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## U.S. Supreme Court Rejects Gender Discrimination Class Action Against Wal-Mart

On June 20, 2011, the United States Supreme Court released its widely-anticipated decision in *Wal-Mart Stores, Inc. v. Dukes, et al.*, 564 U.S. \_\_\_\_ (2011) ("*Wal-Mart*"). In *Wal-Mart*, the Supreme Court reversed the Ninth Circuit Court of Appeals and held that the proposed nationwide gender discrimination class action against the retail giant could not proceed. In a decision that will come as welcome news to large employers and other frequent targets of class action lawsuits, the Supreme Court (1) arguably increased the burden that plaintiffs must satisfy to demonstrate "common questions of law or fact" in support of class certification, making class certification more difficult, especially in "disparate impact" discrimination cases; (2) held that individual claims for monetary relief cannot be certified as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2), which generally permits class certification in cases involving claims for injunctive and/or declaratory relief; and (3) held that Wal-Mart was entitled to individualized determinations of each proposed class member's eligibility for backpay, rejecting the Ninth Circuit's attempt to replace that process with a statistical formula.

The named plaintiffs in *Wal-Mart* were three current and former female Wal-Mart employees. They sued Wal-Mart under Title VII of the federal Civil Rights Act of 1964, alleging that Wal-Mart's policy of giving local managers discretion over pay and promotion decisions negatively impacted women as a group, and that Wal-Mart's refusal to cabin its managers' authority amounted to disparate treatment on the basis of gender. The plaintiffs sought to certify a nationwide class of 1.5 million female employees. The plaintiffs sought injunctive and declaratory relief, punitive damages, and backpay.

The trial court and Ninth Circuit had agreed that the proposed class could be certified, reasoning that there were common questions of law or fact under Federal Rule of Civil Procedure 23(a), and that class certification pursuant to Rule 23(b)(2) – which permits certification in cases where "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" – was appropriate because the plaintiffs' claims for backpay did not "predominate." The Ninth Circuit had further held that the case could be manageably tried without depriving Wal-Mart of its due process rights by having the trial court select a random sample of claims, determine the validity of those claims and the average award of backpay in the valid claims, and then apply the percentage of valid claims and average backpay award across the entire

class in order to determine the overall class recovery.

The Supreme Court reversed. A five-justice majority concluded that there were not common questions of law or fact across the proposed class, and hence Federal Rule of Civil Procedure 23(a)(2) was not satisfied. Clarifying earlier decisions, the majority made clear that in conducting this analysis, it was permitted to consider issues that were enmeshed with the merits of the plaintiffs' claims. The majority then explained that merely reciting common questions is not enough to satisfy Rule 23(a). Rather, the class proceeding needs to be capable of generating "common answers" which are "apt to drive the resolution of the litigation." The four-justice dissent criticized this holding as superimposing onto Rule 23(a) the requirement in Rule 23(b)(3) that "common issues predominate" over individualized issues. The dissent believed that the "commonality" requirement in Rule 23(a) could be established merely by identifying a single issue in dispute that applied commonly to the proposed class. Because the trial court had only considered certification under Rule 23(b)(2), the dissent would have remanded the case for the trial court to determine if a class could be certified under Rule 23(b)(3).

The majority held that the plaintiffs had not identified any common question that satisfied Rule 23(a), because they sought "to sue about literally millions of employment decisions at once." The majority further explained that "[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*."

Addressing the plaintiffs' attempt to provide the required "glue", the majority held that anecdotal affidavits from 120 class members were insufficient, because they represented only 1 out of every 12,500 class members, and only involved 235 out of Wal-Mart's 3,400 stores nationwide. The majority also held that the plaintiffs' statistical analysis of Wal-Mart's workforce (which interpreted data on a regional and national level) was insufficient because it did not lead to a rational inference of discrimination at the store or district level (for example, a regional pay disparity could be explained by a very small subset of stores). Finally, the majority held that the "social framework" analysis presented by the plaintiffs' expert was insufficient, because although the expert testified Wal-Mart had a "strong corporate culture" that made it "vulnerable" to gender discrimination, he could not determine how regularly gender stereotypes played a meaningful role in Wal-Mart's employment decisions, *e.g.*, he could not calculate whether 0.5 percent or 95 percent of the decisions resulted from discriminatory thinking. Importantly, the majority strongly suggested that the rigorous test for admission of expert testimony (the *Daubert* test) should be applied to use of expert testimony on motions for class certification.

The Court's other holdings were unanimous. For one, the Court agreed that class certification of the backpay claim under Rule 23(b)(2) was improper because the request for backpay was "individualized" and not "incidental" to the requests for injunctive and declaratory relief. The Court declined to reach the broader question of whether a Rule 23(b)(2) class could ever recover monetary relief, nor did it specify what

types of claims for monetary relief were and were not considered "individualized." The Court made clear, however, that when plaintiffs seek to pursue class certification of individualized monetary claims (such as backpay), they cannot use Rule 23(b)(2), but must instead use Rule 23(b)(3), which requires showing that common questions predominate over individual questions, and includes procedural safeguards for class members, such as notice and an opportunity to opt-out.

Lastly, the unanimous Court agreed that Wal-Mart should be entitled to individualized determinations of each employee's eligibility for backpay. In particular, Wal-Mart has the right to show that it took the adverse employment actions in question for reasons other than unlawful discrimination. The Court rejected the Ninth Circuit's attempt to truncate this process by using what the Court called "Trial by Formula," wherein a sample group would be used to determine how many claims were valid, and their average worth, for purposing of extrapolating those results onto the broader class. The Court disapproved of this "novel project" because it deprived Wal-Mart of its due process right to assert individualized defenses to each class member's claim.

Looking forward, the *Wal-Mart* decision will strengthen the arguments of employers and other companies facing large class action lawsuits. In particular, the decision reaffirms that trial courts must closely scrutinize the evidence when deciding whether to certify a class action, especially in "disparate impact" discrimination cases. Statistical evidence that is based on too small a sample size, or is not well-tailored to the proposed class action, should be insufficient to support class certification. Likewise, expert testimony that is over-generalized and incapable of providing answers to the key inquiries in the case (here, whether a particular employment decision was motivated by gender discrimination) should also be insufficient to support class certification. Finally, the Court's holding that defendants have the right to present individualized defenses as to each class member, and that this right cannot be short-circuited through statistical sampling, will provide defendants with a greater ability to defeat class certification where such individualized determinations would otherwise prove unmanageable.

Should you have any questions regarding the application of the Court's decision in *Wal-Mart* to your particular situation, you should contact a labor and employment attorney at Sheppard Mullin for consultation and advice.

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