Supreme Court Tightens The Rules for Employment Class Actions

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The United States Supreme Court issued its opinion in the long-awaited *Wal-Mart v. Dukes* decision yesterday. The Court's decision makes it more difficult for plaintiffs to pursue large class actions against employers. Specifically, the Court held that:

- Plaintiffs cannot recover damages, such as back pay, in class lawsuits brought under the more lenient class certification standards applicable to claims for injunctive relief (decided unanimously, 9-0).
- A class action should not be certified absent a showing of "commonality"—that the class claims present a common question. To satisfy this burden, plaintiffs must produce substantial evidence of unlawful policies; a showing that an employer allows managers to have subjective discretion in making employment decisions is not enough (decided 5-4).

The case was brought by Betty Dukes and five other former Wal-Mart employees who worked in 13 of Wal-Mart's 3,400 stores. Plaintiffs claimed that the company discriminated against female employees in violation of Title VII of the Civil Rights Act of 1964 and sought to represent a class consisting of all of the approximately 1.5 million female Wal-Mart employees employed at the end of 1998. Plaintiffs alleged that Wal-Mart's "corporate culture" enabled local managers to pay women less than their male counterparts and to promote males more rapidly than females. The class sought not only injunctive and declaratory relief, but also billions of dollars in punitive damages and backpay.

The district court certified the lawsuit as a single, massive class action. The district court found that plaintiffs met the "commonality" requirement of Federal Rule of Civil Procedure 23(a)(2) and allowed the plaintiffs to tack on backpay claims that would normally be forced to qualify for class action treatment under the more stringent requirements of Rule 23(b)(3). A divided Ninth Circuit affirmed the decision in most respects, and the U.S. Supreme Court accepted review.

**THE SUPREME COURT'S DECISION**

A 5-4 majority Court reversed the Ninth Circuit's "commonality" ruling, while ruling unanimously that the Ninth Circuit erred by allowing plaintiffs to seek billions in backpay damages in a Rule 23(b)(2) class action. Justice Antonin Scalia wrote for the Court.

The 5-4 majority found the proposed class lacked sufficient "glue" holding its claims together. According to the Court, it is not enough for putative class representatives to merely pose a common question, such as "Is that an unlawful employment practice?" Instead, plaintiffs seeking such class treatment must show a "common contention . . . 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." The Court found that plaintiffs' statistical and anecdotal evidence failed to establish that plaintiffs could prove their case on a classwide basis. Instead, the claims would have to be addressed individually.

The Court also held, unanimously, that plaintiffs could not bring backpay class action claims under Rule 23(b)(2). The Court reasoned that plaintiffs could proceed under Rule 23(b)(2) only when they sought a single injunction or declaratory judgment for the entire class but not where each class member sought an individual award of damages.

The decision is enormously significant for employment class action litigation and is likely to have a number of long-term implications:

- Decentralized decision-making models are likely to impede plaintiffs' ability to obtain certification of sprawling classes—sweeping allegations of subjectivity or discretion in decisionmaking are insufficient to support class action treatment;
- Plaintiffs seeking certification of a discrimination class action must clearly identify common discriminatory policies that can be litigated through common evidence, a daunting task in most circumstances because nearly all employers have formal policies *forbidding* discrimination; statistics and anecdotal evidence will not satisfy plaintiffs' burden to identify specific policies or practices they claim are unlawful;
• Class action plaintiffs cannot obtain damages without showing that common issues predominate over any individual issues—plaintiffs may not primarily seek injunctive relief and then ask for damages as an “incidental” claim. This ruling is likely to be fatal to a number of pending cases and will greatly reduce the potential for awards of large attorneys’ fees in class action cases;

• Depending on a company’s management structure and policies, plaintiffs may have to pursue much smaller class actions, possibly even down to the store or unit level, where the claims can be directed at the decisions of specific decisionmakers.

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