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WAL-MART V. DUKES: IS 1.6 MILLION WOMEN 0.6 MILLION TOO MANY?

PANELIST BIOGRAPHIES

CATHY VENTRELL-MONSEES has been practicing in employment discrimination law since 1983. She is currently the Senior Advisor to Commissioner Ishimaru at the Equal Employment Opportunity Commission. She has litigated several ADEA class actions and has written more than fifty amicus briefs in the U.S. Supreme Court and circuit courts. Additionally, she has a part-time law practice and teaches employment discrimination law at the Washington College of Law at American University. From 1985 to 1998, she worked in and directed an age discrimination litigation project at AARP. She is the co-author of *AGE DISCRIMINATION LITIGATION* (James Publishing 2000). Mrs. Ventrell-Monsees has made numerous national and local media appearances as a commentator on age discrimination and employment issues.

Since 1996, Mrs. Ventrell-Monsees has been a member of the Board of Directors of the National Employment Lawyers Association, where she served as its Vice-President of Public Policy. She is currently President of Workplace Fairness, a nonprofit dedicated to educating workers about their employment rights.

RICHARD UGELOW joined the Washington College of Law (“WCL”) faculty in 2002. He specializes in clinical legal education and employment discrimination and teaches in the General Practice Clinic. He joined WCL following a twenty-nine year career as a senior trial attorney and deputy section chief in the Employment Litigation Section of the Civil Rights Division of

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LLZELIE GREEN COLEMAN is a Practitioner-in-Residence with the General Practice Clinic. Prior to arriving at WCL, she was an attorney in the Civil Rights and Employment practice at Cohen Milstein Sellers & Toll, where she represented plaintiffs in class actions alleging employment, fair housing, and credit discrimination, as well as wage and hour violations. Prior to working at Cohen Milstein, Mrs. Green Coleman was a law clerk for the Honorable Alexander Williams, Jr., United States District Judge for the District of Maryland. She also interned with the NAACP Legal Defense Fund and the Center for Constitutional Rights. Mrs. Green-Coleman is an Associate Trustee with the Washington Lawyer's Committee for Civil Rights Under Law and Co-Chair of the ABA Labor and Employment Section's Committee on Equal Opportunity in the Legal Profession. She graduated from Columbia Law School, where she was a Harlan Fiske Stone Scholar, and Dartmouth College with a B.A., with honors, in Government.

LAWRENCE Z. LORBER is a Partner in the Washington, D.C. office of Proskauer Rose, is an experienced employment law practitioner who counsels and represents employers in connection with all aspects of labor and employment law. He advises employers with respect to equal employment opportunity issues, affirmative action, including Office of Federal Contract Compliance Programs and Department of Labor audits, wage and hour issues, employment aspects of corporate mergers and acquisitions, and employee discipline and the preparation of employee handbooks and human resource policies. Mr. Lorber has represented a wide variety of employers in all aspects of employment law, including trial and appellate litigation and employment restructuring. In 1995, Mr. Lorber was one of five labor attorneys selected and approved by Congress as a member of the first Board of Directors of the Office of Congressional Compliance, the Congressional agency established to administer and adjudicate the Congressional Accountability Act, which applied eleven labor and employment laws, including the Fair Labor Standards Act, to the Congress. Mr. Lorber was formerly the Deputy Assistant Secretary of Labor and Director of the Office of Federal Contract Compliance Programs during the Ford Administration. He was also was Executive Assistant to Michael H. Moskow, Assistant Secretary of HUD for Policy, Development and Research, where he had special responsibilities for the Housing Policy Study of 1973 and for the operation of the HUD Research programs. He clerked for the Honorable James Morton in the Maryland Court of Special Appeal, received his law degree from the University of Maryland and is a graduate of the Brooklyn College of the City of New York.

FATIMA GOSS GRAVES is the Vice President for Education and Employment at the National Women's Law Center, where she works to promote the rights of women and girls at school and in the workplace, with a particular emphasis on improving dropout rates for girls, ensuring nondiscrimination in athletics and nontraditional fields for women, advancing equal pay for equal work and the development of fundamental legal principles of equal opportunity. She uses a number of advocacy strategies in her work on these issues ranging from public education and legislative advocacy to litigation, including briefs in the Supreme Court and federal courts of appeals. Prior to joining the Center, she worked as an appellate and trial litigator at Mayer Brown LLP. She began her career as a law clerk for the Honorable Diane P. Wood of the U.S. Court of Appeals for the Seventh Circuit. Mrs. Goss Graves is a graduate of the University of California at Los Angeles and Yale Law School.

BARBARA L. SLOAN is an attorney in the Appellate Services Division of the Office of General Counsel of the Equal Employment Opportunity Commission. In that capacity, she has worked on a wide variety of cases under the statutes enforced by the EEOC, presenting the EEOC's appellate position both in enforcement actions and as *amicus curiae* in private cases. She is presently on detail as an assistant to the General Counsel. Mrs. Sloan has a J.D. degree from Boalt Hall School of Law and clerked for a Fifth Circuit judge. Before law school, she taught English as a second language in Spain and Japan.

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BEGIN TRANSCRIPT:

SUSANNA BIRDSONG: Thank you so much for being here. My name is Susanna Birdsong and I am the Symposium Editor of the *Labor and Employment Law Forum*. I would first like to thank our co-hosts for this event, the Women and the Law Program and the Women’s Law Association. I would especially like to thank Angie McCarthy for all of her hard work in helping us put this event together.

CATHY VENTRELL-MONSEES: Good afternoon and welcome to the Washington College of Law. As I am a Federal Government Employee, please note that my appearance today is of a personal, rather than a professional nature. Therefore any views expressed are my own, and are not the views of the Federal Government.

Today we are going to talk about a very hot issue—the largest civil rights class action ever filed. So let us talk a little bit about Betty Dukes and a group of women who decided to take on the behemoth Wal-Mart.¹ When they filed their suit over ten years ago as a class action, they

1. Kenneth Jost, *Class Action Lawsuits: Will the Supreme Court Approve the Wal-Mart Case?*, 19 CQ RESEARCHER No. 19, May 13, 2011, (describing Betty Dukes slow and incremental progress from part-time cashier to greater of the course of seventeen years and how it relates to the experiences of many women working at Wal-Mart).

raised two straight-forward claims.² Their first claim was that Wal-Mart paid women workers less than male workers in comparable positions, despite the women having superior performance and seniority. The second [claim was] that Wal-Mart promoted men more frequently than . . . women [who were equally or better qualified].

The class was defined in a 2003 Motion for Class Certification as, “All women employed at Wal-Mart from December 26, 1998 to the present who had been subjected to Wal-Mart’s pay and promotion policies and practices.”³ This sounds fairly simple but this is a case of staggering proportions, as the class of women workers may total over 1.5 million.⁴ Wal-Mart,⁵ as I said before, is the largest employer in the world, with over one million employees.⁶ So the class sought injunctive and declaratory relief to compel Wal-Mart to stop its current policies and practices and to prevent future discrimination, in addition to back pay and punitive damages. The class itself waived any right to compensatory damages.

Now, the average back pay claim for the women who are hourly workers [and] managers would total about \$11,000 per person. [Now, c]ompare that to Wal-mart’s . . . assets [whick total over \$170 billion.

So, it was said yesterday in court that this case is kind of a “David versus Goliath” story.⁷ It is actually better said as a “Betty versus Goliath” story. Wal-Mart has actually characterized the case in the Class’s attempt to get certification as being “historic in nature”—that assertion is true.⁸ Wal-Mart argued that “the size alone of this case makes it impossible

2. See *Dukes v. Wal-Mart*, 131 U.S. 2541, 2563 (2011) (holding that evidence presented by members of class did not rise to the level of significant proof that the company acted under a general policy of discrimination).

3. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 187 (N.D. Cal. 2010) (holding that female employees of the Walmart retail store chain did not satisfy numerosity, commonality, typicality, and adequacy requirements, which are required to certify as a class under Title VII).

4. See generally, Jost, *supra* note 1 (discussing Wal-mart’s contention that 1.5 million women possess too many differences to satisfy the class action requirements of “commonality” and “typicality”).

5. 222 F.R.D. at 141 .

6. *Global 500: Top Companies Biggest Employers*, CNN Money (July 23, 2012), available at <http://money.cnn.com/magazines/fortune/global500/2012/performers/companies/biggest/> (last visited Oct. 12, 2012).

7. See *id.* (listing Wal-Mart as the largest global employer).

8. See Martha Burk, *Dukes v. Wal-Mart One Year Later: Where do Women Stand?*, WASHINGTON POST (June 17, 2012), available at http://www.huffingtonpost.com/martha-burk/post_3504_b_1601449.html (last visited Oct. 12, 2012) (noting that the class action against Wal-Mart is the largest class action in United States’ history, with more than 1.5 million plaintiffs).

for class certification.”⁹ In response, the district court noted that “Title VII does not exempt large employers.”¹⁰

So in support of the motion for their class certification filing, the plaintiffs presented statistical evidence at a regional level for the Wal-Mart stores in their paid promotions and practices.¹¹ They presented declarations from 120 class members who testified to the lack of uniformity of the pay and promotion policies and practices and to the pervasive sexist stereotyping from the Wal-Mart corporate culture. And the plaintiffs’ social science expert testified that Wal-Mart’s subjective practices were vulnerable to sexual stereotyping.¹²

In opposition, Wal-Mart also presented its own statistical analysis at a store-by-store level in which its expert found that there was no pay disparity in more than ninety percent of their Wal-Mart stores.¹³ Wal-Mart also challenged the plaintiffs’ anecdotal evidence as being limited to a very small percentage of their 34,000 stores across the country, and challenged the sociologist’s testimony as a mere conjecture. So evidence from both sides was presented to the District Court.

The District Court in California certified the class for pay and promotion claims in 2003.¹⁴ Four years later it went up to the Ninth Circuit, which affirmed the class certification in substantial part.¹⁵ Three years later, it went to the full Ninth Circuit en banc. En banc, the Ninth Circuit affirmed a substantial part the lower Court’s decision.¹⁶ They, however, did decertify one piece of the class action, which was remanded back to the District Court on the punitive damages issue. So that issue was not before the Supreme Court during yesterday’s oral arguments.

9. Principle Brief for the Petitioner, 222 F.R.D. 137 (N.D. Ca. 2004) (arguing that the size of the class exceeds the population of at least twelve of the fifty states)..

10. See *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 142 (N.D. Ca. 2004) (determining Title VII contains no special exemptions for large employers).

11. See Brief for Respondents, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 25411 (2011) (noting that the under-selection for women as Department Heads had merely a one in seven hundred chance of occurring randomly).

12. See Brief for Respondents, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 25411 (2011) (describing senior officer’s practice of referring to female employees as “Janie Qs” and “girls” and of authorizing the holding of management meetings at Hooters restaurants).

13. See Brief for Respondent at 4, *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011) (describing the assertion of Wal-Mart’s expert, Joan Haworth, that “more than 90% of the stores had no pay rate differences between men and women that were statistically significant”).

14. See *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (2004) (upholding the class certification as it satisfied the numerosity, commonality, typicality, and adequacy requirements).

15. See *Dukes v. Wal-Mart Stores, Inc.*, 509 F.3d 1168 (9th Cir. 2007) (determining that despite the size of the class, the class action could proceed in a manner both manageable and in accordance with due process requirements).

16. See *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2011) (upholding the district court’s class certification but determining the district court abused its discretion by certifying the plaintiffs’ punitive damages claims as a separate class for equitable relief).

So the two issues before the U.S. Supreme Court are procedural. The first issue is whether the order certifying the class comports with Rule 23(a) of the Federal Rules of Civil Procedure.¹⁷ And, the second [issue] is whether the claims for monetary relief can be certified under Rule 23(b)(2) of the Federal Rules of Civil Procedure and, if so, under what circumstance?¹⁸

So our distinguished panel today will address these issues and the arguments before the Court. Most significantly, we will also discuss the potential impact of this decision not only in the employment discrimination area but also as it pertains to class actions. I hope to also address some of the pretty dramatic implications raised by several of the questions from the Justices during the oral argument.

RICHARD UGELOW: I am going to talk in the most general terms in the five or six minutes that have been allocated to me to give some context to this litigation.

First, I will talk about the background of Title VII, the potential impact of the *Wal-Mart* decision, and the enforcement scheme set about by Title VII. So Wal-Mart, as you have heard, is an action to enforce Title VII of the 1964 Civil Rights Act.¹⁹

What is Title VII? Title VII is the major Federal Civil Rights Act that prohibits discrimination in employment on the basis of race, religion, gender, color and national origin. It covers everything except age and disability, as there are other statutes that cover those specializations.²⁰ Lastly, it was the first major piece of anti-discrimination in employment legislation.

So let me set the stage of what the employment situation in this country looked like prior to the enactment of Title VII in 1964. Up on the board, I do not know if you can see it, we had sex segregated jobs and we had race segregated jobs. I have put up here some examples of advertisements from either the *Washington Post* or the *New York Times*. This one from 1964 shows separate job classified ads for men or for

17. FED R. CIV. P. 23(A) (requiring that the size of the class makes joinder impracticable, there are questions of law or fact common to the class, the claims and defenses of the representative parties are typical of the claims and defenses of the class, and the representative parties “fairly and adequately” protect the interests of the class).

18. FED R. CIV. P. 23(B)(2) (maintaining that the opposing party acted or refused to act on grounds applicable to the class as a whole, making injunctive relief applicable to the class as a whole).

19. See The Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (as amended) (proclaiming discrimination based upon race, color, sex, religion, and national origin to be illegal).

20. See The Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* (as amended) (prohibiting discrimination in employment because of physical and mental disability); The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (as amended) (forbidding employment discrimination against anyone over the age of forty years of age).

women.²¹ There were also separate job ads for whites and for “Negroes,” which blacks were called at that time. Most of the advertisements for women were for jobs like waitressing, nursing and teaching. The jobs for men often involved heavy labor. During this time in the United States, many states had statutes that prohibited women from lifting more than forty pounds and from working a certain number of hours in a week.

So it was a pretty ugly situation for women and the impact of this discrimination can be seen in the many professions. In an article in the *New York Times* by Nicolas Kristof,²² he notes that many brilliant women became teachers in the early 1960’s because of discrimination in other fields. However, due to the progress that we have made as a society, more women are now becoming brain surgeons, lawyers, and accountants and have a whole range of job opportunities. The article also argues that the current shift by women to other professions, possibly due to low pay for teachers, has caused the teaching profession and our school system to suffer.²³ While the current shift into other professions is voluntary, the overt discriminatory job segregation of the 1960’s still continues to affect our society.

Where are we today? Well, what happened when Title VII was enacted? The statute did not magically heal the whole nation. There was no level playing field. What happened is that employers started adding other qualifications to the jobs. For example, if you wanted to be a security officer or a police officer you might have to be 5’7” tall. What does that mean? Well, it means that many women were disqualified from positions because they were not tall enough.²⁴ Some employers also started imposing a college education requirement. Well, that disqualified minority groups from jobs because they did not have a college education or educational system at that time.²⁵

So we refer to these measures as facially neutral policies. They apply to everyone regardless of race or gender, but they had a more definitive impact on women or minorities depending on the job qualification that

21. See William A. Darity Jr. and Patrick L. Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of Gender*, 12 J. ECON. PERSPECTIVES 63, 64 (1998) (structuring help-wanted advertisements so as to explicitly separate job opportunities based on gender).

22. See Nicholas D. Kristof, *Pay Teachers More*, N.Y. TIMES, March 13, 2011, at WK10 (citing a McKinsey & Co. study, saying that “these days, brilliant women become surgeons and investment bankers—and forty-seven percent of America’s kindergarten through twelfth grade teachers come from the bottom one-third of their college classes.”).

23. See *id.* (citing McKinsey study which found that teachers in countries such as South Korea, Singapore and Finland which are known for their educational performance are highly paid, are well respected and earn more on average than lawyers and engineers).

24. *Dothard v. Rawlison*, 433 U.S. 321 (1977) (holding that Title VII prohibits the application of statutory height and weight requirements to disadvantage a protected class).

25. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (determining that the higher education requirement was an artificial and unnecessary barrier to employment opportunities for minorities, violating Title VII).

was imposed.²⁶ So you could argue, as I would, that these initial job qualification facilitated continued discrimination by excluding women or minorities from certain jobs.

So that, in a very thumbnail way, is the employment picture as of 1964. So then the question is, “How do you correct the bad policies from these decades of overt and what was lawful job discrimination?” Well, this can be done in two ways. A woman who was not 5’7” and wants to be a police officer in Philadelphia or Washington, D.C. can sue individually for a remedy. The other option is to get together as a group and file as a class to challenge the facially neutral practice that really has no bearing on one’s ability to perform the job.

So I think you can see how objective it is to have class actions or group types of litigation lawsuits to challenge these facially neutral but yet discriminatory employment practices. That is the situation of the *Dukes v. Wal-Mart* plaintiffs. They allege that Wal-Mart’s employment practices has the effect of discriminating against them and denying them protected job benefits.

Then the question is, “Who would enforce Title VII?” Well, Congress set up two methods in the Federal Government, more specifically, in the Department of Justice and the Equal Employment Opportunity Commission—both of which had litigating authority in 1972²⁷. So the EEOC had the individual cases of intentional discrimination, or what are known as challenges to patterns or practices of unlawful discrimination, like a height requirement [or] like a college education [requirement] for employment.

So these suits were brought in the name of the United States Attorney General—so it is the United States versus the defendant. Since the government has limited resources, Congress in Title VII said, “we should allow the private sector, the private attorneys, to enforce Title VII.”²⁸ And these private attorneys became known as private attorneys general because they brought class action litigation and challenged the policies that discriminated against women or minorities.²⁹ In the statute, Congress said, “private attorneys general who are successful can receive

26. *See id.* at 429 (establishing disparate impact theory which states that practices while neutral on their face cannot be maintained if they operate to “freeze the status quo of prior discriminatory employment practices”).

27. Equal Employment Act of 1972, 42 U.S.C. § 2000e-5 (2009) (establishing an investigative and judicial body that analyzes charges of discrimination against employers covered by the statute and occasionally files a lawsuit in furtherance of the individual’s interest).

28. *See Overview, Equal Employment Opportunity Commission*, <http://www.eeoc.gov/eeoc/index.cfm> (last visited Oct. 12, 2012) (establishing a procedure which allows either the Commission or a private party to bring a suit on behalf of an employee, protected under federal law, who was discriminated against because of his/her membership in a protected class).

29. *See* 42 U.S.C. §§ 2000e-5(f), (g) (providing injunctions, appropriate affirmative action, equitable relief, back pay, and attorneys fees upon a finding that the respondent intentionally engaged in an unlawful employment practice).

attorneys fees and be compensated for their work.” So there is a two-leg approach to enforcement: the federal government and private attorneys general.

Wal-Mart, depending on this decision, may knock out the private attorneys general enforcement leg. If you cannot bring class actions, you cannot [effect] systemic change and obtain attorneys fees. Consequently, attorneys are less likely to take on these cases.

Now you can say that the federal government should handle all of these matters, but the federal government has limited resources to bring these suits. The federal government is not subject to class certification, as the Department of Justice and Equal Employment Opportunity Commission can bring cases on a self-starting basis.³⁰ They are not affected by class action and if a pattern or practice of discrimination is identified by either agency, the Department of Justice or the EEOC could initiate the litigation. We would not be here talking if that class certification issue, if this case had been brought by a federal agency. We might be talking about something else like whether there is a pattern or practice of discrimination. But we would not be talking about the class certification issue.

Finally, I would like to point out that the size of the class, the Government in the past, the Department of Justice in particular, has brought massive class actions under a pattern of practice claim. For example, every steel company in the United States has been sued by the Department of Justice—this consists of thousands upon thousands of cases.³¹ The entire major trucking industry has been sued by the Department of Justice—again with thousands and thousands of litigants. Both outcomes resulting in many millions of dollars in back pay.³²

So you ask, “well, how was this dealt with?” Well, the Supreme Court created a mechanism in the case of *Teamsters v United States* for addressing these large class action or patterns or practices of discrimination.³³ It is a two-stage process. Stage one is the determination of liability. Is the defendant, (the steel industry, the trucking company, and Wal-Mart) responsible? Did it violate Federal law? Did it discriminate?

30. See 42 U.S.C. § 2000e-5(a) (empowering the Equal Opportunity Commission with the power “to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title”).

31. See, e.g., Dep’t of Justice Office of Pub. Aff., *Justice Department Settles Allegations of Immigration-Related Employment Discrimination Against Summit Steel Fabricators in Houston*, Justice.gov (Aug. 10, 2011) (reaching a settlement agreement to resolve allegations that the company engaged in a pattern or practice of discrimination against non-citizens).

32. See, e.g., *Clarification: Sexual Harassment - Truckers Story*, SEATTLE PRESS (April 11, 2012), available at http://www.seattletimes.com/html/nationworld/2017960191_apssexualharassmenttruckers.html (last visited Oct. 12, 2012) (describing the suit brought by the Equal Employment Opportunity Commission on behalf of female workers who claim they were sexually harassed by mail trainers at an Iowa trucking company).

33. *Teamsters v. United States*, 431 U.S. 324, 360 (1977) (requiring the government to prove by a preponderance of the evidence that the alleged discrimination was the company’s standard operating procedure).

If so, stage two creates the mechanism to have individual hearings to determine individual liability.

Now that does not only include money—that is the issue at Wal-Mart but if you look at the trucking industry and the steel industry it was not only money but also seniority. It was length of service. This is as equally important to the employees as money. Perhaps we can talk about that later. There is also a mechanism for that.

LLEZLIE GREEN COLEMAN: So my role on this panel is to talk a little bit about class actions. I will talk about how plaintiffs approach it; and how a case becomes a class action. I will just mention that prior to coming to Washington College of Law, I was actually at Cohen Milstein Sellers and Toll and did minimal work on the Wal-Mart case. In an interesting aside, the case was actually filed and the class was certified when I first started at the firm in 2004. It hit the Ninth Circuit in December of 2004 and we are just now seeing an argument in the Supreme Court. So you can see how long this process takes.

What are class actions? Class actions are cases where attorneys have discovered discrimination, usually through having individuals come to them complaining about individual discrimination. These attorneys continue to hear a very similar story from people all across the country. So it is not “oh, here is a company we think there is a problem that needs to be investigated.” These individuals are coming to attorneys and saying, “we are not being paid. We suspect that we are not being paid as much.” And in the case of Wal-Mart, women are not being paid as much as men. They are claiming that “[we are] not being paid as much as other men. [We are] not being promoted.” They are putting you in touch with other individuals who are basically saying that the same thing is happening across the board and you start investigating in real life and across the States and in every region where you are hearing the same types of stories. So that is the genesis for how class actions form.

The idea behind the class action is that these cases can best be adjudicated by joining all of these claimants together.³⁴ They are cohesive enough that the policy that they are challenging exists all across the company and all across the country. These stories are the same; you find statistically significant disparities in pay or promotions all across the country and as a result these cases could be adjudicated as one class. Thus, there is some judicial economy to addressing all of these issues as a class instead of relegating it to hundreds or thousands or in this

34. See *Why Class Actions*, Zimmerman Reed, www.zimmreed.com/Why-Class-Actions/16076/ (last visited Oct. 13, 2012) (finding class actions allow individuals who experience a common injury to litigate their claim in an affordable and efficient manner, and as such, class actions serve as a deterrent to businesses because it holds them accountable for committing multiple “minor” violations).

case, millions of individuals for trial.³⁵ So the idea is that they are bound together cohesively in a class and are challenging a pattern or practice that is occurring across the country or throughout that company.

Class actions are governed by Rule of the Federal Rules of Civil Procedure, which provides that the plaintiff has to meet a certain burden in order to establish that their class should be certified. In order for a class to be certified it has to meet all the elements of Rule 23(a). These elements include numerosity, which is that the idea that the class is so large that joinder of all of its members would be impractical. Clearly here no one is arguing that it would make more sense for 1.6 million people to litigate each claim separately, so individual litigation is clearly not feasible here. That really has not been contested, although it is also noted in terms of how class action functions. There is no magic number. So there is not, “oh, we have twenty people that can be a class or we have fifty people that can be a class.” Courts have issued a number of different opinions depending upon the particular circumstances in deciding whether a class is large enough to be certified.

The second element is commonality and this provides that there must be questions of law or facts that are common to the class. This means that if you were to resolve these particular issues it would impact and resolve an issue that is similar or exists for all of the members of this adjudicated class.

The third element is typicality and that is the idea that claims of the named plaintiffs have to be typical of the claims of the class. So they cannot have some very unique claim that they are naming that would not be the same as all of the other individuals that are part of this class.

The fourth element is an advocacy. This requires the named plaintiffs to demonstrate that they and their counsel will fairly and adequately protect the interests of the class. If you have a very small firm or individual, naturally they are going to have a problem in terms of adequacy of counsel. The court could actually determine that such a firm is not really in a position to represent the interests of this class of 1 million women across the country.

So in addition to those four elements of Rule 23(a), the Court also has to meet either 23(b)(2) or (b)(3). Rule 23(b)(2) is really just the issue here. Employee discrimination in class claims are usually certified under 23(b)(2). Rule 23(b)(2) basically says that “the party upheld in the class has to act or refuse to act on the grounds that are generally applicable to the class so that final injunctive relief and corresponding declaratory relief is appropriate with respect to the class as a whole.” That is a relatively complicated way of saying that if you are looking for injunctive or declaratory relief that would resolve this issue, all the discrimination of women for the entire class or all of the individual members, you have to verify the class under 23(b)(2). What is important

35. See Fed. R. Civ. P. 23(b)(3)(D) (the court is to consider whether “a class action is superior to other available methods for the fair and efficient adjudication of the controversy”).

to note here when money becomes part of it, the concern is that if the plaintiffs are seeking various back pay and punitive disabilities, punitive damages are not certified.

Historically, being considered for equitable relief was based literally on the idea that but for this discrimination this individual would have been paid this amount of money.³⁶ It is very different from compensatory damages that may be based upon somebody's individual emotional response to discrimination. Compensatory damages typically involve individualized hearings and are typically certified under Rule 23(b)(3), which we will talk about in a moment. But there is another way for a class to be certified, but cases for monetary relief are typically certified under 23(b)(2). That is what has been challenged here today. In fact, that is one of the more disturbing aspects of Wal-Mart's challenges. The company is arguing that the case should never be certified under Rule 23(b)(2).

23(b)(2) is also important because it is what we would call a mandatory class. If you are certified under 23(b)(2) then every person involved in the definition is part of this class. So the Court has decided it is cohesive enough that we do not have to basically distribute that notice to everyone who could possibly be a member and give them an opportunity to remove themselves from the class.

Rule 23(b)(3) is another way that a class can be certified. It requires that the plaintiffs pay for distributing the class notification. One plaintiff must have the resources to send a notice to all of the individuals who would be part of the class and give them an opportunity to say that, "Well, my claim is special enough that I do not think that I should have to proceed with this class action. I can just do this separately."³⁷ So 23(b)(2) also has other elements that the plaintiff has to meet in order for the class to be certified. They have to prove that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members. They also have to prove that the class action is a superior mechanism to the other available methods for the fair and efficient adjudication of this controversy.

Under 23(b)(3) you have to send out notice to allow the class members the opportunity to opt out and remove themselves from the case, but that is actually very costly. And I would maintain a loss technically is not an element that has to be proven under Rule 23. What you will see now is that our plaintiff also demonstrates manageability as an element of discovery. Manageability is the idea is that in order to address the court's concerns that this class action cannot be managed, you will not be able

36. See GARY L. MCDOWELL, *EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF, AND PUBLIC POLICY* 9 (U. of Chicago Press, 1982) (comparing the traditional understanding of equitable relief which focused on specific concrete rights, especially property, with modern understanding of equitable relief which emphasized on broad remedial mandates exercised in a prescriptive way).

37. See Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 11 (2010) (using adequate notice as a possible factor in determining manageability factor of class certification)

to figure out how to address all of these issues, and you will find that clients actually put forward a trial plan as part of their effort to get a case started. I think that that basically walks you through the element of class certification that you have a sense of what the plaintiffs are trying to do.

CATHY VENTRELL-MONSEES: Great. Thank you. Larry?

LARRY LORBER: Thanks. Before we do anything, let me just add two, historical notes to Richard's very appropriate historical setting, the first of which is relevant to this case. [W]hen the Civil Rights Act [of] 1964 was passed, sex was not included within the civil rights package. Committee from Virginia to the employment section of Title VII as a means to defeat the bill because he thought that Congress would never pass a law barring sex discrimination—and it was.³⁸

Even more interesting is that the amendment was opposed by people such as Eleanor Roosevelt who was also afraid that the inclusion of sex inclusion would defeat the Civil Rights Act and also because the Equal Pay Act³⁹ was passed the year before in 1963.⁴⁰ So it was viewed, for whatever it was worth, that the law that would ensure equal treatment for women in the workplace. So there was that additional factor which sort of leads into my next point.

I will just add one further thing. I also came from the Government. I was at the Labor Department and was involved with the Office of Federal Contract Compliance Programs, which is the Government agency that ensures that employers doing business with the federal government comply with laws and regulations that bar discrimination. When the Executive Order was issued, sex was forgotten.⁴¹ The Order has since been amended to require affirmative action on the basis of sex.⁴²

In this opening session, I just want to talk about the case from the employer's perspective. Let me begin by saying this. Sometimes bad facts make bad law. And for a lot of reasons, it can be said that the Wal-Mart case for various reasons is not the only case to address these issues

38. See Carl M. Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act*, 49 J. S. HIST. 37, 44-45 (1983) (describing how Martha Wright Griffiths, who defended Representative Howard Smith's amendment in the floor debate, recalled Smith explicitly teller her "the amendment was a joke").

39. Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (2006) (abolishing wage disparity based on sex); Fair Labor Standards Act of 1938, 29 U.S.C. 201, et seq. (establishing minimum wage, overtime pay, recordkeeping, and child employment standards affecting the private sector as well as federal, state, and local governments).

40. See Brauer, *supra* note 38 at 41 (mentioning that Eleanor Roosevelt served as the chair of the President's Commission on the Status of Women, which declared the equality of rights for women under the law was already embodied in the Fifth and Fourteenth Amendments).

41. See Exec. Order No. 11375, 32 Fed. Reg. 14303 (1967) (amending Executive Order 11246 to include the word "sex").

42. See *id.*

Now the Supreme Court granted certiorari on a limited question. It rejected most of the issues and the question to which cert was granted was on whether the class certification order under Rule 23(b)(2) was consistent with Rule 23(a).⁴³ That is the only question before the Supreme Court. Notwithstanding this argument, they went far beyond it, including getting into the facts of the case. I think Justice Ginsberg appropriately pointed out this issue and Justice Sotomayor went on to say “Well, wait a second.” This is a low standard to get a class certification here. You don’t argue facts in class. You argue, as Llezlie said, that you meet the criteria of 23(a)—that is what you need to get a class. We will get to 23(b) in a moment. In a trial like this would involve a lot of expert events both on statistics and sociologists and all the rest.

So that was what was before the Court yesterday? I would add on that what happened yesterday, is that the Court meandered deeply into the facts of this case. Now, it is difficult not to do this in some respects because the issue is commonality. Was there a common practice or is the purported class related to each other in a manner sufficient so that they all could be considered to be in a class?

A secondary issue which came up which relates to 23(b)(2) as Llezlie pointed out, once you are in a 23(b)(2) class you cannot get out of a (b) (2) class. If you are deemed to be part of it, you are in it. The Court is pondering whether or not if there was due process. Because you are talking about \$11,100 [per person], give or take [a few dollars], . . . of back pay . . . times a million and a half, [t]hat is a lot of money. There is also interest on this amount depending on how far you go back, how long they worked there and so forth. So there are lots of computations involved.

But once you are in a 23(b)(2) class you cannot get out of a 23(b)(2) class. [W]hat is happening here is that you are talking about everything in play at Wal-Mart since 2003 and 1998, but [this] still includes 544 women who were managers [and thus,] who were both the victims and perpetrators of discrimination. [T]he argument presented was that Wal-Mart both delegated authority to its managers to the extent that it lost control over what the managers did, but that a policy of Wal-Mart [was] that women could not be appropriate managers at Wal-Mart. The other issue is that this class also included part-time employees as well as full time employees; so, arguably they would not have been eligible for a promotion in any case. Additionally, the class included employees in every aspect of the Wal-Mart stores, including the meat cutters and the shelf stockers.

From an employer’s point of view, when you are faced with this type of class assertion, one key element to begin with is to try to parse down the class so that you try to line up the purported class leaders with the

43. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 795 (2010) (granting certiorari to answer the question “Whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)”).

purported class members. They have to be congruent with each other to some extent. They do not all have to be the same but to some extent they have to be lined up. Again, as Llezlie said, the class leaders have to be appropriate to the class. There have been cases where retired employees who were deemed not to be appropriate class leaders to the current employees in some class actions.

What Wal-Mart tried to do is to say: “We have 34,000 stores. We have fourteen regions. We have all different categories of employees—you cannot line up this massive group.” Again it is not because it is a million and a half; because of the diversity of the purported class. You cannot line up the class members with the class leaders and argue that there was a common practice—that is issue one.

Issue two, which is going to be very interesting in this case, is the role of statistics. The Supreme Court has accepted statistics and this is a pattern or practice case, not a disparate impact case for those of you taking it here.⁴⁴ The Court addressed it as a pattern or practice case yesterday—otherwise you are run into a problem depending on what the District Court does on punitive damages. You cannot get punitive damages in a disparate impact case.⁴⁵ In talking about a pattern or practice case, the question is the relevancy of the statistics. What an employer would do is argue that the statistics were not relevant to the argument of the class. They were not relevant in terms of, “Does it truly represent the components of the class?” So you have that issue which came up as well.

Now let me just finish by noting that these are going to be critical issues. How the Court addresses these issues is going to be very important. I think that you have to parse this in a whole lot of ways because you have a chance for the employment laws to be rewritten in many aspects.

CATHY VENTRELL-MONSEES: Thank you. Fatima?

FATIMA GOSS GRAVES: Thanks to my colleagues for talking about some of the history of Title VII because I do think it is important to be in that context. I just wanted to clear up one thing that is true more than anything. Title VII, when passed, included language about sex, but the initial drafts and the ones that went to Committee did not constitute sex. Sex was added as a reason for some to kill the bill, although others were adding it with the hope that it would become law. In the end, it did become law. And so it has been there from the beginning although, how it has been applied in the Courts—particularly for women—has

44. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971) (finding practices and procedures neutral on their face cannot be maintained if they operate to “freeze the status quo of prior discriminatory employment practices”).

45. See 42 U.S.C. § 1981a(a)(1)-(b)(1) (limiting punitive damage awards to cases of intentional discrimination, that is cases that do not rely on disparate impact theory).

ebbed and flowed over time. The class vehicle is especially important when you put it up against the equal where the sorts of classes that are permitted under Title VII are not equal. You could see how it could be more important. As my colleagues from the EEOC know, if this case goes wrong there is a lot hanging on this.

The National Women's Law Center submitted an amicus brief in this case and we did so because we wanted to be included in the record.⁴⁶ I think at the argument yesterday and in some of the briefs there has been a lot of blurring over what facts are actually necessary at this stage. We are talking about the facts necessary to demonstrate that these women have essentially enough in common to proceed together. There are various arguments for how much they had to show; what the standard of proof should be. Some of these issues were never raised in argument but were thoroughly briefed. There are just a couple of things that I want to highlight. I definitely thought that they would raise these points at the argument yesterday.

The first is the information that was presented around the fiscal disparities both in pay and promotion. One of the questions that was asked at the argument was, "Essentially are these statistics enough?"⁴⁷ There is lots of other evidence in the case, but if you brought a case that said, "I can show that there is a policy that caused women to be paid less, promoted less and when promoted having to wait longer for promotion, when you control for things such as job category, seniority, performance and evaluation. Those are the sorts of things that you would want a control for. If I can control all of those things and I show that women are paid less and promoted less despite having better performance value, is that sufficient to say that, "This common policy is impacting women in particular?"

I don't think there was a lot of time spent addressing this question. This may in part be because there is always other evidence in the case that the plaintiffs could put forward to try to show commonality. In our brief, we focused both on the statistical disparities and why these are important.⁴⁸ We also focused on the other types of evidence since the claim is that "Wal-Mart has a policy of allowing its managers to

46. Brief for American Civil Liberties Union & National Women's Law Center et al. as Amici Curiae Supporting Respondents, *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011) (No. 10-277), 2001 WL 805231 (arguing that gender discrimination in the workplace, as alleged in the instant case, remains a national problem and class actions are an appropriate means of addressing this issue).

47. See *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977) (requiring plaintiffs to present evidence of "gross statistical disparities" to meet their burden of proof in a pattern or practice claim); see also *Anderson v. Zubieta*, 180 F.3d 329, 347-48 (D.C. Cir. 1999) (turning to "statistical significance" as the measuring rod in a pattern or practice case when gross statistical evidence is not available).

48. See Brief Amici Curiae of the American Civil Liberties Union and National Women's Law Center, *Wal-Mart Store, Inc. v. Dukes*, 131 S.Ct. 2541 (2011) (noting that women working at Wal-Mart made 5% to 15% less than similarly situated men, even after accounting for seniority, turnover, and performance).

exercise the excessive amount of discretion in making chain promotion decisions.” The plaintiffs brought in experts that tried to put it all together to explain that when there is this type of discretion it can allow managers to choose people for better pay and better promotions based on simply who they like and who likes them, rather than anything related to job performance.

This is not a new theory. There have been lots of cases including Supreme Court cases that have dealt with this issue. If you look at some of the previous cases there is a little confusion over whether this is a new theory. And you know, one of the arguments is that it had to be an entirely subjective policy versus an expressive subjective policy. The idea [is] that there can be a policy of allowing managers to, basically, choose people who they like and [the company does] not give them enough guidance to ensure that [the managers] choose the person best for the job, [with its] promotions or pay.

There was additional evidence presented that there were some sort of common stereotypes. There were 100 sworn statements from the women who talked about the types of things that were said to them by managers that fall into the categories of women [who] are not working for serious reasons, [arguing] that they are housewives, that they are not breadwinners, and that they do not really need the moneyhome with their children; do not need the promotion; and that it would entail travel. Other comments by managers which I do not know exactly how it was put, but were more denigrating to women as workers with names like “Jennie Q” and “girls.” I honestly do not even know what “Jennie Q” means.

At this point, the question is, “what do you need to show this sort of cohesiveness that Llezlie spoke about at the class stage?” There is a lot at stake. An immense amount of evidence is not available in many cases and that it sounds meritorious takes discussion and is necessary before you can even be certified. That is huge.

So I want to make sure I leave time for questions but I do not want to go on and on. And I do want to talk more about the argument yesterday. So I will stop here and let it go to Barbara.

BARBARA SLOAN: All right. I work for the Equal Employment Opportunities Commission (“EEOC”) which is a federal agency.⁴⁹ Thus, the views expressed on this panel are mine alone, and do not reflect the views of the EEOC or the Federal Government. The EEOC is not part of the Department of Justice. It is also not part of the Department of Labor. We are supposed to be somewhat independent and not quite as political as the Department of Labor. As Professor Ugelow stated that

49. See Overview, U.S. Equal Employment Opportunity Commission, <http://www.eeoc.gov/eeoc/> (last visited Oct. 15, 2012) (describing the EEOC’s role in enforcing federal laws which make it illegal to discriminate against an employee or job application because of the person’s race, color, religion, sex, national origin, agem disability, or genetic information).

“there are rising costs” to bringing these kind of cases, we are a little bit more even keeled as far as the kinds of cases we bring and the kinds of arguments we make. They are not quite as political in the tone of appeals as other agencies might be.

We can sue, and like many Federal agencies we can bring our own suits that are EEOC versus the defendant. Under the Age Discrimination in Employment Act⁵⁰ we can also sue state and local governments but in the private sector we are limited to Title VII and the Americans with Disabilities Act.⁵¹ We only have litigation authority with respect to the private sector. So Wal-Mart would fall into our bailiwick and we have had quite a number of cases against Wal-Mart. I work in the Appellate Section so I litigate appeals in federal courts. I have worked on amicus briefs in cases against Wal-Mart as well as in one of our suits against Wal-Mart.

Because the EEOC is part of the government, we are not bound by Rule 23. We can just sue. We do not have to show how they practice. We do not have to show that the claim is typical of the class. So the Wal-Mart case impacts us to the extent that the Court does want to blur the merits and the class memberships—as this would directly impact our class litigation.

The class issue will also impact us indirectly because we are teeny-tiny agency. We have I think about 250 lawyers nationwide. My Appellate unit has fifteen attorneys in total. One big case could require work by our entire section of the agency. So the extent that the Wal-Mart case adversely affects class actions would mean that suddenly we would have to be the main agency involved in these class action cases.

We are confident that will not happen, and if it does, we had better get some more money and some more people, because we really do rely on private class actions for a large amount of the class enforcement. If the Supreme Court does hit on the merits issues, the main things that will affect us are if they decide on merit damages. That is something that will come up in our cases—the formula type of relief that claimants were arguing. This is the notion that we do not have to have many trials if we find out if Wal-Mart is liable.

Specifically, when applied to the case at hand, [this] would mean that all of these 1.5 million people, or however many that they turn out to be, do not need to have a one-on-one mini trial with the Wal-Mart attorney and a Wal-Mart defendant. If we can determine the relief by looking at data from the databases we can compare it statistically with a comparable man and find out whether women were underpaid, overpaid or paid fairly. If they were underpaid, they would be entitled to a raise. We use formula relief in many of our settlements, so to the extent that the courts question about providing relief would impact us.

50. See Age Discrimination in Employment Act of 1967, 29 U.S.C. § 630(b) (2008).

51. See Americans with Disabilities Act of 1990, 42 U.S.C. § 12111 (2009).

We would also be impacted by what Mr. Lorber said about statistics. We use statistics in our big cases. There seems to be some concern by [the] Supreme Court about whether you can, in fact, challenge subjective employment practices—even though it has been forty years since people have challenged this notion. Additionally, there seems to be a question of whether subjective employment practices are limited to just 23(b)(2) class actions or generally. That would be something for the Court to decide.

CATHY VENTRELL-MONSEES: So we will say to you that we expect a decision probably the last week of June. It is probably going to be very mixed on a variety of basis. Susanna, I just want to thank [you] for organizing the panel. Have a great afternoon. Thank you.

END TRANSCRIPT