

No. 10-8018

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SALLY A. RANDALL, RONA C. PEPMEIER,
Individually and on behalf of all others similarly situated,
Plaintiffs-Petitioners,

v.

**ROLLS-ROYCE CORPORATION, ROLLS-ROYCE NORTH AMERICA, INC.,
ROLLS-ROYCE NORTH AMERICA HOLDINGS, INC., and ROLLS-ROYCE
NORTH AMERICA (USA) HOLDINGS CO.,**
Defendants-Respondents.

PETITION FOR LEAVE TO APPEAL PURSUANT TO RULE 23(f)

FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
CASE No. 1:06-cv-0860-SEB-JMS
THE HONORABLE SARAH EVANS BARKER

**BRIEF OF IMPACT FUND, LAWYERS' COMMITTEE FOR CIVIL RIGHTS
OF THE SAN FRANCISCO BAY AREA, EQUAL RIGHTS ADVOCATES,
LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER, INDIANA
CHAPTER OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
AS AMICI CURIAE
IN SUPPORT OF PLAINTIFFS-PETITIONERS AND
IN SUPPORT OF THE GRANT OF PLANTIFFS-PETITIONERS' PETITION
FOR LEAVE TO APPEAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(c), *Amici Curiae* hereby provide the following disclosure statements:

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I. INTEREST OF *AMICI CURIAE*

By the Court's leave, *Amici Curiae* file this brief in support of Plaintiffs' Petition for Leave to Appeal the district court's orders denying Plaintiffs class certification and reconsideration of the denial of class certification. *Amici Curiae* Impact Fund, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, Equal Rights Advocates, and Legal Aid Society - Employment Law Center represent women and minorities in challenging workplace discrimination, often by bringing "disparate impact" claims under Title VII of the Civil Rights Act. They largely represent individuals who lack sufficient resources to bring individual discrimination claims and therefore depend on class actions to obtain relief. *Amicus Curiae* the Indiana Chapter of the National Employment Lawyers' Association is an organization comprised of attorneys who represent employees in workplace discrimination cases and other employment law matters. Collectively, *Amici Curiae* seek to ensure that victims of discrimination, such as Plaintiffs Randall and Pepmeier, may continue to use class actions to obtain relief for their Title VII disparate impact claims.

II. SUMMARY OF ARGUMENT

This case presents an issue of singular importance for the enforcement of civil rights in the context of employment discrimination class actions, which should be reviewed at this juncture under Federal Rule of Civil Procedure 23(f):

How does a trial court conduct a 'rigorous analysis' of competing statistical evidence offered to demonstrate (or refute) the existence of common questions of law or fact (Fed. R. Civ. P. 23(a)(2)) without simultaneously engaging in an impermissible adjudication of the merits?

Plaintiffs *must* present statistical evidence to succeed on a claim of disparate impact discrimination at trial, and also offer such proof at the class certification stage to demonstrate commonality. The district court's assessment of this evidence should be markedly different at each stage of the proceedings. Here, the trial court collapsed the inquiries and strayed far into resolution of statistical disputes that only may properly be adjudicated at the liability stage during a merits trial and not at class certification. Indeed, the court acknowledged that when it "examines expert testimony offered in support of class certification factors, it is essentially conducting a bench trial and serving as trier of fact."

Two other circuit courts have recently grappled with this nettlesome question and, as this case demonstrates, this Court should now do so as well. Absent clear and immediate direction from this Court, district courts will continue to assess whether statistical evidence offered to establish commonality *proves* discrimination and attempt to resolve disputes between experts. Class certification proceedings will devolve into protracted statistical mini-trials, ranging well beyond the parameters of the Rule 23 inquiry, and victims of discrimination will, as a practical matter, be denied the right to challenge classwide discrimination based on a disparate impact theory.

III. ARGUMENT

A. Disparate Impact Class Actions Are a Vital Tool for Combating Systemic Employment Discrimination.

As this Court has recognized repeatedly, class actions, including those brought under Title VII, maximize judicial efficiency, through the aggregation of similar claims. *See Allen v. Int'l Truck & Engine Corp.*, 358 F.3d 469, 471-72 (7th Cir. 2004) (class action for racial discrimination and harassment); *see generally Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). Recently, this Court

reiterated that class certification is “a sensible and legally permissible alternative” where individual suits would cost orders of magnitude more to litigate than the claims would be worth. *Pella Corp. v. Saltzman*, -- F.3d --, No. 09-8025, 2010 WL 1994653, at *2 (7th Cir. May 29, 2010) (quoting *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 748 (7th Cir. 2008)) (consumer fraud case). Such is undoubtedly the case here: Plaintiffs seek certification of disparate impact discrimination claims and the cost of proceeding on that theory of proof far outweighs the potential recovery by any one plaintiff.

Congress enacted the Civil Rights Act of 1964 to “achieve equality of employment opportunities;” it prohibits “not only overt discrimination but also practices that are fair in form, but discriminatory in operation.” *Griggs v. Duke Power Co.*, 401 U.S. 424, 429, 431 (1972). Victims of discrimination may proceed under either a *disparate impact* theory, which does not require proof of intent, or a *disparate treatment* theory, which does. See *Lewis v. City of Chicago*, -- S.Ct. --, No. 08-974, 2010 WL 2025206, at *7 (May 24, 2010). Congress recognized the difficulty of achieving equal employment opportunity and, as part of the Civil Rights Act, specifically provided for class “pattern or practice” actions to facilitate private enforcement. See *Griggs*, 401 U.S. at 426, 429-430; *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401 (1968).

Disparate impact claims are almost always brought as class actions because they are inherently systemic challenges. They target “facially neutral employment practices that have significant adverse effects on protected groups.” *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87 (1988). The evidence in a disparate impact case “focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities.” *Id.* at 987. To establish a claim, the “plaintiff must offer statistical evidence of a kind and degree sufficient to show that

the practice in question has caused” the adverse affect on the protected group. *Id.* at 994.

This type of statistical analysis is expensive and ordinarily out of reach for any individual plaintiff, particularly since remedies for disparate impact are limited.¹ “[Class] disparate impact claims by necessity involve experts and complex statistical analysis and evidence, the costs of which may not be readily borne by individual plaintiffs.” *Bert v. AK Steel Corp.*, No. 1:02cv467, 2007 WL 184746, at *5 (S.D. Ohio Jan. 19, 2007). Without the availability of class actions, plaintiffs will be unable, as a practical matter, to bring disparate impact claims.

Recent cases demonstrate that disparate impact class actions remain a vital means for combating discrimination, since direct evidence of discriminatory animus is rare in the modern workplace. Recently, plaintiffs have used systemic disparate impact cases to successfully challenge entrenched patterns of racial exclusion in the New York City fire department, *United States & Vulcan Soc’y v. City of New York*, 637 F. Supp. 2d 77 (E.D.N.Y. 2009); discriminatory hiring examinations in the Chicago fire department, *Lewis*, 2010 WL 2025206, at *7; racially discriminatory promotion and initial assignment systems in a Texas manufacturing plant, *McClain v. Lufkin Indus.*, 519 F.3d 264 (5th Cir. 2008) (affirming judgment in part, and reversing and remanding for further proceedings in part); racially discriminatory hiring processes, *Nelson v. Wal-Mart Stores, Inc.*, 245 F.R.D. 358 (E.D.Ark. 2007); and gender discrimination in compensation and promotions, *Velez v. Novartis Pharm. Corp.*, 244 F.R.D. 243 (S.D.N.Y. 2007).

¹ Remedies in a disparate impact case are limited to back pay, front pay, injunctive relief, and attorneys’ fees. 42 U.S.C. § 2000e-5(g)(1); 42 U.S.C. §§ 1981a(a)(1) & (2) (2000).

B. Disparate Impact Class Actions Typically Turn on a Predictable Set of Statistical Disputes to Determine Liability at Trial.

Because plaintiffs must offer statistical evidence to establish liability for disparate impact, statistical disputes between the parties inevitably form the centerpiece in the class action trial. See *Robinson v. Metro-North R.R.*, 267 F.3d 147, 160 (2d Cir. 2001) (statistical proof occupies “center stage” in a disparate impact claim). “Virtually all well-litigated class action cases present the problem of conflicting statistical conclusions.” Barbara T. Lindemann and Paul Grossman, *Employment Discrimination Law* 2348 (4th ed. 2007). These conflicts arise because of “the great variety of possible sources of statistics, the numerous geographic and time frame possibilities, and the various tests that can be applied to the resulting data.” *Id.* at 2349.

Most disparate impact cases present a predictable set of competing statistical positions that are adjudicated at the *liability* stage of the proceedings: 1) what is the appropriate population (or pool) for comparison with the target group? *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-51 (1989); 2) which variables should be included in a multiple regression analysis? *Bazemore v. Friday*, 478 U.S. 385, 400 (1986); 3) are statistics more reliable if viewed at the macro level (aggregated) or at the micro level (disaggregated)? *Bouman v. Block*, 940 F.2d. 1211, 1226 (9th Cir. 1991); 4) what measure of statistical significance is more probative? *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 306-12 (1977). In resolving these questions at trial, the Supreme Court has expressly avoided imposing any “rigid mathematical formula” on statistical proof. *Watson*, 487 U.S. at 995. A Title VII plaintiff is not required to prove discrimination “to a scientific certainty;” the statistical evidence is evaluated in “the factual context of the case in light of all the evidence presented.” *Bazemore*, 478 U.S. at 400.

C. The Standard for Evaluation of Statistical Proof at the Class Certification Stage is Different from the Liability Stage.

Plaintiffs also offer statistical evidence at class certification, but for a *very different* purpose -- to demonstrate the presence of common questions of law or fact under Rule 23(a)(2).² The district court's challenge in evaluating this evidence at that preliminary stage is to "walk a fine line between a facial class certification assessment and an assessment on the merits." *Brown v. Nucor Corp.*, 576 F.3d 149, 156 n.10 (4th Cir. 2009). A district court must conduct a "rigorous analysis" to ascertain whether the plaintiffs have satisfied the requirements of Rule 23. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). Most circuits, following the lead of this Court, now agree that this inquiry may go beyond the pleadings and may permissibly resolve legal and factual issues when necessary, even when they overlap with the merits. *See Szabo v. Bridgeport Mach., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001).³

Where statistical evidence offered in support of commonality is essentially identical to merits evidence, how does a court "rigorously analyze" Rule 23(a)(2) commonality, which is often described as a "requirement [that] is easily met in most cases"? Rubenstein, Conte, & Newberg, *Newberg on Class Actions*, § 3:10 (4th ed. 2009). Two other circuit courts have recently wrestled with this thorny issue and their determinations underscore why the district court's determination in this case was in error. In *Brown*, 576 F.3d at 151-52, the Fourth Circuit heard an interlocutory appeal of a race discrimination class action against a steel

² The district court's order does not implicate this Court's recent decision in *Am. Honda Motor Co. v. Allen*, 2010 WL 1332781 (7th Cir. April 7, 2010). The district court conducted an analysis pursuant to *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), in response to Defendants' challenge to the methodology used by Plaintiffs' expert to perform his statistical analysis. Defendants did not challenge the expert's qualifications.

³ *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 589 (9th Cir. 2010); *In re Hydrogen Peroxide Antitrust Litig.*, 522 F.3d 305, 316-17 (3d Cir. 2009); *In re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006).

manufacturing plant, in which the trial court denied class certification because plaintiffs failed to demonstrate common questions of law or fact. The trial court, after evaluating the statistical evidence offered to support commonality, impermissibly found that: plaintiffs' statistics must, *as a matter of law*, meet a "two standard deviation" threshold; and, using this measure, plaintiffs "had not proven a statistically significant disparity." *Id.* at 154-55.

The appellate panel reversed, concluding that, for Rule 23 purposes, the court had set the bar too high for evaluating plaintiffs' statistics:

The question before the district court was not whether the appellants have definitively proven disparate treatment and a disparate impact; rather, the question was whether the basis of appellants' discrimination claims was sufficient to support class certification.

Id. at 156. It emphasized that "evidence need not be conclusive to be probative, and even evidence that is of relatively weak probative value may be useful in meeting the commonality requirement." *Id.* In particular, the panel concluded that the district court committed legal error, reaching a merits issue, when it imposed the "two standard deviation" measure and found that plaintiffs had not proven a statistically significant disparity, particularly in light of the compelling direct evidence that plaintiffs also submitted to support commonality.

The Ninth Circuit sitting *en banc* faced the same question in *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010). The trial court had conducted an exhaustive analysis of the competing statistical evidence offered at class certification and concluded that plaintiffs' evidence was sufficient to establish commonality. *Id.* at 599-600. Typical of these cases, the experts differed on the appropriate level of aggregation and on the use of hypothetical pools that plaintiffs' statistician constructed to account for missing data. *Id.* at 604. On appeal, the

employer argued that the trial court was obliged to determine which analysis was “more persuasive” at certification. *Id.* at 607.

The Ninth Circuit rejected this view, focusing on the language of Rule 23(a)(2): it requires plaintiffs to “establish common *questions* of law or fact,” while “answering those questions is the purpose of the merits inquiry.”⁴ *Id.* at 594. The court recognized that “the statistical disputes typical to Title VII cases often encompass the basic merits inquiry and need not be proved to raise common questions.” *Id.* Turning to the district court’s evaluation of the statistical evidence, the court highlighted its careful consideration of each of the defendant’s arguments and the justifications provided by the plaintiffs’ expert for specific methodological choices. It concluded,

While Plaintiffs and Wal-Mart disagree on whose findings are more persuasive, the disagreement is not one of whether Plaintiffs have asserted ‘common questions of law or fact.’ The disagreement is the common question, and deciding which side has been more persuasive is an issue for the next phase of the litigation. Requiring even more findings and further analysis from the district court would be to force a trial on the merits at the certification stage.

Id. at 609 (citation omitted).

The lesson of *Dukes* and *Brown* is that the Rule 23(a)(2) inquiry requires the plaintiff to present a robust statistical model that is sufficiently probative to raise a common question as to whether defendant has discriminated. The trial court is not tasked with determining which party’s statistics are “more persuasive” or to dictate that one particular statistical standard or methodology is required as a matter of law. Those issues, which arise in every Title VII class action, must wait for trial.

⁴ It highlighted that this inquiry is markedly different than the “far more demanding” Rule 23(b)(3) determination of the predominance of common issues, which would likely warrant greater factual evaluation. *Dukes*, 603 F.3d at 593 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)).

D. The District Court Impermissibly Assessed the Statistical Proof on Its Merits, Rather than for Rule 23 Compliance.

In light of these legal principles, the district court's evaluation of the statistical evidence plainly crossed the line from a class certification inquiry to a determination on the merits, which was an abuse of discretion. This conclusion is demonstrated by numerous findings made by the district court.

- The district court understood its role at class certification in examining expert evidence as “essentially conducting a bench trial and serving as a trier of fact.” Order Denying Plaintiffs’ Motion to Strike Expert Testimony and Defendants’ Motion to Strike Expert Testimony and Denying Class Certification at 13. It expressly set out to determine which expert’s approach was “more persuasive.” *Id.* at 14.

- It resolved the merits question of which variables needed to be included in any regression analysis and made its own factual determination that a particular variable was not “tainted.” *Id.* at 20-21 & n.6.

- It imposed a requirement (not found anywhere in the law) that Plaintiffs prove that the extent of statistical disparities for women were the same across different subunits in order to establish commonality (“common gender effect”). *Id.* at 21-22.

- It determined that units must be disaggregated to a particular level (job) for purposes of statistical analysis, another merits question. *Id.* at 21.

- It determined that every segment of Plaintiffs’ expert statistical analysis must independently demonstrate a statistical disparity of at least two standard deviations. *See id.* at 21.

- It concluded that, although “each [expert] has pursued his own distinct approach to arrive at his expert opinion,” Defendants’ expert was “more convincing.” *Id.* at 14, 21, 27.

While these are all proper and necessary inquiries for the fact finder to make at the liability stage to determine whether discrimination occurred, they have no place in assessing commonality at class certification. At this stage, the court's evaluation is limited to ensuring that the statistical evidence demonstrates the presence of common questions of law or fact under Rule 23(a)(2). Plaintiffs amply satisfied this requirement.

IV. CONCLUSION

This Court should grant the petition for interlocutory review of the trial court's decisions.

Dated: June 2, 2010

Respectfully submitted,



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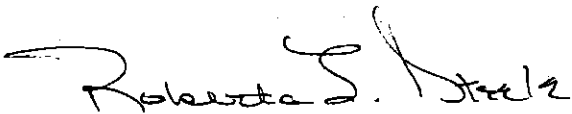
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**CERTIFICATION OF COMPLIANCE WITH PAGE LIMITATIONS,
TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS**

Pursuant to Rule 29(c)(5) and Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that the **BRIEF OF IMPACT FUND, LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, EQUAL RIGHTS ADVOCATES, LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER, AND THE INDIANA CHAPTER OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-PETITIONERS AND IN SUPPORT OF THE GRANT OF PLAINTIFFS-PETITIONERS' PETITION FOR LEAVE TO APPEAL** is no longer than 10 pages and thus complies with Rules 29(d) and 5(c) of the Federal Rules of Appellate Procedure. I further certify that the brief has been prepared in a proportionately spaced typeface in Century Schoolbook font (12 point font for the body of the brief and 11 point font for footnotes) using Microsoft Office Word 2003, and thus complies with the typeface and type style requirements of Rules 32(a)(5) and 32(a)(6) of the Federal Rules of Appellate Procedure.

Dated: June 2, 2010



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CERTIFICATE OF SERVICE

I hereby certify that an original and fourteen (14) copies of this BRIEF OF IMPACT FUND, LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, EQUAL RIGHTS ADVOCATES, LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER, INDIANA CHAPTER OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-PETITIONERS AND IN SUPPORT OF THE GRANT OF PLANTIFFS-PETITIONERS' PETITION FOR LEAVE TO APPEAL have been served on the Court (with a .pdf file on a CD-ROM) this 2nd day of June, 2010 via Federal Express overnight delivery. And this same day all parties to this action have been served by causing two (2) copies of this brief to be mailed by depositing the same in a sealed envelope in the U.S. mail with postage prepaid and addressed to the individuals listed below:

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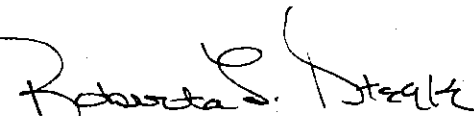
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