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The GSH 60-Second Memo

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What *Wal-Mart v. Dukes* Means for Employers

By Emery K. Harlan, Esq.

Nearly two months after the Supreme Court's decision in [*Wal-Mart Stores, Inc. v. Dukes*](#), 131 S.Ct. 2541 (June 20, 2011), employers and their attorneys are still parsing the meaning of the Court's opinion and its impact on future employment claims faced by employers. Had the Supreme Court ruled against Walmart, it would have been a decision with wide-ranging implications for large, national employers. But even in its ruling for Walmart, the Court has provided some lessons for all employers.

Walmart is, of course, one of the nation's largest private employers, with approximately 3,400 stores and more than one million employees in the United States alone. Like most companies, it has general equal employment opportunity policies, as well as policies prohibiting discrimination and harassment. And - importantly - it gives local managers broad discretion in making pay and promotion decisions.

The *Dukes* case was an attempted class action brought by three current or former employees who alleged gender discrimination. What made the case remarkable is that the plaintiffs sought to bring a class action lawsuit on behalf of an unusually large and wide-ranging class of persons: 1.5 million current or former female employees, covering all stores nationwide and including a variety of job classifications.

Broadly speaking, for plaintiffs to be certified as a class, they must meet a threshold level of "commonality" - the common questions of law and fact must exist among the members of the class of plaintiffs so that a single (common) resolution of the issues is

possible. In *Dukes*, the plaintiffs - who, again, attempted a class that represented the claims of current and former employees of different positions in approximately 3,400 stores nationwide - claimed that the commonality requirement was met because Walmart's corporate culture allegedly "permits bias against women to infect, perhaps subconsciously, the discretionary decision-making of each one of Wal-Mart's thousands of managers thereby making every woman at the company the victim of one common discriminatory practice."

Both the district court and the court of appeals accepted the plaintiffs' theory and allowed the certification of the class. But the Supreme Court disagreed and reversed.

In the lead opinion by Justice Scalia, the Court concluded, "The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's 'policy' of allowing discretion by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy against having uniform employment practices. It is also a very common and presumptively reasonable way of doing business - one that we have said 'should itself raise no inference of discriminatory conduct.'"

Going further, the Court stated, "Without some glue holding the alleged reasons for all those 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 I was disfavored*." (Emphasis in original.)

Four justices dissented in part and would have remanded the case for fact finding, based on expert testimony that the pay and promotion disparities at Walmart "can be explained only by gender discrimination and not by ... neutral variables." Writing for the dissent on this point, Justice Ginsburg stated, "The practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects. Managers, like all humankind, may be prey to biases of which they are unaware. The risk of discrimination is heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes."

The Court also ruled unanimously on a second issue: the plaintiffs could not seek back pay as a remedy for the alleged discrimination under the procedural vehicle through which the plaintiffs sought certification. The plaintiffs in *Dukes* sought class certification under Rule 28(b)(2) of the Federal Rules of Civil Procedure. Under that particular type of class certification, plaintiffs generally are required to seek relief that can be given by a court in a single, indivisible remedy that can satisfy all of the plaintiffs, such as injunctive relief. The Supreme Court had never before expressly ruled that back pay was not available under this particular procedural vehicle, but in *Dukes* it clarified the answer is 'No,' for, among other reasons, back pay as a remedy is too individualized.

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Many implications from this case seem to apply more to employment attorneys than employers. The most important take away for employers may be that discretion in decision-making at the local level can help prevent large class actions like *Dukes*. While increased discretion in decision-making can be a dicey proposition for employers, done correctly, it can, as here, be beneficial. Strong general corporate policies, coupled with training of supervisors and monitoring of supervisors to assure that decisions are made consistent with policy and employment laws, can mitigate against claims that an employer is engaging in practices that have a disparate impact on a large class of employees.

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