

UPDATE: Supreme Court Decertifies Class In Dukes v. Wal-Mart

By Adam Santucci

June 21, 2011

This post was contributed by Brett E. Younkin, Esq., an Associate and a member of McNees Wallace & Nurick LLC's Labor and Employment Practice Group in Columbus, Ohio. On May 17, 2011, Brett reported that the United States Supreme Court was considering an important decision regarding class action suits.

UPDATE:

You may have heard the cheers emanating from Bentonville, Arkansas (the location of Wal-Mart's corporate headquarters), and the corporate headquarters of other large employers following the United States Supreme Court's announcement of its decision in Wal-Mart, Inc. v. Dukes, U.S. (2011) (PDF). On June 20, 2011, the Court decertified the class-action status of the 1.6 million current and former female employees in their decade-old suit against the world's largest private employer. Betty Dukes and her two co-plaintiffs had alleged a nationwide pattern of discriminatory pay and promotion practices by the company, despite its published policy of non-discrimination. However, the Court unanimously disagreed and overruled the Ninth Circuit Court of Appeals, which had allowed the case to proceed as a class action. The decision created what may be viewed as a higher burden of proof for establishing class action status.

While the Court was unanimous in deciding that this particular class should be decertified, only five of the justices joined in the entire ruling. In the majority opinion authored by Justice Scalia, the Court found that commonality was the key to certifying a class under Federal Rule of Civil Procedure 23 – “claims must depend on a common contention . . . which means that 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.” To attempt to resolve “literally millions of employment decisions at once” would not result in a unified answer for why a particular employee was disfavored. “Without some glue holding together the alleged reason for those [discriminatory] decisions, it will be impossible to say that examination of all the class members’ claims will produce a common answer to the crucial discrimination question.” The Court noted that the dissent from the lower court was correct in that the plaintiffs had “little in common but their sex and this lawsuit.”

Additionally, the opinion strongly rejected the plaintiffs' expert witness testimony because, among other things, a litany of the expert's peers had denounced his approach, analysis, and conclusions. The Court also concluded that while anecdotal evidence may be relevant, a hundred stories out of millions of employment decisions throughout 3,400 stores did not prove a pattern of discrimination.

What does this decision mean for employers? It certainly will have an impact in the litigation context if an employer finds itself in the unfortunate position of facing a class action lawsuit. In addition, the Court's decision affirmed the use of anecdotes as evidence of discrimination and, therefore, inappropriate comments made by corporate leaders may be used as evidence of a corporate-wide discriminatory practice. As a result, employers are well advised to include corporate executives in refresher training regarding discrimination and harassment.

The dissent, authored by Justice Ginsburg, agreed with the outcome of the case, but argued for a different approach to evaluating class status. Justice Ginsburg argued that the majority inappropriately muddled two distinct aspects of the class-certification process under the single banner of commonality. Instead of focusing on what distinguishes class members from one another, according to the dissent, the analysis should focus on whether there are sufficient facts to unite them.

The Court, including the dissenters, did agree that putting potentially valid claims for monetary relief at risk for the sake of achieving class status was improper. The creation of the class would have unfairly disadvantaged Wal-Mart, who would have been prevented from offering affirmative defenses if the Court of Appeal's suggested approach of using a random sample of employment decisions been used to present the case to the jury. The Rules of Civil Procedure explicitly forbids abridging or modifying any substantive right, including the use of affirmative defenses, and therefore, because such defenses must be presented on a case-by-case basis, the certification of the class would have been inappropriate.

© 2011 McNees Wallace & Nurick LLC

This document is presented with the understanding that the publisher does not render specific legal, accounting or other professional service to the reader. Due to the rapidly changing nature of the law, information contained in this publication may become outdated. Anyone using this material must always research original sources of authority and update this information to ensure accuracy and applicability to specific legal matters. In no event will the authors, the reviewers or the publisher be liable for any damage, whether direct, indirect or consequential, claimed to result from the use of this material.