And the Class Certification Battle is Won: A Unanimous Supreme Court Reverses Rule 23(b)(2) Class Certification in Dukes v. Wal-Mart

On June 20, 2011, a unanimous U.S. Supreme Court reversed a federal district court's 2004 decision certifying a nationwide class of female employees alleging sex discrimination in the company's pay and promotion practices under Rule 23(b)(2) of the Federal Rules of Civil Procedure. The decision follows rulings by the full Ninth Circuit Court of Appeals in 2010, and a three-judge panel of the Ninth Circuit in 2007, both of which had affirmed class certification in large part.

In a 27-page majority opinion written by Justice Antonin Scalia, the Supreme Court held that the district court improperly certified the *Dukes* class under both Rules 23(a) and 23(b)(2) of the Federal Rules. Four justices (Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan) dissented regarding the Court's Rule 23(a) analysis, disagreeing with the majority about the proper threshold standards to apply in evaluating class certification. However, all justices unanimously agreed that the district court ultimately should not have certified the class under Rule 23(b)(2)'s more specific requirements.

As employers everywhere breathe a collective sigh of relief, what should they still be on guard for, and what should they take away from the Supreme Court's decision and analysis?

The District Court and Ninth Circuit Rulings

On June 21, 2004, the United States District Court for the Northern District of California certified a nationwide class of approximately one and a half million current and former female employees of Wal-Mart – in, as the Supreme Court put it, "one of the most expansive class actions ever." The *Dukes* named plaintiffs asserted that Wal-Mart discriminated against women as a class in both compensation and promotion decisions through Wal-Mart's company-wide policies and practices. In an 84-page opinion, the district court agreed and certified the class. Wal-Mart filed an immediate interlocutory appeal.

The Ninth Circuit, sitting *en banc*, later affirmed the district court's certification, but pared back the scope of the class seeking injunctive relief to include only those women who were employed when the suit was filed. The appeals court

remanded with respect to the employees' punitive damages claims, and instructed the district court to consider whether a class could be certified under Rule 23(b)(2) or (b)(3) for such claims. The appeals court additionally remanded with respect to the claims of putative class members who no longer worked for Wal-Mart when the complaint was filed in 2001, also instructing the district court to consider whether to certify an additional class or classes under Rule 23(b)(3).

The Supreme Court's Analysis and Clarified Standards

Rule 23(a) Analysis

Commonality – The Standard of Proof

In its majority opinion, the U.S. Supreme Court explained that, of Rule 23(a)'s four threshold requirements for certifying a class action (numerosity, commonality, typicality, and adequate representation), the "crux" of the *Dukes* case turned on commonality – namely, whether there were "questions of law or fact common to the class." In addressing this question, the Supreme Court adopted wholesale the approach that it previously had taken in *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982), an approach which the Ninth Circuit, in its *en banc* opinion, had partially rejected as dicta.

Following *Falcon*, the Supreme Court instructed that a district court must perform a "rigorous analysis" of Rule 23's requirements, and explained that, in the *Dukes* case, such an analysis would "necessarily overlap[]" with a merits determination of whether Wal-Mart had engaged in a pattern or practice of gender discrimination under Title VII.

Under this rigorous analysis, the Supreme Court further clarified, plaintiffs must do more than simply meet a notice pleading standard with respect to commonality. Instead, they must "affirmatively demonstrate" and "be prepared to prove" with "significant proof" at the class certification stage that class members have "suffered the same injury," in that they have a common contention of fact or law, the determination of which "is central to the validity of each one of the [class members'] claims in one stroke."

In adopting this approach, the Supreme Court rejected the Ninth Circuit's more lenient proposed proof standard for commonality – namely, that plaintiffs need only *raise* "common *questions* of law and fact" in the literal sense: "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. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."

Thus, the Supreme Court effectively raised the bar on what constitutes adequate proof of commonality sufficient to bring a class action. Class action plaintiffs cannot merely raise common fact questions on the literal level, such as "Do our managers have discretion over pay?," or common questions of law limited to whether all class members have suffered an alleged violation of the same provision of law, such as Title VII.

In particular, here, the Supreme Court found that it was not enough for plaintiffs to show that there was a company-wide corporate policy of "allowing discretion." Rather, plaintiffs had to prove that there was a common mode of exercising that discretion (in a discriminatory fashion) that pervaded the entire company. *Commonality – Application to Dukes*

Applying these standards to the *Dukes* case, the Supreme Court concluded that plaintiffs failed to meet that burden. Specifically, the Supreme Court explained that, within the context of employment pattern or practice discrimination claims, the *Dukes* plaintiffs could prove commonality at the class certification stage in two ways: (1) through evidence that Wal-Mart used a biased testing procedure (or other evaluation procedure) to evaluate employment decisions; and/or (2) through evidence that Wal-Mart "operated under a general policy of discrimination" manifesting itself "in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." The Court held that the *Dukes* plaintiffs failed to establish either.

<u>Social Science Evidence of Company-Wide Corporate Practices and Policies</u>

Plaintiffs' only evidence that Wal-Mart allegedly "operated under a general policy of discrimination," the Supreme Court found, was evidence offered through plaintiffs' sociological expert. The expert opined that Wal-Mart is a highly centralized company, with uniform personnel and management structure across all Wal-Mart stores; extensive oversight from corporate headquarters of store operations, compensation, and promotion decisions; and a strong corporate culture. Plaintiffs' sociological expert asserted that this strong corporate culture (with its alleged uniform personnel policies and practices) was deficient with respect to equal employment opportunities, and that these same policies and practices were such that promotion and compensation decisions made pursuant to those policies were highly susceptible to gender bias.

The evidence offered by plaintiff's sociological expert fell short, the Supreme Court explained, because the expert conceded that he could not determine "with any specificity" how regularly gender stereotypes played a role in decisionmaking – for instance, the expert admitted that he could not "calculate whether .5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking." Since this question was the "essential question" on which

plaintiffs' theory of commonality depended, and because the sociological expert could not answer it, the Supreme Court reasoned that it could "safely disregard" what the expert had to say.[1]

Statistical Evidence of Gender Disparity Caused by Discrimination

The Supreme Court also rejected evidence from plaintiffs' statistical experts as a means of establishing that managers exercised their discretion company-wide in a discriminatory fashion. In particular, the statistical evidence was deficient because it was conducted only at a national and regional level, and could not be applied to prove discrimination at an individual store level: "[I]nformation about disparities at the regional and national level does not establish the existence of disparities at individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level."

The Supreme Court's rejection of the statistical evidence marks a significant departure from the Ninth Circuit's conclusion that such evidence should not be evaluated for its persuasiveness at the class certification stage. Once again, the Supreme Court declined to adopt the Ninth Circuit's reasoning that the proper inquiry for class certification was simply whether plaintiffs' expert testimony was enough to raise *common questions* of fact, and not to evaluate the persuasiveness of plaintiffs' expert testimony vis-à-vis Wal-Mart's expert testimony.

The Supreme Court even went one step further, noting that – even if the statistical evidence persuasively demonstrated a gender-based disparity in pay or promotions (which it did not) – the evidence *still* would not be enough to satisfy the commonality requirement, because plaintiffs had not been able to point to a specific employment practice that caused the disparity. "Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice," the Court explained.

This reasoning by the Supreme Court should be extremely helpful to employers in defeating class certification based on statistical evidence. District courts are

[1] Wal-Mart originally challenged plaintiffs' sociological expert under *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993). The Supreme Court did not reach the issue of whether and to what extent *Daubert* applies to exclude expert evidence at the class certification stage. However, the Court did say in dicta that it "doubt[ed]" the district court's conclusion that *Daubert* was inapplicable at that stage. The Supreme Court's language may have a positive effect for employers, causing district courts to err on the side of caution, and to apply *Daubert* to expert testimony at the class certification stage. Nevertheless, it should be anticipated that the plaintiffs' class-action bar will continue the increasing trend of proffering social scientists as regularly as they proffer statisticians and economists to support their motions for class certification.

far more likely to engage in a searching review of the validity and persuasiveness of statistical proof, and to reject that evidence even if it shows a disparity based on protected-class status on its face, without further proof of a specific employment practice driving the disparity.

Anecdotal Evidence of Gender Bias

Likewise, the Supreme Court rejected plaintiffs' anecdotal evidence of gender discrimination – 120 declarations from named plaintiffs and putative class members – as insufficient to establish commonality. The Court reasoned that the anecdotes (representative of about 1 in every 12,500 class members) were simply too few and far between to establish company-wide discrimination, given the broad geographic scope and sheer size of Wal-Mart: "Even if every single one of these accounts is true, that would not demonstrate that the entire company 'operate[s] under a general policy of discrimination.'" As the Court put it, "a few anecdotes selected from literally millions of employment decisions prove nothing at all."

At the end of the day, the Court agreed with and quoted Chief Judge Alex Kozinski's dissenting opinion in the Ninth Circuit, finding that the *Dukes* class members, who "held a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed . . . [had] little in common but their sex and this lawsuit."

Rule 23(b) Analysis

Monetary Relief Versus Injunctive and Declaratory Relief – New Standards

Once a threshold determination is made under Rule 23(a) regarding whether a class qualifies for class certification, a court still must determine whether the class may be certified under the more specific provisions of Rules 23(b)(1), (b)(2), or (b)(3). The district court originally certified the *Dukes* class under Rule 23(b)(2), which requires that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . . with respect to the class as a whole." Courts have held in the past that monetary relief (*e.g.*, in the form of back pay) may be claimed so long as the monetary relief is not the "predominant" relief and is secondary to the injunctive or declaratory relief sought.

Departing from this standard, the Supreme Court, in the unanimous portion of its opinion, abandoned the predominance inquiry entirely. Instead, the Court reasoned that claims involving individualized monetary relief must be certified – if

at all – under Rule 23(b)(3), because (b)(3) provides procedural protections not found in (b)(2), namely, a requirement that plaintiffs demonstrate the predominance of common questions of fact or law over individualized questions; that plaintiffs show that a class action is superior to other methods of relief; that plaintiffs provide mandatory notice of the action to class members; and that plaintiffs provide class members with a right and opportunity to opt out of the class.

Notably, the Court pointed out that allowing Rule 23(b)(2) certification in cases involving individualized claims for monetary relief would create perverse incentives that could harm individual class members' due process rights. For instance, in *Dukes*, plaintiffs chose to forego claims for compensatory damages in order to meet the predominance test regarding injunctive and declaratory versus monetary relief. But that incentive (to forego compensatory damages) could have hurt class members who might later be collaterally estopped from independently seeking compensatory damages – class members who never received notice of the class action to begin with or the opportunity to opt out of the class to "go it alone."

Finally, the Court agreed with Wal-Mart that the district court's decision to certify the class under Rule 23(b)(2) improperly denied Wal-Mart the constitutional right to defend itself. Specifically, Wal-Mart contended that it was entitled to individualized hearings, both to offer certain defenses to individual class members' claims and to contest claims for damages. The Supreme Court agreed, noting Wal-Mart's right to raise individual affirmative defenses, and rejecting any "Trial by Formula" approach in cases involving individualized claims for monetary relief.[2]

The Dissent – Rejecting the Majority's Rule 23(a) Analysis

In an 11-page opinion authored by Justice Ruth Bader Ginsburg, Justices Breyer, Sotomayor, and Kagan concurred and joined in the majority's opinion regarding certification under Rule 23(b)(2), but dissented regarding the majority's Rule 23(a) analysis. The dissenters raised several challenges to the majority opinion:

1. The dissenters criticized the majority for not properly applying an abuse of discretion standard to the district court's commonality analysis under Rule 23(a). According to the dissenters, the district court was within its discretion to credit

[2] The Supreme Court thereby rejected the Ninth Circuit's application of its opinion in *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) as an example of how the district court might implement a trial plan in cases certified under Rule 23(b)(2) where claims of individualized monetary relief are involved. In *Hilao*, the district court applied a statistical formula to award compensatory damages to class members, rather than allow individualized hearings.

both the validity and persuasiveness of plaintiffs' social science, statistical, and anecdotal evidence.

2. The dissenters further criticized the standard of proof imposed by the majority for establishing commonality at the class certification stage as too harsh, advocating instead for the Ninth Circuit's more lax "raises common questions" test over making plaintiffs adduce "significant proof" at the class certification stage that "an employer operated under a general policy of discrimination" (the *Falcon* standard). In adopting the more rigorous standard, the majority effectively imported Rule 23(b)(3)'s predominance requirement into the threshold Rule 23(a) class certification analysis, an analysis which the dissenters argued was supposed to be "easily satisfied" and not as demanding as an analysis under Rule 23(b)(3).

3. The dissenters also criticized the majority's approach of focusing on the dissimilarities in the plaintiff class for purposes of the commonality analysis, rather than focusing on similarities: "The 'dissimilarities' approach leads the Court to train its attention on what distinguishes individual class members, rather than on what unites them," a consequence not intended by Rule 23(a), according to the dissenters.

What Does the Decision Mean for Employers?

There is no question that the Supreme Court's decision will be a deterrent to employment discrimination class action lawsuits going forward – the worst fears of employers, perhaps expressed best by the dissenting opinions in the Ninth Circuit below, are now no longer in play:

> Put simply, the door is [no longer] open to Title VII lawsuits targeting national and international companies, regardless of size and diversity, based on nothing more than general and conclusory allegations, a handful of anecdotes, and statistical disparities that bear little relation to the alleged discriminatory decisions.

While encouraging, employers still should be mindful of creative attempts by the plaintiffs' bar to bring themselves within the Supreme Court's decision. For instance, the Supreme Court left open the possibility of plaintiffs bringing a class action based on biased testing procedures or other specific, universally-applied employment practices.

Further, while the Supreme Court rejected the evidence offered by plaintiffs' social science expert based on the expert's inability to opine regarding the actual

frequency of stereotyped decisionmaking at Wal-Mart, the Court did not specifically hold that a *Daubert* analysis was required with respect to the expert. This begs the question: Could future plaintiffs get around the *Dukes* decision by offering up a social scientist's (possibly invalid) opinion that stereotyped decisionmaking occurs in a certain percentage (*e.g.*, more than half) of employment decisions made throughout a company?

One other question left unresolved by the Court is what kind of monetary relief might still be sought by plaintiffs seeking to certify a class under Rule 23(b)(2), since the Court did not entirely close the door on the possibility of such relief.

While the answers to these questions remain to be seen, the Supreme Court's decision is a huge win for employers, who undoubtedly will sleep easier now that this battle has been won.

For more information, see *Dukes v. Wal-Mart: A Foreboding Class Certification Decision for Employers*, July 2004 ASAP; *Dukes v. Wal-Mart: Wal-Mart Loses Initial 9th Circuit Battle, but Who Will Win the Class Certification War?*, February 2007 ASAP; and *Setting The Stage For A Potential Supreme Court Battle In Dukes v. Wal-Mart: A Sharply Divided Ninth Circuit Finds Against Wal-Mart Once Again On Class Certification, Articulating New Standards That Could Impact Employers*, May 2010 ASAP.

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