Dukes v. Wal-Mart as a Catalyst for Social Activism

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I. INTRODUCTION

In 1997, Cleo Page1 began working as a cashier at the Wal-Mart Supercenter in Tulsa, Oklahoma. She was making $6.50 an hour.2 Three years later, when Page resigned from a Wal-Mart in Livermore, California, she was making $10 an hour.3 Page left her job because despite her desire for advancement and receiving above-standard evaluations for her work,4 she was twice passed over for a promotion in favor of less experienced, male applicants.5 “I knew I had no chance for a better job at Wal-Mart,” Page explained. “I had come across other women who’d been in the same [retail] position for eight years, and I didn’t want that.”6

Unemployment, however, forced Page to confront new obstacles. Three years of low wages and few opportunities for promotion had left her with little...
savings. As a result, she lost her house in Livermore, as well as the foster children for whom she was caring. Page reflected on how things might have been different had she received the promotions she felt she deserved at Wal-Mart:

If I had gotten the assistant manager position, I would have been able to keep the children, own the home we were in, [because] there were great incentives for that position and the bonuses are a lot higher. I'd still be in California, making a future for me and my children, starting a 401K. I would have wanted that life.

Cleo Page’s account is just one among the 110 voluntary declarations of Wal-Mart’s female employees that attorneys have collected in connection with Dukes v. Wal-Mart, which was filed in June 2001. The lawsuit alleges that the retail giant actively discriminates against women in its patterns and practices of hiring and promotion, as well as through policies that have a disparate impact on female employees. The suit, which is currently pending on class certification status, seeks to represent approximately 1.6 million women who worked at Wal-Mart from the years of 1998 to 2001. If certified, Dukes v. Wal-Mart will be the largest employment discrimination class action suit in American history.

The size of Dukes’s class, however, is not the only contributing factor to the case’s precedent-setting nature. Attorneys for Dukes’s plaintiffs also view the lawsuit as a means by which to expose Wal-Mart’s questionable labor practices and force Wal-Mart to engage in large-scale labor reforms. Such reforms include paying more workers for overtime, revamping the entire hiring and promotions system, and improving the pay structure so that salaries are higher and assigned on a more objective basis. In addition, attorneys expect that a derivative consequence of such changes will be an improvement in the economic status of the many poor and rural women who are employed at Wal-Mart: “We are hoping that by hitting the largest retailer in the world . . . several of the 1.6 million [female employees] will be raised out of poverty and paid a living wage,”

7. Id.
8. Id.
9. Id.
13. Oreskovic, supra note 11, at 1.
14. Id.
17. Telephone Interview with Jocelyn Larkin, supra note 16; Telephone Interview with Debra Smith, supra note 16.
said Debra Smith, an attorney at the San Francisco-based Equal Rights Advocates and one of the plaintiffs' attorneys. Smith also hopes that the lessons of Dukes will "trickle down" to smaller retailers and encourage them to adopt corporate practices that are more sensitive to the subtle and overt biases that lead to discrimination against women in hiring and promotion.

This article will examine Dukes v. Wal-Mart and compare the scope of the legal case with the subsequent and sweeping reforms that both plaintiffs and their attorneys anticipate. This comparison will suggest that while broad labor reforms may indeed materialize, they are unlikely to be direct consequences of the plaintiffs' courtroom success. This limited reach is not due to any deficiency in the Dukes complaint, but rather to the limitations inherent in the adjudication of discrimination suits. Winning monetary relief for the plaintiff class does not address the broader, impoverishing effects of Wal-Mart's general business practices. Discrimination suits do, however, have the potential to address poverty indirectly by sparking the kind of public awareness that is crucial to large-scale and dramatic change.

This article will proceed in the following way: Section II reviews the Dukes complaint. Section III outlines Wal-Mart's economic dominance and its questionable labor practices. Section IV recounts the Dukes advocates' perspectives on using the suit to achieve wider social and economic change. Section V assesses the limitations and remedies available through discrimination litigation. Finally, Section VI argues that while various barriers exist in creating social and economic change through the litigation mechanism, lawsuits such as Dukes can act as catalysts for wider reform through the indirect effects of consciousness-raising and mobilization.

II. THE DUKES V. WAL-MART COMPLAINT

The Dukes plaintiffs challenge the hiring, promotion, and pay practices of Wal-Mart. They allege that these practices actively discriminate against women. Plaintiffs' claims arise out of Title VII of the Civil Rights Act of 1964. The suit is named for lead plaintiff Betty Dukes, a 52-year-old African American woman who still works at the Wal-Mart store in Pittsburg, California.

The plaintiffs allege that in 1999, women constituted 72% of Wal-Mart's hourly employees, but only 33% of its managerial employees. In contrast, re-
tailers of comparable size to Wal-Mart reported an average of 56.5% of women among their management. Other statistics show that within Wal-Mart, women comprised fewer than 10% of store managers, 4% of district managers, and only one of the company's top twenty officers. These statistics generate additional insight in that hourly jobs at Wal-Mart pay an average of about $18,000 a year, while the average managerial job pays $50,000.27

The plaintiffs attribute these role and pay disparities to several company-wide policies and practices that discriminate against Wal-Mart's female employees. Dukes alleges that Wal-Mart corrals female employees in so-called soft departments, such as cosmetics and women's wear. This cabining prevents women from holding positions in some of the better-paying departments, such as electronics or sporting goods. Wal-Mart's promotions system also contributes to the discrepancies by not posting notices of promotions company-wide and not using objective criteria for advancement. An almost entirely all-male managerial staff doles out promotions and raises, which potentially encourages the perpetuation of an "old boys' network" and frustrates assessments based on merit. The complaint also criticizes Wal-Mart's relocation policy as having a disparate impact upon female employees. Plaintiffs argue that Wal-Mart's requirement that managers relocate if necessary disparately impacts single or married mothers.

Another component of the complaint is the allegation that Wal-Mart compensates women less than men for the same work. Richard Drogin, an emeritus statistics professor at California State University at Hayward hired by the plaintiffs' lawyers, performed extensive statistical analysis and field work and found that full-time female hourly employees working at least 45 weeks at Wal-Mart made about $1,150 less per year than men in similar jobs. Female store managers made an average of $89,280 a year, $16,400 less than men. Plaintiffs' action seeks to end Wal-Mart's discriminatory practices, provide

25. Bendick, supra note 24, at 12.
28. See generally Plaintiffs' Third Amended Complaint, supra note 12.
29. Id. ¶ 24.
30. Id.
31. Id. ¶ 29(a). This policy has changed since the filing of Dukes. Wal-Mart began posting openings for entry-level positions in January of 2003. See Girion, supra note 10, at C1.
32. Plaintiffs' Third Amended Complaint, supra note 12, ¶ 29(b), at 7.
33. Id. ¶ 29(k).
34. Id. ¶ 29(g).
35. Greenhouse, supra note 27, at 22.
36. Id.
relief for members of the plaintiff class, and assign punitive damages to the retailer. If successful, the suit will benefit women from various geographic regions of the United States, but it is expected to have the largest impact in the rural areas of the South and Midwest, where Wal-Mart’s economic stronghold is dominant.

III. Dukes’s Target: A Global Powerhouse

With $245 billion in sales last year, Wal-Mart Stores, Inc. is the biggest corporation in the United States. The Bentonville, Arkansas-based corporate giant currently has 3000 stores in this country and plans on adding about 1000 more over the next five years. “Everyday low prices”—Wal-Mart’s slogan—evidently has mass consumer appeal. Wal-Mart maintains its market dominance through a highly systematized cost-cutting strategy that effectively suppresses wages and eliminates competition, thereby passing along substantial savings to shoppers.

Fundamentally, one of the key components in Wal-Mart’s cost-cutting formula—though not ever explicitly acknowledged by the retail giant—is the comparatively lower wages Wal-Mart pays its workforce. Fiercely anti-union, Wal-Mart suppresses wages by quashing unionization efforts within its workforce. This tactic translates into a competitive advantage for Wal-Mart, as lower pay for its workers mean lower costs for consumers. Wages for Wal-Mart employees are often one-third less than what similarly situated unionized employees earn. As a result, some of Wal-Mart’s unionized grocery store competitors are demanding contract concessions of their workers in order to compete with Wal-Mart’s low prices. This trend toward reducing wages has become known in the media as “the Wal-Martization” of the American workforce.

A. Targeting Wal-Mart’s Questionable Labor Practices

Paying comparatively lower wages is not the only labor practice at issue for critics of the Wal-Mart business model. Wal-Mart’s labor practices have

37. Plaintiffs’ Third Amended Complaint, supra note 12, ¶ 3.
38. Plaintiffs’ complaint is against 3244 Wal-Mart and Sam’s Club stores throughout the country. See Oreskovic, supra note 11, at 1. Plaintiffs’ attorneys have collected over 100 declarations of female employees from thirty states. See Girion, supra note 10, at C1.
41. Id.
42. Id.
43. Id.
45. Id.
46. Id.
47. Id.
48. Id.
49. Id.
sparked a series of lawsuits alleging various violations of the Federal Fair Labor Standards Act, which establishes overtime pay and child labor standards, among other requirements. Overtime pay standards, as mandated by the legislation, require employers to pay time-and-a-half if employees work more than forty hours in a week. Some plaintiffs have alleged that various Wal-Mart stores refuse to pay this time-and-a-half rate and instead order employees to work overtime without pay. Other lawsuits have alleged that Wal-Mart avoids overtime pay requirements by forcing employees to work without pay during lunch and rest breaks. Dukes plaintiff Donna Adair, who was an assistant manager at Wal-Mart stores in California and Tennessee, said she was often called in by management to change time sheet records: "People worked off the clock at Wal-Mart, and assistant managers were pulled in to change hours because there was too much overtime being logged, and Wal-Mart didn’t want to pay for that.” An internal Wal-Mart audit also revealed violations of the Federal Fair Labor Standards Act’s child labor laws.

Ultimately, Wal-Mart’s labor practices—those that are legal as well as those that have drawn controversy—contribute, particularly in rural areas where competing retailers have been driven out, to a labor market in which workers find fewer employment opportunities and in which such opportunities provide lower pay. It is against this backdrop that the Dukes plaintiffs raise their claims of sex discrimination in hiring and promotion.

IV. THE POTENTIAL IMPACT OF DUKES: ADVOCATES’ PERSPECTIVES

The plaintiffs’ attorneys for Dukes have stated that they hope that the lawsuit will not only provide relief for the class, but that the suit will also begin to penetrate other labor practices, such as comparatively low wages, the denial of overtime pay, and the prevention of collective bargaining.

“A lot of the issues addressed in Dukes specifically affect women, but if you improve women’s lives, you improve all workers’ lives,” notes attorney Smith. She goes on to mention that the problem of overtime pay at Wal-Mart is one such issue where the relief accorded to the Dukes plaintiffs could affect both

51. See id. § 7(b)(2).
53. Id.
55. See Greenhouse, supra note 52, at A16 ("The audit of one week’s time-clock records for roughly 25,000 employees found 1,371 instances in which minors apparently worked too late at night, worked during school hours or worked too many hours in a day. It also found 60,767 apparent instances of workers not taking breaks, and 15,705 apparent instances of employees working through meal times.").
56. Telephone Interview with Debra Smith, supra note 16.
male and female employees.\textsuperscript{57} Smith observes, however, that “working off the clock probably affects women differentially—there are late-night issues of safety for women, issues relating to family and children. But if you expose this practice of forcing overtime—and not paying for it—men benefit too.”\textsuperscript{58}

Jocelyn Larkin of the Berkeley, California-based Impact Fund, is another plaintiffs’ attorney for \textit{Dukes}. Larkin believes that the most direct effect of \textit{Dukes} will be bringing the female employees of Wal-Mart one step closer to emerging out of poverty: “If we are successful, we are going to be changing the amount of money that many poor women are making because they work at Wal-Mart. If each of them earns a couple thousand dollars more per year, that, across the country, will make a big difference.”\textsuperscript{59}

Smith stated that an additional effect of the lawsuit could be reversing the trend of other retailers emulating Wal-Mart’s business model.\textsuperscript{60} “One of the goals of litigation, when you hit a big retailer like this, is the hope that the domino theory will kick in, smaller retailers will change their practices as well, and overall, women who are in poverty or [on] welfare will benefit from this,” she said. “If Wal-Mart is stopped in its tracks and has to revamp its practices to make sure women are getting promotions and put everyone on an equal playing field, other retailers may change, too.”\textsuperscript{61}

Larkin still questioned, however, whether the lawsuit would produce a palatable economic blow to Wal-Mart.\textsuperscript{62} Even if the class is certified and Wal-Mart settles for a substantial sum, Larkin mused that Wal-Mart would likely survive and continue to prosper financially: “The much harder nut to crack is shoppers. People keep shopping at Wal-Mart because they don’t connect the fact that the low price they’re paying is effectively subsidized by the woman . . . at the checkout [counter]. [That disconnect] probably won’t be bridged by this case.”\textsuperscript{63}

\section*{V. THE LIMITATIONS OF DISCRIMINATION LITIGATION IN PRODUCING CHANGE}

\subsection*{A. The Slippery Nature of Injunctive Relief}

Statistical analyses of other class action suits have shown that while prominent cases have enjoyed significant monetary settlements, other kinds of relief, including improving workplace culture and dismantling vestiges of discriminatory behavior, tend to be short lived.\textsuperscript{64} Such changes are often designed

\begin{thebibliography}{99}
\bibitem{57} Id.
\bibitem{58} Id.
\bibitem{59} Telephone Interview with Jocelyn Larkin, \textit{supra} note 16.
\bibitem{60} Telephone Interview with Debra Smith, \textit{supra} note 16.
\bibitem{61} Id.
\bibitem{62} Telephone Interview with Jocelyn Larkin, \textit{supra} note 16.
\bibitem{63} Id.
\bibitem{64} Michael Selmi, \textit{The Price of Litigation: The Nature of Class-Action Employment Discrimina-
for public relations purposes; they do little to transform corporate culture or the
system that resulted in discriminatory practices in the first place. With no au-
thoritative body charged with supervision, and no punitive results for failing to
implement reform, there is often scant incentive for employers to produce sub-
stantive change. Instant monetary recoveries, then, are generally the most sig-
nificant benefit offered to the plaintiff class.

The recent Home Depot settlement, which offered plaintiffs an average re-
covery of $9,683, but failed to provide specific jobs for class members or insist
on long-term corporate goals and targets, is a cautionary tale in this regard.
Eighteen months before the consent decree's expiration date, the parties jointly
moved to terminate the decree. Despite the fact that Home Depot failed to meet
half of its benchmarks for gender diversity, there is no longer any judicial over-
sight into many of the practices challenged by the Home Depot plaintiffs.

Settlements like the one in Home Depot reveal a tension between realizing
substantial monetary recovery on the one hand and the need for corrective action
to remedy discrimination on the other. Monetary relief has the danger of plac-
ing a price on discrimination—one that large-scale corporations may chalk up as
a cost of doing business. Such a view of discrimination does not acknowledge
standing systems of inequality and may not deter discrimination from occurring
in the future. Moreover, a settlement of the nature of Home Depot's cannot
combat the underlying causes of high rates of poverty amongst female retail em-
ployees, a key concern of the plaintiffs' advocates. While monetary compensa-
tion offers some immediate relief, it strains to combat the independent sociologi-
cal factors that contribute to the rising percentage of women in poverty.

The Dukes prayer for relief illustrates the realization that remedies beyond
individual financial remuneration are essential to success. Such additional relief
includes offers of jobs for women who lost them, promotions—where neces-
sary—, and a permanent injunction that orders an end to all discriminatory prac-
tices alleged in plaintiffs' complaint. Plaintiffs' attorney Smith outlined several

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65. Id. at 1276-77.
66. Id. at 1299-1300.
67. Id.
68. Id. at 1283; see Home Depot v. Butler, Nos. C-94-4335 SI, C-95-2182 SI, 1997 WL 605754
   (N.D. Cal. Aug. 29, 1997).
69. Selmi, supra note 64, at 1285-86.
70. Tristin Green, Targeting Workplace Context: Title VII as a Tool for Institutional Reform, 72
71. Id.
72. Selmi, supra note 64, at 1300-01.
73. Id.
74. Telephone Interview with Jocelyn Larkin, supra note 16; Telephone Interview with Debra
   Smith, supra note 16.
75. Plaintiff's Third Amended Complaint, supra note 12. Relief sought includes rehiring, objec-
tive standards for promotion and salary increases, equitable pay, remedies for sex-based job
assignment, increased training and occupational support, and equitable representation in
management and leadership opportunities. Id.
additional factors that such an agreement must not only acknowledge, but also develop procedures for, including objective criteria for hiring standards, standardized job application processes, uniform salary structures, fair evaluation systems, systematized training available to all employees, postings of promotions, an external diversity committee, and a complaints and harassment reporting system.\(^{76}\) Co-counsel Larkin agreed that any settlement agreement committed to generating substantive change must emphasize monitoring and reporting: “You have to have [a] variety of different approaches and measurements to create the possibility for change. You have to try different kinds of reporting and see what works—it’s a carrot-stick [strategy],” she said. “The hard part is you have to make changes that will be accepted by the company, but you can’t allow the problems or people who have perpetuated the discrimination to remain there. It’s a delicate balance.”\(^{77}\)

Smith stated that the court’s continued involvement in the implementation of the changes was also crucial to her vision of the plaintiff’s success: “You always want the court to retain jurisdiction, so if problems are arising, you can go to the court and say, ‘this is not working,’ and try some other type of injunctive relief.”\(^{78}\)

### B. Indirect Remedies

Plaintiffs’ attorneys anticipate, however, that regardless of how successfully injunctive relief is administered, most of the more sweeping goals of \textit{Dukes}, including better wages, regulated overtime, and unionization, will be reached indirectly—through social and political mobilization sparked by the lawsuit—rather than as a direct result of a victory for the \textit{Dukes} plaintiffs.

Smith cites activism related to the filing of \textit{Dukes} as a positive sign that the lawsuit will indirectly foster change in Wal-Mart’s labor practices: “The lawsuit has really been an inspiration for women at Wal-Mart . . . . A large number of women who worked at Wal-Mart have joined the union and even become organizers for the [United Food and Commercial Workers].”\(^{79}\) Smith believes that the media attention of \textit{Dukes}—and other cases or incidents involving Wal-Mart’s labor practices—contributes to the probability for change at the retailer: “It’s like a snowball going down a hill—the low wages are getting a lot of media [attention], as are the undocumented workers [discovered] by the INS. Wal-Mart is very anti-labor, and I think people can see that more clearly now.”\(^{80}\)

Smith notes that the David-and-Goliath nature of \textit{Dukes v. Wal-Mart}, coupled with the size of the plaintiff class and the economic stature of the defendant,
have been reasons for a significant degree of media focus on *Dukes*. She observed that along with reports on *Dukes*, there have been investigations of Wal-Mart’s other alleged labor practices, such as the use of illegal immigrants in Wal-Mart’s workforce and overtime work with no pay. Smith said the size and importance of the *Dukes* lawsuit is generating an awareness of—and activism against—Wal-Mart’s other sordid labor practices. Larkin agreed that the current “eco-chamber of bad press” substantiates the idea that *Dukes* is “one piece of what has been a pretty dramatic spotlight” on Wal-Mart’s questionable business practices.

Larkin also pointed to the growing awareness of female employees within Wal-Mart’s workforce as one of the most prominent—and potentially beneficial—side-effects of *Dukes*:

> One of the most important effects of the case being successful is for the women at Wal-Mart to stop accepting the brainwashing that they get there . . . . Once [the women] know the facts of what Wal-Mart does, which is what *Dukes* shows us, it forces [women] to ask the question, ‘should I believe in [Wal-Mart’s rhetoric]?’ *[Dukes]* is about prompting women at Wal-Mart to start asking questions.

Larkin recalled conversations with one female manager at Wal-Mart who consistently reported her disbelief that Wal-Mart’s practices were discriminatory against women. That changed, Larkin noted, when the manager read the statistics on pay and promotion published in *BusinessWeek*. “She called and said, ‘you’re right,’” Larkin said.78

This increased awareness of female employees at Wal-Mart and the outside attention being focused on the retailer contribute to boycotts of Wal-Mart, increased efforts to unionize within the store, and investigations of Wal-Mart’s overtime pay system, Smith said.78 *Dukes* has been a catalyst of these various forces that are working, concurrently, to affect change within the ranks of the United States’s largest private employer.

### VI. CONCLUSION

The challenge that the *Dukes* plaintiffs face as they attempt both to navi-
gate the limitations of legal relief and to enact large-scale reform reflects the quandary inherent in major law reform litigation: using the blunt, conservative instruments of the legal toolbox to address overwhelming social and economic inequality.90

Plaintiff’s attorneys Smith and Larkin recognize that for a lawsuit to alter Wal-Mart’s business model, more will be required of the retailer than a commitment to the injunctive relief required by the court. Dramatic change must occur, Larkin stated, but such change must be available for assimilation by the corporation.91 Larkin went on to note that Dukes is already driving some changes within Wal-Mart, such as company-wide posting of job openings and increasing the number of women in high-visibility positions.92

The most profound changes, however, will likely come from popular social and political mobilization. In this sense, it is not the specific remedies offered by litigation—but rather the indirect effects related to the commencement and act of litigating—that are the catalysts for social change. As Thelton Henderson has observed, “Whatever conclusions one may draw, social change through the courts rarely involves a straight line from A to B, but rather is a far more complicated, tangled, and multi-layered process in which litigation can play an important, but far from exclusive role.”93

Dukes itself, therefore, may not have the sweeping, immediate effect of eradicating the worst social and economic consequences of Wal-Mart’s business model, but it offers hope to thousands of rural women trapped in poverty. In its success lies not only the legal remedy for those who experienced discrimination on the basis of sex, but the shape of a broad promise for a better future that, through conversation and mobilization, might yet be realized.

90. See generally Henderson, supra note 20.
91. Telephone Interview with Jocelyn Larkin, supra note 16.
92. Id.
93. See Henderson, supra note 20, at 42.