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SPECIAL FEATURE

Court Sharply Limits Employment Class Actions

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In a significant decision for employers, the U.S. Supreme Court recently rejected an attempted nationwide class-action sex-discrimination lawsuit against Wal-Mart Stores, Inc.

By a 5-4 margin, in *Wal-Mart Stores, Inc. v. Dukes*, the court ruled that the three named plaintiffs had failed to cite any Wal-Mart policy or practice that would justify certifying their lawsuit as a class action.

The plaintiffs were challenging Wal-Mart's "policy" of giving local managers (at approximately 3,400 stores nationwide) "broad discretion, which is exercised 'in a largely subjective manner,'" to make their own employment decisions.

Ultimately, the court concluded that the plaintiffs were inappropriately seeking to aggregate a multitude of employment decisions with no real connection to each other, beyond the mere fact that they involved female employees of Wal-Mart.

Had the court permitted the case to proceed as a class action, it would have constituted the largest employment class action in the nation's history, encompassing claims by as many as 1.5 million current and former Wal-Mart employees.

The court's decision was a relief for employers, as it otherwise could have opened the doors to unmanageably large class-action lawsuits.

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Facts

The three named plaintiffs, who worked in California (one had also worked in Missouri), claimed that Wal-Mart discriminated against them on the basis of their sex in making certain promotion and compensation decisions.

Rather than pursuing their claims individually, the plaintiffs sought to bring them as part of a class action on behalf of all women employed by Wal-Mart anywhere in the United States at any time since December 1998, claiming that the company had an overall practice of discriminating against female employees.

It is important for employers to bear in mind that the *Dukes* decision has reaffirmed, but *not* changed, the basics of class-action lawsuits.

Under the Federal Rules of Civil Procedure, a plaintiff who seeks to bring a class action must demonstrate, as a threshold matter, that there are "questions of law or fact common to the class."

In an attempt to satisfy that requirement, the plaintiffs cited the fact that, under company policy, individual Wal-Mart store managers were given significant discretion to make day-to-day personnel decisions. According to the plaintiffs, the policy resulted in store managers making such decisions on the basis of gender stereotypes and other discriminatory criteria.

As evidence for their claim of a nationwide pattern of sex discrimination by Wal-Mart, the plaintiffs cited:

(1) statistical studies allegedly indicating that Wal-Mart had a smaller proportion of female employees in management positions than other, comparable retailers;

(2) testimony by a purported expert witness (a sociologist) that Wal-Mart's policy of delegating decision-making authority to individual store managers opened the door to sex stereotyping and discrimination; and

(3) affidavits by approximately 120 current and former female employees, from varying locations, recounting their allegedly discriminatory treatment by Wal-Mart.

On the basis of that evidence, a U.S. District Court judge granted the plaintiffs'

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request for certification of the proposed class. After the 9th U.S. Circuit Court of Appeals affirmed the certification by a closely divided vote, the Supreme Court eventually agreed to hear the case.

Supreme Court's decision

In an opinion written by Justice Antonin Scalia, the court held that the plaintiffs failed to meet their burden of demonstrating that the proposed class members' claims were unified by a common discriminatory policy or practice at Wal-Mart.

Thus, the court concluded, the proposed class should not have been certified.

In reaching that conclusion, the court rejected the plaintiffs' key evidence. For example, Scalia concluded that the court could "safely disregard" the sociologist's testimony that Wal-Mart's policy of giving local managers broad discretion left Wal-Mart "vulnerable to" stereotyping and discrimination, because, by the "expert" witness's own admission, he could not determine whether 0.5 percent or 95 percent of the company's employment decisions were actually infected by gender bias.

Similarly, the court opined that the plaintiffs' statistical studies were "insufficient" to show that discriminatory treatment is typical of Wal-Mart's employment practices.

In part, the statistical studies were regional and national in scope and thus failed to "'establish the existence of disparities at individual stores.'"

Also, the studies did not show "commonality" in any alleged discriminatory practice at all 3,400 Wal-Mart's stores.

Likewise, the court rejected the employee affidavits submitted by the plaintiffs because they constituted too tiny a sample size and were confined to too small a proportion of stores to support any inference that Wal-Mart managers, as a whole, had engaged in a common pattern of sex discrimination, in defiance of the company's rigorous equal employment opportunity policies.

In Scalia's words: "In a company of Wal-Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction."

Thus, the court held that the plaintiffs could not establish the existence of common questions of fact or law that would justify aggregating all the proposed class members' claims into a single, nationwide lawsuit.

Rather, the court concluded, the widely disparate nature of those claims dictated that they be adjudicated separately.

As Scalia stated, "[R]espondents wish to sue about literally millions of employment decisions all at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all of the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored.*"

Writing for the four dissenting justices, Justice Ruth Bader Ginsburg opined that "[t]he practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects," and that the evidence submitted by the plaintiffs was sufficient to establish that "gender bias suffused Wal-Mart's corporate culture."

Thus, Ginsburg took the view that the plaintiffs had adequately demonstrated the existence of common questions of law or fact affecting the proposed class members.

Finally, the Supreme Court also held — on this point unanimously — that the District Court had erred in certifying the proposed class members' claims for back pay.

On that issue, the justices were in agreement that the requested back pay could not be considered merely "incidental" to the injunctive and declaratory relief sought by the plaintiffs, as required by the provision of the federal rules on which the plaintiffs sought to rely.

(The dissenting justices would have remanded the case to the District Court to allow the plaintiffs an opportunity to proceed under a different provision of the federal rules, but the majority's holding that the plaintiffs could not meet the threshold requirement of establishing common questions of law or fact rendered that issue moot.)

Implications, recommendations for employers

The *Dukes* decision comes as welcome news to employers, as it disappoints those plaintiffs' lawyers who hoped to use mega class-action lawsuits to extract large settlements from employers by asserting garden-variety discrimination claims as class actions.

The Supreme Court's decision makes clear that unless there are unique factors — such as a specific, company-wide policy, or a set of employment decisions made by a single manager — that unify claims by different employees, it is normally not appropriate for those claims to be brought as part of a class action.

It is also important, however, for employers to bear in mind that the *Dukes* decision has reaffirmed, but *not* changed, the basics of class-action lawsuits.

Thus, the court's decision does not foreclose the possibility that company-wide employment class actions will be found appropriate in some circumstances.

Likewise, the holding does not affect the manner in which any individual discrimination claim will be adjudicated.

Therefore, employers should:

- make certain that all supervisors are given regular, appropriate training as to the criteria on which hiring, promotion, compensation and other employment decisions should (and should not) be based;
- ensure that managers' employment decisions are subject to appropriate oversight, to confirm that they are motivated by legitimate, non-discriminatory factors;
- maintain appropriate, comprehensive equal employment opportunity policies and regularly communicate those policies to employees; and
- see to it that any company-wide employment policies or procedures — for instance, standardized tests or interview procedures — are legally compliant.

Notably, in *Dukes*, the court cited Wal-Mart's strong equal employment opportunity policy as one factor that made it highly improbable that store managers throughout the company would have followed a common practice of sex discrimination.

Employers should remain vigilant — have the right policies and train managers and employees to follow them — in order to minimize the risk of all types of discrimination claims.

Because the *Dukes* decision expressly leaves open the possibility that employment class actions may still be brought on the basis of such common policies or procedures, continued oversight is critical.

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