

## CLIENT ALERT: Supreme Court Rejects Proposed Class Of 1.5 Million Female Wal-Mart Employees Claiming Gender Discrimination

The United States Supreme Court has decided that a class of as many as 1.5 million Wal-Mart employees cannot proceed with a class-action sex discrimination lawsuit. See *Wal-Mart Stores v. Dukes, et al.*, No. 10-277 (June 20, 2011). Reversing two lower courts, the Supreme Court held that the class members' claims did not share common issues of law and fact (often called "commonality") and that the plaintiffs could not show an appropriate nexus between the damages and declaratory relief they sought to obtain.

The representatives of the putative class of female employees alleged that Wal-Mart discriminated against them on the basis of sex (female). Claiming that Wal-Mart vested its store managers with broad discretion in pay and promotion decisions, the plaintiffs contended that this practice resulted in a discriminatory culture that had a disparate impact on women. The plaintiffs sought to certify a class consisting of all women employed at Wal-Mart stores since December 26, 1998, who could have been subjected to this allegedly discriminatory environment.

Rule 23 of the Federal Rules of Civil Procedure requires plaintiffs seeking to certify a class action to meet a multiple-part test. First, under rule 23(a), a putative class must show that the group of plaintiffs is so numerous that joining individual plaintiffs would be impractical; that there are questions of law common to all class members; that the class representatives have presented claims typical of the entire class; and that the class representatives are able to fairly and adequately represent all class members. Next, the putative class must establish at least one of the following required by the second part of the rule: (1) the prosecuting of separate actions by individual class members would create varying or unfair results; (2) injunctive or declaratory relief is appropriate with respect to the class as a whole; or (3) questions of law or fact common to class members predominate over questions affecting individual class members. The plaintiffs in this case sought back pay as injunctive relief under the second prong, contained in Rule 23(b)(2).

The District Court certified the proposed class, holding that the plaintiffs satisfied each of the necessary class-certification elements under Rule 23 of the Federal Rules of Civil Procedure. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004). The Ninth Circuit Court of Appeals affirmed this ruling in 2010. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010).

On June 20, 2011, the Supreme Court overturned the Ninth Circuit's decision. The majority wrote that:

Here [the plaintiffs] 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* [?]

Focusing on the “commonality” and “typicality” prongs required for class certification, the Court explained that a class must “bridge the gap” between individual claims and claims common to an entire class. To accomplish this, a class could show commonality by proving that an employer had a company-wide testing procedure or evaluation procedure that prejudiced all class members. In addition, the putative class could show “significant proof that an employer operated under a general policy of discrimination.” The Court held that the plaintiffs in this case had done neither, citing Wal-Mart’s existing company-wide policy prohibiting sex discrimination. Indeed, the Court noted that the company imposes penalties for violations of its equal employment opportunity policy.

The Court also held that the lower courts did not properly certify the plaintiffs’ back-pay claims because the compensatory back-pay damages the plaintiffs sought in the form of injunctive relief was not appropriate for the class as a whole. Rather, the plaintiffs might be entitled to individualized injunctive relief or monetary damages. Because many potential class members were no longer Wal-Mart employees, an injunction prohibiting Wal-Mart from discriminating against them in the future was not available.

In discussing the back-pay claims, the Court clarified the requirements for classes seeking injunctive relief, monetary relief, or both. Specifically, the Court explained that individual claims for monetary relief may not be certified unless they are incidental to the injunctive or declaratory relief sought. Because the plaintiffs sought to recover back pay, which the Court determined was individualized and unique to each particular plaintiff, the class could not show that the alleged damages were incidental to the injunctive relief sought by the class. Notably, all nine justices agreed that the class did not meet the Rule 23(b)(2) standard requiring that the injunctive or declaratory relief sought be appropriate with respect to the class as a whole.

In the wake of this decision, plaintiffs seeking to bring class-action employment-related discrimination claims are now required to demonstrate that the requested injunctive and/or monetary relief will remedy the damage to the class as a whole and that each class member would not be better able to recover individualized relief. This decision also suggests that it will be more difficult for plaintiffs to bring large-scale employment class actions and that employers now have additional avenues for defending against these actions. Nevertheless, while the Court’s clarification better defines the limits of Rule 23 class actions, the decision confirms that employers continue to face the risk of class action lawsuits by employees. Above all, this decision reemphasizes the importance for employers to maintain effective internal anti-discrimination policies.

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