

## NEWS & INSIGHTS

---

### DO ANY OF THE ELEMENTS OF THE PLAINTIFF'S CLAIMS REQUIRE PLAINTIFF-SPECIFIC PROOF?

December 17, 2020

By: **Sara Anne Ford**

The key to successfully defending class actions is to understand the difference between a “common” issue and an individual issue. Rule 23(a) requires that there be “questions of law or fact common to the class,” and Rule 23(b)(3) requires for damages class actions that those common questions “predominate over any questions affecting only individual members.”

A common issue is “one where ‘the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.’” *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (quoting 2 W. Rubenstein, *Newberg on Class Actions* § 4:50, pp. 196-197 (5th ed. 2012)). An individual issue, on the other hand, is “one where ‘members of a proposed class will need to present evidence that varies from member to member.’” The differentiating factor is the evidence needed: a common issue can be proved by the *same* evidence as to each class member.

A comparison of two Supreme Court decisions illustrates this difference. In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the court addressed the certification of Title VII claims against Wal-Mart. Pay and promotion decisions at the company were left largely to the discretion of its store and district managers, but the plaintiffs argued that the company’s culture permitted bias against women to infect that discretionary decision-making such that all female employees were the victims of discrimination.

The court first focused on the “crux of the inquiry” in a Title VII claim, which it identified as “the reason for a particular employment decision.” The plaintiff submitted three forms of proof to try to establish a common policy affecting the company’s employment decisions – statistical evidence of pay and promotion disparities, anecdotal evidence and the testimony of a sociologist who concluded that the company was “vulnerable” to gender discrimination. The court found this evidence insufficient to create even one common issue, explaining that one could not infer from it that there was a company-wide policy of discrimination implemented by the discretionary decisions of store and district managers. As the court put it, “demonstrating the invalidity of one manager’s use of discretion will do nothing to demonstrate the invalidity of another’s.”

In *Tyson Foods*, the Supreme Court affirmed certification of an FLSA class action in which the plaintiffs claimed that employees of a pork processing plant were underpaid for time they spent putting on and taking off protective gear. The plaintiffs relied on the study of an industrial relations expert who estimated, based on videotaped observations, the average time it took for employees to put on and take off their gear. Tyson contended that this evidence was merely representative, that it could not be used to show how long each individual employee took to do so.

The court held that the representative sample could be used to establish class-wide liability, explaining that “respondents sought to introduce a representative sample to fill an evidentiary gap created by the employer’s failure to keep adequate records. If the employees had proceeded with 3,344 individual lawsuits, each employee likely would have had to introduce [the] study to prove the hours he or she worked... the representative evidence here was a permissible means of making that very showing.”

In both *Dukes* and *Tyson Foods*, the court asked the same basic question – can the plaintiff, by establishing his own claim, prove the claim, or a significant element of the claim, of the class members. In *Dukes*, the answer was no because proving that one female Wal-Mart employee was discriminated against in her manager's decision to deny her a raise or promotion did not permit an inference that any other employee was discriminated against. In *Tyson*, the answer was yes because the study permitted an inference that all of the employee members of the class had worked overtime hours for which they had not been paid. In the end, it's the evidence that counts.