Supreme Court Overturns Class Certification in Wal-Mart Gender Discrimination Case

On June 20, 2011, in *Wal-Mart Stores, Inc. v. Dukes*,[1] the Supreme Court addressed whether a group of 1.5 million current and former female employees of Wal-Mart could assert claims for alleged gender discrimination in a nationwide class action. Reversing the Ninth Circuit Court of Appeals, which affirmed the district court's grant of class certification, the sharply divided Court clarified the "commonality" requirement of Federal Rule of Civil Procedure 23(a)(2).[2] In a separate analysis, the Court unanimously held that the employees' claims for backpay could not be certified as part of a Rule 23(b)(2) class.[3]

I. Facts and Procedural History

Wal-Mart, the nation's largest private employer, operates roughly 3,400 stores nationwide and employs over one million people.[4] The plaintiffs are current and former female employees who alleged gender discrimination under Title VII.[5] They asserted that Wal-Mart affords its managers unchanneled discretion over pay and promotions and that the local managers exercise this discretion to disproportionately award pay raises and promotions to men.[6] Because the plaintiffs claimed that this disparate treatment was a pervasive part of Wal-Mart's "corporate culture," they alleged that every female employee at Wal-Mart had been unlawfully subjected to discriminatory treatment.[7] The plaintiffs endeavored to litigate their claims in a nationwide class action that sought injunctive and declaratory relief, backpay, and punitive damages.[8]

The district court, applying Rule 23 of the Federal Rules of Civil Procedure, certified the class.[9] In granting certification, the district court found that there were "questions of law or fact common to the class," as required by Rule 23(a)(2).[10] The district court also found that the plaintiffs' claim for backpay could be certified under Rule 23(b)(2).[11] A divided Ninth Circuit, sitting en banc, affirmed in relevant part, further holding that the class action could be manageably tried.[12]

II. The Supreme Court's Decision

The Supreme Court, in a 5-4 split, reversed the Ninth Circuit's holding that certification was consistent with Rule 23(a)(2). Under that provision, a class may be certified only if "there are questions of law or fact

---

1 No. 10-277, slip op. (2011), available at http://www.supremecourt.gov/opinions/10pdf/10-277.pdf. Citations to the Court's decision are to the slip opinion.

2 *Id.* at 8-20.

3 *Id.* at 21-27. For class certification to be proper, the class must meet all of the requirements of Rule 23(a) and any one of the alternatives listed in Rule 23(b)(1)–(3).

4 *Id.* at 1-2.

5 *Id.* at 2, 4.

6 *Id.* at 4.

7 *Id.*

8 *Id.*

9 *Id.* at 5. S*ee also Dukes v. Wal-Mart Stores, Inc. (Dukes I)*, 222 F.R.D. 137, 155-60 (N.D. Cal. 2004).

10 *Wal-Mart Stores* at 5; *Dukes I*, 222 F.R.D. at 145.

11 *Wal-Mart Stores* at 6.

12 *Id.* at 6-7. S*ee also Dukes v. Wal-Mart Stores, Inc. (Dukes II)*, 603 F.3d 571 (9th Cir. 2010) (en banc).

common to the class."[13] Writing for the Court, Justice Scalia recounted the Court's jurisprudence of this "commonality" requirement.[14] To comply with Rule 23(a)(2), it is not sufficient that the class members all "have suffered a violation of the same provision of law," such as Title VII.[15] Rather, the class members must "have suffered the same injury."[16]

Explicitly rejecting any suggestion to the contrary,[17] the Court determined that district courts may need "to probe behind the pleadings" in assessing whether the plaintiffs have affirmatively demonstrated that the requirements of Rule 23 are met.[18] This assessment requires a "rigorous analysis" that may require considering some aspects of the merits of the case.[19] In the Title VII context, where the "crucial question" is why a particular employee was disfavored, "proof of commonality necessarily overlaps with [the employees'] merits contention that Wal-Mart engages in a *pattern or practice* of discrimination . . . ."[20]

To bridge the "conceptual gap" between an individual employee's claim of discrimination on the one hand and the existence of a *class* of employees sharing a common question of fact on the other, prior case law suggests two possibilities.[21] The first, not applicable here, is the company's use of a "biased testing procedure to evaluate" current and potential employees.[22] The second option, on which the Court focused its attention, requires "[s]ignificant proof that an employer operated under a general policy of discrimination."[23]

In holding that the plaintiffs failed to meet this hurdle, the Court noted that Wal-Mart's policies forbid such discrimination.[24] Although the plaintiffs submitted testimony from a sociological expert who opined that Wal-Mart's corporate culture made it "vulnerable to gender bias," the Court rejected the evidence as insufficiently indicative of a general policy of discrimination.[25] And, although the Court acknowledged that giving unbridled discretion to supervisors can, in the right circumstances, result in a Title VII claim, "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's."[26] A small sampling of anecdotal evidence is not significant proof of a "common mode of exercising discretion that pervades the entire company."[27]

---

13 Fed. R. Civ. P. 23(a)(2).

14 *Wal-Mart Stores* at 8-13.

15 *Id.* at 9.

16 *Id.* (quoting *Gen.Tel. Co. of Sw. v. Falcon*, 457 U. S. 147, 157 (1982)).

17 *See id.* at 10 n.6 (distinguishing contrary language from a prior case as dicta).

18 *Id.* at 10 (quoting *Falcon*, 457 U.S. at 160).

19 *Id.* (quotation marks omitted).

20 *Id.* at 11.

21 *Id.* at 12.

22 *Id.* (quoting *Falcon*, 457 U.S. at 159 n.15).

23 *Id.* at 12 (alteration in original) (quoting *Falcon*, 457 U.S. at 159 n.15)

24 *Id.* at 13.

25 *Id.* (quotation marks omitted). The Court cast doubt on the district court's conclusion that expert testimony at the class certification stage is not subject to a *Daubert* analysis. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

26 *Wal-Mart Stores* at 15.

27 *See id.*

In a separate part of the opinion in which all of the justices joined, the Court held that the plaintiffs' claims for backpay could not be certified under Rule 23(b)(2).[28] Although it declined to hold that a claim for backpay could *never* comply with Rule 23(b)(2), the Court found that the Rule "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages."[29] The Court rejected the Ninth Circuit's holding that backpay claims could be properly certified under Rule 23(b)(2) so long as they did not "predominate" over the claims for declaratory and injunctive relief.[30] Under the Ninth Circuit's view, Wal-Mart was not entitled to assert statutory defenses to each individual employee's claim for backpay.[31] Where there are individualized monetary claims, Rule 23(b)(3)—which provides additional procedural safeguards to class members—is the proper certification route.[32]

Justice Ginsberg concurred with the Court's holding that a class seeking monetary relief (at least where such relief is not incidental to the declaratory or injunctive relief) could not be certified under Rule 23(b)(2).[33] She parted company, however, with the majority's holding that the plaintiffs could not satisfy the "commonality" requirement of Rule 23(a)(2).[34] Because she believed that the class certification complied with Rule 23(a)(2), she would have remanded the case for a determination of whether the class could meet the provisions of Rule 23(b)(3).[35] The majority foreclosed this approach, however, in holding that there were no questions of law or fact common to the class.[36]

III. Significance of the Decision

The Court's ruling gives teeth to the requirement that class members share a common question of law or fact. Where many employees who work for a variety of different supervisors seek class certification on a discrimination claim, the ruling suggests that they will be met with significant resistance. Most likely, courts will not be persuaded by a small sampling of anecdotal evidence or by general claims that a company's "culture" breeds discriminatory treatment. Because the Court was interpreting the Federal Rules of Procedure, it is unclear whether the decision will impact class action lawsuits in state court. The decision may prompt plaintiffs to seek certification of smaller classes—such as a class of employees working in a single location or for a single supervisor—in the hopes that they will be better able to satisfy the commonality requirement. Even if they meet the requirements of Rule 23(a), plaintiffs seeking backpay will need to meet the more rigorous certification standards of Rule 23(b)(3). This may be a difficult hurdle to surmount.

* * *

If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Jon Mark at 212.701.3100 or jmark@cahill.com.

---

28 *Id.* at 20.

29 *Id.* at 20-21.

30 *Id.* at 23-27.

31 *Id.* at 27; *Dukes II*, 603 F.3d at 625-27.

32 *Wal-Mart Stores* at 22.

33 *Id.* at 1 (Ginsberg, J., concurring in part and dissenting in part).

34 *Id.* at 2-8.

35 *Id.* at 1-2.

36 *Id.* at 19 (majority opinion).

This memorandum is for general information purposes only and is not intended to advertise our services, solicit clients or represent our legal advice.