

Class and Derivative Actions Labor and Employment

To: Our Clients and Friends

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Supreme Court De-Certifies Largest Employment Discrimination Class Action In History

In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ___ (2011), the Supreme Court reversed a lower court's decision to certify a nationwide class pursuing employment discrimination claims against the nation's largest employer. A 5-4 majority of the Court concluded that the class of 1.5 million current and former female employees could not satisfy the commonality requirement of Federal Rule of Civil Procedure 23(a). A unanimous Court concluded that the class' request for backpay amounted to a damages class that could not be certified under Federal Rule of Civil Procedure 23(b)(2) (which addresses injunctions and declaratory relief). The matter now returns to the lower courts where the plaintiffs and their counsel may seek to certify narrower classes or may pursue their claims individually.

Wal-Mart, The Claims Against It, And The Class.

Wal-Mart has approximately 3,400 stores throughout the country and employs more than one million people. Local store managers have broad discretion in pay and promotion decisions, and there is limited corporate oversight regarding decisions to increase wages of hourly employees. Slip Op. at 2. Store managers have discretion to apply their own subjective criteria when selecting candidates as "support managers," which is the first step in the management program. Other than some basic requirements, "regional and district managers have discretion to use their own judgment when selecting candidates for management training." *Id.*

The three named plaintiffs began working at different Wal-Mart stores over a number of years. Each contended that the company's policies affected their careers, though each had a different employment history and experience. They did not contend that Wal-Mart had an express policy against advancing women. "Rather they claim that their local managers' discretion over pay and promotions is exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees." *Id.* at 4 (citation omitted). They also alleged that Wal-Mart is aware of this effect but refuses to limit the managers' authority, which they contend amounts to disparate treatment of female employees. These plaintiffs sought to represent a nationwide class of all of Wal-Mart's female employees and to seek declaratory relief, injunctive relief, punitive damages, and backpay. *Id.*

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The class would have represented all 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. To support class certification, the named plaintiffs relied on: (1) "statistical evidence about pay and promotion disparities between men and women at the company," (2) "anecdotal reports of discrimination for about 120 of Wal-Mart's female employees," and (3) the testimony of a sociologist, whose "social framework analysis" of the company's culture and personnel practices led him to conclude that the company was "vulnerable" to gender discrimination. *Id.* at 5-6.

The Unanimous Court Concludes That A Backpay Class Cannot Be Certified Under Rule 23(b)(2).

In a unanimous portion of the opinion, the Court concluded that the class did not satisfy Federal Rule of Civil Procedure 23(b)(2) because "the monetary relief is not incidental to the injunctive or declaratory relief." *Id.* at 20. Rule 23(b)(2) "applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification with each individual member would be entitled to a *different* injunction or declaratory judgment against the defendant." *Id.* The Court did not address whether Rule 23(b)(2) precludes monetary claims in every setting; "[w]e need not reach that broader question in this case, because we think that, at a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule." *Id.* The rule does not authorize class certification "when each class member would be entitled to an individualized award of monetary damages." *Id.* at 20-21.

Rule 23(b)(3)—not Rule 23(b)(2)—Applies to Claims for Monetary Damages.

The Court's discussion focused on differences between Rule 23(b)(2) and Rule 23(b)(3) classes. Because a (b)(2) class addresses situations or remedies affecting the entire class at once, they are mandatory class actions that provide no opportunity to opt out and do not require notice. This contrasts to a (b)(3) class, which contains several procedural requirements and protections for absent class members. "Given that structure, we think it clear that individualized monetary claims belong in Rule 23(b)(3)." *Id.* at 22. The absence of the notice and opt-out requirements create a "serious possibility" of due process violation when monetary claims are at issue, which "provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here." *Id.* at 23.

The Court was not swayed at all by an Advisory Committee Note to the rule stating that (b)(2) does not apply when the final relief "relates *exclusively* or *predominately* to money damages." *Id.* at 23 (internal quotations omitted). The Court saw no need to consult that note rather than rely on the rule's language, which does not mention such damages in these classes. "The mere 'predominance' of a proper (b)(2) injunctive claim does not justify elimination of Rule 23(b)(3)'s procedural protection" *Id.* at 24. Accepting plaintiffs' argument about injunctive relief "predominating" over damages also provides incentives for class representatives to jettison potentially valid claims for monetary relief. For example, these plaintiffs abandoned claims for compensatory damages to seek only backpay. Such a class could preclude compensatory damage claims by absent class members. *Id.* at 24. The Court did not want to encourage such abandonment in pursuit of class certification.

The Court also rejected the argument that the backpay class was appropriate under (b)(2) because backpay is an equitable award rather than legal damages. Even if true, that is irrelevant. "The Rule

does not speak of 'equitable' remedies but of injunctions and declaratory judgments." *Id.* at 25. Title VII makes clear that backpay is not an injunction or declaratory judgment so such an award cannot be shoehorned into a (b)(2) class. *Id.* at 25.

Rejecting the Ninth Circuit's Efforts to Make the Class fit Rule 23(b)(2).

Plaintiffs' predominance approach would also require the district court to continually re-evaluate the class' composition. That is because former employees lack standing to seek injunctive or declaratory relief regarding the company's employment practices; the class would need to exclude such former employees. The Ninth Circuit attempted to circumvent this problem by excluding from the class former employees who had left the company by the time plaintiffs filed the complaint. But that cutoff was arbitrary and made no sense—anyone no longer employed by Wal-Mart would have no need for prospective injunctive relief regardless of when they left. The solution is *not* to arbitrarily limit class membership based on the date employees left the company; it is to avoid certifying a backpay claim under Rule 23(b)(2) at all. *Id.* at 25.

The Ninth Circuit also tried to overcome individualized issues caused by the fact that "Wal-Mart is entitled to individual determinations of each employees' eligibility for backpay." *Id.* Individual determinations arise because backpay is not available if an employer took an adverse employment action for a non-discriminatory reason. *Id.* If a plaintiff establishes a pattern or practice of discrimination, the company has the right to raise individual affirmative defenses and establish the propriety of employment decisions. The Court rejected the Ninth Circuit's effort to address those individual issues by trying a sample set of class members' claims. Under that plan, that sample set of claims would be resolved through depositions supervised by a master. "The percentage of claims determined to be valid would then be applied to the remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings." *Id.* at 27. The Court was concise, but its rejection was clear: "We disapprove that novel project." *Id.* Such sampling would impermissibly modify Wal-Mart's substantive rights to litigate statutory defenses to individual claims.

No Final Word From the Court on the (b)(2) Standard When the Class Seeks Damages.

Perhaps somewhat disappointing for practitioners, the Court declined to address whether (b)(2) permits class certification if the monetary relief is incidental to the requested injunction or declaratory relief; such monetary relief is incidental if damages flow directly from liability to the class as a whole on the claims forming the basis for the injunctive or declaratory relief. The Fifth Circuit has adopted that approach, *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998), and other courts often use that analysis. The Court saw no need to evaluate the issue because these plaintiffs did not argue that they could satisfy that standard, "and in any event they cannot." Slip Op. at 26. The individual issues tied to affirmative defenses discussed earlier would prevent backpay awards from being "incidental" to a class wide injunction.

The 5-4 Majority: Commonality Is Lacking, And Plaintiffs' Evidence Is Inadequate.

A majority of the justices held that the class does not satisfy the commonality requirement under Federal Rule of Civil Procedure 23(a)(2). Many courts find that a class satisfies commonality so long as

any common question exists. But “any competently crafted class complaint literally raises common ‘questions.’” *Id.* at 9 (internal quotations omitted). Commonality requires more—the plaintiffs must demonstrate that class members suffered the *same injury*. “This does not mean merely that they have all suffered a violation of the same provision of law.” *Id.* They must present a common contention, and it “must be of a 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.” *Id.* As to these claims against Wal-Mart, some factual underpinnings must tie all of the reasons for the employment decisions together. “Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question *why was I disfavored.*” *Id.* at 12.

A Policy of Decentralized Decisions is not Indicative of Companywide Discrimination.

To proceed as a class in this instance, the plaintiffs would need to show that Wal-Mart operated under a general policy of discrimination. But “Wal-Mart’s announced policy forbids sex discrimination,” and it “imposes penalties for denials of equal employment opportunity” *Id.* at 13. The only corporate policy that plaintiffs alleged affected all class members was one permitting local supervisors to exercise discretion over employment matters. “On its face, of course, that is just the opposite of uniform employment practice that would provide the commonality needed for a class action; it is a *policy against having* uniform employment practices.” *Id.* at 14. “In such a company, demonstrating the invalidity of one manager’s use of discretion will do nothing to demonstrate the invalidity on another’s.” *Id.* at 15. The sheer scope of Wal-Mart’s operations also played a role. “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.

Plaintiffs’ Expert Evidence Does not Overcome the Individual Nature of Employment Decisions.

While plaintiffs’ sociologist testified that Wal-Mart was “vulnerable” to discriminatory practices, that opinion had limited utility. He admitted that he could not calculate whether stereotyped thinking affected 0.5% or 95% of the employment decisions at Wal-Mart. That was enough for the majority to conclude that “we can safely disregard what he has to say.” *Id.* at 14. It certainly was not enough to establish that Wal-Mart operated under a general policy of discrimination. The majority also rejected efforts to use regression analysis to establish that gender discrimination affected *all* decisions. That analysis occurred region-by-region and compared the number of women promoted to management with the percentage of women in available pool of hourly employees. But information about disparities at the regional or national level does not establish the existence of disparities at individual stores or raise the inference that a companywide policy of discrimination guides decisions at the store and district level. *Id.* at 16. “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.*

Even if the plaintiffs’ statistical proof established that all of Wal-Mart’s 3,400 stores differed from nationwide or regional data regarding pay and promotion, that still would not demonstrate commonality. Indeed, earlier opinions of the Court specified that merely proving a racial or sexual disparity is not enough under Title VII. Rather, a plaintiff must begin by identifying the specific

employment practice that he or she challenges. *Id.* at 17. Here, the plaintiffs could not point to any specific employment practice tying all 1.5 million claims together, other than establishing store managers have discretion. “Merely showing that Wal-Mart’s policy of discretion has produced an overall sex-based disparity does not suffice.” *Id.*

Affidavits from 120 Absent Class Members do not Establish Commonality as to all 1.5 Million Members.

The majority last analyzed the plaintiffs’ anecdotal evidence of discrimination, consisting of 120 affidavits from current and former Wal-Mart employees. The Court did not find such evidence persuasive as it amounted to approximately one of every 12,500 class members and related to only 235 of the 3,400 stores. More than half the reports came from six states, and fourteen states had no anecdotal evidence about Wal-Mart’s operations. *Id.* at 18. Even if each of the 120 accounts were true, that would not demonstrate that the entire company operates under a general policy of discrimination, “which is what respondents must show to certify a companywide class.” *Id.* “[W]hen the claim is that a company operates under a general policy of discrimination, a few anecdotes selected from literally millions of employment decisions prove nothing at all.” *Id.* at 18 n.9.

Addressing the Standards for Deciding Class Certification.

In addition to reinvigorating the commonality requirement, the majority clarified that courts may need to look behind the pleadings when performing a rigorous analysis of class certification. “Frequently that ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s underlying claim. That cannot be helped.” *Id.* at 10. Some courts have shied away from examining the merits on class certification, relying on one sentence from the Court’s opinion in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). The sentence, however, is limited to discussing a lower court evaluating the merits of claims when deciding whether to shift the cost of class notice to the defendants. “To the extent the quoted statement goes beyond the permissibility of a merits inquiry for any other pretrial purpose, it is the purest dictum and is contradicted by our other cases.” *Id.* at 10 n.6. There is not “anything unusual” about the need to “touch aspects of the merits in order to resolve preliminary matters,” such as class certification. *Id.* at 11 (citing *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676-77 (7th Cir. 2001)). Citing *Szabo* seems designed to convey the message rejecting any further argument about the propriety of considering the merits when necessary to evaluate class certification.

While some practitioners hoped that the Court would address what evidentiary standards govern the admissibility of expert evidence at class certification, the Court did not see a need to address the issue. At most, the Court indicated that it doubts the accuracy of the district court’s conclusion that *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)—which governs the admissibility of expert testimony at trial—does not apply at the certification stage of class action proceedings. *Id.* at 13-14.

Conclusion.

This is an important opinion for employment discrimination class action defendants as well as class actions in general. Companies using a similarly-decentralized promotional structure have strong arguments that class certification is not possible beyond perhaps the level of one store or one division/region. While many courts had interpreted the Rule 23(a) commonality requirement as very

easily satisfied, this opinion places limits on what type of common questions suffice for purposes of class certification. While not resolving whether *Daubert* governs the use of expert evidence at class certification, the opinion leaves no doubt that courts may critically evaluate such evidence and reject it when warranted. Finally, the opinion provides defendants with a potent weapon to oppose (b)(2) injunction classes that truly are efforts to collect damages without satisfying the predominance and superiority analyses of Rule 23(b)(3). Indeed, the Court's rejection of the proposed sampling of some class member's claims to address the backpay issue will provide a substantial tool to resist similar efforts in other class actions, whether under (b)(2) or (b)(3)—the fundamental principle being that a class action cannot circumvent a defendant's right to litigate defenses to individual claims.

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