

Client Alert.

June 22, 2011

Reining in the Mega-Class Action: The Supreme Court Sides with Wal-Mart

By Tom E. Wilson and Joshua A. Gordon

Chalk up a big win for employers and the defense bar. On Monday, in *Dukes v. Wal-Mart*, the Supreme Court held that the country's largest employment class action in history—covering 1.5 million current and former female employees of Wal-Mart—could not go forward because it had been improperly certified by the lower federal courts.

The nearly decade-old lawsuit alleged that Wal-Mart discriminated against all female employees in its pay and promotion decisions according to a “policy” that was based on the discretionary decisionmaking of local supervisors. Plaintiffs alleged that the corporate culture at Wal-Mart was permeated with gender bias, which in turn infected the pay and promotion decisions of local managers. But a majority of the Court was troubled by the seeming contradiction of a *uniform* policy that was supposedly composed of the subjective decisionmaking of literally thousands of local supervisors. With this tension in mind, the Supreme Court blocked the class action because the plaintiffs had not produced enough evidence of a company-wide discriminatory pay and promotion policy.

THE FACTS

Wal-Mart is the nation's largest private employer, with more than one million workers across 3,400 stores. Wal-Mart, like many other large employers, vests pay and promotion decisions in the discretion of its local managers, who exercise their discretion based on subjective factors.

The lead plaintiff in the lawsuit, Betty Dukes, has worked at Wal-Mart's Pittsburg, California store since 1994. Ms. Dukes and two other named plaintiffs claimed that Wal-Mart discriminated against them and the 1.5 million other current and former female employees of Wal-Mart in terms of pay and promotion because of their gender in violation of Title VII. In effect, Ms. Dukes and her two colleagues alleged that Wal-Mart's discretionary promotion and pay practices had a discriminatory impact on its female workforce, and that although Wal-Mart was aware of this impact, it refused to rein in managerial discretion, which amounted to disparate treatment in violation of Title VII. Based on these legal theories, the plaintiffs sought injunctive relief and backpay on behalf of themselves and a class of all current and former female employees of Wal-Mart dating back to 1998.

In a decision that was controversial at the time, the district court ruled that the Wal-Mart lawsuit could proceed as a class action—that the three named plaintiffs could represent the pay and promotion claims of 1.5 million other female employees of Wal-Mart. In a split decision, the federal appeals court mostly affirmed the district court.

The Supreme Court reversed the lower courts in a two-part ruling written by Justice Scalia. In the first part, which was a 5-4 split of the Justices breaking along ideological lines, the majority ruled that the plaintiffs could not proceed as a class action because they had failed to show that their claims were sufficiently similar to those of the class. In the second part of the decision, which was unanimous, the Supreme Court held that plaintiffs had used the wrong procedural vehicle to bring their individual monetary claims for backpay, which in any event must be analyzed under a tougher standard.

Client Alert.

LACK OF COMMON INJURY

A class action cannot proceed to trial in federal court unless it is first “certified” under Rule 23(a) and (b) of the Federal Rules of Civil Procedure¹, which contain the standards under which the court determines whether it is appropriate to aggregate individual claims into a unified action. One of the most important attributes required for certification is that the named plaintiffs share an “injury” in common with the class, so that the resolution of the named plaintiffs’ claims will resolve those of the class in a single stroke. It was this attribute of commonality that the majority of Justices found lacking in the plaintiffs’ lawsuit.

The lower federal courts had found commonality based on Wal-Mart’s discretionary pay and promotion policies, which for the lower courts raised the common question of whether Wal-Mart’s female employees had all been injured by the same corporate policy of discrimination. The Supreme Court majority disagreed, holding that plaintiffs had failed to provide enough evidence that a company policy of discrimination existed.

Justice Scalia began by observing the inherent tension between the *individual* nature of employment discrimination and the *commonality* requirements of class action law:

“in resolving an individual’s Title VII claim, the crux of the inquiry is the reason for a particular employment decision. But here, plaintiffs wish to sue about literally millions of employment decisions at once.”

For the class action vehicle to make sense in this scenario, Justice Scalia required “some glue to hold the alleged reasons for all those decisions together.”

Plaintiffs argued, as they had before the lower courts, that the common “glue” that bound the individual and class claims together was Wal-Mart’s discretionary policy that resulted in discrimination in pay and promotion. But Justice Scalia noted that Wal-Mart’s practice of allowing local managers to make decisions was itself “a policy *against having uniform employment practices.*” Given the amorphous nature of an alleged policy that was decentralized yet centrally controlled, Justice Scalia required that plaintiffs show “significant proof that Wal-Mart operated under a general policy of discrimination.”

Before reviewing plaintiffs’ evidence, Justice Scalia noted that Wal-Mart’s announced policy was exactly the opposite of plaintiffs’ contention: Wal-Mart maintained an anti-discrimination policy, with adverse consequences to those who violated it. Justice Scalia further noted that a decentralized pay and promotion policy based on subjective factors was in fact “a very common and presumptively reasonable way of doing business,” and should raise no inference that discrimination is occurring.

Justice Scalia then reviewed the plaintiffs’ evidence and found it lacking in both quality and quantity. Plaintiffs’ sociology expert opined that Wal-Mart had a strong corporate culture that made it susceptible to gender bias, but the expert could not say whether stereotyped thinking influenced Wal-Mart’s employment decisions in 95% or merely 5% of the cases. Without greater certainty, the expert’s testimony was reduced to mere speculation, and should have been ignored.

¹ Please [click here](#) for further analysis regarding the impact of *Wal-Mart* on class actions brought under Rule 23(a) and (b) of the Federal Rules of Civil Procedure.

Client Alert.

Plaintiffs' statistical evidence showed gender disparities in both pay and promotion at a regional and national level, but not a store-by-store level. (No disparities were found at more than 90% of Wal-Mart's stores.) Justice Scalia reasoned that if Wal-Mart in fact maintained a uniform policy of discrimination, then disparities should be seen at each store, but were not. Plaintiffs also submitted anecdotal evidence consisting of 120 affidavits from class members describing their experiences of discrimination. Justice Scalia rejected this evidence as quantitatively inadequate—where the class consisted of 1.5 million persons, a mere 120 affidavits was not persuasive.

Justice Scalia found that plaintiffs' evidence fell far short of the proof needed to establish the existence of a company-wide discriminatory pay and promotion policy, and that plaintiffs had therefore failed to establish the existence of an injury common to both the three named plaintiffs and the remaining 1.5 million female Wal-Mart workers. Without the requisite commonality, Justice Scalia held that the Wal-Mart class should never have been certified in the first place.

INDIVIDUAL CLAIMS FOR BACKPAY MUST MEET HIGHER TEST

All nine of the Justices rejected certification of the class for a second reason, ruling that class actions seeking individualized claims for monetary relief (e.g., backpay) must meet a more rigorous test outlined in the federal rules.

Although the plaintiffs had sought backpay, they successfully argued in the lower courts that the class should be certified under a section of the federal rules that governs injunctive relief, Rule 23(b)(2), because their request for backpay was simply "incidental" and that they mainly sought injunctive relief. This is a strategy that plaintiffs' attorneys have used for many years in seeking certification in cases in which backpay is among the remedial relief requested.

The Supreme Court rejected this approach, holding instead that where individualized relief is sought, such as for wages or other money damages, the certification question should be analyzed under the stricter subdivision (3) of Rule 23(b), rather than subdivision (2). A key difference between the two standards is that the requirement of commonality may be established under subdivision (2) merely by showing that "there are questions of law or fact common to the class." To establish commonality under subdivision (3), on the other hand, it is not enough that there are common questions; one must show that those common questions "predominate" over individual ones.

This distinction makes sense, the Supreme Court reasoned, because injunctive relief, which provides indivisible relief to the entire class at once, is obviously appropriate for class treatment; the appropriateness of the class action vehicle is not so obvious, however, in cases where potentially large numbers of class members are each seeking their own distinct forms of relief.

TAKE-AWAYS

The Supreme Court's decision has no doubt shifted the legal landscape for employers in a number of important ways:

- Coupled with the Supreme Court's earlier decision this year that upheld class action waivers in arbitration agreements, the outcome in *Wal-Mart* will probably result in fewer employment class actions being filed.
- Fewer of those class actions that are filed will ultimately be certified.
- In order to pass the class certification stage in a disparate impact case after *Wal-Mart*, plaintiffs are going to have to more carefully identify a specific policy or practice as the cause of a discriminatory outcome.
- In particular, class actions against large employers with multiple offices will be much harder to prosecute unless they are tightly based on an express corporate policy/practice that is uniformly followed.

Client Alert.

- After *Wal-Mart*, lower courts will place increased scrutiny on the use of “soft science” experts, aggregated statistics, and anecdotal evidence to show discrimination in class actions.
- Given the importance the Court placed upon Wal-Mart’s anti-discrimination policies, all employers would be well advised to have a robust and muscular equal employment opportunity policy.
- Class actions seeking monetary relief will face a generally higher hurdle to certification in that claims for backpay can no longer be hidden inside a complaint for injunctive relief.

To view the Court’s decision, click [here](#).

Contact:

Tom E. Wilson

Partner
(650) 813-5604
twilson@mofo.com

Joshua A. Gordon

Of Counsel
(650) 813-5671
jgordon@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials in many areas. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We’ve been included on *The American Lawyer’s* A-List for seven straight years, and *Fortune* named us one of the “100 Best Companies to Work For.” Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.