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Daniel J. McCoy Co-Editor 650.335.7897
Allen Kato Co-Editor 415.875.2464
Fenwick
FENWICK & WEST LLP

WAL-MART DEFEATS LARGEST CLASS ACTION FOR GENDER DISCRIMINATION; ALL EMPLOYERS BENEFIT FROM REDUCED RISK OF CLASS CLAIMS ARISING OUT OF SUBJECTIVE DECISIONS BY MANAGERS

In a far-reaching and favorable decision for employers, the U.S. Supreme Court in *Wal-Mart Stores, Inc. v. Dukes* barred the "most expansive class action ever" as lacking evidence of the "common policy of discrimination" necessary for class treatment. Betty Dukes, a Wal-Mart greeter, and two other female employees sued Wal-Mart for gender discrimination on behalf of themselves and up to *1.5 million* current and former female employees of the nation's largest private employer. The purported class of current and former employees worked in stores across the country and were allegedly subjected to discrimination in pay and promotional opportunities.

With respect to pay and promotion decisions, Wal-Mart largely operates in a decentralized fashion. Decisions to increase the pay of hourly employees are generally committed to the local store manager's broad discretion, which is exercised in a largely subjective manner. Decisions to promote employees to management and/or to select them for the management training programs were similarly left to the discretion of local store, regional and district managers applying their own best judgment. Plaintiffs did not allege any express corporate policy of discrimination. Indeed, Wal-Mart policy expressly prohibited discrimination on the basis of gender, and imposed penalties for any proven violation. Rather, plaintiffs asserted that Wal-Mart fostered an informal yet strong and uniform "corporate culture" of bias against women by allowing individual managers to use their subjective judgment in making pay and promotion decisions. The Ninth Circuit Court of Appeals agreed with plaintiffs that, by allowing its managers to use their subjective judgment, Wal-Mart exhibited a common policy of discrimination against women. The Ninth Circuit therefore allowed the class action to proceed to trial, specifically by a special master who would 1) hold several mini-trials of a randomly selected number of claims, and then 2) extrapolate the results of these mini-trials to the entire class in fashioning a class-wide remedy.

Rejecting the conclusion that Wal-Mart operated under a common policy of bias against women, the Supreme Court explained that in order to sue over "literally millions of employment decisions at once," there must be "some glue holding" the reasons for those decisions together. By way of example, the court opined that significant proof that an employer operated under a general policy of discrimination would satisfy this commonality requirement. Class treatment could be justified if discrimination manifested itself through, for e.g., entirely subjective decisionmaking processes. However, Wal-Mart's so-called policy of allowing discretion by local managers over pay and promotion decisions is a "very common and presumptively reasonable way of doing business" that, in and of itself, raises no inference of discriminatory conduct. Rather, to support class treatment, plaintiffs must offer significant proof that an "employer's undisciplined system of subjective decisionmaking [had the] same effects as a system pervaded by impermissible intentional discrimination."

The Court further opined that plaintiffs had "not identified a common mode of exercising discretion that pervades the entire company," and it rejected the conclusory and unsupported assertions of a social scientist that Wal-Mart had a "strong corporate culture" that made it "vulnerable" to gender bias. The Court also discounted statistical disparities in pay at a regional and national level as failing to raise any inference of discrimination, and it rejected the affidavits of 120 employees (who described discriminatory comments and actions by

managers) as a meaningless attempt to establish a general policy of discrimination. Rather, the Court concluded that plaintiffs showed they had "little in common but their sex and this lawsuit," noting that it was impermissible to impose mini-trials of a random sampling of claims and then to apply the results to the entire class.

The Court's holding could foreclose class actions like the one litigated in *Velez v. Novartis,* in which a class of about 6,000 current and former female sales representatives obtained a $250 million punitive damages award at trial arising out of Novartis' alleged use of subjective factors in making compensation and promotion decisions (Fenwick Employment Brief, June 9, 2010). Novartis settled the case after trial for $175 million (Fenwick Employment Brief, January 7, 2011). Instead, to the benefit of employers both large and small, plaintiffs may now bring class actions arising out of the use of subjective factors in making employment decisions only where they can establish by significant proof that the company operated under a companywide policy of discrimination. This may be difficult if not impossible to prove where the employer has an express policy of nondiscrimination that is enforced when violations occur.

However, this is also not to say that subjective employment decisions are now immune from legal challenge. Denials of pay increases and promotions based on subjective judgment that are contrary to objective facts about a female employee's good performance and superior qualifications may expose the employer, even in a single-employee case, to significant liability for discrimination. Further, the class action remedy remains available where the employee is able to show a companywide policy, for instance, in using a test for hiring or promotion that is shown to have an adverse impact on women. Employers should therefore continue to evaluate their policies and procedures for discriminatory application and impact.

The plaintiffs' bar will certainly look for ways to minimize the impact of this ruling by pursing class actions with more narrow classes of plaintiffs and/or flooding the court system with individual claims. And lawmakers may even seek to undo the ruling through federal legislation. In the meantime, this case is a clear victory for employers.

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