The Future of Employment Class and Collective Actions After *Dukes v. Wal-Mart*

The Supreme Court has announced its highly anticipated decision in *Dukes, et al. v. Wal-Mart Stores, Inc.*, disbanding an alleged gender discrimination class action that would have allowed some 1.5 million current and former female Wal-Mart employees to assert Title VII claims in a single lawsuit. In the process of dismantling "one of the most expansive class actions ever[,]" the Court closely scrutinized plaintiffs' commonality allegations, eviscerated plaintiffs' social science expert evidence, and identified due process concerns that could affect the manner in which class *and* collective actions are litigated in the future.

Commonality: Requires common answers

The Supreme Court held that the plaintiffs failed to meet their burden under Rule 23(a)(2) of showing "questions of law or fact common to the class." This portion of the opinion, decided by the now common 5-4 split on the Court (authored by Justice Scalia and joined by Chief Justice Roberts and Justices Kennedy, Thomas and Alito) held that commonality requires a "common contention" that 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." Rather than merely allege common "questions," a plaintiff must show that a class action will provide common *answers* that will help to resolve the litigation.

Significantly, the majority accepted that examining commonality may entail some overlap with the merits of a plaintiff's underlying claim. In *Dukes*, the Court reasoned that to sustain a class action, the plaintiffs must be able to prove that a class proceeding would produce a common answer to the question why each of over a million female employees was disfavored in pay and promotion decisions: "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.*"

The Court rejected the plaintiffs' attempt to prove a generalized policy of discrimination through evidence that Wal-Mart granted discretion to local supervisors over employment matters. Here, the Court found no evidence of a "common mode of exercising" that discretion across all of Wal-Mart's stores. To the contrary, the Court reasoned, on its face such a policy does "just the opposite" of establishing a uniform practice.

The Court's disdain for plaintiffs' expert

The Court explained that commonality can be shown by "significant proof that an employer operated under a general policy of discrimination." In the absence of any common testing or selection procedure used by Wal-Mart to make pay or promotion decisions, the plaintiffs attempted to demonstrate a general policy of discrimination at Wal-Mart by relying on both expert testimony and anecdotal proof, each of which the Court rejected. Indeed, the Court's harsh criticism of the plaintiffs' sociological expert casts serious doubt on the usefulness of such experts in discrimination class actions in which the common class allegations rest on criticism of a company's "corporate culture."

Acknowledging that Wal-Mart's announced company policy forbids discrimination and imposes penalties for violations, the Court considered whether the plaintiffs could prove a general policy of discrimination through the testimony of their sociologist expert, who, relying on "social framework" analysis, opined that Wal-Mart's "strong corporate culture makes it 'vulnerable' to 'gender bias.'" The Court concluded that this testimony was "worlds away" from the required "significant proof" that Wal-Mart operated under a general policy of discrimination, where the expert could not say with any certainty or specificity *how regularly* gender stereotypes played a meaningful role in the challenged employment decisions—the essential question on which commonality depends. Therefore, the Court concluded, "we can safely disregard what he has to say."

The due process rights of corporate defendants in class and collective litigation

The Court unanimously decided that the proposed class could not be certified under Rule 23(b)(2) because the plaintiffs' monetary claims were not incidental to claims for injunctive relief. The Court repeatedly emphasized the importance of establishing each of Rule 23's requirements before subjecting a defendant to class proof (on either liability or damages). Where lower-level supervisors have discretion to dictate the circumstances about which the class complains, "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's. A party seeking to certify a nationwide class will be unable to show that all the Title VII claims will in fact depend on the answers to common questions."

The Supreme Court concluded that the defendant is "entitled to individualized determinations of each employee's eligibility for backpay." In a pattern and practice case such as the plaintiffs alleged, these determinations would usually require additional proceedings to ascertain the scope of individual relief and for the employer to raise and litigate individual affirmative defenses. Accordingly, the Court rejected the Ninth Circuit's novel plan of "trial by formula"—using a sample of class members from which damages for the entire remaining class would be derived.

The same due process concerns and focus on the defendant's ability to present individualized defenses apply with equal, and arguably greater, force in the context of collective actions under the Fair Labor Standards Act, which have none of the procedural protections of Rule 23 class actions. For example, plaintiffs need not establish commonality, typicality, adequacy and numerosity to proceed collectively under 29 U.S.C. § 216(b); therefore, to provide due process under the same rationale as expressed by the Court in *Dukes*, a corporate defendant must be entitled to present individualized defenses (*e.g.*, on the applicability of an exemption) to each plaintiff's allegations.

Proactive steps to insulate employers from costly and time-consuming class actions

- The *Dukes* Court endorsed the continued viability of class actions when an employer "use[s] a biased testing procedure to evaluate both applicants for employment and incumbent employees." Employers should review tests and other selection procedures (such as evaluation systems) for evidence of adverse impact against women and other protected groups. Employers should ensure that legally sufficient job analyses and validation materials support the use of any selection procedure having adverse impact.

- The *Dukes* Court was persuaded by "Wal-Mart's announced policy [that] forbids sex discrimination." Employers should review written policies and procedures for hiring, placement, promotion, pay, and other employment decisions. Strong, clear, and consistently enforced equal employment opportunity and nondiscrimination policies may help to avoid a finding of a common unlawful policy. Employers should review existing policies, handbooks, directives and other company documents to ensure that none of them can provide the sort of "glue" that courts and plaintiffs' counsel will look for to bind a class together.

- The *Dukes* opinion suggests that subjective, individual employment decisions may provide a level of insulation from broad-scale class actions. Employers should review how discretion in employment decision-making is delegated and communicated to the local level with appropriate training.

- Employers involved in Section 216(b) alleged FLSA collective actions should consider the application of the due process language and holding in *Dukes* to pending litigation/motions. Similarly, the commonality holding in *Dukes* should present a significant hurdle to plaintiffs seeking to certify Rule 23 state law wage/hour class actions.

For more information about the *Dukes* decision or other class or collective action issues, contact Nancy Rafuse (404-253-6002) or Jim Swartz (404-253-6046), or visit *www.asherafuse.com.*

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