

Service

Labor & Employment

Too Big to Succeed? Wal-Mart Decision Favors Employers by Making it More Difficult for Plaintiffs to Prosecute Wide-Ranging Class Actions

On June 20, 2011, the U.S. Supreme Court ruled that the largest employment discrimination class action ever filed could not proceed as a class action because of the plaintiffs' failure to demonstrate the existence of a common policy of discrimination, the determination of which "will resolve an issue that is central to the validity of each one of the [class members'] claims in one stroke." The order of the district court certifying the class action as revised and affirmed by the U.S. Court of Appeals for the 9th Circuit was reversed. This decision will make it much more difficult for plaintiffs' lawyers to assert wide-ranging class actions based solely upon claims of excessive subjectivity in employment decisions coupled with claims of statistical disparity resulting from those decisions.

Discussion

In *Wal-Mart Stores, Inc. v. Betty Dukes*, three current and former Wal-Mart employees alleged that Wal-Mart discriminated against them by denying them equal pay or promotions. In the class allegations of their complaint, plaintiffs asserted that the approximately 1.5 million current and former female employees at its 3,400 stores had all been the victims of discrimination. As Justice Scalia noted in his majority opinion,

These plaintiffs . . . do not allege that Wal-Mart has any express corporate policy against the advancement of women. Rather, they claim that their local managers' discretion over pay and promotions is exercised disproportionately

in favor of men, leading to an unlawful disparate impact on female employees. . . . The basic theory of their case is that a strong and uniform “corporate culture” permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal-Mart’s thousands of managers [male and female]—thereby making every woman at the company the victim of one common discriminatory practice.

The decision noted that Wal-Mart’s policy of vesting discretionary decisionmaking in its managers precludes the existence of a uniform employment practice that would provide the commonality necessary for a class action. The speculative nature of the plaintiffs’ expert witness that Wal-Mart’s “strong corporate culture” (the Wal-Mart way) made it “vulnerable” to “gender bias” was insufficient to satisfy plaintiffs’ burden of significant proof that Wal-Mart operated under a general policy of discrimination. The court also concluded that aggregated statistical evidence of disparity in pay and promotions and the anecdotal affidavits of a small fraction of the women in the class were insufficient to “raise any inference that all of the individual, discretionary personnel decisions are discriminatory.”

Impact of the Decision

The *Dukes* decision makes it more difficult for plaintiffs to assert such wide-ranging national class actions. Four points made in Justice Scalia’s decision will be of considerable use in defending future class actions, including those outside the employment arena.

1. Trial courts must consider the merits of plaintiffs’ claim in determining whether the case satisfies the requirements for class certification.
2. The commonality requirements for class certification are now much more stringent. It now requires not just common questions, but questions of a nature that are “capable of classwide resolution,” the determination of which “will resolve an issue that is central to the validity of each one of the claims in one stroke.”
3. Class actions are not appropriate when the monetary relief is not purely incidental to injunctive or declaratory relief. If the relief afforded to each class member may differ materially, a Rule 23(b) (2) class may not be certified.
4. It is not appropriate to resolve class claims by litigating a sample of the class claims and then extrapolate the results to determine class relief.

The impact of this decision is largely limited to claims filed in federal courts in which class certification follows the requirement of the Federal Rules of Civil Procedure. While many states have adopted class procedures similar to the federal rules, there are a significant number of jurisdictions where the rules and case law would permit class actions to proceed on the basis of the limited

evidence of commonality present in *Dukes*. We believe the battleground for these class-action discrimination claims will move to the state courts. In interviews after the court's decision, counsel for plaintiffs indicated that they would be pursuing a number of smaller, more focused class actions against Wal-Mart, store-by-store or regionally, including filings in state courts.

The implications of this decision are not limited to discrimination claims. These holdings should be helpful in defending against wage and hour claims brought under the Fair Labor Standards Act and all class actions brought in federal courts. In each of these situations, the ability to address the merits of the claim should benefit employers and other defendants in resisting class certification.

What this Means to You

This decision reinforces the need to continue pursuing good human resources practices.

Employers should regularly evaluate pay, promotion and hiring practices to determine whether there is any unintended disparity between classes of employees. We recommend such evaluations should be conducted by outside counsel as part of your periodic legal review of HR practices.

Managers and other decisionmakers should continue to be trained on proper performance evaluation and selection procedures and documentation.

Significant employment decisions such as hiring, performance evaluations, promotions and discretionary wage increases should be subject to review by HR and higher authorities as a check and balance to claims of discriminatory bias through excessive subjectivity.

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