

PUBLICATION

Roll-Back in Wal-Mart Gender Discrimination Suit

June 21, 2011

On Monday, June 20, the United States Supreme Court rejected "one of the most expansive class actions ever."

In *Wal-Mart Stores v. Dukes*, No. 10-277, the plaintiffs sought to bring an alleged class action on behalf of up to 1.5 million women alleging gender discrimination in pay and promotion in violation of Title VII of the Civil Rights Act of 1964. Reversing a Ninth Circuit Court of Appeals decision that upheld the suit's class certification, the Supreme Court ruled that the lower courts misapplied the rules governing circumstances in which a class action could properly be certified, especially where significant damages are sought.

Common Questions of Law and Fact Did Not Exist Across a Nationwide Company

The majority decision, written by Justice Scalia, initially focused on Federal Rule of Civil Procedure 23(a), which requires (among other things) that common issues of law and of fact predominate. The majority Court opinion went on to explain that class action plaintiffs must show that they have all suffered the same injury, and that the injury is capable of class-wide resolution. As Justice Scalia wrote, "Without 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*" (emphasis in original).

In this case, because there was no allegation, for example, that Wal-Mart employed a specific biased test, the plaintiffs' burden was to show "significant proof" that Wal-Mart "operates under a general policy of discrimination." The Court found that the plaintiffs failed to meet this burden, notwithstanding the plaintiffs' experts' statistical and social testimony, as well as anecdotal testimony from approximately 40 employees. Further, the plaintiffs' argument – that Wal-Mart allowed local managers to exercise their broad discretion in order to mistreat women – undermined any showing of a uniform policy. Showing merely that Wal-Mart managers used discretion, and that pay and promotion disparities between the genders exists, was not enough; the plaintiffs needed to identify a specific practice, besides "delegated discretion," that was implemented across the company. This they could not do, according to the majority.

By contrast, the four-Justice dissent held that the plaintiffs met the commonality requirement in Rule 23(a) because, among other things, Wal-Mart conditioned promotion on candidates' willingness to relocate. According to the dissent, "Absent instruction otherwise, there is a risk that managers will act on the familiar assumption that women, because of their services to husband and children, are less mobile than men."

The Plaintiffs' Demand for Individualized Monetary Awards Also Doomed the Class

The Court also held that a class could not be certified under Federal Rule of Civil Procedure 23(b)(2) where, as here, the plaintiffs sought significant, individualized back pay awards, as opposed to injunctions, declaratory judgments or individualized awards. Such awards, the Court ruled, were inconsistent with the "indivisible nature" of the relief contemplated by Rule 23(b)(2), where class members may not opt out or even receive notice of the litigation. By contrast, the Court noted, Rule 23(b)(3) – which requires more cumbersome notice

opt-out procedures – is the appropriate rule under which class actions seeking individualized monetary relief should be certified. Here, the plaintiffs sought only certification under Rule 23(b)(2).

All of the Justices joined in this portion of the decision.

For a more detailed explanation of this ruling and how it may apply to current or threatened litigation, please contact your Baker Donelson attorney or any of our more than 70 Labor & Employment attorneys located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; and Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee.