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Alert

U.S. Supreme Court Overturns the Largest Class Action Certification in the Wal-Mart Sex Bias Action

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In the largest class action suit filed in U.S. history, the U.S. Supreme Court held in a June 20, 2011 decision that a sex-bias action brought by 1.5 million women against Wal-Mart could not be certified as a class action under Federal of Civil Procedure 23(b)(2).

This decision in *Wal-Mart v. Dukes* will certainly have wide-ranging implications in employment discrimination actions, as well as in class-action suits in general.

In order to obtain class certification under Rule 23, the representative plaintiffs must first prove that there are questions of law or fact common to the class. Both the District Court and the Ninth Circuit Court of Appeals effectively found that the plaintiffs met this burden of proof through the use of statistical evidence regarding pay and promotion disparities between men and women; anecdotal reports of discrimination; and the report of an expert sociologist who concluded that Wal-Mart's policy of delegating pay and promotion decisions to individual managers and its "strong corporate culture" left the company "vulnerable to gender discrimination."

The Supreme Court reversed, finding that despite plaintiffs' desire to sue Wal-Mart regarding millions of employment decisions, "without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*." Essentially, given the disparity among the employees' circumstances, locations and managers, the purported class could not demonstrate that the claimants all suffered a common injury that could be addressed in a single class action against Wal-Mart.

The majority's opinion, authored by Justice Scalia, concluded that the employees were unable to prove that Wal-Mart "operated under a general policy of discrimination" that could support a finding of commonality among the claims of the 1.5 million plaintiffs. To the contrary, Wal-Mart was found to have an announced policy that forbids sex discrimination and imposes penalties for denials of equal employment opportunity. Although Wal-Mart did have a policy of delegating pay and promotion

decisions to the individual store managers, the Supreme Court rejected this policy as a means of finding commonality among the claims. The Court also disregarded testimony of the employees' expert sociologist who could not answer the "essential question" of whether, as a result of this delegation, ".5% or 95% of the employment decisions at Wal-Mart might be determined by stereotyped thinking." As a result, the employees could not meet the commonality requirement for class action certification.

Justice Ginsburg, joined by three justices, filed a separate decision concurring with the reversal of class certification under Rule 23(b)(2), but dissenting as to the majority opinion's strict proof requirements to find commonality of claims under the threshold requirements of Rule 23(a). While agreeing with the majority that a class action is not available under Rule 23(b)(2) where the class action seeks monetary relief that is not merely incidental to injunctive or declaratory relief, Justice Ginsburg objected to the majority's increased scrutiny of the commonality requirement under Rule 23(a).

The Supreme Court's decision regarding burden of proof issues related to commonality of claims in *Dukes v. Wal-Mart* is likely to affect the viability of a wide range of class action suits. While the Wal-Mart discrimination claims can still be maintained individually or as more limited class actions, the great expense of bringing such small value claims may effectively deter prosecution. On the other hand, the logistical problems associated with managing and trying a single class of 1.5 million members may have been the greatest contributor to the Supreme Court's ruling. The Wal-Mart decision is certainly viewed as a pro-business ruling that will limit corporate exposure to run-away class action practice in the U.S.

Should you have any questions or comments regarding this matter, please feel free to contact us.