

US Supreme Court: Proving Commonality a Hurdle for Future Class Actions

By Sue M. Bendavid

On June 20, the U.S. Supreme Court issued a long-awaited opinion in the nation's largest ever sex discrimination case, ruling in favor of Wal-Mart Stores Inc. This decision is not only "big news" for Wal-Mart; it raises other significant issues for employers nationwide who have been named as defendants in class actions by their employees. *Wal-Mart Stores Inc. v. Dukes*, 2011 DJDAR 8986 (June 20, 2011).

The lawsuit was brought on behalf of 1.5 million current and former female employees who worked for various Wal-Mart retail stores throughout the United States. The lead plaintiff, sometimes referred to as the "Rosa Parks" of her day, was Betty Dukes. Dukes initially worked as a cashier, was later promoted to customer service manager, but then demoted to cashier and greeter after she engaged in a series of disciplinary violations. Along with her co-plaintiffs, Dukes filed a sex discrimination class action arguing the retailer violated Title VII of the Civil Rights Act of 1964.

Dukes alleged that after five years of working for Wal-Mart she was denied opportunities to train for a management position and was demoted after she complained. Her co-plaintiffs made similar allegations and claimed they too were denied advancement opportunities because of their sex.

In an effort to prove the case deserved class treatment, the plaintiffs submitted statistical evidence about pay and promotion disparities, anecdotal reports by approximately 120 employees and testimony of a sociologist, Dr. William Bielby, who analyzed Wal-Mart's culture and practices and opined Wal-Mart was "vulnerable" to gender discrimination.

At the trial level, the U.S. District Court certified the class in 2004. The 9th U.S. Circuit Court of Appeals substantially affirmed the District Court's certification order concluding the plaintiffs' evidence of "commonality" was sufficient to "raise the common question whether Wal-Mart's female employees nationwide were subjected to a single set of corporate policies (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them in violation of Title VII."

In strongly rejecting all of the plaintiffs' evidence, the U.S. Supreme Court reversed and held that commonality — a necessary element for class certification — could not be established.

The Court's opinion centered on the issue of "commonality" and stated that the plaintiffs must demonstrate that class members "have suffered

the same injury" — not merely that they all suffered a violation of the same law. Thus, the focus is on the reasons why employees were treated the way they were, which, under the facts of this case, could not be determined on a class-wide basis.

"What matters to class certification...is not the raising of common 'questions' — even in droves — but, rather the capacity of a class wide proceeding to generate common answers apt to drive the resolution of the litigation..."

As the Court recognized, without some "glue" holding together the reasons for the various employee decisions that were made, the Court stated it would be impossible to say that all class members would produce a common answer to the crucial discrimination question of "why was I disfavored."

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The Court noted that to prove commonality, the plaintiffs would have needed to demonstrate Wal-Mart used either a biased testing procedure or submit significant proof that Wal-Mart operated under a general policy of discrimination and that discrimination manifested itself in hiring and promotion practices in the same general fashion.

The plaintiffs could not meet this burden. In fact, the Court recognized that Wal-Mart's announced policy prohibits sex discrimination. Since local supervisors were given discretion over employee matters, that was the opposite of a uniform discriminatory practice. The Court did not believe managers throughout the company would all exercise their discretion in a common way — against women. Simply put, there was "no convincing proof of a companywide discriminatory pay and promotion policy."

Wal-Mart stated that the Court made the right decision and reiterated that it has had strong policies against discrimination for many years. In fact, a post on Wal-Mart's corporate Web site by Vice President Gisel Ruiz during oral argument stated: "We were pleased to be able to show the Court that Wal-Mart had a strong non-discrimination policy in place

well before the lawsuit was filed, and to illustrate the other flaws in the plaintiff's theories."

According to the Court's opinion, this corporate policy was sufficient for it to conclude that the only commonality was that Wal-Mart had a policy of giving local supervisors discretion over employment matters.

On a different but related issue, the Court also rejected plaintiffs' claims for back pay and held they too may not be certified.

In the separate opinion, Justice Ruth Bader Ginsburg criticized the majority's analysis. While she generally agreed that the plaintiffs' claims should not have been certified for procedural reasons under Rule 23(b)(2), she argued they may be certifiable under Rules 23(b)(3) if the plaintiffs could demonstrate common class questions "predominate" over issues affecting individuals. In fact, Justice Ginsburg recognized, "The risk of discrimination is heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes," and that "discretionary employment practices" may spawn discriminatory results, particularly when an employer has vague criteria for evaluating candidates in place. Citing *Watson v. Fort Worth Bank & Trust*, Justice Ginsburg continued: "A system of delegated discretion, *Watson* held, is a practice actionable under Title VII when it produces discriminatory outcomes."

For employers, this case will no doubt be cited in a variety of class action proceedings nationwide for the proposition that without common injury and common answers as to why certain conduct took place, class treatment of employee claims is improper.



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