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U.S. Supreme Court Reverses Class Certification in Wal-Mart Employment Discrimination Case

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The United States Supreme Court has reversed the certification of a mammoth employment discrimination class against Wal-Mart. *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277 (U.S. Sup. Ct. June 20, 2011) (full opinion available here). The long-anticipated decision is a resounding victory for employers. (The Schiff Hardin Class Action Group distributed a separate Update with additional focus on class action litigation issues.)

The case was brought on behalf of a class of 1.5 million women — "one of the most expansive class actions ever" — who had worked for Wal-Mart over a 12-year period. They claimed that local managers exercised their discretion over pay and promotions disproportionately in favor of men, and they sought injunctive and declaratory relief, backpay, and punitive damages.

The Supreme Court reversed the lower court's decision to certify the class. The Court unanimously agreed that certification was improper because the women sought recovery of significant backpay, which was not available under the procedural rule their lawyers had used to obtain class certification. The Court was also unanimous in its holding that the class procedures mandated by the lower court improperly deprived Wal-Mart of its right to assert individual defenses against individual class members. The Court split 5-4, however, in ruling that the class also lacked "commonality." Because commonality is an essential component in *any* class action, the women's lawyers cannot return to the district court and attempt to certify the class using an alternative procedural rule. In short, the nationwide class alleged by the Wal-Mart plaintiffs is dead. Moreover, in view of the Court's rationale, it will be extremely difficult for any large, nationwide class to be certified in a Title VII case in the future.

Justice Scalia, writing for the majority, acknowledged that in any discrimination claim, "the crux of the inquiry" is the reason for a particular employment decision. Here, the women challenged literally millions of employment decisions that occurred over the course of 12 years, in 3,400 different Wal-Mart retail stores, at the hands of tens of thousands of different managers. "Without some glue holding the alleged reasons for all those decisions together," Scalia observed, it would be impossible for a class action to "produce a common answer to the crucial question *why was I disfavored*."

The Underlying Case

The Northern District of California certified a class of "all women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices." The class alleged that the discretion exercised by local Wal-Mart supervisors over pay and promotion, coupled with Wal-Mart's alleged "corporate culture" of gender bias, violated Title VII and made "every woman at the company the victim of one common discriminatory practice." The class sought equitable relief and some monetary relief (in the form of punitive damages and backpay), but they did not seek compensatory damages.

The district court certified the class under Federal Rule of Civil Procedure 23(b)(2), which features streamlined requirements for class certification, while limiting the relief which may be sought by the class. A divided Ninth Circuit affirmed class certification, concluding that the monetary backpay claims could be certified as part of the (b)(2) class because they did not "predominate" over the claims for declaratory and injunctive relief. The court also determined that the case could manageably be tried as a class action by referring to a special master a random sample of claims for trial, the results of which would then be extrapolated to the class as a whole.

The Supreme Court's Decision

Justice Scalia wrote the opinion of the Court, reversing the class certification order. He was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, concurred in part and dissented in part.

No "Commonality"

The Court first held 5-4 that the certified class did not satisfy the Rule 23(a) requirement that there be "questions of law or fact common to the class." To be "common," the class claims must depend on a "common contention" that is "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":

"What matters to class certification . . . is not the raising of common 'questions' — even in droves —but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."

The Court held that because Plaintiffs had provided "no convincing proof of a companywide discriminatory pay and promotion policy," they had not established the existence of even a single common question.

Plaintiff's Burden on Class Certification

The Court reiterated that a plaintiff who seeks to bring an employment discrimination claim as a class representative has to bridge a wide "conceptual gap" between proving her individual claim on the one hand and demonstrating that there is "a class of persons who have suffered the same injury." The Court addressed two possible ways to bridge that gap. The first approach focuses on a testing or evaluation procedure administered to applicants and/or employees and seeks to prove that it is biased. Because this clearly did not apply to the Wal-Mart class, they pursued the second approach, which requires "significant proof" that an employer operated under "a general policy of discrimination." "That," the majority said, "is entirely absent here."

The Court noted that Wal-Mart's announced policy forbids sex discrimination and that the company imposes penalties for denials of equal employment opportunity. The only evidence of a "general policy of discrimination" the women produced was the testimony of a sociological expert, who testified that Wal-Mart has a "strong corporate culture," that makes it "'vulnerable'" to "gender bias." The expert could not, however, "determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart," and he 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." Because the expert could not opine on this question — which, in the majority's view, was "the essential question" on which the women's claim for class treatment depended — the Court could "safely disregard what he has to say." The majority called the expert's so-called "social framework" analysis "worlds away from 'significant proof' that Wal-Mart operated under a general policy of discrimination."

Discretionary Decisionmaking and Disparate Impact Claims

The Supreme Court has previously held that giving broad discretion to lower-level supervisors can be the basis of Title VII liability, where it results in employment practices that have a disproportionate adverse impact on women or other protected groups. In *Wal-Mart*, the Court held that plaintiffs had failed to specify any such employment practice impacting the class as a whole. The Court noted that delegation of discretion is not improper in itself — to the contrary, "managers in any corporation — and surely most managers in a corporation that forbids sex discrimination — [will] select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all." Plaintiffs attempted to present statistical and anecdotal evidence to show that gender disparities between rates of pay and promotion at Wal-Mart existed on a class-wide basis. But the Court was unconvinced, concluding that Plaintiffs' anecdotal evidence was too limited and their statistical analysis was flawed. Because this evidence showed only the bare existence of delegated discretion and the existence of sex-based disparity, but not a "specific employment practice . . . that ties all their 1.5 million claims together," their evidence fell "well short" of supporting their contention that they shared a common claim that was suitable for class treatment.

Formulaic Approach Improper

Finally, the Court unanimously rejected the Ninth Circuit's conclusion that the claims could be manageably tried on a class-wide basis by selecting a random sample of claims and then extrapolating the results to the rest of the class. The Court concluded that such statistical proof does not alleviate the problem of adjudicating Wal-Mart's individualized defenses, but would instead prevent Wal-Mart from adequately defending itself:

We disapprove that novel project. Because the Rules Enabling Act forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b) . . . , a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims.

The Dissent

The dissenting Justices agreed that the class certification ruling was improper because the class was certified under a subsection of the rule that permits class treatment of claims for equitable relief, and the class here sought (in addition to injunctive and declaratory relief) individualized monetary awards in the form of backpay. But the dissent disagreed with the Court's ruling on whether the class shared a "common" question for which class treatment was appropriate. The dissent stated that the Court "import[ed] into the Rule 23(a) determination concerns properly addressed in a Rule 23(b)(3) assessment." The dissent concluded that the district court's identification of a "common question" — whether Wal-Mart's pay and promotions policies gave rise to unlawful discrimination" — was "hardly infirm."

What it Means for Employers

The *Wal-Mart* decision will have a significant impact on Title VII class action jurisprudence, especially in "pattern-or-practice" cases. It will be very difficult, if not impossible, for plaintiffs to obtain certification of very large classes akin to the one addressed in *Wal-Mart*. Plaintiffs seeking monetary relief will be obliged to meet the more exacting requirements of Rule 23(b)(3) in seeking certification, regardless of class size. By narrowing the sorts of Title VII claims that may be appropriate for class treatment *and* raising the bar for plaintiffs to prove the existence of such claims, the decision makes it far more difficult for Title VII plaintiffs to meet the requirements of a class action.

However, employers should not assume that they are now safe from class actions in the employment discrimination arena. Instead, plaintiffs' counsel will no doubt "downsize" their claims, limiting them to regions or single locations of the employer so as to more easily meet the "commonality" standard articulated by the majority in *Wal-Mart.* The best defenses against any discrimination claim, individual or class, lie in clear policies explicitly prohibiting unlawful discrimination, thorough training of managers and supervisors, and solid documentation showing the legitimate nondiscriminatory reason for the decision at issue.

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