

## Labor & Employment and Litigation & Trial Practice ADVISORY

June 21, 2011

### Supreme Court Reverses Class Action Certification of Nationwide Class of 1.5 Million Female Workers

In what is likely to be one of the more consequential decisions of the current term, the U.S. Supreme Court, in a 5-4 decision, rejected class action certification of “one of the most expansive class actions ever.” *Wal-Mart Stores v. Dukes*, No. 10-277 (June 20, 2011). Involving claims of gender discrimination in pay and promotion in violation of Title VII of the Civil Rights Act of 1964, a lawsuit was brought on behalf of all current and former female employees of Wal-Mart since 1998, a group estimated at as many as 1.5 million women. The plaintiffs contended that Wal-Mart cultivated a “corporate culture” in which the subjective bias of local managers systematically (and disproportionately) favored men, a result that the plaintiffs alleged Wal-Mart was aware of.

Reversing a Ninth Circuit decision that upheld class certification, the Supreme Court found the lower courts had misapplied the requirements of Federal Rule of Civil Procedure 23 governing the circumstances in which class certification should be allowed. Writing for the majority, Justice Antonin Scalia noted at the beginning of the opinion that class actions are an “exception” to the general rule that only named parties may bring suit against a defendant, and that courts must engage in a “rigorous analysis” of whether plaintiffs have met the class certification requirements.

### No Commonality for Rule 23(a) Certification

Turning to Rule 23(a), which spells out criteria for allowing class certification, the Court held that the central issue of the case was the commonality requirement. Specifically, the plaintiffs needed to demonstrate that they suffered a common injury, and not simply that the same general questions were raised by the plaintiffs’ claims. Moreover, the Court stated that the common injury must itself be amenable to class-wide resolution, in that a common question or issue must be essential to the resolution of all of the plaintiffs’ claims “in one stroke.” Also notable was the Court’s admonition that this inquiry will frequently require “some overlap with the plaintiff’s underlying claim.” The Court explicitly rejected often-misquoted dictum from its decision in *Eisen v. Carlisle & Jacquelin*, 417 U. S. 156, 177 (1974) that courts could not “conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.”

In the case before the Court, given the “millions of employment decisions” affecting the putative class action members, “[w]ithout some glue holding the alleged *reasons* for all those 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*.” (Emphasis in original.) Because there was no allegation that Wal-Mart used a specific, bias-testing procedure or implemented a company-wide practice relating to

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the evaluations of applicants and employees, the plaintiffs' burden to show commonality demanded more "significant proof" that Wal-Mart "operates under a general policy of discrimination."

The Court held that the plaintiffs failed to meet this burden with (1) statistical and social testimony from two sociological experts, (2) anecdotal testimony from 40 employees, and (3) hundreds of affidavits of other employees without specific numbers or percentages regarding the disparate employment decisions, the plaintiffs were "worlds away" from satisfying the Court's "significant proof" requirement. The Court also took issue with the district court's conclusion that the admissibility of expert testimony was not at issue at the certification stage of class action proceedings, stating simply, "[w]e doubt that is so. . . ."

Moreover, having not identified a uniformly applied policy or practice, the Court determined that the plaintiffs' allegations that the company "delegated discretion" to local managers actually counseled against a finding of commonality – the Court considered Wal-Mart's delegation of discretion more akin to having "a policy against having uniform employment practices." Ultimately, the mere existence of pay and promotion discrepancies, coupled with limited anecdotal evidence, was insufficient to justify certification; instead, a specific, company-wide practice must be shown.

### **Dissent from Commonality Holding**

Justice Ruth Bader Ginsburg, joined by Justices Stephen Breyer, Sonia Sotomayor and Elena Kagan, dissented from the first portion of the Court's decision relating to commonality under Rule 23(a). The dissenters argued that the Court should have held that the plaintiffs easily met the commonality requirement in Rule 23(a), and that the majority had improperly imposed a more rigorous requirement (relating to Rule 23(b)(3)'s predominance analysis) into the Rule 23(a) analysis. The dissent would have remanded the case for determination of whether the class could be appropriately certified pursuant to Rule 23(b)(3).

### **No Rule 23(b)(2) Certification for Individualized Monetary Claims**

The Court also unanimously held that the lower courts improperly allowed claims for backpay to proceed under Rule 23(b)(2), which allows for class actions where plaintiffs pursue injunctive or other declaratory relief for the entire class. The Court explained that claims for monetary relief may not be certified under that provision, "at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief." The Court refused to reach the broader question of whether Rule 23(b)(2) allowed any room for monetary relief at all because, "at a minimum, claims for individualized relief (like the backpay at issue here) do not satisfy the Rule." The Court reasoned that Rule 23(b)(2) "applies only when a single injunction or declaratory judgment would provide relief to each member of the class." A class cannot be certified under Rule 23(b)(2) where class members would receive a different injunction or declaration, or where each class member would be entitled to an individualized award of monetary damages. The Court rejected plaintiffs' argument, based on lower court authority from several circuits, that a Rule 23(b)(2) class could contain claims for individualized monetary relief where those claims do not "predominate" over the injunctive relief claims. The Court held that individualized monetary claims can only be brought under Rule 23(b)(3), which "allows class certification in a much wider set of circumstances but with greater procedural protections."

## Conclusion

The Court's decision could have a profound impact on large-scale class action litigation. Along with other recent court decisions, enforcing a consumer arbitration agreement disallowing class-wide proceedings, the framework within which federal courts will undertake the certification analysis appears to be tightening, and putative class action plaintiffs may continue to have a hard time connecting a nation-wide company's many decisions and actions in a way that will satisfy the "rigorous analysis" being implemented by the Court. In any event, companies considering their options for resolving class and collective action disputes need to be up to speed on these significant developments.

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