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U.S. Supreme Court Addresses Commonality and "Injunction Class" Requirements in Reversing Certification of Employee Gender Discrimination Class

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In a 5-4 decision, the U.S. Supreme Court reversed the certification of "one of the most expansive class actions ever," brought on behalf of 1.5 million current and former female Wal-Mart employees. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. __, No. 10-277 (June 20, 2011). Complaining that they were paid less than men in comparable positions and received fewer promotions, the plaintiffs sued under Title VII of the Civil Rights Act of 1964 for injunctive and declaratory relief, as well as backpay. In reversing the class certification ordered under Federal Rule of Civil Procedure 23(b)(2), the Court (in an opinion authored by Justice Scalia) reiterated and clarified some class certification basics:

- The proper standards for Rule 23(a) commonality, particularly as it applies in employment discrimination cases;
- The permissible overlap between a rigorous commonality analysis and the merits; and
- The application of Rule 23(b)(2), which allows for certification of classes seeking declaratory or injunctive relief, when a class also seeks monetary relief.

In addition, without definitively resolving the issue, the Court cast doubt on the theory that class certification proceedings are exempt from the standards for expert testimony admission set forth in Rule 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc*, 509 U.S. 579 (1993). Slip op. at 13-14.

Wal-Mart operates 3,400 stores across 41 regions, and its local managers have broad discretion to make pay and promotion decisions in a largely subjective manner. *Id.* at 1-2. The plaintiffs contended that the managers exercised this discretion disproportionately in favor of men, creating a disparate impact on female employees in violation of Title VII. *Id.* at 2-4. To obtain class certification, the plaintiffs had to demonstrate all of the Rule 23(a) requirements and at least one of the Rule 23(b) requirements. *Id.* at 4-5.

In overturning the district court's certification order and the Ninth Circuit Court of Appeals' affirming decision, the Court identified the "crux of this case" as commonality. Slip op. at 8. Although Rule 23(a)(2) provides that commonality is shown if "there are questions of law or fact common to the class," the Court noted that this requirement is "easy to misread . . . ." *Id.* at 8-9. In examining the commonality prong, the Court distinguished between questions that plaintiffs routinely claim are "common" and those that are common as a matter of law under Rule 23(a). By way of example, questions like "Do our managers have discretion over pay?" and "Do all employees work for Wal-Mart?" are insufficient to support class certification. Instead, to establish commonality plaintiffs must show that the members of the class "have suffered the same injury," which means more than that they all suffered a violation of the same provision of law (*e.g.*, Title VII). *Id.* at 9. Instead, the class' claims must rest on a common contention that is susceptible to classwide resolution, such that determining the contention's truth or falsity "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

The Court acknowledged that the commonality inquiry may permissibly overlap with merits issues. *Id.* at 10-12. For example, in this Title VII case, whether the crucial merits question of "*why was I disfavored*" could be resolved on a classwide basis required a rigorous analysis into whether "some glue hold[s] the alleged *reasons* for all those decisions together . . . ." *Id.* at 12 (emphasis in original).

In its 1982 decision in *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, the Court discussed two methods of proving that an employee class suffered the same discriminatory treatment: (1) the employer used a biased testing procedure to evaluate employee applicants; or (2) the employer "operated under a general policy of discrimination," shown by "significant proof." Slip op. at 12-13. The *Wal-Mart* Court found that the first method did not apply and that plaintiffs' proof failed to satisfy the second method. Evidence that a corporate culture created a vulnerability to gender bias was not sufficient, nor was the fact that Wal-Mart allowed its local managers broad discretion. *Id.* at 13-15. Indeed, such discretion "is just the opposite of a uniform employment practice" that could prove commonality. *Id.* at 14.

Plaintiffs' statistical and anecdotal evidence failed to demonstrate that commonality existed, as it did not permit an inference that discretionary decisions at the local levels resulted from a company-wide discrimination policy. *Id.* at 16-18. Indeed, other than the bare existence of delegated discretion, the plaintiffs did not identify any specific employment practice, "much less one that ties all their 1.5 million claims together." *Id.* at 17. While agreeing that Rule 23(a)(2) can be satisfied by just one common question, the Court concluded that plaintiffs' failure to prove a company-wide discriminatory pay and promotion policy defeated a commonality showing. *Id.* at 19.

The Court also held that the backpay claims could not be certified under Rule 23(b)(2), which allows class treatment when "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Slip op. at 20. Expressly sidestepping the question of whether this subsection applies only when injunctive or declaratory relief is the sole relief sought, the Court held that claims for monetary relief may not be certified under Rule 23(b)(2) where such relief is not merely "incidental" to the injunctive or declaratory relief. *Id.* The key to a (b)(2) class is the remedy's "indivisible nature," which is destroyed if members would be entitled to individualized relief such as monetary damages. *Id.* at 20-21. Classes seeking non-incidental monetary awards must be certified under Rule 23(b)(3), which requires additional predominance and superiority showings, as well as opt-out notices to class members. *Id.* at 22-23.

The Court rejected a "predominance" test for whether a monetary claim is "incidental." Slip op. at 23-25. Without deciding "whether there are any forms of 'incidental' monetary relief" that could be certified in a Rule 23(b)(2) class, the Court determined that the plaintiffs could not meet an "incidental" relief standard, given Title VII's detailed and individualized remedial scheme. Slip op. at 26.

In a separate opinion, Justice Ginsburg (joined by Justices Breyer, Sotomayor and Kagan) agreed that the claimed monetary relief was not incidental and could not support the Rule 23(b)(2) certification, but disagreed with the majority's commonality standards and analysis.

In sum, the Court determined that plaintiffs failed to show that Wal-Mart "operated under a general policy of discrimination." With this failure, class certification was improper.

This decision, coupled with the Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*, 564 U.S. __, No. 09-893 (April 27, 2011), in which the Court held that defendant companies could bar class-action suits by incorporating certain mandatory arbitration clauses in contracts, confirms a pro-business and pro-employer trend in the Court's recent pronouncements. The *Wal-Mart* decision will shape, for the foreseeable future: (1) the potential discriminatory impact of a policy allowing local supervisors discretion over employment matters; (2) courts' analysis of commonality in class certification motions; (3) a Rule 23(b)(2) standard that may effectively preclude such certification when a class seeks monetary as well as declaratory or injunctive relief; (4) a requirement that putative class actions seeking non-incidental monetary relief satisfy Rule 23(b)(3), with its additional predominance and superiority prerequisites; and (5) a strong indication that Rule 702 and *Daubert* apply to expert testimony at the class certification stage. In the wake of this decision, class action claims against employers arising from disputes with both employees and customers are now more difficult to sustain if employers are properly counseled and prepared.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors:

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