

Client Alert

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U.S. Supreme Court Strikes Down Employment Class Action Suit Against Wal-Mart, Finds Insufficient Commonality Among Female Plaintiffs

On Monday, the U.S. Supreme Court announced its ruling in *Wal-Mart Stores v. Dukes, et al.* (10-277), which addressed “one of the most expansive class actions ever.” The named plaintiffs, three current or former Wal-Mart employees, brought suit against the retailer, alleging sexual discrimination in both compensation and promotion in violation of Title VII of the Civil Rights Act of 1964. As a class action, the certified class included nearly every woman who had worked for Wal-Mart since 1998, estimated by the Court to be over 1.5 million members employed at thousands of stores. The plaintiffs, on behalf of the entire class, did not allege that Wal-Mart had an explicit policy discriminating against women, but rather that the expansive discretion given to local and regional managers in setting pay and allocating promotions allowed for disproportionate advantages to be given to male employees and had an unlawful disparate impact on female employees. The plaintiffs sought injunctive and declaratory relief, punitive damages and backpay, but not compensatory damages.

The issue before the Court was not whether Wal-Mart’s management structure allowed for the alleged discrimination to occur, but whether the class of plaintiffs was properly certified. In its analysis, the Court examined the plaintiffs’ class certification under Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure.

Rule 23(a) requires that a party seeking to bring a class action suit must demonstrate not only that there are so many plaintiffs that a traditional suit would be unwieldy and that the named plaintiffs can represent the unnamed class of

plaintiffs, but that all plaintiffs have suffered the same injury. This element, known as commonality, is critical, because the court needs to ensure that the single case is capable of resolving all of the underlying claims. Here, plaintiffs attempted to demonstrate commonality with statistical analysis, expert testimony by a sociologist, and anecdotal evidence.

Writing for the 5-4 majority on this issue, Justice Scalia stated that the Rule 23(a) commonality element requires the plaintiffs to demonstrate, not simply allege, that class members “have suffered the same injury.” The Court rejected the plaintiffs’ efforts to do so, finding that they were inadequate to hold together “literally millions of employment decisions.” The statistical analysis, Justice Scalia said, did not isolate what specific employment practice caused the disparity in pay or promotion. The expert, while insisting that Wal-Mart was vulnerable to gender bias, could not state the degree to which this bias played into employment decisions. The anecdotal evidence only accounted for “about 1 in every 12,500 class members.” In sum, the Court found that there was “no convincing proof of a companywide discriminatory pay and promotion policy,” therefore the plaintiffs had not “established the existence of any common question.”

Justice Ginsberg dissented from the ruling, stating that the majority had raised the bar on Rule 23(a)’s commonality requirement. According to Justice Ginsberg, it is no longer sufficient for the putative class members to show a common question; they must now show that common questions predominate any dissimilarities among them.

While examining Rule 23(b) and its role in structuring class action suits, the Court also made a narrow but significant holding specific to employment class actions under Title VII. Title VII contains a detailed scheme that allows the defendant to contest certain remedial measures, such as reinstatement and backpay, on an individualized basis. In the face of hundreds of

thousands, if not millions, of affected workers, the lower court had endeavored to instead conduct proceedings for a sample set of affected employees, extract data from that set, and then apply it to all of the affected employees across the entire class. The Supreme Court unanimously rejected this effort by the lower court to hold what it dubbed “Trial by Formula” and, instead, stated that the defendant must be permitted to litigate its statutory defenses to individual claims.

Looking forward, it is expected that the federal district and circuit courts will expend significant time and energy interpreting the majority’s holding on Rule 23(a). It remains to be seen whether the courts will adopt the view of Justice Ginsberg that the majority opinion raises the bar on the Rule 23(a) commonality requirement. Certainly such a result would be welcome by class action defendants. As for the Court’s Rule 23(b) rulings, these are undoubtedly favorable to class-action defendants. Monday’s decision reaffirms the conventional wisdom that when it comes to class action suits, winning the class certification battle is almost always winning the war.



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