June 22, 2011

On June 20, 2011, the United States Supreme Court struck down what is believed to be the largest employment class action ever certified. The decision should significantly affect plaintiffs' ability to bring large, nationwide class action claims in federal court. **This is an important victory for employers and should help them defend against class action claims in a variety of contexts**.

In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. __ (June 20, 2011) ("*Dukes*"), the Supreme Court overturned a Ninth Circuit Court of Appeals decision affirming the certification of a class of approximately 1.5 million current and former female employees of Wal-Mart who worked at 3,400 stores across the nation. The class sought billions of dollars in backpay damages and other relief based on their allegations of gender discrimination in pay and promotion decisions.

In order to bring a class action claim under Federal Rule of Civil Procedure 23(b)(3), plaintiffs must prove, among other things, that questions of law or fact are common to the entire class. The plaintiffs in Dukes argued that they could meet this burden because Wal-Mart had a company-wide "policy" that afforded individual managers considerable discretion in pay and promotion decisions. They relied primarily on three types of evidence to make this showing: (1) testimony from a sociologist who claimed that Wal-Mart had a "strong corporate culture" that made it "vulnerable" to "gender bias;" (2) testimony from statisticians concerning alleged pay and promotion disparities between men and women at the company; and (3) anecdotal evidence of discrimination.

A five-to-four majority of the Court rejected the plaintiffs' arguments. First, the Court pointed to Wal-Mart's policy against discrimination, demonstrating the vital importance of having and enforcing an anti-discrimination policy. It also found that giving discretion to individual managers was a "very common and presumptively reasonable way of doing business." Furthermore, this approach did not create an inference of discrimination because it was implausible that every manager would exercise that discretion in the same discriminatory manner, absent a policy of discrimination.

Similarly, the sociologist's testimony was insufficient to show a "general policy of discrimination" because he could not say how often—whether 0.5 percent or 95 percent of the time—gender stereotypes may have played a role in employment decisions at Wal-Mart. The plaintiffs' reliance on statistics similarly failed because, even if they could show that a disparity in pay or promotions existed, they could not show that a specific employment practice common to the class caused that disparity. Finally, the Court concluded that anecdotal evidence from a small fraction of the class was insufficient to show a general policy of discrimination.

The Court also unanimously rejected class certification of the plaintiffs' claims for backpay under Federal Rule of Civil Procedure 23(b)(2), which allows class claims for injunctive or declaratory relief. The Court held that, because each class member is entitled to an individualized determination of money damages (and Wal-Mart is entitled to offer individualized defenses), damages cannot be determined on a class-wide basis. Thus, the Court rejected the "trial by formula" approach adopted by the Ninth Circuit, which would have allowed individual liability and damages determinations to be made for a sample set of the class, and then applied to the class as a whole.

Dukes Will Significantly Affect Class Litigation Going Forward

The *Dukes* case will be a powerful tool for all employers facing federal class action complaints. The case will also be used by employers to defend against state class action complaints (which may have similar though not identical standards to the class action procedures stated in the Federal Rules of Civil Procedure). The decision will sharply restrict plaintiffs' ability to bring claims based primarily on subjective decision-making of individual managers. It will also substantially limit plaintiffs' ability to

rely on social science and statistics to demonstrate class-wide discrimination. In addition, the Court's suggestion that the *Daubert* test for determining the admissibility of expert testimony applies at the class-certification stage should help employers strike dubious science and statistics offered by plaintiffs in order to try to obtain class certification. Finally, *Dukes* likely will severely restrict the ability of plaintiffs to seek monetary relief under Rule 23(b)(2).

AT&T v. Concepcion — The First Nail in the Coffin?

The *Dukes* decision may well be the Court's second important recent step towards reining in the class action device. Thus, it also held, in *AT&T Mobility LLC v. Concepcion*, 563 U.S. __ (April 27, 2011) ("*AT&T*"), that the Federal Arbitration Act ("FAA") permits companies to require customers to arbitrate their complaints individually, precluding class action claims. Specifically, the Court held that the FAA prohibits state laws that condition the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures. Consequently, companies can now require consumers to arbitrate any and all disputes and prevent the disputes from being decided on a classwide basis in arbitration.

The arbitration agreement at issue in the *AT&T* case was contained in a contract for cell phone services between AT&T and two customers (the Concepcions). Among other things, the agreement provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." The Concepcions sued AT&T in the United States District Court for the Southern District of California, and their complaint was consolidated with a putative class action alleging false advertising. AT&T moved to compel arbitration of the Concepcions' claims, but both the District Court, and the Ninth Circuit in a subsequent appeal from the District Court's decision, relied on the California Supreme Court's decision in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), to conclude that the arbitration provision was unconscionable because it prohibited class proceedings.

The Court reversed. Emphasizing the "liberal federal policy favoring arbitration," the Court concluded that California's *Discover Bank* rule, which classified most class or collective arbitration waivers in consumer contracts as unconscionable, "stands as an obstacle" to the objectives of the FAA, and is therefore preempted.

While AT&T was not an employment case, it potentially has far-reaching implications for employers. **Thus, in the wake of this decision, employers that utilize employment arbitration programs should consider whether or not to add appropriate language to their standard arbitration agreements in order to make clear that class action claims are precluded**. For employers that have not yet implemented arbitration programs but which face a high likelihood of class action claims (*e.g.*, very large employers, employers with a largely non-exempt workforce, employers who utilize a high number of independent contractors), the *AT&T* decision may tip the cost-benefit analysis in favor of mandatory arbitration.

Conclusion

The *Dukes* decision will not entirely eliminate class actions, in the employment context or otherwise, and employers will still face suits challenging individual employment decisions. However, the decision should at least stem the rising tide of nationwide class action complaints that have exposed employers to substantial costs, burden and liability. Likewise, while congressional responses to *AT&T* are already in the works, it may provide a powerful tool against class actions for employers who choose to implement mandatory arbitration clauses with class waivers.

Our attorneys have deep expertise on these class action and arbitration issues. If you would like to discuss these issues further or have questions about this *Alert*, please contact one of the attorneys listed above.

Key Contacts

Lois Voelz Palo Alto	lvoelz@cooley.com +1 650 843 5058
Leslie Cancel San Francisco	lcancel@cooley.com +1 415 693 2175
Frederick Baron Palo Alto	fbaron@cooley.com +1 650 843 5020