



# Class Action Alert

## Recent developments in class action law

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### *Dukes* redux: plaintiffs seek certification of smaller class sizes in two states

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In the face of the United States Supreme Court's denial of a nationwide class in June, plaintiffs in the *Dukes v. Wal-Mart* sex discrimination case filed their fourth amended complaint last week in the United States District Court for the Northern District of California. The amended complaint alleges that Wal-Mart engaged in a pattern or practice of gender discrimination in violation of Title VII of the Civil Rights Act, resulting in lower pay and fewer advancement opportunities for female employees in California. The complaint seeks class certification for a group of about 95,000 current and former female Wal-Mart employees in California.

The previously sought nationwide class rejected by the Supreme Court ultimately proved unsuccessful. Plaintiffs had previously alleged a class of 1.5 million current and former female Wal-Mart employees from across the country. The sex discrimination claim made on behalf of this class was that Wal-Mart had engaged in a pattern or practice of discrimination against women by allowing local managers to exercise discretion when making personnel decisions about pay and promotions. Plaintiffs, seeking both monetary and injunctive relief, had claimed that managers exercised this discretion to favor male employees.

[By a vote of 5-to-4 this past summer](#), the United States Supreme Court held that the plaintiffs had not met the requirements of Rule 23(a)(2) of the Federal Rules of Civil Procedure, which provides that class claims must share a common question of law or fact. Writing for the majority, Justice Scalia pointed to Wal-Mart's corporate policy of managerial discretion and explained that such a policy would not create the common factual or legal issues necessary for class certification. By a unanimous vote, the Court also held that the plaintiffs had failed to meet the requirements of Rule 23(b)(2) of the Federal Rules of Civil Procedure, which permits certification of classes for injunctive relief. The Court concluded that plaintiffs' claims for monetary relief simply were not incidental to their claims for injunctive relief, precluding application of Rule 23(b)(2).

In response to the Supreme Court's decision, plaintiffs have now altered their legal strategy. Their latest complaint seeks certification of a much smaller class of employees who work or worked for Wal-Mart stores in only one state—California. The complaint also provides more anecdotal allegations of discrimination. For example, a district manager allegedly said “this is why we are concerned about promoting women with children” when a female assistant manager missed work due to her child being sick. Another district manager allegedly stated that higher pay rates for men

are necessary because men serve as heads of their household. Managers also were allegedly told that Wal-Mart had more men in management positions because men are “more aggressive in achieving those levels of responsibility” than women. Consistent with the reduction of the class to employees in a single state, the new complaint also includes less statistical data than before.

Notably, one day after the California plaintiffs filed their amended complaint, another former member of the nationwide *Dukes* class filed a sex discrimination class action suit against Wal-Mart in a Texas federal court. That complaint, filed by named plaintiff Stephanie Odle, is nearly identical to the California amended complaint. Like the new California complaint, it alleges a class from only a single state—Texas. The alleged class is not small, however; it includes over 45,000 women. As with the amended *Dukes* complaint in California, the Texas complaint alleges that Wal-Mart engaged in discriminatory promotion and pay practices, and requests monetary and injunctive relief. It also contains anecdotal evidence similar to that alleged in the amended *Dukes* complaint in California. For example, the Texas plaintiff alleges that she proposed an idea to Wal-Mart’s (male) Director of Operations which was rejected. A few months later, a male store manager pitched the same idea to the Director of Operations, who this time approved it. When the Texas plaintiff asked the store manager how he changed the Director of Operations’ mind about the idea, the store manager responded that it was “a man thing.”

It is not uncommon, following a decision denying or limiting class certification, for plaintiffs’ counsel to file actions in various jurisdictions containing smaller proposed classes. Because a plaintiffs’ victory in any one of these cases can have potentially binding consequences in another, it is important for defendants to manage and coordinate multiple actions carefully. At the moment, Wal-Mart is coordinating that defense across two federal actions with different single state classes. Will there be more? Only time will tell.

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