

## US Supreme Court Soundly Rejects Certification of a Company-wide Gender Discrimination Class in *Wal-Mart Stores, Inc. v. Dukes*

In its highly anticipated decision in *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277, the US Supreme Court has reversed the class certification of a sprawling Title VII lawsuit against Wal-Mart Stores, Inc. The Court's decision raises the bar for the certification of nationwide class employment discrimination claims and severely limits the ways in which claims for backpay can be pursued in the class context.

The case alleged that Wal-Mart discriminated against roughly 1.5 million of its female employees by fostering a corporate culture of gender stereotyping and by failing to prevent first-level managers from discriminating against female workers in pay-or-promotion decisions. The named plaintiffs sought an injunction against the allegedly discriminatory policies as well as billions of dollars in backpay.

The US Court of Appeals for the Ninth Circuit had previously certified the class under Rule 23(b)(2), which allows certification when "final injunctive relief or declaratory relief is appropriate respecting the class as a whole." In an opinion by Justice Scalia, the Supreme Court held that a class could not be certified for two reasons: (i) the claims for backpay could not be certified under Rule 23(b)(2) as they were not incidental to the injunctive relief sought; and (ii) the class failed to satisfy the "commonality" requirement of Rule 23(a).

With respect to the claims for backpay, the Court unanimously held that "claims for individualized relief (like the backpay at issue here) do not satisfy" Rule 23(b)(2). That rule, the Court explained, "applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment" or "to an individualized award of monetary damages." Claims for individualized monetary damages—such as the backpay claims sought by the *Dukes* plaintiffs—"belong in Rule 23(b)(3)," which provides heightened "procedural protections" for absent class members (such as the right to notice and to opt out of the class).

In reaching this conclusion, the Court reasoned that under Title VII's detailed remedial scheme, employers "are entitled to individualized determinations of each employee's eligibility for backpay." That is, for each individual employee, Title VII allows the employer the opportunity to show that "it took an adverse action for any reason other than discrimination," in which case the Court could not order the "hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any backpay." Further, when a plaintiff "seeks individual relief such as reinstatement or backpay after establishing a pattern or practice of discrimination, a district court must usually

conduct additional proceedings to determine the scope of individual relief.” The Court concluded that the individualized proceedings required by this scheme prevented certification under Rule 23(b)(2).

The Supreme Court also disagreed with the Ninth Circuit’s “novel project” of replacing the additional proceedings normally called for could by a “trial by formula” system, in which a sample of class members would be selected for determination of the validity of the claims and the backpay owing as a result. Under this system, the percentage of claims determined to be valid would then be applied to the remainder of the class without further individualized proceedings. Because Title VII provides Wal-Mart the right to raise individualized affirmative defenses against claims of discrimination, the Supreme Court concluded that stripping Wal-Mart of the right to present those individualized defenses would violate the Rules Enabling Act, which “forbids interpreting Rule 23 to ‘abridge, enlarge, or modify any statutory right.’” Accordingly, the necessity of that individualized litigation prevented the claims for backpay from being incidental to the claim classwide injunctive relief.

By a 5-4 vote, the Court also held that the class had been improperly certified because the plaintiffs had failed to show the existence of a “common question” as required by Rule 23(a)(2). The Court explained that to satisfy Rule 23(a)(2), the plaintiffs must demonstrate that the class action would “generate common *answers* apt to drive the resolution of the litigation” (internal quotation marks omitted). And, in analyzing the plaintiff’s showing of commonality, the district court must engage in a “rigorous analysis” that frequently “will entail some overlap with the merits of the plaintiff’s underlying claim.” In this case, for example, the Court explained that the plaintiffs’ “proof of commonality necessarily overlaps” with their “merits contention that Wal-Mart engages in a *pattern or practice* of discrimination,” because “[w]ithout some glue holding the alleged *reasons* for all those [pay-or-

promotion] 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.*”

Although the plaintiffs relied on three forms of proof (statistical evidence about pay and promotion disparities, anecdotal reports of discrimination, and expert testimony regarding Wal-Mart’s corporate culture), the Court explained that the plaintiffs had failed to “bridg[e]” the “conceptual gap” between their individual claims and their class claims for employment discrimination because they failed to show that Wal-Mart “operated under a general policy of discrimination” that “manifested itself in hiring and promotion practices in the same general fashion.”

Wal-Mart had adopted a formal policy forbidding discrimination, and the Court observed that the plaintiffs’ only evidence of a *de facto* general policy of discrimination was a sociologist’s expert testimony that Wal-Mart’s corporate culture led to stereotyped thinking. The Court explained that such testimony failed to support commonality because the expert was unable to “determine with any specificity how regularly stereotypes play a meaningful role in employment decisions” at the company and conceded that his analysis could not explain “whether 0.5 percent or 95 percent” of those decisions were determined by stereotyping. The Court also rejected the plaintiffs’ statistical evidence about pay and promotion disparities because it was limited to regional and national data, which the Court concluded was “insufficient to establish that [plaintiffs’] theory can be proved on a classwide basis.”

Similarly, the Court concluded that plaintiffs’ 120 instances of anecdotal evidence were “too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory” because they related to only 235 of Wal-Mart’s 3,400 stores and only one out of every 12,500 class members. The Court reasoned

that “[e]ven if every single one of these accounts is true, that would not demonstrate that the entire company operates under a general policy of discrimination, which is what [plaintiffs] must show to certify a companywide class” (internal quotations and citations omitted).

Finally, the Court sounded a note of caution about employment discrimination class actions that challenge the delegation of discretion to local supervisors. The Court explained that a policy “of *allowing discretion* by local supervisors ... is the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices.” The Court emphasized that this is “a very common and presumptively reasonable way of doing business,” which “should itself raise no inference of discriminatory conduct.” While “an undisciplined system of subjective decisionmaking” can lead to “Title VII liability under a disparate-impact theory,” the Court emphasized that this possibility does not mean that “every employee in a company using a system of discretion has such a claim in common.”

## Conclusion

In light of the Court’s decision, there are a number of things that employers should keep in mind:

- ***Dukes* is not the death knell for employment discrimination class actions**, but in *Dukes*, the Supreme Court has effectively pushed back on a trend of expansion for employment discrimination class actions.
- **Without “Trial by Formula” and with a strengthened “common question” requirement**, narrower, more targeted class actions will be more likely than nationwide or corporate-wide purported class actions. Employers will have tools to oppose class actions that claim every female (or other

protected class) employee is a victim of discrimination.

- **Stay up-to-date on class certification decisions outside of the employment arena.** In the coming months, lower courts across the country will be working to interpret the Court’s holdings in many different contexts. Staying up-to-date on these decisions, whether they are employment cases, antitrust cases, consumer class actions or other contexts, may be helpful for employment practitioners in supporting denial of class certification arguments.
- ***Dukes* will impact Rule 23(b)(3) and Hybrid Rule 23(b)(2)/(b)(3) actions, too.** Employers will have revitalized arguments to make in opposing class certification. Employment practitioners should consider challenging the availability of Hybrid Rule 23(b)(2)/(b)(3) class actions.
- **Consider the implications for the wage & hour context.** The Court’s objections to the Ninth Circuit’s “trial by formula” approach seem to hold special relevance for wage & hour claims being brought in federal court when state law claims are attached and subject to Rule 23 analysis. Further, the issues recognized by the Court with respect to this approach seem to be based on the same concerns that have caused the recent trend toward decertification of conditionally certified FLSA classes and may provide further support for that trend to continue.
- **Employers should look at their human resources strategies** and consider whether any adjustments may be appropriate in light of the Court’s decision and other recent legal developments.
- **A policy of subjective decisionmaking should not be considered an absolute defense.** Despite the positive role that Wal-Mart’s decentralized decision-making process played in the Court’s decision, employers should not misunderstand the decision to imply that subjective decisionmaking has been

blessed by the Court as nondiscriminatory. The Court explicitly reaffirmed that “an employer’s undisciplined system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination.”

Mayer Brown LLP filed an amicus brief in support of the petitioner on behalf of the Association of Global Automakers, Inc.

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*For more information about the Dukes decision or any other matter raised in this Legal Update, please contact your regular Mayer Brown lawyer or one of the following lawyers.*

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