



Wal-Mart Stores v. Dukes: The United States Supreme Court Alters Class Action Landscape

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Earlier this week, the United States Supreme Court handed down a major victory for employers. The Court, in *Wal-Mart Stores v. Dukes*, overturned certification of the largest class action ever to appear before the Court. The proposed class of plaintiffs totaled 1.5 million current and former female employees of Wal-Mart who alleged that the company discriminated against them on the basis of their gender by denying them equal pay and promotions. The Court's decision makes it more difficult for plaintiffs to bring nationwide class actions - particularly class actions alleging systemic discrimination by employers - by requiring more evidence of commonality before certifying a class.

In *Wal-Mart*, the plaintiffs alleged that Wal-Mart's local managers were allowed too much discretion in making pay and promotion decisions, and that those managers exercised that discretion disproportionately in favor of men thereby leading to an unlawful disparate impact on female employees. The plaintiffs claimed that Wal-Mart's knowledge of this practice and its refusal to curtail its managers' authority amounts to disparate treatment in violation of Title VII of the Civil Rights Act of 1964, as amended. The plaintiffs further alleged that the discrimination to which they had been subjected was common to **all** of Wal-Mart's female employees and that the strong and uniform "corporate culture" permitted bias against women to infect the discretionary decision making of each one of Wal-Mart's thousands of managers, thereby making every woman at Wal-Mart the victim of one common discriminatory practice. They sought to recover injunctive relief, declaratory relief, punitive damages and back pay.

The question before the Court was whether this group of 1.5 million "women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices" could proceed as a class action with their claim for monetary relief under Rule 23(b)(2) of the Federal Rules of Civil Procedure.

Rule 23(a) requires a party seeking class certification to prove that class members are numerous, claims of the lead plaintiffs are typical of the class claims, class counsel is adequate and “there are questions of law and fact common to the class.” To proceed as a class action, a party must also satisfy at least one of the three requirements listed in Rule 23(b). The *Dukes* plaintiffs relied on 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.”

The District Court certified the class with respect to the claims for injunctive and declaratory relief and equal pay. Regarding the promotion claim, the District Court certified the class on the issues of alleged discrimination but not for the recovery of back pay. The Ninth Circuit substantially affirmed, concluding that the plaintiffs met Rule 23(a)(2)’s commonality requirement and also found that certification of the back pay claims was proper. The Ninth Circuit eliminated from the class those employees who had left Wal-Mart’s employ by the date the complaint was filed, finding that they lacked standing to seek injunctive or declaratory relief against Wal-Mart’s employment practices.

The Supreme Court, in a 5-4 decision, disagreed with the Ninth Circuit and found that the female plaintiffs failed to show common questions of law or fact affecting the proposed class. In addition, the Court unanimously ruled that the lower courts had improperly granted certification under Rule 23(b)(2). Writing for the majority, Justice Scalia stated that the plaintiffs failed to show that Wal-Mart’s purported policy of allowing local supervisors discretion regarding pay and promotion decisions resulted in common factual or legal issues best addressed in a class action as opposed to individual suits. “In a company of Wal-Mart’s size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction.”

In reaching the conclusion that the plaintiffs lacked the commonality required for class certification, Justice Scalia stated “the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once.” Instead, “their claims must depend upon a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor.” Justice Scalia wrote “without some glue holding the alleged *reasons* for all those [employment] 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 their efforts to meet the commonality requirement, the plaintiffs pointed to Wal-Mart’s alleged corporate policy of allowing discretion by local supervisors over employment matters. However, the Court found that Wal-Mart’s policy was “the opposite of a uniform employment practice” because it is a “policy against having

uniform practices.” Justice Scalia noted that this “policy” is “also a very common and presumptively reasonable way of doing business,” noting that “left to their own devices most managers in any corporation – and surely most managers in a corporation that forbids sex discrimination – would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all.”

This case has very important ramifications for employers, particularly retailers with operations in multiple locations. First, as one might guess, Wal-Mart faced billions of dollars in potential liability had the Court affirmed the lower court’s certification of such a large class. This decision will necessarily result in fewer large class-actions alleging systemic discrimination. While potential plaintiffs will still be able to pursue discrimination claims alleging unlawful pay and promotion practices, they will have to bring those suits as individual plaintiffs or smaller, more manageable and far less costly class actions in multiple forums. For example, the *Wal-Mart* decision may effectively prevent a group of women accusing Costco Wholesale Corp. of gender discrimination from pursuing their claims against this retail giant as a class. In 2004, a group of women sued Costco in the Northern District of California, accusing it of limiting promotions of females to assistant general manager and general manager by failing to post these job openings. In 2007, these women won the right to pursue their gender discrimination claim as a class, but the appeal of that order was stayed while the Supreme Court considered *Dukes v. Wal-Mart*. The Costco plaintiffs will have an uphill battle in attempting to pursue their claims as a class in light of the *Wal-Mart* decision and may be forced to litigate their claims in smaller groups or individual suits.

In short, the *Wal-Mart* decision hampers plaintiffs’ ability to use a disparate impact analysis to prove class wide discrimination based on a theory of subjective decision making. The Court’s decision also represents a victory for all companies, including retailers, that delegate to supervisors the authority to make subjective personnel decisions involving pay and promotions. Plaintiffs who allege that their employers have engaged in systemic gender, age, or race discrimination will have to narrow their claims to target specific supervisors, locations, or states.

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