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## Put Up Your *Dukes:* Supreme Court Ruling in Wal-Mart Gender Case Strikes Body Blow to Plaintiffs' Class Action Bar

The U.S. Supreme Court in Dukes v. Wal-Mart, 564 U.S. – (June 20, 2011), reversed a ruling by the U.S. Court of Appeals for the Ninth Circuit that had certified a nationwide gender discrimination class action against Wal-Mart. As previously certified, the class included approximately 1.5 million women who had worked for Wal-Mart dating back to December 25, 1998. The plaintiffs allege that Wal-Mart discriminates against women in terms of pay and promotions. Justice Antonin Scalia wrote the Court's opinion, in which the conservative block of four justices plus Justice Anthony Kennedy as the swing vote joined fully. The remaining four justices concurred in part and dissented in part, with Justice Ruth Bader Ginsburg writing that the majority opinion went to far in disqualifying class actions "at the starting gate."

While the sheer size of Wal-Mart as the world's largest private employer presented unique challenges, the Court's analysis can be applied broadly to class actions asserting discrimination based on a theory of delegation of decision-making authority to local managers. Having faced and defeated the lead counsel and team of experts from Dukes in their efforts to certify nationwide class actions against other employers, we were familiar with the major issues in play. As discussed in the attached link, the Court gave employers everything they could have hoped for, and more.

### Platitudes Do Not Establish Commonality

Rule 23 of the Federal Rules of Civil Procedure establishes the requirements that representative plaintiffs must meet to obtain class certification. One requirement under Rule 23(a) is for plaintiffs to show that "there are questions of law or fact common to the class." The Court in Dukes ruled that this requirement is "easy to misread, since '[a]ny competently crafted class complaint literally raises common 'questions.'" For example, some lower courts have accepted generic common questions such as were class members discriminated against. Rejecting this approach, the Court ruled that "claims must depend upon a common contention — for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."

### Rejection of Social Scientist Psychobabble

As the Court observed, the plaintiffs in Dukes sought to challenge millions of employment decisions. The Court ruled that the plaintiffs could not establish commonality "without some glue holding the alleged *reasons* for all those decisions together." Plaintiffs may connect decisions by providing "significant proof" of a "general policy of discrimination." In an effort to make this showing, the plaintiffs offered the analysis of social scientist Dr. William Bielby, who concluded that delegation of discretionary decision-making authority allowed for decisions based on gender stereotypes. Dr. Bielby, though, admitted that he "could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking." With this degree of leeway, Dr. Bielby could be enlisted to support class certification against most any employer.

Fortunately, the Court rejected this evidence as "worlds away" from "significant proof" of a "general policy of discrimination."

**The Absence of a Central Policy Does Not Equal a Central Policy**

Like most employers, Wal-Mart has a strong policy prohibiting discrimination. Thus, the plaintiffs could not point to a specific policy giving rise to their claims. Instead, they alleged that discrimination arose from a "policy" of giving supervisors discretion to make employment decisions. As the Court reasoned, "[o]n its face, of course, that is just the opposite of a uniform employment practice that would provide commonality needed for a class action; it is a policy *against having* uniform employment practices." The Court also characterized delegation of decision-making authority as a "presumptively reasonable way of doing business." The Court then concluded that it would be "quite unbelievable that all managers would exercise their discretion in a common way without some common direction." This ruling is a major relief for employers since a certain level of delegation and subjectivity is inevitable. Moreover, the Ninth Circuit had offered no guidance as to how much discretion is too much.

**Lies, Darned Lies, and Statistics**

The plaintiffs also relied on expert evidence of statistical disparities between pay and promotion rates for men and women. The plaintiffs sought to aggregate numbers across multiple job groups and locations, while Wal-Mart focused on the absence of any disparity at most locations. In holding that the plaintiffs' statistical evidence failed to establish commonality, the Court stressed that disparities at the regional and national level would not establish disparities at individual stores. Moreover, even if the plaintiffs could show disparities at all stores, they still would need to show that a "specific employment practice" had caused these disparities. Again, the "bare existence of delegated discretion" could not serve as the "glue" to connect the class. The Court also rejected the plaintiffs' attempt to establish commonality through anecdotal evidence, noting that the plaintiffs had presented a statement from only one in every 12,500 class members.

**Show Me the Money: Challenges Posed by Claims for Monetary Relief**

Besides meeting the requirements under Rule 23(a), plaintiffs must show that their class meets one of the categories set forth in Rule 23(b). Historically, most plaintiffs in employment cases have sought certification under Rule 23(b)(2), which applies 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." Noticeably absent is any reference to monetary damages. Supreme Court precedent has held that monetary damages may be pursued in a 23(b)(2) class where these damages are "incidental," but what this means has been unclear.

Previously, the U.S. Court of Appeals for the Fifth Circuit in the leading case of Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998), ruled that declaratory and injunctive relief must "predominate" over any monetary relief sought in a 23(b)(2) class. The Fifth Circuit then ruled that claims for compensatory and punitive damages present individualized issues which often preclude certification under 23(b)(2). The majority of circuits since had adopted Allison, while the Second and Ninth Circuits crafted more liberal tests.

Hoping to sidestep the issue altogether, the plaintiffs in Dukes did not seek compensatory damages on a class basis. Nevertheless, the Court ruled that their claims for *back pay* tripped them up. As the Court ruled, "at a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy" Rule 23(b)(2). Instead, "individualized monetary claims belong in Rule 23(b)(3)," which includes additional procedural safeguards, such as a "super-commonality" requirement that common issues predominate over individual issues

and the requirement that class members receive notice and an opportunity to opt out of the class.

The Court then ruled that even the "predominance" test of Allison was too permissive. "The mere 'predominance' of a proper (b)(2) injunctive claim does nothing to justify elimination of Rule 23(b)(3)'s procedural protections." Thus, the Court gave employers more than they might have expected. While most lower courts, even in the more conservative Circuits, have allowed back pay claims in 23(b)(2) classes, the Court ruled that even these damages precluded certification under 23(b)(2).

The plaintiffs in Dukes were not seeking certification under Rule 23(b)(3), the other category sometimes used for employment claims. As noted above, Rule 23(b)(3) requires "super-commonality" where common issues predominate. Since the plaintiffs could not even meet the much easier test of commonality under Rule 23(a), they would not have been able to obtain class certification under 23(b)(3), either.

## No Trial by Formula

Finally, the Court rejected the Ninth Circuit's "novel project" of "Trial by Formula." Under this approach, the damages of a "sample set" of class members would be determined and then projected to the class. In rejecting this approach, the Court stressed that Rule 23 could not change Wal-Mart's statutory right to present a defense to any individual's claim for back pay.

## Impact for Employers

The ruling in Dukes will make it much more difficult for plaintiffs to certify employment class actions where the decisions of multiple supervisors and managers are at issue. Still, in celebrating this win, employers should remain mindful of the lessons learned throughout the lawsuit, which apply whether or not an employer ever faces a class action.

- Focus on Objective Factors. Some level of subjectivity in employment decisions is inevitable. Still, increasing objective variables will counter arguments that decisions are based on stereotypes. This process also can improve decisions and enhance morale.
- Post Jobs and Track Applications. Because Wal-Mart failed to post all job openings, the plaintiffs' expert focused on "feeder pool" positions with high percentages of females. While Wal-Mart argued that women often were not interested in promotions that may require relocation – and limited applicant flow data suggested as much – it lacked adequate supporting data. A posting policy also is helpful in single plaintiff cases to document the selection process.
- Consider Employment Audits. You may want to audit your employment demographics and pay equity. You should act in concert with outside counsel to maximize your chance of preserving confidentiality. Investigating apparent disparities and addressing outliers can improve morale, decrease litigation risks, and correct business inefficiencies.
- Scrutinize EEO-1 Reports. Employers with 100 or more employees must file annual EEO-1 Reports. Wal-Mart maintained that it had not included department managers in the EEO-1 managers category, whereas other retailers did. Including these managers would have almost doubled the percentage of women among in-store managers. Employers should carefully review their EEO-1 Reports to avoid any such results.

Miller & Martin has an experienced Class Action Practice Group chaired by Brad Harvey which has defended employers nationwide in matters similar to the Dukes case. We welcome the opportunity to respond to your Request for Information in the event your company is sued in a matter involving class claims. We also are available to preemptively review your policies and practices regarding employment decision making, pay equity

and/or job classifications (exempt versus non-exempt and employees versus independent contractors, etc.) in order to make recommendations regarding how you can avoid or at least significantly reduce the risk of liability in potential class litigation.

*The opinions expressed in this bulletin are intended for general guidance only. They are not intended as recommendations for specific situations. As always, readers should consult a qualified attorney for specific legal guidance. Should you need assistance from a Miller & Martin attorney, please call 1-800-275-7303.*

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