The Glue is Missing! Wal-Mart Women Fail to Prove Commonality

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The United States Supreme Court dealt a significant blow to class action suits in the recently decided case *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). The action was brought by female employees of Wal-Mart who claimed that the retail giant discriminated against women by denying them equal pay or promotions, in violation of Title VII of the Civil Rights Act of 1964. The women sought injunctive and declaratory relief, back pay and punitive but not compensatory damages. The trial court granted their request for class certification, which was affirmed by the 9th Circuit Court of Appeals. Describing the action as "one of the most expansive class actions ever," including over one and a half million current and former female employees of Wal-Mart, the Supreme Court reversed, concluding that the plaintiffs had "not established the existence of any common question."

At Wal-Mart, pay and promotion decisions are generally left to a local manager's broad discretion, which is exercised in a largely subjective manner. Decisions relating to increases in pay for hourly employees are made by local managers with little corporate oversight. Store managers likewise apply their own subjective criteria in selecting candidates for promotions. While higher level promotions require a few objective criteria, such as at least one-year tenure and willingness to relocate, regional and district managers apply their own judgment when selecting management candidates. The plaintiffs claimed that the discretion given by Wal-Mart to the local managers over pay and promotions was exercised disproportionately in favor of men, leading to an unlawful, disparate impact on female employees.

Significant to the Court's reasoning in its opinion was the plaintiffs' assertion that the discrimination to which they had been subjected was common to *all* Wal-Mart's female employees. According to the Court, plaintiffs' basic theory was "that a strong and uniform 'corporate culture' permit[ted] bias against women to infect the discretionary decisionmaking of each one of Wal-Mart's thousands of managers—thereby making every woman at the company a victim of one common discriminatory practice." Quoting with approval the 9th Circuit dissenting opinion, the Court stated that the plaintiffs had "little in common but their sex and this lawsuit," and held that certification of the plaintiff class was inconsistent with the federal rule because there was no commonality as to questions of law or fact between and the among the plaintiffs.

The Court explained that raising common questions, such as "Do we all work for Wal-Mart?" or "Do our managers have discretion over pay?" are insufficient to obtain class certification. Central to class certification is the resolution of a common dispute of fact or law which will advance the determination of the class members' claims. It would also be insufficient to merely allege that the class members have all suffered a violation of the same provision of law since, as the Court noted, Title VII can be violated in many ways. Instead, the plaintiffs must demonstrate that each of the class members has suffered the same injury and that the same contention is being made, "such as an assertion of discriminatory bias on the part of the same supervisor." Moreover, the common contention must be of a nature where its determination "will resolve an issue that is central to the validity of each one of the claims in one stroke."

There existed a wide gap in plaintiffs' case between an individual's claim of discriminatory denial of a promotion and the existence of a class of persons who had suffered the same injury as that individual. To bridge the gap, the plaintiffs needed to present "significant proof that Wal-Mart operated under a general policy of discrimination," proof the Court found to be entirely absent.

In reaching its conclusion, the Court rejected the opinion of Dr. William Bielby, who testified based upon his social framework analysis, that Wal-Mart has a strong corporate culture that makes it vulnerable to gender bias. Dr. Bielby could not opine as to whether .5% or 95% of the employment decisions by Wal-Mart might be determined by stereotypical thinking, a question, the Court explained, which was essential to the plaintiff's theory of commonality. Because Dr. Bielby had no answer to that question, the Court concluded, "we can safely disregard what he has to say."

The Court also found defective the statistical data provided by plaintiffs' experts who opined that there were statistically significant disparities between men and women at Wal-Mart and those disparities could be explained only by gender discrimination. The Court's majority faulted the experts' opinions because the statistics considered regional and national disparity data instead of the disparities at individual stores. A regional disparity could be attributed only to a small set of stores, and could not, by itself, establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depended. The "studies are insufficient to establish that respondents' theory can be proved on a classwide basis."

The anecdotal evidence presented by plaintiffs, in the form of 120 affidavits reporting experiences of discrimination, was likewise insufficient to demonstrate commonality. The Court compared the number of the affidavits submitted to the number of class members (1 per every 12,500 members), the number of stores referenced in the affidavits (235) versus the total number of stores (over 3,400), and the distribution of the reports throughout the country (large concentration of the reports in only 6 states, 14 states had no reports). It concluded that, even assuming every one of the accounts was true, that would still not demonstrate a general policy of discrimination and as a whole the accounts were too weak to raise any inference that all of the millions of individual, discretionary personnel decisions made by Wal-Mart management were discriminatory. "Without some glue holding the alleged reasons for all those employment 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 held that claims for monetary relief, such as the requested back pay, may not be certified under Federal Rule 23(b)(2), at least where the monetary relief is not incidental to the requested injunctive or declaratory relief. The Court flatly rejected the 9th Circuit's attempt to replace trial court proceedings to determine the scope of individual relief with a formula that determined an average backpay award to be applied to the entire class.

The *Wal-Mart* opinion makes it substantially more difficult for plaintiffs to obtain class certification based upon statistical or anecdotal evidence, at least when the class size is so vast. However, it may have little impact in a normal business context. Although it involved a Title VII claim, the decision focuses on the proof necessary for class certification, not the proof of a case

for discrimination. On this issue, the Court reiterated that giving discretion to lower level supervisors can be the basis for Title VII liability under a disparate-impact theory because an employer's undisciplined decision making can have precisely the same effects as a system pervaded by impermissible, intentional discrimination. Thus, while *Wal-Mart* has been seen as a resounding win to employers, employers should remain vigilant regarding their pay and promotion policies to ensure that they are not adversely impacting any particular class. They should carefully review their procedures, especially ones that involve subjective decision-making, and focus on using gender/age/race-neutral, performance-based criteria. Further, employers should review personnel decisions for disparate impact. Finally, and perhaps where they most often falter, employers should make sure that they effectively implement and monitor compliance with their established anti-discrimination policies and procedures, providing training to their managers and supervisors to do the same.

If you wish to discuss employer/employee anti-discrimination policies, please contact any attorney in our Employment Law group at (410) 727-6600 or by e-mail at:

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