

A Victory for Employers — Supreme Court Reverses Certification of Nationwide Gender Discrimination Class Action

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On June 20, 2011, the Supreme Court released its long awaited opinion in the *Wal-Mart Stores, Inc. v. Dukes* class action. The Court held that certification of a class consisting of approximately 1.5 million current and former female employees alleging gender discrimination was not appropriate because there was insufficient evidence of a companywide discriminatory pay and promotion policy.

A party seeking certification of a class action in federal court must satisfy a number of prerequisites, which are listed in Rule 23(a) of the Federal Rules of Civil Procedure. The prerequisite at issue in the *Wal-Mart* case was whether there were “questions of law or fact common to the class.” This prerequisite is referred to as “commonality.”

In *Wal-Mart*, six current and former employees sued the company claiming that it discriminated against women with regard to pay and promotion decisions. The plaintiffs sought to bring a nationwide class action on behalf of all female employees employed at Wal-Mart retail stores since December 26, 1998. Reduced to its essence, the plaintiffs alleged that management at each store exercised significant discretion over pay and promotions disproportionately in the favor of men, that Wal-Mart was aware of this practice, and that Wal-Mart did nothing to stop this practice from occurring. A federal district court judge in San Francisco held, and the Ninth Circuit Court of Appeals affirmed, that the suit could proceed as a class action. Wal-Mart petitioned the Supreme Court to review the Ninth Circuit’s decision.

In a five to four decision, the Supreme Court held that the plaintiffs did not meet their burden of demonstrating “commonality.” Specifically, the Court found that the alleged policy of giving local supervisors discretion regarding pay and promotion decisions did not create, or even come close to creating, a common factual or legal issue that could be resolved on a class-wide basis. The Supreme Court was not convinced that there was anything (such as the existence of a corporate policy) that linked alleged unfair pay or promotion decisions at one store to alleged unfair pay or promotion decisions at any other stores.

The Supreme Court also addressed another important issue in the *Wal-Mart* case: whether the plaintiffs were authorized to seek individualized monetary relief, in addition to injunctive or declaratory relief, under Rule 23(b)(2). Certification pursuant to Rule 23(b)(2) is appropriate when a single injunction or declaratory judgment would provide relief to the class as a whole. The Court unanimously held that certification pursuant to Rule 23(b)(2) is inappropriate when each class member would be entitled to *individualized* monetary relief, like the back pay at issue in the *Wal-Mart* case.

The decision is good news for employers who have had to defend or fear the proliferation of class action cases brought by disgruntled employees or former employees. The impact of the *Wal-Mart* decision may make it more difficult for plaintiffs to bring massive nationwide class actions alleging discrimination, especially where the plaintiffs are unable to point to a clear company-wide policy to support their claims. Additionally, the Court's holding generally may raise the bar for certification under Rule 23, particularly with regard to establishing commonality.

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