



death knell for large employee class actions? supreme court stresses the "commonality" requirement

MSK Client Alert

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In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court ruled in favor of the nation's largest employer in a case in which the plaintiffs' lawyers sought to represent a class of approximately 1.5 million women. While the nine Justices unanimously held that defendants in employee class actions are entitled to individualized determinations of each employee's eligibility for back pay rather than imposition of damages on a formula basis, the Court split 5-4 to narrow significantly the scope for class actions. The majority did so by making the "commonality" requirement in class actions more difficult for a plaintiff class to meet, especially if a large class is sought in the absence of a uniform and discriminatory company policy.

The plaintiffs alleged that Wal-Mart discriminated on the basis of gender in pay and promotions. The plaintiffs based their class action claims primarily on statistics, such as the fact that women occupied 70% of Wal-Mart store hourly jobs but only 33% of store management positions. The federal district court and the U.S. Court of Appeals for the Ninth Circuit had certified a class composed of "lalll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998."

The plaintiffs argued that Wal-Mart perpetrated sex discrimination by allowing store managers discretion in personnel decisions. By letting an overwhelmingly male managerial force choose employees for promotion and pay increases based on subjective judgments, the plaintiffs contended that Wal-Mart knowingly permitted an alleged company-wide culture of sexism and stereotyping to perpetuate itself.

Class actions in federal court are governed by Federal Rule of Civil Procedure 23 ("Rule 23"), which has two sets of requirements that a proposed plaintiff class

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must meet to become certified as a class. First, any plaintiff class must meet all four criteria in Rule 23(a), which provides that the proposed class must:

- be "numerous";
- have "questions of law or fact common to the class" [the "commonality" requirement];
- have a class representative who is "typical" of the class; and
- have a class representative who "fairly and adequately protect[s] the interests of the class."

If all the requirements of Rule 23(a) are met, the proposed class must fit one of the categories of Rule 23(b). The two possibilities in *Dukes* were:

- Rule 23(b)(2), which applies when "final injunctive relief or corresponding declaratory relief is appropriate"; or
- Rule 23(b)(3), which applies when common questions "predominate" over individual questions, and a class action is a superior dispute-resolution method.

The Supreme Court majority (Justices Scalia, Kennedy, Thomas, and Alito and Chief Justice Roberts) decided the case on Rule 23(a)'s requirement that there must be "questions of law or fact common to the class," often referred to as the commonality requirement. The majority determined that there was no commonality because the plaintiffs did not show "significant proof" that Wal-Mart "operated under a general policy of discrimination." To the majority, there was no such proof in large part because the plaintiffs' only evidence of a "general policy of discrimination" was a sociologist who admitted in his deposition 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.

The majority discounted the plaintiffs' statistical argument, noting that "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's," and that national or regional pay disparities cannot "establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends." The majority stressed that the plaintiffs could not show a "specific employment practice" that tied all their individual cases together, especially since the only relevant Wal-Mart policy expressly prohibited sex discrimination.

As the concurring and dissenting opinion remarked, previously even a single question of law or fact common to class members had been viewed as sufficient to satisfy Rule 23(a)'s commonality requirement. The four Justices in the minority disagreed that the commonality requirement barred class certification, noting that the plaintiffs' evidence suggested that "gender bias suffused Wal-Mart's company culture." The dissenting Justices pointed to a



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statistical regression analysis purporting to show that pay and promotions disparities at Wal-Mart could only be explained by gender discrimination.

While all nine Justices agreed that the case should not have been certified under Rule 23(b)(2) because monetary damages were not merely incidental to injunctive or declaratory relief, the four dissenters would have sent the case back to the lower courts for consideration of whether the class could be certified under Rule 23(b)(3). Because the majority found that the class could not get past Rule 23(a)'s threshold requirement of "commonality," a class could not be certified.

This decision will help employers (and other defendants) defeat class certification at the Rule 23(a) commonality analysis. This will be especially true for national-, regional-, or state-wide claims of disparate treatment in the absence of an actual discriminatory defendant policy. Absent a company-wide policy that results in discrimination, something hard to imagine in 2011, plaintiffs will find it difficult to provide the now required "significant proof" of a "general policy of discrimination."

The *Dukes* decision has been called the death knell of class actions, which is an exaggeration. However, large class actions in federal court alleging discrimination based on an alleged corporate culture, especially where there is decentralized decision-making and no uniform discriminatory policy, now probably confront an insurmountable hurdle. That is good news for large employers.

ASK MSK - Q&A Section:

Q: Can employers use the *Dukes* decision to argue against certification for other types of class actions, including wage-and-hour disputes?

A: Probably not. Wage-and-hour class actions generally challenge an employer's specific policies (such as methods for calculating overtime pay), rather than making a nebulous allegation that stereotypical thinking pervades an entire set of managers. Plaintiffs will find it easier to provide "significant proof" of a "general policy" that arguably violates wage-and-hour laws than to show the same type of commonality when it comes to bias and discrimination.

Q: After *Dukes*, can plaintiffs claiming monetary damages still be certified as a class under Rule 23(b)(2), which allows claims for injunctive or declaratory relief?

A: It remains unclear. The Court's majority did not quite reach this question, because in this case the monetary damages sought by the plaintiffs were not even "incidental" to injunctive or declaratory relief. Still, the Court indicated that it might, in an appropriate case, hold that Rule 23(b)(2) classes cannot seek monetary damages at all. This opens another potential argument for defendants in class-action lawsuits.