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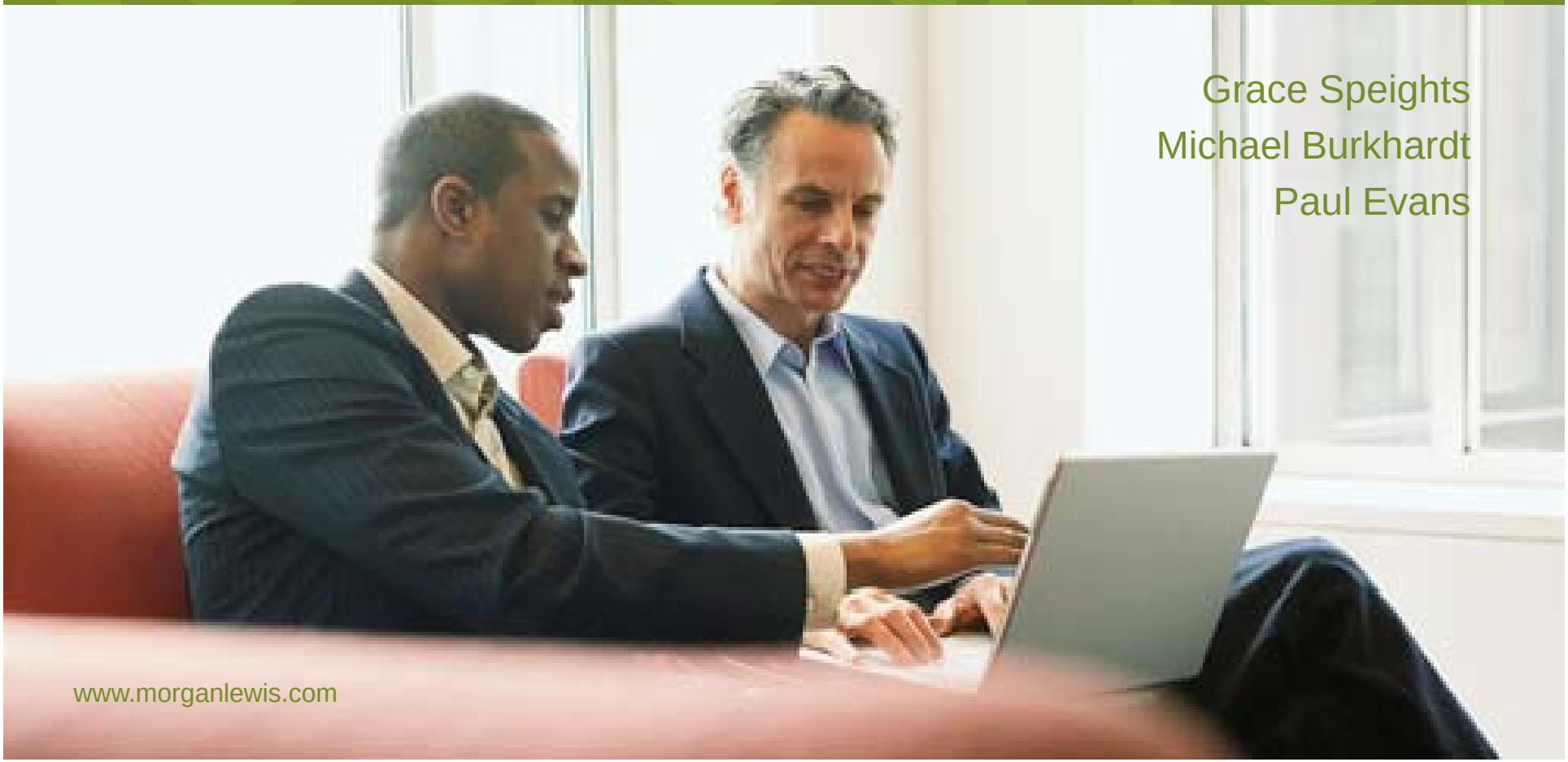
Wal-Mart v. Dukes – What's Next for Employment Class/Collective Actions



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Wal-Mart Stores, Inc. v. Dukes,

--- S. Ct. ---, 2011 WL 2437013 (June 20, 2011)

- Summary of the W*al-Mart* class claims.
  - 1.5 million–person class of current and former female Wal-Mart employees.
  - Brought disparate impact and pattern/practice disparate treatment claims for discrimination in promotions and compensation.
  - Argued that managerial discretion and excessive subjectivity permitted gender bias to cause discriminatory outcomes (i.e., disparities in promotions and compensation)
  - Relied on social science expert that gender stereotyping results in discriminatory outcomes where there is excessive subjectivity in decisionmaking processes.
  - Relied on aggregate statistical disparities adverse to women in terms of representation, compensation, and promotions to support class claims.

Wal-Mart Stores, Inc. v. Dukes,

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- Supreme Court reverses class certification decision that had been upheld by Ninth Circuit.
  - The Court reversed class certification and determined that the class could not be certified under Rule 23(a) or 23(b)(2).
  - The Court determined that plaintiffs had failed to satisfy the commonality requirement under Rule 23(a).
  - The Court further determined that plaintiffs could not maintain a class action under Rule 23(b)(2) where they sought individual monetary damages such as back pay.
  - The Court's decision will also have far-reaching impact on any effort to certify these types of claims under Rule 23(b)(3) because Court held that monetary claims such as back pay cannot be determined on a formulaic basis but require individualized hearings.

Review of Merits at Class Certification Stage

- A district court should not just accept plaintiffs' allegations as true at class certification.
- A district court must engage in a "rigorous analysis" before certifying a class action and consider the merits of plaintiffs' claims if they overlap with issues related to certification.
- The Court also suggested that a district court must scrutinize expert opinions offered in support of class certification under the standards established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

Merely Stating Common Question Does Not Satisfy Commonality

- Although establishing even a single common question could be sufficient, merely stating a common question (e.g., whether Title VII was violated) is not sufficient.
- Allegations that Wal-Mart had a “common” policy of permitting excessive discretion/subjectivity did not satisfy commonality.

Merely Stating Common Question Does Not Satisfy Commonality

- The commonality requirement is not met by "generalized questions" but can only be met where the purported class suffers the "same injury."
- A plaintiff must identify common questions that:
  - depend upon the same contention; AND
  - Provide proof of the contention that "resolves an issue that is central to the validity of each one of the [class members'] claims in one stroke."

Wide Gap Between Individual Claims and Class Claims

- There is a “wide gap” between an individual claim and a company policy of discrimination that creates a class of individuals with the same injury.
- To bridge the “wide gap” a plaintiff must:
  - demonstrate a uniform policy like a biased testing procedure that impacted everyone in the same way; OR
  - present “significant proof” that an employer “operated under a general policy of discrimination.”

Delegation of Discretion Insufficient to Establish Commonality

- The Court made it clear that "the bare existence of delegated discretion" is not sufficient to establish commonality.
- Significantly, the Court rejected three arguments routinely made by plaintiffs in class actions:
  - Rejected use of social science testimony.
  - Rejected aggregate statistical disparities as supporting commonality.
  - Rejected the use of a small handful of declarations as sufficient anecdotal evidence.

"Social Science" Evidence Rejected as Basis for Commonality

- The Court rejected testimony of plaintiffs' social science expert, who claimed that Wal-Mart had a culture that made it susceptible to gender bias due to managerial discretion/excessive subjectivity.
- Social science expert's testimony did not prove a general policy of discrimination.
- The Court suggested that expert testimony is subject to the *Daubert* standard at class certification.

Aggregate Statistical Disparities Do Not Establish Commonality

- The Court rejected the use of aggregate statistical analyses to support commonality.
- The mere existence of gender disparities in pay, promotion, or representation was insufficient.
  - Aggregate statistical disparity or even regional disparity did not establish that any individual store or individuals were subjected to discrimination
- To show commonality, for example, a plaintiff would at least need to demonstrate store-by-store disparities.

Limited Anecdotal Evidence Cannot Establish Commonality

- The Court found that affidavits from 120 individuals, or 1 out of every 12,500 class members, fell well short of meeting the burden of having “significant proof” of a general policy of discrimination.

Key 23(b) Rulings

- In the unanimous portion of the opinion, the Court held that individualized claims for money damages cannot be certified under Rule 23(b)(2).
- Such claims must be certified, if at all, under the more onerous requirements of Rule 23(b)(3).
- The Court rejected the "predominance test," which permitted the certification of claims for monetary damages as long as claims for injunctive relief "predominated" over the claims for monetary damages.

Key 23(b) Rulings

- The Court held that back pay, regardless of whether it is characterized as equitable, cannot be certified under Rule 23(b)(2).
  - The Court rejected a formulaic approach to determining back pay
  - Employer is entitled to rebut a presumption of discrimination and entitled to individual hearings on back pay
- This ruling not only precludes certification of the claims for money damages under Rule 23(b)(2) but will also make it difficult for plaintiffs to certify claims for monetary damages under Rule 23(b)(3).

What's Next?

- Expect multiple and smaller classes and that plaintiffs will attempt to characterize common questions to "satisfy" the *Wal-Mart* standard.
- Through creative pleading, plaintiffs will find ways to suggest that they are challenging specific and narrow employment policies.
- Expect more Equal Pay Act gender claims, which are collective actions like FLSA cases.
- More EEOC pattern/practice cases will be filed as EEOC is not subject to Rule 23 requirements.

What's Next?

- In several pending class actions, defendants are moving to decertify or strike class allegations (as pled) based on *Wal-Mart.*
  - *The numerous broad class actions filed over the last two decades based on subjectivity in decisionmaking and seeking back pay/compensatory/punitive damages can no longer be certified in the manner plaintiffs have previously sought.*
- However, district courts will find ways to certify classes under Rule 23(b)(3) — *Vulcan Society* already proves that some district courts will ignore or mischaracterize the decision to certify a class.
- Plaintiffs' bar is arguing that they need discovery to meet their burden of proving the propriety of class certification under Rule 23(b)(3).
- Plaintiffs' bar is arguing that *Wal-Mart* is limited to its facts and is unlike any other class action because of its size.
- Possible legislative action such as making all employment class actions collective actions.

Post-*Wal-Mart* Decisions: *Vulcan Society v. City of New York*

No. 07–CV–2067, 2011 WL 2680474 (July 8, 2011)

- EDNY disparate impact/disparate treatment testing case.
- Certified class prior to *Wal-Mart* and this ruling rejected the City's motion for reconsideration in light of *Wal-Mart*.
- In contravention of the key holdings in *Wal-Mart*, the Court determined:
  - injunctive relief claims could be certified under 23(b)(2) despite the fact that back pay/ compensatory damages were sought and could not be certified under Rule 23(b)(2).
  - Back pay damages can be determined using a formula approach despite *Wal-Mart* expressly rejecting such an approach.
  - individual hearings will determine compensatory damages claims and individual mitigation of damages issues. Possibly thousands of individual hearings did not destroy predominance or superiority under Rule 23(b)(3).

Post-*Wal-Mart* Decisions: *In re Zurn Pex Plumbing Products Liability Litigation*

- F.3d --. 2011 WL 2623342 (8th Cir. July 6, 2011)

- Eighth Circuit case addressing applicability of *Daubert* to expert opinions at class certification stage.
- Affirmed a district court decision not to conduct a "full and conclusive" *Daubert* inquiry at class certification to instead conduct a "focused" or "tailored" *Daubert* inquiry. Held:
  - It was sufficient for the district court to determine that the expert was qualified and that he used a generally recognized and reliable methodology.
  - The district court did not need to determine if the expert's opinion would be admissible at trial.
- The majority did not mention *Wal-Mart* (In arguing that *Daubert* should apply, the dissent did cite *Wal-Mart*).

Post-*Wal-Mart* Decisions: *Lee v. ITT Corp.*

--F.Supp.2d --. 2011 WL 2516367 (W.D. Wash. June 24, 2011)

- W.D. Wash. case rejecting "hybrid certification."
- Plaintiffs argued for certification of a class for injunctive relief under Rule 23(b)(2) and monetary damages under Rule 23(b)(3).
- The Court held that "Rule 23(b)(2) does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." (Citing *Wal-Mart*)
- Additional due process arguments against "hybrid certification" were not addressed by the *Lee* court, but will likely be litigated in future cases.

Impact in Wage and Hour Actions

- *Wal-Mart* should be helpful in state wage and hour claims, which are governed by Rule 23 or Rule 23-like requirements.
- *Cruz v. Dollar Tree Stores,* (N.D. Cal.)
  - *Relying in part on* Wal-Mart*, the District Court decertified wage and hour class action under California law challenging the exempt status of store managers.*
  - *Court determined that the exempt status of store managers could not be decided on a group basis and that under Rule 23(b)(3) individual issues would predominate over common issues, which would make trial of the case unmanageable.*
  - Relying on *Wal-Mart,* the Court expressly rejected plaintiffs' attempt to try the case based on representative evidence or testimony.
- *But see Jasper et al. v. C.R. England Inc.* (C.D. Cal.)
  - Court denied motion for reconsideration of class certification decision of wage and hour claims under California law rejecting the argument that the *Wal-Mart* decision dictated a different result.

Impact in Wage and Hour Actions

- *Wal-Mart's* application to FLSA collective actions.
  - *Creely v. HCR ManorCare, Inc.* (N.D. Ohio) (rejected application of *Wal-Mart* to FLSA collective action)
    - Court ruled that Rule 23 requirements are not applicable to FLSA action so dismissed defendant's effort to assert that *Wal-Mart* applied.

Impact in Wage and Hour Actions

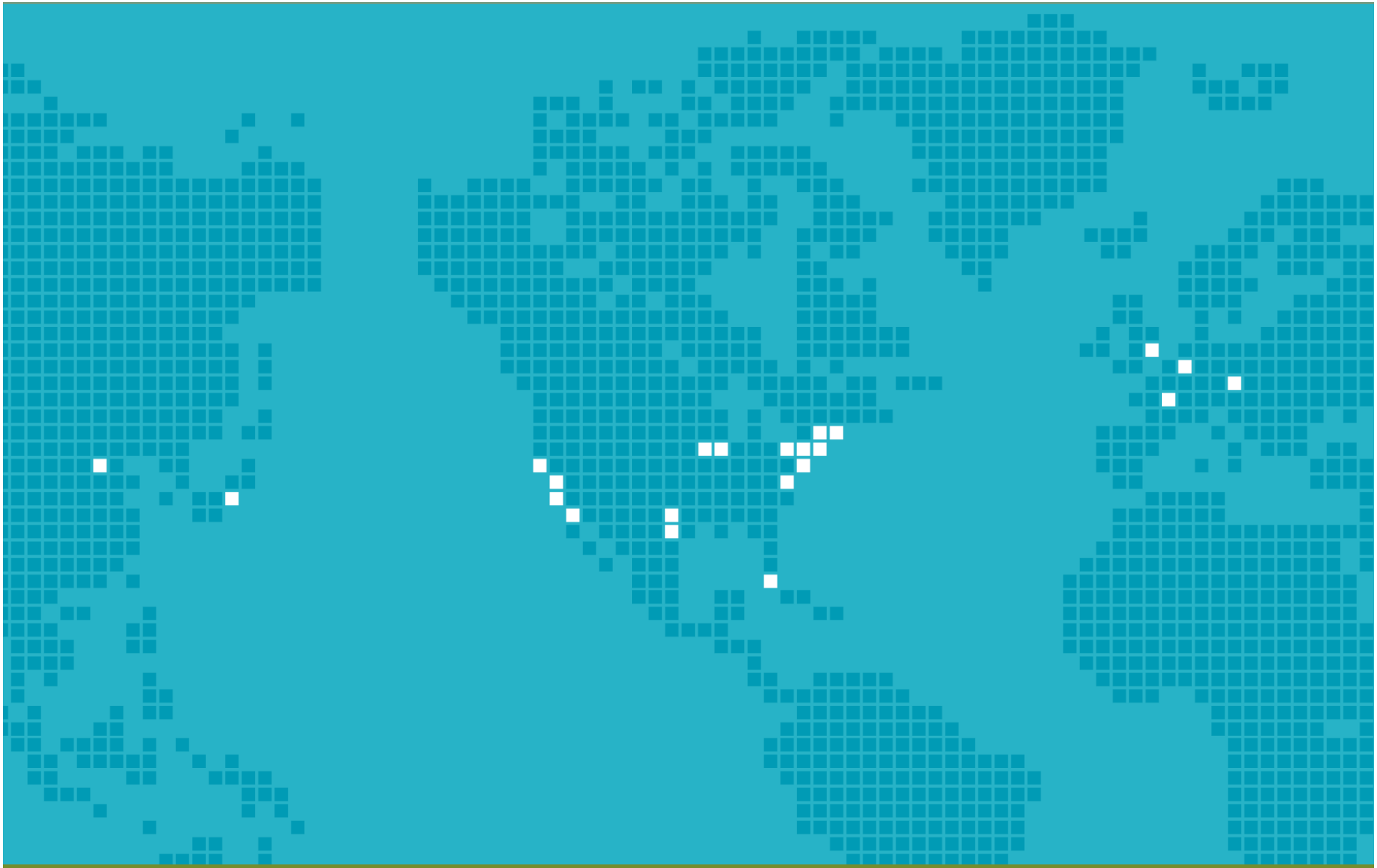
- However, the discussion on commonality in *Wal-Mart* should be helpful in challenging the notion that purported class members in FLSA actions are similarly situated because that analysis also examines whether putative class members share common issues of law or fact.
  - *Hoffman-LaRoche, Inc. v. Sperling,* 493 U.S. 165, 173 (1989) (collective action under Section 216(b) provides the "efficient resolution in one proceeding of ***common issues of law and fact*** arising from the same alleged [conduct]")
- Also, *Wal-Mart*'s rejection of "Trial By Formula" based on Due Process concerns should carry over to collective actions.

What Should Employers Be Doing?

- Do employers need to conduct pay and promotion studies anymore*?*
  - What kind of analyses should employers conduct and should the analyses be restructured in light of *Wal-Mart?*
- Do employers need to worry about subjectivity and oversight in employment policies/practices?
  - Do employers now need to emphasize managerial discretion instead of avoid it?

What Should Employers Be Doing?

- Although *Wal-Mart* has changed class action law, it has not eliminated the need to evaluate your HR policies/data.
- Aside from the business/diversity rationale behind having HR oversight and audits of employment decisions, there is still risk of significant litigation for alleged employment discrimination in pay, promotions, hiring, etc.
  - The plaintiffs' class action bar is aggressively litigating these case and, as *Vulcan Society* teaches us, judges will find a way to certify classes.
  - The EEOC is more active and is likely to become even more so in light of *Wal-Mart*, so you can expect increased demands for data and documents by the EEOC looking for the next pattern/practice case.
  - Implicit bias and excessive subjectivity theory is still well accepted by many courts



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