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Supreme Court Rejects Massive Employment Class Action: *Wal-Mart Stores, Inc. v. Dukes*

By William Stern and Tiffany Cheung

Yesterday, the Supreme Court dealt a blow to another purported class action.¹ In *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277, 2011 U.S. LEXIS 4567 (June 20, 2011), the Supreme Court reversed the certification of a massive class in a gender discrimination case against Wal-Mart. This decision will certainly affect exposure in employment discrimination cases, but also provides defendants with additional arguments in opposing any proposed class, especially classes brought under Federal Rules of Civil Procedure 23(b)(1) or (b)(2).

BACKGROUND

In *Dukes v. Wal-Mart Stores, Inc.*, plaintiffs brought a Title VII action against Wal-Mart, alleging that Wal-Mart discriminates against female employees through a “corporate culture” that permits bias against women to infect the discretionary decision making of local supervisors. The District Court and the Court of Appeals approved the certification of a class of about 1.5 million plaintiffs, current and former female Wal-Mart employees who allege that Wal-Mart discriminated against women in pay and promotions. Plaintiffs sought injunctive relief, declaratory relief, and backpay. The lower courts found that plaintiffs had satisfied Rule 23(a)² and that a 23(b)(2)³ class was appropriate because the monetary damages sought did not predominate over the injunctive and declaratory relief sought.

The United States Supreme Court granted certiorari to address the limited questions of:

- (1) whether the class certified under Rule 23(b)(2) was consistent with Rule 23(a), and
- (2) whether claims for monetary relief can be certified under Rule 23(b)(2) and, if so, under what circumstances?

HOLDING

The Supreme Court delivered:

- 1) a 5-4 opinion holding that plaintiffs failed to satisfy Rule 23(a)’s commonality requirement; and
- 2) a unanimous decision that plaintiffs’ claims for backpay were improperly certified under Rule 23(b)(2).

The Supreme Court held that commonality under Rule 23(a)(2) “requires the plaintiff to demonstrate that the class members have suffered the same injury.” The common question “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

¹ See *AT&T Mobility v. Concepcion*, No. 09-893, 2011 U.S. LEXIS 3367 (April 27, 2011).

² The four elements of Fed. R. Civ. P. 23(a) are: “(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.”

³ Fed. R. Civ. P. 23(b)(2) requires that “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.”

Client Alert.

one of the claims in one stroke.” A common question sufficient to satisfy 23(a)(2) must generate a “common answer[] apt to drive the resolution of the litigation.” “Dissimilarities within the proposed class,” however, may “impede the generation of common answers.” The Supreme Court held that Wal-Mart’s “policy” of allowing discretion by local supervisors over pay and promotion decisions did not sufficiently tie the 1.5 million claims together to satisfy commonality.

The Supreme Court also concluded that claims for individualized relief, like plaintiffs’ backpay claims, could not be certified under Rule 23(b)(2). Asserting monetary damages claims that do not predominate over requests for injunctive or declaratory relief is not enough; only monetary damages that are “incidental to” the injunctive or declaratory relief may be certified under Rule 23(b)(2). Wal-Mart must have an opportunity to show that it took an adverse employment action for a reason other than discrimination. Because Wal-Mart is entitled to individualized determinations of each employee’s eligibility for backpay, plaintiffs’ backpay claims are not “incidental to” the declaratory and injunctive relief, and therefore, cannot be certified under Rule 23(b)(2).

WHAT THE DECISION MEANS

Rule 23(a)’s Commonality Requirement

The majority focused much of its reasoning on factors that may not have general applicability, including the sprawling scope and size of the *Dukes* class and the absence of any inherent “commonality” where the challenged practice is unchecked subjectivity. The majority, however, sets forth a more rigorous standard for commonality than in numerous prior cases where this element has been treated as a low threshold that is easily reached. Not just any common question will do. In challenging whether Rule 23(a) has been satisfied, parties opposing class certification should focus on “[d]issimilarities within the proposed class” that may prevent common answers important enough to “drive the resolution of the litigation.” This commonality standard likely will have a greater impact on Rule 23(b)(1) and (b)(2) classes; plaintiffs seeking to certify classes under Rule 23(b)(3) must already prove that common questions will predominate.

The “Rigorous Analysis” Test

The majority clarified that the necessary “rigorous analysis” of whether Rule 23 has been satisfied “will entail some overlap with the merits of the plaintiff’s underlying claim. That cannot be helped.” Plaintiffs cannot satisfy Rule 23 merely by pleading the elements; they must be prepared to prove that the elements are in fact satisfied.

Money Damages Under Rule 23(b)(2)

Without determining whether there are any forms of “incidental” monetary relief that can be certified under Rule 23(b)(2), a unanimous Supreme Court made clear that this rule does not authorize certification when each class member would be entitled to an individualized award of monetary damages. This decision makes it much more difficult to certify any claims for money damages as part of a Rule 23(b)(2) class. Except in cases where Rule 23(b)(1) applies, plaintiffs seeking monetary damages on a classwide basis will likely need to show that the proposed class meets the more rigorous requirements of Rule 23(b)(3).

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