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Analysis: The U.S. Supreme Court's Decision in Wal-Mart Stores, Inc. v. Dukes Will Substantially Change Several Types of Class Actions and Class-Based Labor and Employment Suits

By **Scott M. McElhaney**

In a closely watched case, the Supreme Court decided in *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277 (U.S. June 20, 2011), that a gender discrimination lawsuit brought by three named plaintiffs on behalf of 1.5 million current and former Wal-Mart employees could not proceed as a class action. Apart from the noteworthy result of preventing the largest employment discrimination lawsuit in United States history from going forward, the case is important for the effects it will have on a broad range of class actions and employment discrimination suits. The *Wal-Mart* decision may make it more difficult for many types of class-based suits to proceed.

The named plaintiffs in the case alleged that they had been denied equal pay and promotions because of their sex in violation of Title VII of the Civil Right Act of 1964. The plaintiffs maintained that Wal-Mart's policy of allowing local managers to have discretion over pay and promotions, along with an allegedly strong and uniform corporate culture that permitted bias against women to infect decision-making, combined to cause discrimination against both the plaintiffs and all other women employed by Wal-Mart. The plaintiffs sought injunctive and declaratory relief as well as backpay.

At the plaintiffs' request, lower courts certified the case to proceed as a class action on behalf of all women who had worked for Wal-Mart since the commencement of the case. The Supreme Court reversed the lower courts' class certification order for several reasons.

The Unanimous Reversal Because of the Lower Courts' Approach to Handling Damages

The Court unanimously ruled that the claims for backpay could not be certified pursuant to the rule that the plaintiffs had invoked – Federal Rule of Civil Procedure 23(b)(2) – because that rule does not apply when, as in this case, class members would be entitled to individualized awards of monetary damages. Instead, class certification under Rule 23(b)(2) is appropriate only when a "single, indivisible remedy would provide relief to each class member." If class members seek individualized monetary relief, then class certification should generally be examined under Rule 23(b)(3), which imposes additional barriers to class certification, such as the requirement that common issues "predominate" over individual issues.

The Justices also unanimously rejected the lower courts' "Trial by Formula" approach, under which a random sample of class member

claims would be tried, and the aggregate results of those trials applied to the relief granted to the class as a whole. The Court explained that Wal-Mart was entitled to additional proceedings in which it could raise individual defenses as to *each* class member's claim – not only the sample cases – to attempt to show that each employment decision was lawful. A similar "Trial by Formula" procedure has been used in some other courts in collective actions under the Fair Labor Standards Act, so the Court's decision in *Wal-Mart* may affect the manner in which FLSA cases are handled.

The 5-4 Reversal Because of a Failure to Identify a Company-Wide Policy of Discrimination

Splitting 5-4, however, the Court ruled that a class could not be certified at all in this case, because the plaintiffs failed to offer "significant proof" that there was a company-wide policy or practice of discrimination. One of the fundamental prerequisites of class certification is the requirement of Rule 23(a) that there be "questions of law or fact common" to the class. In practice, that means that the putative class members' claims must turn on a "common contention" that is "of such a nature . . . that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims." In the context of the claims asserted in the case, the plaintiffs had to prove that Wal-Mart employed a test or selection method that had a discriminatory impact or that Wal-Mart operated under a general policy of discrimination.

There was no discriminatory test at issue, and the Court concluded that there was insufficient proof of a policy or practice of discrimination. Importantly, the majority held that discretionary employment decisions can - but do not *necessarily* - allow for discrimination. The Court stated that the plaintiffs did not prove how many employment decisions may have been influenced by sex discrimination and that their statistical and anecdotal evidence failed to prove that a company-wide policy of discrimination in fact existed.

The effect of the holding of the majority will be to make class certification much more difficult in any employment discrimination suit where there is no tangible, specific employment practice that can be the subject of a suit. That holding will likely reduce the number of class action employment discrimination suits that employers will face going forward.

Additionally, the majority's analysis of the showing that plaintiffs must make in order to establish that there are "questions of law or fact common" to the class under Rule 23(a) may make it more difficult for *any* class action to proceed. The Court's analysis of this "commonality" requirement appears to demand more than what many lower courts have required. Because the "commonality" requirement applies to every type of class action under Rule 23, the *Wal-Mart* case may result in the certification of fewer class actions overall.

If you have any questions regarding this e-Alert, contact **Scott M. McElhaney** at 214.953.6147 or smcelhaney@jw.com.

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