



CLASS ACTION LITIGATION



REPORT

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CERTIFICATION

Members of the defense bar, not surprisingly, think the U.S. Court of Appeals for the Ninth Circuit went too far in *Dukes v. Wal-Mart Inc.* when it upheld certification of what has frequently been called the largest class action in history.

In this article, experienced employment attorneys Mark S. Dichter and William E. Doyle Jr. examine the ruling in detail in light of both U.S. Supreme Court decisions and rulings by other circuits. They also provide a list of defense strategies for opposing class certification in light of *Dukes*.

This is the third perspective on *Dukes* in *Class Action Litigation Report*. Previously, Professor John C. Coffee Jr. provided the outside observer's perspective (8 CLASS 184, 3/9/07) and class attorney Jocelyn Larkin gave the plaintiffs' point of view (8 CLASS 221, 3/23/07).

The Ninth Circuit Departs From Established Principles to Permit Broad-Based Employment Discrimination Class Actions: An Evaluation of *Dukes v. Wal-Mart*

BY MARK S. DICHTER AND WILLIAM E. DOYLE JR.

In *Dukes v. Wal-Mart Inc.*, 474 F.3d 1214 (9th Cir. 2007) (petition for rehearing *en banc* filed Feb. 20, 2007), the United States Court of Appeals for the Ninth Circuit recently announced several new holdings that will make it far easier for plaintiffs to obtain class certification of employment discrimination claims in California, Arizona, Washington, Oregon, Nevada, Idaho, Montana, Alaska, and Hawaii. The Ninth Circuit,

in a 2-1 opinion, upheld a district court's certification of a massive and diverse class encompassing an estimated 1.5 million women who have worked in a wide range of hourly and salaried positions in Wal-Mart's 3,400 stores across the nation. *Id.* at 1222. The six named plaintiffs seeking to represent this huge class contended that Wal-Mart engaged in a pattern or practice of sex discrimination with regard to pay and promotion practices. *Id.* at 1222. The case is astounding as much for the

Ninth Circuit's new holdings as for the scale of the class whose certification has been approved.

The Ninth Circuit established new principles regarding several important issues that had not been authoritatively addressed in the Circuit, including:

- What is the proper scope of the district court's assessment of evidence in support of and in opposition to motions for class certification where that evidence overlaps substantially with the merits of the claims?

The Ninth Circuit held that district courts are precluded from weighing competing evidence in support of or against class certification if such evidence overlaps substantially with the merits of the claims and, that in such cases, the plaintiffs' evidence must be accepted as long as it is "reasonable." *Dukes*, 474 F.3d at 1224-30.

- May a district court entertain a *Daubert* challenge to expert evidence presented for or against class certification?

The Ninth Circuit held that *Daubert* is not applicable at the class certification stage and that a plaintiffs' expert evidence is acceptable unless it is "fatally flawed." *Dukes*, 474 F.3d at 1227.

- Can subjective decisionmaking be a basis for establishing commonality under Federal Rule of Civil Procedure 23(a)?

The Ninth Circuit held that subjective decisionmaking could serve as the basis for a finding of commonality if it is combined with other evidence tending to support commonality, such as statistical evidence of a pattern of discriminatory results. *Dukes*, 474 F.3d at 1231.

- Are *Teamsters* hearings necessary to determine individual relief in Title VII pattern or practice cases or is a formula approach permissible?

The Ninth Circuit altered the framework for litigating pattern or practice cases under *Teamsters v. United States*, 431 U.S. 324, 360-61 (1977), holding that Wal-Mart would not be permitted to offer evidence that **any** particular class member was not subject to discrimination. *Dukes*, 474 F.3d at 1238-40.

- May a district court certify a class for the award of punitive damages based wholly on a formula approach, without requiring or permitting litigation of individual relief?

The Ninth Circuit approved a formula-based award and allocation of punitive damages to class members without consideration of actual harm to particular class members. *Dukes*, 474 F.3d at 1241-42.

- Is injunctive relief appropriately characterized as the predominant relief sought for purposes of Rule 23(b)(2), based on the representative plaintiffs' assertions that their "primary purpose" is obtaining injunctive relief?

The Ninth Circuit approved certification of the class under Rule 23(b)(2) and determined that the monetary relief sought by the plaintiffs was secondary to their desire for injunctive relief, based on declarations signed by the representative plaintiffs regarding their "primary goal" in bringing the action. *Dukes*, 474 F.3d at 1233-36.

- Is injunctive relief appropriately characterized as the predominant relief sought for purposes of Rule 23(b)(2), where many of the class members are former employees who have no standing to seek injunctive relief?

In *Dukes*, the Ninth Circuit concluded that the case was appropriately certified under Rule 23(b)(2) because the primary purpose of the plaintiffs as a whole was injunctive relief and the former employees also pursued the action for this purpose because they are "concerned about protecting those class members that are suffering as they once did." 474 F.3d at 1235.

This article examines the Ninth Circuit's decision regarding these and other important class certification issues. In addition, this article explores legal arguments that may be advanced to defeat class certification and practical steps employers may take to avoid systemic employment discrimination claims in light of *Dukes*.

Class Certification Under Rule 23

Most of the important holdings in *Dukes* bear on a district court's consideration of a motion for class certification under the Federal Rules of Civil Procedure. Rule 23(a) requires a plaintiff seeking certification of a class action to demonstrate that (1) the class is so numerous that joinder of all members is impracticable [numerosity], (2) there are questions of law or fact common to the class [commonality], (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [typicality], and (4) the representative parties will fairly and adequately protect the interests of the class [adequacy]. Fed. R. Civ. P. 23(a). These Rule 23(a) requirements apply to private plaintiffs (but not to the EEOC) who pursue claims under Title VII. See *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 155 (1982).

While in a particular case all of these requirements may be in dispute, the commonality and typicality requirements frequently are the major contested issues in Title VII class actions. The Court has explained that "[t]he commonality and typicality requirements . . . tend to merge. . . . Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Falcon*, 457 U.S. at 157 n. 13.

Examination of the Major Holdings in *Dukes*

What is the proper scope of the district court's assessment of evidence in support of and in opposition to motions for class certification, where that evidence overlaps substantially with the merits of the claims?

In *Falcon*, the Supreme Court noted that "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." 457 U.S. at 160 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978)). The Court further explained that "[s]ometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to

probe behind the pleadings before coming to rest on the certification question.” 457 U.S. at 160. The Court cautioned that “actual, not presumed, conformance with Rule 23(a) remains indispensable,” and that “[a] Title VII class action, like any other class action, may only be certified if the trial court is satisfied, *after a rigorous analysis*, that the prerequisites of Rule 23(a) have been satisfied.” 457 U.S. at 160-61 [emphasis added].

However, the Court has not provided guidelines regarding this “rigorous analysis” requirement nor has the Court explained the standards district courts should use to evaluate competing evidence offered in support of and in opposition to a class certification motion. Accordingly, one of the most important legal issues in Title VII class actions is the weight district courts should give to evidence supporting or opposing class certification, especially evidence that overlaps substantially with the merits of the plaintiffs’ claims. In Title VII cases, the consideration of such evidence most directly impacts a district court’s finding (or lack thereof) of commonality and typicality, as reflected by the parties’ submissions in *Dukes*.

In *Dukes*, both the plaintiffs and Wal-Mart offered expert statistical testimony addressing whether any disparities existed sufficient to raise an inference of class-wide discrimination. Moreover, plaintiffs offered testimony—challenged on legal grounds by Wal-Mart—from a sociologist who opined that Wal-Mart promoted a strong, uniform corporate culture that *might* have given rise to the use of gender stereotypes. Significantly, in holding that the commonality and typicality requirements had been met, the district court accepted the opinions of the plaintiffs’ experts without considering and weighing the competing expert testimony provided by Wal-Mart or Wal-Mart’s legal challenge to the reliability of the plaintiffs’ social science evidence. *Dukes v. Wal-Mart Inc.*, 222 F.R.D. 137, 153-65 (N.D. Cal. 2004). The Ninth Circuit approved of the district court’s approach and noted that “it has long been recognized that arguments evaluating the weight of evidence or the merits of a case are improper at the class certification stage.” *Dukes*, 474 F.3d at 1227 (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974)).

Importantly, in affirming the district court’s treatment of the parties’ expert evidence, the Ninth Circuit principally relied on the Second Circuit’s decisions in *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999) and *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 135 (2d Cir. 2001), for the proposition that “it was appropriate for the [district] court to avoid resolving ‘the battle of the experts’ at [the class certification] stage of the proceedings.” 474 F.3d at 1229. *Caridad*, according to the Ninth Circuit, held that “a district court may not weigh conflicting expert evidence” at the class certification stage. *Id.* The Ninth Circuit’s reliance on *Caridad* and *In re Visa Check* is surprising, given that, more than two months before the Ninth Circuit’s decision in *Dukes* was published, the Second Circuit issued an important and far-reaching decision that rejected *Caridad* and *In re Visa Check* on these issues. See *Miles v. Merrill Lynch & Co. (In re Pub. Offering Sec. Litig.)*, 471 F.3d 24 (2d Cir. 2006) (petition for rehearing *en banc* filed).

The Second Circuit’s holding in *Miles* represents such a clear departure . . . that it is surprising the Ninth Circuit did not even mention this development in *Dukes*.

In *Miles*, the Second Circuit held that (1) a district court may *not* certify a class without making a ruling that *each* Rule 23 requirement is fully satisfied—rejecting a lesser standard such as “some showing” for satisfying each requirement; (2) *all* of the evidence presented as to a Rule 23 threshold requirement, including competing expert testimony, must be assessed in making that determination; and (3) a district court is required to examine all of the evidence and make a complete determination on the Rule 23 issues, even if there is a substantial overlap between a Rule 23 requirement and the merits of the plaintiffs’ claim. 471 F.3d at 42.

The district court in *Miles*, like the Ninth Circuit in *Dukes*, relied on a reading of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), under which a court “cannot conduct a preliminary inquiry into the merits of a suit” in considering a motion for class certification. See *Miles*, 227 F.R.D. 65, 93 (S.D.N.Y. 2004). In *Eisen*, the Court noted that “[w]e find nothing in either the language or the history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.” 417 U.S. at 177. The Second Circuit acknowledged that the Court’s language had “led some courts to think that in determining whether any Rule 23 requirement is met, a judge may not consider any aspect of the merits, and has led other courts to think that a judge may not do so at least with respect to a prerequisite of Rule 23 that overlaps with an aspect of the merits of the case.” 471 F.3d at 33.

The Second Circuit observed that the Court’s admonition in *Eisen* was addressed to situations where the district court attempted to decide a merits issue having nothing to do with class certification, which is what happened in *Eisen*. 471 F.3d at 33-34. Nothing in *Eisen* suggested, however, that a district court should not determine the class certification issues simply because they overlap substantially with the merits issues. 471 F.3d at 33-34. Based on this reasoning, the Second Circuit rejected the *dicta* in *Caridad* and *In re Visa Check*, and held that “there is no reason to lessen a district court’s obligation to make a determination that every Rule 23 requirement is met before certifying a class just because of some or even full overlap of that requirement with a merits issue.”¹ *Miles*, 471 F.3d at 41. Rather, the Second Circuit held, “a district court is to assess all of the relevant evidence admitted at the class

¹ In fact, the very same Second Circuit judge who wrote the opinion in *Caridad* authored the *Miles* opinion and effectively acknowledged the incorrectness of *Caridad*. See *Miles*, 471 F.3d at 35 n.6 (“As the author of *Caridad*, I welcome the opportunity to acknowledge the shortcomings of its language and to participate with the panel in the pending case in providing needed clarification.”).

certification stage and determine whether each Rule 23 requirement has been met, just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit.” *Miles*, 471 F.3d at 43.

The Second Circuit’s holding in *Miles* represents such a clear departure from *Caridad* and *Visa Check* that it is surprising the Ninth Circuit did not even mention this development in *Dukes*. This must have been a purposeful omission, as Wal-Mart provided the Ninth Circuit with a copy of the *Miles* decision through a Fed R. App. P. 28(j) submission more than two months prior to the Ninth Circuit’s ruling, and the dissenting judge in *Dukes* expressly cited *Miles* in his dissent. 474 F.3d at 1245 n. 11 (Kleinfeld, C.J., dissenting).

In any event, the Ninth Circuit’s view is now at odds with the Second Circuit’s view and the majority of circuits which have ruled on this issue. See *Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005); *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005); *Gaiety v. Grant Thornton LLP*, 368 F.3d 356, 366 (4th Cir. 2004); *Valley Drug Co. v. Geneva Pharmaceuticals Inc.*, 350 F.3d 1181, 1188 n.15 (11th Cir. 2003); *Szabo v. Bridgeport Machs. Inc.*, 249 F.3d 672, 676 (7th Cir. 2001); *Newton v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 259 F.3d 154, 166 (3d Cir. 2001); compare *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 17 (1st Cir. 2005) (declining to provide general standard for evaluating whether a plaintiff’s evidence is sufficient to justify class certification).

May a district court entertain a *Daubert* challenge to expert evidence presented for or against class certification?

Recent amendments to Rule 702 of the Federal Rules of Evidence codified the holdings of *Daubert v. Merrill Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Corp. v. Carmichael*, 526 U.S. 137 (1999), with respect to admissibility of expert testimony. To be admissible under Rule 702, expert testimony must be the “product of reliable principles and methods” and the expert must have “applied the principles and methodology reliably to the facts of the case.” Fed. R. Evid. 702. Under Rule 702, courts must ensure that an expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Kumho Tire Co.*, 526 U.S. at 152.

Under *Daubert* and the Advisory Committee Notes to the amended Rule 702, there are five factors for courts to consider in evaluating whether expert analysis is reliable: (1) whether the technique has been tested; (2) whether the technique has been subject to peer review and publication; (3) the method’s known or potential error rate; (4) the existence and maintenance of standards and controls; and (5) the method’s general acceptance in the scientific community. *Daubert*, 509 U.S. at 593-94; Advisory Committee Notes to Fed. R. Evid. 702 (2000 Am.). Lastly, “Rule 702 . . . requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.” *Daubert*, 509 U.S. at 595.

In *Dukes*, the Ninth Circuit ruled that “courts need not apply the full *Daubert* ‘gate-keeper’ standard at the class certification stage . . . [r]ather, a lower *Daubert* standard should be employed at this [class certification] stage of the proceedings.” 474 F.3d at 1227 (internal quotations omitted) (citing *Visa Check*, 280 F.3d at 132 n.4).

Because of the magnitude of the class certification determination . . . , the minimal standards . . . established by *Daubert* and Rule 702 should apply with full force.

As noted above, the majority of circuits require district courts to determine whether the plaintiffs’ evidence, including expert evidence, is sufficient to establish the requirements of Rule 23(a) in light of the defendant’s competing evidence. It is unclear whether each of those circuits would extend this principle to require the district court to consider only *admissible* evidence. The Fifth Circuit has expressly required “findings . . . based on adequate *admissible* evidence to justify class certification.” *Unger v. Amedisys Inc.*, 40 F.3d 316, 319 (5th Cir. 2005) [emphasis added]. Similarly, the Second Circuit noted in *Miles* that evidence considered at the class certification stage must meet standards of admissibility: “[A] district court is to assess all of the relevant evidence *admitted* at the class certification stage and determine whether each Rule 23 requirement has been met, just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit.” *Miles*, 471 F.3d at 43 [emphasis added]. However, there are few other cases where the courts of appeals have made express holdings on this issue.

Because of the magnitude of the class certification determination and the importance of expert evidence to that determination in employment discrimination cases, the minimal standards of reliability and relevance established by *Daubert* and Rule 702 should apply with full force at the class certification stage. However, formal adherence to the *Daubert* standards may not be as critical where the district court considers and resolves challenges to the reliability and relevance of the expert evidence offered in support of and in opposition to class certification. For example, the Eleventh Circuit has suggested that *Daubert* may not apply at the class certification stage. See *Drayton v. Western Auto Supply*, No. 01-10415, 2002 WL 32508918, at *5 n. 13 (11th Cir. March 11, 2002) (rejecting employer’s argument that district court failed to conduct a “rigorous analysis” before granting class certification because it failed to entertain a *Daubert* challenge to plaintiffs’ statistical evidence).

Nonetheless, in *Cooper v. Southern Co.*, 390 F.3d 695, 716-719 (11th Cir. 2004), the Eleventh Circuit approved the district court’s determination that the plaintiffs’ statistical evidence was insufficient to establish a common pattern of discrimination sufficient to warrant class certification. In particular, the Eleventh Circuit agreed that the plaintiffs’ statistician “did not incorporate variables that would allow the comparison of individuals who were similarly situated with respect to managerial decisionmakers, job types, locations, departments, and the specific criteria relevant for the jobs in question.” 390 F.3d at 717. Similarly, the court of appeals agreed that the statistician’s analysis was insufficient because it “did not take into account the type or level of acquired skills” and because the statistician “calculated ‘experience’ *only* by tabulating the amount

of time that had passed since an individual finished his or her formal education . . . since what those employees have done in the intervening years may be extraordinarily different.” *Id.*

In addition, the Eleventh Circuit noted that the statistical “reports did not factor in any employee’s actual job performance, a consideration that is undeniably important in decisions relating to compensation and promotion.” *Id.* Finally, the Eleventh Circuit agreed with the district court that the plaintiffs’ statistician “did not establish the existence of any specific promotion or compensation policy or practice, let alone trace the alleged racial disparities to such a policy or practice” nor did the analysis “make reference to any of the specific named plaintiffs or their specific similarly-situated comparators, making it altogether unclear how the reports could establish *commonality* among these named plaintiffs’ claims and the overall claims of the affected class.” 390 F.3d at 718.

What is the standard for evaluating the testimony of social science experts at the certification stage?

In many recent Title VII class action cases, plaintiffs offered social science testimony that discrimination likely occurred because employment decisions were left largely to the unchecked discretion of predominantly male managers, whose decisions inevitably were influenced by subconscious biases and stereotypes. Plaintiffs offered this evidence in an attempt to identify a particular employment practice—subjective decisionmaking—that allegedly caused the statistical disparities. They argue that the subjective decisionmaking resulting in discriminatory outcomes is the common practice to which all class members were subjected, thereby establishing commonality under Rule 23(a).

In *Dukes*, the plaintiffs offered social science testimony of Dr. William Bielby to try to establish that statistical pay and promotion disparities were caused by discriminatory decisionmaking. Dr. Bielby contended that Wal-Mart’s practice of affording managers and supervisors some degree of discretion in making pay and promotion decisions likely resulted in some discriminatory decisionmaking. Plaintiffs’ expert reached this conclusion without interviewing any of Wal-Mart’s male managers or supervisors, based on a theory that, as human beings, those managers and supervisors inevitably possessed subconscious biases and stereotypes that necessarily influenced their decisions affecting female employees. Of course, many of the Wal-Mart managers and supervisors who made the employment decisions encompassed within the class allegations were women.

The Ninth Circuit’s approach is perhaps most permissive on whether the district court could rely on these social science experts.

Before the Ninth Circuit, Wal-Mart challenged the district court’s reliance on plaintiffs’ social science testimony on the grounds that the expert’s opinions were vague and imprecise and, as such, did not meet the standards for scientific testimony set forth in *Daubert*,

509 U.S. at 579. Wal-Mart appeared to have ample support for this challenge based on the expert’s admission that he could not determine whether .5 percent or 95 percent of the employment decisions at issue were influenced by subconscious, discriminatory biases. *Dukes*, 474 F.3d at 1227. Like the district court, the Ninth Circuit rejected that argument on the grounds that: (1) “‘experts ordinarily deal in probabilities, in ‘coulds’ and ‘mights’ ”; and (2) courts need only apply an unspecified, lesser *Daubert* standard at the class certification stage. *Dukes*, 474 F.3d at 1226-27. The Ninth Circuit also noted that, even under a full *Daubert* challenge, the testimony of plaintiffs’ social science expert would “satisfy the *Daubert* test because [he] employed a well-accepted methodology to reach his opinions and because his testimony has a ‘reliable basis in the knowledge and experience of [the relevant] discipline.’ ” *Id.* at 1227.

The Ninth Circuit’s approach is perhaps most permissive regarding whether the district court could rely on these social science experts to certify the class. The factual support for the social science experts had no demonstrable relationship to the facts about Wal-Mart’s actual pay or promotion policies or the managers who implemented those policies. Moreover, the methodology employed by these social science experts is controversial and has been openly questioned by those in the relevant academic community. Indeed, many sociologists question how such theories can be applied to the employment context without careful investigation of the particular workplaces in light of the fact that employers implement anti-discrimination policies and other measures which have been proven to be effective in reducing biases and stereotypes.

The impact of *Dukes* is likely to be felt most in the Ninth Circuit. For example, a district court within the Ninth Circuit excluded the testimony of the same expert sociologist who testified for the plaintiffs in *Dukes*. See *Gosho v. U.S. Bancorp Piper Jaffray Inc.*, slip op., No. C00-1611-PJH (N.D. Cal. Oct. 1, 2002) (unpublished). In response to a challenge under *Daubert*, the court in *Gosho* held that the sociologist’s report could not be tested and was not established in the scientific community because the expert admitted in his deposition that “he had no specific knowledge of the operations of any particular [] branch office, nor did he visit any of the branch offices, or speak to any branch managers or any [] employee.” *Id.* at 6-7.

Outside the Ninth Circuit, it is unlikely that the *Dukes* decision will influence many courts to accept social science experts so uncritically. In *Cooper*, the Eleventh Circuit refused to consider social science testimony, noting that it merely “recapitulat[ed] the basic allegations of the plaintiffs in the guise of an expert report” and had “extremely limited use.” 390 F.3d at 718. Indeed, the Eleventh Circuit rejected the plaintiffs’ reliance on the same “excessive subjectivity” theory proffered in *Dukes*, explaining that an expert’s opinion that the employer’s policies “could” facilitate discrimination did not support a finding of commonality where the expert’s opinion failed to “establish the existence of any specific promotion or compensation policy or practice, let alone trace the alleged racial disparities to such a policy or practice.” *Id.*

What is the appropriate method of assessing statistical experts at the certification stage?

Wal-Mart focused much of its appeal on criticism of the plaintiffs' statistical evidence and the district court's determination that the plaintiffs' evidence was sufficient to establish commonality. Wal-Mart's principal argument against the plaintiffs' statistical evidence was that the plaintiffs' expert conducted aggregated statistical analysis that encompassed employees across an entire Wal-Mart region, rather than conducting the analysis for each store.

The court of appeals initially framed its assessment of Wal-Mart's statistical arguments in terms of whether the plaintiffs' statistical evidence was sufficient to "rais[e] an inference of class-wide discrimination." *Dukes*, 474 F.3d at 1228. Based on this standard, the court of appeals appeared to begin to consider the merits of the plaintiffs' and Wal-Mart's competing statistical evidence. *Id.* However, the court of appeals ultimately adopted the lenient standard under which "dueling experts" or weighing of competing expert analysis is improper at the class certification stage, relying on *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d at 135, and *Caridid*, 191 F.3d at 292-93. *Dukes*, 474 F.3d at 1228-30. As noted above, the Ninth Circuit majority did not mention the recent *Miles* decision in which the Second Circuit renounced *dicta* regarding "expert dueling" in *In re Visa Check* and *Caridid*. See *Miles*, 471 F.3d at 51-52 (holding that a district court must weigh competing expert testimony and make legal and factual conclusions regarding such evidence at the class certification stage). Ultimately, the court of appeals rejected Wal-Mart's attacks on plaintiffs' statistical evidence, and concluded that "Wal-Mart provided little or no proper legal or factual challenge to" the plaintiffs' statistical evidence. *Dukes*, 474 F.3d at 1230 (emphasis added).

With regard to Wal-Mart's specific attacks on the plaintiffs' aggregated statistical analysis, the Ninth Circuit ruled that "the proper test of whether workforce statistics should be viewed at the macro (regional) or micro (store or sub-store) level depends largely on the similarity of the employment practices and the interchange of employees at the various facilities." *Dukes*, 474 F.3d at 1228 (citing *Kirkland v. New York State Dep't of Corr. Servs.*, 520 F.2d 420, 425 (2d Cir. 1975)). The court found that the plaintiffs' statistician met this standard by providing a "reasonable explanation" for conducting regression analysis on a regional level. *Dukes*, 474 F.3d at 1228-29.

According to the court of appeals, the plaintiffs' expert prepared a separate multiple regression analysis encompassing the employees in each of Wal-Mart's 41 regions (each region contained 80-85 stores), while Wal-Mart's expert prepared over 7,500 multiple regression analyses encompassing sub-units within stores. *Dukes*, 474 F.3d at 1228-29. The court of appeals found that the plaintiffs' statistician, Dr. Richard Drogin, provided a "reasonable explanation" for conducting regression analysis on the regional level, based on his assertions that a store-level analysis would not "capture" the "(1) effect of district, regional and company-wide control over Wal-Mart's uniform compensation policies and procedures; (2) the dissemination of Wal-Mart's uniform compensation policies and procedures resulting from the frequent movement of store managers; and (3) Wal-Mart's strong corporate culture." *Dukes*, 474 F.3d at 1228-29.

Outside the Ninth Circuit, it is unlikely that the Dukes decision will influence many courts to accept social science experts so uncritically.

The court of appeals dismissed Wal-Mart's argument that "the Chow test"—a statistical diagnostic procedure generally accepted in the statistics profession—indicated that the plaintiffs' aggregated regression analysis was inappropriate. *Dukes*, 474 F.3d at 1229 n.7. The court concluded that "there is no legal support for the contention that a Chow test must—or even should—be applied at the class certification stage. . . . we have not found a single case suggesting that commonality would be undermined if the Plaintiffs' evidence failed this test." *Id.* The court of appeals' treatment of the Chow test is inconsistent with its inquiry into whether the plaintiffs' statistical evidence was sufficient to "rais[e] an inference of class-wide discrimination," which, as noted above, was the way the Ninth Circuit initially framed its assessment of the plaintiffs' statistical evidence. *Dukes*, 474 F.3d at 1228.

Only that inquiry—which obviously overlaps with the merits of the plaintiffs' claims—explains why the court of appeals adopted a standard for the appropriateness of aggregated statistical analysis through reliance on *Kirkland*, 520 F.2d at 425, a case that had nothing to do with class certification. Nevertheless, the court of appeals' shift in focus allowed it to ignore authority supporting the use of the Chow test, including cases considered by the district court, *Dukes*, 222 F.R.D. at 157 (discussing, for example, *Coates v. Johnson & Johnson*, 756 F.2d 524, 542 (7th Cir. 1985), in which the Seventh Circuit agreed that an aggregated regression analysis was inappropriate based on the results of a Chow test).

Moreover, it is unclear why the Ninth Circuit overlooked its own prior discussion of aggregation in *Paige v. California*, 291 F.3d 1141 (9th Cir. 2002), which the district court cited in *Dukes*, 222 F.R.D. at 135. Circuit Judge Hawkins, who was part of the 2-1 majority that decided *Dukes*, was also a panelist in the 3-0 *Paige* decision. In *Paige*, the Ninth Circuit found that aggregation of employment test data across job classifications was justified because the jobs were sufficiently similar to each other:

The plaintiffs demonstrated, by pointing to the State Personnel Reports, the Census reports, and the CHP's own descriptions of the positions, sufficient commonality among the duties and skills required by the various supervisory positions to justify aggregation. The defendants themselves group the supervisory positions together for purposes of their reports to the State Personnel Board and the EEOC.

291 F.3d at 1148. In *Paige*, the Ninth Circuit also permitted aggregation of data for African Americans, Hispanics, and Asians into a combined minority category, finding that the aggregation was justified, again, by the similarity of the positions. 291 F.3d at 1148 ("In general, 'the plaintiff should not be required to disaggregate the data into subgroups which are smaller than the groups which may be presumed to have been similarly

situated and affected by common policies.’” (quoting *Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship and Training Comm.*, 833 F.2d 1334, 1339-40 n. 8 (9th Cir. 1987)).

Under the standard for aggregated analysis adopted in *Paige*, it appears that there is a substantial question whether the occupations encompassed by the plaintiffs’ aggregated analysis in *Dukes* were sufficiently similar to justify aggregation. In *Dukes*, the Ninth Circuit conceded that “[t]he class in this case is broad and diverse . . . encompass[ing] approximately 1.5 million employees, both salaried and hourly, with a range of positions” 474 F.3d at 1224.

Is excessive subjectivity a viable theory of commonality under Rule 23(a)?

The Ninth Circuit held that subjective decisionmaking “by itself is insufficient to meet Plaintiffs’ burden of proof” but was sufficient when combined with other evidence, such as “substantial evidence of Wal-Mart’s centralized company culture and policies” and “considerable statistical evidence demonstrating a pattern of discriminatory pay and promotion for female employees.” *Dukes*, 474 F.3d at 1231.

The Ninth Circuit’s reasoning appears to be inconsistent with the Supreme Court’s decision in *Falcon*, 457 U.S. at 159 n. 15. There, the Court observed that “[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class [action] . . . if the discrimination manifested itself in [employment] . . . practices in the same general fashion, such as through *entirely* subjective decision-making processes.” 457 U.S. at 159 n. 15 [emphasis added]. The Court did not countenance that subjective decisionmaking could be amalgamated with other objective practices to form a common practice of discrimination sufficient to support commonality. In *Bacon v. Honda of Am. Manufacturing Inc.*, 370 F.3d 565, 571 (6th Cir. 2004), the Sixth Circuit expressly rejected this concept:

We do not accept the argument that Honda’s decision-making process is entirely subjective because, as a matter of fact, it is not. Plaintiffs cannot avoid the heavy lifting of showing eligibility for class certification by conflating two exceptions to separate rules for adjudicating discrimination cases. An entirely subjective decision-making process may, theoretically, allow different kinds of employees to be in the same class—a question of class membership (*Falcon*). For the entirely separate purpose of establishing a *prima facie* case of disparate impact, mixed objective and subjective standards may be considered to be purely subjective (*Watson*).

The two exceptions are not interchangeable, however. Plaintiffs are trying to demonstrate eligibility for class membership, which is governed by the “entirely subjective” requirement in *Falcon*. They must prove that the potential members of the class actually have something in common: they are subject to random decision-making. As an entirely separate matter, the Court has been cognizant of the difficulties inherent in proving discrimination and therefore set a relatively low bar for establishing a *prima facie* case. Therefore, counting mixed criteria as subjective furthers the goal of making sure that valid claims get to a jury. The constructive subjectivity in *Watson*

cannot substitute for the actual and complete subjectivity required for the exception in *Falcon* because the cases deal with two unrelated legal issues: class membership and the elements of a *prima facie* case. We hold that the *Falcon* requirement is not met because the plaintiffs have not shown that the wide range of class members are all subject to the same, exclusively-subjective, decision-making process.

370 F.3d at 571-72 (citations omitted); see also *Garcia v. Johanns*, 444 F.3d 633 n.10 (D.C. Cir. 2006) (following *Bacon* for the proposition outlined in the quote above).

Are “Teamsters hearings” necessary to determine individual relief in Title VII cases or is a formula approach permissible?

The Ninth Circuit ruled that Wal-Mart would not be permitted to offer defenses regarding whether *any* particular class member was in fact subject to a pattern or practice of discrimination. *Dukes*, 474 F.3d at 1238-39.

The court based its ruling on a very strained interpretation of *Teamsters*, 431 U.S. at 361, which held that, where plaintiffs seek “individual relief for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief.” The Ninth Circuit explained that, under *Teamsters*, a district court “has the discretion to be flexible and to ‘fashion such relief as the particular circumstances of a case may require to effect restitution.’” *Dukes*, 474 F.3d at 1238 (quoting *Teamsters*, 431 U.S. at 364 (quote drawn from section discussing whether nonapplicants could be awarded retroactive seniority as a remedy)).

The Ninth Circuit ignored one of the key principles of *Teamsters*, that an employer has the opportunity to show that individual class members were not subject to discrimination and, therefore, not entitled to individual relief. Indeed, one of the central holdings in *Teamsters* is that, once a discriminatory pattern or practice has been established, “the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.” 431 U.S. at 361-62. This central holding is meaningless if individual hearings can be jettisoned simply to make class litigation manageable. There is no basis for concluding that the Supreme Court viewed individual hearings as optional in large class actions. Indeed, the Court was well aware that employment discrimination claims frequently would be brought as class actions. See, e.g., *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 405 (1977) (“[S]uits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs . . .”) [issued May 31, 1977, the same day as *Teamsters*].

In *Dukes*, the Ninth Circuit cited *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764 (1977), as support for its conclusion that *Teamsters* hearings were not required. 474 F.3d at 1238. But in *Franks*, the Court came to the exact opposite conclusion as the proposition for which the Ninth Circuit cited it in *Dukes*:

Generalizations concerning such individually applicable evidence cannot serve as a justification for the denial of relief to the entire class. Rather, at such time as individual class members seek positions as OTR drivers, positions for which they are presumptively entitled to priority hiring consideration under

the district court's order, evidence that particular individuals were not in fact victims of racial discrimination will be material. But petitioners here have carried their burden of demonstrating the existence of a discriminatory hiring pattern and practice by the respondents and, therefore, the burden will be upon respondents to prove that individuals who reapply were not in fact victims of previous hiring discrimination. Only if this burden is met may retroactive seniority if otherwise determined to be an appropriate form of relief under the circumstances of the particular case be denied individual class members.

424 U.S. at 773 (citations and footnote omitted). Far from denying the employer the right to demonstrate that individual class members were not subject to discrimination, the Court in *Franks* expressly noted that "Bowman may attempt to prove that a given individual member of [the] class . . . was not in fact discriminatorily refused employment as an OTR driver in order to defeat the individual's claim to seniority relief as well as any other remedy ordered for the class generally." 424 U.S. at 773 n. 32.

The Ninth Circuit's ruling is also remarkable because it would appear to foreclose individual evidence of non-discrimination in any class action where the size of the class makes individualized hearings impractical. Indeed, the Ninth Circuit never identified any other aspect of the "particular circumstances" in *Dukes* that justified deviation from the "usual" procedure of holding hearings to consider whether particular class members are entitled to monetary relief.

May a district court certify a class for the award of punitive damages based wholly on a formula approach, without requiring or permitting litigation of individual relief?

The Ninth Circuit ruled that punitive damages could be assessed against Wal-Mart based on a formula approach, without any consideration of actual harm to particular class members. *Dukes*, 474 F.3d at 1241-42. The Supreme Court recently held that, in assessing whether the award of punitive damages comports with due process under the Constitution, "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff." *State Farm Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003). The Ninth Circuit attempted to avoid the Supreme Court's discussion in *State Farm* by claiming that the Supreme Court was concerned only with punitive damages awarded in a multistate action for conduct which may have been unlawful in one jurisdiction, but not in another. *Dukes*, 474 F.3d at 1242.

The Ninth Circuit's interpretation is inconsistent with the scope of the Supreme Court's recent treatment of due process limitations on punitive damages awards. The Court has not issued narrow, case-specific pronouncements in this area. The Court's recent decisions provide an entire framework for assessing whether punitive damages awards are consistent with due process. In *BMW of North America Inc. v. Gore*, 517 U.S. 559 (1996), the Court explained that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that" may be imposed. 517 U.S. at 574.

The Court announced three "guideposts" for assessing whether a defendant has received "adequate notice of the magnitude of the [punitive] sanction": (1) the degree of reprehensibility of the misconduct; (2) the disparity between the harm or potential harm suffered by the defendant and the punitive damages award; and (3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases. *Id.* In *State Farm*, the Court expanded on several of these guideposts in detail. For example, the Court explained the degree of reprehensibility as follows:

We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

State Farm, 538 U.S. at 419-20 (citations to *BMW* omitted). As to the ratio of harm to the punitive damages award, the Court in *State Farm* announced that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 424-25. Accordingly, the Court's discussion in *State Farm* went well beyond the narrow issue upon which the Ninth Circuit distinguished it.

Since the Ninth Circuit's ruling in *Dukes*, the Supreme Court has issued another decision regarding due process limits on punitive damages awards, *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007). The *Philip Morris* decision further calls into question both the reasoning and viability of the Ninth Circuit's ruling on punitive damages. In *Philip Morris*, the Court described its prior rulings in *BMW* and *State Farm* in broad terms, as decisions addressing "fundamental due process concerns" such as "risks of arbitrariness, uncertainty and lack of notice." 127 S. Ct. at 1063. It is clear that the Ninth Circuit failed to consider all of the due process issues implicated by a formula approach to punitive damages in light of the Supreme Court's broad application of *BMW* and *State Farm*. Of equal importance, the Court ruled in *Philip Morris* that due process prohibits punitive damages to be awarded against an "individual without first providing that individual with 'an opportunity to present every available defense.'" *Lindsey v. Normet*, 405 U.S. 56, 66, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972) (internal quotation marks omitted)." 127 S. Ct. at 1063. The Ninth Circuit's decision certainly abrogated Wal-Mart's individual-specific defenses in order to make the case manageable as a class action in light of the massive size of the proposed class.

Is injunctive relief appropriately characterized as the predominant relief sought for purposes of Rule 23(b)(2), based on the representative plaintiffs' assertions that their "primary purpose" is obtaining injunctive relief?

Plaintiffs seeking class certification of Title VII claims frequently move for certification under Rule 23(b)(2), which requires the plaintiffs to demonstrate that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). The Advisory Committee notes to Rule 23(b)(2) explained that certification is not appropriate under Rule 23(b)(2) if the "final relief relates exclusively or predominantly to money damages." Fed. R. Civ. P. 23(b)(2), Adv. Comm. Notes to 1966 amend., 39 F.R.D. 69, 102. In *Molski v. Gleich*, 318 F.3d 937, 949-50 (9th Cir. 2003), the Ninth Circuit held that the district court should determine whether the final relief relates predominantly to money damages by assessing the plaintiffs' primary purposes in litigating the action. Thus, the Ninth Circuit's reliance on this standard in *Dukes* is not surprising.

However, in *Dukes*, the Ninth Circuit appeared to employ a subjective assessment of intent when it examined the plaintiffs' primary purpose for the litigation: "Plaintiffs stated that their primary intention in bringing this case was to obtain injunctive and declaratory relief—not money damages—and Wal-Mart has failed to effectively rebut Plaintiffs' statements or cast doubt on their reliability." 474 F.3d at 1236. This assessment conflicts with *Molski*, where the Ninth Circuit adopted an objective standard for evaluating the plaintiffs' primary purposes: "'before allowing (b)(2) certification a district court should, at a minimum, satisfy itself . . . [that] even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought.'" 318 F.3d at 950 n.15 (quoting *Robinson v. Metro-North Commuter Railroad Co.*, 267 F.3d 147, 164 (3d Cir. 2002)).²

In any event, the Ninth Circuit's standard on this Rule 23(b)(2) issue has been rejected by a majority of the circuits. See, e.g., *Barabin v. Aramark Corp.*, No. 02-8057, 2003 WL 355417, at *2 (3d Cir. Jan. 24, 2003) (holding that certification under Rule 23(b)(2) is appropriate only where monetary relief is incidental to injunctive relief, which "depends on: (1) whether such damages are of a kind to which class members would be automatically entitled; (2) whether such damages can be computed by 'objective standards' and not standards reliant upon 'the intangible, subjective differences of each class member's circumstances'; and (3) whether such damages would require additional hearings to deter-

² In *Dukes*, the Ninth Circuit also approved of the district court's plan to certify the class under Rule 23(b)(2), while providing notice and opt-out rights for the class members, which are required under Rule 23(b)(3), but not provided for in Rule 23(b)(2). 474 F.3d at 1236. This appears to conflict with the Advisory Committee Notes to the 2003 amendments to Rule 23, which provide that "[t]here is no right to request exclusion from a (b)(1) or (b)(2) class." Advisory Comm. Notes, 2003 Amendments to Rule 23(c)(2). The Ninth Circuit appears to have disregarded the structure and intent of Rule 23(b)(2), in contravention of the Supreme Court's admonition that "[t]he text of [Rule 23] . . . limits judicial inventiveness." See *Amchem Prod. Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

mine." (citing *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)); *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 446-47 (6th Cir. 2002) (concluding that injunctive relief does not predominate over monetary damages where highly individualized determinations would be required to determine those damages); *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001) (adopting Fifth Circuit's formulation in *Allison*, 151 F.3d at 415, that monetary relief predominates unless it is incidental to injunctive relief); *Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577, 580-81 (7th Cir. 2000) (noting that the Seventh Circuit has adopted the *Allison* standards for determining whether a claim for monetary relief can be certified under Rule 23(b)(2)).

Is injunctive relief appropriately characterized as the predominant relief sought for purposes of Rule 23(b)(2), where many of the class members are former employees who have no standing to seek injunctive relief?

In *Dukes*, the Ninth Circuit concluded that the fact "[t]hat some of the class members are former employees does not alter the primary intent of the plaintiffs as a whole . . ." 474 F.3d at 1235. The Ninth Circuit also noted that "[i]n cases involving discrimination, it is especially likely that even those plaintiffs safe from immediate harm will be concerned about protecting those class members that are suffering as they once did." *Id.*

The Ninth Circuit appears not to have taken seriously Wal-Mart's constitutional standing arguments. Wal-Mart argued that the Ninth Circuit's "primary purpose" formulation in *Molski* must be subject to the limitations of Article III standing. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (noting that courts must be "mindful that [Rule 23's] requirements must be interpreted in keeping with Article III constraints" (quoting *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 612-12)); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.").

Non-employee plaintiffs cannot as a matter of law have a primary purpose of seeking injunctive relief because they lack standing to seek such relief unless they indicate an intent to seek re-employment with Wal-Mart. See *Gratz v. Bollinger*, 539 U.S. 244, 260-62 (2003) (holding that plaintiff had standing to seek prospective relief with respect to the University's continued use of race in undergraduate admissions because he "demonstrated that he was 'able and ready' to apply as a transfer student should the University cease to use race in undergraduate admissions.").

Injunctive relief will not redress any of the historical injuries of which they complain, and they have standing only to the extent they seek monetary relief. See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (holding that standing cannot be based on speculative assertions of future harms, there must be a "a sufficient likelihood that [the plaintiff] will again be wronged in a similar way"); *Faibisch v. Univ. of Minn.*, 304 F.3d 797, 801 (8th Cir. 2002) (holding that former employee lacks standing to seek injunctive relief because she had no specific intention to seek reemployment); *Jackson v. Motel 6 Multipurpose Inc.*, 130 F.3d 999, 1007 (11th Cir. 1997) (ruling that former employees lack standing to seek injunctive relief where they "allege[d] neither that

they will be discriminated against by [the employer] in the future nor any facts that would support such a conclusion.”); *see also Deakins v. Monaghan*, 484 U.S. 193, 199-200 (1988) (“Article III of the Constitution limits federal courts to the adjudication of actual, ongoing controversies between litigants. . . . It is not enough that a controversy existed at the time the complaint was filed, and continued to exist when review was obtained in the Court of Appeals.” (citations omitted)).

The Ninth Circuit did not discuss these standing issues and only noted that “no case discusses the employment status of the plaintiffs as a factor in granting or denying class-certification under Rule 23(b)(2) even when former employees are explicitly mentioned as part of the class.” 474 F.3d at 1235 (citing *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001)).

Defense Strategies to Oppose Class Certification Under the *Dukes* Framework

Perhaps the best defense strategy is to prepare for and try to avoid pattern or practice claims before they arise through a privileged class action risk assessment. A class action risk assessment is a legal and statistical review of personnel policies, practices, and data to examine the risk of a systemic discrimination claim and to develop risk mitigation measures.

If a claim arises, however, the following strategies may be successful in defeating class certification even under the *Dukes* framework:

- Attack the class representatives’ substantive claims, thereby depriving them of Article III standing to represent the putative class. *See Jenkins v. BellSouth Corp.*, No. 02-1057 (N.D. Ala. Sept. 19, 2006).
- Argue that the plaintiffs’ agreement to proceed under a “single motive” theory requires the plaintiffs to submit statistical evidence that controls for more than just the “major” factors influencing pay and promotion decisions. In *Dukes*, the plaintiffs agreed to proceed under a “single motive” theory of discrimination to avoid the “same decision defense” that Wal-Mart contended would make the litigation unmanageable in a class format. 474 F.3d at 1240. The “same decision defense” is based on amendments to Title VII contained in the Civil Rights Act of 1991. *See* 42 U. S. C. § 2000e-2(m). Under this defense, the employer has an opportunity to avoid back pay and other monetary liability if it can demonstrate that it would have taken the same adverse action against the plaintiff even in the absence of the unlawful motivating factor. 42 U. S. C. § 2000e-5(g)(2)(B).

This statutory framework essentially codified significant portions of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), in which all members of the Court agreed that a violation of Title VII could be established by a showing that an unlawful factor played a role in the employer’s decision. The three dissenting members of the Court argued that a plaintiff must establish that the unlawful factor was the “but for” cause of the adverse employment action. *Id.* at 284-86. Writing for the dissenters, Justice Kennedy noted that “[n]o one contends, however, that sex must be the sole cause of a decision before there is a Title VII violation.” *Id.* at 284.

However, the “single motive” theory that the plaintiffs adopted in *Dukes* means that the plaintiffs must prove that there was only one motive for the challenged employment decisions, and that motive was discrimination. Thus, the plaintiffs have adopted a theory under which they must establish that gender was the sole cause of the challenged employment decisions. Ignoring legitimate factors that are not “major” may be sensible where a Title VII violation is established by a demonstration that sex played some role in the employer’s pay decisions. *Bazemore v. Friday*, 478 U.S. 385, 397 (1986) (holding that a multiple regression analysis is relevant as long as it controls for the “major” legitimate factors that influenced the employer’s pay decisions). However, this conclusion does not follow where the Title VII claim requires proof that sex was the sole cause of those pay decisions.

Because this issue was not considered by the Ninth Circuit in *Dukes*, it leaves open an argument in future cases that class certification may only be established through statistical proof that eliminates more than just the major legitimate factors and establishes a common pattern in which discrimination was not only a contributory factor but the sole factor causing pay disparities between similarly situated employees.

- Argue that resolving statistical outliers will make the action unmanageable in class format due to the fact that statistical analysis encompassing a large number of current and former employees will produce a significant number of outliers. Litigation of the action as a class will require the trier of fact to consider individual evidence regarding whether statistical outliers/undue influencers should be removed from the regression models because of unique circumstances (e.g., an employee with a Ph.D. in music unrelated to his or her job functions). The number of such outliers will only be a small fraction (on average, approximately .2 percent) of the employees and former employees included in the regression models. But if the proposed class is massive, the number of outliers could easily reach several thousands (2,000 outliers for a regression encompassing 1 million employees).

Even under the *Dukes* framework, Wal-Mart presumably would have a right to introduce individual-specific evidence that there are legitimate reasons for excluding these outliers/undue influencers from the regression models, because those arguments go to the weight of the plaintiffs’ statistical evidence. *Bazemore*, 478 U.S. at 397. Such a submission would be appropriate under *Teamsters*, which held that, once the plaintiffs establish a *prima facie* case of a pattern or practice of discrimination, the employer has the burden “to defeat the *prima facie* showing of a pattern or practice by demonstrating that the [plaintiffs’] proof is either inaccurate or insignificant.” 431 U.S. at 360. A defense based on statistical outliers certainly is designed to meet the plaintiffs’ pattern or practice evidence. 431 U.S. at 360 n.46.

- Highlight the plaintiffs’ failure to establish that any particular employment practice both caused statistical disparities and permitted excessively subjective decision making. *See Gutierrez v. Johnson &*

Johnson, No. 2:01-CV-5302, 2006 WL 3779751, at *8 (D.N.J. Dec. 19, 2006) (“Statistics and naked assertions of excessive subjectivity are inadequate to establish that Plaintiffs have suffered a common harm susceptible to common proof. Plaintiffs have not demonstrated the required nexus between their statistical analyses and a policy or practice.”).

- Challenge the methodology of the plaintiffs’ social science expert by showing the rejection of the expert’s theories in the academic literature and through other experts in the relevant field.
 - Help corporate deponents understand that the company’s written policies, training presentations, and other formal or informal management guide-
- lines all provide “objective” criteria for employment decisions.
 - Seek discovery of circumstantial evidence that would establish that the representative plaintiffs’ primary goal in the litigation is to obtain monetary relief, making the case unsuitable for certification under Rule 23(b)(2).
 - Assuming that the Second Circuit’s holding in *Miles* survives, employers should argue that the Ninth Circuit’s admonition against “expert dueling” at the class certification stage is no longer appropriate after the Second Circuit’s renunciation of *Caridad* and *In re Visa Check*, upon which the Ninth Circuit relied.

