

Employment Law Advisory for 6/22/11

The Dukes v. Wal-Mart Opinion: A Significant Victory For Employers

Wal-Mart is the nation's largest private employer so it is no surprise that Wal-Mart has been the target of the largest class action sex discrimination lawsuit in history in *Dukes v. Wal-Mart*. In *Wal-Mart*, the plaintiffs sought to certify a nationwide class of 1.5 million current and former female employees of Wal-Mart on the basis that all female employees in the purported class were the subject of sex discrimination based on Wal-Mart's delegation of pay and promotion practices to the discretion of local managers who, according to statistical evidence, disproportionately exercised their discretion in favor of male employees and against female employees. Boiled down to its core, plaintiffs' argument in support of class certification was essentially that Wal-Mart had a uniform "corporate culture" that permits bias against women to infect the discretionary decision-making of local management thereby making every woman at the company a victim of one common discriminatory practice, i.e., the discriminatory discretionary decision-making of local managers. Surprisingly, the *Wal-Mart* plaintiffs convinced the trial court and the Ninth Circuit Court of Appeals to certify a nationwide class of approximately 1.5 million current and former female employees based on this theory.

In a much anticipated opinion, the United States Supreme Court reversed the Ninth Circuit and issued an opinion that is likely to significantly alter the legal landscape for employment class actions to the benefit of employers. The Supreme Court strongly reaffirmed the principle that any discrimination plaintiffs seeking class certification must show that "there are questions of law or fact common to the class." The Supreme Court squarely rejected the argument that discretionary decision making by local management combined with statistical proof of disparity is enough to satisfy this standard of common issues. As the Court observed, the *Wal-Mart* plaintiffs sought to challenge literally millions of employment decisions at once by virtue of their class certification litigation but offered no "glue" holding the alleged reasons for those millions of decisions together. As a result, the proposed *Wal-Mart* class failed to meet the most basic threshold for class certification--the concept that the class claims must depend upon a common contention that is capable of class wide resolution. The Court pointedly noted that proving discrimination in one local manager's exercise of discretion does nothing to demonstrate the discrimination in a different local manager's exercise of discretion.

The Supreme Court's opinion should prove as an effective tool against the increasingly frequent approach of class action litigation against large employers. The Supreme Court reaffirmed well-settled principles of class certification in refusing to allow an enormous number of highly individualized claims to be tried as a class, essentially by statistics alone. While the size of the class in *Wal-Mart* made the case unique, the Court's focus on what common issues must be raised by a proposed class to obtain certification will be useful for employers of all sizes.

If you have questions regarding the meaning of the *Dukes v. Wal-Mart* opinion relative to your employment practices and your potential exposure to class action litigation or, you have questions about other employment law issues, please contact one of our attorneys.