“Subjective” Decision-Making After Wal-Mart v. Dukes

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# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. INTRODUCTION</td>
<td>5</td>
</tr>
<tr>
<td>II. “SUBJECTIVE” DECISION-MAKING BEFORE DUKES</td>
<td>6</td>
</tr>
<tr>
<td>. Courts Denying Commonality Where Plaintiffs Challenged Discretionary Decision-Making</td>
<td>7</td>
</tr>
<tr>
<td>. Courts Finding Commonality Based On “Subjective” Decision-Making</td>
<td>11</td>
</tr>
<tr>
<td>III. THE SUPREME COURT’S DECISION AND SUBJECTIVITY</td>
<td>13</td>
</tr>
<tr>
<td>IV. THE AFTERMATH OF DUKES</td>
<td>17</td>
</tr>
<tr>
<td>V. HR LESSONS FROM DUKES AND BEST PRACTICES</td>
<td>24</td>
</tr>
<tr>
<td>. Job Descriptions And Systems For Advancement</td>
<td>24</td>
</tr>
<tr>
<td>. Job Evaluations</td>
<td>25</td>
</tr>
<tr>
<td>. Strong EEO Policies And Practices</td>
<td>25</td>
</tr>
<tr>
<td>. Creating A Corporate Culture</td>
<td>26</td>
</tr>
<tr>
<td>. Communication And Training Of Managers</td>
<td>26</td>
</tr>
<tr>
<td>. HR Monitoring</td>
<td>26</td>
</tr>
<tr>
<td>. Audit Results For Anomalous Decisions</td>
<td>27</td>
</tr>
<tr>
<td>ADDENDUM A</td>
<td></td>
</tr>
<tr>
<td>ADDENDUM B</td>
<td></td>
</tr>
</tbody>
</table>
# TABLE OF AUTHORITIES

## CASES

<table>
<thead>
<tr>
<th>Case</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abram v. United Parcel Serv. of Am., Inc., 200 F.R.D. 424 (E.D. Wis. 2001)</td>
<td>3, 4</td>
</tr>
<tr>
<td>Chapman v. AI Transport, 229 F.3d 1012 (11th Cir. 2000)</td>
<td>4</td>
</tr>
<tr>
<td>Dukes v. Wal-Mart, 222 F.R.D. 137 (N.D. Cal. 2004), aff’d, 509 F.3d 1168 (9th Cir. 2007), rev’d, 131 S. Ct. 2541 (2011)</td>
<td>8</td>
</tr>
<tr>
<td>Ellis v. Costco Wholesale Corp., No. 07-15838, 2011 WL 4336668 (9th Cir. Sept. 16, 2011)</td>
<td>13, 14</td>
</tr>
<tr>
<td>Ellis v Elgin Riverboat Resort, 217 F.R.D. 415 (N.D. Ill 2003)</td>
<td>5</td>
</tr>
<tr>
<td>Engquist v. Oregon Dep’t of Agric., 553 U.S. 591 (2008)</td>
<td>2</td>
</tr>
<tr>
<td>General Telephone Co. v. Falcon, 457 U.S. 147 (1982)</td>
<td>1, 2, 3, 4, 8</td>
</tr>
<tr>
<td>Hnot v. Willis Group Holdings Ltd., 228 F.R.D. 476 (S.D.N. Y. 2005)</td>
<td>6</td>
</tr>
</tbody>
</table>

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Jones v. GPU, Inc.,

McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
   No. 11-3639 (7th Cir. Feb. 24, 2012).......................................................16, 17

MacGregor v. Farmers Ins. Exchange,

Moore v. Boeing Co.,
   No. 4:02CV80 (CDP), 2004 U.S. Dist. LEXIS 5959 (E.D. Mo. March 31, 2004).........6

Ramos v. SimplexGrinnell LP,

Reid v. Lockheed Martin Aeronautics Co.,
   205 F.R.D. 655 (N.D. Ga. 2001)...............................................................3

Ruiz v. Serco, Inc.,
   No. 10-cv-00394-bbc (W.D. Wis. Aug. 5, 2011).................................14, 15

Serrano v. Cintas Corp.,

U.S. v. City of New York,
   No 07-cv-2067(NGG)(RLM), 2011 WL 2680474 (E.D.N.Y. July 8, 2011).........12

Velez v. Novartis Pharm. Corp.,
   244 F.R.D. 243 (S.D.N.Y. 2007)..............................................................7

Vuyanich v. Republic Nat’l Bank of Dallas,
   723 F.2d 1195 (5th Cir. 1984).................................................................4

Wal-Mart v. Dukes,
   509 F.3d 1168 (9th Cir. 2007) rev’d, 131 S. Ct. 2541 (2011).......................8

Wal-Mart v. Dukes,
   131 S. Ct. 2541 (2001).............................................................................passim

Watson v. Fort Worth Bank & Trust,
   487 U.S. 977 (1988)..............................................................................2

STATUTES

Title VII of the Civil Rights Act of 1964....................................................1, 4, 10
OTHER AUTHORITIES

Fed. R. Civ. P. 23.......................................................................................................................1, 12
Fed. R. Civ. P. 23(a) ..............................................................................................................1, 13, 14, 15
Fed. R. Civ. P. 23(a)(2)..........................................................................................................8
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Executive Summary

In Wal-Mart Stores, Inc. v. Dukes, the U.S. Supreme Court reversed the certification of a class of more than 500,000 current and former female employees of Wal-Mart in a case alleging widespread gender discrimination under Title VII. The Supreme Court’s holding heightens the commonality standard under Rule 23(a) making it much more difficult for plaintiffs to establish “significant proof” that an employer is operating under a general policy of discrimination. Importantly, the decision squarely rejects the notion that an employer’s policy of decentralized decision-making by itself can support a class action where the standard requires proof of common issues of fact. Between the lines, the ruling provides important guidance to employers and HR professionals who wish to preempt class allegations. The decision contains parameters that help minimize potential liability, particularly for businesses that use discretionary decision-making within their personnel policies.

I. Introduction

In one of its most significant decisions regarding the standards for class action certification under Rule 23 of the Federal Rules of Civil Procedure, the U.S. Supreme Court, in Wal-Mart Stores, Inc. v. Dukes, reversed the certification of a class of more than 500,000 current and former female employees of Wal-Mart in a case alleging widespread gender discrimination. The decision contained parameters that help minimize potential liability, particularly for businesses that use discretionary decision-making within their personnel policies.

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gender discrimination under Title VII. While the full impact of *Dukes* is yet to be seen, one of its most lasting impacts will likely be the way courts analyze discretionary decision-making processes of employers when considering class certification motions.

For the last thirty years, plaintiffs have argued that that the Supreme Court opened the door for certification of class actions based on discretionary decision-making in *General Telephone Co. v. Falcon*.\(^3\) In that decision, the Court commented in a footnote that “[s]ignificant proof that a employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision-making processes.”\(^4\) Though the Supreme Court came far short of endorsing such class actions, plaintiffs widely relied on the case for the proposition that commonality may be satisfied by evidence of discretionary decision-making processes. The Supreme Court’s latest decision in *Dukes* clarifies its position regarding discretionary decision-making and puts a nail in the coffin of overbroad class claims seeking to attack decentralized decision-making based on ill-defined, allegedly discriminatory policies.

**II. “Subjective” Decision-Making Before *Dukes***

The Supreme Court previously recognized that individualized personnel decisions are not inherently discriminatory. For example, in *Watson v. Fort Worth Bank & Trust*, the Supreme Court stated that “an employer’s policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of

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\(^3\) *General Telephone Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982).

\(^4\) *Id.*
discriminatory conduct.” The Supreme Court noted that “it may be customary and quite reasonable simply to delegate employment decisions to those employees who are most familiar with the jobs to be filled and with the candidates for those jobs.” The Supreme Court more recently commented that “[e]mployment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify.” Notwithstanding, before Dukes, courts came to differing conclusions as to whether to certify class actions based on discretionary employment decisions, though a majority of courts rejected certifying such actions.

A. Courts Denying Commonality Where Plaintiffs Challenged Discretionary Decision-Making

Seizing on the Supreme Court’s language regarding “entirely subjective decision-making,” courts typically denied class certification where the employer used both discretionary and objective factors. For example, in Reid v. Lockheed Martin Aeronautics Co., plaintiffs brought claims alleging pattern and practice discrimination against African-American employees in promotion, training, assignments, compensation and performance evaluations. Though the plaintiffs claimed that the employer used an entirely subjective process with respect to promotions, training, compensation and evaluations which they claimed established commonality, the court denied certification finding that the employer’s process was not entirely subjective. The court noted that

6 Id.
amongst other considerations, certain management directives introduced some objective criteria with regard to compensation and promotions.\(^9\)

Likewise, class certification was denied in *Abram v. United Parcel Serv. of Am., Inc.* where a group of African-American supervisors claimed that the defendant’s system for determining supervisors’ compensation was subjective and resulted in discrimination. Plaintiffs argued that there was “too much discretion and ‘subjective judgment’ on the part of center managers.”\(^10\) The court concluded that the process utilized for determining compensation was not “entirely subjective” within the meaning of *Falcon*. In so holding, the court noted that there were detailed evaluation forms to be completed, and that the discretionary factors listed on those forms did not raise any issues because “subjective criteria necessarily and legitimately enter into personnel decisions involving supervisory positions.”\(^11\) The court concluded that while some individual managers might be able to use racial bias in performance evaluations, the defendant’s “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.”\(^12\) The court found that “[i]f the decision to permit some measure of subjectivity could be regarded as itself a discriminatory practice, virtually all Title VII cases against large employers would be

\(^9\) *Id.* at 676.

\(^{10}\) 200 F.R.D. 424, 426 (E.D. Wis. 2001).

\(^{11}\) *Id.* at 430.

\(^{12}\) *Id.*
transformed into nationwide class action lawsuits.” The Eleventh Circuit similarly noted in *Chapman v. AI Transport* that:

> It is inconceivable that Congress intended anti-discrimination statutes to deprive an employer of the ability to rely on important criteria in its employment decisions merely because those criteria are only capable of subjective evaluation. To phrase it differently, subjective reasons are not the red-headed stepchildren of proffered non-discriminatory explanations for employment decisions. Subjective reasons can be just as valid as objective reasons.

In *Vuyanich v. Republic Nat’l Bank of Dallas*, the Fifth Circuit reversed the district court’s decision granting certification to a class of female African Americans alleging discrimination in pay, promotion and maternity leave practices because the employer’s reliance on two objective inputs in hiring decisions, education and experience, defeated plaintiffs’ claims that the process was “entirely subjective.” Also focusing on the presence of some objectivity in the defendant’s decision-making process, the court in *Jones v. GPU, Inc.* held that “the entirely subjective standard is a difficult one because the presence of some objective criteria in the process precludes a finding of ‘entirely’ subjective.” The court concluded that the “presence of objective criteria or oversight precludes an ‘entirely subjective’ method of class certification.

Likewise in *Armstrong v. Fed. Deposit Ins. Corp.*, the court denied certification because it found that the employer’s merit promotion plan did not vest officials with

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13 Id.

14 229 F.3d 1012, 1034 (11th Cir. 2000).

15 723 F.2d 1195, 1199 (5th Cir. 1984).


17 Id. at 97.
limitless discretion where officials compared applications with quality ranking factors and the fact that the officials used discretion is applying the factors did not render the process “entirely subjective.” 18 In so finding, the court held that although the officials used discretion in their decisions, “[t]he selection process is based, at least in part, on identifiable criteria.” 19 More recently, in Serrano v. Cintas Corp., the court denied class certification because commonality was not satisfied because hiring decisions were made on widely differing objective and subjective factors. 20

In a different approach, a small minority of courts regarded the existence of discretionary decision-making as a basis to deny commonality altogether. In Ellis v Elgin Riverboat Resort, the court denied certification finding that the employer’s “decentralized hiring procedure, which allows decisionmakers to consider subjective factors, supports individualized claims of discrimination but cuts against the assertion that an employer engages in a pattern or practice of discriminatory hiring as a standard operating procedure.” 21 Likewise, in Moore v. Boeing Co., the court denied certification finding that that “the only ‘policy’ or pattern or practice that they can point to is what they refer to as ‘excessive subjectivity.’” In other words, they claim that because Boeing’s managers make the decisions subjectively, each subjective decision discriminates against women

19 Id.
class members. This type of claim of disparate treatment requires individualized determination, rather than class treatment."22

B. Courts Finding Commonality Based On “Subjective” Decision-Making

Though the majority of courts denied class certification before Dukes, a sizeable minority of courts found “subjective” decision-making to be a basis for finding commonality. In Hnot v. Willis Group Holdings Ltd., the court certified a class of female employees alleging gender discrimination with regard to promotion and compensation decisions.23 The court found that commonality existed based on allegations of a common policy of granting “unfettered discretion” to regional and local officers in making promotion and compensation decisions, the fact that compensation and promotion decisions were subject to review and oversight by human resources, and statistical reports showing disparities in promotion and compensation between high-level male and female employees.24 In Carlson v. C.H. Robinson Worldwide, Inc., the court found commonality existed where plaintiffs claimed that defendant “failed to promote women proportionally to their workforce numbers because it operated on all-male, centralized subjective decision-making promotions process, employed a gender-biased personality test to assess promotability, failed to post branch manager opportunities, and failed to utilize an application process in favor of a ‘tap on the shoulder’ policy.”25 The court found that defendant’s failure to post available positions, failure to have a formal

24 Id. at 482-83.
path to promotion and failure to maintain a record-keeping system of promotion was analogous to “subjective decisionmaking.” Likewise, in *Velez v. Novartis Pharms. Corp.*, the court found commonality on the basis of the subjectivity of the management system, combined with anecdotal and statistical evidence of discrimination.27

Based on a similar rationale, in *Dukes v. Wal-Mart*, plaintiffs sought to justify class certification with a combination of expert opinions, factual evidence, statistical evidence, and anecdotal evidence purporting to show a corporate policy and common pattern of discrimination imposed on female employees nationwide. The district court found that commonality existed because “Plaintiffs present[e]d evidence that Wal-Mart’s policies governing compensation and promotions are similar across all stores, and build in a common feature of excessive subjectivity which provides a conduit for gender bias that affects all class members in a similar fashion.28 Although the district court recognized that “excessive subjectivity” alone did not necessarily satisfy the commonality requirement for class actions, it found that plaintiffs’ evidence regarding statistical disparities and anecdotal evidence, coupled with Wal-Mart’s policy of decentralized, subjective decision-making satisfied commonality.29 The Ninth Circuit affirmed the district’s decision finding that it was not an abuse of discretion.30

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26 *Id.* at *11.


28 222 F.R.D. 137 (N.D. Cal. 2004), aff’d, 509 F.3d 1168 (9th Cir. 2007), rev’d, 131 S. Ct. 2541 (2011).

29 *Id.* at 149-50.

30 509 F.3d 1168 (9th Cir. 2007) rev’d, 131 S. Ct. 2541 (2011).
III. The Supreme Court’s Decision And Subjectivity

Though the district court and Ninth Circuit both endorsed Plaintiffs’ theory in *Dukes*, the Supreme Court concluded that the “common” policy of permitting local managers to use discretion to make employment decisions based upon subjective factors did not satisfy the commonality requirement of Rule 23(a)(2). Significantly, the Supreme Court held that the commonality requirement is not met by raising “common questions” but rather by demonstrating a class-wide ability to generate common answers that are capable of class-wide resolution. The Supreme Court addressed the “wide gap” between an individual claim of discrimination and the existence of a company policy of discrimination that creates a class of individuals with the same injury as the named plaintiff, which it first acknowledged in *General Telephone Co. of Southwest v. Falcon*.

It noted that such a gap could be bridged in two ways. First, it cited the case of a uniform biased testing procedure that impacted all test takers in the same way. Second, it could occur when there is “significant proof” that an employer “operated under a general policy of discrimination.”

Concluding that the first factor had no application in the case, the Supreme Court opined that the only evidence of a corporate policy plaintiffs showed was Wal-Mart’s policy of allowing discretion by local supervisors over employment decisions, which in

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32 *Id.* at 2551.


34 131 S. Ct. at 2553.
and of itself was not evidence sufficient to raise an inference of discrimination. In essence, it fell far short of “significant proof” that the company operated under a general policy of discrimination. Indeed, the Supreme Court squarely rejected the notion that a common policy of decentralized decisions by itself can support a class action where the standard requires proof of common issues of fact:

The only corporate policy that the plaintiffs’ evidence convincingly establishes is Wal-Mart’s “policy” of allowing discretion by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy against having uniform employment practices. It is also a very common and presumptively reasonable way to doing business—one that we have said “should itself raise no inference of discriminatory conduct.”

In so finding, the Supreme Court’s decision appears to tacitly embrace the position advanced in the amicus brief filed in support of Wal-Mart by the Society for Human Resource Management and HR Policy Association (“SHRM brief”). The SHRM brief argued that “subjective” decision making does not mean inherently “biased” or “capricious” decision-making, but rather decision-making that relies on “informed, individualized judgment rather than the mechanical application of seemingly objective criteria.” In other words, the SHRM brief essentially argued that “subjective” decision-making was a loaded term because it improperly suggested decisions made on personal

35 Id. at 2554.
36 Id. at 2555.
37 Id. at 2554
38 See amicus brief filed by the Society for Human Resource Management and HR Policy Association, Addendum A.
39 Id. at p. 10.
bias, rather than decisions made on legitimate factors that cannot be readily measured quantitatively such as performance ratings, tenure, and a stated willingness to relocate.  

Notably, the Supreme Court’s opinion did not use the loaded term “subjective” in its discussion of Wal-Mart’s policy, and instead, consistent with the position advocated in the SHRM brief, adopted the more neutral term and accurate term “discretionary” decision-making.

The Supreme Court’s opinion further noted that while “giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory” the fact “this type of Title VII claim ‘can’ exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common.”  

Moreover, the court observed that, “demonstrating the invalidity of one manager’s use of discretion will do nothing to demonstrate the invalidity of another’s. A party seeking to certify a nationwide class will be unable to show that all the employees’ Title VII claims will in fact depend on the answers to common questions.”  

The Supreme Court concluded that plaintiffs were unable to identify a common mode of exercising discretion that pervaded the entire company and noted that “[i]n a company of Wal-Mart’s size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction.”

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40 See id. at pp.10-14.

41 131 S. Ct. at 2554.

42 Id.

43 Id. at 2555.
Significantly, the Supreme Court rejected the testimony of plaintiffs’ social science expert who claimed that Wal-Mart had a culture that made it susceptible to gender bias, finding it irrelevant to the question of whether plaintiffs could prove a general policy of discrimination. The Supreme Court concluded that the expert testimony demonstrated no linkage between sexual-bias stereotyping and employment decisions that adversely affected the class members and that the testimony fell far short of “significant proof” that the company operated under a general policy of discrimination. The Supreme Court further suggested that the expert’s testimony would need to pass muster under the Daubert standard for the admission of expert testimony, but found that question unnecessary to reach. The Supreme Court also rejected the use of aggregate statistical analyses and the mere existence of gender disparities in pay, promotion, or representation as enough to meet the commonality burden. Instead, the Supreme Court suggested that to show commonality, a plaintiff would at least need to demonstrate store-by-store disparities. Finally, the Court rejected plaintiffs’ anecdotal proof, finding that the proffered affidavits from 120 individuals, or 1 out of every 12,500 class members, fell well short of meeting the burden of having “significant proof” that Wal-Mart operates under a general policy of discrimination.

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44 Id. at 2553-54.
45 Id.
47 131 S. Ct. at 2555.
48 Id.
49 Id. at 2556.
The Supreme Court also importantly observed that the commonality inquiry involved a “rigorous analysis” that overlapped with the merits of the case because “the crux of the inquiry is ‘the reason for a particular employment decision’” and “[w]ithout some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question why was I disfavored.”

Thus, the Supreme Court confirmed that a district court should consider and resolve any issues of fact that are necessary to determine whether one or more elements of Rule 23 are satisfied, regardless of whether those issues may overlap or be identical to one or more issues to be decided in ruling on the merits of the plaintiff's claims.

IV. The Aftermath Of Dukes

The tangible impact of the Supreme Court’s decision in discrimination cases is too early to tell. To date, there have been very few employment discrimination cases applying the Supreme Court’s decision in Dukes in a class certification context. The one area where there has been a flurry of decisions, however, is in wage and hour cases. There are very few cases, however, that offer any sort of insight into “subjective” decision-making because there is typically little discretion or subjective judgment in determining an employee’s right to wages because it often arises automatically by

50 Id. at 2552.

51 From June 20, 2011 to September 3, 2011, the Supreme Court’s decision in Dukes has been cited and discussed by numerous courts in a variety of contexts relating to class certification issues. Addendum B summarizes some of the key decisions that provide a meaningful analysis of the Dukes holding.

operation of law.\textsuperscript{53} Notwithstanding, the issue of discretionary decision-making in the context of certification has been addressed by a few courts since \textit{Dukes}.

In one of the most significant recent court rulings, in \textit{Ellis v. Costco Wholesale Corp.}, the Ninth Circuit vacated and remanded a district court’s decision finding commonality of a class of current and former employees who alleged gender discrimination in the defendant’s promotion practices.\textsuperscript{54} Plaintiffs claimed that the defendant had a “pervasive culture of gender stereotyping and paternalism.”\textsuperscript{55} Relying extensively on the Supreme Court’s opinion in \textit{Dukes}, the Ninth Circuit found that the district court failed to conduct a “rigorous analysis” to determine whether plaintiffs had met the requirements of Rule 23.\textsuperscript{56} Significantly, the court held that the district court failed to consider the merits of the case to determine the question of “whether there was a common pattern and practice that could affect the \textit{class as a whole}.”\textsuperscript{57} The Ninth Circuit noted that even though the defendant offered expert testimony that gender disparities were only confined to two regions, which was incompatible with an inference of nationwide discrimination, the district found commonality to exist simply because the

\textsuperscript{53} See \textit{Ramos v. SimplexGrinnell LP}, No 07-cv-981, 2011 WL 2471584, *5 (E.D.N.Y June 21, 2011) (applying \textit{Dukes}, certifying class and noting that there is little discretion or subjective judgment in determining an employee’s right to be paid prevailing wages); \textit{Bouaphakeo v. Tyson Foods, Inc.}, No. 5:07-cv-04009-JAJ, 2011 U.S. Dist. LEXIS 95814, *11 (N.D. Ia. Aug. 25, 2011) (applying \textit{Dukes}, certifying class and finding that no inquiry into the individual decision maker’s subjective thought process was necessary because case involved company-wide compensation policy that was applied uniformly at the defendant’s facility).

\textsuperscript{54} No. 07-15838, 2011 WL 4336668 (9th Cir. Sept. 16, 2011).

\textsuperscript{55} \textit{Id}. at * 4.

\textsuperscript{56} \textit{Id}. at *10.

\textsuperscript{57} \textit{Id}.,
plaintiffs’ expert submitted admissible evidence on nationwide discrimination. The Ninth Circuit concluded that it was not enough for the district court to hold that plaintiffs’ expert opinions were admissible, but rather, for purposes of deciding commonality, the district court must also find the opinions persuasive, which the district court failed to do. In so holding, the Ninth Circuit clarified that “a district court must consider the merits if they overlap with the Rule 23(a) requirements.”

In MacGregor v. Farmers Ins. Exchange, the court declined to conditionally certify a collective action brought under the Fair Labor Standards Act (“FLSA”) where plaintiffs alleged that supervisor approval was required for overtime hours and supervisors refused to approve overtime. Noting that the Supreme Court’s decision in Dukes found that leaving employment determinations to the discretion of supervisors did not raise an inference of illegal conduct, the court concluded that collective treatment was imprudent because the lawsuit would involve numerous inquiries into independent supervisor decisions regarding each employees’ requested, approved and refused hours. Similarly, in Ruiz v. Serco, Inc., plaintiffs alleged that the defendant violated the FLSA by willfully misclassifying its employees as exempt from the FLSA’s overtime requirements. Plaintiffs alleged, inter alia, that the defendant had a policy allowing

58 Id.
59 Id.
60 Id. at *8.
62 Id. at *4.
managers or project directors to complete FLSA worksheets classifying particular employees or positions as exempt.64 Citing Dukes, the court concluded that “a company-wide policy of giving discretion to local managers or program directors is not a ‘policy’ capable of evaluation on a class-wide basis.”65

In Bell v. Lockheed Martin Corp., the court denied class certification where Plaintiffs brought gender discrimination claims on behalf of a putative class of women employed by Lockheed Martin Corp. Plaintiffs asserted that certain of Lockheed’s policies and practices had a disparate impact on female employees’ compensation and advancement.66 Relying on the Supreme Court’s opinion in Dukes, the court rejected Plaintiffs’ argument that they had identified a common issue under Rule 23.

Plaintiffs pointed to four alleged Lockheed policies that they argued were common issues, including: (1) when hiring a new employee, a Lockheed hiring manager was free to deviate from the recommended compensation rate by as much as 5%; (2) when calculating merit pay raises, managers were allowed to deviate up to 2% from the recommended merit raise; (3) in the event of a promotion, managers were allowed to increase an employee’s salary up to 6%; and (4) corporate policy mandated company-wide posting of jobs at job levels L3 to L6 (below the director level) and permitted discretion

64 Id. at p. 17.

65 Id. at p. 19. See also In Re Wells Fargo Residential Mortg. Lending Discrimination Litig., No. M:08-MD-01930 MMC, 2011 U.S. Dist. LEXIS 99830 at *17 (N.D. Cal. Sept. 6, 2011) (denying class certification because “where persons who are afforded discretion exercise that discretion differently, commonality is not established”).

for posting of L7 (director) positions. Plaintiffs argued that these policies had a disparate impact on female employees at hire that was exacerbated during annual merit and promotion-based increases.

The court found that Plaintiffs failed to establish the existence of a common question of law or fact under Rule 23(a)(2). Because the allegedly discriminatory Lockheed policies were “substantially similar” to Wal-Mart’s discretionary policies at issue in *Dukes*, the court found that Lockheed’s policies were “entitled to a presumption of validity.” The court also noted that Plaintiffs’ claims, which related to four different policies, were not subject to common answers. The women in the proposed class worked in different geographic locations, in different departments, had different titles, and reported to different supervisors. Lockheed employed more than 136,000 people in four business areas, each of which included multiple business units in multiple locations throughout the country. The court reasoned that “Plaintiffs attempt to raise discrimination claims that depend on the discretion of individual managers in each of Lockheed’s facilities…This is precisely the type of allegation that…*Dukes*…rejected when it explained that for a Plaintiff to satisfy the commonality standard, the claim ‘must depend upon a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor.’”

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67 *Id.* at *18.

68 *Id.* at *20.

69 *Id.*
Dukes, the court found that Plaintiffs were unable to “identif[y] a common mode of exercising discretion that pervades the entire company.”  

In McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., the Seventh Circuit held that the district court erred in rejecting the plaintiffs’ attempts to certify their race discrimination class claims per Wal-Mart Stores, Inc. v. Dukes.  

Plaintiffs challenged the impact of two specific Merrill Lynch policies -- one that allowed brokers to decide to work in “teams” and one that suggested success-based criteria for distribution of departing brokers' accounts -- even though managers had discretion regarding implementation of both policies.  The Seventh Circuit drew a distinction between the situation that gave rise to the Supreme Court’s decision in Dukes and the one before the Seventh Circuit. The Seventh Circuit noted that, under Dukes, “if employment discrimination is practiced by the employing company’s local managers, exercising discretion granted them by top management . . . , rather than implementing a uniform policy established by top management to govern the local managers, a class action by more than a million current and former employees is unmanageable.”  

The Seventh Circuit held that, unlike Dukes, the exercise of discretion was influenced by two company-wide policies which permitted individuals to exercise discretion in a certain

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70 Id. at *26 (quoting Dukes, 131 S. Ct. at 2554-55).

71 No. 11-3639 (7th Cir. Feb. 24, 2012).

72 Id. at 13.

73 Id. at 12.
way -- a way that, according to plaintiffs, caused the alleged disparate impact on African-American employees.\textsuperscript{74}

The above cases suggest that the Supreme Court’s tightening of the commonality standard may result in increased decisions denying certification where there is an employer policy of decentralized, subjective employment decisions. Certainly, the Supreme Court’s decision makes it much more difficult for plaintiffs to establish “significant proof” that an employer is operating under a general policy of discrimination. Additionally, because courts must engage in a “rigorous analysis” before certifying a class action, and must consider the merits of plaintiffs’ claims if they overlap with issues related to certification, plaintiffs may face additional hurdles in meeting their burden with respect to the other Rule 23(a) requirements, not just commonality. Moreover, plaintiffs will face additional challenges with respect to proffering expert evidence because the Supreme Court’s decision makes clear that courts must scrutinize expert opinions offered in support of class certification. Further, based on the Supreme Court’s suggestion that the standard set forth in \textit{Daubert} likely applies to expert evidence used in the class certification process, challenges to expert testimony at the class certification stage will have the effect of requiring an actual showing of commonality by plaintiffs rather than mere assertions of commonality by lawyers or their experts.

Though the Supreme Court’s decision in \textit{Dukes} does not foreclose the possibility of class actions based on discretionary decision-making processes, the Court’s constraint that commonality between plaintiffs be linked with evidence more substantial than

\textsuperscript{74} \textit{Id.} at 14.
statistical or anecdotal data, or expert analysis, will likely make it more difficult moving forward for courts to certify large classes. Accordingly, one of the impacts of the Supreme Court’s decision is the potential uptick in the filing of smaller class actions focused on specific job groups and/or specific geographic locations, with multiple subclasses. Alternatively, plaintiffs may opt to file fewer class actions in federal court to avoid the tightened certification standards, instead relying primarily on state laws.

V. HR Lessons From *Dukes* And Best Practices

While *Dukes* was certainly a significant win for employers, employers still face substantial risks in defending against these types of actions. Almost all businesses at some level implement individualized discretionary decision-making. It is up to employers to *preemptively* take the initiative in implementing steps to preclude similar complaints from developing. One of the main messages to take away from the Supreme Court’s ruling is that subjective decision making at the local level, in conjunction with objective criteria should continue to be regarded as a best practice for employers in order to minimize risks of being faced with a class action.

A. Job Descriptions And Systems For Advancement

As a best practice, consider drafting job titles and descriptions for managerial positions by professionals in order to eschew any confusion surrounding qualifications or responsibilities. By carefully crafting job descriptions, employers can minimize common characteristics in potential classes. Additionally, limiting positions with objective requirements such as specific educational backgrounds, years of experience, or other job-specific prerequisites will safeguard against “entirely subjective” decisions. Further, adopting a clear system for employees to advance in the organization, as well as a system
for posting all jobs internally will ensure that employees know when managerial positions are created or become open. Moreover, employers should consider using a document retention system with regards to hiring practices in order to document and audit employment decisions.

B. Job Evaluations

Employers should avoid evaluating employees with generic evaluations. Using locally-based managers as decision makers, combined with evaluations that directly correlate with specific job descriptions, provides a more accurate evaluation, while also leading employees to the appropriate positions for their skills. Employers should encourage managers to be specific in their evaluations and use specific examples of performance. In addition, employers should have a clearly delineated system for employees to assert complaints of any unfair conduct, including an appeals process for decisions to which an employee disagrees.

C. Strong EEO Policies And Practices

Employers can also minimize risk by developing and enforcing strong EEO policies and practices. SHRM’s brief took an aggressive approach in defending corporate diversity training as a best practice. Wal-Mart invested heavily in its diversity program, setting goals that raised industry standards. The Supreme Court’s decision in Dukes confirms the importance of investment in diversity programs. Diversity training promotes the retention of a talented, diverse workforce, it improves corporate image, and it minimizes the potential for discriminatory decision making and any resulting complaints.
D. Creating A Corporate Culture

As *Dukes* demonstrated, in class action litigation, plaintiffs look for any evidence that company culture aids discrimination. In *Dukes*, examples such as doing the Wal-Mart cheer at meetings; testimony about the “Wal-Mart Way”; company-wide communications through computers and “Wal-Mart TV”; and frequent transfers among stores, were used to demonstrate a high degree of store-to-store uniformity. Employers should be conscious of the practices and traditions that function to enhance an organization’s cohesion and should ensure that the message of implementation and enforcement of EEO policies comes from the top-down. Employers should perform regular training on EEO and harassment policies, and monitor complaint and “open door” policies for effectiveness.

E. Communication And Training Of Managers

Employers should train managers in EEO policies on a frequent basis. Additionally, employers should ensure that decision makers have a solid understanding of what criteria to look for, and the correct process and procedure for hiring or promoting. Ensuring that managers systematically consider all of the same legitimate factors when reviewing candidates for an opening will minimize the risk that an employment decisions are “entirely subjective.”

F. HR Monitoring

HR and personnel managers should keep track of managers regarding their compliance with a company’s diversity policy, especially those managers making decentralized, subjective personnel decisions. Employers should create a framework to monitor and evaluate managers based on their adherence to the corporation’s EEO
policies and other diversity obligations. By staying in the loop on what is happening in an organization, HR departments can advertise internal successes from achieving diversity in managerial positions to decreasing discrimination complaints.

G. Audit Results For Anomalous Decisions

In *Dukes*, it was essential for the plaintiffs to convince the Court that discriminatory practices, if they existed, constituted more than just a few “bad apples.” The plaintiffs’ argued that Wal-Mart had an attitude of “knowing indifference” regarding the alleged disparity of treatment among its workforce through correlating all of the “bad apples” into a trend. However, especially in large, decentralized organizations, there is always the potential for a decision maker to perpetuate discriminatory actions in the group. Instead of waiting for multiple instances of alleged discrimination to spring up, employers should try to preempt any possible trend by rooting out the anomalies.

Employers should analyze hiring, promotion, compensation, and termination data to identify areas of vulnerability, i.e., areas where the company’s employment practices are creating statistically significant disparities between similarly situated male/female or non-minority/minority employees. Employers should consider hiring outside legal counsel to take advantage of legal privileges -- particularly when first setting up ongoing audit practices. Employers should also develop ways to address any issues uncovered in an audit to make adjustments and correct any significant disparities. If no remedial steps are taken, the EEOC could use a company’s awareness of workforce disparities as evidence of intent to discriminate. Likewise, HR and personnel managers should keep track of managers regarding their compliance with a company’s diversity policy, especially those managers making decentralized, subjective personnel decisions. By
creating a framework to monitor and evaluate managers based on their adherence to the corporation’s EEO policies and other diversity obligations, employers can help to foreclose the possibility of being hit with these types of employment class actions.