

## E-ALERT | Class Action Litigation Employment

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### SUPREME COURT ISSUES LANDMARK CLASS ACTION DECISION IN WAL-MART V. DUKES

The Supreme Court decision in *Wal-Mart Stores, Inc v. Dukes et al.*, No. 10-277, will have an immediate and substantial impact on class action litigation.

The Court in *Dukes* reversed the certification of a nationwide class consisting of *all* women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, one of the largest classes ever to be certified by a federal court. “The basic theory of [plaintiffs’] case,” the Court noted, was “that a strong and uniform ‘corporate culture’ permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal-Mart’s thousands of managers – thereby making every woman at the company the victim of one common discriminatory practice.” The Court declined to permit a class action to proceed on this basis.

In an opinion by Justice Antonin Scalia, a five-justice majority (including also Justices Kennedy, Thomas, Alito and Chief Justice Roberts) held that the plaintiffs had not satisfied the preliminary “commonality” requirement of Rule 23(a)(2), which requires a plaintiff to show that “there are questions of law or fact common to the class.” In a further holding joined by all nine justices, the Court held that the lower court had acted improperly in certifying a claim for monetary relief pursuant to Rule 23(b)(2) instead of following the more rigorous procedural requirements of Rule 23(b)(3).

The Court’s decision has broad implications for all types of class-action litigation, including consumer, product liability, and investor class actions, as well as employment class actions like *Dukes* itself.

First, the Court expressed a skeptical general view of class actions, reiterating that they are “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.”

Second, the Court emphasized the rigorous nature of the inquiry a district court must conduct before certifying a class. The Court repudiated what it termed a mistaken interpretation of *Eisen v. Carlisle & Jacquelin*, 417 U. S. 156, 177 (1974), that had caused lower courts to shy away from evaluating the legal and factual issues underlying putative class claims. The Court emphasized that “Rule 23 does not set forth a mere pleading standard.” Rather, a proposed class representative “must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.” (emphasis in original). The Court faulted plaintiffs for having produced “no convincing proof” of commonality. And although it did not expressly rule on the point, the Court suggested that (contrary to the view taken by some lower courts) expert testimony offered in class certification proceedings must meet the rigorous standards of admissibility under Federal Rule of Civil Procedure

702 and the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993).

Third, while stopping short of concluding that there are no circumstances under which truly "incidental" claims for monetary relief could be certified under Rule 23(b)(2), the Court held that the *Dukes* plaintiffs' backpay claims could not be certified under Rule 23(b)(2) and that their individualized monetary claims could be advanced only under Rule 23(b)(3), which provides "notice" and "opt out" protections to putative class members. In reaching this conclusion, the Court rejected the plaintiffs' argument that backpay claims are cognizable under Rule 23(b)(2) because they are "equitable" in nature, noting that Rule 23(b)(2) does not encompass all equitable claims, but only claims for "injunctive" and "declaratory" relief.

Fourth, the Court sharply rejected what it termed the Ninth Circuit's proposed "Trial by Formula" – the extrapolation of a backpay award for the class as a whole by evaluating a "sample set" of putative class members' claims. The Court held that the company had a right to present affirmative defenses against each putative class member in order to show that the adverse employment actions against particular employees were based on reasons other than discrimination. Since no one contended that it would be feasible for Wal-Mart to present such evidence where the class includes 1.5 million members, a class could not be certified.

The Court expressly recognized that the principles upon which its ruling was based are not limited to employment cases but will also have a significant impact on other types of class actions. It noted that in securities litigation, for example, the standards articulated for satisfying the commonality requirement would "often be an insuperable barrier to class certification" absent the so-called "fraud on the market" presumption.

Justice Ginsburg (joined by Justices Breyer, Sotomayor, and Kagan) filed a separate opinion concurring in the holding that plaintiffs' backpay claims could not be certified under Rule 23(b)(2) but disagreeing with the majority's holding that plaintiffs had failed to satisfy the commonality requirement of Rule 23(a)(2).

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