

## [Dukes v. Wal-Mart: Supreme Court Justices Debate Merits of Class Certification Discriminatory Pay & Promotion Claims](#)

by [Adam Santucci](#)

May 17, 2011

*This post was contributed by [Brett E. Younkin, Esq.](#), an Associate and a member of McNees Wallace & Nurick LLC's Labor and Employment Practice Group in Columbus, Ohio.*

The receipt of a federal lawsuit is generally viewed as a bad day for any employer; seeing that a plaintiff is seeking class action status on behalf of hundreds or thousands of current and past employees is enough to turn a bad day into an unenviable nightmare. Such was the situation when Wal-Mart, one of the country's largest employers, was notified that a female manager, Betty Dukes, was suing the company on behalf of all female managers alleging a pattern and practice of discriminatory pay and promotion practices. Ms. Dukes alleged that despite the company's non-discrimination policy, the Arkansas-based employer paid their female managers at lower rates than their male counterparts on a nationwide scale and women were promoted less often than men.

Recently, the issue of certifying the class of female employees became the focal point of what many view to have been one of the liveliest oral arguments before the United States Supreme Court in years. During each side's hour-long presentation, it seems that the Justices spoke almost as much as the attorneys, often-times overlapping each other's questions and even interrupting a colleague's question in an attempt to make their own point. However, the result of the heated debate is far from clear. Will Wal-Mart be faced with a multi-million dollar class action for discriminatory practices or will it be just another single-litigant against one of the world's largest retail empires?

Class certification is governed by Rule 23 of the Federal Rules of Civil Procedure and generally requires (1) that there to be too many potential members to identify and join each of them; (2) a common question of law or fact; (3) a commonality of claims or defenses; and (4) that the representative parties will adequately protect the interests of the entire class. It's generally agreed that the potential plaintiffs here would meet most of these requirements. However, the focus of the discussion before the Court was whether the proposed class of female managers truly shared common legal and factual issues. One key question from Justice Kennedy has led many to speculate that Ms. Dukes and her potential class members have a fatal flaw in their argument.

During the plaintiffs' presentation, Justice Kennedy asked the rather straight-forward question: "What is the unlawful policy that Wal-Mart has adopted?" The response was

that the store managers have “unchecked discretion” in the decision-making process and have used that power to create a culture of discrimination throughout the corporation. The problem with this response is that it contradicts the position that Wal-Mart’s headquarters enforces a consistent, nationwide policy, which is a key aspect of the plaintiffs’ case and may be necessary to establish corporate-wide liability.

The plaintiffs’ attorney tried to argue both sides of an opposing view – that there is a top-down corporate culture to discriminate against females, and that the actual decision-makers in the individual stores themselves have too much power and discretion. It was on this point where Justice Scalia accused the plaintiffs’ counsel of trying to “whipsaw” the Court stating that the power given to store managers is too subjective while there is a corporate culture to guide those same managers to discriminate against women. While the commonality issue appeared to weigh in Wal-Mart’s favor, how the court will decide the case is unclear at this time. A decision is expected sometime this summer, and we will be sure to provide an update when it is issued.

© 2011 McNees Wallace & Nurick LLC

*This document is presented with the understanding that the publisher does not render specific legal, accounting or other professional service to the reader. Due to the rapidly changing nature of the law, information contained in this publication may become outdated. Anyone using this material must always research original sources of authority and update this information to ensure accuracy and applicability to specific legal matters. In no event will the authors, the reviewers or the publisher be liable for any damage, whether direct, indirect or consequential, claimed to result from the use of this material.*