Ginsburg's vehement dissent[33] argued that the majority improperly "disqualifie[d] the class at the starting gate" by "import[ing] into the Rule 23(a) determination concerns [such as whether questions of law or fact *predominate* over questions affecting only individuals] properly addressed in a Rule 23(b)(3) assessment."[34] Ginsburg criticized the majority for insisting that 23(a)(2) "must mean more than it says:" "[s]ensibly read, . . . the word 'questions' means disputed issues."[35]

Under this "sensible" reading of 23(a)(2), the purported class raises such a disputed issue, or poses such a common question: "whether Wal-Mart's pay and promotions policies gave rise to unlawful discrimination."[36] Indeed, scholars have long described Rule 23(a)(2) as easily satisfied.[37]

But the majority's "rigorous analysis" raised the bar, so to speak:

> The Court's emphasis on differences between class members mimics the Rule 23(b)(3) inquiry into whether common questions "predominate" over individual issues. And by asking whether the individual differences "impede" common adjudication, . . . the Court duplicates 23(b)(3)'s question whether "a class action is superior" to other modes of adjudication. Indeed, Professor Nagareda, whose "dissimilarities" inquiry the Court endorses, developed his position in the context of Rule 23(b)(3).[38]

The Rule requires a "common question," but the majority articulated a higher standard: a common question that will resolve the case. The majority, citing *General Telephone Co. of Southwest v. Falcon*,[39] insisted that its position was not new—but the subsequent flood of motions to decertify predicated upon *Dukes* suggests otherwise.

III. The Consequences of the *Dukes* Decision

A. *The Blurring of 23(a)(2) and 23(b)(3)*

The requirements of 23(a)(2) seem straightforward and easily satisfied. The Rule requires that would-be class representatives pose

33. *Id.* Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, concurs in part—that the purported class could not have been certified as a 23(b)(2) class—and dissents in part, but the bulk of the opinion assails the commonality standard established by the majority. *Id.* at 2561–62.

34. *Id.* at 2562 (Ginsburg, J., dissenting). As the cases that follow will show, many district courts continue to consider such concerns in Rule 23(b)(2) and (b)(3) assessments.

35. *Id.* at 2562 n.3.

36. *Id.* at 2564.

37. 5 J. Moore et al., Moore's Federal Practice § 23.23[2], 23–72 (3d ed. 2011).

38. *Dukes*, 131 S. Ct. at 2566.

39. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147 (1982).

"questions of law or fact common to the class."[40] The use of the conjunction "or"—used to link alternatives, of course—makes the rule seem even less intimidating. Plaintiffs must pose common questions of law *or* fact—they need not pose common questions of law *and* fact. As Professor Nagareda has explained, "[e]ven a single question of law or fact common to the members of the class will satisfy the commonality requirement."[41]

Justice Ginsburg's dissent emphasizes that the commonality requirement is clear, unambiguous, straightforward, and meant to be "easily satisfied."[42] She cites dictionary definitions of "question" ("[a] subject or point open to controversy"), "question of fact" ("[a] disputed issue to be resolved . . . [at] trial"), and "question of law" ("[a]n issue to be decided by the judge") and concludes that a common question "*must be* a dispute, either of fact or of law, the resolution of which will advance the determination of the class members' claims."[43] Given that reading of the rule, it is difficult to see why the *Dukes* plaintiffs did not meet the commonality threshold. As Justice Ginsburg asserts, the question "whether Wal-Mart's pay and promotions policies gave rise to unlawful discrimination[ ] was hardly infirm."[44]

Justice Scalia suggests that Justice Ginsburg's plain interpretation of the Rule is too "easy," a "misread[ing]," "since any competently crafted class complaint literally raises common 'questions.'"[45] He recites a series of questions that will not satisfy the commonality standard: "Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get?"[46] These are straw men. One need not be an expert on aggregate litigation to detect the differences between the questions above—as Justice Ginsburg put it, mere "utterance[s] crafted in the grammatical form of a question"—and the *Dukes* plaintiffs' question. It is obvious that these questions do not satisfy the Rule 23(a)(2) commonality standard. But it is not at all obvious that the *Dukes* plaintiffs' question does not. By way of explanation, Justice Scalia uses language that complicates the Rule and makes its requirements more difficult to satisfy.

The language in the *Dukes* opinion most often cited by lower courts engaged in a commonality analysis is that plaintiffs' "claims must depend upon a common contention [that] . . . must be of such a nature

40. FED. R. CIV. P. 23(a)(2).

41. Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 176 n.110 (2003).

42. *See Dukes*, 131 S. Ct. at 2565 (Ginsburg, J., dissenting).

43. *Id.* at 2562 (Ginsburg, J., dissenting) (emphasis added). One would think that Justice Scalia, well known for his ardent adherence to the plain text of rules and statute, would embrace such a definition.

44. *Id.* at 2564 (Ginsburg, J., dissenting).

45. *Id.* at 2551.

46. *Id.*

that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[47] This is a vibrant metaphor—one envisions a gleaming swordsman felling trees "in one stroke"—but not terribly useful to a commonality analysis. Unsurprisingly, courts struggle with the meaning of the statement. Most often, they simply reproduce it and follow it with "in other words" and a quotation from Professor Nagareda's *Class Certification in the Age of Aggregate Proof*.[48] The Eighth Circuit, for example, concluded that the statement meant that "a proponent of certification [must] show that a classwide proceeding [would] 'generate common *answers* apt to drive the resolution of the litigation,'"[49] and the United States District Court for the Southern District of New York concluded that the statement required courts to determine "whether classwide proceedings have the capacity to 'generate common *answers* apt to drive the resolution of the litigation.'"[50]

The requirement that "common questions" be able to generate "common *answers*" is certainly more succinct than the sword metaphor, but not necessarily more helpful. What exactly *is* a "common answer" to a Rule 23(a)(2) common question? If the common question is, for example, whether Company X had an unofficial policy of requiring its employees to work overtime without additional pay in violation the Fair Labor Standards Act ("FLSA"), is the common answer to that question "yes, Company X had such an unofficial policy in violation of the FLSA" or "no, Company X did not have such an unofficial policy?" Must a court weighing certification essentially decide the merits of plaintiffs' claims?

Not quite—but almost. Many courts cite *Dukes* for the proposition that a commonality analysis requires courts to engage in a "rigorous analysis" to ensure "that the prerequisites of Rule 23(a) have been satisfied" and that the rigorous analysis frequently "entails some overlap with the merits of the plaintiffs' underlying claims."[51] The rigorous analysis demands that courts probe behind the pleadings in search of dissimilarities that may hinder class litigation of the plaintiffs' claims. Without common proof, one cannot expect common answers—and common answers drive the resolution of class litigation. Justice Scalia's sword metaphor, then, is interpreted to mean that a 23(a)(2) "common question" must be able to generate "common answers," and courts in search of common answers must conduct a rigor-

47. *Id.*

48. Bennett v. Nucor Corp., 656 F.3d 802, 814 (8th Cir. 2011); Ellis v. Costco Wholesale Corp., 657 F.3d 970, 981 (9th Cir. 2011); Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950(LBS)(JCF), 2012 WL 205875, *4 (S.D.N.Y. Jan. 19, 2012), *aff'd in part, rev'd in part*, 877 F. Supp. 2d 133 (S.D.N.Y. 2012).

49. *Bennett*, 656 F.3d at 814.

50. *Chen-Oster*, 2012 WL 205875, at *4.

51. *Bennett*, 656 F.3d at 814.

ous analysis to ensure that there is common proof—that is, they must probe behind the pleadings in search of dissimilarities that might impede class treatment of the plaintiffs' claims.

It is this characterization of the rigorous analysis that most troubles Justices Ginsburg, Breyer, Sotomayor, and Kagan. Subjecting a plaintiff's class claims to a rigorous analysis is nothing new. The Court in *Dukes* cites *Falcon* for that proposition. But *Dukes* requires that common issues predominate: "[t]he Court's emphasis on differences between class members mimics the Rule 23(b)(3) inquiry into whether common questions 'predominate' over individual issues. And by asking whether the individual differences 'impede' common adjudication . . . the Court duplicates 23(b)(3)'s question whether 'a class action is superior' to other modes of adjudication."[52] This is problematic for two reasons. First, if courts must unearth dissimilarities at the 23(a)(2) stage, "no mission remains for Rule 23(b)(3)."[53] Second, conducting a rigorous search for dissimilarities at the 23(a)(2) stage may serve to bar a 23(b)(1) or (b)(2) class, neither of which has a predominance requirement.[54]

Courts' certification decisions since *Dukes* bear out Justice Ginsburg's argument. In *Sullivan v. DB Investments, Inc.*, the Third Circuit, sitting *en banc*, affirmed the district court's decision to certify a settlement class of De Beers diamond purchasers.[55] The plaintiffs, direct and indirect purchasers of De Beers diamonds, alleged that De Beers coordinated the worldwide sale of diamonds by executing output-purchase agreements with competitors, synchronizing and setting production limits, and restricting the resale of diamonds within certain geographic regions, all in violation of state and federal antitrust laws.[56] De Beers argued that the purported class failed to satisfy the Rule 23(b)(3) predominance requirement because some class members were entirely without a cognizable legal claim—the result of differences among the state statutes governing class members' claims.[57] "A necessary corollary" of the commonality standard established by *Dukes*, De Beers argued, is that "for there to be any common questions, all class members must have at least some colorable legal claim:" "[o]therwise, it is nonsense to speak of 'resolv[ing] an issue that is central to the validity of each one of the claims.'"[58] De Beers

52. *Dukes*, 131 S. Ct. at 2566 (Ginsburg, J., dissenting).
53. *Id.*
54. *Id.*
55. Sullivan v. DB Invs., Inc., 667 F.3d 273, 308 (3d Cir. 2011).
56. *Id.* at 286.
57. More specifically, De Beers argued that the existence of substantive variations in state antitrust, consumer protection, and unjust enrichment laws should preclude a court from finding that common issues predominated as required by 23(b)(3). *Id.* at 297. Some members of the nationwide settlement class, then, might be said to have no "colorable legal claim" with respect to one or more of the class claims because their state does not provide for a cause of action for those particular injuries.
58. *Id.* at 344 (Jordan, J., dissenting).

repudiated the plaintiffs' argument that it is enough that each class member have some pleaded claim, again citing *Dukes*: "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must . . . prove that there are in fact . . . common questions of law or fact. . . . [S]ometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question."[59] It follows, then, that district courts must conduct an inquiry into the existence or validity of each class member's claim.[60]

The court disagreed, characterizing De Beers's argument as a "misreading" of *Dukes*.[61] *Dukes*, the court asserted, does not require district courts to determine whether each class member has a cognizable legal claim.[62] Rather, *Dukes* requires district courts to determine whether the defendant's conduct was common as to all class members: "commonality is satisfied where common questions generate common answers 'apt to drive the resolution of the litigation.'"[63] And that, the court held, was exactly the situation presented in the case at bar.[64] De Beers's anticompetitive conduct resulted in a common injury to all class members—inflated diamond prices—in violation of federal antitrust law and the antitrust laws of every state:

> Based upon our case law, we can distill that each class member shares a similar legal question arising from whether De Beers engaged in a broad conspiracy that was aimed to and did affect diamond prices in the United States. Evidence for this legal question would entail generalized common proof as to the implementation of De Beers's conspiracy, the form of the conspiracy, and the duration and extent of the conspiracy.[65]

What is most interesting about *Sullivan* for the purposes of this Article is that the defendants drew heavily upon *Dukes* in crafting their defense—despite the fact that 23(a)(2) commonality was not at issue in the case. De Beers clearly believed that *Dukes*—though it focused almost exclusively on 23(a)(2) and 23(b)(2)—was relevant to a 23(b)(3) predominance analysis, which bolsters Justice Ginsburg's argument that the *Dukes* commonality assessment mimics a 23(b)(3) predominance assessment.

Moreover, the court's opinion in *Sullivan* shifts back and forth uncomfortably between discussing "predominance" and "commonality." The two standards—meant to be separate and distinct—blur. Though commonality was not at issue in the case, the court frequently writes

59. *Id.* at 344–45 (Jordan, J., dissenting) (citing *Dukes*, 131 S. Ct. at 2551).
60. *Id.* at 346 (Jordan, J., dissenting).
61. *Id.* at 299.
62. *Id.*
63. *Id.*
64. *Id.* at 299–300. ("[T]he answers to questions about De Beers's alleged misconduct and the harm it caused would be common as to all of the class members, and would thus inform the resolution of the litigation . . . .").
65. *Id.* at 300 (internal quotation marks and citations omitted).

of "commonality," "common questions," "common answers," and "generalized common proof."[66] And the court, too, seems to believe that *Dukes* is relevant to a 23(b)(3) analysis; it cites again and again from the case in making its determination as to predominance and superiority.

The blurring of the commonality and predominance standards is problematic because it makes prediction difficult. Have the two standards disappeared, replaced by one "predominance of common questions" standard? Must a plaintiff prepare to satisfy the predominance requirement at the 23(a)(2) stage?

Kottaras v. Whole Foods Market, Inc. raises the same questions. In that case, the United States District Court for the District of D.C. denied the plaintiff's motion to certify a class of Los Angeles County Whole Foods shoppers.[67] The plaintiff, a patron of Whole Foods Market and Wild Oats Market, alleged that a merger between the two grocery chains raised prices on certain products in violation of Section 1 of the Sherman Act.[68] In *Kottaras*, as in *Sullivan*, 23(a)(2) was not at issue. Defendant Whole Foods argued that the purported class failed to satisfy the Rule 23(b)(3) predominance requirement. The court agreed, holding that "an essential element of the plaintiff's case—that is, injury to individual members of the class—[could not] be proven through classwide evidence . . . ."[69]

The court in *Kottaras* began by delineating the legal standard articulated in *Dukes*: when determining whether to certify a class under Rule 23, a court must engage in a "rigorous analysis," and this analysis frequently entails an examination of "the merits of the plaintiff's underlying claim."[70] The court interpreted this to mean that district courts must "scrutinize the probative value of evidence offered with respect to whether the requirements for class certification have been met."[71] The court then expressly rejected the "lenient" legal standard for class certification under 23(b)(3) articulated in *In re Nifedipine Antitrust Litigation*. In that case, the D.C. Circuit asserted that district courts could refuse to scrutinize the probative value of evidence proffered to demonstrate the requirements of Rule 23.[72] This "low hurdle," the court concluded, was inconsistent with the Supreme Court's holding in *Dukes*.[73]

In *Kottaras*, the plaintiff's evidence failed to satisfy the more demanding standard established by *Dukes*. The plaintiff's expert stated, first, that by analyzing pricing data for each item's stock-keeping unit

66. *See, e.g., id.* at 299–300.
67. Kottaras v. Whole Food Mkt., Inc., 281 F.R.D. 16, 18 (D.D.C. 2012).
68. *Id.*
69. *Id.*
70. *Id.* at 20–21; Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011).
71. *Kottaras*, 281 F.R.D. at 22.
72. *Id.* at 21.
73. *Id.* at 22.

(or "SKU"), he would be able to show that members of the class were injured by the merger and, second, that by using a regression analysis that controlled for other factors that might affect prices, he could determine how much of the overcharge for a particular product was due to the merger.[74] But the court accepted the defendant's argument that Whole Foods shoppers buy "highly differentiated baskets of products" and that, in fact, "the majority of products sold at Whole Foods have decreased in price" in the post-merger period. Thus, determining whether and which Whole Foods customers were actually harmed by the merger would require an individualized inquiry into "the items purchased by each consumer and the changes in price of each item."[75] Because individual, rather than common, evidence was required to show adverse impact to the class, the plaintiff did not satisfy the Rule 23(b)(3) predominance requirement.[76]

Kottaras, then, serves not only as another example of a court using *Dukes* in the 23(b)(3) context and blurring the commonality and predominance standards but also as an example of the *Dukes* dissimilarities approach in action. In *Kottaras*, of course, the court actually *is* engaging in a 23(b)(3) analysis—but the focus on "differentiated baskets" and "individualized inquiry into items purchased" looks very like the Court's approach in *Dukes*. Finally, the court in *Kottaras* asserts that *Dukes* did away with the too "lenient" standard for class certification under 23(b)(3) articulated in *In re Nifedipine Antitrust Litigation*. This is significant: *Dukes*—which focused almost exclusively on 23(a)(2), heretofore an "easily satisfied" standard construed permissively by courts—made the 23(b)(3) predominance and superiority requirements more difficult to satisfy.

These precedents bear out Justice Ginsburg's argument that the *Dukes* emphasis on differences between class members mimics a Rule 23(b)(3) assessment. They also give some foundation to her prediction that (b)(1) and (b)(2) classes which, traditionally, need not have satisfied predominance or superiority requirements, may now have to meet those bars in order to secure certification. In *Connor B. v. Patrick*, for example, the United States District Court for the District of Massachusetts denied the defendants' motion to decertify a 23(b)(2) class of children who were or would be in the foster care custody of the Massachusetts Department of Children and Families ("DCF") as a result of abuse or neglect.[77] The plaintiffs alleged that "overarching systemic deficiencies" within DCF—including excessive caseloads, inadequate supervision and monitoring of providers, and inadequate caseworker and supervisor training—exposed the children in DCF

74. *Id.* at 24.

75. *Id.* at 19–20.

76. *Id.* at 25.

77. Connor B. *ex rel.* Vigurs v. Patrick, 278 F.R.D 30, 31 (D. Mass. 2011).

custody to potential harm.[78] The defendants argued for decertification on the grounds that *Dukes* had "changed the standards for class certification" and that the purported class no longer satisfied the Rule 23(a) commonality requirement and 23(b)(2) cohesiveness requirement.[79] The court disagreed, asserting that *Dukes* had not in fact changed the law for all class action certifications but rather had only "provided guidance on how existing law should be applied to expansive, nationwide class actions . . . very different from" the case before them.[80]

The defendants argued, first, that *Dukes* required the court to go beyond the pleadings before granting class certification. The court asserted that "at no point in its decision [did the Supreme Court] imply that rigorous analysis will *always* require courts to go beyond the pleadings."[81] Unlike the plaintiffs' Title VII claims in *Dukes*, which demanded an inquiry into "the reason for the particular employment decision," the alleged violations here "flowed from structural infirmities within a unified child welfare system . . . where there is no requisite showing of common intent."[82] The defendants next argued, again pursuant to *Dukes*, that the dissimilarities among the 8,500 class members in the case—differences in social worker assignments, goals, physical and mental health needs, and length of stay in DCF custody—made class certification improper. As in *Dukes*, "class members' alleged harms are caused by individual social workers who exercise wide discretion in determining what is in the best interest of the child rather than by a uniform organization policy that dictates how discretion should be exercised."[83] The court rejected this argument, too, pointing out that the plaintiffs had alleged specific and overarching systemic deficiencies within DCF that place children at risk of harm. "These deficiencies, rather than the discretion exercised by individual case workers, are the alleged causes of class members' injuries, because they undermine DCF's ability to timely and effectively implement case workers' decisions"—these are "the glue" that unites the plaintiffs' claims. Finally, the defendants argued that, under *Dukes*, the plaintiffs had failed to satisfy the Rule 23(b)(2) requirements because no single injunctive or declaratory relief is possible where each class member has different needs for DCF services, placements, and visitation. The court held that "any new rules of law that *Dukes* may have created for Rule 23(b)(2) class actions were limited to its specific holding regarding the propriety of claims for monetary

78. *Id.*
79. *Id.* at 32.
80. *Id.* at 33.
81. *Id.*
82. *Id.*
83. *Id.* at 33–34.

relief." The plaintiffs' claims here were limited to injunctive relief.[84] In *Connor B.*, the defendants attempted to use *Dukes* dissimilarities approach to bar a 23(b)(2) class—albeit by defeating *cohesiveness*. The court did not take the bait—insisting, as few courts have done, that *Dukes* did not effect a substantial change in the law.

B. Dukes *in the Employment Context*

Dukes makes clear that, pursuant to *Falcon*, an employer's "subjective [pay and] promotion practices" can be subjected to classwide litigation only where the plaintiff employee offers "significant proof" that the employer operated under "a general policy of discrimination" and that the "discrimination manifested itself in hiring and promotion practices in the same general fashion."[85] In other words, all supervisors must have "exercise[d] discretion in a common way."[86] This is a staggering, perhaps insurmountable, burden where the plaintiff seeks to certify a nationwide class. The Court's objection to the anecdotal, statistical, and sociological evidence offered by the plaintiffs in *Dukes* was that it failed to establish the existence of general discriminatory treatment at the store level.[87] A second, "more fundamental" objection the Court raised to the plaintiffs' evidence was that "[e]ven if it established (as it does not) a pay or promotion pattern that differs from the nationwide figures or the regional figures in *all* of Wal–Mart's 3,400 stores, that would still not demonstrate that commonality of issue exists."[88] Supervisors will give different reasons for the various pay and promotion decisions they made—and in order to satisfy Rule 23(a)'s commonality requirement, the plaintiff must show that all supervisors exercised discretion in a common way. In other words, the plaintiff must show—or at least raise an inference—that "*all* the individual, discretionary personnel decisions [were] discriminatory."[89]

In *Delagarza v. Tesoro Refining & Marketing Co.*, the United States District Court for the Northern District of California certified a

84. *See also* M.D. v. Perry, No. C-11-84, 2011 WL 7047039 (S.D. Tex. July 21, 2011) (denying the defendants' motion to stay proceedings pending appeal of the district court's class certification order). In *M.D.*, the defendants argued that the plaintiffs had failed to satisfy the Rule 23 commonality requirement "in light of the recently released Supreme Court decision in [*Dukes*]." *Id.* at *1. The court distinguished the case before it from *Dukes*, concluding that important distinctions between the two cases mitigated against a stay: "[T]he respondents [in *Dukes*] wished to sue about literally millions of employment decisions at once"; here, the "[p]laintiff's claimed injuries result from the common alleged deficiencies in the Texas foster care system. Those alleged deficiencies are the 'glue' holding [their] claims together." *Id.*

85. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553 (2011).

86. *Id.* at 2555.

87. *Id.*

88. *Id.*

89. *Id.* at 2556 (emphasis added).

23(b)(3) class of twelve-hour shift employees at an oil refinery.[90] The plaintiffs alleged that their employer had a policy that required them to be on duty at the refinery for the entirety of their shifts, failing to provide them with required meal periods or extra pay.[91] The defendant oil refinery argued, pursuant to *Dukes*, that because there was diversity within the purported class—that is, because job duties varied from unit to unit and day to day and because not all members of the class were subject to the same requirements to remain on the premises—there was no common policy tying all class members together.[92] The court rejected this argument, characterizing the defendant's reliance on *Dukes* as inapposite: "[h]ere, . . . Plaintiffs allege a specific set of practices . . . . Plaintiffs contend, and the evidence indicates, the challenged policy applies to all members of the class . . . with only exceptional variations."[93] Thus the court held that the purported class satisfied the commonality requirement.[94]

And in *Ross v. RBS Citizens*, the Seventh Circuit affirmed the district court's decision to certify a 23(b)(3) class of current and former employees of Charter One Bank who were subject to the bank's allegedly unlawful compensation policies of failing to pay overtime compensation.[95] The plaintiffs alleged that the bank had a policy of failing to pay overtime compensation for hours worked in excess of forty per work week.[96] The defendants argued that the purported class failed to satisfy the *Dukes* standard of commonality.[97] But the court rejected this argument. Here, as in *Delagarza*, there was a "*policy* . . . denying certain employees overtime pay that was lawfully due."[98] The fact that the policy was "unofficial" or that "there were slight variations in how Charter One enforced" the policy was not dispositive: "[t]his unofficial policy is the common answer that potentially drives the resolution of this litigation," "the glue holding together" the class.[99]

90. Delagarza v. Tesoro Ref. & Mktg. Co., No. C-09-5803 EMC, 2011 WL 4017967, *1 (N.D. Cal. Sept. 8, 2011).

91. *Id.*

92. *Id.* at *6. Here the defendant is attempting to make exactly the type of argument that Justice Ginsburg decried in her dissent, that "[d]issimilarities within the proposed class . . . have the potential to impede the generation of common answers." *Dukes*, 131 S. Ct. at 2551.

93. *Delagarza*, 2011 WL 4017967, at *8.

94. *See also* Espinoza v. 953 Assocs. LLC, 280 F.R.D. 113, 130 (S.D.N.Y. 2011) ("Although plaintiffs' claims may raise individualized questions regarding the number of hours worked and how much each employee was entitled to be paid, those differences go to the damages that each employee is owed, not to the common question of Defendants' liability. Plaintiffs have alleged a common injury that is capable of class-wide resolution without inquiry into multiple employment decisions . . . .").

95. Ross v. RBS Citizens, N.A., 667 F.3d 900, 905-06 (7th Cir. 2012).

96. *Id.* at 902.

97. The court characterizes the defendants' interlocutory appeal as an "effort[ ] to fit the present case into the *Dukes* mold." *Id.* at 909.

98. *Id.* (emphasis added).

99. *Id.* at 909-10.

The defendants in *Delagarza* and *Ross* argued that the purported classes in each case failed to satisfy the commonality requirement under *Dukes*. In each case plaintiffs complained only of "unofficial" policies—and those were not administered with perfect uniformity. But district and appellate courts have not extended the reasoning in *Dukes*—that where there is not an express company-wide policy, plaintiffs must show that all individual personnel decisions were discriminatory or in violation of a particular law—to cases such as these. The courts in *Delagarza* and *Ross* found that unofficial company-wide policies satisfy the standard established by *Dukes* and also make clear that perfect uniformity of decision is not required to meet the more demanding standard.

The courts in *Delagarza*, *Ross*, and similar non-Title VII employment cases seem to have little or no difficulty disposing of defendants' attempts to fit the cases before them into the *Dukes* mold. But courts struggle, unsurprisingly, to distinguish *Dukes* in Title VII cases that present facts very like those presented in *Dukes*.

In *Chen-Oster v. Goldman, Sachs & Co.*, for example, a federal magistrate judge recommended that the defendants' motion to strike the plaintiffs' class claims in light of *Dukes* be denied.[100] The plaintiffs sought to certify a class of former female associates, vice presidents, and managing directors of Goldman Sachs who, as employees of the company, had allegedly been subject to gender discrimination and retaliation.[101] Goldman Sachs argued that the plaintiffs' "central thesis [was] that Goldman Sachs grant[ed] its managers unbridled discretion to make compensation, promotion, and assignment decisions" and that *Dukes* had effectively extinguished that argument as the basis for a class action suit.[102] But the magistrate judge underscored that while Goldman Sachs managers did have discretion with respect to certain aspects of the pay and promotion process, it was not complete discretion. Goldman Sachs utilized a number of "specific employment practices"—a "360-degree review process," forced quartile-ranking of employees, and the "tap on the shoulder" system of selecting employees. Managers exercised discretion *only within that framework* by, for example, moving an employee to a higher or lower quartile without regard to review scores. The judge was not willing to conclude, without further discovery, that the combination of these employment practices did not amount to "a common mode of exercising discretion" under *Dukes*.[103] District Judge Leonard Sand agreed.[104]

100. Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950(LBS)(JCF), 2012 WL 205875, *1 (S.D.N.Y. Jan. 19, 2012), *aff'd in part, rev'd in part*, 877 F. Supp. 2d 133 (S.D.N.Y. 2012).

101. *Id.*

102. *Id.* at *3.

103. *Id.* at *5.

And in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, the Seventh Circuit reversed the district court's decision to deny certification to a class of current and former African-American employees of Merrill Lynch who, as employees of the company, had allegedly been subject to racial discrimination.[105] The defendants argued, and the district court agreed, that the case was like *Dukes*: Merrill Lynch delegated discretion over compensation decisions to more than one hundred "Complex Directors."[106] But Judge Posner, writing for the court, pointed out that the Complex Directors exercised discretion only "within a framework established by the company."[107] Compensation decisions were in fact determined by two company-wide policies: a teaming policy and an account distribution policy.[108] The teaming policy allowed brokers to form "teams." The goal of forming a team was to gain access to additional clients or to share clients with brokers who had complementary skills. Team participation affected brokers' performance evaluations, which in turn affected their pay and promotions. The account-distribution policy governed the transfer of customer accounts from departing brokers to other brokers. Merrill Lynch established criteria for deciding which brokers would win a competition for the accounts. The criteria included the competing brokers' past performance—influenced heavily by team participation.

The Merrill Lynch Complex Directors exercised discretion with respect to teaming and account distribution: they could veto teams and supplement company criteria for distributions.[109] Judge Posner, distinguishing *Dukes*, did not find this fact dispositive:

> [T]o the extent that these regional and local managers exercise discretion regarding the compensation of the brokers whom they supervise, the case is indeed like *Wal-Mart*. But the exercise of that discretion is influenced by the two company-wide policies . . . . The teams, [the plaintiffs] say, are little fraternities . . . , and as in fraternities the brokers choose as team members people who are like themselves. If they are white, they, or some of them anyway, are more comfortable teaming with other white brokers. Obviously they have their eyes on the bottom line; they will join a team only if they think it will result in their getting paid more, and they would doubtless ask a superstar broker to join their team regardless of his or her race. But there is bound to be uncertainty about who will be effective in bringing and keeping shared clients; and when there is

104. *Chen-Oster*, 877 F. Supp. 2d at 118 (agreeing with the magistrate judge's conclusion that Goldman's "360-degree review process," forced quartile-ranking of employees, and "tap on the shoulder" system distinguished the case from *Dukes*).

105. McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 483, 488, 492 (7th Cir. 2012).

106. *Id.* at 488.

107. *Id.*

108. *Id.* at 489.

109. *Id.*

> uncertainty people tend to base decisions on emotions and preconceptions, for want of objective criteria.[110]

There may be no intentional discrimination at the managerial level, but the practice of allowing brokers to choose their partners could *enable* racial discrimination—i.e., could have a disparate impact. The court held that "[t]he spiral effect attributable to company-wide policy and arguably disadvantageous to black brokers presents a question common to the class."[111]

In *Bennett v. Nucor*, on the other hand, the Eighth Circuit affirmed the district court's decision to deny certification to a class of current and former employees of a large steel manufacturing company.[112] The plaintiffs alleged that they had been subject to racial discrimination in violation of Title VII.[113] The defendants argued, pursuant to *Dukes*, that the purported class failed to satisfy the Rule 23(a)(2) commonality requirement. The court agreed, leaning heavily on the district court's finding that employment practices varied substantially across the steel company's many production departments. Employment at the company was characterized by (1) a decentralized management structure; (2) autonomous production departments; (3) the operational independence of those departments; (4) a wide variety of promotion, discipline, and training policies; and (5) "stark" inter-departmental variations in job titles, functions performed, and equipment used.[114] The plaintiffs argued that a *Falcon*-like class was appropriate given the company's "subjective promotion practices," but the court disagreed. First, the company's promotion practices were not entirely subjective—it utilized several objective criteria in making its pay and promotion determinations, and these criteria varied substantially across departments.[115] Second, even if the company did employ "entirely subjective decisionmaking processes" like those at issue in *Falcon*, the plaintiffs had failed to present "significant proof," demanded by *Dukes*, that the company operated under a general policy of discrimination and that the discrimination manifested itself in similar hiring and promotion practices—that is, there was no significant proof that all supervisors exercised their discretion in a common way.[116]

In cases like *Chen-Oster* and *McReynolds*, courts have appeared to scour the record for any indication of a "company-wide policy" that circumscribes or guides managerial discretion with respect to pay and promotion determinations. The magistrate judge in *Chen-Oster*, for

110. *Id.*
111. *Id.* at 490.
112. Bennett v. Nucor Corp., 656 F.3d 802, 807 (8th Cir. 2011).
113. *Id.*
114. *Id.* at 814–15.
115. *Id.* at 815.
116. *Id.*

example, focused on the 360-degree review, quartile ranking, and tap-on-the-shoulder processes, and the court in *McReynolds* focused on the teaming and account distribution policies. These policies, the courts reasoned, might very well amount to *Dukes*'s "common mode of exercising discretion."

But this seems a stretch. If the managers at Goldman Sachs and Merrill Lynch can exercise discretion in such ways that completely subvert the so-called company-wide "policy," how is that different—or, at least, meaningfully different—from exercising complete discretion to begin with?[117] The magistrate judge in *Chen-Oster* does not provide us with a wealth of information on that score—and neither does Judge Sand.[118] One could argue that the 360-degree review process is likely to generate large amounts of objective data that might form the basis of the "significant proof" demanded by *Falcon* and *Dukes*. Every employee at Goldman Sachs receives a raw and adjusted score on the basis of his or her 360-degree review. Managers may then, at their discretion, move an employee up or down in the quartile rankings. It should be reasonably easy then, assuming the data still exists, to determine whether managers move men up in the rankings at a substantially—that is, statistically significant—greater rate than they do women. If a plaintiff can show that managers move men up at a substantially greater rate than they do women, he or she may have proven a common mode of exercising discretion within the meaning of *Dukes*. On the other hand, given the *Dukes* court's emphasis that "the crux of [a Title VII] inquiry is 'the reason for *a particular* employment decision'"[119] and the requirement that would-be class representatives show that all supervisors exercised discretion in a common way, the 360-review data, especially in the absence of any

117. *See* Chen-Oster v. Goldman, Sachs & Co., 877 F. Supp. 2d 113, 118 (S.D.N.Y. 2012) (acknowledging that "[i]t is true that an individual manager's decision might be more or less discretionary" within the framework of the larger employment practices). *See also* Bolden v. Walsh Constr. Co., 688 F.3d 893, 897–98 (7th Cir. 2012) (distinguishing *McReynolds* from the case before it and asserting that the litigants in the case had attempted to "cleverly" use *McReynolds* "to repackage local variability as uniformity").

118. Judge Sand merely insists that *Dukes* does not "doom" classes in cases where individual managers exercise discretion within the framework of specific employment practices. *Chen-Oster*, 877 F. Supp. 2d at 118 (citing Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2554 (2011)). Interestingly, Judge Sand goes on to distinguish the proposed class before him from that in *Dukes* on the basis of scale or "sheer size." *Id.* at 119. The *Dukes* class numbered in the millions. The *Chen-Oster* class was much smaller. This quite clearly suggests that size matters in Title VII aggregate litigation—that a policy of unbridled individual discretion might not doom a small class, where "the possibility exists that class members' claims will be based on a 'common contention.'" *Id.* (quoting *Dukes*, 131 S. Ct. at 2551 and citing Cronas v. Willis Grp. Holdings, Ltd., No. 06 Civ. 15295(RMB), 2011 WL 5007976, at *3 (S.D.N.Y. Oct. 18, 2011)).

119. *Dukes*, 131 S. Ct. at 2552.

corporate policy, may be no better than the generalized statistical evidence rejected by the *Dukes* court.

Judge Posner's reasoning in *McReynolds* is perhaps more helpful, if only because more deliberate:

> Assume that with no company-wide policy on teaming or account distribution, but instead delegation to local management of the decision whether to allow teaming and the criteria for account distribution, there would be racial discrimination by brokers or local managers, like the discrimination alleged in *Wal-Mart*. But assume further that company-wide policies authorizing broker-initiated teaming, and basing account distributions on past success, increase the amount of discrimination. The incremental causal effect . . . of those company-wide policies . . . could be most efficiently determined on a class-wide basis.[120]

But as in *Chen-Oster*, the Merrill Lynch managers in *McReynolds* exercised a kind of veto power over the "policies" at issue, which raises the same question about how relevant the policies are to the commonality analysis.[121]

C. *Hybrid Classes*

Before *Dukes*, multiple circuits had held that the relief sought by a 23(b)(2) class need not be solely injunctive or declaratory.[122] In the Second Circuit, for example, one could use 23(b)(2) to certify a class seeking both injunctive and monetary relief if "(1) the positive weight or value to the plaintiffs of the injunctive or declaratory relief sought [was] predominant [over the value of the monetary relief] . . . and (2) class treatment would be efficient and manageable."[123] Following *Dukes*, defendants have argued that where plaintiffs' claims include those for individualized relief, *Dukes* precludes certification of any portion of the case under 23(b)(2). To counter such arguments, courts have looked to Rule 23(c)(4), which provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues."[124] Courts have characterized these defendants' arguments as a misreading of *Dukes* and asserted that the maintenance of hybrid classes under 23(c)(4) is, as one court put it,

120. McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 490 (7th Cir. 2012).

121. The search for the *Dukes* holy grail—that is, the search for a policy to act as the "glue" holding together myriad decisions that were allegedly harmful to plaintiffs—characterizes Fourth and Fourteenth Amendment class-action litigation cases post *Dukes*, too. *See, e.g.*, Morrow v. Washington, 277 F.R.D. 172, 192–93 (E.D. Tex. 2011); Logory v. Cnty. of Susquehanna, 277 F.R.D. 135, 142 (M.D. Pa. 2011).

122. Easterling v. Conn. Dep't of Correction, 278 F.R.D. 41, 45 (D. Conn. 2011).

123. Robinson v. Metro-N. Commuter R.R., 267 F.3d 147, 164 (2d Cir. 2001), *abrogated by* Hecht v. United Collection Bureau, Inc., 691 F.3d 218 (2d Cir. 2012).

124. FED. R. CIV. P. 23(c)(4).

"fully consistent with *Dukes*'s careful attention to the distinct procedural protections attending (b)(2) and (b)(3) classes."[125]

In *Easterling v. Connecticut Department of Correction*, for example, plaintiff Cherie Easterling, a female applicant who had failed to secure a Corrections Officer position with the Connecticut Department of Correction, alleged that the Department's physical fitness test, administered to all candidates for Corrections Officer positions, had a disparate impact on female applicants in violation of Title VII.[126] The United States District Court for the District of Connecticut granted Easterling's motion for class certification under 23(b)(2) in January 2010—before *Dukes*.[127] After *Dukes*, the defendant moved the court to decertify the class given the *Dukes* holding that claims for individualized relief do not satisfy 23(b)(2).[128] The court denied the defendant's motion and instead modified its earlier certification order, converting the existing class to a 23(c)(4) hybrid class—maintaining Rule 23(b)(2) certification with regard to liability and injunctive relief and certifying a separate 23(b)(3) class with regard to monetary damages and individualized injunctive relief.[129]

In *Chen-Oster*, too, defendant Goldman Sachs argued that, as a matter of law, the plaintiffs' claims for individualized relief precluded certification under 23(b)(2).[130] The magistrate judge rejected this argument, citing 23(c)(4) and the Second Circuit's interpretation of it in *Robinson v. Metro-North Commuter R.R.*:[131] "[t]he Second Circuit has made clear that '[d]istrict courts should take full advantage of Rule 23(c)(4) to certify separate issues in order to reduce the range of disputed issues in complex litigation and achieve judicial efficiencies.' This especially includes bifurcating class actions with regards to the issues of liability and damages."[132]

125. Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950(LBS)(JCF), 2012 WL 205875, at *8 (S.D.N.Y. Jan. 19, 2012), *aff'd in part, rev'd in part*, 877 F. Supp. 2d 133 (S.D.N.Y. 2012).

126. Easterling v. Conn. Dep't of Correction, 265 F.R.D. 45, 48 (D. Conn. 2010).

127. *Id.* at 55.

128. Easterling v. Conn. Dep't of Correction, 278 F.R.D. 41, 43 (D. Conn. 2011).

129. *Id.* at 51. The defendant in *Easterling* also challenged the certification order on the grounds that common issues did not predominate over individual issues. *Id.* at 43–45, 47–49. The court found several pressing individual questions: "Each individual claimant will still need to establish her status as a member of the class in order to receive a pro rata share of the back-pay award. Additionally, to share in any forward-looking relief, such as priority hiring or front pay, each claimant would need to establish that she is currently qualified for a CO position. Finally, the court will still need to consider individual mitigation issues, such as a claimant's interim earnings or failure to mitigate." But the court ultimately held that these individual questions were "less substantial than the issues that [would] be subject to generalized proof" and affirmed its earlier decision with respect to predominance. *Id.* at 50.

130. *Chen-Oster*, 2012 WL 205875, at *8.

131. Robinson v. Metro-N. Commuter R.R., 267 F.3d 147 (2d Cir. 2001), *overruled in part*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2560–62 (2011).

132. *Chen-Oster*, 2012 WL 205875, at *7.

IV. Conclusion

A review of class-action cases post *Dukes* makes clear, first, that defendants regard the case as a promising opportunity to secure decertification on the grounds that the class opposing them fails to satisfy the requirements of 23(a)(2), 23(b)(3), or 23(b)(2) and, second, that the standard for commonality established by *Dukes* did, in fact, mimic that for predominance and superiority, thus making 23(a)(2) substantially more difficult to satisfy than it had been. Further inquiry is required to determine whether this heightened standard will act to bar 23(b)(1) and 23(b)(2) classes at the commonality threshold—a serious problem, given that (b)(2), a rule "which reflects a series of decisions involving challenges to racial segregation," is intended to capture civil rights cases.[133] The Supreme Court would do well to clarify the *Dukes* holding, making clear that the 23(a)(2) rigorous analysis does not require that common issues *predominate*, thus retaining 23(b)(3)'s particular "mission."

133. *Dukes*, 131 S. Ct. at 2557–58.