

## **Labor and Employment Law Update** **Lawyers for Employers®**

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### **Lessons for Employers in the Wake of the US Supreme Court's Rejection of Class Actions for Litigating Gender Discrimination in *Wal-Mart v. Dukes***

What are the lessons for employers in the wake of the United States Supreme Court's much-awaited decision in *Wal-Mart Stores, Inc. v. Dukes, et al.*? While the decision focused on the propriety of using class actions in employment discrimination litigation, it also validated best practices for employers who train local managers to comply with anti-discrimination laws and then delegate decision-making, subject to corporate compliance review.

In *Dukes*, the Supreme Court reversed the District Court and Ninth Circuit's rulings that certified a proposed class of approximately 1.5 million current and former female employees of Wal-Mart who sought to litigate claims of sex discrimination under Title VII in the form of a class action, rather than individually. The plaintiffs alleged widespread gender discrimination, including denial of equal pay and promotion opportunities, and sought injunctive and declaratory relief, punitive damages and backpay against Wal-Mart. Plaintiffs alleged that, by delegating substantial discretion to individual managers, Wal-Mart "fosters or facilitates gender stereotyping and discrimination, . . . and that this discrimination is common to all women who work or have worked in Wal-Mart stores."

As the Supreme Court found, Wal-Mart's policies expressly forbid sex discrimination. Having no other policies to point to, plaintiffs argued that Wal-Mart allowed a culture of gender discrimination by permitting supervisors with discretion to make pay and promotion determinations once certain objective criteria were met. Plaintiffs' case relied upon a sociologist who believed that Wal-Mart's corporate culture made it vulnerable to discrimination; however, the sociologist could not identify with any specificity how — or even if — that corporate culture played a role in Wal-Mart's employment decisions.

In any class action, the plaintiffs have the burden to demonstrate that the case meets the criteria laid out in the civil procedure rules for certifying a class. In this case, plaintiffs moved for class certification under Federal Rule of Civil Procedure 23, but could not demonstrate the required Rule 23(a)(2) "commonality" among the experiences of the plaintiffs. A five-member majority of the Court ruled that to satisfy commonality, Title VII plaintiffs seeking to bring class claims and to demonstrate commonality needed to establish either biased testing procedures used to evaluate applicants or a general policy of discrimination. The claims brought by the *Dukes* plaintiffs did not meet that standard. Instead, the majority of the Court characterized plaintiffs' approach as suing "about literally millions of employment decisions at once." In addition, all nine justices ruled that, even if the plaintiffs had met the "commonality" requirement, a class action seeking backpay could not be pursued under the portion of the rule relied on by the plaintiffs, and could only be pursued under a different provision of the class action rules.

## What This Means for Employers

According to the Supreme Court's decision, in order to proceed as a class action, the common contention "must be of such a nature that it is capable of class-wide resolution" so 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." In other words, a common question must produce a common answer to make class action treatment the appropriate vehicle for resolving the litigation. In the *Dukes* case, the plaintiffs did not identify a common practice or policy — through their expert sociologist or otherwise — that was common to the proposed class of current and former female employees throughout the U.S.

Most employers do not rely on a purely centralized decision-making process, but rely upon an employee's direct supervisor to contribute to the decision-making process, often subject to review by upper management and human resources professionals. This will continue to be a best practice for most employers, along with providing training regarding compliance with anti-discrimination and harassment laws.

Consequently, the *Dukes* decision should help employers avoid class actions alleging discriminatory practices unless plaintiffs can show that a biased test or common evaluation practice or policy was applied by the employer across the board, regardless of individual circumstances. The Supreme Court's decision in *Dukes* may also make it more difficult to pursue wage and hour cases, such as meal and rest break claims, in the form of class actions, where the practices differ depending on the locations and supervisors.

Of course, nothing in the *Dukes* decision suggests that illegal discrimination or pay practices are any less illegal than they were before the decision. Employers should continue to train their managers and supervisors regarding best practices and compliance with all applicable laws.

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