Class Dismissed: Supreme Court Rejects Title VII Class Certification in Wal-Mart v. Dukes and Provides Guidance on Important Class Action Issues

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On June 20, 2011, the United States Supreme Court issued its much anticipated *Wal-Mart v. Dukes* decision--a case some have called the most consequential of the Court's 2010 term. In it, the Court reversed a divided *en banc* Ninth Circuit ruling certifying a class action brought by nearly 1.5 million current and former female Wal-Mart employees[1] While the main issues in the case involved whether the plaintiffs could meet Rule 23(a)(2)'s commonality requirement and whether the plaintiffs' claims for monetary relief in the form of back pay were appropriately asserted under Rule 23(b)(2), the case also offers guidance on two additional questions: whether a district court must resolve *Daubert* objections at the certification stage, and whether a district court can use randomly selected "sample cases" to determine the value of class claims.

Background

The case originated in 2001 when six named plaintiffs brought a class action in a California district court, claiming that Wal-Mart, the world's largest private employer, had engaged in company-wide gender discrimination in violation of Title VII of the 1964 Civil Rights Act. The plaintiffs did not argue that Wal-Mart had in place an express corporate policy against the advancement of women. Instead, they pointed to Wal-Mart's policy of granting local managers discretion over pay and promotions and alleged that discretion was disproportionately exercised in favor of men, causing an unlawful disparate impact on female employees. The plaintiffs further alleged that Wal-Mart was aware of the disparate impact caused by its policies, and, because it did nothing to cabin local managers' authority, it was liable for disparate treatment in violation of Title VII. The plaintiffs sought injunctive and declaratory relief, punitive damages, and backpay. Presumably to avoid the stricter requirements of Rule 23(b)(3), the plaintiffs did not seek compensatory damages.

To establish their claims, the plaintiffs alleged that Wal-Mart's uniform "corporate culture" permitted bias against women to infect the discretionary decisionmaking of all local Wal-Mart managers--and so all female Wal-Mart employees were subjected to one common discriminatory practice. To demonstrate class-wide discrimination, the plaintiffs offered statistical evidence about pay and promotion disparities between men and women at the company, anecdotal reports of discrimination, and the expert testimony of a sociologist who, after conducting a "social framework analysis" of Wal-Mart's "culture" and personnel practices, opined that Wal-Mart was "vulnerable" to gender discrimination.

The district court granted class certification, and a sharply divided (6-5) *en banc* Ninth Circuit affirmed. The court of appeals concluded that the evidence the plaintiffs provided was sufficient "to raise the common question whether Wal-Mart's female employees nationwide were subjected to a single set of corporate policies (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them in violation of Title VII." The court of appeals also found that the named plaintiffs' claims were sufficiently typical of the class as a whole, and that they could serve as adequate class representatives. Next, the court found that certification was appropriate under Rule 23(b)(2)--which applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." According to the Ninth Circuit, the individualized backpay claims could proceed under that provision because they did not "predominat[e]" over the requests for declaratory and injunctive relief.

Finally, the court of appeals found that, even though the case involved approximately 1.5 million members, the action could be tried manageably as a class. The court found that the trial court could employ the approach it approved in *Hilao v. Estate of Marcos*, 103 F.3d 767, 782-87 (9th Cir. 1996). There compensatory damages claims were tried after the court selected "sample cases" and referred them to a special master. The special master in turn valuated the claims and extrapolated the value and validity of the untested claims from the sample set.

The Supreme Court reversed the Ninth Circuit on two grounds. First, a 5-4 majority found that certification of the plaintiff class was inconsistent with Rule 23(a)(2)'s "commonality" requirement. Second, a unanimous Court found that the plaintiffs' back pay claims were improperly certified under Rule 23(b)(2). In dicta, the Court stated its disapproval of the trial court's ruling that *Daubert* did not apply at the certification stage, and it also noted its objection to the court of appeal's conclusion that the class action could be tried through the use of sample cases and mathematical extrapolations.

The Crux of the Case: Plaintiffs Failed to Establish "Commonality"

The majority identified Rule 23(a)(2), which requires a showing that there are "questions of law or fact common to the class," as the nub upon which the case turned.[2] Relying on its decision in *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147(1982), the Court ruled that to satisfy Rule 23(a)(2) the plaintiffs had to offer "significant proof that Wal-Mart operated under a general policy of discrimination" and this policy was the source of the discrimination suffered by each class member. Explaining the commonality inquiry broadly, the Court wrote, "what matters to class certification . . . is not the raising of common questions--even in droves--but rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." Because Wal-Mart had in place a company-wide non-discrimination policy, and there was no evidence that its practice of providing local managers with discretion to make pay and promotion decisions was the common cause of the discrimination allegedly suffered by the class, there was no proof of a general corporate policy of allowing discrimination. According to the Court, "[w]ithout some glue holding the alleged reasons for all those [discriminatory] decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question why was I disfavored." In light of Wal-Mart's size and geographical scope, the Court also found it "unbelievable that all managers would exercise their discretion in a common way without some common direction."

Writing for the dissenting justices, Justice Ginsburg argued that the majority conflated the generalized "commonality" requirement of Rule 23(a)(2) with the more stringent "predominance" requirement of Rule 23(b)(3)--the provision applicable to "opt out" classes seeking individualized damages. According to the dissent, the majority erred by training its

attention on what distinguishes individual class members, when Rule 23(a)(2) requires courts to focus on what unites them. Under the dissent's approach, the relevant Rule 23(a)(2) question is whether there is some evidence that Wal-Mart's pay and promotion practices produce discriminatory outcomes. Because there was statistical evidence in the record showing pay and promotion disparities between male and female Wal-Mart employees, plaintiffs made a sufficient showing that there was corporate-wide discriminatory decisionmaking for purposes of 23(a)(2).

Experts Used to Address Rule 23's Requirements Are Likely Subject to *Daubert* at Class Certification Stage

Before the Ninth Circuit, Wal-Mart argued that the trial court abused its discretion by refusing to test the reliability of the "social-framework analysis" conducted by an expert witness and offered as evidence that Wal-Mart's local managers were vulnerable to gender stereotyping and bias. In rejecting Wal-Mart's argument, the Ninth Circuit stated that it was "not convinced" that the standards established by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), applied at the class certification stage. This ruling created a circuit split. *See American Honda Motor Co., Inc.*, 600 F.3d 813 (7th Cir. 2010); *see also Sher v. Raytheon Co.*, 2011 U.S. App. LEXIS 4902 (11th Cir. Mar. 9, 2011). And while the Court failed to address the question directly, it noted the district court's belief that *Daubert* did not apply at the certification stage, and curtly wrote, "We doubt that is so." Moreover, in a footnote, the Court seems to conduct its own weighing of the expert's methodology by noting that the expert's conclusions had been criticized by the "very scholars on whose conclusions he relies for his social-framework analysis." From this, it seems that at least five justices of the Court are of the view that *Daubert* does indeed apply at the class certification stage.

Plaintiffs' Back Pay Claims Could Not Be Certified Under Rule 23(b)(2)

The Court unanimously held that the plaintiffs' back pay claims could not proceed as a class action under Rule 23(b)(2). Relying on the text and history of Rule 23, the Court explained that Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class; it would not apply when individual class members are entitled to a different injunction or declaratory judgment. Similarly, the rule would not capture cases where each class member seeks individualized damages.

The Court also flatly rejected the plaintiffs' attempt to distinguish *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), by arguing that their backpay claims could proceed as part of a (b)(2) class because they did not "predominate" over the requests for declaratory and injunctive relief. In *Shutts*, the Court ruled that a class action predominantly for money damages that did not provide claimants the procedural protections of Rule 23(b)(3), notice and an opportunity to "opt-out," violated due process. But, according to the Court, *Shutts* did not establish that individualized damages claims *must* "predominate" over injunctive and declaratory claims before due process concerns are implicated. In the Court's view, the "serious possibility" that due process would be offended by allowing the class to proceed under (b)(2) was an additional reason to deny certification.

The Court, however, expressly left intact the Fifth Circuit's ruling in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), that monetary relief was available in a Rule 23(b)(2) class so long as the monetary claim was "incidental to requested injunctive or declaratory relief."[3]

Rejection of Ninth Circuit "Trial by Formula" Approach to Valuating Class Claims

Further the Court rejected the Ninth Circuit's proposed use of "Trial by Formula" to determine class damages in a Title

VII case. According to the Ninth Circuit's proposed procedure, a sampling of class members could present their damages claims to a special master who would then determine the "average" awardable damages to the class by multiplying the sample of valid claims, and making a class-wide award based on that sampling. While acknowledging that this approach might result in a windfall for some class members, the Ninth Circuit reasoned that an employer proven to have discriminated against a protected group must bear that risk.

The Supreme Court, however, concluded that this approach was unsound, as it abridged Wal-Mart's statutory right to raise individual defenses in response to the requests for back pay. In other words, "a class cannot be certified on the premise that [the party opposing the class] will not be entitled to litigate its statutory defenses to individual claims." In so ruling, a unanimous Court reaffirmed that Rule 23 can not be read to "abridge, enlarge, or modify any substantive right." 28 U.S.C.? 2072(b).

Implications

The *Wal-Mart v. Dukes* decision brings clarity to class action jurisprudence. *Dukes* reinforces that district courts must engage in a rigorous review of each of the class action elements. Indeed, the Court amplified its ruling in *Falcon* that, even at the certification stage, courts should look beyond the pleadings even if the court's analysis overlaps the merits of plaintiffs' claims to ensure that the Rule 23 criteria have been satisfied. The Court also signaled in dicta that experts used to establish the Rule 23 criteria will be subject to scrutiny under *Daubert*.

The decision also will have a substantial impact on class actions where plaintiffs are seeking individualized back pay or monetary relief. In light of *Dukes*, any class action where plaintiffs seek individualized damages will be subject to the more rigorous standards of Rule 23(b)(3). And defendants can assert the argument that the presence of individualized affirmative defenses precludes the trial court from using minitrials of sample cases to derive a formula for calculating class-wide damages.

[1] The Ninth Circuit limited the class to only those women currently employed by Wal-Mart on the date the original class action complaint was filed

[2] Given its ruling on the lack of Rule 23(a)(2) "commonality," it is somewhat surprising that the majority actually reached the requirements of certification under Rule 23(b)(2). Generally, unless all four Rule 23(a) criteria are satisfied, a court should not address the requirements of Rule 23(b). In this sense, the majority's discussion of Rule 23(b)'s requirement may be considered dicta, but the unanimous holding of the Court on the issue makes it clear that Rule 23(b)(2) can not be used to support a claim seeking individualized damages.

[3] The Sixth, Seventh, and Eleventh Circuits later adopted the Fifth Circuit's reasoning. *Reeb v. Ohio Dep't of Rehab. & Corr., Belmont Corr. Inst.*, 435 F.3d 639, 648 (6th Cir. Ohio 2006); *Lemon v. Int'l Union of Operating Eng'rs, Local No. 139, AFL-CIO*, 216 F.3d 577, 581 (7th Cir. 2000); *Murray v. Auslander*, 244 F.3d 807 (11th Cir. 2001).

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