



Management Alert

Dukes Oral Argument

Today, the U.S. Supreme Court heard oral argument in *Wal-Mart Stores, Inc. v. Dukes*, on Wal-Mart's petition for certiorari of a Court of Appeals order certifying the largest employment discrimination class action ever. The hearing transcript [[link to transcript](#)] was posted on the U.S. Supreme Court website this afternoon.

The U.S. Supreme Court's review follows a 6 to 5 *en banc* decision of the U.S. Court of Appeals for the Ninth Circuit in San Francisco – reported at 603 F.3d 571 (9th Cir. 2010) – which affirmed an earlier class certification order in the largest employment discrimination class action ever certified. The Ninth Circuit upheld an earlier panel decision certifying a class action gender discrimination lawsuit challenging Wal-Mart's pay and promotions practices. The full Ninth Circuit ruled that the U.S. District Court for the Northern District of California did not abuse its discretion in finding that the large and diverse class – encompassing approximately 1.5 million female employees, both salaried and hourly with a range of positions, who are or were employed at one or more of company's 3,400 stores across the country – was united by a complex of company-wide discriminatory practices against women where plaintiffs presented expert opinions, factual evidence, statistical evidence, and anecdotal evidence showing a corporate policy and common pattern of discrimination imposed on female employees nationwide.

The U.S. Supreme Court heard argument on the following questions: (1) Whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2) and, if so, under what circumstances; and (2) whether the order certifying a class conforms to the requirements of Federal Rule of Civil Procedure 23(a). The argument was lively, and both counsel were repeatedly interrupted with questions from the Justices on a variety of points, including several raised by Seyfarth Shaw in two amicus briefs it filed on behalf of Costco Wholesale Corporation [[click to link to Costco brief](#)], the Society For Human Resource Management and HR Policy Association [[click to link to SHRM brief](#)].

Arguments Focused On Rule 23(a)

Much of the argument focused on the issue of whether plaintiffs had adequately demonstrated a common policy of discrimination on the part of Wal-Mart under Rule 23(a). Plaintiffs' theory, which had been endorsed by the District Court and the slim majority of the Ninth Circuit, was that the common policy consisted of two elements: Wal-Mart's common corporate culture that allegedly embodies sexual stereotypes, coupled with granting in-store managers unfettered discretion in making make personnel decisions.

Several Justices expressed apparent skepticism as to Plaintiffs' theory. Justice Kennedy, who is widely seen as providing the decision "swing-vote" in closely-divided cases, commented to plaintiff's counsel that "your complaint faces in two directions" by alleging that there is both a centralized corporate "culture" and that "supervisors have too much discretion." Justice Kennedy continued that "there's an inconsistency there, and I'm just not sure what the unlawful policy is." Justice Scalia similarly commented that plaintiffs' theory seemed internally contradictory, remarking, "Which is it? It's either individual supervisors who are left on their own or there is a strong corporate culture that tells you what to do." Chief Justice Roberts and Justice Alito expressed seemingly similar views. Justice Thomas, as is his custom, asked no questions and made no comments.

On the other hand, other Justices appeared more sympathetic to Plaintiff's commonality theory. Justice Kagan, for example, suggested "all that the plaintiffs have to demonstrate . . . at this stage in the proceedings is a practice, a policy of subjectivity that on the whole results in discrimination against women." Likewise, Justice Breyer asked pointedly, "should central management under the law have withdrawn some of the discretion to prevent discrimination?" Justice Ginsburg appeared to echo this view, asking: "Isn't there some responsibility on the company to say, 'Is gender discrimination at work?' And if there is, isn't there an obligation to stop it?" Justices Sotomayor and Breyer made comments that appeared sympathetic with Plaintiffs' view.

Plaintiffs' counsel attempted to buttress Plaintiff's claim of a common policy of discrimination by pointing to the evidence of Plaintiffs' experts that, counsel claimed showed a statistically significant pattern of discrimination and a culture that was susceptible to discrimination. The arguments on these points were not flushed out as thoroughly as were the arguments on excessive discretion. Several Justices worried that plaintiffs' expert testimony would seemingly permit similar class actions against many major American corporations. Justice Alito, for example, expressed concern that "the academic theory on which [plaintiffs'] theory is based" would lead to that conclusion. And Chief Justice Roberts also pointedly asked: "Is it true that Wal-Mart's pay disparity across the company was less than the national average?" Other Justices, however, remarked that any flaws in the views of plaintiffs' expert are more appropriately at trial, and not at the class certification stage when, as Justice Breyer put it: "Were just talking about getting your foot in the door."

Whether Claims For Monetary Relief Can Be Certified Under Rule 23(b)(2)

There also was substantial debate regarding claims for monetary relief can be certified under Rule 23(b)(2). Several Justices expressed several concerns regarding the District Court's order permitting the class to seek monetary equitable relief in the nature of back pay. Expressed concerns included whether such relief is permissible in a rule 23(b)(2), whether Wal-Mart would be given adequate opportunity under the District Court's order to rebut individual "damage" claims, and whether unnamed class members would be denied the right to bring individual legal claims if the class claims failed at trial. Justice Sotomoyor, on the other hand, seemed sympathetic to allowing the class to seek monetary damages, repeatedly suggesting that monetary damages would be permissible because they would be "incidental" to conventional injunctive relief. And Justice Breyer appeared to suggest the class should be allowed to proceed in an attempt to obtain injunctive relief.

A Supreme Court Ruling Is Expected In June 2011

It is very difficult, if not impossible, to predict the ultimate outcome from the oral argument. If, for example, a majority of the Justices of the Supreme Court were to conclude that plaintiffs had failed to demonstrate a common policy of discrimination, the entire class certification order could be reversed. If, on the other hand, a majority concluded such a policy had been demonstrated, the Supreme Court would need to consider other issues, such as manageability of the class and the Rule 23(b) issues. The class certification order could, therefore, be affirmed in full, modified in minor or substantial respects, or remanded to the District Court for further consideration.

The ruling, expected by late June, could thus change the legal landscape for workplace class-action lawsuits. Pending further developments, employers and human resource professionals should stay aware of the issues raised by *Dukes*. Pending further clarification from the Supreme Court, the issues pending in *Dukes* present a difficult challenge for employers, most of which rely on informed individualized judgment by supervisors to make promotion, pay and other employment decisions, and some in conjunction with promulgation of programs aimed at increasing diversity and preventing discrimination in the workplace. Policies and programs requiring individualized decision making by supervisors can potentially lead to liability. Accordingly, employers should review HR practices related to pay and promotion decisions - subjective or not - to determine whether the company practices, policies or procedures are adversely impacting any classification of employee. In addition, employers should review their programs aimed at increasing diversity and preventing discrimination to ensure that they are being implemented effectively.

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