Supreme Court Tightens Class Action Rules, Rejecting Class Composed Of 1.5 Million Wal-Mart Employees

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In *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277 (U.S. June 20, 2011), the Supreme Court vacated class certification of a gender discrimination lawsuit brought by 1.5 million current and former Wal-Mart employees because the plaintiffs failed to identify a specific, company-wide policy or practice of discrimination. Additionally, the Court held unanimously that the employees' backpay claims could not be certified as a class action because Wal-Mart was entitled to individual proceedings so that it could present defenses as to each claim.

Facts And Procedural History

In *Wal-Mart*, three former and current female employees alleged that Wal-Mart discriminated against them on the basis of gender in denying them equal pay or promotions, in violation of Title VII. The named plaintiffs sought class certification on behalf of the approximately 1.5 million female employees who currently do or did work for Wal-Mart since December 1998. To establish that all putative class members were subjected to discriminatory policies and practices, the plaintiffs relied upon statistical evidence of gender-based pay and promotion disparities, anecdotal evidence of gender discrimination from only 120 female employees of Wal-Mart, and expert testimony from a retained sociologist that Wal-Mart's culture and personnel practices made it vulnerable to gender discrimination. On behalf of the putative class, the plaintiffs sought backpay as well as injunctive and declaratory relief. The district court certified the claims pursuant to Federal Rule of Civil Procedure 23(b)(2). 222 F.R.D. 137 (N.D. Cal. 2004). The Ninth Circuit, in a narrow 6-to-5 split *en banc* decision, affirmed. 603 F.3d 571 (9th Cir. 2010).

The Supreme Court's Ruling

In its June 20 ruling, the Supreme Court held the class could not be certified because plaintiffs failed to establish a specific, company-wide policy or practice of discrimination. Under Federal Rule of Civil Procedure 23(a)(2), there must be "questions of law or fact common" to the class, which means that the putative class members' "claims must depend upon a common contention of such a nature … that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims." Specifically as to pattern or practice Title VII claims, where the crux of the inquiry is "the reason for a particular employment decision," the Court held plaintiffs must show "significant proof that Wal-Mart operated under a general policy of discrimination" or otherwise prove "a common answer to the crucial discrimination question."

Here, the Court concluded proof of such a policy or practice was lacking. Specifically, the Court concluded that discretionary employment decisions *can* – but *do not necessarily* – support discrimination. The Court noted that plaintiffs provided no proof as to the number of employment decisions influenced by gender bias and that plaintiffs' statistical and anecdotal evidence failed to prove common direction.

The Court unanimously held that the employees' claims for backpay could not be certified pursuant to Federal Rule of Civil Procedure 23(b)(2), because those claims were not incidental to the injunctive and declaratory relief sought. The Court reserved judgment on whether claims for "incidental" monetary relief could ever be certified under Rule 23(b)(2), explaining that certification under Rule 23(b)(2) is appropriate only when a "single, indivisible remedy would provide relief to each class member," and that claims seeking individualized monetary relief should generally be certified instead under Rule 23(b)(3).

Additionally, the Court rejected the Ninth Circuit's "Trial by Formula" approach, explaining that, after a class establishes a pattern or practice of discrimination, "a district court must usually conduct 'additional proceedings … to determine the scope of individual relief.'" Accordingly, the Court held that Wal-Mart was entitled to additional proceedings and to raise individual defenses as to each claim – not just the sample cases – to show that each employment decision was lawful.

In short, the Court rejected class treatment of discrimination claims in the absence of a company-wide discriminatory policy or practice, class treatment of backpay claims under Rule 23(b)(2), and the Ninth Circuit's "Trial by Formula" approach. Accordingly, the judgment of the Ninth Circuit was reversed.

Implications Of *Wal-Mart* For Employers

The Supreme Court's ruling is very good news for employers. Justice Scalia's repeated references to the need for a "common policy" that is discriminatory, *i.e.*, unlawful – not just common, should be very helpful in all class-based cases.

The Court's ruling is especially good news for employers who operate in multiple locations and delegate discretion on employment decisions to local managers. As the ruling makes clear, a company-wide policy cannot be established by statistical disparities, anecdotal evidence, and/or vague expert testimony concerning an employer's culture. Accordingly, employers who establish company-wide equal opportunity policies and leave discretionary employment decisions to local managers should be less vulnerable to company-wide class actions in the future.

It will also be interesting to see how the Supreme Court's rejection of the "Trial by Formula" approach will play out, as it could affect a wide variety of cases. Class-action plaintiffs often seek the calculation of class-wide damages in such a manner – for example, in overtime class actions under the Fair Labor Standards Act and similar state laws. The Court's ruling, however, casts serious doubt on the continued validity of this approach in any type of class action.

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Proskauer Continues Expansion Of LA Office

Proskauer continued the expansion of its Mergers & Acquisitions Group and Los Angeles office with the addition of Joseph J. Giunta as Senior Counsel.

Formerly a partner at Skadden, Arps, Slate, Meagher & Flom LLP, and one of the founding partners of that firm's West Coast M&A practice, Mr. Giunta's practice encompasses mergers and acquisitions (both friendly and hostile), proxy contests, tender offers, restructurings, recapitalizations and leveraged buyouts.

"Joe's experience working with purchasers, sellers and their financial advisers in the full gamut of merger, acquisition and disposition transactions will be invaluable to us, not just in Los Angeles, where our corporate practice is recognized as one of the most active and accomplished in the region, but across our global platform," said Jeffrey A. Horwitz, co-head of Proskauer's Mergers & Acquisitions Group.

Michael A. Woronoff, head of Proskauer's Los Angeles office and its West Coast corporate and securities practice, said, "Joe is one of the best in the business, and we're very lucky to have the opportunity to bring him onboard. His experience will allow the firm to continue to expand its work on the large-scale matters in which our clients are increasingly involved."

During his tenure at Skadden, Mr. Giunta handled transactions for The Greenbrier Companies, Oaktree Capital Management LLC, the Special Committee of Times Mirror, the Special Committee of Spiros Development Corporation, Del Webb Corporation, Plum Creek Timber Co., Baxter International, Inc., CEMEX, S.A., Cobra Golf Inc., Costco Wholesale Corporation, Sapiens International Corp., Ron Howard and Brian Grazer, and the Special Committee of the Board of Directors of St. John's Knits, among many others.

Mr. Giunta is the latest addition to Proskauer's global Corporate Department and transactional practice, which in recent weeks have welcomed Seung Chong and Jeremy Leifer (Mergers & Acquisitions, Private Equity), Gene Buttrill (Capital Markets) and Jay C.S. Tai (Mergers & Acquisitions, Private Equity) in Hong Kong, Russell T. Carmedy and Michael Nouril (Mergers & Acquisitions, Private Equity) in London, and Frank Zarb (Capital Markets, Finance) in Washington, DC.