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Supreme Court Victory for Employers in Dukes v. Wal-Mart

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On June 20, 2011, in a resounding victory for employers, the United States Supreme Court struck down the largest employment class action ever certified. Justice Scalia, writing for the majority in *Dukes v. Wal-Mart Stores, Inc.*, held that the Northern California District Court's decision to certify the class of 1.5 million current and former female employees of Wal-Mart was improper for two noteworthy reasons.

First, the majority explained that the crux of the inquiry in an employment discrimination case is the reason for the employment decision. The *Dukes* plaintiffs, however, alleged claims arising out of workplace issues as diverse as having been yelled at by a manager, pay disparities, disputed demotions, and lack of access to a training program—in the Court's words, "millions of employment decisions at once." Without some "glue" to hold the reasons for these decisions together, the Court explained, it is impossible to say that common questions of law or fact predominated.

According to the Court, neither of the established methods for "gluing" the employment decisions together existed. The first method, evidence that the employer used a biased testing procedure to evaluate employees and applicants, did not exist because Wal-Mart indisputably had no testing procedure or other companywide evaluation method that could be charged with bias. To the contrary, Wal-Mart vested individual store managers with discretion to make employment decisions at the local level, the "whole point" of which, according to the Court, "is to avoid

evaluating employees under a common standard." The second method required "significant proof" that Wal-Mart operated under a general policy of discrimination. The plaintiffs did not dispute, however, that Wal-Mart's nationwide policies stressed fair, nondiscriminatory treatment and that there was no nationwide policy favoring sex discrimination. The Court rejected the plaintiffs' attempt to show an unwritten corporate culture of discrimination, dismissing testimony of a sociologist that those given discretion tend to discriminate based on stereotypical thinking and the anecdotal evidence offered by plaintiffs—declarations from 120 employees reporting experiences of discrimination, representing only a fraction of the stores and states in which Wal-Mart operates. The Court's reasoning should set employers' minds at ease that limited anecdotal or sociological evidence will not be extrapolated to thousands of individual decision-makers.

In the second half of the opinion, joined by all of the Justices, Justice Scalia explained that class certification was improper for the additional reason that the case did not meet the requirements of Federal Rule of Civil Procedure 23(b)(2), which provides for certification of claims seeking injunctive relief. Resolving a split between the Circuits, the Court concluded that because the plaintiffs were seeking backpay along with equitable relief, Rule 23(b)(2) was inapplicable.

The *Dukes o*pinion raises several other points of interest to employers. First, in addition to setting a high bar for anecdotal and statistical evidence offered to support the "required inference that all of the individual, discretionary decisions were discriminatory," the Court rejected the Ninth Circuit's prior statement that expert testimony at the certification stage need not meet the strict scientific standards of *Daubert v. Merrell Dow Farms, Inc.*, 509 U.S. 579 (1993). The Court also reiterated that Rule 23 does not set forth a "mere pleading standard" and reminded courts that certification is appropriate only if, after a "rigorous analysis" that may overlap with the merits of the plaintiff's underlying claim, the court is satisfied that the prerequisites of Rule 23 have been met. In sum, while the opinion does not put an end to class action discrimination claims, it certainly makes it much harder to bring them.