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DUKES OF HAZARD: RULE 23(A)(2) COMMONALITY POST *WAL-MART V. DUKES*

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“[T]here are questions of law of fact common to the class...”¹ In 2011, the Supreme Court ruled that a class of 1.5 million class members, spanning all fifty states, did not meet the required commonality quoted above. The Court ruled that commonality required plaintiffs to establish that all class members suffered the same injury.² The Court interpreted the above quotation to require potential members’ claims have a common contention capable of resolution among the entire class.³ This means “determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”⁴ The Court went on to quote a law review article that stated,

What matters to class certification... is not the raising of common ‘questions—even in droves—but, rather the capacity of a class wide proceeding to generate common *answers* apt to dive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.⁵

The ruling, a judicial manifestation of the “restrictive ethos” thesis,⁶ in *Wal-Mart Stores, Inc. v. Dukes* created another area for jurists to spar over when determining whether class certification is proper under Rule 23.

This article will discuss how *Dukes* has been applied in the Eighth and Tenth Circuits, as well as the District of Kansas and the Eastern and Western Districts of Missouri. This article will specifically deal with situations where claims brought by a class depend on individual circumstances. Furthermore, this article will discuss how individual circumstances can be overcome when class

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¹ FED. R. CIV. P. 23(a)(2).

² *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011) (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 (1982)).

³ *Id.*

⁴ *Id.*

⁵ *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV 97, 131 (2009)).

⁶ A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 449 (2013).

members can point to a specific, non-discretionary policy for the basis of the cause of action.

I. APPLICATION OF DUKES IN THE EIGHTH AND TENTH CIRCUITS

Prior to the Supreme Court's ruling in *Dukes*, the Eighth and Tenth Circuits, like most courts, treated the commonality requirement as easily met⁷ or "subsumed under, or superseded by" either typicality or the more stringent Rule 23(b)(3) predominance requirement.⁸ Following *Dukes* the treatment of commonality shifted.

A. Commonality in the Eighth Circuit after *Dukes*

After *Dukes*, the Eighth Circuit followed many courts by focusing on the individualized circumstances giving rise to the class members' claims. While defendants can show a lack of commonality by establishing individual circumstances underlie the class member's claims, evidence of a company-policy can defeat the argument.

The individual circumstances defense is apparent in *Luikens v. Domino's Pizza, LLC*.⁹ There, delivery drivers sought to bring a class action suit against their employer, Domino's Pizza, under the Minnesota Fair Labor Standards Act (MFLSA).¹⁰ The drivers alleged that the fixed charge Domino's Pizza charged customers for the delivery service was a gratuity payment unlawfully withheld from such drivers.¹¹ Similar to the summary of differences, which was later accepted by the Supreme Court in *Dukes*, offered by Chief Judge Kozinski's in his dissent from the majority in the Ninth Circuit Court of Appeals initial *Dukes v. Wal-Mart Stores Inc.*,¹² Domino's offered a "summary of difference in delivery transactions" to the Court, which proved persuasive enough to allow for the class to be decertified.¹³ According to the Court, the "summary of differences" affected the reasonableness of construing the delivery charge as a gratuity.¹⁴ The Court reasoned the class should not be certified because the characterization of a delivery charge in one transaction did not necessarily determine how the same charge could be construed in another transaction.¹⁵ Additionally, class certification was improper because Domino's conduct among the class members

⁷ See *Paxton v. Union Nat. Bank*, 688 F.2d 552, 561 (8th Cir. 1982) (court ruling that district abused discretion by not finding commonality requirement was met when the legal question "linking the class members [was] substantially related to the resolution of litigation"). See also *DG ex rel. Stricklin v. Devaugh*, 594 F.3d 1188, 1195-97 (10th Cir. 2010) (appeals court finding that district court did not abuse discretion in finding commonality even though the approximately ten thousand children in OKDHS's custody received "an individualized and specific placement, treatment, and service plan that changes based on evolving circumstance and the unique characteristics of each child.").

⁸ See *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

⁹ 705 F.3d 370 (8th Cir. 2013).

¹⁰ *Id.*

¹¹ *Id.* at 376.

¹² 603 F.3d 571, 652 (9th Cir. 2010) (Kozinski C.J., dissenting)

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

differed significantly in critical ways.¹⁶ Use of the “summary of differences” argument is an important defense to defeat class certification because it undermines the putative class members’ commonality argument. Even when the injury to class members is the same, illustrating the differences establishes that there is no common contention central to the validity of each claim.

Appeals courts may also decertify a class because of individual circumstances. However, if putative class members are able to establish the defendant had a specific policy giving rise to the cause of action, the Eighth Circuit is unlikely to find that the district court abused its discretion in certifying the class.¹⁷ In *Bouaphekeo v. Tyson Foods, Inc.*, Tyson Foods, Inc. attempted to argue that differences amongst putative plaintiff’s clothing, individual routines, and variations in duties meant that class certification was improper due to lack of commonality.¹⁸ The Eighth Circuit Court of Appeals found the argument unpersuasive because, unlike in *Dukes*, Tyson’s specific company policy of paying employees for donning, doffing, and walking applied to every individual class member.¹⁹ The Supreme Court in *Dukes* specifically mentioned this method of “bridging the gap”²⁰ and its application here shows that while proving commonality may be more difficult, it is not impossible if plaintiff class members specifically show the existence of commonality.

Following *Duke*, a new battleground has emerged with defendants attempting to defeat commonality by showing individualized circumstances gave rise to the cause of action and with plaintiffs attempting to overcome the individualized circumstances by establishing a companywide policy.

B. Application of *Dukes* in the Tenth Circuit

Similar to the Eighth Circuit, the Tenth Circuit rulings on commonality have centered on whether individualized circumstances and inquiries show that commonality is not met.

Defendants can use individualized circumstances and inquiries even when there is a company wide policy that would allow putative class members to establish commonality.²¹ In *Roderick*, defendant XTO Energy argued that its uniform payment methodology, a company wide policy, could not be used to establish commonality because of individualized circumstances and inquiries. XTO first argued that answering the common question actually required two separate individualized inquiries.²² Class members attempted to rebut this by showing there was “an implied duty of marketability in every class member’s lease.”²³ The court did not find the class member’s argument persuasive because,

¹⁶ *Id.*

¹⁷ *See* *Bouaphekeo v. Tyson Foods, Inc.*, 765 F.3d 791, 797 (8th Cir. 2014) (named plaintiffs alleging Tyson Foods, Inc. violated Fair Labor Standards Act and Iowa Wage Payment Collection Law by not paying wages while employees were donning (putting on) personal protective equipment and clothing before and again after production).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Dukes* at 2553 (quoting *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 159 (1982)).

²¹ *Roderick v. XTO Energy, Inc.*, 725 F.3d 1213 (8th Cir. 2013).

²² *Id.* at 1218 (“(1) Is there an implied duty to obtain a marketable product under the terms of a particular royalty owner’s lease?; and (2) If so, when has a marketable product been obtained?”).

²³ *Id.*

unlike the district court, the appeals court required the class members to affirmatively establish that the implied duty of commonality was actually common in every member's lease rather than merely assert such.²⁴ Furthermore, XTO argued that the variations in each class member's lease and determining if the gas was in a marketable condition would require individualized determinations, illustrating there was no common contention capable of determining the validity of class member's claim in one stroke.²⁵

XTO's use of individual circumstances and inquiries to defeat commonality is similar to the argument put forth by Wal-Mart in *Dukes*. In both cases, the defendants defeated commonality by establishing that while there was a company-wide policy, store manager discretion in *Dukes* and uniform payment methodology in *Roderick*, individualized circumstances²⁶ underlying each class member's claim prevented a showing of a common contention central to the validity of each class member's claim.

The use of discretion in a company-wide policy, like in *Dukes*, is another way for defendants to defeat a showing of commonality. In *Tabor v. Hilti, Inc.*, female employees filed suit, challenging a discretionary policy for granting promotions.²⁷ While the statistical evidence the plaintiffs offered established that the policy caused a disparate impact on women, they did not establish that Hilti's promotion choices were common across the entire class of female employees.²⁸ Thus, plaintiffs likely will not survive challenges to commonality by merely offering a company-wide policy that allows supervisors much discretion in awarding promotions. Instead, such plaintiffs must affirmatively state how such discretion and resulting promotion decisions are common to the entire class.

Defendants in a class action should attempt to establish that their company-wide policy either was individualized as to each class member or that the policy allowed decision makers discretion in its application. If defendants are able to establish either, then a court is unlikely to find that the proposed class has met the commonality requirement.

Both the Eighth and Tenth Circuits, following the decision in *Dukes*, have found that class treatment is improper if individualized circumstances underlie the class members' claims unless the class members are able to establish that their claims arise out a company wide policy that is not individualized or discretionary.

II. DUKES IN THE DISTRICT OF KANSAS AND EASTERN AND WESTERN DISTRICTS OF MISSOURI

The U.S. District Courts in Kansas and Missouri have applied the commonality rule articulated in *Dukes* in a similar manner to their corresponding court of appeals. This means the district courts have used *Dukes* to rule class

²⁴ *Id.*

²⁵ *Id.*

²⁶ In *Roderick*, the individual circumstances that prevented a finding of commonality were: "(1) [Was] there an implied duty to obtain a marketable product under the terms of a particular royalty owner's lease?; and (2) If so, when has a marketable product been obtained?" *Id.* at 1218.

²⁷ 703 F.3d 1206, 1229 (10th Cir. 2013).

²⁸ *Id.*

treatment improper when individualized circumstances underlie the class member's claims.

A. Application of *Dukes* in the District of Kansas

The U.S. District Court for the District of Kansas has applied the commonality rule from *Dukes* most often in litigation revolving around natural gas.

A common issue arising in class actions in the energy law context involves leases signed by potential class members. In *Frederick v. Southern Star Cent. Gas Pipeline, Inc.*, owners of mineral and/or surface rights alleged the Gas Storage Leases they signed were inequitable and unconscionable because the fair market value of such leases when signed was significantly more than the one-dollar per acre rental price.²⁹ The plaintiffs claimed the dispositive legal issues that established commonality were whether the terms of the lease were unconscionable and whether the lease should be reformed to reflect the fair market value at the time.³⁰ The court's analysis of these issues, as well as the merits of the underlying claim, discussed how the leases were too dissimilar to find that the commonality requirement had been met. Specifically, the court found that determining unconscionability required individualized assessments into the factual circumstances of each lease, such as the circumstances surrounding execution of the contract.³¹ As such, the court found no commonality among the class.

Likewise, in *Araklon Grazing Ass'n v. Chesapeake Operating, Inc.*, the court ruled the dissimilarities in the leases signed by class members meant commonality was not established. In an attempt to overcome the ruling in *Roderick*, the plaintiffs offered a "lease chart" that established all but 12 of the 1,044 leases at issue contained the implied duty of marketability.³² The defendant used the lease chart evidence against the plaintiffs, pointing to the fact that there were numerous variations in the lease language that prevented a finding of commonality.³³ Ultimately, the court determined they would have to make individualized inquiries into the language of each lease, precluding a finding of commonality.³⁴ The decisions in both *Frederick* and *Araklong* illustrate the difficulty in establishing commonality in the post-*Dukes* class action context, even when nearly identical leases issued by the same company are the common contention Plaintiffs hope to use to establish commonality.

Much like the Eighth and Tenth Circuits, potential class members in the Kansas federal district court can overcome individualized circumstances by offering substantial evidence that the defendants all operated under the umbrella of a general policy.³⁵ In *Motor Fuel Temperature*, consumers brought a class action against gas stations in Kansas, alleging that the defendants operation under a general policy of selling motor fuel by the gallon, without first disclosing or

²⁹ No. 10-1063-JAR (D. Kan. filed Sept. 2, 2011).

³⁰ *Id.* at 3.

³¹ *Id.*

³² No. 09-1394-CM. (D. Kan. signed July 7, 2014).

³³ *Id.* at 3.

³⁴ *Id.*

³⁵ *In re Motor Fuel Temperature Sale Practice Litigation*, 279 F.R.D. 598, 612 (D. Kan. 2012).

adjusting for temperature expansion, made the defendants liable for unjust enrichment, civil conspiracy, and violation of the Kansas Consumer Protection Act.³⁶ The court held that showing that the defendants operated under this general policy was enough to satisfy the commonality requirement.³⁷ The court reasoned the alleged common practice caused a common injury among class, and that any dissimilarity among the class did not impede a finding of common answers³⁸

Motor Fuel Temperature shows a plaintiff should attempt to establish two facts to overcome individualized circumstances: (1) a common practice or policy, and (2) that their claims do not turn on a “kaleidoscope of variables”.³⁹ In *Motor Fuel Temperature*, individualized circumstances undoubtedly existed amongst the class members. However, the plaintiffs’ attorney was able to tie those individual circumstances into one common contention by establishing that the claims of the class arose from a company wide policy.

In the U.S. District Court for the District of Kansas, individualized circumstances can prevent class certification unless class members can establish that their claims arise from a common practice or policy, and that the claims do not depend on a kaleidoscope of variables.

B. Application of *Dukes* in the Eastern and Western Districts of Missouri

The U.S. Districts Courts in the Eastern and Westerns Districts on Missouri have applied the *Dukes* commonality standard in similar fashion to the other courts mentioned in the this paper. That is, class certification is improper when individualized circumstances and inquiries underlie the class members’ causes of action. However class certification is allowed if there the defendant has a policy or acts in a manner common to the class as a whole.

This application of *Dukes* arises in *Combs v. Cordish Companies, Inc.*, where the plaintiffs allege the defendants took specific measures to prevent African Americans from entrance into the Power and Light District, thus denying them access to businesses.⁴⁰ The plaintiffs argued there were two common questions among the class:

- (1) whether Defendants had polices or practices that denied African Americans the right to make contracts in the District; and
- (2) whether such polices were actually employed with the intent of deny African Americans the rights to make such contracts or to otherwise limit the number of African Americans in the District.⁴¹

The Western District Court of Missouri pointed out that while the questions were common in a broad and abstract way, each plaintiff had to establish that the policies were actually used in all situations in which the plaintiffs were involved.⁴² The court went on to rule that the plaintiffs had not established or alleged a universal method or standard used by the defendants,

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* (quoting *Dukes*, 131 S.Ct. at 2551).

³⁹ *Id.* (quoting *Dukes*, 131 S.Ct. at 2557).

⁴⁰ No. 14-0227-CV-W-ODS (W.D. Mo. Feb. 3, 2015).

⁴¹ *Id.*

⁴² *Id.*

neither did the plaintiffs offer significant proof of general policy of discrimination.⁴³ The general policy of discrimination was not established because there were individual and contextualized questions of the extent to which the alleged practices were employed.

This use of *Dukes* and *Falcon* illustrates the difficulties in establishing commonality, but also provides a roadmap to use when attempting to show commonality. The Supreme Court found that to bridge the gap between individual claims of discrimination and a common class, plaintiffs must either point to an universally applicable method or standard or offer significant proof that the defendant operated under a general policy. In *Combs*, commonality would have been established if the plaintiffs either (1) offered evidence that the defendants had a universally applicable standard of excluding African Americans from the Power and Light District or (2) offered significant proof that a large numbers of African Americans were excluded because the defendants utilized a general policy of discrimination. Unfortunately, the plaintiffs offered no such evidence to overcome the individualized circumstances present in their cause of action.

Further, when defendants move to dismiss a claim for the failure to state plausible claims for class-wide relief prior to discovery, Missouri federal district courts have been willing to allow plaintiffs to bypass a showing of commonality.⁴⁴ In *Simpson*, the court found that the plaintiff's allegations were plausible for class-wide relief because the allegation were narrower than those in *Dukes*. The plaintiff alleged the defendant discriminated against minorities through its hiring policies and practices for specific positions in St. Louis.⁴⁵ The narrow scope, the court stated, increased the likelihood that the plaintiff could identify a common answer to why class members were not hired; that common answer would be the glue that held the class together.⁴⁶

This again illustrates the need for a plaintiff's allegations to not involve a "kaleidoscope" of variables that would make class certification improper because of too many individualized circumstances amongst putative class members. The narrow scope of the allegations allowed the court to see where the litigation was headed and show there would be a common contention amongst the class members.

III. CONCLUSION

Since *Dukes*, courts have focused more on the common question of law or facts that brings together the class. If the claims brought by the class involve a myriad of individualized circumstances and inquiries, courts are reticent on allowing class treatment. Conversely, if class members are able to point to a specific policy that does not involve discretion in its application or eliminate the individual circumstances by offering significant proof that the defendant acted

⁴³ *Id.*

⁴⁴ *Simpson v. Boeing Co.*, 27 F. Supp. 3d 989 (E.D Mo. 2014).

⁴⁵ *Id.* at 994.

⁴⁶ *Simpson*, unlike *Dukes*, did not involve a nationwide class. Instead, the class in *Simpson* was located in the St. Louis area and this geographic specificity illustrated to the court that class certification was proper.

under a specific policy, courts are likely to find that commonality has been established.