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June 2011

Supreme Court Denies Certification of Nationwide Gender Discrimination Class Action against Wal-Mart

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The United States Supreme Court has refused to certify a class in what would have been the largest employment-discrimination class action in history. In *Wal-Mart Stores, Inc. v. Dukes, et al.*, plaintiffs sought a class consisting of "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998," a class which would have included 1.5 million members. 564 U.S. __, slip op. at 2, 5 (June 20, 2011). The plaintiffs contended that Wal-Mart violated and continues to violate Title VII by promoting women less frequently and paying them less than men. Both the United States District Court for the Northern District of California and the Ninth Circuit Court of Appeals had certified the class.

The Supreme Court reversed the Ninth Circuit for two different reasons. First, in a narrow 5-4 decision, the Court held that plaintiffs could not satisfy Rule 23(a)'s commonality requirement, principally because the plaintiffs could not point to a specific uniform employment practice that they claimed affected the whole class. *Id.* at 8-20. Second, in a unanimous 9-0 decision, the Court held that because the class members' backpay claims were so individualized, plaintiffs could not satisfy Rule 23(b)(2)'s requirement that a single class-wide remedy be possible. *Id.* at 20-21.

Commonality under Rule 23(a)

The Court invoked its decision in *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982), as the proper standard for commonality in employment-discrimination class actions. *Id.* at 12-13. *Falcon* requires a putative Title VII class representative to bridge the "wide gap" between (a) his individual claim that he was discriminated against and his "otherwise unsupported allegation that the company has a policy of discrimination"; and (b) the existence of a class of persons who have suffered the same injury such that the individual's claim shares common questions with the class claims. This "conceptual gap might be bridged" either by showing that the employer "'used a biased testing procedure,'" or by "'significant proof that an employer operates under a *general policy of discrimination* . . . if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision-making processes.'" *Id.* (quoting *Falcon*, 457 U.S. at 157-58) (emphasis added).

The *Dukes* plaintiffs did not contend that Wal-Mart used a biased testing procedure. Rather, the plaintiffs relied on (1) their sociological expert's opinion that Wal-Mart's corporate culture made it "vulnerable" to gender bias; (2) Wal-Mart's centralized policy of granting discretion to store-level managers to make subjective pay and promotion decisions; (3) their statistics; and (4) 120 affidavits by class members as to their individual experiences of gender bias. The Court rejected all of the plaintiffs' proffers as to commonality. *Id.* at 13-18.

The Court acknowledged that its commonality analysis would necessarily consider evidence that overlapped with the merits of the plaintiffs' claims. It was untroubled by the overlap, noting that such overlaps occur often in Rule 23 determinations and, in a larger sense, are a "familiar feature of litigation" on issues such as jurisdiction and venue. *Id.* at 10-11.

Turning to the plaintiffs' evidence to bridge the "*Falcon* gap," the Court summarily rejected plaintiffs' "corporate culture" argument, noting that plaintiffs' sociological expert conceded that "he could not calculate whether 0.5 percent or 95 percent" of the employment decisions at Wal-Mart were tainted by stereotyping. *Id.* at 13.

Having rejected the plaintiffs' "corporate culture" evidence, the Court scrutinized "[t]he only corporate policy that the plaintiffs' evidence convincingly establishes, [which was] Wal-Mart's 'policy' of *allowing discretion* by local supervisors over employment matters." *Id.* at 14. The Court's reasoning as to whether that corporate policy sufficed to support a class action is either elegantly simple and logical, or contrived and illogical, depending on one's point of view. The Court held that the policy and practice of giving thousands of local managers discretion to make pay and promotion decisions is, in fact, a "policy *against having* uniform employment practices," and, incidentally, "is also a very common and presumptively reasonable way of doing business…." *Id.* at 14-15.

The Court noted that such a "policy of no policy" could present a common question if the managers' discretion was shown to have been exercised in a common way; however, plaintiffs' statistical evidence did not support such a conclusion. *See id.* at 16-17. The Court rejected statistical pay and promotion disparities by region, which the plaintiffs claimed evidenced a disparate impact on women. It did so by reaffirming that a disparate impact case based on excessive discretion by low-level supervisors must involve more than statistical disparities. Such a case must, as a threshold matter, involve a "specific employment practice that is challenged." *Id.* at 17 (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988)). This, of course, led the plaintiffs to a dead-end because the Court had already found they failed to identify such a specific employment practice. *See id.* at 15-16.

Finally, the Court rejected the plaintiffs' anecdotal evidence in the form of 120 affidavits from class members. The Court held that the anecdotal evidence was, essentially, too anecdotal. 120 affidavits — or one for every 12,500 class members — were too few to show that Wal-Mart "operates under a general policy of discrimination," as *Falcon* requires for a proper class. *Id.* at 17-18.

The Propriety of Monetary Relief for a "(b)(2)" Class

The Court also held that, regardless of whether the plaintiffs could show commonality under Rule 23(a), they could not properly proceed with a Rule 23(b)(2) class. Because the plaintiffs' backpay claims were so individualized, the class could not satisfy Rule 23(b)(2)'s requirement that a single class-wide remedy be possible.

Rule 23(b)(2) class actions are limited, by the language of the rule, to those in which injunctive or declaratory relief "is appropriate respecting the class as a whole." Given the plaintiffs' highly individualized backpay claims, there could never be a remedy that would be appropriate generally to the whole class. *Id.* at 20-21.

The Court declined to resolve whether any claim for monetary relief *automatically* disqualifies a class from Rule 23(b)(2) certification, but held that claims for monetary relief under that provision "may not [be certified], at least where (as here), the monetary relief is not incidental to the injunctive or equitable relief." *See id.* at 20, 26. The Court squarely rejected the Ninth Circuit's attempt to alleviate the concern that a class action involving so many unique claims would unfairly deprive Wal-Mart of the chance to defend each one on its facts. In a Title VII pattern-and-practice case, once a pattern and practice of discrimination is found to exist as to the class, the employer may attempt to prove individualized affirmative defenses as to individual class members. The Ninth Circuit had proposed a "Trial by Formula" method by which discovery would be conducted, and the validity of affirmative defenses would be determined, only as to a sample set of class members. The determinations would then be extrapolated to craft a remedy as to the whole class. Chiding the Ninth Circuit, the Court held that such a "novel project" would violate the Rules Enabling Act by abridging Wal-Mart's right to litigate individualized defenses. *Id.* at 26-27.

The Plaintiffs argued that Rule 23(b)(2) certification was appropriate because that provision is geared toward class-wide equitable remedies and backpay is an equitable remedy under Title VII. The Court disagreed: Just because the Rule refers to "injunctive or declaratory relief," which are equitable remedies, does not mean that it embraces all types of remedies that are deemed by statute to be equitable. *Id.* at 25. The Court also invoked the rights of potential class members who might wish to opt out of the plaintiffs' proposed class but would be unable to do so: Certifying a class under Rule 23(b)(2) might unfairly foreclose individual backpay claims by employees who preferred to separately litigate their claims and potentially recover more than they could as a class member. *Id.* at 24.

Implications

Dukes has broad implications both for employment discrimination class actions and for class actions in general. The decision provides comfort to employers who delegate compensation and personnel decisions to supervisors. While *Dukes* does not give employers *carte blanche* to grant supervisors unfettered discretion, it protects employers who grant discretion and provide at least a framework of pay and decision-making guidelines to temper that discretion.

In the broader class-action context, *Dukes* will force plaintiffs' counsel to more finely craft their alleged "common issues" — a task which has historically been viewed as "'easily satisfied.'" *Dukes*, slip op., dissent at 8 (Ginsburg, J.) (quoting 5 J. Moore et al, Moore's Federal Practice § 23.23[2], p. 23-72 (3d ed. 2011)). The Court took pains to emphasize that Rule 23(a) requires more than casually pleading a simple *common question*, such as whether female employees at Wal-Mart experience gender discrimination. Rather, plaintiffs must offer a common contention "of such a nature that it is capable of class-wide resolution, which means that the 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." *Dukes*, slip op. at 9. In other words, plaintiffs' common questions must be capable of yielding "*common answers*." *Id.* at 9-10 (quotation omitted, emphasis added). Armed with this standard, defendants may find more success challenging proposed class actions for lack of commonality. The lower courts now have clear license to scrutinize plaintiffs' evidence, not just their pleadings, at the class certification stage. That scrutiny must uncover a mechanism to resolve liability wholesale without unfairly precluding individualized determinations. In that same vein, the Court's limitation on Rule 23(b)(2) classes will force more classes to be proposed under Rule 23(b)(3). Rule 23(b)(3), by its text, requires plaintiffs to show not just that a common question exists, but that common questions *predominate* over individualized issues.

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