

# Dukes v. Wal-Mart



Briefs and Other Related Documents  
Related Westlaw Journal Article  
Supreme Court of the United States  
WAL-MART STORES, INC., Petitioner,  
v.  
DUKES et al.  
No. 10-277.  
Argued March 29, 2011.  
Decided June 20, 2011.

**Background:** Female employees of retail store chain brought Title VII against employer alleging sex discrimination and seeking injunctive and declaratory relief, back pay, and punitive damages. The United States District Court for the Northern District of California, [Martin J. Jenkins, J.](#), 222 F.R.D. 137, granted in part and denied in part plaintiffs' motion for class certification, and the Ninth Circuit Court of Appeals, [Pregerson](#), Circuit Judge, 509 F.3d 1168, affirmed. On rehearing en banc, the Court of Appeals, [Michael Daly Hawkins](#), Circuit Judge, 603 F.3d 571, affirmed in part and remanded in part. Certiorari was granted.

**Holdings:** The Supreme Court, Justice [Scalia](#), held that:

- (1) evidence presented by members of putative class did not rise to level of significant proof that company operated under general policy of discrimination, as required to satisfy commonality requirement and to permit certification of plaintiff class;
- (2) certification of plaintiff class upon theory that defendant has acted, or refused to act, on grounds that apply generally to class, thereby making final injunctive or declaratory relief appropriate with respect to class as whole, is not appropriate with respect to claims for monetary relief, at least where monetary relief is not incidental to injunctive or declaratory relief; and
- (3) necessity of litigation to resolve employer's statutory defenses to claims for backpay asserted by in-

dividual members of putative employee class prevented court from treating these backpay claims as "incidental" to claims for declaratory or injunctive relief.

Reversed.

Justice [Ginsburg](#) concurred in part and dissented in part and filed opinion, in which Justices [Breyer](#), [Sotomayor](#), and [Kagan](#) joined.

West Headnotes

## [1] Federal Civil Procedure 170A 161

170A Federal Civil Procedure  
170AII Parties  
170AII(D) Class Actions  
170AII(D)1 In General  
170AK161 k. In general. [Most Cited Cases](#)

Class action is exception to the usual rule that litigation is conducted by and on behalf of individual named parties only. [Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.](#)

## [2] Federal Civil Procedure 170A 164

170A Federal Civil Procedure  
170AII Parties  
170AII(D) Class Actions  
170AII(D)1 In General  
170AK164 k. Representation of class; typicality. [Most Cited Cases](#)

In order to justify a departure from usual rule that litigation is conducted by and on behalf of individual named parties only, class representative must be part of class and possess same interest and suffer same injury as class members. [Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.](#)

## [3] Federal Civil Procedure 170A 163

170A Federal Civil Procedure

# Dukes v. Wal-Mart



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Justice Ginsburg, Breyer, Sotomayer and Kagan, concurring in part & dissenting in Part:

The practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects. Managers, like all humankind, may be prey to biases of which they are unaware. The risk of discrimination is heightened when those managers are predominantly of one sex, and are steeped in corporate culture that perpetuates gender stereotypes.

An example vividly illustrates how subjective decisionmaking can be a vehicle for discrimination. Performing in symphony orchestras was long a male preserve. . . [citations omitted]. In the 1970’s orchestras began hiring musicians through auditions open to all comers. Reviewers were to judge applicants solely on their musical abilities, yet subconscious bias led some reviewers to disfavor women. Orchestras that permitted reviewers to see the applicants hired far fewer female musicians than orchestras that conducted blind auditions, in which candidates played behind opaque screens.

# NEX TIONS

ARIN N. REEVES | [arin@nextions.com](mailto:arin@nextions.com)

AUGUST 6, 2013

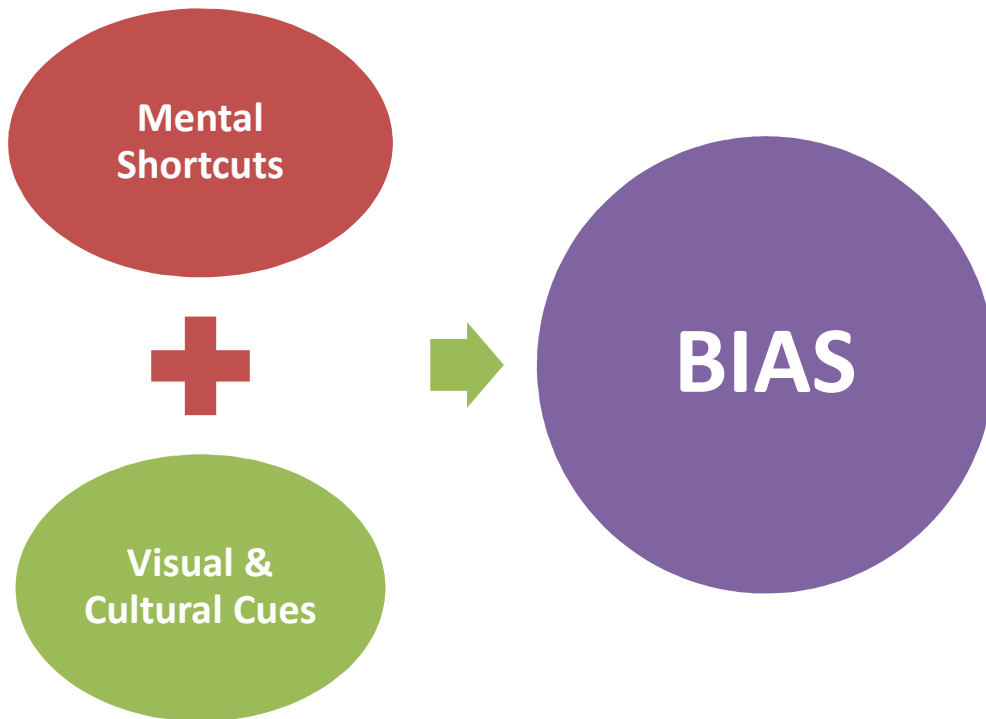




# WHAT IS D&I IN THE 21<sup>ST</sup> CENTURY?



# WHAT IS IMPLICIT BIAS?



## IMPLICIT BIAS:

Cognitive Shortcuts (70-75% of Thoughts)

Present in Every Individual, Internalized  
by Group Against Whom Bias is Directed

Shortcuts Anchored to the Environment,  
Not the Individual

Can Be Interrupted By Self,  
By Others & By Environment

Bias Interruption Can Become Habit

**BIAS INTERRUPTION IS INCLUSION**

# FRAMEWORK FOR LEADING INCLUSIVELY

## Leadership Strategies

Expectation Setting

Modeling Behaviors

## Organizational Strategies

Decreased Subjectivity

Accountability for Outcomes

## Individual Strategies

Interaction Strategies

Reflection Strategies

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Plaintiffs alleged that Wal-Mart discriminated against all female associates in all aspects of pay and promotion.

**Class Certification denied:** Plaintiffs failed to satisfy Rule 23(a)(2) “commonality” requirement because the members of the class, “ held a multitude of different jobs, at different levels of Wal-Mart’s, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed. . . . Some thrived while others did poorly. They have little in common but their sex and this lawsuit.”

# Too many employees



# Dukes v. Wal-Mart



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## Too many decisions

# Dukes v. Wal-Mart



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# Too many decisionmakers

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**No Company Policy**



Supreme Court of the United States  
Clara WATSON, Petitioner  
v.  
FORT WORTH BANK AND TRUST.

No. 86-6139.  
Argued Jan. 20, 1988.  
Decided June 29, 1988.

Former employee filed Title VII suit against bank, alleging racial discrimination against her and other similarly situated persons. The United States District Court for the Northern District of Texas, Eldon B. Mahon, J., decertified employee class and entered judgment on merits in favor of bank. Employee appealed. The Court of Appeals, Johnson, Circuit Judge, 798 F.2d 791, affirmed in part, vacated in part and remanded on writ of certiorari, the Supreme Court, Justice O'Connor, held that subjective or discretionary employment practices challenged as violating Title VII may, in appropriate cases, be analyzed under disparate impact approach.

Vacated and remanded.

Justice Blackmun concurred in part and concurred in judgment and filed opinion, in which Justices Brennan and Marshall joined.

Justice Stevens concurred in judgment and filed opinion.

Justice Kennedy did not participate in decision.

West Headnotes

**[1] Civil Rights 78** **1138**

78 Civil Rights

78II Employment Practices

78k1138 k. Disparate Treatment. **Most Cited Cases**

(Formerly 78k153, 78k9.10)

In "disparate treatment" case, Title VII plaintiff is required to prove that defendant acted with discriminatory intent or motive. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

**[2] Civil Rights 78** **1545**

78 Civil Rights

78IV Remedies Under Federal Employment Discrimination Statutes

78k1543 Weight and Sufficiency of Evidence

78k1545 k. Prima Facie Case. **Most Cited Cases**

(Formerly 78k383, 78k44(1))

Prima facie case of disparate treatment is ordinarily established by proof that employer, after having rejected Title VII plaintiff's application for job or promotion, continued to seek applicants with qualifications similar to plaintiff's. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

**[3] Civil Rights 78** **1536**

78 Civil Rights

78IV Remedies Under Federal Employment Discrimination Statutes

78k1534 Presumptions, Inferences, and Burden of Proof

78k1536 k. Effect of Prima Facie Case; Shifting Burden. **Most Cited Cases**

(Formerly 78k378, 78k43)

Burden of proving prima facie case of disparate treatment contrary to Title VII is not onerous, and employer may rebut it simply by producing some evidence that it had legitimate, nondiscriminatory reasons for decision. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

**[4] Civil Rights 78** **1536**

78 Civil Rights





Westlaw

108 S.Ct. 2777  
487 U.S. 977, 108 S.Ct. 2777, 47 Fair Empl.Prac.Cas. (BNA) 102, 46 Empl. Prac. Dec. P 38,065, 101 L.Ed.2d 827,  
57 USLW 4922  
(Cite as: 487 U.S. 977, 108 S.Ct. 2777)

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[2] Civil Rights 78 ↻1545

Plaintiff, an African American woman, was hired as a teller. She applied for numerous promotions, but each time the job was given to a male or white coworker. The Bank had not developed precise or formal criteria for evaluating the positions to which Watson applied. Rather, Watson's supervisors made purely subjective determinations that her male or white coworkers were more qualified. The Court held that disparate impact analysis applies to purely subjective decisions.

Justices Brennan and Marshall joined.

Justice Stevens concurred in judgment and filed opinion.

Justice Kennedy did not participate in decision.

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[1] Civil Rights 78 ↻1138

78 Civil Rights

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Westlaw

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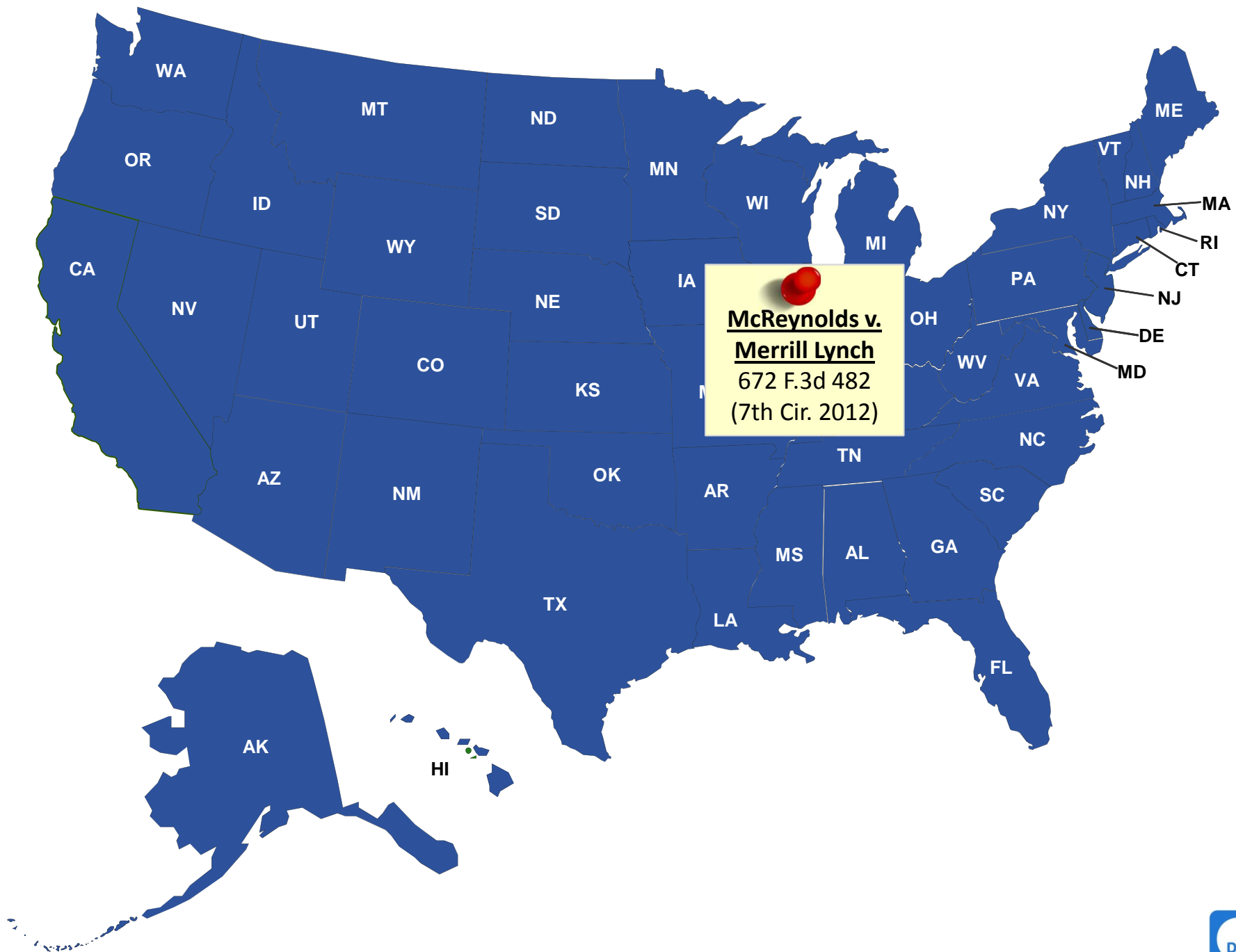
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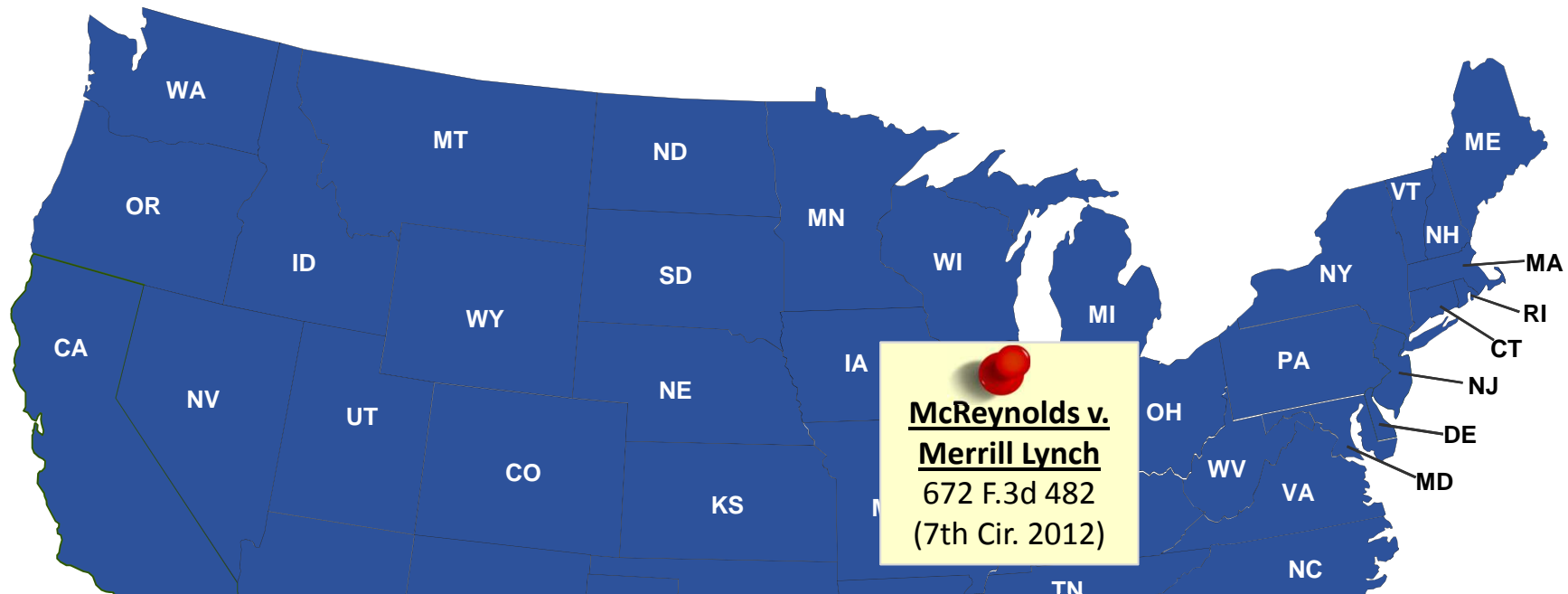
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[2] Civil Rights 78 ↻1545

We are also persuaded that disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests. . . . It is true, to be sure, that an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct. Especially in relatively small businesses like respondent's, it may be customary and quite reasonable simply to delegate employment decisions to those employees who are most familiar with the jobs to be filled and with the candidates for those jobs. It does not follow, however, that the particular supervisors to whom this discretion is delegated always act without discriminatory intent. Furthermore, even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain. . . . If an employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply. . . . We conclude, accordingly, that subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases.

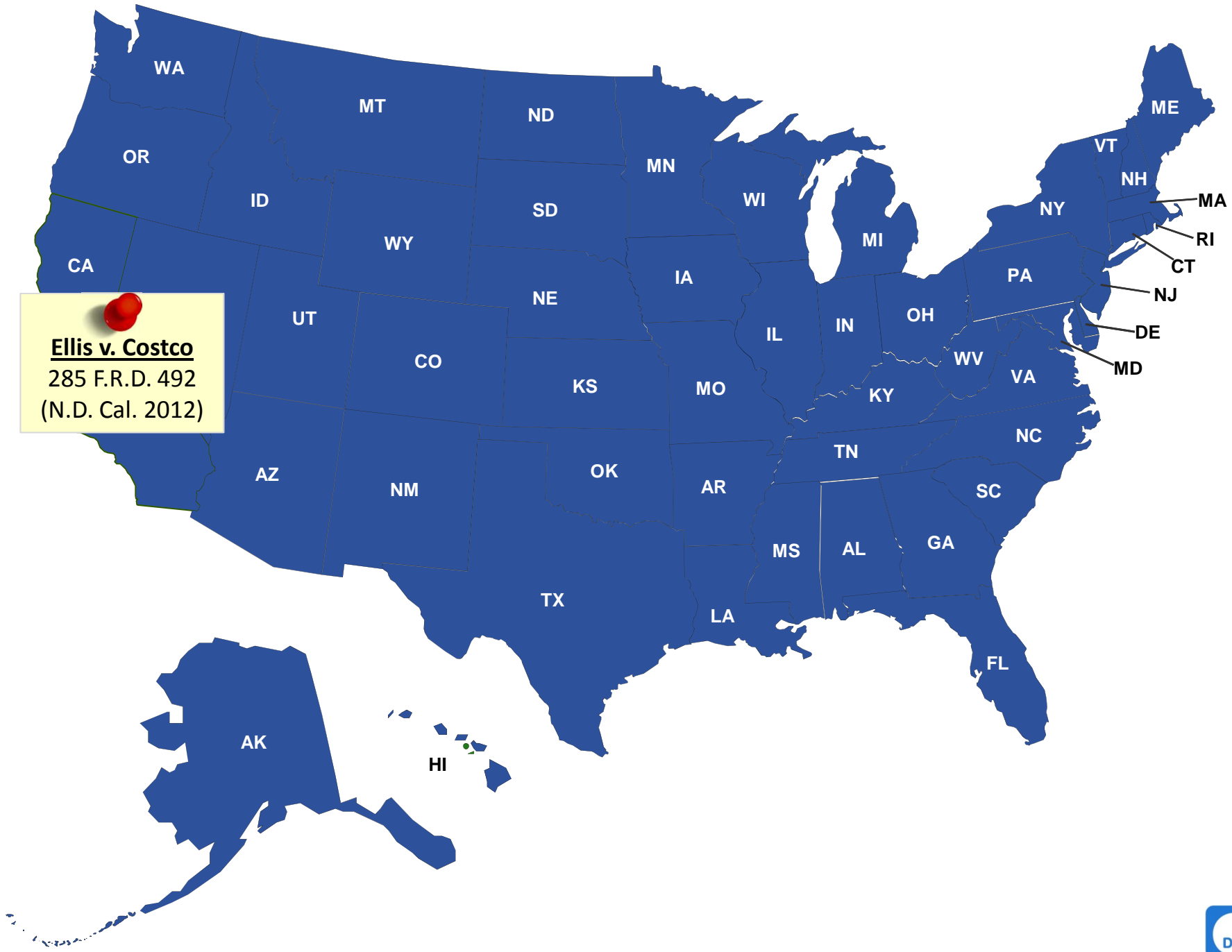



**McReynolds v.**  
**Merrill Lynch**  
672 F.3d 482  
(7th Cir. 2012)

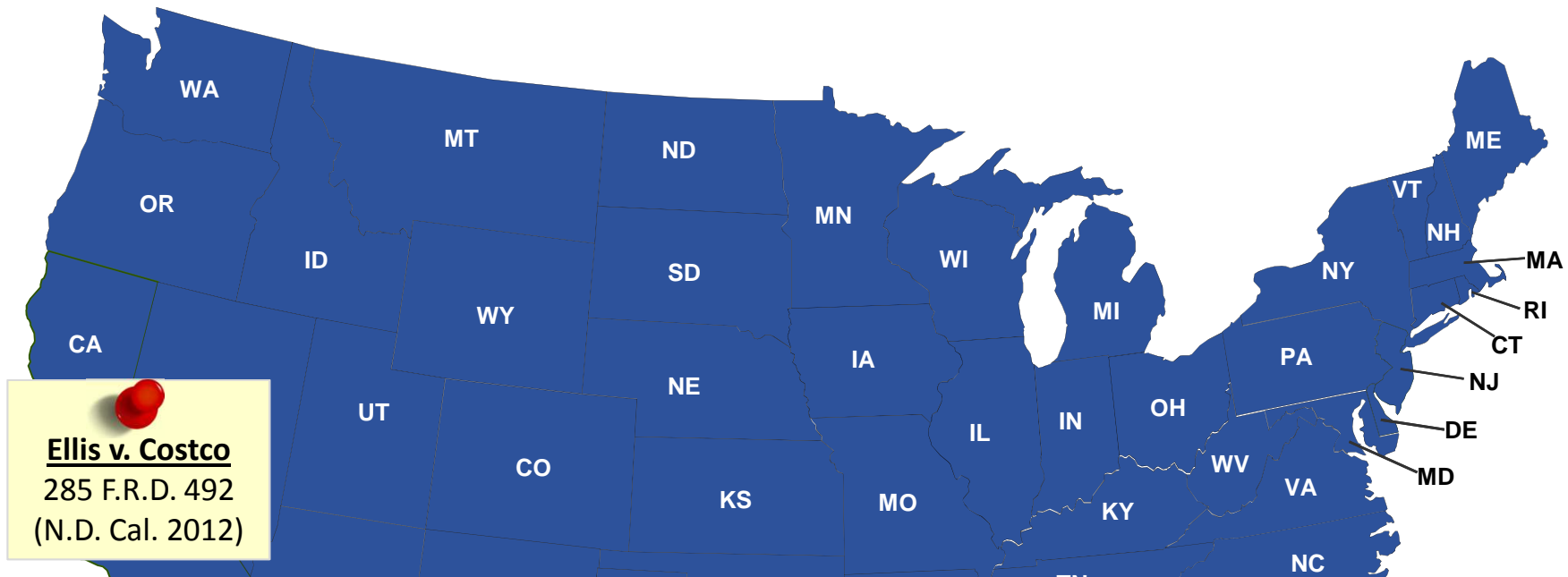


African American Financial Advisors brought suit alleging two corporate policies caused an adverse disparate ***impact*** upon the pay of African American advisors: the Company’s “teaming policy,” and its “account distribution” policy. Merrill Lynch permitted brokers in the same office to form teams who share clients and prospective clients for the mutual benefit. Newer/younger brokers included in successful teams benefited. Merrill Lynch then doled out leads to those advisors with the best sales records. Those included on good “teams” then also got the best leads. The Court held that *Dukes* actually supports class certification. First this is exclusively a ***disparate impact*** case. Motive is irrelevant, and only equitable relief (which does include back pay) is available. Furthermore, Plaintiffs had identified two ***company sponsored policies***—teaming and account distribution—that had a disparate impact on the African American advisors pay.

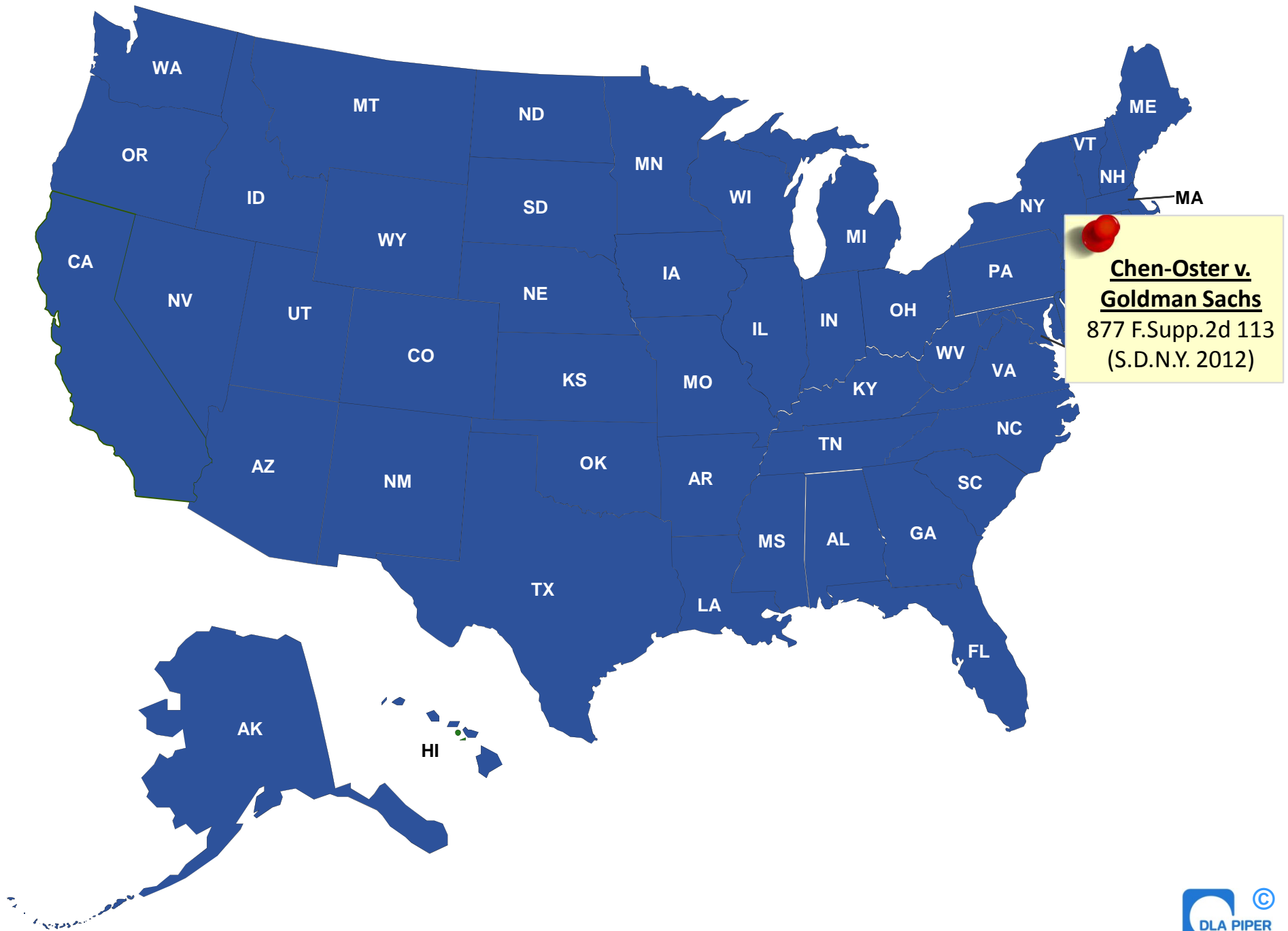


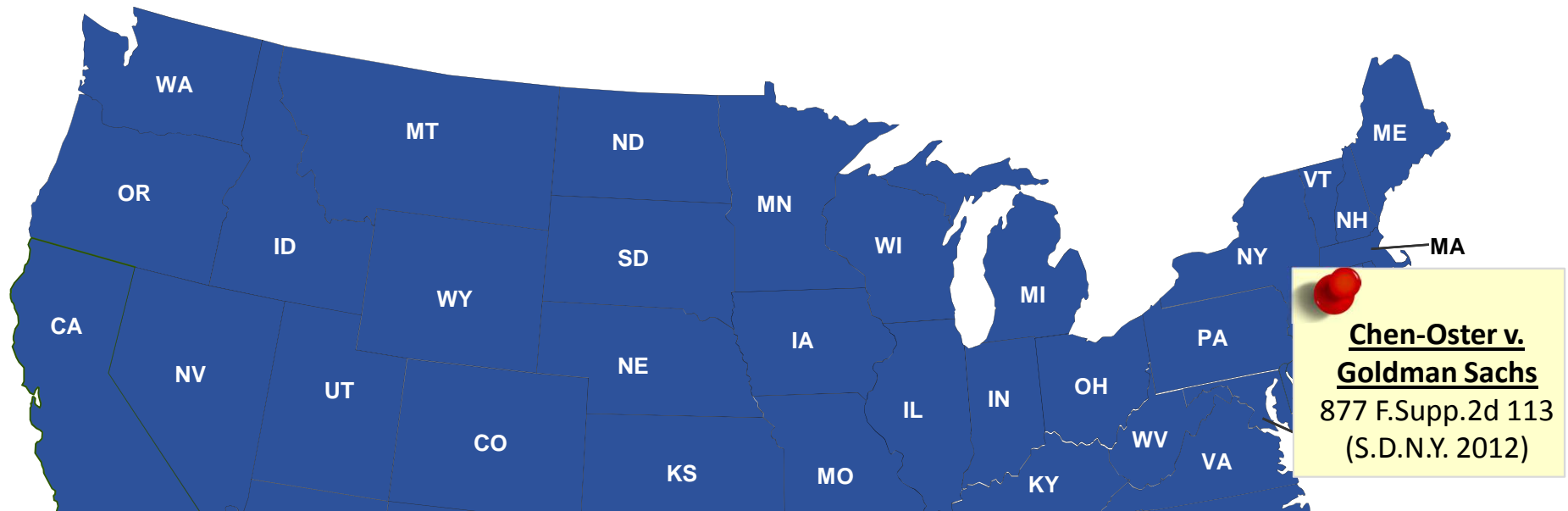


  
**Ellis v. Costco**  
285 F.R.D. 492  
(N.D. Cal. 2012)



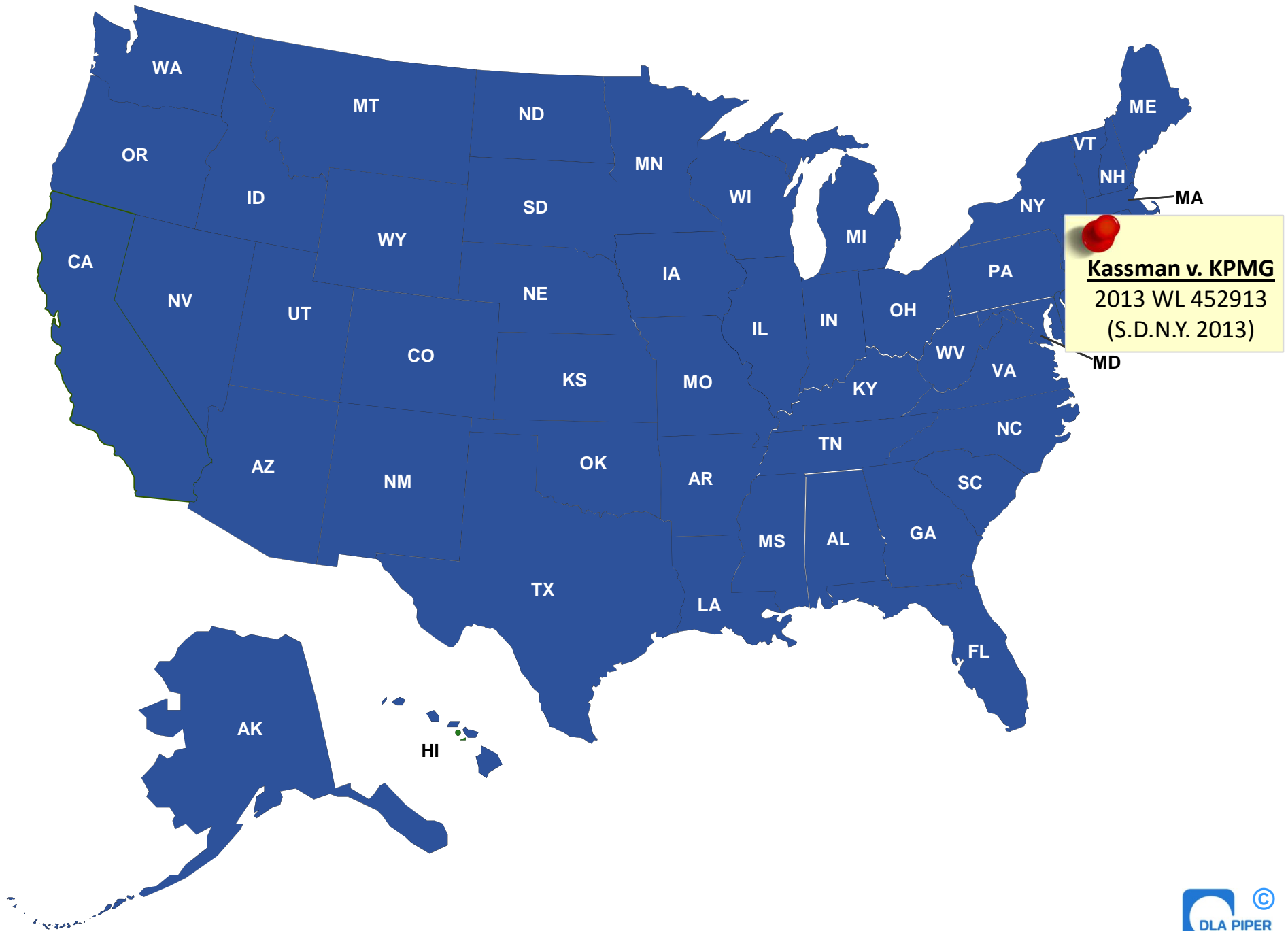
Female employees who had been passed over for promotions to Assistant General Manager and General Manager Positions brought ***disparate treatment and impact*** claims that Company's promotional process had disparate impact on women. Specifically, the Company used a wholly subjective, "tap-on-shoulder" process, with no transparency into selection criteria other than minimum standards, to promote employees into the top two store management positions. The court granted class certification and distinguished Wal-Mart. First, senior leadership was heavily involved in identifying candidates for these top positions. Second, Costco retained a diversity consultant who recommended that Costco switch to a job-posting system, with more transparent criteria for advancement. Costco formally rejected those recommendations for the AGM and GM position—*i.e.*, a specific corporate preference for a purely discretionary process. Finally, Plaintiffs presented expert evidence of statistical disparities and a culture of stereotypical biases.

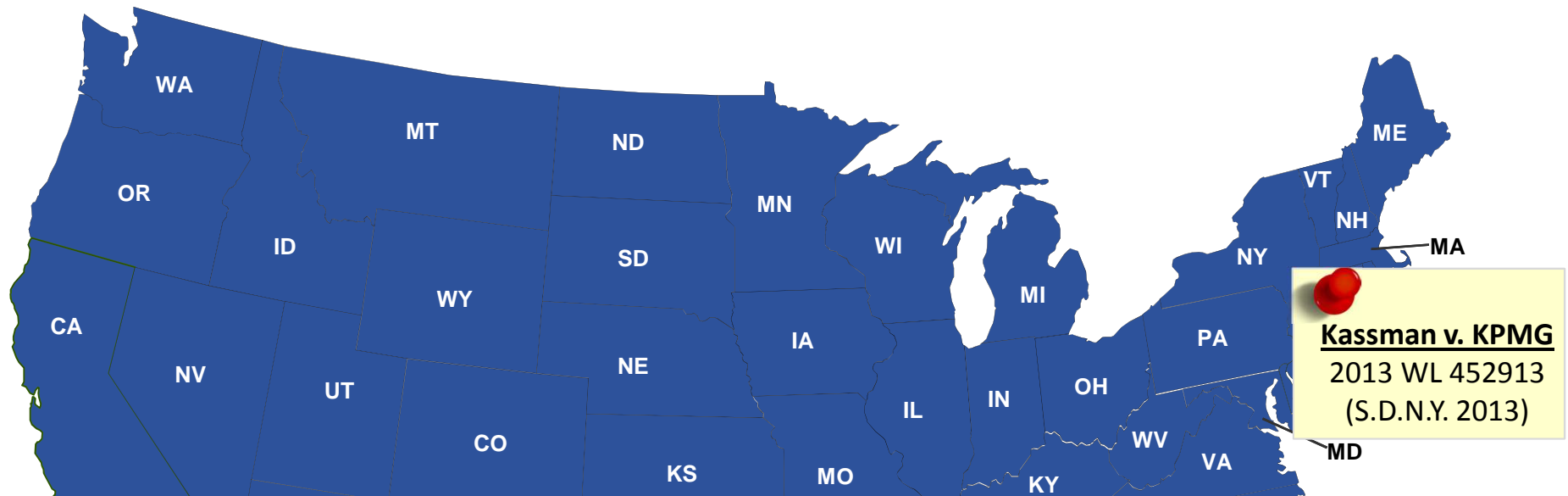




Plaintiffs sued Goldman Sachs alleging that Goldman Sachs engaged in “a continuing pattern and practice of discrimination based on sex against female Managing Directors, Vice Presidents, and Associates with respect to compensation, business allocations, promotions, and other terms and conditions” of employment. Goldman moved to strike the class allegations as part of Rule 12 Motion, citing *Dukes*. The Court denied the motion to strike class allegations for two reasons. First, unlike the *Dukes* plaintiffs, the Goldman plaintiffs identified specific company policies that led to discrimination: (1) tap-on-the-shoulder promotions; (2) 360-degree reviews; and (3) forced ranking of employees. The class was also significantly smaller and the decisions emanated from a single location. Second, the Court found a Rule 12 motion was not the appropriate mechanism to address the propriety of class allegations. Rather, this determination needed to be made at the class certification stage, i.e., after costly discovery.

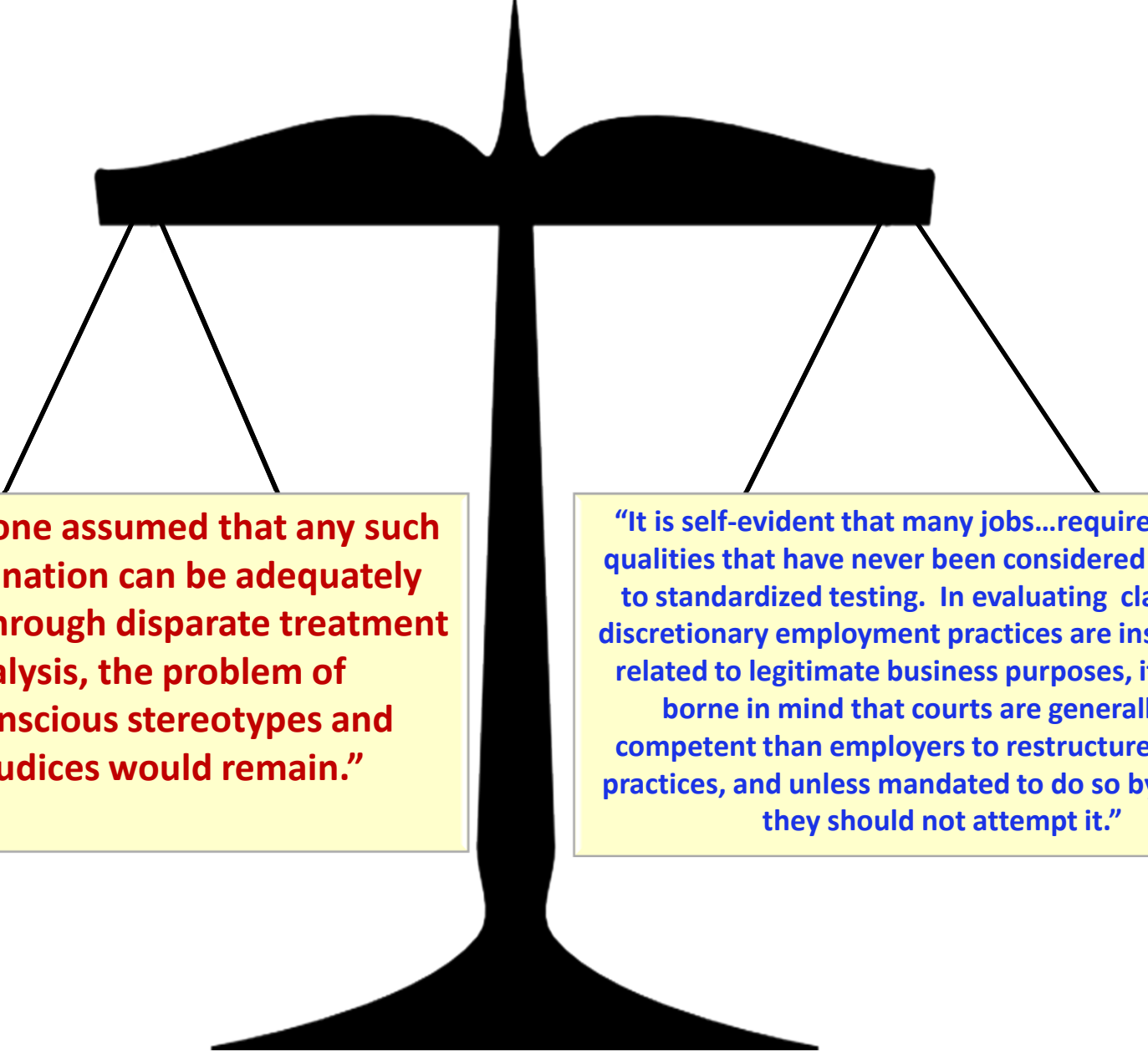






Plaintiffs sued KPMG alleging that the Company discriminated against women: in assignments and promotions; treated mothers and pregnant women less favorably; and failed to investigate and adequately respond to allegations of discrimination in the workplace. KPMG moved to strike the class allegations on a 12(b) motion, relying on *Dukes*. The court denied that motion for 2 reason. First, unlike the *Dukes* plaintiffs, the KPMG plaintiffs identified company policies that allegedly caused the discrimination: (1) evaluating employees using a KPMG standard known as the “KPMG way”; (2) KPMG’s flexible works schedule policy; and (3) KPMG’s policy of demoting women but not men who transfer from international offices. Second, the Court found a Rule 12 motion was not the appropriate mechanism to address the propriety of class allegations. Rather, this determination needed to be made at the class certification stage, i.e., after *costly* discovery.

## *Watson v. Forth Worth Bank:*



**“Even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain.”**

**“It is self-evident that many jobs...require personal qualities that have never been considered amenable to standardized testing. In evaluating claims that discretionary employment practices are insufficiently related to legitimate business purposes, it must be borne in mind that courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.”**

Tap On The Shoulder Promotion

McReynolds v. Merrill Lynch  
672 F.3d 482  
(7th Cir. 2012)

Pick Your Own Team

The teams, they say, are little fraternities (our term but their meaning), and as in fraternities the brokers choose as team members people who are like themselves. If they are white, they, or some of them anyway, are more comfortable teaming with other white brokers. Obviously they have their eyes on the bottom line; they will join a team only if they think it will result in their getting paid more, and they would doubtless ask a superstar broker to join their team regardless of his or her race. *But there is bound to be uncertainty about who will be effective in bringing and keeping shared clients; and when there is uncertainty people tend to based decisions on emotions and preconceptions, for want of objective criteria.*

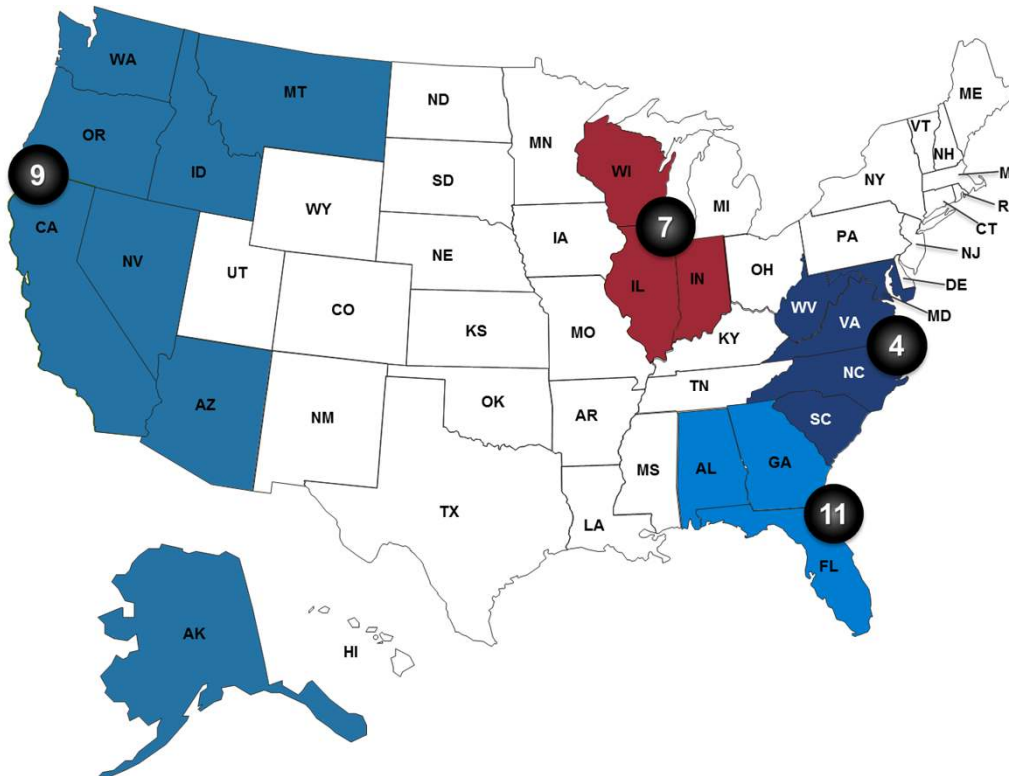
Chen-Oster v. Goldman Sachs  
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Ellis v. Costco  
285 F.R.D. 492  
(N.D. Cal. 2012)

Kassman v. KPMG  
2013 WL 452913  
(S.D.N.Y. 2013)

360 Reviews

# The Circuit split on word-of-mouth recruiting



## Seventh Circuit:

- Word of mouth recruitment is not an employment practice at all. Totally **passive** by nature and not a basis for a disparate impact claim.

*E.E.O.C. v. Consol. Serv. Sys.*, 989 F.2d 233, 235-36 (7th Cir. 1993) (Posner, J.); *E.E.O.C. v. Chicago Miniature Lamp Works*, 947 F.2d 292, 299 (7th Cir. 1991).

## Fourth, Eleventh and Ninth Circuits:

- Word of mouth recruitment **is** an employment practice subject to disparate impact claims.

*Thomas v. Washington County Sch. Bd.*, 915 F.2d 922, 924-26 (4th Cir. 1990); *Domingo v. New Eng. Fish Co.*, 727 F.2d 1429 (9th Cir. 1984); *N.A.A.C.P. v. City of Evergreen*, 693 F.2d 1367 (11th Cir. 1982)



# Word-of-Mouth Recruiting



U.S. Equal Employment  
Opportunity Commission

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“While word-of-mouth recruiting in a racially diverse workforce can be an effective way to promote diversity, the same method of recruiting in a non-diverse workforce is a barrier to equal employment opportunity if it does not create applicant pools that reflect the diversity in the qualified labor market.” See EEOC Compliance Manual, Section 15-VI(A)(2).

## 26 USC § 206(d):

“No employer . . . shall pay[] wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions

EXCEPT where such payment is made pursuant to

- (i) a seniority system;
- (ii) a merit system;
- (iii) a system which measures earnings by quantity or quality of production; or
- (iv) a differential based on any other factor other than sex.”

# The Equal Pay Act

## Lower Class Certification Threshold



### FLSA Section 216(b)

- Governs EPA claims
- Collective action may be brought by “employees similarly situated.” Section 216(b) of the FLSA.
- Employees must opt in.
- Conditional certification is “more elastic” and “less stringent” than under federal rules. *Hip v. Liberty National Life Ins Co.*, 252 F.3d 1208 (11th Cir. 2001).
- Courts generally require only a “modest” showing of a common discriminatory policy. *Hoffman v. Sbaro*, 982 F. Supp. 249, 261 (S.D.N.Y. 1997).
- Certification based only on pleadings and affidavits. *See, e.g., Mooney v. Aramco Servs. Co.*, 54 F.3d 1207 (5th Cir. 1995).

### FRCP 23

- Does NOT apply to EPA claims
- Individuals are class members unless they opt out. FRCP 23(b)(3).
- Class certification subject to a “rigorous analysis.” *Dukes v. WalMart*, 131 S.Ct. 2541, 2551 (2011).

# Bona Fide Merit System: A Statutory Defense



Section 703(h) of Title VII provides...

“Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a *bona fide* seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.”

# Bona Fide Merit System: A Statutory Defense



United States Court of Appeals,  
Seventh Circuit.  
George McREYNOLDS, et al.,  
Plaintiffs–Appellants,  
v.  
MERRILL LYNCH & CO., INC., et al., Defend-  
ants–Appellees.  
  
No. 11–1957.  
Argued Oct. 24, 2011.  
Decided Sept. 11, 2012.

**Background:** Brokers at a financial services firm sued the firm under § 1981 and Title VII, raising various claims of racial discrimination and seeking to litigate the claims as a class. The United States District Court for the Northern District of Illinois, Robert W. Gettleman, J., 2011 WL 1196859, dismissed, and the brokers appealed.

**Holdings:** The Court of Appeals, Sykes, Circuit Judge, held that:

- (1) retention-incentive program was a race-neutral compensation system keyed to quality of production;
- (2) complaint failed to allege facts sufficient to support an inference that the retention program itself was adopted because of its adverse effects on black brokers;
- (3) Lilly Ledbetter Fair Pay Act of 2009 affects when discriminatory practices may be challenged under Title VII by extending statute of limitations every time a paycheck is issued, but does not affect the substance of a Title VII claim; and
- (4) conclusion that, if the complaint were construed as a challenge to the firm's underlying discriminatory practices, dismissal would be warranted on grounds that the suit was duplicative of claims in parallel federal litigation was not an abuse of discretion.

Affirmed.

West Headnotes

## [1] Federal Civil Procedure 170A ↪175

170A Federal Civil Procedure  
170AII Parties  
170AII(D) Class Actions  
170AII(D)2 Proceedings  
170Ak175 k. Time for proceeding and determination. [Most Cited Cases](#)

## Federal Civil Procedure 170A ↪1828

170A Federal Civil Procedure  
170AXI Dismissal  
170AXI(B) Involuntary Dismissal  
170AXI(B)5 Proceedings  
170Ak1827 Determination  
170Ak1828 k. Time of determination; reserving decision. [Most Cited Cases](#)

There is no fixed requirement that a court must always defer a decision on a motion to dismiss for failure to state a claim until after the court addresses class certification; a motion to dismiss for failure to state a claim tests the sufficiency of the complaint, and although such a dismissal operates as a final decision on the merits if leave to replead is not granted, it is sometimes appropriate to decide such a motion ahead of class certification. [Fed.Rules Civ.Proc.Rules 12\(b\)\(6\), 23\(c\), 28 U.S.C.A.](#)

## [2] Civil Rights 78 ↪1141

78 Civil Rights  
78II Employment Practices  
78k1141 k. Seniority or merit system. [Most Cited Cases](#)

Title VII plaintiffs challenging a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production must establish intent to discriminate; disparate racial impact is insufficient. Civil Rights Act of 1964, § 703(h), 42 U.S.C.A. § 2000e–2(h).



# Bona Fide Merit System: A Statutory Defense



United States Court of Appeals,  
Seventh Circuit.  
George McREYNOLDS, et al.,  
Plaintiffs–Appellants,  
v.  
MERRILL LYNCH & CO., INC., et al., Defend-  
ants–Appellees.

West Headnotes

[1] [Federal Civil Procedure 170A](#) ↪175

[170A](#) Federal Civil Procedure

[170AII](#) Parties

[170AII\(D\)](#) Class Actions

[170AII\(D\)2](#) Proceedings

[170Ak175](#) k. Time for proceeding and  
determination. [Most Cited Cases](#)

The plaintiffs alleged that Merrill Lynch used “production credits” which were the product of past discrimination to determine retention bonuses, and, therefore, had a disparate impact upon African American brokers.

“The import of § 703(h) is that disparate racial impact is insufficient under Title VII to invalidate a ‘bona fide seniority or merit system,’ or a ‘system which measures earnings by quantity or quality of production.’ Plaintiffs challenging an employment practice or compensation system must establish intent to discriminate.” *Id.*

the substance of a Title VII claim; and  
(4) conclusion that, if the complaint were construed as a challenge to the firm's underlying discriminatory practices, dismissal would be warranted on grounds that the suit was duplicative of claims in parallel federal litigation was not an abuse of discretion.

Affirmed.

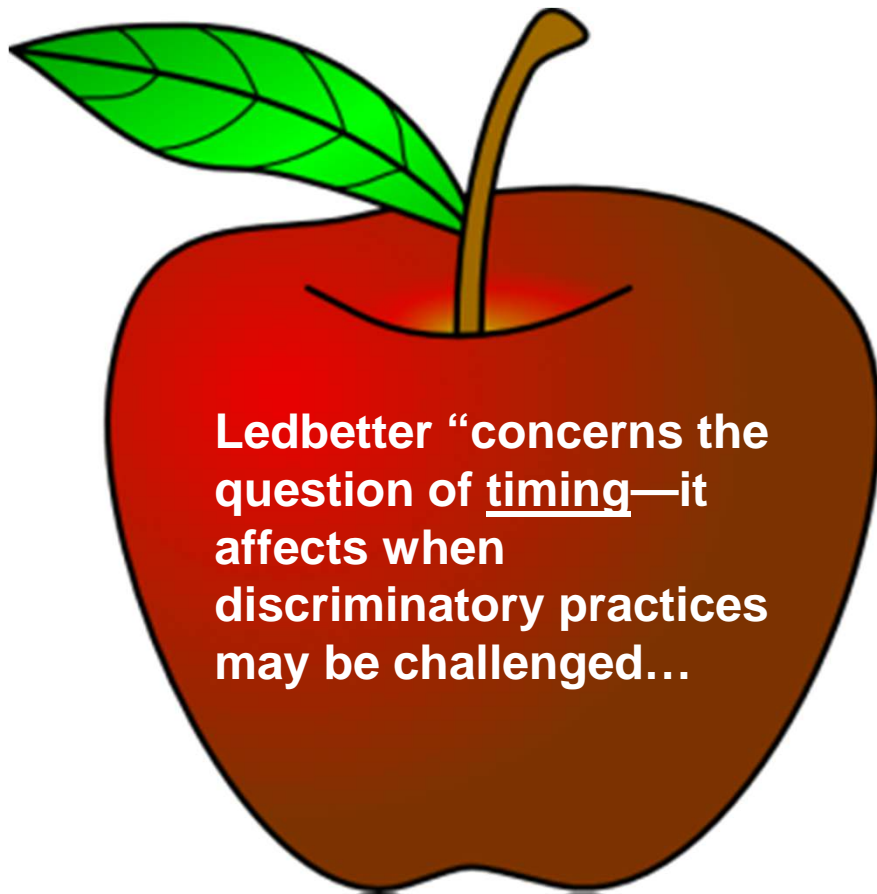
[/811](#) Employment Practices  
[78k1141](#) k. Seniority or merit system. [Most Cited Cases](#)

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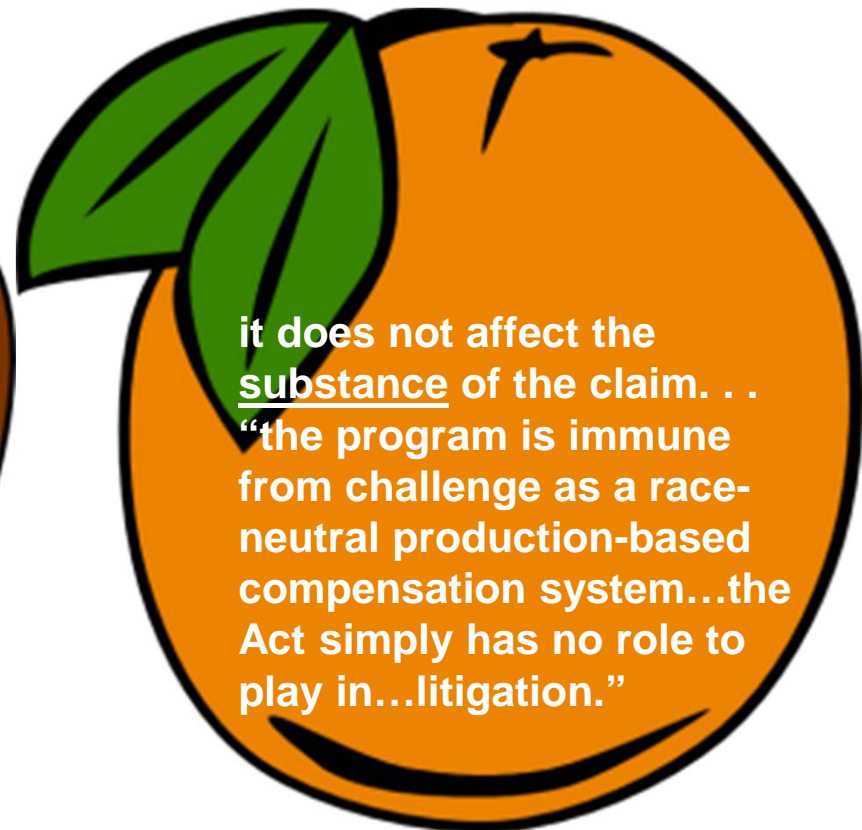
# Bona Fide Merit System & Ledbetter



In *McReynolds*, the plaintiffs countered that dismissal was improper under the Lilly Ledbetter Act because Merrill Lynch created a new cause of action when it paid the retention bonuses and, therefore, the case was outside the ambit of § 703(h). *McReynolds, et al. v. Merrill Lynch & Co. Inc., et al.*, 694 F.3d 873, 887 (7th Cir. 2012).



Ledbetter “concerns the question of timing—it affects when discriminatory practices may be challenged...



it does not affect the substance of the claim. . .  
“the program is immune from challenge as a race-neutral production-based compensation system...the Act simply has no role to play in...litigation.”

# Bona Fide Merit System: A Statutory Defense



**A system which presents a “means or order of advancement or reward for merit.”**

*Brock v Georgia Southwestern Coll*, 765 F.2d 1026, 1036 (11<sup>th</sup> Cir. 1985)

**Systems which are “informal” or based on “ad hoc,” “subjective,” or “personal judgments,” cannot qualify as such.**

*Hodgson v. Brookhaven Gen Hosp.*, 436 F.2d 719, 726 (5<sup>th</sup> Circuit 1970).

# Bona Fide Merit System: A Statutory Defense



**A “written set of job descriptions, regularly evaluated,” did not constitute a merit system.”**

*Morgado v. Birmingham-Jefferson County Civil Def. Corps*, 706 F.2d 1184, 1188 (11<sup>th</sup> Cir. **1983**)

**Salary increases set using mathematical formula, that was a multiplier of forced ranking (subjective) and base pay was *bona fide* merit system.**

*Herman v. Roosevelt Federal Savings and Loan Association*, 432 F.Supp. 843, 851 (E.D. MO. **1977**)

# Take Aways:



Figure Out Your “Screened Audition”



If Your Organization Is Using Third Party Consultants To Analyze Disparate Impact or Diversity Initiatives, Cloak With Privilege



Be Patient In Litigation: Do Not Create Bad Decisions By Filing Early Motions With An Undeveloped Record



If Your Organization Is Wedded to Wholly Subjective Processes, then Adopt an Arbitration Program



## Why Care: Discrimination Cases are Expensive, Disruptive and Bring Negative Press



- EEOC litigation against Morgan Stanley resulted in \$54 million settlement and an extensive Consent Decree
- EEOC alleged that Morgan Stanley discriminated against women in promotion, compensation and the terms, conditions and privileges of employment
- Settlement established \$40 million fund for claimants; class was defined as all women employed between January 1, 1995 to July, 2004
- Settlement required Morgan Stanley to appoint internal ombudsman and outside monitor, implement management training on anti-discrimination laws; perform promotion and compensation analyses; implement programmatic relief
- Consent decree in place for three years

# National Equal Pay Enforcement Task Force - 2010



- Combined resources of Equal Employment Opportunity Commission (EEOC), Department of Justice (DOJ), Department of Labor (DOL) and Office of Personnel Management (OPM)
- Objectives include:
  - Improving coordination and collaboration between agencies and increasing enforcement efforts against pay discrimination
  - Collecting data from private sector employers to better understand gender-based pay gaps and target enforcement efforts
  - Strengthen wage discrimination focus in the EEOC systemic enforcement and litigation program.
  - Public education campaign about employer obligation and employee rights

- Lily Ledbetter Fair Pay Act expands the statute of limitations
- Increased agency funding, collaboration efforts of National Equal Pay Enforcement Task Force and emphasis on systemic investigations increases the risk of pattern and practice cases
- Potential for substantial settlements and verdicts, along with support from the agencies, have made these complex cases more attractive to the plaintiffs' bar
- As discussed, Dukes was a speed bump and not a death knell
- Look for more circumscribed class definitions; classes may be limited regionally, by job functions, selection methods or reporting relationships, among others

# EEOC Strategic Objectives for 2012-2016



- Eliminating Barriers in Recruitment and Hiring
- Protecting Immigrant, Migrant and Other Vulnerable Workers
- Addressing Emerging and Developing Issues
- Enforcing Equal Pay Laws
- Preserving Access to the Legal System
- Preventing Harassment Through Systemic Enforcement and Targeted Outreach

# Recent EEOC activity and some results



- In 2012, the EEOC filed 122 lawsuits
  - 86 individual suits
  - 26 multiple-victim suits
  - 10 systemic suits
  - 254 lawsuits resolved for total of \$44.2 million

In 2012, EEOC completed 240 systemic investigations, resulting in 46 settlements or conciliation agreements with total monetary recovery of \$36.2 million without litigation



# EEOC Litigation: Not a Level Playing Field



- Rule 23 does not apply to suits brought by the EEOC; instead, the EEOC can pursue claims in a “pattern or practice” framework with different evidentiary burdens
- Private plaintiffs (non-class action): McDonnell-Douglas burden-shifting
  - Plaintiff makes prima facie case
  - Defendant provides legitimate business justification for decision (burden of production)
  - Plaintiffs must produce direct or indirect evidence that Defendants stated justification is pretextual (burden of persuasion)

# What is a “pattern and practice” case?



- Pattern and practice is the application of a two phase burden shifting framework and not a cause of action. Can be used by the EEOC or certain class plaintiffs. Known as Teamsters method of proof.
- Phase I Proof of Discriminatory Pattern or Practice and Injunctive Relief
  - Plaintiff has burden of establishing “that unlawful discrimination has been a regular procedure or policy followed by an employer”, i.e., “discrimination is the norm”
  - Burden typically met using statistical evidence
    - Demonstrate underrepresentation of protected group members as opposed to availability of same group, or
    - Demonstrate overrepresentation of protected class members in less desirable jobs

# Pattern and Practice, continued



- Burden shifts to Employer to prove that government's proof is flawed, inaccurate or otherwise unreliable
- Plaintiff/government have burden of persuasion in Phase 1
- If plaintiff meets burden, presumption arises that any particular employment decision, made while the discriminatory policy was in place, was made in pursuit of that policy
- Phase II, Individual Liability and Damages
  - To obtain individual relief, individuals must show that they were subject to discrimination (ex. Applicant was qualified and applied for position)
  - Employer can present defense of individual decisions (Applicant was denied position for lawful reasons)

# What are section 706 and 707 claims (42 U.S.C. section 2000e)



- What's the difference: both allow plaintiffs to prove intentional discrimination through circumstantial evidence
- Section 707. Intended to transfer DOJ pattern or practice authority to the EEOC. Subject to procedures of section 706.
  - *EEOC contends that pattern and practice damages are not limited by charge filing period for 707 cases*
  - *707 does not authorize jury trials or compensatory or punitive damages*
- Section 706. EEOC authorized to bring suits under section 706 of Title VII, subject to administrative prerequisites, timely charge, investigation, cause finding and conciliation

# Viability of the Failure to Conciliate Defense



- The Eighth Circuit recently held that EEOC can't bring suit to recover damages on behalf of an individual in a "class" case unless it has identified each individual and attempted to conciliate each individual's claims during its investigation and conciliation process. *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8<sup>th</sup> Cir 2012)
- Sixth Circuit rejected the argument that the EEOC had to identify specific individuals or be precluded from seeking recovery on their behalf. *Serrano et al and EEOC v. Cintas Corporation*, 699 F.3d 884 (6<sup>th</sup> Cir. 2012)
- Sixth Circuit also held that the Teamsters framework applies to both section 706 and 707 cases.



# Approaching the EEOC process



- Take EEOC investigations and information requests seriously. Use process to limit scope of investigation.
- EEOC has subpoena authority and will use it. More productive to negotiate scope of demands *before* a subpoena is issued. Subpoena enforcement proceedings send negative message to the outside world and within the agency.
- Push EEOC to come forward with its proof and document your efforts.
- Take conciliation seriously and manage it carefully. Can be opportunity to resolve problem cases before investigation.

# Private “pattern and practice” cases



- *Cyphers v. Toshiba America*, putative class action complaint filed in Southern District of New York on 1/31/2011, brought by HR Manager at Toshiba American Nuclear Energy Corporation, alleging an “astounding lack of women in leadership positions companywide” and a “systemic pattern and/or practice of gender discrimination against female employees.”
- Alleges that subjective practices resulted in: a) female employees received less salary, bonus and benefits than similarly situated men; b) female employees either not promoted or waited longer for promotions; and c) female employees received less desirable assignments, inequitable evaluations and more rigid discipline.
- “Selection and advancement opportunities are driven by personal familiarity, subjective decision-making, preselection, and interaction among male managers, supervisors, and subordinates, rather than by merit or equality of opportunity.”

- Percentage of women decreases at higher levels of corporate structure
- Few women in executive or board positions
- Subjective compensation, evaluation and promotion practices which allegedly permit and encourage the incorporation of gender stereotypes
- Threatened or actual retaliation
- Disparate impact claims
- Practices not validated

# Gender Discrimination 3.0: New Approaches



- New Lingo: Plaintiffs bar has new focus on practices and policies that have an element of subjectivity
  - In-group favoritism
  - Out-group aversion
  - Stereotyping
- Technology makes historical data available and easy to analyze
- Agency focus on systemic cases
- Transparency makes it easier for employees to know where they stand with respect to others

- Expect more class action complaints alleging that female employees receive disparate treatment with respect to terms and conditions of employment, including training, assignments, advancement opportunities and compensation.
- Even employers with sound practices may face claims that the processes are subjective and leave the door open for disparate treatment and bias, conscious or otherwise.
- Know your numbers. Identify gender disparities in compensation and promotions. Start with a spreadsheet.

(cont'd)



- Document exceptions and retain the documentation
  - Which applicants were interviewed?
  - Why candidates were not promoted?
  - Who made the decision?
  - If candidate selected was “more qualified,” document the qualifications

# Lessons Learned



- Understand the demographics of your workforce and watch for gender patterns in job categories.
- Are men and women in similar positions receiving similar compensation?
- If not, why not? Make sure it's documented.
- Be consistent and document exceptions
- Train managers to listen for complaints and respond promptly
- Don't assume every complaint is frivolous
- Take retaliation issues very seriously