Dukes V. Wal-Mart: A New Interpretation of the Class-Action Model

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By: Mark Fischer
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Dukes v. Wal-Mart: A New Interpretation of the Class Action Model

Introduction

Wal-Mart Stores, Inc. is currently the world’s largest retailer and largest corporation. It is the largest private employer in the United States and Mexico. It is the largest grocery retailer and toy seller in the United States. Wal-Mart employs 1.8 million people worldwide, and its total revenue for the first nine weeks of 2007 was in the billions of dollars. Wal-Mart’s strategy of “always low prices, always” is central to their business model that has enabled the giant to dominate its competition in nearly all markets, including dollar stores, gas stations, groceries and wholesale clubs. As of today, it stands in first position on the Fortune 500 list of biggest corporations in America- surpassing long-time frontrunner Exxon-Mobil.

The retailer’s pledge of low prices, however, does not come without a price of its own. Wal-Mart has been heavily criticized by labor unions and community groups, particularly for its alleged business practices and its impact on the economies of the small towns in which it operates. Wal-Mart has a stinging reputation of bulldozing its way into small-town America and bringing rock-bottom prices with it. The local mom-and-pop type stores are being driven out of business and cannot compete with these prices because of Wal-Mart’s superior buying capabilities, both domestically and abroad. Thus far, Wal-Mart has enjoyed relative success in countering negative media and legal attention. Wal-Mart even maintains its own website (cite walmartfacts.com) dedicated to highlighting its public servantry and stories from happy
associates who can write in on the forums telling their story about how Wal-Mart has changed their lives for the better. In its 45th year of operation, the company’s power may have finally met its match: Wal-Mart is currently facing a lawsuit involving the largest certified class in history, with plaintiffs seeking billions of dollars in damages - the largest prayer for monetary relief in the history of litigation. The outcome of Dukes v. Wal-Mart1 will not only change the way class actions are certified but will also have a tremendous trickle-down effect evident in the way other large corporations and employers align their business practices to conform with the evolving law stemming from this case. This paper will discuss the Dukes litigation, how the Ninth Circuit has departed from precedent and holdings of other Circuits, and the constitutional and civil rights issues at stake by the Ninth Circuit employing the class device in this lawsuit.

Background

Sam Walton opened the first Wal-Mart store in Bentonville, Arkansas in 1962. Within five years, “Mr. Sam” had opened 24 stores and sales exceeded $12 million annually. Walton’s early successes formed the original backbone of the Wal-Mart business plan: achieving higher sales volume by selling products with slightly lower markups than most competitors.2 Wal-Mart stores continued to grow rapidly through the decades, expanding to corner the market in a variety of retail formats, including supercenters, discount centers, general merchandise stores, and

membership warehouse clubs. Currently, a staggering 176 million customers worldwide shop at Wal-Mart every week.\(^3\) This number is the equivalent of one-half of the American population.

Wal-Mart’s colossal customer base and domination of the market share means the company has a tremendous need for workers. Wal-Mart refers to them as “associates” and employs them in droves. Domestically and internationally, Wal-Mart currently employs 1.8 million associates.\(^4\) The majority of the company’s associates are full-time and many are seniors seeking supplemental income or are students looking for work experience.\(^5\) Wal-Mart maintains an online forum that demonstrates that a good number of its associates are satisfied with their jobs.\(^6\) Naturally, this happiness does not extend to all associates. Associates will apply for management positions and not be selected. Some will be passed over for raises. In 2003, a group of women sensed that Wal-Mart might have a pattern or practice of selecting women for management positions less often than men.\(^7\) Women might be corralled into stereotypical roles and receive less pay than similarly situated men.\(^8\) These allegations formed the genesis of *Dukes v. Wal-Mart*, which at present is the largest class action in the history of litigation.\(^9\)

Plaintiffs brought on behalf of six named plaintiffs and all others similarly situated, a complaint asserting claims against Wal-Mart for sex discrimination under Title VII of the 1964 Civil Rights Act.\(^10\) Plaintiffs assert that women are paid less than men in similar positions, despite having more favorable performance reviews, and women receive fewer promotions and

\(^1\) Wal-Mart Employment and Diversity, http://www.walmartfacts.com/featuredtopics  
\(^2\) Id.  
\(^3\) Id.  
\(^4\) Id.  
\(^5\) Id.  
\(^6\) Id.  
\(^7\) Audio presentation: Dukes v. Wal-Mart: Class Action or Mass Confusion? (American Bar Association 2007)  
\(^8\) Id.  
\(^9\) Betty Dukes, Patricia Surgeson, Cleo Page, Deborah Gunter, Karen Williamson, Christine Kwapnowski, and Edith Arana v. Wal-Mart Stores, Inc. No. 04-16688 (9th Cir. filed Feb 20, 2007).  
\(^10\) Dukes et al. v. Wal-Mart, Inc. Nos. 04-16688, 04-16720 2007 9th Cir. WL 329022 (Feb. 6, 2007)
must wait longer than men for management positions.\textsuperscript{11} Plaintiffs argue that these issues stem from Wal-Mart’s strong, centralized culture that tolerates gender-based discrimination and that discriminatory treatment arise from the company’s policies and procedures implemented in all Wal-Mart stores.\textsuperscript{12} This company oversight means that discrimination is common to all 1.5 million women who make up the putative class.\textsuperscript{13}

As mentioned, Wal-Mart had its beginnings as a family operated business. Even today, many members of the Walton family are members of the board of directors. The nature of the company fosters a centralized oversight structure as well as a family-like culture among associates, managers, and the home office in Bentonville, Arkansas. Plaintiff’s argument in Dukes centers around the darker side of this culture. Plaintiffs assert that Wal-Mart fosters and tolerates an environment that is adverse to women.\textsuperscript{14} Anecdotal evidence of this culture has been brought to support plaintiff’s claims, including reference to top executives calling female associates “girls” and holding manager meetings at strip clubs.\textsuperscript{15} Plaintiffs contend that the company has tolerated, by virtue of the actions of top executives, the second-class treatment of women in the company, and that this evidence establishes a pattern or practice of company-wide discrimination against women.\textsuperscript{16}

Plaintiffs seek injunctive relief for the members of the class, as well as declaratory relief, lost pay, and punitive damages. Compensatory damages are not sought on behalf of the class.\textsuperscript{17}
Plaintiffs sought to certify a nationwide class of women who have been subjected to Wal-Mart’s allegedly discriminatory pay and promotions policies. The district court heard oral argument and certified the proposed class as it related to issues of alleged discrimination, including liability for punitive damages and injunctive and declaratory relief. Wal-Mart appealed, contending that the class did not meet Federal Rule of Civil Procedure 23(a)’s requirements of commonality and typicality. Wal-Mart also contended that the court erred by certifying the class and thereby eliminating Wal-Mart’s ability to respond to individual claims and by failing to recognize that Plaintiff’s claims for monetary relief predominated over their claims for declaratory and injunctive relief.

A panel of judges for the Ninth Circuit reviewed Wal-Mart’s contentions on appeal in turn. The court approached the commonality/typicality issue by citing Federal Rule of Civil Procedure 23(a):

A district court may certify a class only if: (1) the class is so numerous that joinder of all members is impractical; (2) there are questions of law and fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

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18 Id.
19 Id.
20 Id.
21 Fed. R. Civ. P. 23(a)
In addition, Federal Rule of Civil Procedure Rule 23(b) requires that the district court must also find that at least one of the following three conditions is satisfied:

(1) the prosecution of separate actions would create a risk of: (a) inconsistent or varying adjudications or (b) individual adjudications dispositive of the interests of other members not a party to those adjudications; (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class; or (3) the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Commonality

Turning first to the commonality issue, the court stated that commonality focuses on the relationship of common facts and legal issues among class members, and the commonality test is qualitative rather than quantitative— one significant issue common to the class may be sufficient to warrant certification.

The court held that plaintiffs have exceeded the burden of establishing commonality by providing: (1) significant evidence of company-wide corporate practices and policies, which include excessive subjectivity in personnel decisions, gender stereotyping, and maintenance of a strong corporate culture; (2) statistical evidence of gender disparities caused by discrimination;

\[22\text{ Dukes et al. v. Wal-Mart, Inc. Nos. 04-16688, 04-16720 2007 9th Cir. WL 329022 (Feb. 6, 2007)}\]
and (3) anecdotal evidence.\textsuperscript{24} This evidence, when taken as a whole, raises an inference of discriminatory practices by Wal-Mart that affects all plaintiffs in a common manner.\textsuperscript{25}

The court also allowed, over Wal-Mart’s strenuous objections, plaintiffs to present statistical evidence of Wal-Mart’s uniform management structure and extensive oversight of store operations. Plaintiff’s expert analyzed data at the regional level rather than on a store-by-store basis, as Wal-Mart urged. The court held that the proper test of whether statistics should be taken at the macro (regional) level or micro (store or sub-store) level depends on the similarity of the employment practices and the interchange of employees at the various facilities.\textsuperscript{26}

\textbf{Typicality}

Wal-Mart further contended on appeal that the class representatives are not typical of all female managers because only one of the six named plaintiffs holds a salaried management position.\textsuperscript{27} The court resolved this issue by recognizing that Rule 23’s typicality requirement, as the commonality requirement, has been permissively construed so that plaintiffs are not required to offer a class representative for each type of discrimination claim alleged.\textsuperscript{28}

\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
\textsuperscript{27} Betty Dukes, Patricia Surgeson, Cleo Page, Deborah Gunter, Karen Williamson, Christine Kwapnowski, and Edith Arana v. Wal-Mart Stores, Inc. No. 04-16688 (9\textsuperscript{th} Cir. filed Feb 20, 2007).
\textsuperscript{28} Id., quoting Hanlon, 150 F.3d at 1020.
Due Process Concerns

Wal-Mart’s third point of error was that by certifying the class, the district court deprived Wal-Mart of its right to defend itself. Wal-Mart’s theory, grounded in precedent, was that it has a right to an individualized hearing for each class member’s claim so that it may present a defense relevant to the facts. It claims this right is abridged in a class of such a large size.

The Ninth Circuit panel responded to this claim by holding that Teamsters does not require that a district court utilize additional proceedings, but rather the “court has the discretion to be flexible and to fashion such relief as the particular circumstances of a case may require to effect restitution.”

Impermissible Predomination of Monetary Claims over Claims for Declaratory and Injunctive Relief

One of the final issues Wal-Mart brought on appeal was the district court erred when it failed to recognize that monetary relief predominated over their claims for declaratory and injunctive relief, thus making class certification inappropriate. Plaintiffs in this case have moved to certify the class under Rule 23(b)(2), supra. The Ninth Circuit panel concurred with the

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29 Id.
30 Int’l Bhd of Teamsters, 431 U.S. at 331, 97 S.Ct. 1843
district court on this issue. The panel opinion states that resolution of this controversy is governed by precedent\textsuperscript{32} which holds that Rule 23(b)(2) class actions can include claims for monetary damages so long as such damages are not the ‘predominant’ relief sought, but instead are ‘secondary to the primary claim for injunctive or declaratory relief.’

The court addresses this point at length. The court upholds the district court by stating that: (1) focusing on the potential size of a punitive award would have the perverse effect of making it more difficult to certify a class the more egregious the defendant’s conduct or the larger the defendant\textsuperscript{33}; and (2) back-pay is recoverable as an equitable, make-whole remedy in employment class actions notwithstanding its monetary nature.\textsuperscript{34}

-Ninth Circuit Panel Dissenting Opinion-

One of the Ninth Circuit judges on the three-judge panel dissented. Judge Kleinfeld’s dissent echoes the constitutional and civil rights issues at stake should the \textit{Dukes} litigation proceed as a class action. The first point raised in the dissent is that the case “poses a considerable risk of enriching undeserving class members and counsel, but depriving thousands of women actually injured by sex discrimination of their just due.”\textsuperscript{35} Therefore, by proceeding as a class action, if the class loses, all the women in the class lose their claims as well. This case, as

\begin{footnotesize}
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\item Molski v. Gleich, 318 F.3d 937 (9th Cir. 2003)
\item Betty Dukes, Patricia Surgeson, Cleo Page, Deborah Gunter, Karen Williamson, Christine Kwapnowski, and Edith Arana v. Wal-Mart Stores, Inc. No. 04-16688 (9th Cir. filed Feb 20, 2007).
\item Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. at 170 (N.D. Cal.2004)
\item Betty Dukes, Patricia Surgeson, Cleo Page, Deborah Gunter, Karen Williamson, Christine Kwapnowski, and Edith Arana v. Wal-Mart Stores, Inc. No. 04-16688 (9th Cir. filed Feb 20, 2007).
\end{enumerate}
\end{footnotesize}
any other class action, included a choice for potential members of the class to “opt-out” of the
class so as to be entitled to pursue their rights individually. In reality this “opt-out” provision is
a fiction.\textsuperscript{36} The vast majority of women employed by Wal-Mart who would make up this class
are either working as a mother trying to make ends meet or are working as a second or third
source of income for their family.\textsuperscript{37} These women, along with most Americans, do not have the
resources, time, or knowledge to hire a lawyer, fill out required forms to protect her own cause of
action, and file them with the court. Therefore, with a class of 1.5 million individuals, there will
potentially be thousands who will lose their claims should the class lose.

The converse risk is also of concern in certifying the class: many women who have
worked at Wal-Mart have no desire to seek management positions. Many have not experienced
sex discrimination. Some women were fired for theft of company time. Still others left Wal-
Mart voluntarily to seek better opportunities elsewhere. These women, should the class stand,
would take part in the damage award just as women with viable claims. This is an unfair result
to Wal-Mart and is in contravention of the spirit of Title VII of the 1964 Civil Rights Act, which
states that damage awards such as the potential damage award in this case cannot be given to
those who are not actually victims of systemic discrimination.\textsuperscript{38} By allowing the case to be tried
as a class action, the Ninth Circuit would be abridging Wal-Mart’s federally protected rights
under Title VII.

The dissent also expresses concern about enriching undeserving counsel. With a class
action device, there is less contact by the lawyer with the actual clients. Counsel might try to

\textsuperscript{36} Audio presentation: Dukes v. Wal-Mart: Class Action or Mass Confusion? (American Bar Association 2007)
\textsuperscript{37} Wal-Mart: The High Cost of Low Price (Robert Greenwald, 2005)
\textsuperscript{38} 42 U.S.C.§ 2000e-5(g)(2)(A)-(B); Audio presentation: Dukes v. Wal-Mart: Class Action or Mass Confusion?
(American Bar Association 2007)
shoehorn the defendant into settling the case unfairly. Wal-Mart certainly has done potential risk analysis in this case and is well aware that billions of dollars are at stake. When the potential loss is as tremendous as it is in this case, a rational defendant will settle even the most unjust claim.\textsuperscript{39}

Judge Kleinfeld differs further from the majority’s assessment of Rule 23’s four threshold requirements: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. The majority was able to find that the commonality and typicality requirements were met because the court applied a permissive and minimal burden on plaintiffs to establish the requirements. \textit{Supra}. The court inferred that Wal-Mart engages in discriminatory practices in compensation and promotion based on plaintiff’s evidence of Wal-Mart’s strong corporate culture, excessive subjectivity on the part of management in personnel decisions in the face of evidence of company-wide policies and procedures, statistical evidence of gender bias, and anecdotal evidence of gender bias.\textsuperscript{40} Wal-Mart made many objections to such evidence supporting a finding of commonality, but the court determined that such objections related to the weight of the evidence, rather than its validity, and thus should be addressed by a jury at the merits phase of the case.\textsuperscript{41} Judge Kleinfeld would hold that the court must conduct a more in-depth analysis of the evidence to ensure that Rule 23’s requirements are met. The dissent cites the Supreme Court and the Second Circuit and would hold that “class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action”\textsuperscript{42} therefore a district judge making a determination of class

\textsuperscript{39} Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. at 170 (N.D. Cal.2004)
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} \textit{Id.}
certification must make a “definitive assessment of Rule 23 requirements, notwithstanding their overlap with merits issues and “must receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met.”

The panel here departed from precedent by refusing to hear any issues it considered to be “on the merits” and therefore for the jury to determine.

**Wal-Mart’s Response: Petition for Rehearing En Banc**

**Application of Rule 23**

In its Petition for Rehearing En Banc, Wal-Mart addresses the Rule 23 analysis issue in depth. Wal-Mart asserts that the panel relieved plaintiffs of the weight of their burden by refusing to decide Wal-Mart’s challenges to plaintiff’s evidence because to do so would overlap with the merits of the case. This holding was made based on now-repudiated case law stemming from other Circuits.

Three months prior to the filing of the petition for rehearing en banc, the Second Circuit brought itself into alignment with the other appellate courts throughout the country by repudiating the aspects of precedent that the panel relied on in its Rule 23 holding. In addition, the Supreme Court held in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) that there is no

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43 *In re IPO Litig.*, 471 F.3d 24 (2nd Cir. 2006)
44 Betty Dukes, Patricia Surgeson, Cleo Page, Deborah Gunter, Karen Williamson, Christine Kwapnowski, and Edith Arana v. Wal-Mart Stores, Inc. No. 04-16688 (9th Cir. filed Feb 20, 2007).
45 Id.
46 *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2nd Cir. 1999); *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124 (2nd Cir. 2001)
47 *In re IPO, supra.*
lesser burden on the district court’s obligation to make a determination that all Rule 23 requirements are met before certifying a class just because of some or full overlap of that requirement with a merits issue. By virtue of its holding, the panel creates an inter- and intra-circuit conflict concerning the rigor with which a district court must analyze Rule 23’s requirements.\textsuperscript{48} This conflict is of monumental importance to all class action litigation. If the class in \textit{Dukes} stands, future plaintiffs bringing class action lawsuits that will fall under the jurisdiction of the Ninth Circuit will not be held to a Rule 23 test as rigorous as under other Circuits. Defendants in that jurisdiction will be deprived their right to challenge plaintiff’s evidence at the class certification stage if such evidence, either that of the plaintiff or the defendant, goes to merits issues rather than the consideration of its value in determining whether or not the class is certified. Furthermore, the panel of three judges, one of whom dissented, has caused the Ninth Circuit to part company with the rest of the country on this fundamental issue in the class certification process. Plaintiffs will be unsure of the degree of evidence required to satisfy Rule 23. Defendants will be denied a full ability to challenge the certification by presenting evidence a district court could deem “goes to the merits” of the issue and therefore is inappropriate for adjudication at the certification stage. A split of authority on Rule 23 analysis such as the scenario playing out in the Dukes litigation will cause mass confusion with the class action device.

\textsuperscript{48} Betty Dukes, Patricia Surgeson, Cleo Page, Deborah Gunter, Karen Williamson, Christine Kwapnowski, and Edith Arana v. Wal-Mart Stores, Inc. No. 04-16688 (9th Cir. filed Feb 20, 2007).
As mentioned above, Rule 23 has a second subsection that must also be satisfied in order for a class to be certified. In addition to meeting the four-part burden set out in Rule 23(a), plaintiffs must also satisfy at least one of the requirements of Rule 23(b), which include:

1. the prosecution of separate actions would create a risk of: (a) inconsistent or varying adjudications or (b) individual adjudications dispositive of the interests of other members not a party to those adjudications; (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class; or (3) the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Plaintiffs have asserted, and the court has concurred, that Rule 23(b)(2) is met. Wal-Mart argues\(^\text{49}\) that the Supreme Court\(^\text{50}\) has recognized a significant likelihood that actions seeking monetary damages, such as \textit{Dukes}, can “only be certified under Rule 23(b)(3), which permits opt-out, and not under Rule 23(b)(1) or Rule 23(b)(2), which do not.” From this holding springs many issues that exacerbate the split between the Ninth Circuit and all other Circuits in the country but from precedent as well. Indeed, the panel’s decision even widens the division between its holding in the \textit{Dukes} class action certification and binding Ninth Circuit precedent.

One substantive issue involving Rule 23(b)(2) is the application of the appropriate test to determine if the action is eligible for class certification. The Fifth, Sixth, Seventh, and Eleventh Circuits adopt the “incidental damages” test\(^\text{51}\), which essentially states that class certification is improper unless monetary damages flow directly from liability to the class as a whole.\(^\text{52}\) In other

\(^{49}\) \textit{Id.}  
\(^{50}\) \textit{Ticor Title Ins. Co. v. Brown,} 511 U.S. 117 (1994)  
\(^{51}\) \textit{Id.}  
\(^{52}\) \textit{Id.}
words, if the monetary damages depend on the variety of circumstances surrounding each of the plaintiffs, the class cohesiveness is weakened and certification is therefore improper. The Ninth Circuit has isolated itself from the holdings of its sister Circuits by deciding that it will not adopt the incidental damages test, nor “any other bright-line rule.” Again creating confusion for parties involved in class action certification, the Ninth Circuit fashions its own rule and adopts an “ad hoc” test coming from the Second Circuit, which no other Circuit has adopted. This ad hoc test focuses on the intent of the plaintiffs in bringing suit. The Ninth Circuit panel goes one step further and allows plaintiffs to show their subjective intent in bringing suit as consideration for class certification. This ad hoc test approach opens the door to a wide variety of abuses by potential plaintiffs considering their likelihood of getting a class certified. If subjective intent is to be a major consideration in class certification, diligent attorneys would not have tremendous difficulty in procuring statements from a putative class alleging a subjective intent to reform and rehabilitate a defendant. Subjective intent of those aggrieved can be manipulated easily and crafted to fit into a mold created specifically for class formation. Further, what checks are in place to determine whether plaintiff’s subjective intent has been manipulated? By adopting a rule such as this, any and all cases could be certified under Rule 23(b)(2) by simply obtaining an affidavit from each plaintiff reciting that their subjective intent in bringing the suit was to seek injunctive relief. This would be true no matter how large the prayer for relief is sought by the class. Additionally, consideration would not be given to whether the class retained its necessary cohesive character of if bringing the suit as a class action would promote judicial economy, as

53 Molski v. Gleich, 318 F.3d at 950 (9th Cir. 2003)
54 Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. at 170 (N.D. Cal.2004) “Plaintiffs have stated that it is their intent to obtain injunctive relief by bringing this suit.”
should be the reason for employing the class action device.\textsuperscript{55} Such a discretionary test lends itself to abuse and warrants en banc review by the Ninth Circuit to determine whether it is preferable to adhere to case law precedent or if it is more appropriate to part company with the courts of the rest of the country and develop a new, novel standard for class certification.

**Plaintiff’s Lack of Article III Standing**

The Ninth Circuit further departs from precedent and isolates itself from the rest of the Circuits by holding it irrelevant that the majority of the plaintiffs in the class no longer work for Wal-Mart, and a significant number of these women were removed from their positions for cause. Because the class is seeking injunctive relief in the form of a ruling that Wal-Mart must cease its discriminatory practices, these women who are no longer employed by the corporate giant lack Article III standing to seek an injunction. The Supreme Court has previously ruled\textsuperscript{56} that plaintiffs who do not face further harm have nothing to gain by seeking an injunctive relief and therefore lack standing to be part of such a class. This was the also holding followed in *Bolin v. Sears Roebuck & Co.* 231 F.3d 970, 979 (5\textsuperscript{th} Cir. 2000). By allowing the class in *Dukes* to proceed including plaintiffs who lack Article III standing, the Ninth Circuit not only abandons precedent but also abridges Wal-Mart’s constitutionally protected rights.

\textsuperscript{55} *Allison v. Citgo Petroleum Group*, 151 F.3d 402 (5\textsuperscript{th} Cir. 1998) “By requiring the predominance of injunctive or declaratory remedies, (b)(2) was required.”; *Robinson v. Metro-North Commuter R.R.* 267 F.3d 165 (2\textsuperscript{nd} Cir. 2001) “Classes certified under (b)(2) should achieve judicial efficiency.”

\textsuperscript{56} *City of Los Angeles v. Lyons*, 461 U.S.95, 101-02 (1983)
Title VII and Due Process Impact of the Panel’s Ruling

Perhaps the most serious transgression committed by the panel’s decision is its violation of Wal-Mart’s Title VII protection against awarding non-victims monetary damages. The Supreme Court has held that “Title VII does not authorize affirmative relief for victims as whom, the employer shows, the existence of systemic discrimination had no effect.” But in addition to this rule, an employer is entitled to show that individual class members are not entitled to monetary relief because they were not actually subjected to the discriminatory practice or would have received the same treatment in its absence.

Under the trial plan as set in the Ninth Circuit, Wal-Mart’s rights under Title VII will be abridged. This is inconsistent with over thirty years of case law interpreting Title VII’s provisions: “in the Title VII context, the decision maker has an opportunity to explain the statistical difference.” In Phase I of the trial, the jury will determine liability and then, if Wal-Mart is found liable of discriminatory practices, it will assign damages, which may include punitive damages. The trial will then proceed to Phase II, in which the judge will employ a standardized formula to award back pay to each member of the class. At no point in the trial

58 Price Waterhouse v. Hopkins, 490 U.S. 228, 244 n.10 (1989); Fadhl v. San Francisco 741 F.2d 1163, 1166 (9th Cir. 1984)-“We have held in a variety of circumstances that an award of back pay is appropriate only if the discrimination is a but for cause of the disputed employment action…this is the settled rule among other circuits as well.”
59 Betty Dukes, Patricia Surgeson, Cleo Page, Deborah Gunter, Karen Williamson, Christine Kwapnowski, and Edith Arana v. Wal-Mart Stores, Inc. No. 04-16688 (9th Cir. filed Feb 20, 2007).
60 (cite: Teamsters v. United States, 431 U.S. at 361-362 (1977); Costa v. Desert Palace, Inc. 299 F.3d at 857 (9th Cir. 2002); McLesky v. Kemp, 481 U.S. 279, 296 (1987)
62 Id.
will Wal-Mart be provided an opportunity to rebut evidence or challenge any individual’s right to monetary relief. Wal-Mart will not be permitted to call store managers accused of discrimination to the stand in its own defense.\textsuperscript{63} Again, as a due process matter, a defendant is entitled to a full array of defenses, and a class action model cannot abridge this right. As a result of this trial plan, the dissenting judge of the Ninth Circuit panel states in his dissent that women who were not affected by Wal-Mart’s alleged discriminatory practices, and women who were fired for good reason will share in the recovery with women who genuinely deserve monetary damages. This result is not in keeping with the spirit of Title VII and abridges Wal-Mart’s due process rights. Indeed, the Supreme Court has held that “the Due Process Clause forbids the imposition of punishment for lawful conduct and requires that a defendant have an opportunity to present every available defense before being punished.”\textsuperscript{64} Because Wal-Mart will not be allowed the opportunity for individual inquiry into the harm suffered by specific plaintiffs, the trial plan precludes Wal-Mart’s right to an array of defenses, and virtually guarantees non-victims will share in a monetary damage award along with those truly harmed by Wal-Mart’s alleged discrimination, the Ninth Circuit should review it’s decision to allow the class certification to stand.

\textsuperscript{63} \textit{Id.}
Dukes’ Trickle-Down Effect on Corporate America

As a final matter, the outcome of the Dukes litigation, should it proceed to trial, will have tremendous impact on the way large corporations in this country conduct business and fashion their hiring and promotion practices. Should Wal-Mart be found liable of discrimination as alleged by plaintiffs in this case, one of the trickle-down effects resounding from this action will include an incentivization of large corporations to adopt a quota system to insulate themselves and to make themselves less vulnerable to a Dukes-style lawsuit. Quota systems in hiring management and promoting employees are in contravention to the intent of the Civil Rights Act.65 As a practical matter, it would be much simpler for corporations to conform to the Dukes holding by simply promoting more women or other protected classes to avoid charges of discrimination. The danger in protecting themselves in this fashion is that corporations expose themselves to reverse-discrimination actions by those employees (such as non-minorities or males) who were not promoted. Case law regarding reverse discrimination actions is much more tenuous than Title VII actions. This opens the door for interpretation of this area of law and potentially creates more risk for corporations that are simply trying to conform their promotion and hiring practices to the current state of the law. The Dukes litigation is not a matter that should be taken lightly. Its impact is potentially tremendous on corporate america.

Conclusion

The Ninth Circuit has departed from precedent and other Circuits on nearly every point at issue in the *Dukes* litigation. Its holding has caused confusion in the class certification process, it has abridged Wal-Mart’s constitutional rights under the Due Process Clause, and it will create tremendous corporate fallout should *Dukes* proceed as a class action. This is the largest class action case in the history of litigation. Should plaintiffs be successful, the law evolving from this case not only be a wake-up call to the giant Wal-Mart, but will also signify, through it departure from precedent and loose interpretation of Rule 23 and the Civil Rights Acts, a tremendous threat to most of corporate america.