

Ninth Circuit Affirms Largest Ever Class Action: What Does It Mean to You?

The U.S. Court of Appeals for the Ninth Circuit (covering California and eight other Western states) in *Dukes v. Wal-Mart*, 2010 WL 1644259 (9th Cir. April 26, 2010), affirmed the certification of the largest class action in history. The plaintiffs claim Wal-Mart has “rolled back” pay and promotions for women across the country. At the time of certification, the class encompassed approximately 1.5 million women, and damages could reach the multi-billion dollar range. While affirming certification, the Ninth Circuit remanded the case for the lower court to reconsider whether individuals no longer employed by Wal-Mart at the time the case was filed can remain in the class and whether the class can pursue punitive damages.

A class action allows representative plaintiffs to serve as proxies to litigate claims on behalf of a much broader class. To justify this procedure plaintiffs must show a certain level of commonality between their claims and those of the class. Ironically, Betty Dukes, whose name is attached to the case, originally met with a lawyer because she felt she had been demoted based on her race. Now, the pay and promotions gender discrimination claims of over a million women may rise or fall based on her representation. While class certification does not rule on the merits of the underlying claims, it can create enormous pressure on a defendant to settle. We expect Wal-Mart to ask the U.S. Supreme Court to review the Ninth Circuit’s decision. The Supreme Court only accepts appeals in a very small minority of cases, but given the key legal issues involved and the size of the class, we would not be surprised if it does so in this case.

The Ninth Circuit took a more liberal approach than most other Circuits on a number of issues, including:

- what may constitute centralized employment practices supporting class certification;
- whether delegation of “excessive subjectivity” in employment decisions can support class certification;
- whether experts may aggregate statistics (e.g., analyze job groups and geographic locations together) and how closely to review statistics at the class certification stage;
- how a court should review anecdotal evidence at the class certification stage; and
- whether punitive damages may be pursued on a class basis and how an employer can exercise its right to defend itself against individual awards in a class action.

The Wal-Mart litigation also offers practical lessons for employers, including:

- increase consideration of objective factors in employment decisions to improve the process from a business perspective and reduce litigation risks;
- post all job openings to attract the best candidates, better track EEO efforts, and enhance the ability to support placement decisions;
- consider internal employment and pay equity audits, conducted in concert with legal counsel, to investigate and address any apparent disparities or outliers; and
- carefully review any required EEO-1 Reports to make sure job groups are not placed in the wrong category, causing the appearance of underrepresentation.

By [Brad Harvey](#). For a more detailed analysis of the Dukes case, [click here](#). For more information on Miller & Martin’s Class & Collective Actions Practice Group, please [click here](#).

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ATLANTA

1170 Peachtree Street,
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832 Georgia Avenue,
Suite 1000,
Volunteer Building
Chattanooga, TN 37402-
2289

NASHVILLE

150 Fourth Avenue North,
Suite 1200, One Nashville Place
Nashville, TN 37219