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Labor Employment Law Focus

Supreme Court's Landmark *Wal-Mart v. Dukes* Ruling and its Impact on Employment Class Actions

On June 20, 2011, the U.S. Supreme Court reversed the lower courts' certification of a class of approximately 1.5 million current and former female Wal-Mart employees who alleged sex discrimination. In its decision, the Supreme Court raised the bar for plaintiffs seeking class certification, forcing plaintiffs to narrowly define the class when alleging discrimination, and arguably any other legal violation.¹



Domenique Camacho Moran

Writing for the majority, Justice Antonin Scalia ruled Plaintiffs did not meet the "commonality" threshold for class certification under Federal Rule of Civil Procedure 23(a)(2) because they could not demonstrate all class members were subject to the same discriminatory employment policy. While Justices Ginsburg, Breyer, Sotomayor and Kagan disagreed with the application of Rule 23(a)(2), all nine justices agreed that Plaintiffs' backpay claims were improperly certified under Rule 23(b)(2).

Factual and Procedural Background

Plaintiffs asserted claims against Wal-Mart Stores, Inc. ("Wal-Mart") for sex discrimination under Title VII of the Civil Rights Act of 1964. Plaintiffs alleged women employed in Wal-Mart stores were paid less and received fewer promotions than men as a result of Wal-Mart's corporate culture of gender bias, and practice of giving local managers discretion to make pay and promotion decisions. Plaintiffs sought to certify a nationwide class of women who had been subjected to these allegedly discriminatory pay and promotion policies. The class sought injunctive and declaratory relief,

punitive damages, and backpay.

The U.S. District Court for the Northern District of California certified the class, finding Plaintiffs satisfied the requirements of Rule 23(a)(2) and 23(b)(2).² Defendant Wal-Mart appealed, arguing: (1) the putative class did not meet Rule 23(a)'s commonality and typicality requirements; (2) certification of the putative class would eliminate Wal-Mart's ability to respond to Plaintiffs' individual discrimination claims; and (3) class certification under 23(b)(2) was improper because Plaintiffs' individual claims for monetary relief (backpay and compensatory damages) predominated over their claims for injunctive or declaratory remedies.

Reviewing the decision *en banc*, a divided Ninth Circuit substantially affirmed the District Court's certification, concluding (1) Plaintiffs met Rule 23(a)(2)'s commonality and typicality requirements; (2) their backpay claims were properly certified under Rule 23(b)(2) because those claims did not predominate over the declaratory and injunctive relief claims;³ and (3) the class action could be manageably tried without depriving Wal-Mart of its right to present its statutory defenses if the District Court selected a random set of claims for valuation and then extrapolated the validity and value of the untested claims from the sample set.⁴

On June 20, 2011, the Supreme Court reversed the Ninth Circuit's decision and held class certification was inappropriate for two reasons. Firstly, Plaintiffs did not satisfy Rule 23(a)(2)'s commonality requirement. Secondly, the Supreme Court held claims for individualized relief, such as backpay, could not be certified under Rule 23(b)(2) because they are not incidental to injunctive relief.

Standards for Class Certification Under Rule 23

Under Federal Rule of Civil Procedure

23, a party seeking to certify a class must demonstrate it has met all four requirements of Rule 23(a), and at least one of the requirements of Rule 23(b).⁵ Rule 23(a) requires: "(1) the class is so numerous that



Dariely Rodriguez

joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the

class."⁶ The Rule's four requirements – numerosity, commonality, typicality, and adequate representation – effectively limit class claims to those fairly encompassed by the named plaintiff's claims.⁷

After satisfying the elements of Rule 23(a), the proposed class must satisfy at least one of the three requirements listed in Rule 23(b). Rule 23(b)(1) permits a class certification where "prosecuting separate actions by or against individual class members would create a risk of either inconsistent or varying adjudications, or adjudications ... that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Rule 23(b)(2) applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Certification of a class under Rule 23(b)(3) will be granted where "questions of law or fact common to class members predominate over any questions

affecting only individual members,” and a class action would be “superior to other available methods for fairly and efficiently adjudicating the controversy.”⁸

Supreme Court’s Analysis

In *Wal-Mart*, Plaintiffs sought class certification under Rules 23(a) and (b)(2). The Supreme Court’s Rule 23 analysis focused on whether the proposed class satisfied Rule 23(a)(2)’s commonality requirement, and whether the putative class members’ backpay claims could be certified under Rule 23(b)(2).

A. Rule 23(a)(2) – Heightened “Significant Proof Standard”

Speaking for the 5-4 majority, Justice Scalia held that Plaintiffs did not satisfy the commonality standard under Rule 23(a)(2) because they failed to convincingly prove Wal-Mart operated under a company-wide discriminatory pay and promotion policy. Even though circuit courts have liberally applied the commonality requirement, here, the Court held commonality requires class members demonstrate they suffered the “same injury,”⁹ and not merely a violation of the same law. In addition, the putative class members’ claims must be based on a common contention “capable of classwide resolution.”¹⁰ The Court opined certification is proper only after a rigorous analysis by the courts, which, the Court acknowledged, often involves a review of the merits of plaintiff’s underlying claim.¹¹

Applying this standard to the Wal-Mart proposed class, the Court found the facts establishing commonality necessarily overlapped with Plaintiffs’ allegation that Wal-Mart engaged in a pattern or practice of discrimination. In order to meet the commonality standard, the Supreme Court would have required Plaintiffs to establish a common answer to the crucial question “why was I disfavored” by submitting “significant proof” Wal-Mart operated under a general policy of discrimination.¹² Although the record showed Wal-Mart had a policy of allowing local supervisors to exercise discretion when making pay and promotion decisions, the Court found this fact alone to be insufficient. Rather, such discretion could result in three different scenarios.¹³ Firstly, managers may have based their pay and promotion decisions on “sex-neutral, performance-based” reasons. Secondly, managers may have based their decisions on factors, such as employment test scores, that cause a disparate impact. Thirdly, some managers may have been guilty of intentional sex discrimination. Plaintiffs’ evidence, which included expert testimony, statistical evidence and anecdotal evidence, failed to show all individual, discretionary personnel decisions were discriminatory and thus, failed to meet the commonality standard.

For example, Plaintiffs’ expert testified Wal-Mart’s “strong corporate culture”

made it “vulnerable” to “gender bias.”¹⁴ The expert’s inability to “determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart,”¹⁵ resulted in the Court rejecting the testimony, stating it was “worlds away” from meeting the “significant proof” standard. Similarly, while Plaintiffs’ regional statistical analyses showed significant disparities in promotions between men and women, the Court also rejected this evidence because it did “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.”¹⁶ The Court found that merely proving the discretionary system had produced a racial or sexual disparity was not enough; rather Plaintiffs needed to challenge a specific employment practice that tied the putative class members’ claims together. Finally, the 120 employee affidavits with reports of alleged discrimination (1 affidavit for approximately every 12,500 class members) only alleged discrimination at a fraction of Wal-Mart’s 3,400 stores.¹⁷ Consequently, the Court held “even if every single” employee account were true, it was insufficient to show the entire company operated under a general policy of discrimination.

For these reasons, a 5-4 majority ruled class certification was inappropriate. Rather than ending its analysis there, the Court reviewed the lower court’s finding with regard to Plaintiffs’ ability to adequately establish class certification under Rule 23(b)(2).

B. Class Certification is Inappropriate Under Rule 23(b)(2)

A unanimous Court held Plaintiffs’ claims for individualized monetary damages could not be certified under Rule 23(b)(2) because such claims, specifically those seeking backpay, are not incidental to injunctive or declaratory relief. The Court held that Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each class member. Rule 23(b)(2), the Court held, does not apply to cases where class members would be entitled to individualized injunctive or declaratory relief, or individualized awards of monetary damages. According to the Court, claims for individualized monetary claims can only be certified pursuant to Rule 23(b)(3).¹⁸ Thus, the Court held Wal-Mart was entitled to individually litigate each employee’s eligibility for backpay.¹⁹

Conclusion

The *Wal-Mart* decision will impact class actions in employment discrimination cases across the country. Plaintiffs will now be forced to narrowly tailor their proposed class to make sure the class claims can be resolved by a common

answer. Lower courts will now be able to review the merits of putative class claims when evaluating class certification motions. While the *Wal-Mart* decision will likely deter plaintiffs from filing overbroad class actions against large employers, it probably will not affect the certification of smaller, more targeted employment class actions based on specific employment practices.

Domenique Camacho Moran is a partner and leads the Farrell Fritz’s Labor & Employment Practice Group. Ms. Moran has represented employers in connection with all types of employment litigation, including matters arising under Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act, the Fair Labor Standards Act, and the New York Human Rights Law.

Dariely Rodriguez is an associate in the firm’s commercial litigation department, concentrating in labor and employment law. She has extensive experience counseling employers from a variety of industries on employment-related issues.

1. *Wal-Mart Stores, Inc. v. Dukes et al.*, 564 U.S. (2011).
2. *Dukes et al. v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 145 (N.D. Cal. 2004).
3. In order to obtain this result, the Court of Appeals remanded plaintiffs’ punitive damages claim in the (b)(2) class so the District Court could determine whether the punitive damages would cause the monetary relief to predominate over the plaintiffs’ requests for injunctive and declaratory relief. See *Dukes et al. v. Wal-Mart Stores, Inc.* 603 F.3d, at 621.
4. This approach was approved by the Ninth Circuit in *Hilao v. Estate of Marcos*, 103 F.3d 767, 782-87 (1996). There, compensatory damages for about 9,541 class members were calculated by selecting 137 claims at random, referring those claims to a special master for valuation, and then extrapolating the validity and value of the untested claims from the sample set. *Id.* at 625-626.
5. *Zinser v. Accufiz Research Inst., Inc.*, 253 F.3d 1180, 1186 (2001).
6. Fed. R. Civ. P. 23(a).
7. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982).
8. Fed. R. Civ. P. 23(b)(1)-(3).
9. *Falcon*, *supra* at 157.
10. *Dukes*, *supra* at 9.
11. *Falcon*, *supra* at 160.
12. *Dukes*, *supra* at 12.
13. The Court has recognized “inappropriate cases,” giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory. *Watson. Fort Worth Bank & Trust*, 487 U.S. 977, 990-91 (1998).
14. 222 F.R.D. at 154.
15. *Id.* at 192.
16. 603 F.3d, at 637.
17. The Court also stated more than half of the affidavits were from employees concentrated in six states (Alabama, California, Florida, Missouri, Texas, and Wisconsin); half of all States had only one or two anecdotes; and 14 States had no affidavits at all. 603 F.3d, at 634.
18. A class may be certified under Rule 23(b)(3) when “questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. A (b)(3) class is not mandatory; class members are entitled to receive notice, and have the option of withdrawing from the class.
19. The Court rejected the Ninth Circuit’s attempt to circumvent Wal-Mart’s right to present its statutory defenses with a Trial by Formula, under which the District Court would select a random set of claims for valuation and then extrapolate the validity and value of the untested claims from the sample set.