

Supreme Court's Ruling in Wal-Mart Case Stiffens Requirements for Employment Class Actions

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On June 20, the U.S. Supreme Court held that the class action against Wal-Mart had been improperly certified because issues of commonality required for class actions were lacking in the nationwide class of some 1.5 million current and former female employees. The court also held that the monetary relief claims were inappropriate under the federal rule of civil procedure that provides for injunctive and declaratory relief in class actions. See *Wal-Mart Stores, Inc v Dukes, et al.*

As described by the court, "Wal-Mart is the nation's largest private employer. It operated four types of retail stores throughout the country: discount stores, supercenters, neighborhood markets, and Sam's Clubs. ...In all, Wal-Mart operates approximately 3,400 stores and employs more than one million people."

The lawsuit alleged that local managers were granted discretion over pay and promotional decisions that disproportionately favored men, leading to a disparate impact on women. Because Wal-Mart was aware of this, yet failed to "cabin" its managers' authority, it engaged in disparate treatment. The class claimed that all female employees were subjected to this discrimination as a result of the corporate culture which permitted bias against women.

Rule 23 of the Federal Rules of Civil Procedure governs class certification in the federal courts. To obtain certification, a class must demonstrate that it meets certain criteria including "questions of law or fact common to the class" or "commonality." The Wal-Mart class was certified under a sub-rule that provides for injunctive and declaratory relief.

To meet their burden of commonality, the class relied on statistical evidence about pay and promotion disparities between men and women, anecdotal reports of discrimination by approximately 120 female employees and a sociologist who opined on the culture and personnel practices and concluded Wal-Mart was vulnerable to sex discrimination.

The court began its analysis by recognizing that class actions are an exception to the general rule "that litigation is conducted by and on behalf of the individual named parties only." The court explained that commonality requires more than droves of common legal questions such as "Do all the plaintiffs work for Wal-Mart? Do managers have discretion over pay? Is that unlawful? What remedies should be provided?" Rather, the class should be able to demonstrate common answers. Where dissimilarities exist within the proposed class, common answers may be impeded, thereby making class certification

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inappropriate.

The court noted that in discrimination cases, the primary issue is the reason behind the employment decision and, in this case, there were literally millions of decisions involved in a single lawsuit. "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."

In the Wal-mart case, there was no testing procedure for evaluating applicants and incumbents that could be shown to be biased and no general policy of discrimination since the only policy at issue was allowing local managers to exercise discretion based on subjective criteria.

Therefore, some decisions could be sex-neutral, others may have favored attributes that produced a disparate impact and still others could have been intentionally discriminatory. However, showing the invalidity of one manager's discretion does not prove the invalidity of other managers' decisions and does not result in commonalities. Moreover, disparities at the national or even regional level do not show disparities at each of the local levels where there may have been a shortage of interested or qualified women. In short, commonality was lacking and the class had been improperly certified.

Wal-Mart also successfully challenged the appropriateness of the request for back pay by the class under the sub-rule providing for declaratory and injunctive relief claiming it would deprive it of the right to present certain defenses. The court agreed that the rule is designed to provide class members with broad relief, not individualized awards of monetary damages. "Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay."

The long and short of this ruling is that the court's analysis of commonality should make it more difficult for plaintiffs to obtain class certification in discrimination cases. In addition, it will be difficult for class members to pursue monetary damages in the future under the rule which provides for certification based on injunctive or declaratory relief, possibly making such class actions less desirable. The court's ruling is a victory for employers.

While employers have cause to celebrate, they should also review their policies concerning how employment decisions are made to ensure disparate impact is not occurring. Solid employment policies and practices, coupled with ongoing training for decision makers, are essential to avoid liability.

If you need assistance training your decision makers or ensuring you are following best practices, consult with the author or one of Plunkett Cooney's experienced employment attorneys.