

JULY 2011

What the Supreme Court Giveth, Congress May Taketh Away

***Wal-Mart Stores v. Dukes*: A Short-Lived Victory for Employers?**

By Nancy A. Noall and Jennifer A. Riester

In a significant victory for employers, the United States Supreme Court issued its decision in *Wal-Mart Stores, Inc. v. Dukes* on June 20, 2011 and changed the future of class action lawsuits in the employment arena. The Court has raised the bar for class certification by requiring "significant proof" of the commonality requirement of Federal Rule of Civil Procedure 23. Essentially, all class members must have the same claim in order for the class action to be certified.

Dukes was one of the largest class-action lawsuits of any type and was *the* largest employment class action ever. The plaintiffs in the case asserted claims for sex discrimination under Title VII of the Civil Rights Act of 1964. It was brought on behalf of 1.5 million current and former Wal-Mart employees throughout the United States. Plaintiffs alleged that Wal-Mart's corporate culture and policies caused women to be paid less and promoted less often than male co-workers. The main policy at issue gave local managers sole discretion to make decisions regarding pay and promotions. Plaintiffs argued that Wal-Mart was aware that practices going on at the local level discriminatorily impacted women and its allowance of the practices to continue amounted to a common policy of discrimination. Plaintiffs' "proof" of a corporate policy of discrimination consisted of a sociological study, a statistical analysis, and anecdotal testimony by some class members. The sociological study concluded that Wal-Mart's "corporate culture" made it "vulnerable" to "gender bias." The statistical analysis was equally sweeping: it concluded that since there was a lower percentage of women promoted to management compared to their percentage in hourly positions, "there are statistically significant disparities between men and women at Wal-Mart," that "can be explained *only* by gender discrimination" (emphasis added). The anecdotal evidence of bias came from 0.0008 percent of the potential class members recounting examples of discharges, demotions, and comments at seven percent of Wal-Mart stores. Yet based upon this tottery support, plaintiffs sought to represent millions of women, all holding different positions, working in different departments, in different stores, under different managers, scattered across different cities in different states. The plaintiffs

sought injunctive and declarative relief, punitive damages and back pay. The ramifications for all large employers, not just Wal-Mart, were immense if this suit had been allowed to proceed as a class action.

The Supreme Court held in a 5-4 decision that plaintiffs failed to meet the minimum requirement of commonality for class certification under Rule 23(a). The Court's ruling states that commonality requires class members demonstrate they have suffered the same injury and that their claims depend upon on a common contention and the claim is capable of classwide resolution. Justice Scalia, writing for the Court, found plaintiffs' evidence "insufficient", holding that the plaintiffs' were actually trying to litigate "about literally millions of employment decisions at once." The Court now requires more than a pleading standard; a party must affirmatively demonstrate compliance with Rule 23 requirements. These new requirements remove any doubts that a court may consider the merits of the claims when determining class certification.

In a separate 9-0 decision, the Supreme Court held the claims for monetary damages could not be certified under Rule 23(b)(2) because individualized claims (such as back pay) are not incidental to injunctive relief.

These rulings will now require all courts to perform an in-depth analysis to determine whether the burdens of Rule 23 have been met. It allows the courts to go beyond the pleadings and into the merits of the claim to make a Rule 23 determination. The stricter requirements will help to weed out potential classes that really have no common issue and were created solely to scare companies into settling otherwise weak claims.

The *Dukes* case is an important victory for employers. Unfortunately, this decision has already led to calls by Democrats in Congress for passage of the Paycheck Fairness Act, which has been in limbo for the past three years. Among other things, the Paycheck Fairness Act would amend the Equal Pay Act to (1) eliminate many of the existing defenses to pay disparities between men and women; (2) eliminate limits on compensatory and punitive damages; and (3) make class action claims for equal pay violations easier to maintain. The Paycheck Fairness Act would, in effect, "overrule" the *Dukes* decision in certain respects. Employers should write to their Congressional representatives and urge them to say "no" to this Act.



Nancy A. Noall is a Partner with Weston Hurd LLP and Chair of the firm's Labor Practice Group. She concentrates her practice in the areas of labor and employment law and has successfully defended clients in such industries as computer software, contract research and development, communications and manufacturing. She has arbitrated grievances under union contracts in Arkansas, Kentucky, Indiana, New Jersey and Ohio. Nancy can be reached at 216.687.3368 or NNoall@westonhurd.com.



Jennifer A. Riester is an Associate with Weston Hurd LLP. She focuses her legal practice in the areas of toxic tort litigation, products liability, employment litigation and insurance coverage. Jennifer can be reached at

216.687.3271 or JRiester@westonhurd.com.

*As a reminder this material is being provided to draw your attention to the issues discussed.
Although prepared by professionals, it should not be utilized as a substitute for legal advice and
representation in specific situations.*

About Weston Hurd LLP

With offices in Cleveland, Columbus, Beachwood and Akron, Weston Hurd LLP provides comprehensive legal counsel to Fortune 500 companies, insurance carriers, banks, healthcare providers, small- and medium-sized businesses, the real estate industry, governmental agencies, non-profit enterprises and individuals.

For additional information about Weston Hurd, please visit www.westonhurd.com.

Cleveland ■ Columbus ■ Akron ■ Beachwood