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Dukes v. Wal-Mart: Supreme Court Announces New Class Action Standards That Will Substantially Curtail Employment Discrimination Class Actions, As Well As Consumer, Antitrust, and Other Class Actions

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On June 20, in *Dukes v. Wal-Mart*, the U.S. Supreme Court dealt a huge blow to plaintiffs seeking to certify employment discrimination class actions under Federal Rule of Civil Procedure 23, as well as consumer, antitrust, and other class actions. The heavily publicized case involved a proposed 1.5-million-person class of female Wal-Mart employees seeking to bring disparate impact and pattern or practice claims for discrimination in promotions and compensation. Justice Scalia wrote for the majority. In a 5-4 decision, the Court found that allegations that Wal-Mart had a "common" policy of permitting local managers to use discretion to make employment decisions based upon subjective factors did not satisfy the commonality requirement of Rule 23(a)(2). Significantly, the Court held that the commonality requirement is not met by "generalized questions" that do not meaningfully advance the litigation and is not met where named plaintiffs and members of the purported class have not suffered the "same injury." In addition, in a unanimous decision, the Court found that claims for "individual monetary damages," including back pay, could not be certified under Rule 23(b)(2). This decision provides defendants in class actions with a variety of tools to defeat efforts to certify large class actions involving disparately situated plaintiffs.

The Court Must Consider Certain Merits Issues in Deciding Class Certification Motions

The Court reached several conclusions that addressed, and rejected, arguments plaintiffs have made for years in support of certifying broad class actions in all contexts. For example, the Court put the final nail in the coffin of the argument that a district court must accept plaintiffs' allegations as true and avoid any factual considerations of the "merits" in ruling upon class certification. The Court made it clear that a district judge must engage in a "rigorous analysis" before certifying a class action and must consider the **merits** of plaintiffs' claims if they overlap with issues related to certification. The Court also suggested that a district court must scrutinize supposedly expert opinions offered in support of class certification. In making this ruling, the Court suggested that the standard set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (the *Daubert* standard) likely applies to expert evidence used in the class certification process.

"Commonality" Element Not Met Where Common Questions Are Not Significant

While acknowledging that even a single common question could be sufficient to establish communality, the Court held that reciting basic common questions, such as whether Title VII was violated, is not

enough. A plaintiff must identify common questions that depend upon the same contention and the resolution of that contention must "resolve an issue that is central to the validity of each one of the claims in one stroke." For example, the Court acknowledged that the case before it presented common questions like "do all of us plaintiffs indeed work for Wal-Mart?" and "do our managers have discretion over pay?" but held that "reciting these questions is not sufficient to obtain class certification." Rather, it held that "commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." In discussing this point, the Court made clear that "commonality" does not exist merely because a purported class all allegedly suffered a violation of the same provision of law. This will be a significant benefit to defendants in defeating class actions where many purported class members have suffered no injury at all.

The Court then addressed the "wide gap" between an individual claim of discrimination and the existence of a company policy of discrimination that creates a class of individuals with the same injury as the named plaintiff, which was first acknowledged by the Supreme Court in *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157-58 (1982). It noted that such a gap could be bridged, and commonality found, in two ways. First, it cited the case of a uniform biased testing procedure that impacted all test takers in the same way. Second, it could occur when there is "significant proof" that an employer "operated under a general policy of discrimination." In discussing the second way, the Court made it clear that "the bare existence of delegated discretion" is not sufficient to establish commonality.

Significantly, the Court rejected three arguments routinely made by plaintiffs in arguing for class certification. First, the Court rejected the testimony of plaintiffs' social science expert, Dr. William Bielby, who claimed that Wal-Mart had a culture that made it susceptible to gender bias, finding it useless to the salient question of whether plaintiffs could prove a general policy of discrimination. In doing so, the Court suggested that the testimony of expert witnesses used in support of class certification is subject to the *Daubert* standard. Second, the Court rejected the use of aggregate statistical analyses and the mere existence of gender disparities in pay, promotion, or representation as enough to meet the commonality burden in an employment case. Instead, the Court suggested that to show commonality, a plaintiff would at least need to demonstrate store-by-store disparities. Third, the Court found that affidavits from 120 individuals, or 1 out of every 12,500 class members, fell well short of meeting the burden of having "significant proof" that Wal-Mart operates under a general policy of discrimination. While these rejections occurred in the context of this employment discrimination claim, purported class plaintiffs in many other cases frequently attempt to rely on similar evidence to support class certification. For example, antitrust plaintiffs attempt to use aggregate statistical analyses of costs and prices and consumer class action lawyers use surveys, regression analyses, and purported social science analyses to establish the existence of commonality. The Court's decision in *Dukes* makes clear that the Court may not merely accept plaintiffs' efforts to homogenize out individual issues through unreliable expert testimony.

Rule 23(b)(2) Cannot Be Misused to Circumvent Due Process

The Court next ruled, in the unanimous portion of the opinion that will have a substantial impact on class actions generally, that individualized claims for money damages cannot be certified under Rule 23(b)(2) and instead must be certified, if at all, under the more onerous requirements of Rule 23(b)(3). In so ruling, the Court noted that Rule 23(b)(3), unlike Rule 23(b)(2), mandates notice to the class and an opportunity for class members to opt out of the lawsuit, necessary safeguards consistent with preserving the constitutional due process rights of class members whose individual claims for monetary damages would be adjudicated if a class were certified. The Court rejected the "predominance test" established by the Ninth Circuit, which permitted the certification of claims for monetary damages as long as claims for

injunctive relief "predominated" over the claims for monetary damages. It cited favorably to the "incidental damages" test first adopted by the Fifth Circuit in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998), which permits certification of claims for monetary relief as long as that relief "flow[s] directly from liability to the class as a whole," which "should not require additional hearings." While seeming to express skepticism that monetary damages could ever be incidental to injunctive and declaratory relief, the Court declined to adopt a bright-line rule prohibiting all money damages from ever being certified under Rule 23(b)(2). This ruling has widespread implications because Rule 23(b)(3) requires plaintiffs to prove that common questions predominate over individual ones and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Given the Court's cynicism regarding the use of discretionary decisionmaking as grounds for the less stringent commonality standard, this burden should be extremely difficult for plaintiffs' attorneys to meet in employment class actions without significantly altering the types of class actions they bring.

Even in the many jurisdictions that have long been critical of Rule 23(b)(2) certification of claims for monetary damages, plaintiffs' attorneys have previously had some success in distinguishing back pay from monetary damages and thereby getting claims for huge back pay awards certified under Rule 23(b)(2). The Supreme Court put an end to that practice as well. In a far-reaching ruling that will effectively require plaintiffs who bring class action employment discrimination lawsuits (except those solely for classwide injunctive relief) to meet the standards of Rule 23(b)(3), the Court held that back pay, regardless of whether it is characterized as equitable, cannot be certified under Rule 23(b)(2). Central to this holding was the Court's rejection of the Ninth Circuit's proposed sampling-based approach to doling out back pay to the class without ever permitting Wal-Mart to defend the employment decisions it made regarding each individual class member. Rather than approve this approach, which it derisively referred to as "trial by formula," the Court held that Wal-Mart was "entitled to individualized determinations of each employee's eligibility for backpay." This ruling not only precludes certification of the claims for money damages under Rule 23(b)(2), but will also make it difficult for plaintiffs to certify claims for monetary damages under Rule 23(b)(3). In addition, this ruling will limit the use of Rule 23(b)(2) to obtain "restitution damages" or any other type of money damages in all kinds of cases, including consumer class actions, antitrust class actions, and products liability actions.

What Comes Next?

In general, it will be more difficult for plaintiffs to obtain class certification in all cases. District courts will now be required to scrutinize closely all alleged common questions of law and fact to determine if the proposed class action can generate common answers to those questions that are apt to drive the resolution of the litigation. In particular, variations in whether class members suffered injury will be ripe for attack given the express language of the Court's opinion. It will not be sufficient for plaintiffs to allege a "general policy" without proving the existence of such a policy and its impact on each class member. In addition, defendants are now more likely to have challenges to expert testimony at the class certification stage heard under the *Daubert* standard, which will have the effect of further requiring an actual showing of commonality by plaintiffs rather than mere assertions of commonality by lawyers or their experts. Even where some level of commonality is shown, in damages cases plaintiffs will also need to meet the predominance and other standards of Rule 23(b)(3), and they will not be able to circumvent due process through the use of formulaic damages awards that do not permit defendants to address the individual variations in the claims of each class member.

We also expect this decision to be tremendously helpful to retailers and other businesses that delegate authority to the local level in all types of class actions. The Court held that decisions relevant to the case

were "decentralized" and made in local Wal-Mart stores, which it found to be the "opposite" of a common practice that would justify a class action. Retail and other similar companies frequently operate in this manner with respect to employment and many other decisions. These companies will be able to argue that nationwide class actions are inappropriate where the relevant decisions are made at the local level.

Class action employment discrimination lawyers will likely respond to this decision by modifying the types of cases they bring and how they characterize the common questions asserted in those cases. We expect plaintiffs' attorneys to file smaller class actions focused on specific job groups and/or locations, perhaps with multiple subclasses. Joe Sellers, one of the lawyers for the plaintiffs in *Dukes*, has already been quoted as saying the decision will result in "more class actions at the store or regional level." *See* "Wal-Mart Case Is a Blow for Big Cases and Their Lawyers," http://www.nytimes.com/2011/06/21/business/21class.html?_r=1&smid=tw-nytimes&seid=auto. These smaller class cases may be brought under state laws in state courts to avoid some of the impact of this decision on certification. In addition, plaintiffs may focus on more tailored challenges targeting specific aspects of employers' personnel policies that apply to a broad range of employees. It is also likely that employers will face more multiplaintiff cases that attempt to consolidate various individual discrimination claims, including pattern or practice claims. Mr. Sellers has stated that the plaintiffs' lawyers in *Dukes* have prepared "thousands" of individual charges of gender discrimination that they plan to file with the Equal Employment Opportunity Commission (EEOC). *See* "Wal-Mart Women Vow to Press Bias Fight in Courts, Agency," http://www.businessweek.com/news/2011-06-21/wal-mart-women-vow-to-press-bias-fight-in-courts-agency.html. In short, we expect to see plaintiffs' attorneys testing various avenues to obtain the most expansive classes possible under the new standards.

We also expect to see an increase in Equal Pay Act claims. While the standard for certification in those cases is demanding, plaintiffs' counsel may view it as a favorable alternative to proceeding under Rule 23 in light of this decision. Moreover, while class action counsel are not likely to entirely abandon theories premised upon subjectivity and stereotyping, we expect more class actions focused on objective personnel policies, such as employment tests, that apply generally to a large group of employees. The EEOC has been aggressively investigating such cases for several years as part of its focus on screening procedures and claims of systemic discrimination.

Finally, as has already started, we expect calls for government action. The EEOC has stated that it is reviewing the *Dukes* decision and determining whether it warrants any changes in its strategies for enforcement of Title VII. The Commission, which is not bound by Rule 23, could respond by more aggressively filing representative actions, potentially in partnership with intervening private class counsel. In addition, civil rights groups have already started calling for congressional action, including a renewed push for passage of the Paycheck Fairness Act. While the current Congress is unlikely to move forward with such legislation, as we saw with the Lilly Ledbetter Fair Pay Act, future political changes to the makeup of Congress could result in legislation designed to eat away at some of the employer-friendly aspects of the *Dukes* decision.

What Should Employers Do Now?

The *Dukes* decision is a great win for employers who no longer face the prospect of defending overbroad class claims indiscriminately attacking the individualized decisionmaking of local managers based upon ill-defined, allegedly discretionary policies. However, now is not the time for employers to become complacent. As noted above, we expect more targeted class claims as class action plaintiffs' attorneys test the boundaries of this decision. While this next wave of cases will almost certainly focus

on smaller classes than that at issue in *Dukes* and the other large class actions of recent years, it will still create significant risks to organizations who are sued, in terms of litigation costs, potential exposure, and public relations. Fortunately, *Dukes* ups the ante for plaintiffs' attorneys as well, as they now face a much greater battle when filing class actions, and we expect that they will be more diligent in researching and selecting cases than they have been in the past. For this reason, as well as to most efficiently manage their businesses, employers should continue to develop employment practices and policies that reflect best practices, monitor those practices and policies to ensure compliance with EEO policies, and analyze the impact of such practices and policies for equity and consistency with diversity policies and goals.

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