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**CASE LAW SUMMARY****Class Actions**

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*Wal-Mart Stores, Inc. v. Dukes*, \_\_\_ S. Ct. \_\_\_\_ (2011)

The Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes* scores a significant victory for employers faced with the ever-present threat of employment class action litigation. The Supreme Court unanimously struck down the lower court's granting of class certification to a class of up to 1.5 million current and former Wal-Mart female employees claiming gender discrimination. The impact of *Dukes* will be felt immediately as it significantly alters the landscape for employment class action litigation making it more difficult for plaintiffs to certify a discrimination class.

***The Facts in Dukes***

The *Dukes* action was filed by three female employees who worked for Wal-Mart and Sam's Club stores in California. They sought to represent a nationwide class of female employees claiming that Wal-Mart denied female employees of equal pay or promotions. Their theory of nationwide discrimination was that Wal-Mart's policy of giving local managers discretion over pay and promotions led to managers overwhelmingly exercising their discretion disproportionately in favor of men. Further, as argued by plaintiffs, Wal-Mart's awareness of this effect and its failure to cabin its managers' authority constitutes disparate treatment. They further argued that, "a strong and uniform 'corporate culture' permits bias against women to infect, perhaps subconsciously, the discretionary making of each of Wal-Mart's thousand of managers thereby making every woman at the company the victim of one common discriminatory practice."

***The Lower Court's Granting of Class Certification***

The gateway issue to obtaining class certification is for plaintiffs to establish, "commonality" – an element required under Rule 23 of the Federal Rules of Civil Procedure which requires plaintiffs to prove there are questions of law or fact common to the class. Plaintiffs submitted three types of evidence to prove commonality: (1) using statistical evidence, they claimed there is disparity with pay and promotion between men and women at the company; (2) anecdotal reports of discrimination from about 120 of Wal-Mart's female employees; and (3) testimony of a sociologist opining that Wal-Mart was vulnerable to gender discrimination after conducting a "social framework" analysis on Wal-Mart's

corporate culture and personnel practices. Based on this evidence, the lower courts found plaintiffs met their burden of proving commonality.

After finding plaintiffs satisfied commonality, the second step of the Rule 23 analysis required plaintiffs to prove that the purported class fits into at least one of three class types described in Rule 23(b). Plaintiffs argued that since they were seeking declaratory and injunctive relief against Wal-Mart, the class could be certified under Rule 23(b)(2) – a type of class when injunctive or declaratory relief is sought. Notably, relief was not limited to declaratory and injunctive relief but there was also an issue of back pay. To determine whether the request for back pay destroyed a Rule 23(b)(2) class from being certified, the lower court applied a “**predominance**” test – whether monetary relief predominated over the injunctive or declaratory relief. Agreeing with plaintiffs that back pay did not predominate, a 23(b)(2) class was indeed certified. Importantly, to certify under 23(b)(2), the class had to be excised of any employee who had left Wal-Mart’s employ since the filing of the complaint since declaratory and injunctive relief was not applicable to those individuals. Plaintiffs also had to abandon any demand for compensatory damages [e.g., emotional distress damages] in order to meet the requirements under 23(b)(2).

### *The Supreme Court Unanimously Reverses Class Certification*

The Supreme Court unanimously held that the lower court’s use of Rule 23(b)(2) to certify a class was improper since back pay destroyed certification under 23(b)(2). The Supreme Court held that under a 23(b)(2) class, any monetary relief must be incidental to the declaratory or injunctive relief and should not result in additional hearings to resolve the disparate merits of each individual’s case. The Supreme Court rejected not only the lower court’s use of a predominance test, but further rejected the notion that back pay could somehow be merely incidental to the declaratory or injunctive relief. The Court recognized that one possible reading of Rule 23(b)(2) is that that provision does not authorize the class certification of monetary claims *at all*, though it does not ultimately reach this question in *Dukes*.

### *The Supreme Court Was Split On The Issue of Commonality*

The gateway issue of commonality was not only hotly contested by the parties, but was hotly debated as between the Supreme Court justices as well. On commonality, the Supreme Court was split 5-4 with the majority siding with Wal-Mart – that commonality under Rule 23(a) had not been established. The majority rejected the notion that commonality could be established by the raising of “common questions,” alone and indeed acknowledged that the raising of common questions alone was not sufficient. Rather, to establish commonality, there needed to be “common *answers* to drive the resolution of the litigation.” “Their claims must depend upon a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor – which means that determination of its true or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”

In applying these principles to facts of *Dukes*, the majority rejected plaintiffs' argument that a policy giving local managers discretion over pay and promotion establishes "commonality" even if this policy is coupled with expert opinion of regional and national data of "statistically significant disparities between men and women at Wal-Mart ... [and] these disparities ... can only be explained by gender discrimination." The majority took issue with applying evidence at a regional or national level to decisions being made at a local level. "Even if it established (as it does not) a pay or promotion pattern that differs from the nationwide figures or the regional figures in *all* of Wal-Mart's 3,400 stores, that would still not demonstrate that commonality of issue exists. Some managers will claim that the availability of women, or qualified women, or interested women, in their stores' area does not mirror the national or regional statistics. And almost all of them will claim to have been applying some sex-neutral, performance-based criteria—whose nature and effects will differ from store to store."

The majority further took issue with plaintiffs' other evidence used to establish class certification for virtually the same reasons as the statistical evidence; namely, such evidence could not be applied class-wide to explain the motivation behind the individual employment decisions being made at a local level. The "social framework" opinion regarding Wal-Mart's vulnerability to gender discrimination did not establish commonality because the expert could not calculate, "whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking." Accordingly, the problem with this evidence was that it could not be applied to the local decision-making process. The anecdotal evidence of discrimination consisting of 120 affidavits of plaintiffs reporting experiences of discrimination – about 1 for every 12,500 class members, related to only about 235 out of Wal-Mart's 3,400 stores was not sufficient to demonstrate that the entire company was operating under a general policy of discrimination. Furthermore, the Court noted that the accounts were not adequately representative of the 3,400 stores across 50 states – more than half of the reports being concentrated in only six states. The Court contrasted the anecdotal evidence of the *Dukes* class with the anecdotal evidence offered in *United States v. T.I.M.E.-D.C., Inc.*, 517 F. 2d 299 (CA 5 1975), where around 40 affidavits of discrimination were taken of a class consisting of only around 334 members.

### *Comments*

The *Dukes* decision has drastically altered the landscape for litigating employment class actions. The *Dukes* decision notably undermines the past practice of using statistical evidence as a means of establishing the existence of a uniform employment practice pervading an entire company, i.e., the existence of a common question among class members. Indeed, the *Dukes* case strongly suggests that such statistical evidence will be highly scrutinized.

The *Dukes* decision also suggests that a more thorough approach must be taken with respect to the practice of using anecdotal evidence to obtain class certification. Notably, in the *T.I.M.E.* decision referenced by the Supreme Court, the affidavits came from

individuals “spread throughout” the company who worked at the company’s operational centers employing the largest numbers of the class members. The anecdotal evidence came from roughly 12% of the class in that case. Applying a similar percentage would have resulted in more than 175,000 affidavits being presented in *Dukes*.

Class certification proceedings post-*Dukes* will likely require more merit-based evaluation of the underlying case meaning the issue of whether there was (or was not) discrimination will play more of a central role in class certification proceedings. This will undoubtedly result in more discovery being conducted at the class certification stage and will demand that plaintiffs’ counsel conduct a thorough factual investigation prior to bringing suit.