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Supreme Court Hears Oral Argument on Whether Largest Discrimination Class Action in History Should Survive

The stakes for employers in employment discrimination class actions have never been higher. On Tuesday, the United States Supreme Court heard oral argument in *Dukes v. Wal-Mart,* the largest employment discrimination class action in history involving an estimated 1.5 million women across approximately 3,400 Wal-Mart stores nationwide. The Court is expected to issue its opinion this summer.

The plaintiffs in *Dukes* assert that the common thread tying their claims together is Wal-Mart's company-wide "policy" of giving store managers too much discretion to make pay and promotion decisions based upon subjective criteria. They claim this policy is applied in the same way to all women in the class because Wal-Mart's "uniform corporate culture" informs the managers how to exercise their discretion. Plaintiffs concede that not all 1.5 million women were victims of discrimination. But they claim that they can identify victims and can award back pay simply by applying a formula to the performance and pay data stored in Wal-Mart's databases.

The Court challenged these assumptions head on and focused their attention on two main questions: What exactly is the unlawful policy at issue here? And how will Wal-Mart present defenses as to the women who were *not* victims of discrimination despite what the statistical evidence shows?

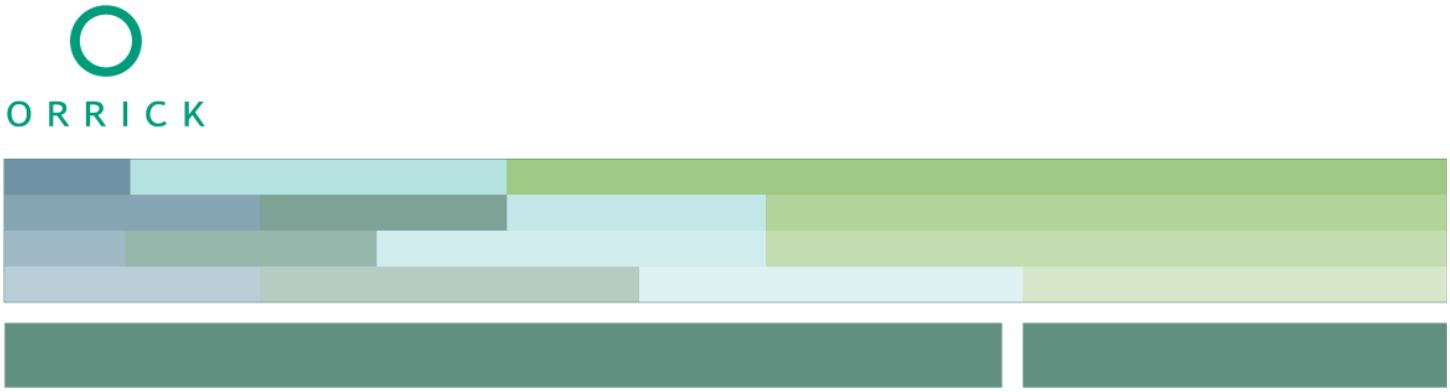
High Court Finds Key Weaknesses in Plaintiffs' Arguments But Hints at Possibility of "Injunctive Relief" Class

Inconsistency in Plaintiffs' "Commonality" Theory – "I'm getting whipsawed here."

Justice Kennedy captured the key logical gap in the plaintiffs' argument. "Your complaint faces in two directions," he said. "Number one, you said this is a culture where Arkansas knows, the headquarters knows, everything that's going on. Then in the next breath, you say, well, now these supervisors have too much discretion. It seems to me there's an inconsistency there, and I'm just not sure what the unlawful policy is."

Justice Scalia was soon to follow: "I'm getting whipsawed here. On the one hand, you say the problem is that they were utterly subjective, and on the other hand you say there is a strong corporate culture that guides all of this. Well, which is it?"

According to Joseph Sellers, counsel for plaintiffs, Wal-Mart managers "are given this discretion, but they are informed by the company about how to exercise that discretion." While Wal-Mart has a written policy *against* sex discrimination, Sellers denounced it as mere "lip service" and indicated that managers were instructed otherwise through training—an issue that he says is for trial, not the certification stage. Sellers further agreed with Justice Breyer's suggestion that the common question is whether central management should have withdrawn some of the subjective discretion if it knew or should have known that the management training was causing gender disparities.



"How do you work out the back pay?"

Justices Ginsburg, Kagan, and Sotomayor seemed less concerned with the commonality concerns and chose to focus more on the remedial aspects of the case. Justice Ginsburg pointedly asked: "How do you work out the back pay?" Sellers said they could "use a formula relying on Wal-Mart's robust database in which it captures performance, seniority, and a host of other job-related variables" and permits a "very precise comparison in a way that having individual hearings relying on hazy memories, post hoc rationalizations, doesn't."

Justice Sotomayor then asked, "when in this process is the defendant going to be given an opportunity to defend against [the statistical] finding?" She remarked that this would require an individualized inquiry, which the district court said would be "impossible" to accomplish given the size of the class.

Sellers indicated that Wal-Mart simply has not produced any evidence to show that it can reconstruct the 10-year old decisions more reliably than what is maintained in the databases. Justice Scalia was unconvinced, remarking sarcastically that "[w]e should use that in jury trials, too, for really old cases."

Might the Court Take a Middle-of-the-Road Approach?

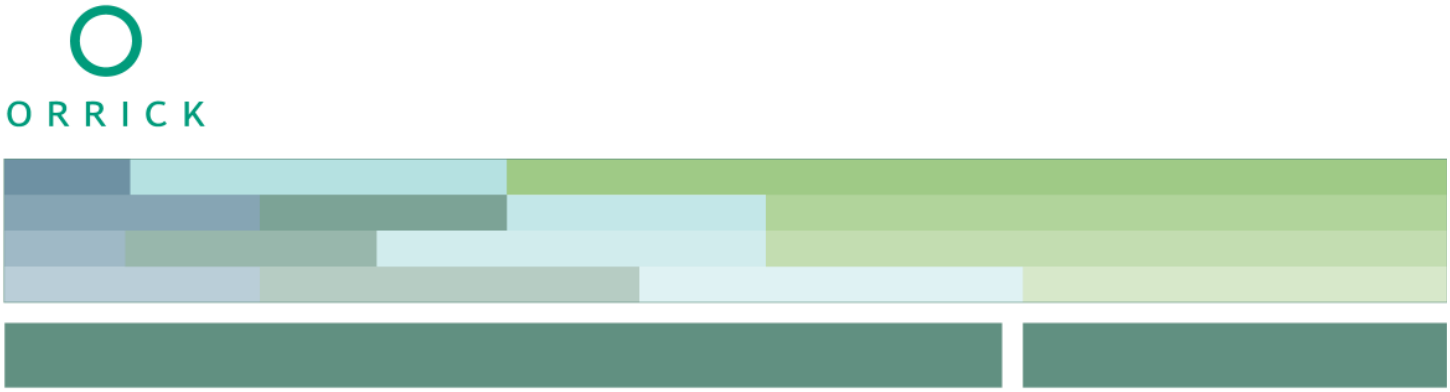
Justice Sotomayor hinted that, given the back-pay issues, she may be inclined to support class certification as to injunctive relief only. She was quick to ask Sellers, "[w]hat would the injunction look like in this case?" And she asked counsel for Wal-Mart, Theodore Boutrous, Jr., whether it would be possible to separate out the injunctive relief claims from the back pay claims.

Boutrous conceded that it's "at least a possibility" and "[i]t would certainly be better than this, shoe-horning these monetary relief claims that are so individualized." Nevertheless, he said that it would also create problems because not all women were affected the same way by the "common" policy. One key conflict he noted was that there are 544 managers who are alleged to be discriminators and victims simultaneously. "They can't opt out, they're current employees, they're former employees, they cut across every position in the country, and there's no demonstration that they're being affected in a common way." That makes it "impossible to make…sweeping generalizations" about the impact of the company's policies.

Whether the injunction-only approach will appeal to the rest of the Justices is unclear. However, the three women Justices did appear to take a united front throughout the argument, and Justice Breyer indicated some support for the approach during Mr. Boutrous's rebuttal.

Guidance for Employers in Anticipation of the High Court's Opinion

While it is impossible to predict the outcome of *Dukes*, employers should take steps in the meantime to carefully review how they make decisions regarding pay and promotions and minimize potential exposure to class litigation. The recent fervor with which federal agencies and the private class action bar are tackling equal pay issues confirms that these cases are here to stay, regardless of the *Dukes* outcome.



The most obvious first step for employers is to review the use of subjectivity in employment decisions. Subjective decision making is a common and lawful practice, and most job positions require at least some level of subjective evaluation. Fortunately, there is nothing inherently unlawful in applying some subjective criteria to personnel decisions. However, employee plaintiffs are increasingly arguing that it is subject to abuse. To successfully defend subjectivity, it is important to ensure that (a) the subjective factors in any evaluation or promotion process are well thought out and reasonably quantifiable; (b) managers are trained in how to use and rely on subjective factors; and (c) there are appropriate safeguards for review and appeal.

Employers are also advised to conduct internal compensation audits to ensure its policies and practices are not causing sex-based pay and promotion disparities. However, as with any audit, employers should be mindful of the protections afforded by the attorney-client privilege and attorney work product doctrine, since informal or unprotected analyses and studies are discoverable by OFCCP, EEOC, and in private litigation.

The Orrick Team

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- Strategic representation in OFCCP audits and EEOC systemic investigations and claim defense in private class actions
- Reviewing pay and related policies and conducting privileged audits
- Creating training materials for HR, legal and decision-makers
- Advising on data retention policies

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