The Fall-Out from *Dukes v. Wal-Mart Stores, Inc.*—the Extent to Which Subjective Decision-Making Processes Are Susceptible to Class Treatment and How Employers Can Minimize Their Risk

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I. Introduction

Employees seeking to certify class actions against employers often claim that an employer has used a subjective decision-making process to systematically discriminate against employees of a protected group, causing disparate treatment of and/or a disparate impact on class members. This article analyzes the factors affecting courts' decisions as to whether to certify such class actions and concludes with a summary of preventive measures employers should consider.

Certification of such a class action is one of the most devastating employment-related events that can happen to an employer. It creates enormous potential liability and makes substantial defense costs a virtual certainty, resulting in a powerful incentive toward a substantial settlement. In the event that such a case proceeds to trial, it further allows the introduction of evidence that otherwise could be inadmissible. It creates the concern that if enough individuals of a protected group testify, one after the other, that they were subjected to discrimination, even the most methodical response to each such allegation may leave the jury unconvinced that the employer's actions were nondiscriminatory.

A key basis for certifying these kinds of class actions is a comment the Supreme Court made in a footnote in 1982.[1] The Court stated that "[s]ignificant proof that an employer operated under a general policy of discrimination *conceivably* could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through *entirely subjective* decision-making processes."[2] Although this footnote

1. Gen. Tel. Co. v. Falcon, 457 U.S. 147, 159 n.15 (1982).
2. *Id.* (emphasis added).

indicates that class actions "conceivably" could be brought based on subjective decision making, it has been widely cited as generally enabling such class actions. However, it left unanswered many questions as to where such decision making does, and does not, warrant class treatment. Thereafter, the courts' decisions as to whether to certify class actions based on subjective employment decisions have been inconsistent. While some of the differing rulings can be explained through case-by-case distinctions, much of the differences are best explained by disagreement among the courts as to the viability of class-based treatment of such cases.

Prior to the district court decision in *Dukes v. Wal-Mart Stores, Inc.*,[3] decided in June 2004 and just recently affirmed while the courts were inconsistent regarding the extent to which such class actions should be certified, class certification was denied in the majority of cases. In *Dukes v. Wal-Mart*, the U.S. District Court for the Northern District of California certified a nationwide class of approximately 1.5 million former and current female Wal-Mart employees seeking back pay, injunctive relief, and punitive damages for alleged gender discrimination based on subjective decisions, making it the largest action of its kind ever certified in federal court.[4] In certifying the class, the district court in *Dukes* held, in part, that discretionary centralized policies allowing local managers to make subjective decisions regarding pay and promotion were a valid basis for class certification.[5] On appeal, the Ninth Circuit found it "well-established" that subjective decision making should be scrutinized carefully because such decision making is a "ready mechanism for discrimination."[6] In addition, the Court concluded that evidence of Wal-Mart's centralized culture and policies "provide[d] a nexus between the subjective decision making and the considerable statistical evidence demonstrating a pattern of discriminatory pay and promotions for female employees."[7]

When the district court decided *Dukes*, some feared that it would lead to a trend of courts certifying nationwide class actions similar in nature.[8] This article examines the fallout from the *Dukes* decision, and

3. 222 F.R.D. 137 (N.D. Cal. 2004), *aff'd,* Nos. 04-16688, 04-16720, 2007 WL 329022 (9th Cir. Feb. 6, 2007).

4. *Id.* at 143.

5. *Id.* at 149–50.

6. Dukes v. Wal-Mart, Inc. Nos. 04-16688, 04-16720, 2007 WL 329022, at *9 (9th Cir. Feb. 6, 2007) (quoting Sengupta v. Morrison-Knudsen Co., 804 F.2d 1072, 1075 (9th Cir. 1986)).

7. *Id.*

8. *See, e.g.*, Terri L. Ross, *After* '*Dukes v. Wal-Mart*': *What Impact Is This Remarkable Employment Discrimination Class Action Certification Likely to Have? What Will the Ninth Circuit Say?* N.Y.L.J., Dec. 6, 2004, at S4 ("the Wal-Mart decision may signal a new trend toward allowing more diverse, nation-wide employment discrimination class actions").

concludes that, although the case is significant in its size and impact on a substantial company, it has not marked a turning point in the legal treatment of subjective decisions in employment. Rather, the variables affecting the likelihood of certification prior to *Dukes* remain essentially the same.

These variables include the following. First, the extent to which the decisions at issue are completely subjective, as opposed to being based on a combination of subjective and objective factors, is significant in the courts' decisions. Footnote fifteen of *Falcon* suggests that purely subjective decisions can be susceptible to class treatment, so decisions that are predominantly subjective, albeit with a small objective component, are more likely to be viewed as susceptible to class treatment than a more even mix of subjective and objective factors. Second, the extent to which the challenged decisions have factual similarity is significant in the courts' review of the propriety of class-based treatment. Third, the strength of the evidence of discrimination, both anecdotal and statistical, is significant.

Finally, the perspectives of the various courts appear to be a significant factor. Some courts seem to have stronger objections to the use of subjective factors in employment decisions than others. The *Dukes* decision constitutes a particularly telling example of a judicial distrust of subjective decision making, as it is laced with disparaging references to subjectivity. That perspective tends to be typified by the belief that groups of individuals of a particular racial/ethnic/gender background, left entirely to their own devices, may be more likely to "favor their own," and create a self-perpetuating framework that is difficult to penetrate. Conversely, some courts focus on the notion that the antidiscrimination laws narrowly prohibit discrimination, and generally do not require employers to take affirmative steps beyond refraining from intentionally discriminating. Such courts tend to emphasize that they will not second-guess an employer's business decisions or processes, e.g., the decision to value subjective assessments, so long as no discriminatory intent has been demonstrated.

Courts also vary as to their views regarding the impact of the need for individual adjudications of claims in subjective class actions. Employers generally will argue that the challenged decisions were not discriminatory, and that each decision must be analyzed individually. Indeed, such an argument is inevitable. In most cases, if the decisions were not discriminatory, then they must by necessity be the results of individual assessments. The courts have varied as to the significance that they place on this concern.

The courts similarly vary on the level of evidence they seek to require to certify a class based on subjective decision making. On the broadest level, the way plaintiffs typically seek such certification is to show that (a) there is a subjective process, (b) the process affects the

plaintiffs in similar ways, (c) statistically significant disparities result, and (d) anecdotal evidence supports the statistical evidence. Defendants typically will respond to the statistical and anecdotal evidence substantively, e.g., arguing that the statistical analysis is flawed because it does not account for relevant variables and by presenting a statistical analysis showing that, if one accounts for the missing variables, there is no discrepancy. Some courts will reject such a response by an employer, concluding that those disputes are better left for later resolution on the merits, and are not germane to the decision of whether to certify a class. Other courts, recognizing the impact of certification, will more rigorously analyze the evidence.[9]

Employers should recognize that they cannot know in advance the inclinations of the court to which they may be haled. As such, it is prudent for employers to review the extent to which their employment decisions are subjectively based. Employers should consider the risk compared to the business need, and identify ways to reduce the risk. Risk reduction measures are discussed in the conclusion below.

II. Certification Requirements under the Federal Rules of Civil Procedure

By way of background, for an employment-related class action to be certified, the basic elements applicable to all class actions under the Federal Rules of Civil Procedure must be met. This section briefly summarizes those elements.

A. Rule 23(a) Requirements

In pertinent part, Rule 23(a) of the Federal Rules of Civil Procedure establishes the following four threshold requirements for a class action:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or 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.[10]

1. Numerosity

The numerosity threshold of Rule 23(a) requires that joinder of all prospective plaintiffs must be impractical.[11] In assessing the difficulty

9. *See* Daniel S. Klein, Note, *Bridging the Falcon Gap: Do Claims of Subjective Decisionmaking in Employment Discrimination Class Actions Satisfy the Rule 23(A) Commonality and Typicality Requirements?* 25 REV. LITIG. 131, 180 (2006) ("class action suits must be subject to 'rigorous analysis' and courts should 'probe behind the pleadings' to ensure the existence of a factual nexus between the plaintiff and the putative class").

10. FED. R. CIV. P. 23(a).

11. FED. R. CIV. P. 23(a)(1).

of joining all plaintiffs, the court may consider the number of plaintiffs, the difficulty of identifying them, their geographical diversity, and the nature of the action.[12] In many employment class actions, numerosity is undisputed.

2. Commonality and Typicality

Under Rule 23(a), plaintiffs have the burden to show that there are questions of law or fact that are common to the proposed class, and that their claims are typical of the claims of the other class members.[13] Class relief is appropriate when the issues in the case concern questions of law or fact "'applicable in the same manner to each member of the class.'"[14] "'[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members.'"[15] Commonality and typicality are necessary to "bridge the gap" between an individual employment discrimination action and one brought on behalf of a class of individuals.[16] Commonality does not require that every question of law or fact be common to every member of the class.[17] Rather, commonality exists if a common issue pervades the class members' claims.[18] Typicality requires a showing that the members of the class share the same or similar grievances as those of the named plaintiffs.[19] As the analysis of the typicality of the claims overlaps with the commonality inquiry, commonality and typicality have a tendency to merge.[20] Commonality and typicality often are the key issues in determining the propriety of class certification, and constitute a particularly important issue in class actions regarding subjective decisions.

3. Adequacy of the Representation

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class."[21] Like the commonality and typicality requirements, it assures that the representative plaintiffs and the class members have shared interests, and ensures the absence of conflicts.[22] To serve as class representatives, the named plaintiffs must share common interests with class members, lack

12. *See* Bradford v. Sears, Roebuck & Co., 673 F.2d 792, 795 n.2 (1982) (quoting Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1038 (5th Cir. 1981)).
13. FED. R. CIV. P. 23(a)(2)–(3).
14. *Falcon,* 457 U.S. at 155 (quoting Califano v. Yamasaki, 442 U.S. 682, 701 (1979)).
15. *Id.* at 156 (citations omitted).
16. *Id.* at 148, 157–58.
17. *See* Morgan v. United Parcel Serv. of Am., Inc., 169 F.R.D. 349, 357 (E.D. Mo. 1996).
18. *Id.*
19. *Id.* at 355–56.
20. *Falcon,* 457 U.S. at 158 n.13.
21. FED. R. CIV. P. 23(a)(4).
22. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625–26 (1997).

interests adverse to class members, and vigorously prosecute the interests of the class through qualified counsel.[23]

B. Rule 23(b) Requirements

There often is significant overlap in the considerations relevant to certification under Rules 23(a) and 23(b) in employment class actions.[24] Provided that the Rule 23(a) requirements are met, an action is maintainable as a class action if (1) the prosecution of separate actions would create a risk of inconsistent or varying adjudications or adjudications with respect to individual members that would be dispositive of the interests of other nonpresent members or substantially impair or impede their ability to protect their interests; (2) "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole"; or (3) the court finds that questions of law or fact common to the class members predominate over questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the case.[25] In employment actions, plaintiffs typically contend that they satisfy the second or third prongs of Rule 23(b). This issue also tends to be especially important in class actions regarding subjective decisions.

III. Pre-*Dukes* Cases

Prior to the district court decision in *Dukes*, a majority of the courts rejected motions to certify classes challenging as discriminatory management's subjective decision making powers.

A. Class Certification Denied

1. Rule 23(a) Requirements

A. COMMONALITY AND TYPICALITY

i. Degree of Subjectivity. In denying motions to certify classes challenging subjective decisions, courts frequently focus on the fact that the challenged decisions are not "entirely subjective," and instead contain both objective and subjective components.

For example, in *Grosz v. The Boeing Co.*, the court denied certification to a group of plaintiffs alleging that the defendant used compensation practices in its Southern California facilities that resulted in gender discrimination against female employees.[26] In finding that the plaintiffs failed to demonstrate commonality or typicality, the court noted that

23. *See* E. Tex. Motor Freight Sys. Inc. v. Rodriguez, 431 U.S. 395, 404–05 (1977).

24. *See* Mendoza v. Zirkle Fruit Co., 222 F.R.D. 439, 450 (E.D. Wash. 2004).

25. FED. R. CIV. P. 23(b).

26. No. SACV-02-71-CJC, 2003 U.S. Dist. LEXIS 25341, at *2 (C.D. Cal. Nov. 7, 2003).

the criteria for success in the challenged positions differed substantially, and thus they "necessarily involve[d] a variable mix of subjective and objective factors, depending on the nature of the position involved."[27] The court held that the plaintiffs' claim of "excessive subjectivity" was "a criticism, not an actual company-wide policy or practice."[28]

For similar reasons, class certification was denied in *Reid v. Lockheed Martin Aeronautics Co.* to two groups of plaintiffs bringing claims for systemic disparate treatment and disparate impact, alleging a pattern and practice of discrimination against African-American salaried employees in promotion, training, assignments, compensation, and performance evaluations.[29] This systemic discrimination allegedly resulted in a hostile work environment and retaliation against African-American employees who exercised their rights.[30] The court held that class certification was not warranted.[31] In reaching this conclusion, the court noted that "[p]laintiffs' assertions of discretionary and subjective decision-making do not satisfy the commonality and typicality requirements in the instant cases."[32] In response to the plaintiffs' claim that the defendant's "entirely subjective" promotions, training, compensation, and evaluation systems supported findings of commonality and typicality, the court held that

> [p]laintiffs have not submitted "significant proof" that the decision-making processes at [the defendant's] Marietta facility were entirely subjective, that these processes resulted in statistically significant disparities for all black employees regardless of job group or pay grade, or that these processes were part of a general policy of intentional discrimination.[33]

Also focusing on the presence of some objectivity in the defendant's decision making process, the court in *Abram v. UPS, Inc.* denied class certification to a group of African-American supervisors claiming that the defendant's system for determining supervisors' compensation was subjective and resulted in discrimination.[34] They sought to certify a class of "'all African-American full-time supervisors employed throughout UPS.'"[35] The parties agreed that the defendant had standard personnel procedures for compensation, and that the actual decision making was individualized and decentralized.[36] However, the plaintiffs argued

27. *Id.* at *6.
28. *Id.* at *16.
29. 205 F.R.D. 655, 687 (N.D. Ga. 2001).
30. *Id.* at 658.
31. *Id.* at 687.
32. *Id.* at 678.
33. *Id.* at 677.
34. Abram v. United Parcel Serv. of Am., Inc., 200 F.R.D. 424, 434 (E.D. Wis. 2001).
35. *Id.* at 425.
36. *Id.* at 426.

that this allowed for "too much discretion and 'subjective judgment' on the part of center managers."[37] The court found that the process utilized for determining compensation was not "entirely subjective" within the meaning of *Falcon*.[38] It noted, for example, that there were detailed evaluation forms to be completed, and that subjective factors listed on those forms were not an issue because "'subjective criteria necessarily and legitimately enter into personnel decisions involving supervisory positions.'"[39] The court further noted that while some individual managers might be able to use racial bias in these performance evaluations, the defendant's "decision to permit some consideration of subjective factors is not, *in and of itself*, a discriminatory practice that provides the unifying thread necessary for 'commonality' to exist."[40] The court found that "[i]f the decision to permit some measure of subjectivity could be regarded as itself a discriminatory practice, virtually all Title VII cases against large employers would be transformed into nationwide class action lawsuits."[41] Thus, the court looked not only at the extent of the subjectivity, but also at the extent to which subjectivity was, in the court's view, reasonable under the circumstances.

Likewise, class certification was denied in *Boyce v. Honeywell, Inc.*, to a group of plaintiffs seeking to certify a class allegedly subjected to discrimination based upon race, national origin, and gender.[42] The court found that the defendant's decision-making process was not entirely subjective.[43] Rather, the court found that there were human resource guidelines that provided "objective criteria to guard against discrimination."[44] Thus, class certification was not warranted.

For similar reasons, the court in *Betts v. Sundstrand Corp.* denied certification to six named African-American plaintiffs seeking to certify a class of applicants on the basis that the defendant discriminated in hiring and recruitment.[45] The plaintiffs argued that the defendant's common hiring process and subjectivity in hiring, when combined with their statistical evidence, satisfied Rule 23's commonality and typicality requirements.[46] In denying certification, the court found that while the hiring practices and procedures allowed for some amount of subjectivity, "where there are [some] objective factors, even a generally subjective process will not satisfy Rule 23's commonality and typicality requirements. Here, while defendant's hiring practices allow

37. *Id.*
38. *Id.* at 429.
39. *Id.* at 430 (citation omitted).
40. *Id.*
41. *Id.*
42. 191 F.R.D. 669, 670 (M.D. Fla. 2000).
43. *Id.* at 676.
44. *Id.*
45. No. 97 C 50188, 1999 U.S. Dist. LEXIS 9743, at *27 (N.D. Ill. June 21, 1999).
46. *Id.* at *18.

for a certain amount of subjectivity, the managers are not completely unfettered."[47]

In addition to focusing on the presence of some objectivity in a defendant's decision-making processes, courts denying certification of class actions challenging subjective employment decisions also frequently focus on the fact that the challenged decisions were "too subjective" to support certification. For example, in *Stastny v. Southern Bell Telephone & Telegraph Co.*, the Fourth Circuit reversed the lower court's decision granting the plaintiffs' motion for certification of a class of female employees at various of the defendant's North Carolina facilities alleging discriminatory pay and promotion practices.[48] The court found commonality lacking because the defendant provided its different facilities with almost complete local autonomy.[49] The court found that the defendant's pay and promotion decisions were "entirely in the hands of one's superiors primarily one's immediate boss and are conferred upon employees based largely upon the boss's opinion of the subordinate's performance."[50] The court stated that while such evidence of subjectivity could bolster proof on the merits of an individual's claim of discrimination, it cut against any inference of commonality.[51]

Similarly, in *Webb v. Merck & Co., Inc.*, the court denied certification to twenty named plaintiffs seeking to certify a class of African-American employees who worked or had worked for the defendant's manufacturing division in plants in Pennsylvania, New Jersey, or Georgia, or as sales representatives in the Mid-Atlantic region.[52] The court noted that this proposed class would include all employees at every level at six separate facilities in five states, including both union and nonunion employees.[53] The plaintiffs alleged that the defendant gave its managers broad discretion to implement equal opportunity and antidiscrimination procedures and did not ensure that those procedures were achieved.[54] Additionally, the plaintiffs alleged a general practice of discriminating against African Americans in "hiring, compensation, promotion, demotion, job assignments, training, transfer, layoff, discharge and discipline."[55] The court further held that since the plaintiffs' claims were

47. *Id.* at *20–*21 (citations omitted). *See also* Vuyanich v. Republic Nat'l Bank of Dallas, 723 F.2d 1195, 1199–1200 (5th Cir. 1984) (vacating lower court's decision granting certification to class of females and African-Americans alleging discrimination in pay, placement, promotion, and maternity leave practices because defendant's reliance on two objective inputs in its subjective hiring process precluded certification of an across-the-board class action).

48. 628 F.2d 267, 276 (4th Cir. 1980).

49. *Id.* at 279.

50. *Id.*

51. *Id.*

52. 206 F.R.D. 399, 409–10 (E.D. Pa. 2002).

53. *Id.* at 401.

54. *Id.*

55. *Id.* at 402.

admittedly based upon "individual decisions made by hundreds if not thousands of individual managers," there was too much subjectivity in the decision making for the class to be certified.[56]

ii. Similarity of Challenged Decisions. In denying motions to certify classes challenging subjective decisions, courts frequently focus on the lack of similarity between the challenged decisions, finding that the individualized nature of the plaintiffs' claims and the lack of uniformity in the defendant's decisions warrant denial of class certification.

For example, in *Chaffin v. Rheem Manufacturing Co.*, the Eighth Circuit affirmed the lower court's decision to deny class certification to African-American employees alleging race discrimination in promotions.[57] The plaintiff seeking class certification alleged race discrimination under both the disparate treatment and disparate impact theories of liability.[58] The court found typicality lacking, based on the plaintiff's failure to present evidence of a class of individuals with grievances similar to his.[59]

A similar result was reached in *Patterson v. General Motors Corp.*, where the Seventh Circuit affirmed the district court's decision to deny the plaintiff's motion for class certification.[60] In that case, the plaintiff sought to certify a class of African-American current and former employees at three of the defendant's Illinois facilities, alleging that the defendant discriminated against African Americans with regard to compensation, promotion, termination, and other terms and conditions of employment.[61] The court found that commonality was lacking due to the individualized nature of the claims at issue: "[t]he issue of whether a particular job assignment or promotion denial was discriminatory would depend upon any number of factors peculiar to the individuals competing for the vacancy, including relative seniority, qualifications, availability for work and desire to perform the job."[62] Thus, the court concluded that "'the plaintiff's claims do not relate to general policies or practices which are allegedly discriminatory, but rather to individualized claims of discrimination which could not possibly present common questions of law or fact sufficient to justify class action treatment.'"[63] The court similarly found typicality lacking based on the fact that the plaintiff's claims were "so personal," he could not be a proper class representative.[64]

56. *Id.* at 406.
57. 904 F.2d 1269, 1270 (8th Cir. 1990).
58. *Id.* at 1276.
59. *Id.*
60. 631 F.2d 476, 478 (7th Cir. 1980).
61. *Id.* at 478–79.
62. *Id.* at 481.
63. *Id.* (citation omitted).
64. *Id.*

Likewise, in *Hartman v. Duffey*, the Court of Appeals for the District of Columbia reversed the lower court's decision to grant class certification to a class of females alleging gender discrimination in hiring by the defendant.[65] In that case, the plaintiff alleged that subjective employment decisions allowed the defendant to systematically discriminate in choosing among minimally qualified applicants.[66] The court indicated that such subjective employment decisions may support class certification.[67] However, it concluded that the lower court's certification of civil service and foreign service applicants was unwarranted when the court was "unable to locate in the record sufficient positive findings of commonality and typicality as to the types of discriminatory practices utilized in hiring both groups to permit affirming the trial court's original class certification encompassing both civil service and foreign service applicants."[68] The court thus remanded the case with instructions that the lower court should address the issue of whether the plaintiffs shared a common injury.[69]

Also focusing on the individualized nature of the plaintiffs' claims, the court in *Grosz v. The Boeing Co.* denied certification to a group of plaintiffs alleging that the defendant used compensation practices in its Southern California facilities that resulted in gender discrimination against female employees.[70] In finding that the plaintiffs failed to demonstrate commonality or typicality, the court noted that each of the defendant's separate business units had separate organizational and reporting structures and operated with significant autonomy.[71] The court found that "[b]ecause of this diversity, the criteria for success in these positions differs substantially."[72] In denying certification, the court noted that the plaintiffs failed to identify a companywide policy or practice that caused salary disparities—in fact, "Boeing has numerous policies and practices that vary depending on the . . . location of the facility, the business group, and the employee's position."[73] There was no evidence of use of common decisional criteria and practices across the class, and thus commonality and typicality were lacking.[74]

Similarly, in *Webb v. Merck & Co., Inc.*, the court held that the plaintiffs did not establish commonality because their claims were "simply not susceptible to generalized proof or defenses," and that they would need to be considered on a case-by-case basis, along with the

65. 19 F.3d 1459, 1461 (D.C. Cir. 1994).
66. *Id.* at 1472.
67. *Id.*
68. *Id.*
69. *Id.* at 1474.
70. 2003 U.S. Dist. LEXIS 25341, at *2.
71. *Id.* at *4.
72. *Id.* at *6.
73. *Id.* at *14–*15.
74. *Id.* at *16–*17.

defendant's defenses to each claim.[75] The court found that resolution of the merits of the plaintiffs' claims of race discrimination "would degenerate into an unmanageable plethora of multiple individual determinations for each individual proposed class member."[76] This was the case because the plaintiffs "fail[ed] to identify any centralized, uniform policy or practice of discrimination by [the defendant] that formed the basis for discrimination against those employees who work or worked in two different divisions . . . at six separate facilities . . . across five different states. . . . "[77] The court concluded that "other than sharing the common position of being black employees of [the defendant], the plaintiffs' allegations are discrete and individualized" and were "not susceptible to generalized proof or defenses."[78]

For similar reasons, the court in *Reid v. Lockheed Martin Aeronautics Co.* found that "a plaintiff may represent a multi-facility class only where centralized and uniform employment practices affect all facilities in the same way."[79] The court held that there were not sufficiently centralized and uniform employment practices to satisfy the commonality and typicality requirements.[80] Instead, the court found that, although the defendant had general corporate policies, implementation of those policies "remained the province of the individual business units."[81] In reaching this conclusion, the court noted:

> The evidence shows that the actual employment practices in [the defendant's] Aeronautics area were developed and implemented on the local level, and Plaintiffs have not shown commonality and typicality with respect to employees at facilities other than Marietta. With regard to the Marietta facility, Plaintiffs have offered no evidence that their promotions, training, hostile work environment, or retaliation claims are susceptible to class-wide proof or are typical to the proposed classes.[82]

The court in *Riley v. Compucom Systems, Inc.* likewise denied certification where a group of past and present African-American employees alleged discrimination in the company's hiring, promotion, compensation, and other employment related practices.[83] The court noted that the plaintiffs had failed to identify specific policies that affected each class member in the same way.[84] Because the plaintiffs worked in different

75. 206 F.R.D. at 405–06.
76. *Id.* at 406.
77. *Id.*
78. *Id.* at 408.
79. 205 F.R.D. at 668.
80. *Id.* at 669.
81. *Id.* at 669–70.
82. *Id.* at 678.
83. No. 3:98-CV-1876-L, 2000 U.S. Dist. LEXIS 4096, at *18 (N.D. Tex. Mar. 31, 2000).
84. *Id.* at *7.

departments, performed different jobs, and sought different relief (e.g., for promotion or for wrongful termination),"individualized proof [was] necessary."[85] The court denied certification because there were an "overwhelming number of individual-specific issues in this case."[86]

Also focusing on the individualized nature of the plaintiffs' claims, the court in *Moore v. The Boeing Co.* denied certification to nine plaintiffs alleging that the defendant gave them lower salaries and assigned them less overtime than similarly qualified males.[87] The plaintiffs argued that the defendant had a centralized policy that allowed managers unfettered discretion in setting salaries, which fostered discrimination.[88] The court noted that the plaintiffs had not identified a specific "policy" other than that the defendant exercised excessive subjectivity in setting salaries for female employees.[89] It focused on the fact that different criteria were used in setting salaries for different positions to hold that "[t]he decentralized nature of the decision-making defeats plaintiffs' attempt to convert separate decisions by separate managers into a company-wide policy."[90]

In *Betts v. Sundstrand Corp.*, the court likewise noted that certification was not warranted when the proposed class included all job categories, union and nonunion, and salaried and nonsalaried, and that there were different hiring practices for different types of positions, thus destroying commonality.[91] The court also found that the decision makers were not "centralized"—rather, the human resources personnel did not get involved until the individual manager had narrowed the field.[92] Accordingly, class certification was denied.[93]

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85. *Id.* at *8.
86. *Id.* at *17–*18.
87. No. 4:02CV80 CDP, 2004 WL 3202777, at *1 (E.D. Mo. Mar. 31, 2004).
88. *Id.* at *10.
89. *Id.*
90. *Id.* at *12.
91. 999 U.S. Dist. LEXIS 9743, at *18–*19.
92. *Id.* at *19. *See also Moore,* 2004 WL 3202777, at *11 (finding that commonality did not exist because the inquiry would be too individualized, requiring examination of numerous policies and looking at different jobs in a range of departments); Donaldson v. Microsoft Corp., 205 F.R.D. 558, 567 (W.D. Wash. 2001) (denying motion to certify class of female and African-American employees and former employees alleging sex and race discrimination in compensation and pay because class was too diverse to satisfy commonality requirement); Wright v. Circuit City Stores, Inc., 201 F.R.D. 526, 541 (N.D. Ala. 2001) (denying motion to certify class alleging race discrimination in promotion because commonality and typicality requirements were not met absent some identifiable pattern or practice that affected the class in common ways); Lott v. Westinghouse Savannah River Co., Inc., 200 F.R.D. 539, 559–60 (D.S.C. 2000) (denying class certification sought by class of African-American employees alleging race discrimination in promotions, pay, training, and exposure to hazardous conditions because decentralization of employer's promotion and other decisions weighed against finding of commonality and typicality); Zachery v. Texaco Exploration & Prod., Inc., 185 F.R.D. 230, 246 (W.D. Tex. 1999) (denying motion to certify class of African-American employees alleging discrimination in promotions where commonality and typicality requirements were not met); Reyes v. The Walt Disney World Co., 176 F.R.D. 654, 658 (M.D. Fla. 1998) (denying motion to certify class of

iii. Strength of Evidence of Discrimination. Courts denying motions to certify classes challenging subjective decisions frequently focus on the overall weakness of the plaintiffs' evidence presented in support of their claims of discrimination.

For example, in *Moore v. The Boeing Co.*, the court dismissed the statistics offered by the plaintiffs in support of their motion to certify the class. The court found that, while the data suggested that some managers may have used their discretion to discriminate against women, "the data does not show that there is a company-wide policy of discrimination."[94] The court focused on two main problems with the plaintiffs' statistics: they relied on data from periods outside of the statute of limitations period, and they aggregated data improperly.[95] While the aggregation of all job groups within the same sites did yield a statistically significant disparity in pay favoring men, when the job groups were analyzed individually, most of the disparities were not statistically significant, and in some cases women were favored over men.[96]

Hispanic employees alleging across-the-board discrimination claims because they failed to satisfy the commonality and typicality requirements of Rule 23(a)); Abrams v. Kelsey-Seybold Med. Group, Inc., 178 F.R.D. 116, 130 (S.D. Tex. 1997) (denying class certification to present and former African-American employees and unsuccessful job applicants alleging race discrimination in promotions and transfers because claims of discrimination did not present common questions of fact or law sufficient to justify class action treatment); Boykin v. Viacom Inc. & MTV-Networks, No. 96 CIV. 8559, 1997 U.S. Dist. LEXIS 17872, at *12, *14 (S.D.N.Y. Nov. 12, 1997) (denying motion to certify class alleging race discrimination in hiring, placement, promotions, and other terms and conditions of employment because commonality and typicality requirements were not satisfied); Appleton v. Deloitte & Touche LLP, 168 F.R.D. 221, 231–33 (M.D. Tenn. 1996) (denying motion for certification of class of current and former African-American employees alleging race discrimination with regard to hiring, training, compensation, promotion, evaluation, and termination because commonality and typicality were lacking); Zapata v. IBP, Inc., 167 F.R.D. 147, 159–60 (D. Kan. 1996) (denying motion to certify class alleging hostile work environment claims and discrimination in work assignments based on national origin because plaintiffs failed to demonstrate necessary commonality and typicality); Tooley v. Burger King Corp., No. 93 C 7531, 1995 WL 170016, at *3 (N.D. Ill. Apr. 7, 1995) (denying motion for class certification brought by class of African-American employees alleging race discrimination in hiring, pay, assignments, disciplinary actions, promotions, and firing when plaintiffs did not establish typicality or commonality); Gorence v. Eagle Food Ctrs., Inc., No. 93 C 4862, 1994 WL 445149, at *9–*10 (N.D. Ill. Aug. 16, 1994) (denying motion for class certification alleging sex discrimination in compensation, promotion, and benefits because commonality and typicality were not met); Allen v. City of Chicago, 828 F. Supp. 543, 552–53 (N.D. Ill. 1993) (denying motion to certify age and race discrimination claims brought by laid-off city employees because they failed to demonstrate commonality and typicality); Berggren v. Sunbeam Corp., 108 F.R.D. 410, 411 (N.D. Ill. 1985) (denying motion to certify action brought by former outside sales representatives alleging sex discrimination in pay and promotion because they failed to demonstrate commonality).

93. *Betts,* 1999 U.S. Dist. LEXIS 9743, at *27.

94. 2004 WL 3202777, at *13.

95. *Id.* at *12.

96. *Id.* at *13.

Similarly, in *Grosz v. The Boeing Co.*, the court noted that the plaintiffs were "unable to adduce statistical evidence that suggests the existence of a uniform pattern of treatment of women at Boeing."[97] To the contrary, the statistical evidence "belie[d] the existence of any common, class-wide pattern of discrimination."[98]

> Over the entire period of 1998–2002 and in all locations, there were no statistically significant differences in compensation between men and women in either direction for the majority of job aggregation groups analyzed by Plaintiffs' statistical expert. According to Plaintiffs' own statistician, in some years and at some sites, women were treated more favorably than men; in other years and sites, they were treated less favorably.[99]

For similar reasons, the court in *Webb v. Merck & Co., Inc.* declined to certify the plaintiffs' discriminatory impact claims that challenged the defendant's decision to allow managers and supervisors to make subjective decisions.[100] The court found that the plaintiffs' statistics were "questionable." Specifically, the court criticized the plaintiffs' expert for failing to account for nondiscriminatory variables, such as the effect of the collective bargaining agreements' mandatory wage rates and position grades in her analysis of the compensation data.[101] The court also found the plaintiffs' lack of other supporting evidence of discrimination fatal to their efforts to certify a class action:

> In addition, after three years of discovery, the only documented evidence plaintiffs have produced which can even be remotely classified as evidence of racial animus at Merck is a *single* e-mail sent by *one* supervisor in *one* department at *one* facility within the scope of the broadly-defined class. The e-mail itself contains no racial references and refers to employees that includes both whites and blacks.[102]

B. Adequacy of the Representation

In denying certification to plaintiffs challenging subjective decisions, courts also have relied on the individualized nature of the claims at issue, and concluded that differences among the putative class members could lead to class conflicts.

For example, in *Patterson v. General Motors Corp.*, the Seventh Circuit determined that the purported class representative could not fairly and adequately represent the interests of the class of African-American current and former employees alleging a variety of types of discrimination because the representative's claims were "so personalized, there is

97. 2003 U.S. Dist. LEXIS 25341, at *17.
98. *Id.*
99. *Id.*
100. 206 F.R.D. at 410.
101. *Id.* at 408 n.2.
102. *Id.*

a serious question as to whether he could fairly and adequately protect the interests of the class."[103] The court hypothesized that "[t]here could even be a conflict between plaintiff and others in the alleged class. For example, other members of the purported class may have been in competition with plaintiff for the promotion or union office he was allegedly denied."[104]

Similarly, in *Betts v. Sundstrand Corp.*, the court found that the named plaintiffs were not adequate representatives: "the personalized nature of plaintiffs' grievances . . . makes it unlikely the representative parties could fairly and adequately represent the interests of the class."[105] The court also held that the diversity of claims brought by the plaintiffs could create conflicts between class members.[106]

2. Rule 23(b) Requirements

A. RULE 23(B)(2)

In denying certification to classes challenging subjective decisions, courts analyzing claims under Rule 23(b)(2) frequently conclude that monetary relief predominates.

For example, in *Allison v. Citgo Petroleum Corp.*, the Fifth Circuit affirmed the lower court's denial of the plaintiffs' motion for class certification.[107] In that case, the class purported to cover African-American employees and applicants alleging disparate impact and disparate treatment race discrimination claims in hiring, promotion, compensation, and training at the defendant's manufacturing facilities in Lake Charles, Louisiana.[108] The court found that certification was improper under Rule 23(b)(2) because monetary relief predominated given

103. 631 F.2d at 481. *See also Moore,* 2004 WL 3202777, at *13 (finding that plaintiffs did not adequately represent class members when some of them were no longer part of the putative class).

104. *Patterson,* 631 F.2d at 482.

105. 1999 U.S. Dist. LEXIS 9743, at *23.

106. *Id.* at *23–*24. *See also* Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 480 (9th Cir. 1983) (affirming lower court's class determination with regard to white females and black males on the basis of inadequacy of representation because court's doubt that black female class representative believed that black males or white females were victims of discrimination was reasonable); Payne v. Travenol Laboratories, Inc., 673 F.2d 798, 810–11 (5th Cir. 1982) (finding that district court did not abuse its discretion in concluding that black female plaintiffs could not adequately represent interest of black males in employment discrimination suit, where black female plaintiffs asserted that defendant discriminated against females by assigning them to lower-paying jobs than males).

107. 151 F.3d 402, 407 (5th Cir. 1998). *See also Abram,* 200 F.R.D. at 433 (finding that the named plaintiffs were inadequate class representatives because the statistics they presented failed to demonstrate the representatives possessed the same interests and suffered the same injuries as the class members); *Boyce,* 191 F.R.D. at 676–77 (finding that the named class members likely held "interests antagonistic to absent class members" when some of the named plaintiffs had "female or Hispanic female supervisors who [were] accused of discriminating against those very class representatives").

108. *Allison,* 151 F.3d at 407.

the degree to which recovery of compensatory and punitive damages required individualized proof and determinations.[109]

In *Grosz v. The Boeing Co.*, the court found that the plaintiffs' claims for back pay and punitive damages precluded class certification under Rule 23(b)(2) because they were not "incidental" to injunctive relief.[110] Rather, given that the plaintiffs failed to identify a "policy or practice common to the purported class, there [was] no practice for this Court to enjoin for the protection of the class as a whole."[111] This led the court to conclude that the back pay and punitive damages sought were predominant.[112] The court also found that the back pay and punitive damage awards would need to be determined on a case-by-case basis.[113] In addition, the court rejected the plaintiffs' contention that those damages could be determined on a "formulaic basis," because "[e]ven in class cases, relief can only be provided to individuals who were actually injured, and those injuries must be proven individually."[114]

In *Reid v. Lockheed Martin Aeronautics Co.*, the court found that the plaintiffs failed to satisfy Rule 23(b)(2)'s requirements because "[p]laintiffs' claims for compensatory and punitive damages seek to remedy inherently individual injuries and can be recovered only after examining the particular circumstances of each individual class member."[115] As such, those claims were "not properly sought as a group remedy" and were "not incidental to the injunctive relief" plaintiffs sought.[116]

Similarly, in *Riley v. Compucom Systems, Inc.*, the court found that the plaintiffs did not satisfy Rule 23(b)(2)'s requirements because they failed to demonstrate that the defendant "acted or refused to act on grounds generally applicable to the . . . class."[117] In addition, the court held that the plaintiffs' request for monetary relief, which included back pay, front pay, damages for lost compensation and benefits, compensatory, and punitive damages, predominated over their claims for injunctive and declaratory relief.[118] That was so because entitlement to compensatory damages could not be presumed from a constitutional or statutory violation, and instead individualized proof was necessary, "including proof of actual injury, which often requires medical or psychological evidence unique to each individual's circumstances."[119] Similarly, punitive

109. *Id.* at 416. The court in *Allison* did not address any Rule 23(a) factors.
110. 2003 U.S. Dist. LEXIS 25341, at *18–*19.
111. *Id.*
112. *Id.* at *19.
113. *Id.*
114. *Id.* at *20.
115. 205 F.R.D. at 681.
116. *Id.*
117. 2000 U.S. Dist. LEXIS 4096, at *11.
118. *Id.* at *14.
119. *Id.*

damages were "non-incidental" because they required individualized proof.[120]

B. RULE 23(B)(3)

In denying certification to classes challenging subjective decisions, courts analyzing Rule 23(b)(3) frequently conclude that questions affecting individual class members predominate over those common to the class.

For example, in *Allison v. Citgo Petroleum Corp.*, the Fifth Circuit found that certification under Rule 23(b)(3) was not warranted because the plaintiffs' claims for compensatory and punitive damages required individualized proof and considerations, and thus predominance of individual-specific issues would detract from the superiority of the class action device.[121] Similarly, in *Grosz v. The Boeing Co.*, the court held that the plaintiffs' action could not be certified under Rule 23(b)(3) because the class action model was not "superior" when the requests for back pay and punitive damages would require the court to conduct individualized hearings that would defeat the efficiencies of a class action proceeding.[122]

Likewise, in *Reid v. Lockheed Martin Aeronautics Co.*, the court found that the plaintiffs failed to meet Rule 23(b)(3)'s requirements because "individual issues relating to their employment discrimination claims predominate over the common issue of Defendants' alleged discriminatory pattern and practice."[123] The court found that the presence of those issues "diminishe[d] the manageability of any class litigation and would result in a series of essentially separate lawsuits."[124]

B. Class Certification Granted

1. Rule 23(a) Requirements

A. COMMONALITY AND TYPICALITY

Although they were in the minority, a substantial number of courts prior to *Dukes* certified class actions based on allegations of discriminatory use of subjective decisionmaking powers.

i. Degree of Subjectivity. In granting motions to certify classes challenging subjective decisions, courts frequently focus on the fact that the challenged decisions were either "entirely subjective" or "highly subjective."

120. *Id.* at *15.
121. 151 F.3d at 419.
122. 2003 U.S. Dist. LEXIS 25341, at *22.
123. 205 F.R.D. at 685–86.
124. *Id.* at 686. *See also Riley,* 2000 U.S. Dist. LEXIS 4096, at *16–*17 (finding that the plaintiffs failed to meet Rule 23(b)(3)'s requirements because the "hundreds, if not thousands of individual issues" raised by the plaintiffs' allegations demonstrated that questions of law or fact common to the class members did not predominate over questions only affecting individual class members).

A. Entirely Subjective

In *Cox v. American Cast Iron Pipe Co.*, for example, the Eleventh Circuit focused on the fact that the defendant's personnel policies were "entirely subjective" in deciding to reverse the lower court's decertification order with regard to female employees alleging gender discrimination in compensation, promotion, and training.[125] The plaintiffs alleged that the defendant's subjective personnel policies perpetuated discrimination against females.[126] The lower court decertified the class on a finding that the plaintiffs' broad allegations of discrimination were "'individual acts of discrimination, not any *policy* of discrimination.'"[127] The Eleventh Circuit disagreed, finding that allegations of entirely subjective personnel policies can support a finding of commonality sufficient to justify class certification.[128] The *Cox* decision is contrary to the decisions reached in *Moore v. The Boeing Co., Abram v. UPS, Inc.*, and *Grosz v. The Boeing Co.* The *Cox* court certified the class although there was no policy identified beyond the defendant's allegedly subjective decision-making process, whereas the courts denied class certification on that very basis in *Moore, Abram*, and *Grosz.*[129]

Although the Fourth Circuit denied class certification in *Stastny v. Southern Bell Telephone & Telegraph Co.*,[130] it reached a different conclusion in *Holsey v. Armour & Co.*, where it affirmed, in part, the lower court's decision to certify a class of individuals alleging race discrimination "in hiring, promotions, layoffs, recalls, and other terms of employment."[131] The court found that the evidence demonstrated that entirely subjective criteria were applied to employees seeking sales or supervisory jobs.[132] This subjectivity supported class certification.[133] However, there was insufficient evidence of commonality to allow certification with regard to outside applicants and individuals applying for positions other than sales or supervisory jobs.[134] Accordingly, class certification was vacated with regard to those individuals.[135]

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125. 784 F.2d 1546, 1557 (11th Cir. 1986).
126. *Id.*
127. *Id.*
128. *Id.*
129. *See* discussions of *Moore, Abram,* and *Grosz, supra* notes 24–26, 32–39, 85–88 and accompanying text.
130. *See* discussion of *Stastny, supra* notes 46–49 and accompanying text.
131. 743 F.2d 199, 203–04 (4th Cir. 1984).
132. *Id.* at 216.
133. *Id.*
134. *Id.*
135. *Id. See also* Lilly v. Harris-Teeter Supermarket, 720 F.2d 326, 333 (4th Cir. 1983) (finding that lower court properly granted class certification on termination claims because "the complaint plainly alleged a practice of disparate treatment in the exercise of unbridled discretion, thus raising questions of law and fact common to all discharged black employees").

In *Beckmann v. CBS, Inc.*, the court granted certification to a group of female technical employees alleging that the defendant and affiliated stations discriminated against them in employment decisions.[136] The court found commonality to exist based on the plaintiffs' allegations that their supervisors had unfettered discretion in making employment decisions, including promotion decisions, and decisions regarding training, overtime, and assignments.[137] The court found that the plaintiffs' allegations of similar discriminatory employment practices across the defendant's stations, including the defendant's use of "entirely subjective personnel processes that operate to segregate the Plaintiffs in a non-advancement career track" supported a finding of commonality.[138] This holding is contrary to that reached in *Webb v. Merck & Co., Inc.*[139] The court in *Webb* denied class certification based on its conclusion that there was too much subjectivity in the personnel decisions, whereas the court in *Beckmann* used that as one of its main rationales for granting class certification.[140]

In *Butler v. Home Depot, Inc.*, the court certified a class of current female employees employed in the defendant's West Coast division, along with female applicants who applied for jobs within the West Coast division.[141] The court found typicality to exist based on evidence presented by the plaintiffs that the defendant's system of hiring, training, promotions, and compensation was "entirely subjective" because there was no evidence of objective criteria, thereby allowing local male managers to have broad discretionary authority.[142]

In *Shores v. Publix Super Markets, Inc.*, the court certified a class of female management and nonmanagement employees who worked in the defendant's retail operations in Florida, Georgia, and South Carolina, with the exception of pharmacy workers.[143] The plaintiffs asserted claims of gender discrimination under the disparate impact and disparate treatment theories of liability.[144] The court found that the typicality requirement was met based on the defendant's centralized policy of decentralized subjective decision making and the plaintiffs' allegations that managers were given "total discretion" to make decisions with regard to promotions and training.[145]

In *Richardson v. Byrd*, the Fifth Circuit affirmed the lower court's decision to grant certification to a class of female employees

136. 192 F.R.D. 608, 610 (D. Minn. 2000).
137. *Id.* at 614.
138. *Id.*
139. *See* discussion of *Webb, supra* notes 50–54 and accompanying text.
140. *Id.*
141. No. C-94-4335 SI, 1996 U.S. Dist. LEXIS 3370, at *21–*22 (N.D. Cal. Jan. 24, 1996).
142. *Id.* at *4.
143. No. 95-1162-CIV-T-25(E), 1996 WL 407850, at *10 (M.D. Fla. Mar. 12, 1996).
144. *Id.* at *7.
145. *Id.* at *3–*5.

and applicants alleging gender discrimination in hiring and job placement.[146] The court found that evidence presented at the trial demonstrated that the defendant's employment practices were "infected by the 'entirely subjective decision-making processes' recognized in *Falcon* as a manifestation of the policy whose impact might be sufficient to connect otherwise differently situated persons."[147] The defendant challenged class certification on the grounds that the named plaintiff should not have been permitted to represent a class of both employees and applicants because her claims lacked a sufficient nexus under Rule 23(a) to those of applicants.[148] The court recognized that the district court found that the defendant had no established seniority or merit system to determine eligibility for transfer or promotion, lacked written guidelines for transfer and promotion decisions, and that such decisions were determined by the mostly male supervisors based largely on subjective factors.[149] Based on those findings, the court found that class certification was supported.[150] The reference to the defendant's employment practices being "infected" by subjective decision making clearly indicates the court's view of subjectivity.

B. Highly Subjective

Focusing on the fact that the challenged decisions were highly subjective, the Ninth Circuit affirmed the lower court's decision granting certification to a class of 15,000 African-American employees working in a wide range of positions at the defendant's facilities located in twenty-seven different states in *Staton v. Boeing Co.*[151] In *Staton*, some of the plaintiffs were subject to collective bargaining agreements that established objective criteria for promotion, while others were subject only to subjective decision making.[152] The court explained that the Supreme Court's decision in *Falcon* did not bar a finding of commonality because footnote fifteen in that case presented "a demonstrative example rather than a limited exception to the overall skepticism toward broad discrimination class actions."[153] Thus, in *Falcon*, the Supreme Court "precludes a class action that, on the basis of one form of discrimination against one or a handful of plaintiffs, seeks to adjudicate all forms of discrimination against all members of a group protected by Title VII, § 1981 or a similar statute."[154]

146. 709 F.2d 1016, 1018 (5th Cir. 1983).
147. *Id.* at 1020.
148. *Id.* at 1019.
149. *Id.* at 1020.
150. *Id.*
151. 327 F.3d 938, 953 (9th Cir. 2003).
152. *Id.* at 954.
153. *Id.* at 955.
154. *Id.*

In *Warren v. Xerox Corp.*, the court granted certification to a group of African-American sales employees seeking certification for claims of assigning African-American salespeople to inferior territories, refusing promotions and transfers, denying sales commissions, and retaliating against those who asserted their rights.[155] Xerox argued that, because compensation and other benefits were dependent on a combination of factors, its policies were not "entirely subjective."[156] The court noted that "the existence of some objective factors does not negate a claim that the process is 'entirely subjective' where those variables are alleged to have been inappropriately applied."[157] The court further noted that Xerox "provided only general goals, not specific formulas as to how those factors should be applied." [158]

The court in *Warren* departed from other decisions when it granted class certification, in part, based on its conclusion that supervisors were delegated authority to apply objective rules and policies, and that Xerox provided only general goals and not specific formulas as to how individual supervisors were to implement these factors.[159] The lack of such formulas is the norm, and class certification has been denied in other cases, such as *Moore v. The Boeing Co.* and *Grosz v. The Boeing Co.*, where there were allegations of managers inappropriately applying the company's generalized policies.[160]

Additionally, the court in *Warren* found that "the fact that company-wide policies may be implemented differently in local sales operations does not negate a finding of commonality where, as here, the policy or practice was applied to the entire class."[161] Finally, the court noted that "the subjective nature of the decentralized decisionmaking process does not prevent certification of plaintiffs' disparate impact and treatment claims."[162]

In *Anderson v. The Boeing Co.*, the court granted certification to the plaintiffs who sought to certify a class of female employees alleging gender discrimination in the defendant's Oklahoma facilities.[163] The plaintiffs presented anecdotal and expert evidence that the defendant's policies had allowed managers to make subjective decisions with regard to salary and overtime pay.[164] The plaintiffs also relied on centralized policies of the defendant.[165] The court found that the plaintiffs

155. No. 01-CV-2909, 2004 WL 1562884, at *1 (E.D.N.Y. Jan. 26, 2004).
156. *Id.* at *11.
157. *Id.*
158. *Id.*
159. *Id.*
160. *See* discussions of *Moore* and *Grosz, supra* notes 68–72, 85–88 and accompanying text.
161. 2004 WL 1562884, at *11.
162. *Id.*
163. 222 F.R.D. 521, 554 (N.D. Okla. 2004).
164. *Id.* at 536.
165. *Id.* at 535.

satisfied the commonality requirement based upon common questions of fact concerning whether the defendant "failed to correct gender disparities in salary despite knowledge of their existence," whether the defendant allowed "subjective decision making with the knowledge that it perpetuates intentional discrimination and/or disparately impacts women," whether the defendant's "practices and policies allow managers to use subjective criteria in making decisions concerning overtime assignments," and "[w]hether there are statistically significant gender disparities in overtime assignments."[166] In reaching that conclusion, the court rejected the defendant's argument that class certification was inappropriate because its procedures were not entirely subjective.[167] The court held that factor did not compel against a finding of class certification because *Falcon*'s "entirely subjective" requirement only "'precludes a class action that, on the basis of one form of discrimination against one or a handful of plaintiffs, seeks to adjudicate all forms of discrimination against all members of a group protected by Title VII, § 1981 or a similar statute.'"[168]

Likewise, in *Mathers v. Northshore Mining Co.*, the court granted certification to a group of female plaintiffs claiming gender discrimination in "training opportunities, job assignments, overtime, promotions, and compensation."[169] Although the policies and practices at issue clearly had objective elements to them,

> the evidence of record suggests that subjective decision making was used to determine who qualified for the necessary skills training, safety training, and other relevant factors. In addition, it is not necessary [for a finding of commonality] that a defendant employ absolutely no objective criteria in its decision making process.[170]

The court concluded that the commonality element was met.[171] This determination is contrary to that reached by the courts in *Grosz v. The Boeing Co., Boyce v. Honeywell, Inc.*, and *Betts v. Sundstrand Corp.*, where they held that the presence of some objective factors warranted against a finding of commonality.[172]

In *McReynolds v. Sodexho Marriott Services, Inc.*, the court granted certification to a class of African-American current and former employees alleging race discrimination in promotion.[173] The court found commonality to exist based on its conclusion that the plaintiffs' statistical and anecdotal evidence demonstrated that the defendant's lack of any uniform

166. *Id.* at 537.
167. *Id.*
168. *Id.* (quoting Staton v. Boeing Co., 327 F.3d 938, 955 (9th Cir. 2003)).
169. 217 F.R.D. 474, 476 (D. Minn. 2003).
170. *Id.* at 485.
171. *Id.*
172. *See* discussions of *Grosz, Boyce,* and *Betts, supra* notes 24–26, 40–45 and accompanying text.
173. 208 F.R.D. 428, 430, 433 (D.D.C. 2002).

promotion policy or guidelines had a disparate impact on the promotion of African-American employees and created an environment in which managers intentionally discriminated against such employees by denying them promotions to upper-level management positions.[174] The court rejected the defendant's contention that its promotion decisions were not based on entirely subjective criteria because some managers considered objective criteria and some jobs had objective requirements.[175] The court noted that whether a particular manager used objective criteria was not relevant; rather, "what is significant is that the determination of which criteria to use is left entirely to the individual manager."[176] In this case, the decision of whether to use objective criteria, and, if so, what criteria to use, was left to the discretion of the individual manager.[177]

ii. Similarity of Challenged Decisions. In granting motions to certify classes challenging subjective decisions, courts also frequently focus on the similarity of the challenged decisions.

In *Staton v. Boeing Co.*, for example, the court found typicality to exist based on a finding that the large class was "united by a complex of company-wide discriminatory practices against African-Americans."[178] In reaching this conclusion, the court rejected the defendant's contention that its recent acquisition of two subsidiaries precluded a finding of commonality.[179] The court found that employees from both of the subsidiaries were among the class representatives, and that their experiences were similar to those of the other class members.[180] In addition, the court rejected the defendant's contention that commonality was defeated by the inclusion of some but not all class members in collective bargaining agreements.[181] Furthermore, the court found that the mere fact that some employment decisions were made locally did not preclude a finding of commonality based on the defendant's generally centralized employment practices.[182] The court went on to find that typicality existed because the claims of the class representatives were "'reasonably coextensive with those of absent class members.'"[183] Yet, other courts, such as *Patterson v. General Motors Corp., Grosz v. The Boeing Co.*, and *Webb v. Merck & Co., Inc.*,[184] have found similar differences sufficient to destroy typicality.

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174. *Id.* at 441.
175. *Id.*
176. *Id.* at 442.
177. *Id.*
178. 327 F.3d at 953.
179. *Id.* at 954.
180. *Id.*
181. *Id.* at 954–55.
182. *Id.* at 956.
183. *Id.* at 957 (citation omitted).
184. *See* discussions of *Patterson, Grosz,* and *Webb, supra* notes 58–62, 68–76 and accompanying text.

Similarly, in *Griffin v. Carlin*, the Eleventh Circuit affirmed the lower court's decision granting class certification to African-American employees alleging discrimination in promotions.[185] The plaintiffs alleged that the defendant's promotion policies were partly subjective.[186] The court held that the plaintiffs alleged diverse employment practices from which the court could "infer that discriminatory treatment was typical of [the] defendant's promotion practices" and that those practices "were motivated by a pervasive policy of racial discrimination."[187]

In *Anderson v. The Boeing Co.*, the court noted, "plaintiffs have experienced the types of discrimination allegedly experienced by the proposed class."[188] The court also found typicality to exist because the named plaintiffs' claims were "typical of the putative salary and overtime subclasses."[189] In reaching this finding, the court rejected the defendant's contention that the fact that different plaintiffs worked under different collective bargaining agreements precluded a finding of commonality: "that plaintiffs in the overtime subclass belonged to different unions and worked under different CBAs is not a bar to a finding of typicality considering the nearly identical policies governing assignment of overtime under the different CBAs."[190]

In *Mathers v. Northshore Mining Co.*, the court noted that "while factual circumstances relating to specific training, promotion decisions and overtime assignments may vary from woman to woman, they all give rise to the common question of whether [the defendant] inappropriately used gender as a factor in employment decisions."[191] The court also found typicality to exist because a review of the record demonstrated that the disparities in overtime, promotions, and compensation existed among all female hourly nonexempt employees working in the eight departments at issue.[192] The court's decision here can be contrasted to that reached in *Patterson v. General Motors Corp.*, as the denial of class certification in *Patterson* was based on similar allegations that factual circumstances about the challenged decisions would necessarily preclude a finding of commonality or typicality, concerns the court in *Mathers* dismissed.[193]

Likewise, in *McClain v. Lufkin Industries, Inc.*, the court certified a group of African-American employees alleging that the defendant's policies disparately impacted them.[194] The court granted certification to

185. 755 F.2d 1516, 1519, 1533 (11th Cir. 1985).
186. *Id.* at 1523.
187. *Id.* at 1532.
188. 222 F.R.D. at 537.
189. *Id.* at 538.
190. *Id.* at 539.
191. 217 F.R.D. at 485.
192. *Id.* at 486.
193. *See* discussion of *Patterson, supra* notes 58–62 and accompanying text.
194. 187 F.R.D. 267, 282 (E.D. Tex. 1999).

a class of African-American employees employed on or after March 6, 1994, who had been or may have been adversely affected by the defendant's "past or present systems of administering hiring, wages, salaries, job assignments, training, evaluations, promotions, demotions, terminations, layoffs, recalls, and rehires."[195] The court found that five factors supported a finding of commonality.[196] First, the subjective employment practices challenged by the suit were widespread in their impact—potentially affecting all African-American employees employed by the defendant.[197] Second, the homogeneity of the practices being challenged supported a finding of commonality—all challenged practices were either centrally controlled or proceeded in parallel at the defendant's various divisions.[198] Third, the homogeneity of the class itself supported commonality: "[r]ace-based disparate impact claims necessarily imply a class consisting of plaintiffs with common questions of fact."[199] "The fourth [indicator] of commonality concern[ed] the centralization of the [defendant's] management organization with respect to the challenged employment [practices]."[200] Fifth, commonality was supported by the time frame of the claimed discrimination—employment conditions had been substantially the same since March 6, 1994.[201] With regard to typicality, the court found that prong met because the legal claims made by the representative plaintiffs were typical of those of all class members.[202]

In *Orlowski v. Dominick's Finer Foods, Inc.*, the court certified a subclass of female employees who complained of discriminatory policies and practices, including job assignments, training, promotions, and shift assignments.[203] The court found the commonality requirement satisfied based on the plaintiffs' allegations that employment decisions were highly centralized and subjective, a contention that the defendant disputed.[204] The court went on to find typicality satisfied, rejecting the defendant's contention that an analysis of the plaintiffs' claims would turn on the circumstances of each individual decision.[205] The court found that "typicality is not defeated by factual distinctions between the claims of the named plaintiffs and those of other class members;

195. *Id.* at 277–78.
196. *Id.* at 279–80.
197. *Id.*
198. *Id.* at 280.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.* at 281.
203. 172 F.R.D. 370, 372 (N.D. Ill. 1997). The court denied class certification for a subclass of Hispanic employees because the sole class representative—a female Hispanic employee—was not an adequate class representative given that her interests may conflict with those of the Hispanic men in the subclass. *Id.* at 375.
204. *Id.* at 373.
205. *Id.* at 374.

the representative and the class members need not have suffered 'precisely the same injury.'"[206] The court noted that the typicality analysis focuses on the defendant's actions toward the class, and not "particularized defenses against individual class members."[207] This holding is contrary to that reached by the courts in *Webb v. Merck & Co., Inc.* and *Patterson v. General Motors Corp.*, for the denials of class certification in those cases were based, in part, on findings that the plaintiffs' claims were not susceptible to generalized defenses.[208]

In *Butler v. Home Depot, Inc.*, the court found typicality to exist because all plaintiffs shared similar claims—they contended that the defendant maintained a personnel system "characterized by the use of subjective criteria by male management with hostile and stereotypical attitudes towards women."[209] In addition, the plaintiffs alleged that they were subject to discrimination with respect to "job placement, equal pay, and denial of training and promotional opportunities."[210]

In *Dean v. The Boeing Co.*, the court certified a class of female employees who were currently or formerly employed in the defendant's Kansas facilities.[211] The court noted that while the defendant had argued that its decision making was "so 'diverse and decentralized' as to prevent commonality," it also claimed "the alleged subjective bias against women cannot exist because its human resource procedures are 'well-organized' and subject to substantial oversight."[212] The court found commonality to exist based on its finding that the representatives' claims were typical of those of two of the putative subclasses.[213]

In *Morgan v. United Parcel Service of America*, the court certified a class of African-American employees alleging race discrimination in promotion, evaluation, and pay.[214] The court found commonality to exist based on its finding that the defendant had uniform policies throughout the country, including its subjective, decentralized system of decision making.[215] The court found typicality to exist based on its conclusion that the prospective class members had the same or similar grievances as those of the class representatives.[216]

Similarly, in *McReynolds v. Sodexho Marriott Services, Inc.*, the court found typicality to exist with respect to claims against the

206. *Id.* (citation omitted).
207. *Id.*
208. *See* discussions of *Webb* and *Patterson, supra* notes 58–62, 73–76 and accompanying text.
209. 1996 U.S. Dist. LEXIS 3370, at *8–*9.
210. *Id.* at *9.
211. No. 02-1019-WEB, 2003 U.S. Dist. LEXIS 8787, at *4, *84 (D. Kan. Apr. 24, 2003).
212. *Id.* at *47.
213. *Id.* at *51.
214. 169 F.R.D. 349, 356 (E.D. Mo. 1996).
215. *Id.*
216. *Id.*

defendant beginning on March 27, 1998.[217] Prior to that time, typicality was lacking because none of the plaintiffs worked at the predecessor company.[218]

iii. Strength of Evidence of Discrimination. Courts granting motions to certify classes challenging subjective decisions frequently focus on the overall strength of the plaintiffs' evidence presented in support of their claims of discrimination.

For example, in *Caridad v. Metro-North Commuter Railroad*, the Second Circuit reversed the lower court's ruling denying the plaintiffs' motion for class certification.[219] In that case, the plaintiffs sought to certify a class of African-American present and former employees alleging that the defendant's companywide policies for employee discipline and promotion, which delegated to department supervisors substantial authority to make discretionary decisions, led to the implementation of such decisions in a racially discriminatory manner.[220] The plaintiffs pursued their claims under the pattern and practice and disparate impact theories of liability.[221] Relying on the statistical evidence presented by the plaintiffs, the court found that the evidence supported "a finding of commonality on the issue of discipline with respect to those African-American employees who were disciplined while working in one of the 48 positions in which African-Americans are more likely to be disciplined than Whites."[222] The court also found that the statistical evidence supported a finding of typicality with regard to the promotion claim because it "tends to establish that being Black has a statistically significant effect on an employee's likelihood of being promoted; indeed, being Black reduces an employee's likelihood of promotion by approximately 33 percent."[223] The court found typicality to exist because nineteen of the named plaintiffs alleged discrimination in discipline and seven of the named plaintiffs alleged discipline in promotion.[224]

Likewise, in *Senter v. General Motors Corp.*, the Sixth Circuit affirmed the lower court's decision to grant class certification in an action alleging that the defendant discriminated against African-American employees in its promotional practices.[225] In that case, the court found that the defendant had no formal method for selecting supervisors, no postings were made, and supervisors had the authority to select individuals for promotion without any guidelines.[226] The court also

217. 208 F.R.D. at 445.
218. *Id.*
219. 191 F.3d 283, 286 (2d Cir. 1999).
220. *Id.*
221. *Id.* at 291.
222. *Id.* at 292.
223. *Id.* at 292–93.
224. *Id.* at 293.
225. 532 F.2d 511, 516 (6th Cir. 1976).
226. *Id.* at 528.

held that the plaintiffs' statistics supported the conclusion that those subjective promotional policies resulted in discrimination against African-American employees:

> Although not conclusive, the statistical evidence here was quite revealing. Inland promoted its first black foreman in 1964. By 1966, the number of black supervisors had risen to four compared with four hundred and twenty-two white supervisors. . . . During this period black employment at Inland comprised approximately fourteen per cent of the total work force. During the six years between 1966 and 1971 the percentage of black foremen increased an average of one-half of one percent per year.[227]

The court found the plaintiffs' allegations that promotional discrimination had been practiced by the defendant across the board satisfied the commonality requirement.[228] The court also found that the named plaintiff's claims were typical of those of the class given that the named plaintiff was a member of the class at the time the suit was brought and his interests were not shown to be antagonistic to those of the class.[229]

In *Warren v. Xerox Corp.*, certification was granted to a class of African-American sales employees alleging that African-American salespeople were assigned to inferior territories, refused promotions and transfers, denied sales commissions, and retaliated against for asserting their rights.[230] The defendant argued that the plaintiffs' statistics were flawed, as they focused on companywide numbers, and that any disparities disappeared when the focus of the statistics turned to specific organizational units.[231] In contrast to the rigorous statistical analysis conducted by the courts in *Moore v. The Boeing Co., Grosz v. The Boeing Co.*, and *Webb v. Merck & Co.*,[232] the court in *Warren* held that its analysis of the plaintiffs' statistical evidence should not extend to weighing the merits of expert reports.[233] The court in *Warren* found commonality satisfied "where, as here, plaintiffs' statistical and anecdotal evidence tends to show that being a member of a racial minority has a negative effect on compensation, that showing suffices to demonstrate a common question of fact concerning defendant's employment practices, within the meaning of Rule 23(a)."[234] The court also found that typicality was met based on the significant showing plaintiffs made that a companywide policy or practice of discrimination

227. *Id.* at 527 (citations omitted).
228. *Id.* at 524.
229. *Id.* at 525.
230. 2004 WL 1562884, at *1.
231. *Id.* at *9.
232. *See* discussions of *Moore, Grosz,* and *Webb, supra* notes 92–100 and accompanying text.
233. 2004 WL 1562884, at *9.
234. *Id.* at *10.

existed and was implemented in a number of the defendant's offices nationwide.[235]

Similarly, in *Dean v. The Boeing Co.*, the court held that "statistical dueling" is not relevant at the class certification stage: "Plaintiff's expert concludes that the disparities adverse to female employees are statistically significant, and the Court will not attempt to balance this conclusion against the findings of Defendant's expert."[236] As with *Warren*, this holding can be contrasted to the holdings reached in *Moore v. The Boeing Co., Grosz v. The Boeing Co.*, and *Webb v. Merck & Co., Inc.*, where the courts more rigorously analyzed the parties' statistics.[237] The court in *Dean* went on to find commonality to exist with regard to two subclasses of the Kansas female employees, which excluded engineers, based upon its finding that the plaintiffs "provided specific allegations regarding their own experiences, statistical analyses of Defendant's treatment of male and female employees, and other evidence obtained from Defendant, which taken together show common factual questions regarding intentional discrimination and disparate impact."[238]

B. Adequacy of the Representation

In granting class certification, courts typically reject allegations of potential class conflicts, finding that the named plaintiffs are adequate class representatives.

For example, in *Staton v. Boeing Co.*, the court found adequacy of representation satisfied, although the class included both supervisory and nonsupervisory employees.[239] The court cited the lower court's finding that there was no evidence of any conflict of interest between the class members: "'[g]iven that the named plaintiffs include representatives of each major employee sub-group, and that the requested relief applies equally through-out the class, the Court finds that there are no conflicts between class members sufficient to defeat certification.'"[240]

Similarly, in *Mathers v. Northshore Mining Co.*, the court found that the representatives alleged the same basic cause of action as the proposed class members: "[a]ll of the representatives allege that they

235. *Id.* at *14.

236. 2003 U.S. Dist. LEXIS 8787, at *48.

237. *See* discussions of *Moore, Grosz,* and *Webb, supra* notes 92–100 and accompanying text.

238. 2003 U.S. Dist. LEXIS 8787, at *46–*47. *See also Butler,* 1996 U.S. Dist. LEXIS 3370, at *8 (finding that the plaintiffs' statistical evidence suggesting a low number of women in managerial and supervisory positions supported a finding of commonality); *McReynolds,* 208 F.R.D. at 443 (finding that the plaintiffs, through their statistical evidence and testimony, made a preliminary showing that the defendant's promotion practice was "entirely subjective and perhaps discriminatory").

239. 327 F.3d at 958–59.

240. *Id.* at 959.

were discriminated against on the basis of gender due to subjective employment decisions regarding training and job placement."[241] In addition, the court found no reason to believe that the representatives' interests would be contrary to those of the proposed class.[242]

In *Dean v. The Boeing Co.*, the court found that the representatives were adequate although the class included both supervisory and nonsupervisory employees.[243] This was so because their interests were co-extensive and the defendant presented no evidence establishing an actual conflict of interest between the putative class members.[244]

In *McClain v. Lufkin Industries, Inc.*, the court found the adequacy of representation prong satisfied because the plaintiffs "demonstrate[d] that the experience of each individual class representative [took] its form from a generally applicable system of [the defendant's] employment practices."[245] The court rejected the defendant's challenges to two of the class representatives, finding that the challenges "do not go to plaintiffs' suitability or capacity to manage this action" and that the interests of the class representatives "are common to and consistent with those of the class with respect to the litigation and resolution of this law suit."[246]

Similarly, in *Orlowski v. Dominick's Finer Foods, Inc.*, the court found that the named plaintiffs were adequate class representatives.[247] The court rejected the defendant's contention that the class representatives' interests conflicted with those of class members because they were competing for a scarce number of promotions.[248] The court found that if it were to accept that argument, "'almost every class action charging discrimination in promotion' would be 'doomed.'"[249] This holding can be contrasted to that reached in *Patterson v. General Motors Corp.*, where the court found the purported class representatives inadequate because they were competing for the same jobs.[250]

Likewise, in *Butler v. Home Depot, Inc.*, the court found that the adequacy of representation prong was met despite the defendant's claims that the inclusion in the class of applicants would create class conflicts because they were all competing for the same sales and management positions, and that the presence of both supervisory and nonsupervisory personnel would create conflicts.[251] The court found that bifurcating the trial into liability and damages phases

241. 217 F.R.D. at 486.
242. *Id.*
243. 2003 U.S. Dist. LEXIS 8787, at *53–*55.
244. *Id.* at *54–*55.
245. 187 F.R.D. at 281.
246. *Id.*
247. 172 F.R.D. at 374.
248. *Id.*
249. *Id.* (citation omitted).
250. *See* discussion of *Patterson, supra* notes 101–02 and accompanying text.
251. 1996 U.S. Dist. LEXIS 3370, at *10–*13.

eliminated any potential problems stemming from the alleged class conflicts.[252]

In *Morgan v. United Parcel Service of America*, the court found that the plaintiffs satisfied the adequacy of representation prong with regard to center managers.[253] However, the court found that the plaintiffs were not adequate class representatives for persons employed in positions lower than center manager because the center managers supervised those employees, whereby certification would require the proposed class members to defend the very conduct that they were challenging.[254] Similarly, the court found that the class representatives could not adequately represent managerial employees at higher levels because those managers were responsible for some of the actions challenged by the named plaintiffs.[255]

In *McReynolds v. Sodexho Marriott Services, Inc*, the court found adequacy of representation to exist despite the defendant's contention that there were conflicts between class members.[256] The court stated that "[t]he mere fact that some putative class members were involved in the supervision and rating of other class members does not mean that the supervising class members perpetuated or contributed to any of [defendant's] alleged discriminatory policies."[257] Due to the absence of any specific allegations of discrimination by class members against other class members, the court found no conflict to exist.[258] Moreover, the court noted that even if there were specific allegations of such discrimination, "an injunction against a few supervisory members of the class—who most likely did not exert significant influence over departmental policy-making—is fairly characterized as de minimis relative to the value of such an injunction in protecting those same supervisors from epidemic discrimination."[259]

2. Rule 23(b) Requirements

Courts certifying classes challenging subjective employment decisions tend to do so under Rule 23(b)(2), finding injunctive relief not overshadowed by the plaintiffs' claims for monetary relief.

For example, in *Robinson v. Metro-North Commuter Railroad Co.*, the court held that the lower court abused its discretion in refusing certification of the plaintiffs' pattern-and-practice disparate treatment

252. *Id.* at *12.
253. 169 F.R.D. at 358.
254. *Id.* at 357.
255. *Id.* at 357–58.
256. 208 F.R.D. at 447.
257. *Id.*
258. *Id.*
259. *Id.* at 447–48 (citation omitted). *See also Beckmann,* 192 F.R.D. at 615 (finding adequacy of class representation to exist although the circumstances of each plaintiff's claims may be slightly different because "their interests are sufficiently similar to those of the class that it is unlikely that their goals and viewpoints will diverge"); *Shores,* 1996 WL 407850, at *8 (finding no inherent conflict between class members although class included both supervisory and nonsupervisory employees).

claim under Rule 23(b)(2) by applying a bright-line bar to class treatment of all claims for compensatory damages and other nonincidental damages, such as punitive damages.[260] The court found that the lower court should have considered whether "'the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought [was] predominant even though compensatory or punitive damages [were] also claimed,'" and whether "class treatment would be efficient and manageable."[261] In addition, the court held that the district court abused its discretion in failing to bifurcate the pattern-and-practice claim and certifying the liability phase of the case for class treatment.[262] Finally, the court held that the district court should have certified the plaintiffs' disparate impact claims under Rule 23(b)(2).[263]

In *Anderson v. Boeing Co.*, the court found the requirements of Rule 23(b)(2) met with regard to plaintiffs' pattern or practice disparate treatment claims because the court held that, based on the plaintiffs' declaration, arguments, and authorities, "the members of the class, named and unnamed, would ultimately rather have [the defendant] enjoined from the type of conduct of which they complain than be compensated for the damage from any prior injurious conduct."[264] In reaching that conclusion, the court rejected the defendant's argument that the plaintiffs failed to allege with specificity the injunctive relief they sought.[265] "[T]he Court finds that a sufficient description of the injunctive and declaratory relief sought has been expressed through plaintiffs' counsel's citation to [*Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977)]."[266] The court also granted certification to the plaintiffs with regard to their requests for back pay and punitive damages, finding that the Tenth Circuit had affirmed the propriety of classwide back-pay remedies, and that the punitive damages remedy is focused on "'the degree of reprehensibility of the defendant's conduct'" rather than the individual circumstances of each class member's claims.[267] Similarly, the court found that plaintiffs' disparate impact claim could be maintained under Rule 23(b)(2).[268]

In *Warren v. Xerox Corp.*, the court certified the liability phase of the case under Rule 23(b)(2), noting that the plaintiffs requested an injunction that "'would require *Xerox* to change the method of assignment, in a

260. 267 F.3d 147, 163–64 (2d Cir. 2001). This is the decision following the remand of the case in Caridad v. Metro-North Commuter R.R., 191 F.3d 283 (2d Cir. 1999).
261. *Robinson,* 267 F.3d at 164 (citation omitted).
262. *Id.* at 167.
263. *Id.* at 169.
264. 222 F.R.D. at 541.
265. *Id.* at 540–41.
266. *Id.* at 541.
267. *Id.* (citations omitted).
268. *Id.* at 542.

way that would give less unfettered [discretion] and try to ensure some balance in the assignment of territories,' with specific mechanisms and monitoring 'to ensure that . . . African Americans are not, predominantly, assigned to . . . the less desirable territories.'"[269] However, the court declined to certify the class with respect to the remedial phase of the case, based on its finding that damages arising out of plaintiffs' claims would require separate determinations for each class member.[270]

In *Dean v. The Boeing Co.*, the court found Rule 23(b)(2)'s requirements met with regard to the plaintiffs' disparate impact claim.[271] Because compensatory and punitive damages are not available in disparate impact claims, the court concluded that the plaintiffs' disparate impact claim was primarily injunctive or declaratory, despite the plaintiffs' demand for back pay and front pay.[272]

In *Orlowski v. Dominick's Finer Foods, Inc.*, the court certified the class under Rule 23(b)(2) despite the plaintiffs' claims for monetary damages.[273] The court found that when plaintiffs satisfy Rule 23(a)'s requirements and seek injunctive or declaratory relief, "'disputes over whether the action is primarily for injunctive or declaratory relief rather than a monetary award . . . should be avoided' and certification under 23(b)(2) should be granted."[274] This holding is contrary to that reached by the courts in *Allison v. Citgo Petroleum Corp., Grosz v. The Boeing Co., Reid v. Lockheed Martin Aeronautics Co.*, and *Riley v. Compucom Systems, Inc.*, where the courts denied class certification on the grounds that the plaintiffs' claims for monetary relief predominated over their claims for injunctive relief.[275]

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269. 2004 WL 1562884, at *15.

270. *Id.* at *16.

271. 2003 U.S. Dist LEXIS 8787, at *67.

272. *Id.* at *66–*67. However, the court found that certification of the plaintiffs' pattern-or-practice disparate treatment claim was not possible under Rule 23. *Id.* at *67–*68. First, under Rule 23(b)(2), certification was not appropriate because the plaintiffs' request for injunctive and declaratory relief was "exceedingly vague," and the plaintiff's claim for monetary relief was dominant. *Id.* at *60. Likewise, the court found that certification of the plaintiffs' pattern-or-practice disparate treatment claim was not maintainable under Rule 23(b)(3) because individual questions of fact and law would predominate. *Id.* at *78. Although common questions would tend to predominate with regard to plaintiffs' statistical evidence, the plaintiffs' allegations of subjective decision making would lead to individual inquiries during the liability phase. *Id.* at *72, *74. That is so because the defendant's policies were not "entirely subjective": "there were different policies at place in different parts of Defendant's operations at different times, all of which affected class members in different ways depending on whether they were, for example, unionized hourly workers or non-union salaried supervisors." *Id.* at *76. Similarly, the court found that its consideration of anecdotal evidence would lead to individual questions of fact or law predominating over class claims. *Id.* at *78.

273. 172 F.R.D. at 374.

274. *Id.* at 374–75 (quoting 7A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1775 (2d ed. 1986)).

275. *See* discussions of *Allison, Grosz, Reid,* and *Riley, supra* notes 105–118 and accompanying text.

The *Orlowski* court also rejected the defendant's contention that the class was unmanageable.[276] The court found that the case could be managed by splitting the action into two phases—the first for determining classwide liability and punitive damages and the second for determining compensatory relief.[277] The court recognized that some of the same evidence may be introduced at both phases of the case, but found that the issue of liability would not be relitigated in the second phase.[278]

In *Butler v. Home Depot, Inc.*, the court certified the liability phase of the class under Rule 23(b)(2), finding that the plaintiffs' allegations that the defendant maintained a policy and practice of denying equal opportunities to women satisfied the requirement that the party opposing the class acted or refused to act on grounds generally applicable to the class.[279] The court rejected the defendant's contention that the plaintiffs' claims for monetary relief "overwhelm" the claims for injunctive relief, finding that such a contention was "speculative."[280]

In *Mathers v. Northshore Mining Co.*, the court certified a "hybrid" class, whereby it granted certification as to the liability phase of the case but denied certification as to the damages phase of the case.[281] The court did so because the plaintiffs sought "front pay, back pay, compensatory damages, punitive damages, and damages for past and future mental anguish and emotional distress."[282] Of course, a finding of class-based liability would be highly problematic to an employer, as the employee's subsequent claims likely would include an instruction to the jury that the employer had been found to have discriminated on a claimwide basis. This would, of course, place plaintiffs seeking monetary damages in a much better position than a similarly situated employee bringing an individual discrimination claim.

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276. 172 F.R.D. at 375.

277. *Id.*

278. *Id.*

279. 1996 U.S. Dist. LEXIS 3370, at *15.

280. *Id. See also Shores,* 1996 WL 407850, at *9 (certifying a "hybrid" class whereby in the liability phase of the case the procedures of Rule 23(b)(2) would be followed and the procedures for Rule 23(b)(3), including the opt-out procedures, would apply to the damages phase of the case); *McReynolds,* 208 F.R.D. at 448 (certifying class under Rule 23(b)(2) for the purpose of determining liability, finding that certification of the remedy stage was "unwise" at that stage of the proceedings); *McClain,* 187 F.R.D. at 282 (certifying the class under Rule 23(b)(2), but severing the plaintiffs' claims for monetary relief from class claims for injunctive relief); *Beckmann,* 192 F.R.D. at 615 (certifying a "hybrid" class by resolving the issues of liability under the procedures of Rule 23(b)(2) and the issue of damages under the procedures of Rule 23(b)(3)); *Morgan,* 169 F.R.D. at 358 (finding that monetary damages were not merely incidental to the requested injunctive relief, but certifying the class for the issues of liability and injunctive relief).

281. 217 F.R.D. at 487.

282. *Id.*

IV. The *Dukes* Decision

Significant for its strongly stated animosity toward an employer's use of subjective criteria in making employment decisions, the court's decision in *Dukes* caused some to fear that the tides would change toward certification of large class actions challenging subjective employment decisions.[283] In fact, the certification of fifteen million former and current female Wal-Mart employees alleging gender discrimination in subjective pay and promotion decisions is the largest of its kind.

In *Dukes*, the district court found commonality to exist based on three categories of evidence suggesting that Wal-Mart's alleged discriminatory pay and promotion policies were common to the entire class.[284] First, the plaintiffs provided expert testimony establishing statistical disparities based on gender in pay and promotions.[285] Second, class members presented anecdotal evidence of managers holding or tolerating discriminatory attitudes.[286]

Third, the district court concluded that the plaintiffs presented evidence of common company policies and practices: "Plaintiffs present evidence that Wal-Mart's policies governing compensation and promotions are similar across all stores, and build in a common feature of excessive subjectivity which provides a conduit for gender bias that affects all class members in a similar fashion."[287] In reaching this determination, the *Dukes* court relied on footnote fifteen in *Falcon.*[288]

In *Falcon*, the Supreme Court found that the district court erred in allowing the plaintiff to maintain a class action on behalf of all Mexican-American applicants for employment without any specific showing identifying the questions of law or fact that were common between the plaintiff and the purported class.[289] In the now-famous footnote fifteen, the Supreme Court went on to say that "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through *entirely subjective* decisionmaking processes."[290]

The *Dukes* court recognized that "excessive subjectivity" by itself does not necessarily satisfy the commonality requirement for class actions, but "where, as here, such subjectivity is part of a consistent corporate policy and supported by other evidence giving rise to an inference

283. *See* Ross, *supra* note 6.
284. 222 F.R.D. at 145.
285. *Id.* at 154–165.
286. *Id.* at 165–66.
287. *Id.* at 145.
288. *Falcon,* 457 U.S. at 159 n.15.
289. *Id.* at 158–59.
290. *Id.* at 159 n.15 (emphasis added).

of discrimination, courts have not hesitated to find that commonality is satisfied."[291] The court rejected Wal-Mart's argument that the subjectivity of its pay and promotion decisions defeated commonality and would enmesh the court or jury in prolonged fact scenarios regarding each employment decision, stating that "[b]ecause the focal point will be the practice of utilizing excessive subjectivity, rather than the facts concerning each individual decision, the Court is satisfied that the subjective nature of Defendant's personnel practices does not defeat commonality in this case."[292]

The *Dukes* court concluded that the plaintiffs satisfied the typicality requirement by demonstrating that the claims of the named plaintiffs were reasonably co-extensive with those of the class as a whole.[293] Rejecting Wal-Mart's argument that the named representatives' claims were too "individual-specific" to be typical of the class, the court concluded that some degree of individualized specificity is to be expected in all cases, and that the focus was appropriately on "whether the named plaintiffs suffered injury from a specific discriminatory practice of the employer in the same manner that the members of the proposed class did, and whether the named plaintiffs and the class members were injured in the same fashion by a general policy of employment discrimination."[294] Thus, because the discrimination alleged was based on a common practice—"excessively subjective decision making in a corporate culture of uniformity and gender stereotyping"—typicality was satisfied.[295] The court went on to find that the adequacy of representation prong was met because plaintiffs demonstrated that the interests of the class representatives did not conflict with those of the class members and class counsel was qualified to conduct the litigation.[296]

With regard to Rule 23(b), the court concluded that the plaintiffs demonstrated that Wal-Mart "'acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . . with respect to the class as a whole.'"[297] Finally, the *Dukes* court concluded that plaintiffs' claims for equal pay and promotion were manageable with respect to issues of liability and injunctive and declaratory relief.[298] However, the court found that the promotion claims were only manageable with respect to lost pay where objective data was available to document class member interest in the challenged promotion.[299]

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291. 222 F.R.D. at 149–50 (citations omitted).
292. *Id.* at 151.
293. *Id.* at 166.
294. *Id.* at 167 (citation omitted).
295. *Id.* at 167–68.
296. *Id.* at 168–69.
297. *Dukes,* 222 F.R.D. at 170 (quoting FED. R. CIV. P. 23(b)(2)).
298. *Id.* at 174–75.
299. *Id.* at 175–83.

In referring to "excessive subjectivity," the court indicated its view that subjective decision making is problematic. The court's opinion makes other disparaging references to subjectivity as well. For example, the court found evidence that "Wal-Mart's policies governing compensation and promotions are similar across all stores, and build in a common feature of excessive subjectivity which provides a conduit for gender bias that affects all class members in a similar fashion."[300] The court went on to state that "[w]hile some level of subjectivity is inherent in, and in fact a useful part of, personnel decisions, courts have long recognized that the deliberate and routine use of excessive subjectivity is an 'employment practice' that is susceptible to being infected by discriminatory animus."[301]

By contrast, antidiscrimination laws have been interpreted in numerous other cases as allowing employers much discretion in decision making, including how the decision is made.[302] Also, other courts have been more troubled by the need to make individual determinations in addressing the company's defense of its decisions.[303]

The Ninth Circuit affirmed the district court's decision on February 6, 2007, finding that the district court's decision was not an abuse of discretion.[304]

V. Post-*Dukes* Cases

Following the district court decision in *Dukes*, the majority of courts have continued to deny motions to certify classes raising allegations of managers using their subjective decision-making authority in a discriminatory manner. Moreover, a significant minority of courts continue to grant motions to certify in such situations.

300. *Id.* at 145.

301. *Id.* at 149 (citations omitted).

302. *See, e.g.,* Cooper v. Southern Co., 390 F.3d 695, 731–32 (11th Cir. 2004) (affirming summary judgment in favor of employers although African-American employee had higher score on his interview than applicant selected, because belief of one member of hiring committee that African-American employee had questionable work habits and adopted inappropriate demeanor during interview were legitimate, nondiscriminatory reasons for employer's decision not to offer employee the position); Kendrick v. Penske Transp. Serv., 220 F.3d 1220, 1233 (10th Cir. 2000) (jury may not second-guess business decisions of employers); *Abram,* 200 F.R.D. at 430 ("It is inconceivable that Congress intended anti-discrimination statutes to deprive an employer of the ability to rely on important criteria in its employment decisions merely because those criteria are only capable of subjective evaluation.").

303. *See, e.g.,* discussions of *Patterson* and *Webb, supra* notes 58–62, 73–76 and accompanying text.

304. *Dukes,* 2007 WL 329022, at *21.

A. Denying Class Certification

1. Rule 23(a) Requirements

A. Commonality and Typicality

i. Degree of Subjectivity. As was the case prior to *Dukes*, recent cases denying motions to certify classes challenging subjective decisions have focused on the fact that the challenged decisions were not "entirely subjective," and instead contained both objective and subjective components.

For example, while the Sixth Circuit granted class certification in *Senter*, following the district court decision in *Dukes*, the Sixth Circuit has twice denied certification to classes seeking to challenge an employer's subjective decision-making processes. In *Bacon v. Honda of America Manufacturing, Inc.*, the Sixth Circuit affirmed the lower court's denial of the plaintiffs' motion for class certification.[305] The plaintiffs were attempting to certify a class of African-American workers at "four [of the defendant's] Ohio facilities over the past twenty years who were involved in the company's promotion system."[306] The plaintiffs alleged discrimination under the disparate treatment and disparate impact theories of liability.[307] Specifically, the plaintiffs alleged "that 'company-wide subjective practices' and 'similar promotion criteria' across departments" satisfied the commonality requirements.[308] The court rejected this claim.[309] Citing to *Falcon*, the court noted that if the plaintiffs could demonstrate that the defendant "operated in a discriminatory fashion against all workers in the class 'through an *entirely* subjective decision-making process," then they could maintain their action as a class action.[310] However, because the defendant's promotion decisions encompassed objective criteria such as seniority, attendance, and test scores, the plaintiffs' claims did not fall within *Falcon*'s definition of "entirely subjective."[311] Similarly, in *Reeb v. Ohio Department of Rehabilitation & Correction*, the Sixth Circuit vacated the lower court's decision to certify a class of female employees of the state correctional facility alleging gender discrimination and seeking compensatory and punitive damages, declaratory relief, and unspecified injunctive relief.[312]

In *Yapp v. Union Pacific Railroad Co.*, the court rejected a motion to certify a class of approximately 1,000 current and former employees spread across twenty-three states alleging that the defendant's hiring

305. 370 F.3d 565, 568 (6th Cir. 2004).
306. *Id.* at 571.
307. *Id.* at 574.
308. *Id.* at 571.
309. *Id.*
310. *Id.* (quoting *Falcon,* 457 U.S. at 159 n.15).
311. *Bacon,* 370 F.3d at 571.
312. 435 F.3d 639, 641 (6th Cir. 2006).

selections for nonunion job vacancies had a disparate impact on African-American employees.[313] The court found that the plaintiffs failed to identify a process or procedure causing the alleged discrimination.[314] That failure was fatal to a finding of commonality:

> [i]t is impossible for this Court to find common legal or factual issues between the named plaintiffs and any putative plaintiffs when the named plaintiffs have not told this Court what process or procedure caused them to suffer disparate impact, especially considering that the many departments utilize different methods for selecting job candidates that encompass both objective and subjective criteria.[315]

Recognizing that in certain situations subjective employment practices may give rise to a claim of discrimination, the court found that "during the evidentiary hearing none of the plaintiffs presented any evidence that subjective considerations played any role in their non-selection, and in the same hearing [the defendant] presented evidence that objective considerations played a role in each plaintiff's non-selection."[316] Accordingly, the court found that "although a disparate impact claim can be based on entirely subjective employment practices, where there are objective factors, even a generally subjective process will not satisfy Rule 23(a)'s commonality and typicality requirements."[317] This holding is contrary to that reached in *Warren v. Xerox Corp.*, *Anderson v. The Boeing Co.*, *Mathers v. Northshore Mining Co.*, and *McReynolds v. Sodexho Marriott Services, Inc.*, where the courts granted motions to certify classes despite the presence of some objectivity in the defendants' decision-making processes.[318] In *Yapp*, the court also found typicality lacking because the plaintiffs' failure to identify the policy or practice causing the disparate impact made it impossible to determine if the named plaintiffs' claims were typical of those of the class.[319]

Likewise, in *Armstrong v. Powell*, the court denied the plaintiffs' motion to certify a class of employees alleging that the defendant engaged in a pattern-or-practice of discrimination against older workers in denying them promotions and forcing them to quit, and that the defendant's promotion practice had a disparate impact on older workers.[320] With regard to commonality and typicality, the court found that the plaintiffs had failed to identify a companywide practice of discrimination and had failed to demonstrate that the process utilized by the

313. 229 F.R.D. 608, 623 (E.D. Mo. 2005).
314. *Id.* at 622.
315. *Id.*
316. *Id.*
317. *Id.* (citations omitted).
318. *See* discussions of *Warren, Anderson, Mathers,* and *McReynolds, supra* notes 153–75 and accompanying text.
319. 229 F.R.D. at 622.
320. 230 F.R.D. 661, 673–74, 682 (W.D. Okla. 2005).

defendant in making promotion decisions was "entirely subjective."[321] The court found that the allegations could not be construed as companywide absent centralized decision making or some other common practice of discrimination.[322] The court found that selection decisions were made by various officials in different divisions and regions, and that there was "no evidence of coordination between the selecting officials."[323] In addition, the court rejected the plaintiffs' contention that commonality existed based on the defendant's delegation of decision-making authority to the selecting officials.[324] The court noted that, although those officials exercised discretion, that discretion was not unfettered: "[t]he selection process is based, at least in part, on identifiable criteria."[325] "The use of discretion in applying [the] criteria [did] not render the process 'entirely subjective."[326] As with *Yapp*, this holding is in contrast to that reached in *Warren v. Xerox Corp.*, *Anderson v. The Boeing Corp., Mathers v. Northshore Mining Co.*, and *McReyonlds v. Sodexho Marriott Services, Inc.*[327]

ii. Similarity of Challenged Decisions. Also as was the case prior to *Dukes*, recent decisions denying motions to certify classes challenging subjective decisions have focused on the lack of similarity between the challenged decisions.

In *Reeb v. Ohio Dept. of Rehabilitation & Correction*, for example, the court noted that the lower court failed to examine the precise nature of each of the named plaintiffs' individual discrimination claims to determine if commonality existed.[328] Relying on the Supreme Court's language in *Falcon*, the court found that the plaintiffs' generalized Title VII claims required them to allege "'significant proof' that [the defendant] operated under a general policy of gender discrimination that resulted in gender discrimination manifesting itself in 'the same general fashion' as to each of the kinds of discriminatory treatment upon which the pattern-or-practice class action rests."[329] The court concluded that the record was not sufficient for the lower court to have conducted the necessary analysis to meet *Falcon*'s requirements.[330] Accordingly, the court remanded the case to the lower court for additional proceedings.[331]

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321. *Id.* at 675.
322. *Id.*
323. *Id.*
324. *Id.* at 677.
325. *Id.*
326. *Id.* (citations omitted).
327. *See* discussions of *Warren, Anderson, Mathers,* and *McReynolds, supra* notes 153–75 and accompanying text.
328. 435 F.3d at 644.
329. *Id.* (citation omitted).
330. *Id.*
331. *Id.*

Reaching a different conclusion than it reached in *Cox v. American Cast Iron Pipe Co.*,[332] in *Cooper v. Southern Co.*, the Eleventh Circuit affirmed the district court's denial of class certification because the plaintiffs, who alleged race discrimination in the defendant's subjective decision making with regard to promotions and compensation, failed to satisfy the typicality requirement of class certification.[333] The Eleventh Circuit held that the lower court did not abuse its discretion when it found that "the named plaintiffs did not present claims typical of the full range of employees in their putative class."[334] This determination was based on the fact that the challenged compensation and promotion decisions "were made by individual managers in disparate locations, based on the individual plaintiffs' characteristics, including their educational backgrounds, experiences, work achievements, and . . . interviews."[335] Additionally, the plaintiffs sought to represent a very broad class that purported to include all African-American employees at all levels of all of the defendant companies.[336]

In *Bacon v. Honda of America Manufacturing, Inc.*, the court found that the plaintiffs failed to show how hourly and salaried employees would share interests and failed to demonstrate how differing promotion criteria for varied job classifications acted to discriminate against each class member.[337] In addition, the court held that the plaintiffs failed to "elaborate on why this court should disregard the objective criteria for promotion and find that all African-American employees were harmed by managers 'who made subjective decisions."[338] The court went on to state that it "view[s] with skepticism a class that encompasses 1) both workers and supervisors; 2) production-line workers and those in administrative positions; 3) workers in four plants with different production capabilities; and 4) workers and supervisors spread over more than 30 departments."[339] Based on these differences, the court found it difficult to imagine a common promotion policy that would affect all of the class members in the same way.[340] With regard to the plaintiffs' disparate impact claims, the court found typicality lacking because the individual decisions made by the named representatives made them ineligible for promotion for the majority of their time with the company.[341] Thus, the plaintiffs could not show that a "facially neutral polic[y]

332. *See* discussion of *Cox, supra* notes 123–27 and accompanying text.
333. 390 F.3d 695, 702–03 (11th Cir. 2004).
334. *Id.* at 714.
335. *Id.* at 714–15.
336. *Id.* at 715.
337. 370 F.3d at 571.
338. *Id.*
339. *Id.*
340. *Id.*
341. *Id.* at 572.

regarding promotion affected them in a typical way because they opted out of the most common and reliable path of advancement."[342]

In *Morgan v. The Metropolitan District Commission*, the court rejected a motion to certify a class of plaintiffs alleging race discrimination in promotions because the plaintiffs failed to satisfy the typicality or commonality requirements.[343] Recognizing that the putative class members varied greatly in terms of their departments, supervisors, seniority, and individual circumstances, the court concluded that commonality did not exist: "[t]hus, while most, though not all, of the named Plaintiffs and affiants allege discrimination in promotions, there is little to bind their claims together into a common practice and policy."[344] The court also found typicality lacking because the putative class members worked in a variety of departments.[345] Concluding that certification of the class "'would be grouping together many unrelated employment decisions made by many individual supervisors against many individual plaintiffs,'" the court declined to certify the class.[346]

In *Stubbs v. McDonald's Corp.*, the court declined to certify a class of African-American employees and applicants alleging discrimination with regard to promotion, constructive discharge, hostile environment, compensation, and failure to hire.[347] The plaintiffs alleged that the "[d]efendant's supervisors were given discretion in making promotion decisions because positions were filled through selective training and word-of-mouth recruitment."[348] The court found that such allegations of decentralized, individualized decisions were "fatal to [p]laintiff's ability to set forth a common claim of promotion discrimination."[349] With regard to the plaintiffs' other claims, the court found commonality lacking based on the fact that the plaintiff sought to represent a wide range of jobs and positions spread out over a large geographic area, and a finding that the claims would involve a "myriad [of] individual considerations."[350] For those same reasons, the court found typicality lacking.[351] This holding can be contrasted with that reached in *Mathers v. Northshore Mining Co.* and *Orlowski v. Dominick's Finer Foods, Inc.*, where motions to certify class actions were granted despite allegations of individualized decisions.[352]

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342. *Id.* at 574.
343. 222 F.R.D. 220, 235, 237 (D. Conn. 2004).
344. *Id.* at 232.
345. *Id.* at 232–33.
346. *Id.* at 234 (citations omitted).
347. 224 F.R.D. 668, 670 (D. Kan. 2004).
348. *Id.* at 675.
349. *Id.*
350. *Id.*
351. *Id.*
352. *See* discussions of *Mathers* and *Orlowski, supra* notes 189–91, 201–06 and accompanying text.

In *Grosz v. The Boeing Co.*, the Ninth Circuit affirmed the district court's decision denying a motion to certify a class of employees alleging gender discrimination with regard to the defendant's Southern California facilities.[353] The court found that the district court did not abuse its discretion in denying the motion for class certification because, in conjunction with the diversity of job descriptions within the class, the "excessive" subjectivity alleged by the plaintiffs warranted denial of class certification.[354] Given the diversity of the plaintiffs' positions, the court found:

> Determining what level of subjectivity is appropriate in making employment decisions depends greatly on what job classification is being evaluated. . . . While subjectivity in evaluating the work of an employee who books conference rooms may be inappropriate and discriminatory, the same level of subjectivity could be necessary to evaluate an employee who works as a specialized engineer spending months or years on one technical problem. The diversity within job classifications, with their varying degrees of complexity and analysis, affects the determination of whether the alleged discriminatory practice, excessive subjectivity, is discriminatory or a legitimate business practice.[355]

Thus, the court held that the lower court did not abuse its discretion in finding that the plaintiffs failed to satisfy the requirements of Rule 23(a).[356] The court stated explicitly that which seems to be implicit in a number of decisions. Subjectivity is seen by some courts as problematic, but less so where the court views the subjectivity as warranted under the circumstances.

iii. Strength of Evidence of Discrimination. As was the case prior to *Dukes*, courts denying motions to certify classes challenging subjective decisions after *Dukes* have continued to focus on the overall weakness of the plaintiffs' evidence presented in support of their claims of discrimination.

In *Cooper v. Southern Co.*, for example, the court held that the district court did not abuse its discretion in concluding that the proffered statistics and anecdotal evidence did not demonstrate a pattern and practice of discrimination common to the class or a common disparate impact affecting the putative class.[357] Specifically, the court found the plaintiffs' statistics lacking because they focused on companywide numbers, failed to compare similarly situated employees; failed to take into account job-related skills, education, experience, and job performance; and did not consider the differing scenarios presented by various promotion decisions.[358]

353. 136 Fed. Appx. 960, 962 (9th Cir. 2005).
354. *Id.*
355. *Id.*
356. *Id.*
357. 390 F.3d at 719.
358. *Id.* at 726.

Similarly, in *Armstrong v. Powell*, the court held that the plaintiffs' statistical evidence of under representation by itself was insufficient to establish commonality.[359] However, in *Armstrong*, the court declined to conduct a rigorous analysis of the plaintiffs' statistical evidence:

> Notably, the Defendant has challenged whether Plaintiffs' expert has truly compared "similarly situated employees." Because of the difficulties in making such a determination without addressing the merits and because evidence of a statistically significant disparity is not sufficient, by itself, to meet the commonality requirement, the Court declines to address the question at this juncture.[360]

B. Adequacy of Representation

Courts denying motions to certify classes challenging subjective decisions have continued to focus on potential conflicts among the class members. For example, in *Armstrong v. Powell*, the court found that the case was "fraught with potential conflicts of interest between the named representatives and the putative class."[361] The court based this determination on the fact that several of the plaintiffs competed for the same jobs, and several of the named plaintiffs were actually selected for positions during the relevant time period.[362] In addition, the court found a potential for conflict between current and former employees given that former employees would not be interested in injunctive relief.[363] Finally, the court found that, due to the differing defenses raised by the defendant in response to certain of the plaintiffs' claims, the named representatives might be focused on issues relevant to their own cases rather than issues applicable to the entire class.[364] This holding can be contrasted with that reached in *Orlowski v. Dominick's Finer Foods, Inc.*, where the court held that it would be improper to deny class certification based on the particularized defenses raised in the case.[365]

2. Rule 23(b) Requirements

Courts denying motions to certify classes challenging subjective decisions have continued to find that claims for monetary relief are predominant. For example, in *Reeb v. Ohio Department of Rehabilitation & Correction*, the Sixth Circuit held that under Rule 23(b)(2), if the class seeks compensatory damages, those damages "necessarily predominate over requested declaratory or injunctive relief."[366] This holding is contrary to that reached in *Robinson v. Metro-North Commuter*

359. 230 F.R.D. at 677.
360. *Id.* at 677 n.37.
361. *Id.* at 678.
362. *Id.*
363. *Id.*
364. *Id.*
365. 172 F.R.D. at 374.
366. 435 F.3d at 651.

Railroad Co., Anderson v. The Boeing Co., Dean v. The Boeing Co., Orlowski v. Dominick's Finer Foods, Inc., and *Butler v. Home Depot, Inc.*[367] Accordingly, that court held that the district court abused its discretion in certifying the class under Rule 23(b)(2).[368] In reaching this conclusion, the court noted that its holding did not foreclose all Title VII class actions: "Plaintiffs now have the choice of proceeding under Rule 23(b)(3) in an action for money damages or in an action under Rule 23(b)(2) for declaratory or injunctive relief alone or in conjunction with compensatory and punitive damages that inure to the group benefit."[369] The court also noted that the plaintiffs were free to bring Title VII actions as individuals.[370]

Similarly, in *Armstrong v. Powell*, the court found that the plaintiffs could not satisfy Rule 23(b)(2)'s requirements because they failed to identify a particular discriminatory policy applicable to the entire class and because they were predominantly seeking money damages rather than injunctive relief.[371] The court also found that the case presented "troubling questions regarding manageability."[372] Specifically, the court found it troubling that without a "companywide practice of discrimination, it [was] difficult to envision an injunction that could rectify the alleged discrimination."[373] In addition, the court was concerned "whether the former employees [had] standing to bring claims for injunctive relief."[374] With regard to damages sought, the court found that the plaintiffs' request for front pay would require an analysis of each plaintiff's individual circumstances, raising questions of manageability and casting doubt on whether injunctive relief actually predominated over other relief sought.[375] In addition, the court found that certification under Rule 23(b)(3) was inappropriate because several of the class representatives had defenses unique to themselves, which caused the court to question whether the class claims were truly predominant.[376] Also cutting against a finding of predominance of the class claims was the lack of a companywide practice of discrimination.[377] Finally, "the need to adjudicate the individual claims for back pay and front pay [posed potential] manageability concerns."[378]

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367. *See* discussions of *Robinson, Anderson, Dean, Orlowski,* and *Butler, supra* notes 258–66, 269–78 and accompanying text.
368. *Reeb,* 435 F.3d at 651.
369. *Id.*
370. *Id.*
371. 230 F.R.D. at 679.
372. *Id.*
373. *Id.* at 680.
374. *Id.*
375. *Id.*
376. *Id.* at 681.
377. *Id.*
378. *Id.*

B. Granting Class Certification

As was the case prior to *Dukes*, a substantial minority of courts have continued to certify class actions based on allegations of discriminatory abuse of subjective decision making powers.

1. Rule 23(a) Requirements

A. Commonality and Typicality

i. Degree of Subjectivity. Recent cases granting motions to certify classes challenging subjective decisions have continued to focus on the fact that the challenged decisions were either "entirely subjective" or "highly subjective."

For example, in *Satchell v. FedEx Corp.*, the court certified a class of individuals alleging that the defendant discriminated based on race in performance evaluations, promotion, compensation, and discipline.[379] The court found commonality satisfied based on allegations of manager discretion, a lack of systematic monitoring, and an adverse impact on minorities.[380] In reaching this determination, the court rejected the defendant's argument that its personnel decisions were not entirely subjective, although the defendant alleged that such decisions are driven by objective factors detailed in various manuals.[381] The court stated that "[a] court may certify a class where the challenged personnel policies contain both objective and subjective components."[382] This holding is in contrast to that reached by the courts in *Bacon v. Honda of American Manufacturing, Inc.*, and *Yapp v. Union Pacific Railroad Co.*, where class certification was denied because both objective and subjective decision making contributed to the challenged decisions.

In *Williams v. The Boeing Co.*, the court granted, in part, the motion for class certification brought by African-American employees alleging nation-wide race discrimination in compensation and promotions, retaliation, and hostile work environment under the disparate treatment and disparate impact theories of liability.[383] The plaintiffs' claims included allegations that the defendant's "company-wide policies . . . granting local managers excessive subjectivity in determining promotions for salaried and hourly employees and compensation for salaried employees . . . allowed and even fostered racial discrimination."[384] Looking to the Ninth Circuit's decision in *Staton*, the court found that the proposed class, which was the same as that in *Staton* with the addition of the salary compensation claim and a

379. Nos. C 03-02659 SI, C 03-02878 SI, 2005 WL 2397522, at *1 (N.D. Cal. Sept. 28, 2005).

380. *Id.* at *6–*7.

381. *Id.* at *5.

382. *Id.*

383. 225 F.R.D. 626, 628–29 (W.D. Wash. 2005).

384. *Id.* at 633.

modified start date in the class definition, likewise met Rule 23(a)'s requirements.[385]

Similarly, in *Carlson v. C.H. Robinson Worldwide, Inc.*, the court granted, in part, the motion to certify a class of all females employed by the defendant at any time during the liability period or who would be employed by the defendant in the future, with three subclasses—compensation, promotion, and sexual harassment.[386] With regard to their compensation and promotion claims, the plaintiffs alleged gender discrimination under the disparate impact and disparate treatment theories of liability.[387] With regard to their hostile work environment claim, the plaintiffs alleged only disparate treatment.[388] The court declined to certify the across-the-board class because the plaintiffs failed to direct the court to evidence in the record to support such a broad class.[389] With regard to the plaintiffs' compensation claims for salaried employees, the court found that the plaintiffs satisfied Rule 23(a)'s commonality requirement.[390] The plaintiffs alleged that the defendant had a "centralized, all male group of vice presidents who dictate compensation based on the subjective recommendations of the branch managers," and that the branch manager's discretion caused women to be paid less than men.[391] The court found commonality to exist based on the fact that the defendant's compensation review process had some oversight by management, and because all class members alleged that they were subjected to the same practices that formed their discrimination claims.[392]

ii. Similarity of Challenged Decisions. Following the *Dukes* district court decision, courts have continued to focus on the similarity of the challenged decisions in granting motions to certify classes challenging subjective decisions.

For example, in *Hnot v. Willis Group Holdings Ltd.*, the court certified a class of high-level female employees in the Northeast region of an insurance brokerage company alleging gender discrimination with regard to promotion and compensation decisions.[393] The court found commonality to exist based on allegations of a common policy of granting "unfettered discretion" to regional and local officers in making promotion and compensation decisions, the fact that compensation and promotion decisions were subject to review and oversight by human resources and a top-level officer, and statistical reports showing

385. *Id.* at 631.
386. No. Civ. 02-3780, 2005 WL 758602, at *6 (D. Minn. Mar. 31, 2005).
387. *Id.*
388. *Id.*
389. *Id.*
390. *Id.* at *9.
391. *Id.* at *8.
392. *Id.* at *9.
393. 228 F.R.D. 476, 479–80 (S.D.N.Y. 2005).

significant disparities in promotion and compensation between high-level male and female employees.[394] The court further found that typicality had been demonstrated because the named plaintiffs and the potential class members were all officers or eligible for officer titles.[395] The court found it insignificant that the named plaintiffs did not hold every officer title and did not work in every office location.[396]

In *Carlson v. C.H. Robinson Worldwide, Inc.*, the court found commonality to exist with regard to the promotion claims based on the plaintiffs' allegations that the defendant "failed to promote women proportionally to their workforce numbers because it operated an all-male, centralized subjective decision-making promotions process, employed a gender-biased personality test to assess promotability, failed to post branch manager opportunities, and failed to utilize an application process in favor of a 'tap on the shoulder' policy."[397] The court found that the presence of individual fact issues due to the defendant's decentralized policies were outweighed by the uniformity of the defendant's subjective decision making and failure to post available positions, failure to have any formal path to promotion, and failure to maintain a record-keeping system of promotions.[398] These alleged failures—to post, to have a formal promotion process, and to keep records regarding promotions—are analogous to "excessively subjective" decisions. There is no legal obligation to do these things, but the court clearly viewed the employer's decision not to do them as problematic. Also notable, the court here was willing to look past the individual-specific decisions to certify the class, although the presence of such individualized decisions formed a central basis for denial of class certification in *Cooper v. Southern Co., Bacon v. Honda of America Manufacturing Inc., Morgan v. Metropolitan District Commission*, and *Stubbs v. McDonald's Corp.*[399]

Based on the individualized nature of the claims, the court found commonality lacking with regard to the plaintiffs' sexual harassment claims.[400] The defendant did not dispute typicality with regard to the plaintiffs' compensation claims, and the court found typicality satisfied with regard to the promotion claims based on its finding that the claims of the representatives arose from the same or similar legal theories as those alleged by the class.[401]

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394. *Id.* at 482–83.
395. *Id.* at 485.
396. *Id.*
397. 2005 WL 758602, at *10.
398. *Id.* at *11.
399. *See* discussions of *Cooper, Bacon, Morgan,* and *Stubbs, supra* notes 330–49 and accompanying text.
400. *Carlson,* 2005 WL 758602, at *13.
401. *Id.* at *14. *See also Satchell,* 2005 WL 2397522, at *7 (finding typicality met based on its conclusion that the claims of the putative class representatives were "reasonably coextensive with those of absent class members, even if they have not experienced each and every alleged form of discrimination").

iii. Strength of Evidence of Discrimination. Also as was the case prior to *Dukes*, courts granting motions to certify classes challenging subjective decisions continue to focus on the overall strength of the plaintiffs' evidence presented in support of their claims of discrimination. For example, in *Hnot v. Willis Group Holdings Ltd.*, the court rejected the defendant's argument that the plaintiffs' statistical evidence was flawed.[402] The court found that the class plaintiffs "'need not demonstrate at this stage that they will prevail on the merits.'"[403] This holding is to be contrasted with *Cooper v. Southern Co.*, where the court rigorously analyzed the parties' statistical showings.[404]

B. ADEQUACY OF THE REPRESENTATION

Courts granting motions to certify classes challenging subjective decisions have continued to reject claims of potential class conflicts. For example, in *Satchell v. FedEx Corp.*, the defendant argued that the named plaintiffs were not adequate class representatives because the fact that some of them were managers who made many of the challenged evaluation, discipline, and promotion decisions created conflicts between the class members.[405] The court found that it could avoid any conflict by creating two separate classes, as proposed by the plaintiffs.[406]

Similarly, in *Hnot v. Willis Group Holdings, Ltd.*, the court held that the class representatives were adequate despite its finding that one of the named plaintiffs conducted supervisory reviews of other class members.[407] The court found that this asserted potential conflict was not a "fundamental" conflict.[408] The court noted that "[i]f supervisory employees and supervisees all are subject to discrimination, all have an equal interest in remedying the discrimination, and the named plaintiffs can still be expected to litigate the case with ardor."[409]

In *Carlson v. C.H. Robinson Worldwide, Inc.*, the court found Rule 23(a)'s adequacy of representation requirement met because the court's review of the record found no evidence that demonstrated that the interests of the representatives were antagonistic to the rest of the class.[410] Accordingly, the court concluded that the representatives would "adequately serve the interests of the proposed class."[411]

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402. 228 F.R.D. at 483.
403. *Id.* (citation omitted).
404. *See* discussion of *Cooper*, *supra* notes 354–55 and accompanying text.
405. 2005 WL 2397522, at *8.
406. *Id.*
407. 228 F.R.D. at 485–86.
408. *Id.* at 486.
409. *Id.* (citation omitted).
410. 2005 WL 758602, at *15.
411. *Id.*

2. Rule 23(b) Requirements

Following the district court decision in *Dukes*, some courts have continued to certify classes challenging subjective employment decisions under Rule 23(b)(2). In *Williams v. The Boeing Co.*, for example, the court found that Rule 23(b)(2)'s requirements were satisfied because the plaintiffs presented declarations from numerous class members stating that their primary objective was injunctive relief and noting that if plaintiffs were successful in their case, "injunctive relief remedying Boeing's discriminatory employment practices would be both reasonably necessary and appropriate."[412] The court rejected Boeing's contention that the plaintiffs' "request for back pay, front pay, compensatory and punitive damages show[ed] that monetary damages predominate[d]."[413] The court found that argument contradicted by the fact that the plaintiffs did not seek certification to obtain compensatory damages.[414] The court further held that back pay and front pay constitute equitable relief that falls under Rule 23(b)(2).[415] Similarly, the court rejected Boeing's argument that the plaintiffs' failure to specify the requested injunctive relief sought indicated that monetary relief predominated.[416] The court held that in the early stage of litigation, plaintiffs could not be required to provide such specificity.[417] Accordingly, the court held that certification of the class under Rule 23(b)(2) was appropriate.[418] However, the court limited the class based on manageability concerns and prudential issues.[419] First, the court held that inclusion of employees working for companies acquired by Boeing would be unmanageable, and thus the court excluded such employees from its certification order.[420] Second, the court certified the class for the liability phase and the injunctive portion of the remedial phase for the disparate treatment and disparate impact claims, but refrained from ruling on certification of the back pay and punitive damages portions of the remedial phase of the disparate treatment claim.[421]

Similarly, in *Carlson v. C.H. Robinson Worldwide, Inc.*, the court found that certification under Rule 23(b)(2) was warranted because the primary relief sought by the plaintiffs was injunctive.[422] This was so although the plaintiffs also sought punitive damages, back pay, and front

412. 225 F.R.D. at 632.
413. *Id.* at 633.
414. *Id.*
415. *Id.*
416. *Id.*
417. *Id.*
418. *Id.*
419. *Id.*
420. *Id.* at 636–37.
421. *Id.* at 639–40.
422. 2005 WL 758602, at *16.

pay.[423] However, the court severed the plaintiffs' request for lost wages, nominal damages, and punitive damages, finding that those damages would require an analysis of the individual claims of the plaintiffs.[424] The court stated that it would consider the plaintiffs' motion to certify the damages phase as a class action in the event that liability was established in either the compensation or promotion class.[425]

VI. Conclusion

Both before and after the district court decision in *Dukes*, several variables have regularly affected the likelihood of certification of a class action alleging that subjective decision making led to discriminatory results. The extent to which decisions were completely subjective, as opposed to being based on a combination of subjective and objective factors, the extent to which the challenged decisions have factual similarity (e.g., same departments, locations, types of jobs, decision makers), the strength of the evidence of discrimination, both anecdotal and statistical, and the perspective of the forum court all appear to be significant factors.

Employers therefore should review their decision-making processes, identify subjective factors, and consider the need to maintain those factors, recognizing the legal risk that comes with retaining subjectivity. Some decisions will, by their nature, require more subjectivity. For example, a salesperson's success often can be measured through sales data, while a creative design professional's work may be less susceptible to objective measure. A court is more likely to be suspicious of subjective review of the salesperson than the creative design professional, because it seems logical to use objective sales numbers to evaluate a salesperson, and a failure to rely on such objective criteria may raise suspicions.

Employers, having identified subjective decisions, can reduce their risk by combining subjective and objective factors. For example, if the creative design professional does work for clients, having data to measure client satisfaction adds objectivity to the process. A performance review, evaluating the employee's work quality, similarly adds an objective component by quantifying the relevant subjective measures of an employee's job performance. In addition, documenting in advance the employer's reasoned decision to utilize subjective factors in making employment decisions, before a lawsuit is filed, can be invaluable.

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423. *Id.* at *15.

424. *Id.* at *16.

425. *Id. See also Hnot,* 228 F.R.D. at 486 (concluding that plaintiffs met Rule 23(b)'s requirements on the issues of liability and injunctive relief, and deferring consideration of whether the Rule 23(b) requirements were met with regard to individual damages); *Satchell,* 2005 WL 2397522, at *9 (finding Rule 23(b) satisfied because, although the plaintiffs sought compensatory and punitive damages, injunctive relief was the "primary relief sought").

A review of an employer's decision-making processes not only can reduce the risk of class actions, but generally reduces the risk of individual employment claims. The use of objective criteria often is to the employer's benefit in individual cases as well as in class actions.

Employers further can undertake to evaluate the average salaries, raises, bonuses, and likelihood of promotion, hire, and termination, for protected groups as compared to nonprotected groups. Any such undertaking should be done carefully, however, for a flawed process creates risks. For example, such an internal review could be discoverable in litigation, and indications of statistical disparities with no remedial action taken could be harmful to the employer. However, done properly, an employer can review the kinds of data that a plaintiffs' employment lawyer would review. If discrepancies are found, the employer could prophylactically determine whether there are missing variables and, if so, determine whether introduction of those variables eliminates the discrepancies. If introduction of such variables does not eliminate the discrepancy, the employer can consider what remedial steps should be considered to prevent a successful class action.

There are many variables that affect the likelihood of a successful class action based on subjective decision making, including the forum court. Nonetheless, as set forth above, there are important preventative measures an employer can take to be in the best possible position in the event the employer is forced to defend its decision-making processes in a class action proceeding.