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Supreme Court Considers Class Certification in Title VII Case

On March 29, 2011, the United States Supreme Court heard oral arguments in *Wal-Mart Stores, Inc., v. Dukes* (No. 10-277), a case that involves potential certification of a class that might consist of as many as 1.5 million female employees from 3,400 Wal-Mart stores across the country. This lawsuit alleges that Wal-Mart Stores discriminates, and has discriminated, against women with regard to pay and promotion decisions in violation of Title VII of the Civil Rights Act of 1964. The United States Court of Appeals for the Ninth Circuit concluded, in a decision issued in April 2010, that certification of current female employees of Wal-Mart as a class with respect to their claims for injunctive relief, declaratory relief and back pay was appropriate. It remanded claims for punitive damages and the claims of putative class members who no longer worked for Wal-Mart when the original complaint was filed on June 8, 2001, for further analysis by the District Court. On December 6, 2010, the Supreme Court granted *certiorari* on whether the class certification as determined by the Ninth Circuit Court of Appeals was legally appropriate.

Appearing before the Ninth Circuit Court of Appeals and the District Court, the plaintiffs had relied upon primarily statistical evidence to obtain class certification based on their allegation that Wal-Mart has a strong, centralized structure that fosters or facilitates gender stereotyping and discrimination. The plaintiffs also argued that Wal-Mart has a “common” or company-wide policy of unfettered discretion by its managers in making employment decisions, which results in those managers making discriminatory pay and promotion decisions. Wal-Mart contends that the plaintiffs have not provided sufficient evidence of a link between different promotion and pay decisions made by different decision-makers in its stores across the country to warrant class certification status.

Much of the questioning by the justices pertained to whether the plaintiffs could establish commonality of questions of law and fact among the class, a prerequisite for class certification. Several justices questioned whether the plaintiffs could consistently argue that managers, on the one hand, had too much individual discretion, while at the same time arguing that these individual decisions were guided by a corporate culture of discrimination. The Court also posed the question of whether a policy of excessive subjectivity could serve as the basis for a Title VII pattern and practice case.

Whether claims for monetary relief can be certified as a class under Rule 23 (b)(2) received less time during oral arguments. Certification of monetary claims under Rule 23 (b)(2) raises due process concerns for both the plaintiffs and Wal-Mart. The plaintiffs suggest that issues of back pay should be decided by statistical analysis rather than individualized hearings, which would preclude Wal-Mart from presenting individual defenses, such as employee performance.



The Supreme Court's ruling, which is expected in June 2011, might have a fundamental impact on the nature of employment class actions. If the plaintiffs succeed as they did before the Ninth Circuit Court of Appeals, it could open the door to other plaintiffs filing class action employment lawsuits (on the basis of gender, race or other protected characteristics) based on allegations of statistical disparities and company-wide policies.

Similar lawsuits are already being filed against other companies, including a second class action suit filed against Lockheed Martin alleging the company discriminates against its female employees in violation of Title VII by failing to promote female employees as quickly as males, and by failing to compensate women equally as it pertains to pay grade, raises and bonuses.

Employers are encouraged to conduct attorney-client privileged reviews of their company policies, payroll practices and statistics to identify vulnerabilities.

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