

[No Certification in Massive Wal-Mart Class Action](#)

June 23, 2011

By Larry M. Golub and Misty A. Murray

On June 20, 2011, the United States Supreme Court issued its long-anticipated decision in [Wal-Mart Stores Inc. v. Dukes et al., 564 U.S. _____ \(2011\)](#), decertifying a class of 1.5 million female Wal-Mart employees who alleged that they were discriminated against on the basis of their sex and were denied equal pay and promotions. Justice Scalia issued the majority opinion, parts of which were joined in by all nine Justices.

The proposed nationwide class in *Wal-Mart* consisted of

[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart's challenged pay and management track promotion policies and practices."

The three class representatives did not allege that Wal-Mart had an express corporate policy of discrimination, but rather that local managers had broad discretion over pay and promotions and exercised that discretion disproportionately in favor of men and that the corporate culture permitted bias against women.

The primary evidence of the alleged uniform corporate practice consisted of statistical evidence of salaries and promotions heavily favoring male employees and anecdotal reports of female employees, along with the testimony of a sociologist who conducted a "social" analysis of Wal-Mart's corporate culture.

The requested relief sought an injunction to prohibit Wal-Mart's discriminatory practices, and also a claim to recover back pay.

The District Court certified the class, finding that the class met the threshold requirements of [Federal Rule of Civil Procedure 23\(a\)\(2\)](#) that are required for all class actions, and then the requirements of Rule 23(b)(2), which requires that the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

In other words, a Rule 23(b)(2) class is typically limited to injunctive or corresponding declaratory relief.

A divided *en banc* Ninth Circuit panel affirmed the trial court ruling, finding that the commonality requirement was met and that the back pay claim did not predominate over the injunctive relief request.

The Ninth Circuit also found that the class could be manageably tried and that Wal-Mart would not be denied its right to present statutory defenses because the District Court could permit Wal-Mart to present individual defenses to randomly selected sample cases.

The United States Supreme Court granted a writ of *certiorari* on December 6, 2010, and [we reported on that event](#). The Court limited its review to whether claims for monetary relief could be certified under Rule 23(b)(2) and, if so, under what circumstances.

In this week's ruling, the Supreme Court reversed the Ninth Circuit's decision and decertified the class. Writing for five of the nine members of the Court, Justice Scalia first found that common issues were lacking under Rule 23(a)(2). Under that part of Rule 23, the Court reiterated that

"[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" (citation omitted) and that the plaintiff's "common contention . . . must be of such a nature that it is capable of classwide resolution – 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."

The majority opinion further advised that

"Rule 23 does not set forth a mere pleading standard," but an affirmative demonstration that each of the components of that rule have been met after the trial court has made a "rigorous analysis," which frequently "will entail some overlap with the merits of the plaintiff's underlying claim."

With respect to the case before it, the majority opinion explained that "'significant proof that Wal-Mart 'operated under a general policy of discrimination'" was "entirely absent here." It also observed that the testimony of plaintiff's sociologist as to his analysis of Wal-Mart's corporate culture was "worlds away" from "significant proof that Wal-Mart operated under a general policy of discrimination."

The opinion found that the statistical and anecdotal evidence "falls well short" and even if such evidence was taken at face value, it was "insufficient to establish that respondents' theory can be proved on a class wide basis" or that "one named plaintiff's experience of discrimination" was sufficient "to infer that 'discriminatory treatment is typical of [the employer's employment] practices.'"

Given the lack of proof of a uniform corporate practice, the commonality requirement of Rule 23(a)(2) was lacking.

The majority opinion also concluded that the back pay claims were improperly certified under Rule 23(b)(2) because claims for individualized monetary relief do not satisfy the Rule's requirement that a single injunction or declaratory judgment provide relief for the entire class.

Here, given the individualized nature of each employee's claim, individualized proof of damages as to back pay would be required, making the class unmanageable under Rule 23(b)(2). Rather, Justice Scalia wrote, "we think it clear that individualized monetary claims belong in Rule 23(b)(3)" and the "procedural protections attending the (b)(3) class."

The minority opinion, joined in by four Justices, only agreed with the second basis for the majority opinion's ruling, and expressly dissented from the finding that there was no commonality. Writing for the concurring/dissenting opinion, Justice Ginsburg observed:

"The evidence reviewed by the District Court adequately demonstrated that resolving those [gender discrimination] claims would necessitate examination of particular policies and practices alleged to affect, adversely and globally, women employed at Wal-Mart's stores. Rule 23(a)(2), setting a necessary but not a sufficient criterion for class-action certification, demands nothing further."

Justice Ginsburg also would have remanded the case to the trial court to determine if plaintiffs could have complied with the requirements for monetary claims under a Rule 23(b)(3) class, but observing that the majority opinion "disqualifies the class at the starting gate, holding that the plaintiffs cannot cross the 'commonality' line set by Rule 23(a)(2)."

In the few days since the Supreme Court issued the *Wal-Mart* decision, numerous legal and non-legal commentators have expressed their opinion as to the reach of the decision, with some bemoaning the purported demise of class action litigation and others observing that the decision can be limited to its facts and the employment context. Time will tell whether the *Wal-Mart* decision substantially alters the nature of class litigation.