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US Supreme Court Rejects Proposed Class Based on "Corporate Culture of Bias" and Statistical Evidence; Gives Teeth to Commonality Requirement of Rule 23(a)(2)

On June 20, 2011 the US Supreme Court unanimously held in *Wal-Mart Stores, Inc. v. Dukes, et al.*, 564 U.S. ____ (2011), that 1.5 million current and former female employees of Wal-Mart could not proceed as a class in their claims for employment discrimination. Previously, the Ninth Circuit, in a sharply divided (6-5) *en banc* opinion, affirmed the district court's certification of a class under Federal Rule of Civil Procedure 23(b)(2) for injunctive and declaratory relief and back pay.¹

The Court unanimously agreed that plaintiffs' claims for back pay were not properly certified under Rule 23(b)(2). In a split 5-4 decision, the majority also held that the plaintiffs failed to meet the "commonality" requirement of Rule 23(a)(2). The Court's decision on Rule 23(a)(2) could have potentially far-reaching implications for all class actions and, in particular, for employment class actions.

The Court held that to satisfy the "commonality" requirement of Rule 23(a), it is not enough to claim that all putative class members have suffered a violation of the same provision of law by the same defendant. Rather, the "common contention ... 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

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one of the claims in one stroke."²

For employment class actions under Title VII, where the crux of the inquiry is the reason for a particular employment decision, the Court held that there must be "some glue holding the alleged *reasons* for all those decisions together," or it will be impossible to find a common answer to the question of why any particular employment decision was made for any particular class member.³ Typically, plaintiffs (like those in the *Wal-Mart* case) will not be able to establish this "glue" where local managers make pay and promotion decisions and where local management decides how to categorize managers for overtime purposes, or ensures that work given to employees categorized as exempt from overtime is really "exempt" in nature.

To establish commonality, the *Wal-Mart* plaintiffs argued that Wal-Mart had created a corporate culture of bias in pay and promotion matters, which violated Title VII of the Civil Rights Act of 1964 by discriminating against women. In support of class certification, the plaintiffs alleged a subjective, localized decision-making process, provided statistical evidence about gender pay and promotion disparity at the company, anecdotal reports of discrimination by 120 female employees, and the testimony of a sociologist who had conducted studies on the retailer and concluded that the company had a "culture" of poor practices and was "vulnerable to gender discrimination." The Court held that while some of the plaintiffs' evidence may form the basis of a disparate-impact theory, it was insufficient to establish a common question. Holding that the plaintiffs failed to identify either "a common mode of exercising discretion that pervades the entire company" or a "specific employment practice," the Court rejected the plaintiffs' evidence and its application to Wal-Mart's 3,400 stores.⁴

After this opinion, plaintiffs and their counsel will need to muster better evidence than statistical data and anecdotal testimony to prove commonality for class certification. The Court's decision, however, may leave some debate as to how much evidence may be sufficient where the anecdotal evidence is larger in proportion to the proposed class size. In *dictum*, the Court also appears to favor adopting the *Daubert* standard for expert testimony proffered at the class certification stage.

The Court concluded by holding that because Rule 23 cannot be interpreted to "abridge, enlarge or modify

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any substantive right,"⁵ a class cannot be certified on the premise that the defendant will not be entitled to litigate its statutory defenses to individual claims.

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¹ *Dukes v. Wal-Mart Stores, Inc.*, Case Nos. 04-16688 and 04-16720

² Slip Op. at 9

³ *Id.* at 11-12

⁴ *Id.* at 15-17

⁵ 28 U.S.C. § 2072(b)

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