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***Ouch!* Supreme Court Wal-Mart Decision
Is a Blow to Plaintiffs**

By Joe Murray
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Class action litigation has taken one on the chin, as the U.S. Supreme Court issued its decision Monday in *Wal-Mart v. Dukes*, a much-watched sex discrimination case brought under Title VII of the Civil Rights Act of 1964. In essence, the Court affirmed that members of a putative class must have enough in common with each other that it makes sense to treat them as "one" for purposes of the litigation. The Court also said that individualized claims for relief, including monetary damages and injunctions, must proceed under rules that allow putative class members to "opt out" and that provide procedural safeguards for defendants.

In all, the decision appears to be a very good one for employers. It will henceforth be more difficult for plaintiffs to bring class claims, significantly reducing the "leverage" that they have traditionally been able to exert, often pressuring employers to agree to large settlements to avoid financial devastation.

Background

The Supreme Court reversed a **decision from the U.S. Court of Appeals for the Ninth Circuit**, which had affirmed certification of a nationwide class consisting of roughly 1.5 million women who were current or former employees of Wal-Mart. Although Wal-Mart had policies prohibiting sex discrimination, the company allowed most employment decisions to be made by local management. Among other things, the plaintiffs alleged that this "delegation of authority" tended to prevent women from advancing in the organization as quickly or far as their male counterparts. However, according to Justice Antonin Scalia, who wrote for the 5-4 majority, the lawsuit would have involved the challenge of more than a million discrete employment decisions made by thousands of managers at local levels.

The procedural rules governing class actions require, among other things, that the class members share "common questions of law or fact." The majority, consisting of Scalia, Chief Justice John Roberts, and Justices Samuel Alito, Anthony Kennedy, and Clarence Thomas, found that there was no "commonality" among the members of the putative class. "Without some glue holding the alleged reasons for all those decisions together," Scalia said, "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 of why I was disfavored."

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Moreover, the Court said, the Ninth Circuit improperly applied to the case a procedural rule that would allow damages claims to be calculated for the entire class more or less “automatically,” according to a formula. Justice Scalia said that another rule, which allows putative plaintiffs to “opt out” of the class and allows the defendant to present defenses tailored to the claims, should apply instead.

Notably, Justice Ruth Bader Ginsburg, joined by Justices Stephen Breyer, Elena Kagan, and Sonia Sotomayor, agreed with this portion of the majority opinion, making it unanimous. (These justices did dissent from the “commonality” portion of the decision, however.)

Lessons for Employers

The *Dukes* decision is welcome for employers, but a few cautions are in order. First, the Supreme Court did not rule on the merits of the plaintiffs’ claims, so Wal-Mart may face thousands of individual or multiple-plaintiff lawsuits alleging that a particular manager or supervisor discriminated against women, and the plaintiffs may still prevail. Second, although the majority affirmed the delegation of decisionmaking authority to local management, employers will want to make sure that their policies, procedures, and related materials prohibit the use of impermissible considerations, and that local management is adequately trained about their equal employment opportunity obligations. Third, the “commonality” portion of the ruling could be overruled depending on the outcome of the 2012 presidential election and who appoints the next Supreme Court justice.

Employers should also be aware that they remain vulnerable to class litigation if the plaintiffs can identify a *common* policy or practice that results in discrimination.

If you have questions about the *Dukes* decision, class actions in general, or any other employment litigation issue, please contact any member of **Constangy’s Litigation Practice Group**, or the Constangy attorney of your choice.

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