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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Employment Lawyers Weigh In On Wal-Mart V. Dukes

Law360, New York (June 20, 2011) -- The U.S. Supreme Court sided with Wal-Mart Stores Inc. in a long-awaited ruling on Monday, reversing a decision to grant nationwide class status to an estimated 1.5 million workers in a suit alleging the retail giant engaged in a companywide policy of discrimination against female employees. Here, employment attorneys tell Law360 why the 5-4 ruling is significant.

Randy Avram, partner, Kilpatrick Townsend & Stockton LLP:
"I was shocked when I learned that this case was certified in the first place. The Supreme Court's decision really restores the intent of Rule 23 — to combine only claims that are truly based on common issues. Plaintiffs failed to establish any common discriminatory practice affecting all 1.5 million female Wal-Mart employees, and the court correctly determined that a class action was not the appropriate way to address millions of individual employment decisions."

John Balitis, director, Fennemore Craig PC:
"I believe the decision's most significant impact will be to neutralize what has become an increasingly frequent class action approach to employment claims against large employers. As a result of the extraordinary attorneys' fees that are generated in these types of cases, class action employment litigation often is driven by lawyer self-interest rather the merits of the underlying claims. The court's decision makes clear that adequate evidence and proof must exist to sustain certification, and this message hopefully will reverse the trend of thinly supported, high stakes class action lawsuits that do not belong in the court system."

Elise Bloom, partner, Proskauer Rose LLP:
"The ruling is, obviously, very good news for all employers but especially for those that operate in multiple locations. The decision reinforces the importance of having a strong EEO policy but also validates an employer's delegation of discretion to individual managers at the local level. Scalia's repeated references to the need for a 'common policy' that is unlawful not just common, should be very helpful in all class-based cases."

Adam Childers, partner, Crowe & Dunlevy:
"The response from large employers across the country should be a resounding, "Whew!" If the United States Supreme Court had approved class certification for approximately 1 million past and present female employees at Wal-Mart, the stage would have been set for an avalanche of other large class

action employment discrimination lawsuits against other large employers. A flood of class action lawsuits would have been costly for companies at a time when the national economic recovery is already stuttering. So, this is obviously a big win for big business."

Apalla Chopra, partner, O'Melveny & Myers LLP:
"The court's decision provides a material check against the ease with which some class actions are certified. The court held that claims for individualized relief are improper in a Rule 23(b)(2) class. The court also stressed that the commonality requirement of Rule 23(a)(2) cannot be satisfied by creative class definitions. Instead, a plaintiff must demonstrate "significant proof" of a "common contention" that is actually "capable of classwide resolution." The court, in addition, expressly disproved of statistical extrapolation methods (referred to by the court as "trial by formula") which deny defendants the right to raise individual defenses, and questioned the usefulness of isolated anecdotes in putative class actions. This decision should be very helpful to employers grappling with complicated class action issues, such as those highlighted above."

Michael Droke, partner, Dorsey & Whitney LLP:
"The decision validates the way businesses operate, when they delegate individual decision making authority to local management. It protects employers from classwide claims of intentional torts, absent some policy or corporate discriminatory statement. Senior executives must avoid policy pronouncements, statements, and acts (such as stray remarks in email correspondence) that could provide evidence of corporate intent to discriminate. Ultimately, the decision may help address the 'commonality' concern in other employment-based class claims, such as overtime-exempt misclassification lawsuits."

Don Falk, partner, Mayer Brown LLP:
"The Supreme Court reaffirmed well-settled principles of class certification in refusing to allow highly individualized claims to be tried by statistics alone. First, the court reaffirmed that the special provisions for certifying classes that seek only court orders cannot be misused to certify classes seeking separate monetary relief for each individual class member. Second, the court reaffirmed that an issue isn't common enough to support trying hundreds or thousands of claims together unless the issue would let a court or jury accurately resolve something central to the validity of each class member's claim in a single determination."

Vanessa Griffith, partner, Vinson & Elkins LLP:
"Although the holding is unsurprising given the magnitude of the class, the decision is nonetheless very significant. Class actions will be more infrequent, will be smaller when certified, and the degree of factual commonality among class members will be significant. The plaintiff's reliance on a social framework analysis, which has experienced acceptance in some courts, is unlikely to be successful in the future as a basis on which to find the required element of commonality; instead, courts will require proof that the class suffered from a more concrete and identifiable employment practice. Finally, the court's holding that certification under 23(b)(2) is generally not available when there is a backpay claim will further erode interest in pursuing class action litigation."

David Harris, officer, Greensfelder Hemker & Gale PC:

“This case will have a big impact because it seemingly stems a trend by some courts to skip the notice and opt out rules for damages classes by certifying claims under B(2) as injunctive claims. It also heightens the proof standard for plaintiffs when attempting to certify a class while leaving open an important question about the scrutiny to be applied to expert testimony at the class certification stage.”

Stephen G. Harvey, Angelo A. Stio, Barak A. Bassman, partners, Pepper Hamilton LLP:
"In Wal-Mart Stores Inc. v. Dukes., all nine justices agreed that 'one of the most expansive class actions ever' involving claims that female Wal-Mart employees were subject to unlawful discrimination in pay and promotion could not be certified as a class action for back pay. A five-justice majority led by Justice Scalia went a step further and held that the class could not meet the less rigorous standard required for any class action. The decision is a victory for businesses, the end of the road for the plaintiffs in this case, and a long-term setback for other class action plaintiffs seeking to bring similar class actions."

Amanda Dealy Haverstick, special employment law counsel, Proskauer Rose LLP:
“The Supreme Court’s emphasis that a class cannot be certified based on statistical disparities and vague social framework analysis alone constitutes a strong blow to the plaintiffs’ class action bar. The days of plaintiff-side employment attorneys almost guaranteeing a class certification award simply by hiring an expert to submit a report are now over. Statisticians and social scientists will have to seriously recast their canned expert reports if they are to have any chance at persuading a court to certify a class after Wal-Mart. It will be interesting to see how the Supreme Court’s rejection of the district court’s plan on classwide damages calculations will play out in other contexts, especially in FLSA and state law overtime representative actions. The Wal-Mart district court proposed that it could determine the damages for over 9,500 class members through a random sampling of only 137 members, by extrapolating the results of the sample to the entirety of the class. Plaintiffs in overtime class actions often take a similar approach to trying to prove their claims at trial. The viability of such approach has been called into serious question by the Wal-Mart decision.”

Robert Hingula, associate, and Alison Lungstrum, associate, Polsinelli Shughart PC:
"Considering the Dukes opinion with the Supreme Court’s decision in AT&T Mobility LLC v. Concepcion — where the court upheld the enforceability of an arbitration agreement that required individual arbitration rather than class action treatment — it appears the court is moving toward limiting the wide-ranging class and collective actions that have become a trend in the courts. The court’s recent decisions may create more scrutiny of plaintiffs using class and collective action devices, because employees, it appears, must more clearly prove they suffered a truly collective and common wrong to sustain a class or collective action."

Fred Isquith, partner, Wolf Haldenstein Adler Freeman & Herz LLP:
"I view the split decision by the court as highly technical, dealing with the peculiar procedures of rules on class certification. Its effect should be limited to the facts in the Wal-Mart case, where the plaintiff attempted to sue for women throughout a vast enterprise. I do not read the opinion as affecting cases arising in the normal business context."

Christopher Landau, partner, Kirkland & Ellis LLP:
"Wal-Mart is the most important class action decision since the federal rules governing class

certification were amended in the 1960s, and a real wake-up call to the lower courts. Courts must now pay close attention to the language of the rules governing class certification, and to the substantial due process concerns underlying those rules. The days of drive-by class certification are over."

Wendy Johnson Lario, partner, Day Pitney LLP:
"In a much-anticipated decision, the U.S. Supreme Court struck down a proposed class of 1.5 million female workers alleging gender discrimination in pay and promotions. The decision is a victory for employers nationwide. The employees contended that Wal-Mart's discretionary pay and promotion policy was exercised in a discriminatory manner and that every woman working at Wal-Mart was a victim of this discriminatory policy. The court disagreed and found insufficient proof that the policy was exercised in a common way against all female employees. The court also held that the employees could not seek class certification under Rule 23(b)(2) because they were seeking, at least in part, back pay damages. While this decision did not determine the merits of the discrimination claims, it curtailed what could have been the most costly employment litigation in history."

Wendy Lazerson, partner, Bingham McCutchen LLP:
"The court's decision today is a step toward restoring sanity in the class action arena. It is difficult to imagine how more than 1.5 million exercises of discretion by individual managers in stores throughout the country could be boiled down to a corporate policy and a common question as to how pay and promotion practices decisions are made. The court's recognition of the impropriety of piggybacking the individualized back wages claims on to a claim for injunctive relief is icing on the cake and hopefully will give pause to plaintiff-side counsel."

Joseph M. Murray Jr., associate, Constangy Brooks & Smith LLP:
"This is a huge victory for employers. Had the plaintiffs prevailed, companies would have faced nationwide class actions based on little more than corporate culture, statistical disparities, and anecdotal evidence of discrimination. Instead, the Dukes decision correctly reinforces that plaintiffs must identify a specific employment practice that can be linked with the 'common' harm suffered by the purported class. That said, plaintiffs will undoubtedly try similar arguments in the future, and employers should provide appropriate guidance and management training to ensure that decision-makers understand the difference between permissible considerations and impermissible stereotypes."

Felicia Reid, partner, Curiale Hirschfeld Kraemer LLP:
"The Dukes v. Wal-Mart decision is a huge win for employers and appears to be the death knell for large class action employment discrimination cases. It creates significant hurdles to class certification in any type of discrimination class action. For example, it requires 'convincing proof' of a general classwide policy of discrimination. It is unclear what kind of proof will ever suffice, given the court's rejection of fairly strong statistical evidence of gender disparities. It also rejects statistical sampling and extrapolation to avoid individual mini-trials, making class certification far less available in all types of employment cases."

Dan Rohner, stakeholder, Sander Ingebretson & Wake:
"The Supreme Court's decision is a huge victory for all employer, but more particularly for large national companies at greatest risk for these types of employee class actions. By requiring that class members

prove that the circumstances surrounding their alleged claims are in fact similar, the court's decision ensure that fact-specific, low-level decisions that happen to be discriminatory are not unfairly treated as companywide bias. While it undeniably makes these types of cases more difficult to bring, the court essentially concluded that the standard which must be met for six plaintiffs to represent the interests of 1.5 million employees should be high."

David Sanford, partner, Sanford Wittels & Heisler LLP:
"The all-male majority decision in Wal-Mart represents a jaw-dropping form of judicial activism that needs an immediate congressional remedy. For this five-member conservative block of the United States Supreme Court to acknowledge a 'policy' sufficient for a class action to be certified, Wal-Mart would need a sign in each of its premises that reads 'Women Paid Less than Men at Wal-Mart: Apply Here.' The four-member dissent (including the only three women on the court) represents a measured and appropriate response to the questions posed — a response that does not sacrifice the right of female employees to work in environments free of discrimination. In contrast, the majority's opinion represents yet another example of the court prioritizing the rights of big corporations over the rights of the American worker. There was no class action problem in the United States. Nonetheless, the five-member majority has handed corporations a 'get out of jail free card' they don't deserve, insulating large corporations from accountability if they are merely 'too big' or if they simply institute a policy against having uniform employment practices. Ironically, the companies now the most insulated from liability are those capable of causing the most harm."

Gary Siniscalco, partner, Orrick Herrington & Sutcliffe LLP:
"Of key importance is the court's focus on what 'common questions' must be raised by a putative class to obtain certification. In plaintiffs' case, they wished to 'sue about literally millions of employment decisions at once.' But the majority held that '[w]ithout 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.' The Dukes decision will require plaintiffs to clearly articulate the connection between their claims and any challenged policy."

Charles Smith, partner, Skadden Arps Slate Meagher & Flom LLP:
"Today's decision has implications that cut more broadly than the labor and employment context. Justice Scalia's majority opinion reaffirms that district courts are to use class certification determinations as a gatekeeping function. Rule 23 is not a mere pleading rule, and plaintiffs bear a substantial burden of putting forward evidence to show they meet the rule's requirements. Perhaps most significantly, the court emphasizes that a rigorous analysis of whether plaintiffs have met their burden will in many cases overlap with the merits of the underlying claim. This emphasis in the court's opinion may lead to a narrower reading of the court's decision earlier this term in Halliburton, which some have read as a broad pro-plaintiff decision on the standards for class certification in securities litigation."

Scott Burnett Smith, attorney, Bradley Arant Boult Cummings LLP:
"The Supreme Court's opinion in Wal-Mart v. Dukes is a landmark. At bottom, the court's opinion makes two things clear. First, the disparate claims of thousands or millions of plaintiffs across the country cannot be vacuumed up into one lawsuit. (The court's decision on this point was 5-4.) The plaintiff bears

the burden of proving---not merely alleging --- a valid cause of action that all plaintiffs share in common. Second, Rule 23(b)(2) means what it says. (The court's opinion on this point was unanimous.) Individual claims for monetary relief can no longer be hidden inside a complaint for injunctive relief. Wal-Mart v. Dukes will bring long-needed uniformity to the law of class actions. The court's opinion draws bright lines based upon the language of Rule 23. Employers and businesses will be able to use these bright lines to better defend against sprawling class actions."

Ronald Wick, member, Cozen O'Connor:
"Today's decision imposes a stringent level of precision on the commonality requirement necessary to certify a class action. In essence, the court held today that it is insufficiently 'common' that all class members allege the same type of discrimination (gender discrimination) by the same employer (Wal-Mart); rather, they must point to a specific discriminatory policy or practice on which that discrimination was based. In the eyes of the majority, the mere vesting of discretion of pay and promotions decisions in local managers, coupled with evidence of a discriminatory culture, did not meet this requirement. Interestingly, the court focused on the discretionary nature of Wal-Mart's pay/promotion regime to conclude that the class members' questions could not be common. The majority also held that in evaluating whether there is a common question, the court should consider whether the commonality of the class members' disputes with the defendant are outweighed by 'dissimilarities' that will make it difficult to adjudicate the case on a classwide basis. As applied here, today's decision undoubtedly heightens the burden for class actions against large, national retailers and other companies doing business out of multiple locations, if the dispute relates to an area in which decisions are made on any store-specific or region-specific, rather than companywide, basis."

Robert T. Zielinski, principal, Miller Canfield Paddock & Stone PLC:
"The decision in Dukes v. Wal-Mart erects a major impediment to plaintiff's employment class actions that fail to identify a particular employment practice as the cause of the discriminatory outcome. Essentially the court revived it old Wards Cove analysis, despite the legislative reversal of that decision. As a practical matter, class actions based on easily identified objective criteria (e.g. test scores) will be unaffected, while those lacking such a focus will be nonstarters. The decision neither requires nor suggests any changes to employer day to day behavior, other than a sigh of relief."