

Employment Alert

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Largest Ever Rule 23 Employment Discrimination Case Is Allowed To Proceed

Last week, in a sharply divided 6-5 en banc decision, *Dukes v. Wal-Mart Stores, Inc.*, the Ninth Circuit certified the largest nationwide employment discrimination class action in history, setting the stage for the Supreme Court to resolve an ongoing circuit split regarding the requirements of class certification. The potential class could contain over one million females, employed by Wal-Mart from 2001 through the present, who claim to have been victims of sex discrimination under Title VII of the 1964 Civil Rights Act.

The *Dukes* class was allowed to proceed because the 94-page majority opinion decided that a class of 500,000 to possibly 1.5 million former and current workers would not be too unwieldy and that Rule 23 provides adequate due process safeguards for the defendant in a matter such as this one. The Court also held that more stringent standards for class certification required under Rule 23(b) (3) were not applicable here because despite the fact that the plaintiffs seek billions of dollars in backpay, Rule 23(b)(2), which allows certification under less stringent circumstances when injunctive relief "predominates" over monetary relief, applied.

Wal-mart has indicated that it may seek review from the United States Supreme Court. The Supreme Court may very well grant such a request because the unprecedented size of this proposed class presents the Court an unique opportunity to clarify the outer limits of Rule 23's commonality and typically provisions where, as here, each member of a huge, diverse putative class combines elements in her claim that are both common and not common to the other claimants.

Put another way, even in a Rule 23 class, Wal-Mart is entitled to defend itself by presenting affirmative, individualized rebuttal evidence, if it exists, on a case by case basis. Here, for example, there may be facts unique to each class member to explain in a non-discriminatory way why that individual employee was not promoted. Yet, as pointed out by the dissent, in order to allow Wal-Mart to adequately defend itself with individualized proof at trial, the district court would have to allow "up to 1.5 million individual determinations of liability," which obviously could not occur in a single trial or frankly in hundreds of trials. Thus, this case raises the question of whether some class actions are simply too large to bring or whether the right to raise individual defenses is inherently constrained by Rule 23.

Additionally, the Court's finding that injunctive relief predominates over monetary relief where billions of dollars in backpay are sought raises other issues. Traditionally, money predominates over injunctive relief unless money is incidental to the relief sought, and typically courts have found that seeking billions of dollars in backpay is hardly incidental. But the *Dukes* decision rejects that notion in favor of a balancing approach to resolve whether monetary relief predominates over injunctive relief based on a number of factors, none of which is solely determinative. These factors include whether the monetary relief sought determines the key procedures that will be used, whether it introduces new and significant legal and factual issues, whether it requires individualized hearings, and whether its size and nature as measured by recovery per class member raise particular due process and manageability concerns. Of crucial importance, whether the class claim is predominately money driven determines whether the plaintiff class must show not only that the claim meets the typicality and commonality requirements of Rule 23(a) but also the more stringent requirements of Rule 23 (b)(3) that common issues predominate and that the class action at issue is manageable. The Ninth Circuit's *Dukes* ruling is new territory on this issue and directly conflicts with other circuits thus providing another reason why the Supreme Court may decide to review the matter.

For more information, please contact Paul Garry, or any other MBT labor and employment lawyer at (312) 474-7900.

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