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9th Circuit's handling of *Dukes*

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It has been over a year since the Supreme Court ruled in *Wal-Mart Stores, Inc. v. Dukes* that about a million and half female employees could not maintain a class action against the discount superstore. Since then, the 9th U.S. Circuit Court of Appeals has had a handful of opportunities to apply the teachings of *Dukes* to other putative class actions. In

two published decisions, the 9th Circuit has refined the court's test for "commonality," which is one of the four requirements in FRCP 23(a) that must be established to certify any class (the others are numerosity, typicality and adequacy). These post-*Dukes* decisions demonstrate how the 9th Circuit's commonality test has evolved over the past year, and where it is likely headed.

The issue in *Dukes* was whether the district court properly certified a class comprised of current and former female employees of Wal-Mart who alleged that their local supervisors discriminated against them with respect to pay and promotion matters. The Supreme Court held that the class could not be certified because, among other things, there was no "commonality" as required by FRCP 23(a)(2).

Commonality is a relatively easy concept to articulate - the rule states that there must be "questions of law or fact common to the class" - but courts and litigants alike have struggled with its application. *Dukes* confirmed that the test is not satisfied merely by reciting questions that apply across the class (e.g., "Do our managers have discretion over pay?"); rather, plaintiffs' claims must depend on a common contention that is capable of classwide resolution. The plaintiffs in *Dukes* argued that Wal-Mart engages in a pattern and practice of discrimination, but this was insufficient to satisfy the commonality test because resolution of the claims would require an analysis of millions of individual employment decisions made by local supervisors. The court explained that, without "some glue" holding the alleged reasons for all those decisions together, the class could not proceed.

Ellis v. Costco Wholesale Corp., 657 F.3d 970 (9th Cir. 2011), was the first 9th Circuit case following *Dukes* to apply the commonality test. There, the plaintiffs alleged that Costco engaged in gender discrimination with respect to certain opportunities for

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