

WHAT'S NEXT IN *DUKES*?

By Brian Kabateck and Ron Karz

Dukes is a case notable not only for its size, but perhaps also the influence that the Supreme Court's decision may have on similar cases.

Dukes was first filed in 2000 when 54-year-old Betty Dukes sued Wal-Mart for sex discrimination, claiming she was denied the opportunity to advance to higher positions within the company.

By June 2001, a class action lawsuit was filed in the U.S. District Court in San Francisco, with plaintiffs seeking to represent a class of over 1.5 million similarly situated women, all of whom have worked or continue to work for Wal-Mart. The class of women involved would cover a period going back to 1998.

In June 2004, the federal district judge ruled in favor of class certification. Wal-Mart appealed. In February 2007, the court's decision was affirmed by a three judge panel of the 9th Circuit U.S. Court of Appeals. Wal-Mart filed for a rehearing en banc, claiming that the majority erred over whether elements for class certification were met. In December 2007, the 9th Circuit withdrew its original opinion and made a superseding opinion that still affirmed the class certification. The court also dismissed Wal-Mart's petition for rehearing as moot, indicating that the revised opinion addressed the errors Wal-Mart claimed. Nevertheless, Wal-Mart filed once more for a rehearing en banc, which was eventually granted.

On April 26, 2010, the en banc court affirmed the district court's class certification with a 6-5 vote. Wal-Mart then appealed to the Supreme Court.

Aside from the effect on the over 1.5 million members of the class, the Supreme Court's decision in Dukes could also possibly influence the overall course of class action practice. The claims in Dukes concern violations of Title VII of the Civil Rights Act of 1964 involving pay and promotions. The district court certified a class of all women employed at any Wal-Mart domestic retail store since Dec. 26, 1998, and who have been or may be confronted by Wal-Mart's alleged discriminatory pay and managerial promotions policies. The class encompasses women who worked at any of Wal-Mart's 3,400 stores in the United States, including as part-time, full-time, entry-level, hourly and salaried employees. Sitting en banc, the 9th Circuit affirmed in part and reversed in part the district court's certification of the class.

The court upheld certification for plaintiffs, who were still employed when the complaint, was filed for their claims of injunctive and declaratory relief, as well as back pay. However, the court remanded the claims for punitive damages so that the district court could consider whether to certify the class under Federal Rules of Civil Procedure 23(b)(2) or (b)(3). In considering certification, the rule asks whether the defendant has acted or refused to act on grounds that apply generally to the class, whether questions of law or fact common to class members predominate over any questions affecting only individual members, and whether a class action is superior to other available methods for fairly and efficiently judging the action. In addition,

the court remanded with regard to the claims of putative class members who no longer worked for Wal-Mart when the complaint was filed.

The class was certified under Rule 23(a) and (b) (2). There was no dispute as to the numerosity requirement, as this is the indeed one of the largest employment class actions in history, with over a million and a half putative class members. Additionally, the court found that there was adequate evidence of centralized corporate-wide practices and policies of subjectivity in personnel decisions, along with sexual stereotyping. There were also statistics showing gender disparities, as well as anecdotal evidence of gender bias. This all pointed to the common question of whether there was discrimination based on "a single set of corporate policies." The court found typicality, notwithstanding that the only class representative for managers holds a low level position.

Five judges of the panel of 11 dissented, saying that class certification would be improper because the named plaintiffs could not show "significant proof" of a Wal-Mart policy or practice "that would make it possible to conclude that 1.5 million members of the proposed class suffered similar discrimination." The dissenters argued that "the evidence does not come close to meeting the requirements for demonstrating commonality and typicality." Relying on *General Telephone Co of the Southwest v. Falcon*, 457 US 147 (1982), the dissent stated that: "In this case, the plaintiffs asked the district court to certify a class of 1.5 million women based on: (i) 120 anecdotes; (ii) statistical evidence; and (iii) expert testimony. In light of *Falcon*, the district court's responsibility to conduct a rigorous scrutiny of this evidence was clear...the evidence does not come close to meeting the *Falcon* requirements for demonstrating commonality and typicality."

The Supreme Court is expected to significantly focus on issues raised by the dissent. Considering the magnitude of this case, its views may well resonate with the court. As put by the dissent: "On its face, 120 anecdotes, or one anecdote for every 12,500 class members, does not support plaintiffs' claim that Wal-Mart had a company-wide policy of discrimination. The affidavits describe the affiants' experiences in, at most, 235 of Wal-Mart's 3,400 stores, meaning that the affidavits provide no information about working conditions in over 3,100 stores. A single affidavit from a single store in Michigan tells little about whether there is discrimination at each of the other 72 stores in Michigan, let alone the rest of the company."

The possibility that the Supreme Court may follow the dissent's conclusion that the evidence is an inadequate sampling is supported by previous decisions. In *Int'l Broth. of Teamsters v. United States*, it held that a court may find a company-wide policy of discrimination where plaintiffs have offered a substantial number of affidavits compared to the size of the class, along with sufficient statistical evidence. 431 U.S. 324 (1977). In *Teamsters*, there were 40 anecdotes of discrimination out of a class of 334 employees and were held as proof of a pattern of practice of discrimination. The 40 anecdotes were from employees spread throughout the company and represented seven of the company's 10 largest operations. This would seem a stark contrast to the perceived weakness in *Dukes*, as noted by the dissent.

If the court sides with the dissent, the decision could well lead to a tightening of standards for all prospective employment related class actions. Before taking on such cases, it will become incumbent upon class action attorneys to vet cases with a higher standard of care, making certain that the alleged wrongful policies and practices of the employer are indeed company-wide practices. This could have a beneficial effect of saving the courts from dealing with improvident lawsuits. On the other hand, in dealing with any case that might involve

anything near the awesome dimensions of *Dukes*, it could simply make it impractical and exorbitantly expensive to obtain the kind of proof that the 9th Circuit dissent is demanding. If the Supreme Court also demands such an approach, it could mean that the road to justice will be blocked for future aggrieved employees of mega-corporations like Wal-Mart.