

## **SUPREME COURT ISSUES LANDMARK CLASS ACTION OPINION**

On June 20, 2011 the Supreme Court issued its long-awaited opinion in *Wal-Mart Stores, Inc. v. Dukes*, in which the Court rejected a class-action lawsuit against Wal-Mart on behalf of 1.5 million female employees alleging gender discrimination and disparate pay. This opinion, which is attached below for your convenience, is likely to have significant implications for workplace class action litigation and class action litigation more generally.

The U.S. Supreme Court's decision reverses the decision of the U.S. Court of Appeals for the Ninth Circuit (reported at 603 F.3d 571), which had affirmed an earlier certification order in the largest employment discrimination class action in history. The Ninth Circuit had ruled, *en banc*, that the trial court did not abuse its discretion in finding that the enormous class—which included 1.5 million female employees, both salaried and hourly with a range of positions, employed at 3,400 Wal-Mart stores nationwide—was tied together by company-wide discriminatory practices against women.

The opinion, authored by Justice Scalia and joined by Justices Roberts, Kennedy, Thomas, and Alito, addresses two questions: (1) whether the order certifying a class satisfies the commonality requirement of Federal Rule of Civil Procedure 23(a); and (2) whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2).

### Commonality under Rule 23(a)

The opinion begins by explaining that class actions are an exception to the general rule favoring individual actions. The Court held that because any competently crafted class complaint can raise a mere common question, the critical inquiry is whether “that common contention” 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 of the claims in one stroke.” Slip Op. at 9 (emphasis added). “What matters to class certification ... is not the raising of common questions--even in droves--but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.” *Id.* at 9-10. The Supreme Court concluded that based on the reasons for the employment decisions at issue, “it would be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the critical question...” at issue in the lawsuit. *Id.* at 12.

The Supreme Court also clarified an outstanding question on whether the merits of the case can be considered at class certification. Citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), many courts had held that trial courts were prohibited from inquiring into the merits of the class claims when considering a request for certification. The Supreme Court plainly rejected this position, holding that the merits can—indeed must—be considered where necessary to ensure that a rigorous analysis is performed under Rule 23. Slip Op. at 10-11.

Quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982), the Supreme Court further held that “significant proof” of a common policy of discrimination would be required at the certification stage. Slip Op. at 13. Plaintiffs were required to show that Wal-Mart operated under a general policy of discrimination, but the Supreme Court concluded that the testimony demonstrated no nexus between gender stereotyping and employment decisions impacting the class members. The Court went on to analyze plaintiffs’ affidavits and expert evidence in great detail, finding that they were not truly representative of the classwide conditions (*e.g.*, only 120 affidavits, or about 1 for every 12,500 class members and only from 235 of 3,400 stores) and insufficient to show a general policy of discrimination. The Court particularly criticized the social framework testimony submitted by Dr. William Bielby, finding that it was “worlds away from the ‘significant proof’ that Wal-Mart operated under a general policy of discrimination.” The only probative evidence of discrimination submitted by plaintiffs, the Court explained, was the manner in which local managers exercised their discretion. However, demonstrating the invalidity of one manager’s use of discretion “will do nothing to demonstrate the invalidity of another’s...” such that all class members’ claims will “depend on the answers to common questions.” *Id.* at 15. Plaintiffs’ claims were therefore not capable of classwide resolution.

During its criticism of the testimony by Dr. Bielby, the Supreme Court noted the district court had concluded that *Daubert* does not apply to expert testimony at the certification stage. This is a question is subject to dispute amongst the federal courts. Although the Supreme Court did not decide the issue, which apparently was not before it, the Court remarked that “[w]e doubt this is so.” *Id.* at 14. This language, though clearly dicta, may help persuade lower courts to apply the *Daubert* standard when considering expert evidence submitted in support of a request for class certification.

#### Monetary Relief under Rule 23(b)(2)

The Supreme Court also concluded that plaintiffs’ claims for back pay were improperly certified under Rule 23(b)(2), and that claims for monetary relief may not be certified under Rule 23(b)(2) unless the monetary relief is not incidental to claims for injunctive and declaratory relief. Prior to this decision, there was a split of authority on this issue amongst the federal appellate courts.

Consistent with its ruling on commonality, the Supreme Court held that Rule 23(b)(2) certification is unavailable when “each class member would be entitled to an individualized award of monetary damages.” *Id.* at 21. Rather, such claims must be brought under Rule 23(b)(3), which, of course, must be supporting by a showing of predominance and superiority. The Court likewise rejected the notion that the equitable nature of backpay damages qualifies it for relief under Rule 23(b)(2).

The Court also rejected the plaintiffs’ theory of damages, accepted by the Ninth Circuit, that the amount of back pay could be shown by trying a sample set of class members’ claims and, through statistical modeling, extrapolating those results to their fellow class members. Such an approach violates the Rules Enabling Act, as “a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims.” *Id.* at 27. Wal-Mart is entitled, the Court reasoned, “to individualized determinations of each employee’s eligibility for backpay.” *Id.* at 26.

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