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U.S. Supreme Court Reverses Wal-Mart Sex Bias Class Action

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U.S. SUPREME COURT REVERSES WAL-MART SEX BIAS CLASS ACTION

On Monday, June 20, 2011, the United States Supreme Court published its much-awaited opinion in the case of *Wal-Mart Stores, Inc. v. Dukes, et al.,* No. 10-277, U.S. Supreme Court (Jun. 20, 2011) (available at http://www.supremecourt.gov/opinions/10pdf/10-277.pdf), holding that 1.5 million female workers of Wal-Mart cannot sue in a class action alleging gender discrimination in pay and promotions.

Background Facts

Wal-Mart is the largest private employer in the United States, operating 3,400 retail stores in all 50 states. The three female plaintiffs worked for Wal-Mart in different stores, and in different job capacities. They alleged that even though Wal-Mart had written policies forbidding gender discrimination, that Wal-Mart store-level managers, predominantly male, vested with significant independent discretion, engaged in a nationwide and companywide "pattern and practice" of gender discrimination. They claimed that such gender discrimination violated Title VII of the Civil Rights Act of 1964, and sued on behalf of all current and former female workers of Wal-Mart since December, 1998, seeking an injunction barring future discrimination, and "backpay", but not "compensatory damages".

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The United States District Court for the Northern District of California, in San Francisco, held that plaintiffs could use the procedural tool of class action to sue Wal-Mart, because the trial court found that the claims presented common issues of gender discrimination. On appeal, the United States Court of Appeals for the Ninth Circuit agreed, but limited the class to only current employees, as former employees had no real interest in an injunction barring future discrimination.

The U.S. Supreme Court reversed the Court of Appeals.

Legal Analysis of the Supreme Court

The Federal Rules of Civil Procedure create different kinds of class action cases. In cases specifically not seeking monetary relief, just injunctions, the burden is not as high to create a class action, but the class members do not receive notice of the class action. See, Fed. R. Civ. Pro. 23(b)(2). When seeking monetary relief, a higher standard applies, requiring that the common issues "predominate", and all members of the class receive an "opt out" notice. See, Fed. R. Civ. Pro. 23(b)(3). The District Court and Court of Appeals in *Wal-Mart v. Dukes* approved the class action under the former, less stringent rule, Rule 23(b)(2), for injunctions only.

In the Supreme Court, plaintiffs argued that independent discretion left too much potential for discrimination by store managers, but the Supreme Court found that plaintiffs presented no actual evidence of a broader discriminatory practice. Plaintiffs' 125 supporting affidavits were actually from very few geographic regions, and varied in their allegations. Where the plaintiffs specifically sought recovery for "back pay", the case also did not fit well into the easier standard under Rule 23(b)(2) for injunction cases only. The measurement of damages would clearly be individual, and the employer should be allowed to defend each individual claim. The Supreme Court found significant problems with the Ninth Circuit Court of Appeals analysis for injunctions. The Ninth Circuit permitted a statistical sample of the plaintiffs' claims, applied the employer's defenses against such random claims, and then extrapolated the percentage of times that such defenses succeeded against all claimants. The Ninth Circuit also found that class members could have waived "compensatory damages" claims, excluded from the defined class, without even receiving notice of the lawsuit.

In addition to finding the class action inappropriate under Rule 23(b)(2), for non-monetary cases, the majority of the Supreme Court, led by Justice Scalia, also more broadly held the case inappropriate for any kind of class action, where the plaintiffs had nothing in common other than being female, and working at Wal-Mart. Justices Ginsburg, Breyer, Sotomayor and Kagan agreed that the case failed under Rule 23(b)(2), but dissented from the larger holding that there could be no class action at all.

The plaintiffs will now be required to pursue their claims of gender discrimination individually against Wal-Mart and not as a class action.

Employer Impact

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This case again reminds employers that they must maintain anti-discrimination policies that demand that discrimination be reported, and anti-retaliation policies promising to reasonably investigate. More important, if discrimination is reported, it must actually be investigated. A significant factor in the *Dukes* decision was Wal-Mart's clearly written policy prohibiting discrimination, widely implemented, and evidence showing that it did not tolerate discrimination.

Employers may also reconsider informal promotion opportunities that amount to little more than "a tap on the shoulder." Consider posting promotion opportunities internally in a break room, or electronically, so that all employees can see them and apply if they want. Such transparency may discourage speculation of discrimination, and give an employer good evidence to use in defense should allegations of promotion rigging be alleged.

Additional Information

McNair Law Firm has experienced attorneys who focus on aspects of employment and labor law. If you have any questions, please contact the McNair attorney with whom you work or any of the attorneys included in our Labor & Employment Practice Group on our website.

This Supreme Court Alert provides an overview of certain aspects of a specific court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.