



Supreme Court Limits Discrimination Class Actions in Wal-Mart Ruling

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In a major victory for employers, on June 20 the U.S. Supreme Court held that a sex discrimination lawsuit brought on behalf of up to 1.5 million current and former female Wal-Mart employees could not be maintained as a class action. *Wal-Mart Stores, Inc. v. Dukes*. This ruling will make it much more difficult for plaintiffs' attorneys to maintain class action lawsuits alleging that a class of employees has been subjected to a "common policy" or practice of discrimination.

In April 2010, the U.S. Court of Appeals for the Ninth Circuit affirmed certification of what would have been the largest employment discrimination class action in history. The class included women employed in numerous positions at any of Wal-Mart's 3,400 retail stores across the United States at any time since December 26, 1998 who had been or may be subjected to the challenged practices. The plaintiffs argued that although Wal-Mart maintained a formal policy prohibiting gender discrimination and had no express corporate policy against the advancement of women, there was a tacit, unwritten common policy in that (1) the discretion local Wal-Mart managers exercised over pay and promotions led to an unlawful disparate impact on women; and (2) Wal-Mart's strong and uniform "corporate culture" permitted bias against women to infect the decisions of local Wal-Mart managers.

The issue before the Court was whether the case met the requirements for a class action under Rule 23 of the Federal Rules of Civil Procedure. A 5-4 majority of the Court held that the plaintiffs had failed to meet the requirement of Federal Rule of Civil Procedure 23(a)(2) to demonstrate that their sex discrimination claims had common questions of law or fact. The Court also unanimously held that the plaintiffs' claims for monetary relief were inappropriately certified under Rule 23(b)(2), which allows for class actions to obtain injunctive or declaratory relief common to the class, because the monetary relief sought, such as lost wages, was not "incidental" to the requested injunctive or declaratory relief.

Writing for the majority, Justice Scalia – joined by Chief Justice Roberts and Justices Kennedy, Thomas, Alito – found that the plaintiffs failed to meet the Rule 23(a) requirement of demonstrating the existence of a common policy of discrimination. Noting that Rule 23 "does not set forth a mere pleading standard," the Court found that the plaintiffs' burden of proving commonality necessarily overlapped with their contention that Wal-Mart engaged in a pattern or practice of discrimination, thereby requiring the district court to examine the merits of the case in determining whether to certify a class.

The Court reasoned that to satisfy the commonality requirement, the plaintiffs' claims must depend on a common contention – for example, the discriminatory bias of a supervisor – and must be capable of class-wide resolution. The Court noted that there are two ways plaintiffs may bridge the gap between an individual's claims of discrimination and the existence of a class of individuals who suffered the same harms:



(1) where an employer uses a biased testing or evaluation procedure for employees and/or applicants; or (2) where there is “significant proof” of a general policy of discrimination. The plaintiffs proceeded under the second approach.

The plaintiffs attempted to demonstrate commonality by providing testimony from a sociological expert, statistical evidence about pay and promotion disparities between male and female employees, and anecdotal reports of discrimination in the form of affidavits from employees. The Court found that this evidence did not constitute the “significant proof” required to show a general policy of discrimination. The Court rejected the sociological expert’s analysis because he could not calculate with any specificity how regularly stereotypes played a meaningful role in employment decisions at Wal-Mart. It also found that the statistical analyses were insufficient to establish that the plaintiffs’ allegations could be proven on a class-wide basis. Finally, the Court found that even if all 120 affidavits were true, they would not demonstrate that Wal-Mart operated under a general policy of discrimination because they only related to 235 of 3,400 stores and represented only one out of every 12,500 class members.

In fact, the only “policy” that the plaintiffs’ evidence established was that local supervisors were allowed discretion over employment matters, a finding which undermined the plaintiffs’ claims because the Court found it “quite unbelievable that all managers would exercise their discretion in a common way without some common direction.” Since the plaintiffs failed to demonstrate a specific, prohibited employment practice or any evidence that tied all the class members’ claims together, the Court concluded that there was no question common to the putative class members.

Finally, the Court unanimously held that claims for monetary relief may not be certified under Rule 23(b)(2), which allows for class actions to obtain injunctive or other declaratory relief common to a class as a whole. The Ninth Circuit previously held that the plaintiffs’ claims for lost wages did not bar a class action under Rule 23(b)(2) because this relief was only “incidental” to the requested injunctive or declaratory relief. The Supreme Court disagreed, holding that the claims for monetary relief in the form of back-pay could only be certified under the more stringent requirements of Rule 23(b)(3), which allows class certification only if common issues of law and fact predominate over issues affecting individual class members and only if a class action is superior to other methods of litigating the claims. Rule 23(b)(3), unlike Rule 23(b)(2), also requires that all class members be given notice of the proposed litigation and an option to opt out of the class. The dissent, written by Justice Ginsburg, agreed that the case was improperly certified under Rule 23(b)(2), but opined that the case should have been remanded to the lower courts for a determination as to whether the case could have been certified under Rule 23(b)(3).

The Court’s ruling is a definite victory for employers. While not sounding the death knell for all discrimination class actions, the decision should put at end to private class action lawsuits that attempt to aggregate a large numbers of discrete employment decisions involving different decision makers in a single lawsuit. Contrary to opinions expressed by some commentators, the decision does not exempt large employers from discrimination laws or leave true victims of discrimination without a legal remedy.



Employees remain free to bring individual claims of discrimination, and nothing in the decision precludes the maintenance of a class action where a group of plaintiffs can produce evidence of a common policy that was lacking in this case.

It remains to be seen whether plaintiffs' attorneys respond to this decision with more discretely tailored class action suits aimed at the actions of a particular decision maker or groups of decision makers within a company, possibly requiring employers to defend similar actions in multiple forums.

More Information

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