

# The Ninth Circuit Certifies Largest Civil Rights Class Action Suit in U.S. History

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On April 26, 2010 the Ninth Circuit in *Dukes v. Wal-Mart Stores Inc.* [ruled in a divided 6-5 vote](#) to affirm certification of a class of 500,000 current female employees of Wal-Mart Stores for alleged gender discrimination in their pay and promotion under Title VII of the 1964 Civil Rights Act. Wal-Mart had argued that the number of putative class members would be too large to defend. These female employees may now proceed in a nationwide class action.

In this decade old lawsuit, plaintiffs allege that Wal-Mart pays women less than men in comparable positions even when the women have higher performance ratings and greater seniority and that the company gives women fewer promotions to in-store management positions and makes them wait longer than men for such promotions. The plaintiffs allege that Wal-Mart has a strong, centralized corporate structure that fosters gender stereotyping and discrimination in Wal-Mart's 3,400 stores, that policies and practices supporting discrimination are consistent throughout all the stores, and that gender discrimination is common to all women who work or have worked for the company.

In its opinion, the Ninth Circuit reiterated that a district court must rigorously analyze the requirements of Rule 23 of the Federal Rules of Civil Procedure, but warned district courts not to decide merits issues unnecessary to the Rule 23 requirements. Further, the Ninth Circuit rejected the argument that plaintiffs must adduce "significant proof" of commonality in order to satisfy Rule 23. Rather, plaintiffs need only put forth sufficient evidence to support a common question of law and fact. At first glance, the Ninth Circuit's decision appears limited to putative class action cases involving discrimination under Title VII. However, it potentially may have much broader implications. The majority's opinion may impact other employment and civil rights litigation, securities fraud litigation, product liability, and antitrust litigation. For example, a suit arising out of a small number of discrete incidents in a company with de-centralized management decision-making or de-centralized control but which also has centralized or common policies, may suffice for the "commonality" prerequisite under Rule 23(a)(2) because, under the Ninth Circuit's ruling, "significant proof" is not required to bridge the gap between individual actions and class-wide actions.

The Ninth Circuit also held that to be certified under Rule 23(b)(2), a class must seek only monetary damages that are not superior in "strength, influence or authority" to injunctive and declaratory relief. To determine whether monetary relief predominates, a district court "should consider, on a case by case basis, the objective 'effect of the relief sought' on the litigation" and consider factors such as whether the monetary relief sought determines the key procedures that will be used, whether it introduces new and significant legal and factual issues, whether it requires individualized hearings, and whether its size and nature—as measured by recovery per class member—raise particular due process and manageability concerns. According to the majority, therefore, the back pay relief sought by the plaintiffs in this case did not predominate over the injunctive or declaratory relief that was sought by plaintiffs. The amount of monetary claims was held to be principally a

function of Wal-Mart's size, and not the primary goal and nature of the litigation. The possibility exists that other types of money damages in the securities fraud, product liability, or consumer protection litigation context may be found to not be "superior [in] strength, influence, or authority to injunctive and declaratory relief," and, therefore, are permissible money damages under Rule 23(b) (2) and the standard enunciated by the Ninth Circuit. Accordingly, in these types of cases, which previously may not have been certified as class actions because they did not meet the "commonality" prerequisite or were viewed as primarily seeking money relief, may be certified as a class action, increasing significantly the cost of litigation and doing business in the Ninth Circuit.

The impact of the majority's decision may not be known for sometime. It is also possible that the majority's decision will be short-lived. Wal-Mart has vowed to appeal the decision to the United States Supreme Court. We will keep you posted of future developments.