



Wal-Mart Stores, Inc. v. Dukes

June 22, 2011

In *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277 (June 20, 2011), the Supreme Court vacated the certification of the largest class action in history and issued a decision limiting the availability of class actions to litigate employment discrimination actions that are not united by significant proof that the defendant operated under a general policy of discrimination. The decision contains several pronouncements of key significance to class actions generally:

- *Courts Must Resolve Merits Issues on Class Certification If Relevant to Certification.* An important component of the Court's decision in *Dukes* is its holding that the district courts must conduct a thorough analysis and adjudication as to whether the Rule 23 (a) and (b) standards for class certification have been satisfied, which will in many cases involve resolution of issues related to the merits of the underlying dispute. In *Dukes*, the Court emphasized that the Rule 23 class certification analysis is more than a pleading standard, and that the proponent of class certification must present *significant* proof that there are common questions of law and fact to warrant class adjudication.
- *Individualized Money Damages Claims Belong Only in Rule 23(b)(3) Classes.* Prior to the *Dukes* decision, many courts had looked to notes of the Advisory Committee on the Federal Rules of Civil Procedure as guidance that monetary relief sought in the context of a proposed Federal Rule 23(b)(2) injunctive relief or declaratory judgment class is not fatal to certification so long as the final relief sought did not relate *exclusively or predominately* to money damages. The possibility that Rule 23(b)(2) cases may seek money as relief has been foreclosed by the *Dukes* decision, except perhaps in those rare cases in which the monetary relief flows directly from liability to the class as a whole on the claims as to which an injunction or declaratory relief is obtained, *i.e.*, not individualized determinations.
- *The Commonality Hurdle of Rule 23(a) Matters and Must Be Carefully Considered.* The *Dukes* Court required a rigorous analysis of whether a proposed class action presents a common issue of law or fact that is material to the resolution of the action as a whole. The Court rejected the Plaintiffs' employment discrimination theory that Wal-Mart's decentralized and subjective decision-making procedures constituted a common discriminatory employment practice applicable to the entire class. Although the Court recognized that employment discrimination liability may in some cases be found based on such subjective and decentralized practices, it held that the maintenance of such practices does not logically compel the conclusion that they result in a systemic pattern or practice of unlawful discrimination throughout the organization.
- *The Court Has Signaled that Daubert Gatekeeper Determinations May Be Appropriate At The Certification Stage.* The Court expressly stated that it "doubt[ed]" the district court's determination in *Dukes* that *Daubert* determinations about the admissibility of expert testimony were not required to be made at the class certification stage. Although the

Court did not resolve this issue in this case, it signaled that district courts may be required to conduct *Daubert* analyses of proffered expert testimony when deciding class certification motions.

- *Skepticism Toward Extrapolation Techniques.* The Court rejected the Ninth Circuit's determination that the defendant's right to present individual defenses could be preserved by allowing it to defend randomly selected sample cases, and the findings extrapolated to the claims of remaining class members. "Trial by Formula," the Court ruled, is incompatible with the Rules Enabling Act, which forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right," including the defendant's right to litigate its statutory defenses to individual claims.

More detail on the facts of the case and the Court's decision follows.

BACKGROUND

Dukes involved a putative class of 1.5 million current and former female Wal-Mart employees seeking injunctive and declaratory relief, and back pay awards to each individual, under Title VII of the Civil Rights Act of 1964 and Federal Rule of Civil Procedure 23. The six named plaintiffs ("Plaintiffs") filed a putative class action asserting gender discrimination claims under Title VII of the 1964 Civil Rights Act and seeking back pay, injunctive and declaratory relief, and punitive damages. Plaintiffs alleged that women employed in Wal-Mart stores: (1) are paid less than men in comparable positions, despite having higher performance in ratings and greater seniority; and (2) receive fewer—and wait longer for—promotions to in-store management positions than men. Plaintiffs alleged that Wal-Mart's corporate culture fosters and facilitates gender stereotyping and discrimination, that the subjective and decentralized decision-making practices used by Wal-Mart and underlying the discrimination are consistent throughout all of the approximately 3,400 stores and Wal-Mart's geographical regions, and thus the alleged discrimination is common to all women. The district court certified the class pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, and the Ninth Circuit affirmed.¹

The Supreme Court held that a claim based on Wal-Mart's alleged policy of giving broad discretion to local managers to make pay and promotion decisions did not provide significant proof of any company-wide discriminatory policy and thus failed to establish any common question of fact or law concerning a particular employment policy or practice that would satisfy

¹ A party seeking to certify a class must demonstrate that it has met all four requirements of Rule 23(a) of the Federal Rules of Civil Procedure. The four prerequisites that a party must meet under Rule 23(a) before a case may be certified as a class action are: (1) that the class is so numerous that joinder of all members is impracticable; (2) that there are questions of law or fact common to the class; (3) that the claims or defenses of the representative parties are typical of those of the class; and (4) that the representative parties will adequately protect the interests of the class. A party seeking to certify a class must also demonstrate that the class action is maintainable under any of the three categories set forth in Rule 23(b). Rule 23(b)(2), upon which Plaintiffs relied, applies "if the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

the requirements of Federal Rule 23(a). The Court further held that class action proceedings brought under Federal Rule 23(b)(2) may not include claims for individualized relief such as backpay or other monetary relief where the monetary relief is not incidental to the injunctive or declaratory relief being sought. The Court's holding provides two significant defenses in certain class action employment discrimination suits, and provides additional guidance to the lower courts on the type of inquiry that must be conducted in the course of deciding issues of class certification not only in employment discrimination cases but in others as well.

THE SUPREME COURT DECISION

Commonality

In a 5-4 decision, in which Chief Justice Roberts, Justice Kennedy, Justice Thomas and Justice Alito joined, Justice Scalia emphasized that the "crux" of this case is the commonality requirement in Rule 23(a)(2). As a preliminary matter, Justice Scalia held that it is sometimes necessary to "probe behind the pleadings" in order to properly evaluate whether class certification is appropriate. Citing *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982). Furthermore, certification is proper only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.* at 161. Additionally, Justice Scalia explained that such "rigorous analysis" will often entail some overlap with the merits of plaintiffs' underlying claims, an analysis which the lower courts are directed to undertake as part of the class certification determination.

In determining whether plaintiffs in a putative class action raise questions of law or fact common to the class, Justice Scalia underscored that plaintiffs' claims "must depend upon a common contention . . . That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Justice Scalia held that in the *Dukes* action, proof of commonality necessarily overlaps with Plaintiffs' claim that Wal-Mart engaged in a pattern or practice of discrimination because the central inquiry in an individual's Title VII claim is the reason for an alleged employment decision. Therefore, Justice Scalia stressed that the commonality requirement can only be satisfied if there is "some glue holding the alleged *reasons*" for all of the millions of individual employment decisions together.

In analyzing whether Wal-Mart's allegedly subjective decision-making processes could possibly raise a common question, Justice Scalia first noted that Wal-Mart's "policy" of "allowing discretion by local supervisors over employment matters" "[o]n its face . . . is just the opposite of a uniform practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices." Although recognizing that subjective discretionary policies might conceivably give rise to Title VII claims under a disparate-impact theory on behalf of a putative class, Justice Scalia underscored that "merely proving that the discretionary system has produced a racial or sexual disparity *is not enough*"; the plaintiff must identify a specific employment practice that is challenged. The Court concluded that Plaintiffs failed to identify a "common mode of exercising discretion that pervades the entire company."

Claims for Monetary Relief

The Court unanimously held that the Plaintiffs' claims for backpay were improperly certified under Rule 23(b)(2) because Rule 23(b)(2) "applies only when a single injunction or declaratory judgment would provide relief." Therefore, claims for *individualized* relief, like backpay, cannot be certified under Rule 23(b)(2). The Supreme Court held that the Rule's history and structure indicate that individualized monetary claims belong instead in Rule 23(b)(3), with its procedural protections of predominance, superiority, mandatory notice, and the right of class members to opt out so as not to be bound by the class result. The Court declined to decide whether claims for monetary relief "incidental" to injunctive or declaratory relief could ever be certified under Rule 23(b)(2).

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For further information about this decision, please feel free to contact members of the Firm's Litigation Department.

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