



## What is on the Horizon for Employers after *Dukes v. Wal-Mart*?

In a well-reasoned decision that will impact class actions of every stripe, the United States Supreme Court on Monday shut the door to a 1.5 million woman class in *Dukes v. Wal-Mart*. Plaintiffs sought to certify their Title VII gender discrimination claims by showing that Wal-Mart had a common policy giving local managers discretion in making pay and promotion decisions, and that such discretion was exercised, class-wide, to disproportionately benefit men over women.

In reversing the lower courts' decisions, the Court stated that "the crux of this case is commonality," and Plaintiffs failed to meet their burden under Federal Rule of Civil Procedure 23(a)(2). Justice Scalia, writing for Justices Roberts, Kennedy, Thomas, and Alito, explained that plaintiffs were attempting to "sue about literally millions of employment decisions at once." But he noted that "[w]ithout some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*." Any plaintiff can craft a complaint to raise common questions. But, **"[r]eciting these questions is not sufficient to obtain class certification."** Rather, the claims "must depend on a common contention" that can be resolved "in one stroke" and is "capable of classwide resolution."

The Court concluded that plaintiffs lacked enough "glue" to hold their claims together. Wal-Mart had no generally applicable testing procedure disfavoring women, so plaintiffs instead tried to show that the company had a "general policy of discrimination." Plaintiffs' only evidence was the testimony of a sociological expert who opined that Wal-Mart had a "strong corporate culture" that made it "vulnerable" to gender bias. What the expert could not do, however, was to say how many or which employment decisions at Wal-Mart were affected by "stereotyped thinking." The Court therefore disregarded the expert's testimony. The Court also cast doubt on whether the expert's opinion should have even been admissible in this circumstance, under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

Likewise, even though they presented statistical evidence of sex-based disparities in Wal-Mart's workforce, the plaintiffs could not show commonality by simply pointing to Wal-Mart's practice of granting individual managers discretion to make subjective employment decisions. "Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice." The Court's opinion also implicated the potential scope of pattern and practice claims asserted by government agencies by reiterating that Title VII claims require proof of "the reason for a particular employment decision" rather than simply proof of statistical disparity.

On a more narrow issue, the Court also unanimously held that the plaintiff class should not have been certified under FRCP 23(b)(2), which allows for "final injunctive relief or...declaratory relief" for the class "as a whole." The plaintiffs sued for backpay under this section of the statute, arguing that backpay was "merely incidental" to any injunctive or declaratory relief available under Title VII. However, the Court held that recovery of backpay was not an appropriate remedy under this section of the rule, not least because Wal-Mart was entitled to "litigate its statutory defenses to individual [backpay] claims."

While the Justices unanimously held that the class should not have been certified under FRCP 23(b)(2), Justices Ginsburg, Bryer, Sotomayor, and Kagan dissented from the Court's opinion on the issue of commonality under FRCP 23(a)(2). They would have remanded the case to see if it could alternatively be certified under Rule 23(b)(3), which, among other things, requires plaintiffs to show that common issues predominate. They believe the majority improperly imported the more demanding standard of Rule 23(b)(3) into what they believed should be an "easily satisfied" commonality inquiry under 23(a)(2).



## Implications for Employers

Although *Dukes* is notable for the size of the class sought to be certified, the Court's decision applies to all class actions and emphasizes the heavy burden plaintiffs have when pursuing a case on behalf of others. In the employment context, the decision reassures employers that a common practice of delegating decision making to local management alone is not a "common policy" that supports class certification.

However, employers should not consider themselves completely immune from class liability. Employers can expect that the decision will further invigorate already motivated government agencies, like the EEOC and the OFCCP, in investigating and pursuing systemic discrimination claims. The plaintiffs' bar will also likely continue to assert claims based on perceived patterns of discriminatory actions or policies, particularly when there is some common "glue" that ties discriminatory decisions together, such as a biased testing procedure or a singular decision maker.

This is not to say that uniform practices across an employer's workforce are unlawful or should not be employed. In many instances, those common practices are neutral, if not meaningful in reducing gender, racial, or other disparities. But the *Dukes* decision reinforces the importance of evaluating company-wide hiring, selection, pay, and promotion practices to ensure that those practices do not have a disparate impact on protected employees or, worse yet, reflect intentional discrimination. Employers should also have and implement a strong anti-discrimination policy, whether or not individual employment decisions are made in a decentralized manner.

## The Orrick Team

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- Reviewing pay and related policies and conducting privileged audits
- Creating training materials for HR, legal and decision-makers
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