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Supreme Court Reverses Certification of Sex Discrimination Class Action, Limits Availability of Monetary Damages in 23(b)(2) Class Actions and Clarifies Commonality Requirement

On June 20, 2011 the United States Supreme Court reversed certification of a class consisting of approximately 1.5 million female Wal-Mart employees alleged to have suffered discrimination in relation to their pay and promotion, in violation of Title VII of the Civil Rights Act of 1964. *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277 (S. Ct. June 20, 2011). The class is believed to have been the largest contested class ever certified in a discrimination case.

The ruling is significant to all companies defending class actions in the employment and other contexts. The Court by 5-4 majority vote clarified the scope of Federal Rule of Civil Procedure 23(a)(2), which addresses “commonality,” and by unanimous 9-0 vote held that Rule 23(b)(2) does not authorize certification of classes whose members would be entitled to different (if any) injunctive or declaratory relief or to individualized monetary awards, whether or not such monetary claims “predominate” over claims for injunctive relief.

BACKGROUND

The *Dukes* plaintiffs claimed that Wal-Mart’s company-wide policy of providing local managers discretion over pay and promotion matters resulted in discrimination against female employees. They sought injunctive and declaratory relief, punitive damages and back pay stemming from the alleged discrimination, and requested class certification pursuant to Federal Rule of Civil Procedure 23(b)(2), which permits class actions when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” The U.S. District Court for the Northern District of California certified a class of former and current female Wal-Mart employees who held or had held various jobs in different stores in different states under the supervision of different managers, and the Ninth Circuit affirmed *en banc*. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010).

INDIVIDUALIZED MONETARY RELIEF CLAIMS MAY NOT BE CERTIFIED UNDER RULE 23(B)(2)

Class actions seeking monetary damages typically are pursued under Rule 23(b)(3), which requires that common issues predominate over individual ones, and that a class action be manageable and superior to other alternatives. Rule 23(b)(3) also requires that class members be given notice and the opportunity to opt out, while Rule 23(b)(2) does not. The *Dukes* plaintiffs sought certification pursuant to Rule 23(b)(2) in an attempt to avoid the requirements under Rule 23(b)(3).



The Court held that the plaintiffs' claims for back pay were improperly certified under Rule 23(b)(2), because "claims for *individualized* relief ... do not satisfy the Rule," regardless of whether it authorizes certification of monetary claims at all. Rule 23(b)(2) instead focuses on generalized relief:

Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.

Id. at 20-21. The structure of Rule 23(b) also shows that "individualized monetary claims belong in Rule 23(b)(3)," under which the class is not mandatory, class members are entitled to "the best notice that is practicable under the circumstances" and members may opt out of the class. *Id.* at 22. In contrast, notice to class members is optional and the class is mandatory – lacking the opt-out right – under (b)(2), which renders it inappropriate for individualized monetary claims.

The plaintiffs had argued that certification under (b)(2) was proper because their back pay claims did not predominate over their requests for injunctive and declaratory relief. The Court unanimously held that the plaintiffs' proposed predominance test was not supported by the text of (b)(2) and created "perverse incentives for class representatives to place at risk potentially valid claims for monetary relief." *Id.* 23-24. In *Dukes*, the three class representatives had strategically excluded claims for compensatory damages in order to lend plausibility to their argument for certification of an injunctive relief class under Rule 23(b)(2). The Court noted a due process concern where certification of the Wal-Mart class under (b)(2) created the possibility that the individual claims of some 1.5 million class members for compensatory damages could be precluded altogether based on litigation of which they had no notice and from which they could not "opt out" under Rule 23(b)(2).

Finally, the Court held that "Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay" under Title VII. *Id.* at 26. The Court rejected the plaintiffs' attempt to establish back pay through a sampling of plaintiffs and statistical averaging of awards "to arrive at the entire class recovery – without further individualized proceedings." *Id.* at 27. It disapproved this "trial by formula" method on the grounds that it would impermissibly preclude Wal-Mart from presenting its statutory defenses as to each individual class member and violate the Rules Enabling Act, 28 U.S.C. §2072(b), which forbids interpreting rules of procedure to "abridge, enlarge or modify any substantive right."

While the Court withheld opinion on whether claims for monetary relief may *ever* be certified under Rule 23(b)(2), it held that, at a minimum, claims for monetary relief that are not incidental to injunctive or declaratory relief cannot be certified under the rule. *Id.* at 20.



NO COMMONALITY ABSENT SIGNIFICANT PROOF OF A GENERAL POLICY OF DISCRIMINATION

A 5-4 majority of the Court also held that the plaintiffs failed to satisfy the commonality requirement under Rule 23(a)(2) that “there are questions of law or fact common to the class.” *Id.* at 8. As the Court explained, “commonality” requires the plaintiff to demonstrate that class members have “suffered the same injury,” *id.* at 9 (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982)), and not just “a violation of the same provision of law,” *id.* The claimed injury must, in other words, have a common factual basis that can be established with respect to the class as a whole:

Their claims must depend upon a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is 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.

Id. at 9.

Noting that Rule 23 is more than a mere pleading requirement, the Court emphasized that parties seeking certification “must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.,” that may require a court to consider issues overlapping with the merits of the case. *Id.* at 10. In *Dukes*, the plaintiffs’ commonality argument overlapped with the merits of their claim of a pattern or practice of discrimination, because the central issue to be determined in a discrimination case is “the reason for a particular employment decision.” *Id.* at 11. Without proof of such a pattern or practice, therefore, they could not establish the commonality of that question:

Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question *why was I disfavored*.

Id. at 11-12. (emphasis in original). The Court found that the plaintiffs failed to provide “significant proof” that Wal-Mart “operated under a general policy of discrimination,” particularly in light of its announced policy against discrimination and its penalties for denials of equal opportunity. *Id.* at 13. The testimony of the plaintiffs’ expert sociologist “did nothing to advance [plaintiffs’] case,” even if it was not subject to *Daubert* exclusion. *Id.* at 14. Although he opined that Wal-Mart’s “strong corporate culture” makes it “vulnerable” to “gender bias,” he admittedly could not determine whether “.05 percent or 95 percent of the employment decisions” at Wal-Mart were actually affected by stereotypical thinking. *Id.* at 14. “If Bielby admittedly has no answer to that question, we can safely disregard what he has to say,” the Court found, because it “is worlds away from” proof of a general policy of discrimination. *Id.*



The Court also noted that Wal-Mart’s policy of local decision-making is a “presumptively reasonable way of doing business,” and is the opposite of a uniform policy of discrimination necessary to show commonality. *Id.* at 15. While the Court recognized that, “in appropriate cases,” a policy of unbridled discretion to lower level supervisors over personnel and pay decisions *could* theoretically be the basis of a Title VII disparate impact claim, the plaintiffs’ statistical and anecdotal evidence failed to show that Wal-Mart’s policy of discretion given to local store managers was exercised in a common way, resulting in company-wide discrimination against females. Further, the size and scope of the proposed class worked against the plaintiffs because, as the Court pointed out, “[i]n a company of Wal-Mart’s size and geographic scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction.” *Id.* at 16. Statistical evidence of “an overall sex-based disparity” does not establish that a “specific employment practice” was employed by Wal-Mart managers on a company-wide basis. *Id.* at 17. As the Court noted, invalidating “one manager’s use of discretion will do nothing to demonstrate the invalidity of another’s.” *Id.* at 15. Thus, the plaintiffs’ reliance on statistical data of pay disparity on a regional level was insufficient to show the type of “store-by-store disparity on which the plaintiff’s theory of commonality depends.” *Id.* at 16.

Similarly, the plaintiffs’ anecdotal evidence in the form of affidavit testimony also failed to support a finding of commonality. The number of anecdotal accounts represented only one out of every 12,500 class members and only 235 out of 3,400 Wal-Mart stores. Fourteen states had no anecdotal evidence, and half of all states had only one or two accounts of discrimination. Even if the accounts were true, the Court found this evidence to fall well short of establishing a company-wide policy of discrimination to establish commonality of claims. The plaintiffs failed to demonstrate that their Title VII claims depended upon answers to common questions applicable to the entire class.

FUTURE IMPACT

Dukes significantly impacts plaintiffs’ ability to maintain class actions generally, and especially employment discrimination class actions.

First, *Dukes* limits the availability of class certification under Rule 23(b)(2) to claims for classwide injunctive and declaratory relief in which, at most, monetary relief would be incidental and not individualized. While it leaves open the question of whether a monetary claim can under any circumstances be certified under this rule, it clearly establishes that claims for individualized or non-incidental monetary relief may not be. Thus, plaintiffs may not use (b)(2) to avoid the predominance, superiority, notice and opt-out requirements provided by (b)(3) when pursuing monetary relief.

Second, the 5-4 majority clarified the commonality requirement of Rule 23(a)(2) by holding that the claims of class members must be based on a “common contention” that they suffered the “same injury,” such as discrimination by the same supervisor, and that the resolution of this contention must resolve a central issue on a classwide basis. In simple terms, this means that the question common to all class members must have a common factual basis.



From an employment law perspective, the *Dukes* majority held that alleged unbridled discretion of local store managers relating to pay and personnel decisions, combined with statistical evidence of impact, could not demonstrate commonality sufficient to allow a class action to proceed against Wal-Mart. But *Dukes* does not preclude any individual female employee of Wal-Mart from making a particular, individualized claim of discrimination relating to pay or promotion. While employers may take comfort from the Court's decision, they are wise to consider their promotion and pay policies and any associated disparate impact upon a protected class of employees, because the Supreme Court did not determine that a class action cannot be brought in "appropriate cases" by a protected class of employees.

FOR MORE INFORMATION

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