



Supreme Court Overturns Nationwide Class Action in Wal-Mart Gender Discrimination Case

The Supreme Court, in Wal-Mart v. Dukes, reversed the Ninth Circuit's decision that allowed three female Wal-Mart employees to file a gender discrimination claim on behalf of all women employed by the retailer since December 26, 1998. The Supreme Court concluded that there were no issues common to the class and that the lower courts improperly certified the class's claims for backpay.

Background

Wal-Mart's Pay and Promotion Practices Challenged

Wal-Mart, a retailer employing more than one million people in the United States, divides its approximately 3,400 stores into nationwide divisions that are further split into even smaller regions. With respect to pay and promotion decisions, Wal-Mart gives broad discretion to its local managers. While there are certain requirements that an employee must meet to be eligible for management training or promotion, Wal-Mart's regional, district, and store managers are allowed to use their best judgment when selecting candidates.

Three Wal-Mart employees filed suit against the retailer, alleging that Wal-Mart discriminates against women by denying them equality in pay and/or promotions. They argued that local managers' discretion over pay and promotions disproportionately favors men. They further maintained that Wal-Mart's failure to curb local managers' discretion results in women being treated unequally.

The plaintiffs filing suit for gender discrimination asked the District Court to certify a class consisting of more than one million current and former female employees employed by Wal-Mart since December 26, 1998. As remedies for the alleged gender discrimination, they sought to stop Wal-Mart's practices and obtain damages, including backpay.

Class Certification Requirements

Generally, a lawsuit must specifically name the persons filing the lawsuit and detail the specific harm. However, in limited circumstances, federal courts will certify a class of plaintiffs, allowing a case to proceed on behalf of the persons bringing the claim and a large number of unnamed individuals.

Plaintiffs seeking class certification must show that all individuals in the proposed class have legal and factual claims in common. If they meet this first requirement, plaintiffs must then demonstrate that the relief requested

satisfies one of the following: (1) allowing individual suits prejudices the interests of individual class members or individuals who oppose the class; (2) injunctive or declaratory relief (i.e., relief stopping the defendant's challenged actions) is appropriate for the entire class; or (3) issues common to the class predominate over issues affecting individual class members.

Lower Courts

In support of class certification, plaintiffs provided (1) statistical evidence about pay and promotion disparities between male and female employees at Wal-Mart; (2) individual reports of discrimination from approximately 120 of Wal-Mart's female employees; and (3) testimony from a sociologist who concluded that because of Wal-Mart's culture and personnel practices, the company was vulnerable to gender discrimination.

The District Court approved the request for class certification, finding issues common to the class and allowing the monetary claims for backpay to be certified under the rule allowing class certification if injunctive and declaratory relief is appropriate for the entire class. The Ninth Circuit Court of Appeals [upheld](#) the decision. Wal-Mart appealed the ruling to the Supreme Court.

Supreme Court

The Supreme Court [reversed](#) the Ninth Circuit's ruling, concluding that class action certification was improper because there were no issues common to the class and that the lower courts improperly certified the class's claims for backpay.

No Issues Common to the Class

There are two ways a plaintiff may establish that there are issues common among plaintiffs affected by an employer's pay and promotion practices:

- There is a biased testing procedure or company-wide evaluation method; or
- There is significant proof that the employer operates under a general policy of discrimination.

The Supreme Court concluded that for purposes of certifying a class action, there were no issues common to all plaintiffs because Wal-Mart does not have a biased testing procedure or evaluation method. The Court further concluded that plaintiffs failed to establish that Wal-Mart operated under a general policy of discrimination because Wal-Mart's stated policy is that gender discrimination is forbidden. The Court discounted the sociologist's testimony because he was unable to determine how frequently stereotypes played a role in pay and promotion decisions at Wal-Mart. Further, given Wal-Mart's size, the Court concluded that in relying on statistical evidence and the gender discrimination complaints of 120 female employees, plaintiffs were unable to show a common method of exercising discretion in a discriminatory way that exists throughout the entire company.

BUCK COMMENT. *Although the Supreme Court's ruling effectively ends the Wal-Mart v. Dukes litigation and substantially limits the ability of individuals to bring nationwide employment discrimination class actions, current and former employees can continue to pursue their individual discrimination claims or smaller class actions.*

Monetary Claims for Backpay Improperly Class Certified

With respect to the second requirement, the Supreme Court also unanimously concluded that the lower courts improperly certified the plaintiffs' backpay claims. The Court reasoned that class certification was improper because (1) the claims for monetary relief were not incidental to the claims for injunctive and declaratory relief (i.e., relief stopping the defendant's challenged actions); and (2) the claims for individualized relief were certified under the wrong rule. The Court concluded that the backpay claims should be analyzed under the rule allowing certification where issues common to the class predominate over any questions affecting individual class members. The Court found this rule protects an employer's right to evaluate individual damages.

BUCK COMMENT. *Because the Supreme Court did not invalidate claims for backpay in class actions, employers remain vulnerable to class claims for backpay. However, such claims are likely to be on a smaller scale than was attempted in the Wal-Mart litigation.*

Conclusion

As the Supreme Court made clear, lawyers seeking class certification of employment discrimination claims against national employers must be able to show more than statistics demonstrating that the plaintiffs earn less or are promoted less frequently than others. To support a class action, they will have to offer strong evidence of an employer's nationwide discriminatory policies or practices. Although the class claims filed against employers may be smaller and more discrete in light of the Supreme Court's decision, employers are still vulnerable to class actions and individual discrimination claims.

In light of the Court's decision in *Wal-Mart v. Dukes* and other recent decisions expanding individual protections against employment-related retaliation and discrimination (see our [February 8, 2011](#), [April 8, 2011](#) and [April 14, 2011](#) *For Your Informations*), employers should ensure that they have put in place company-wide anti-discrimination policies, have clearly communicated those policies to their employees and managers, and have put in place effective training.

Buck's consultants are available to assist your company in understanding the impact of the Supreme Court's decision and how it may affect your employment policies and practices.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.