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Wal-mart Stores, Inc. v. Dukes – What Happened and What Does It Mean?

On June 20, 2011, the U.S. Supreme Court handed down one of the most significant labor and employment class action decisions in the last thirty years. The following is a brief analysis of the case, with thoughts regarding its impact on the future of employment discrimination class action litigation.

Factual Background

Wal-mart is the nation's largest employer. *Wal-mart Stores, Inc. v. Dukes, et al.*, 564 U.S. ___, ___, Slip op. at 1 (2011). It is split up into 41 regions, with each region containing 80-85 stores. *Id.* Each store has between 40-53 departments and 80-500 staff positions. *Id.* at 2.

Three female employees sued Wal-mart, claiming that the company discriminated against them on the basis of their sex by denying them equal pay or promotions in violation of Title VII of the Civil Rights Act of 1964, as amended. *Id.* They sought class action status against Wal-mart on behalf of its 1.5 million female employees. *Id.* at 2.

None of the plaintiffs alleged that Wal-mart expressly discriminates. *Id.* at 4. Rather, their argument was that Wal-mart's "policy" of giving its local managers discretion over pay and promotions has resulted in unintended, but still unlawful, discrimination against women. *Id.* at 2, 4. Moreover, because Wal-mart is now aware of this, the plaintiffs argued that such discrimination is, therefore, intentional.

Procedural Background

This case was filed in the U.S. District Court for the Northern District of California (San Francisco). It has been around for nearly a decade. Until today, Wal-mart lost in front of every court it appeared before on this issue. The district court originally certified a class action against Wal-mart in 2004. Wal-mart appealed to the Ninth Circuit, a panel of which first ruled 2-1 in favor of the plaintiffs; the opinion was then withdrawn, and the panel then issued a new opinion, again ruling 2-1 in favor of the plaintiffs. Wal-mart appealed to the entire Ninth Circuit, which ruled *en banc* 6-5 against it.

Wal-mart appealed to the Supreme Court, which granted certiorari for two likely reasons: First, there is a split in the federal circuits about the certification of employment discrimination class action cases in which the plaintiffs seek monetary relief. Second, there was immense public interest in the case given Wal-mart's size as an employer and the amount of potential plaintiffs and liability.

The Supreme Court Rules 9-0 in Favor of Wal-mart

The Supreme Court, in an opinion written by Justice Scalia, ruled 9-0 in favor of Wal-mart that the class was improperly certified.

Obtaining class action certification is difficult. In order to demonstrate that a case is certifiable as a class action, a plaintiff must meet the requirements laid out in Federal Rule of Civil Procedure 23. In short, a plaintiff must meet *all* of the Rule

23(a) requirements (numerosity, typicality, commonality, and adequacy of representation) and *also* fit within Rule 23(b)(1), (b)(2), or (b)(3). Here, the plaintiffs argued that they met all of the Rule 23(a) factors and that they fell within Rule 23(b)(2) ("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").

The Supreme Court ruled in a 5-4 split that the plaintiffs failed to establish the Rule 23(a) factor of "commonality" and unanimously (9-0) that the plaintiffs failed to satisfy the Rule 23(b)(2) test.

Plaintiffs Failed To Provide "Convincing Proof" Of Commonality As Required By Rule 23(a)(2)

To establish commonality, the rules requires a plaintiff to show that "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). In reaching its majority decision that commonality was not present in this case, the Supreme Court determined that the plaintiffs' claims "must depend on a common contention" and "[t]hat common contention, moreover, 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." *Wal-mart*, 564 U.S. at ____, Slip op. at 9.

In coming to its decision, the Court revisited a seminal decision it issued on the topic in 1982 – *General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147 (1982). In *Falcon*, the Supreme Court indicated that there were two ways a plaintiff claiming denial of a promotion due to employment discrimination might be able to show commonality:

> First, if the employer "used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a)."
>
> Second, "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes."

Id. at 159 n.15. Here, the Court found that the first method did not apply and that the evidence for the second method "is entirely absent." *Wal-mart*, 564 U.S. at ___, Slip op. at 13. In reviewing the evidentiary record, the Court noted Wal-mart's policy against sex discrimination. It also eviscerated the plaintiffs' alleged statistical evidence, noting that the plaintiffs' sociological expert's testimony that Wal-mart was "vulnerable" to "gender bias" was insufficient to establish a classwide policy of discrimination. *Id.* at 14 ("'[W]hether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking'" is the essential question on which respondents' theory of commonality depends. If [the sociological expert] admittedly has no answer to that question, we can safely disregard what he has to say. It is worlds

away from 'significant proof' that Wal-Mart 'operated under a general policy of discrimination'").

The Supreme Court considered whether a "policy" of allowing discretion by independent supervisors could fit within the *Falcon* framework. It decided it could not. It noted that such a policy against having uniform employment practices is "common," "presumptively reasonable," and "should itself raise no inference of discriminatory conduct." *Id.* at 14-15 (internal citation omitted). The Court rejected this notion in this case because the plaintiffs failed to identify "a common mode of exercising discretion that pervades the entire company." *Id.* at 15. In so doing, it stated: "In a company of Wal-Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction." *Id.* at 15-16. Statistical evidence submitted by the plaintiffs to meet this burden were deemed "insufficient" in part because "[a] regional pay disparity, for example, may be attributable to only a small set of Wal-Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends." *Id.* at 16. In any event, merely showing that Wal-mart's "policy of discretion has produced an overall sex based disparity does not suffice." *Id.* at 17.

In essence, because the plaintiffs "provide[d] no convincing proof of a companywide discriminatory pay and promotion policy," the Court "concluded that they have not established the existence of any common question." *Id.* at 19.

By Seeking Monetary Relief -- Including Back Pay -- Plaintiffs Could Not Meet Rule 23(b)(2)

"Rule 23(b)(2) allows class treatment when "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." *Id.* at 20 (citing FED. R. CIV. P. 23(b)(2)).

The Court found unanimously that the plaintiffs failed to establish that they fell within the parameters of Rule 23(b)(2) because they brought claims for "individualized" relief, such as back pay and punitive damages. *Id.* at 20.

This area of the opinion gave a highly complex analysis of a very technical rule. In short, the Supreme Court determined that, by seeking monetary relief, which requires an individualized inquiry (*e.g.*, how much is each plaintiff owed), that these plaintiffs could not satisfy Rule 23(b)(2). Thus, the takeaway is that claims for monetary relief are likely inconsistent with Rule 23(b)(2) and plaintiffs are unlikely to obtain class certification under Rule 23(b)(2) in employment discrimination class action suits if they are seeking back pay or other monetary relief.

What's Left for Employment Discrimination Class Actions?

The next Supreme Court battle will be whether an employment discrimination case can be certified if the plaintiffs meet the four Rule 23(a) factors and the Rule 23(b)(3) test, which states that a class may be maintained where "questions of law or fact common to class members predominate over any questions affecting only individual members," and a class action would be "superior to other available methods for

fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).

In federal courts in Texas, Louisiana, and Mississippi, however, our federal appellate circuit has already determined that 23(b)(3) would be inapplicable to plaintiffs seeking monetary relief in employment discrimination class action cases. *Allison v. Citgo Petroleum*, 151 F.3d 402, 426 (5th Cir. 1998) ("[B]ecause these claims require individualized proof and determinations, the district court did not err in finding that issues common to the proposed class do not predominate over those affecting only individual plaintiffs and that a class action would not be a fair and efficient method for adjudicating these claims. The district court did not, therefore, abuse its discretion in denying class certification of these claims under Rule 23(b)(3)").

What Does All of This Mean?

Employment discrimination cases are hard to certify. They were hard before, and they are harder now. The Supreme Court's decision is a clear signal that the Court refuses to bend the well-established class certification rules. Plaintiffs' lawyers will make other attempts to certify employment discrimination class action cases, but this opinion puts a severe dent in the notion that any of the rules will be expanded beyond their current application.

The ball is now squarely in Congress' court to legislatively change the class action rules if they want to make it easier for plaintiffs to bring employment discrimination class action lawsuits.

A copy of the opinion can be found at http://www.supremecourt.gov/opinions/10pdf/10-277.pdf