

## Employment Law

### **'Dramatic Halo Effect' of Wal-Mart Ruling Seen Spurring Change in Workplace Suits**

BY JESSIE KOKRDA KAMENS

**T**he U.S. Supreme Court's landmark 2011 class action decisions set the table for a year of "significant change" in workplace class action litigation in 2012, led by the "halo effect" of the *Wal-Mart Stores Inc. v. Dukes* decision, a law firm report released Jan. 14 said.

The opinion in *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (12 CLASS 519, 6/24/11) "dominated the legal landscape" and was cited by lower courts an "astounding" 541 times in 2012, Seyfarth Shaw LLP's 2013 *Workplace Class Action Litigation Report* said.

"Marked by the halo effect of [*Dukes*], this past year created a number of lasting changes in employment law that will continue to alter the legal landscape and litigation strategies for employers in 2013," Gerald L. Maatman Jr., co-chair of Seyfarth's class action defense group and the report's author, said in a press release. "Meanwhile, wage and hour claims continue to rise with no sign of a crest in lawsuit filings and the EEOC's renewed focus on systemic investigations also poses high-stakes challenges for employers."

The *Dukes* decision held that Fed. R. Civ. P. 23(b)(2) cannot be used to recover individualized monetary relief for a class, and established a heightened standard for Rule 23(a)'s commonality requirement, the report said.

**'Wholesale' Certification Review.** The ninth annual report said that the *Dukes* decision caused federal and state courts to conduct a "wholesale review" of class certification orders in pending cases.

The decision also prompted defendants to file new rounds of motions for decertification, it said.

The vacated class in *Dukes* involved an allegedly discriminatory employment policy allowing managers to exercise discretion in pay and promotion, but the report said that these types of claims are not entirely dead.

"Courts are beginning to allow discretionary elements of an identifiable policy to be attacked" in the employment discrimination context, the report said.

**Battleground After *Concepcion*.** The report said that the U.S. Supreme Court's opinion in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (12 CLASS 362, 5/13/11), was already producing "second generation" issues.

That decision held that the Federal Arbitration Act preempts state law and paves the way for broad use of class action waiver clauses in arbitration agreements.

The key battleground issue going forward is whether class action bans in arbitration agreements should escape enforcement in cases where the plaintiff produces hard evidence that it would be too costly to pursue an individual action, the report said.

In such cases, plaintiffs argue that a class action is the only mechanism that allows plaintiffs to vindicate their statutory workplace rights effectively, the report said.

**Settlement Strategy Affected.** Settlement values in the employment discrimination class action context nosedived following the *Dukes* decision, according to the report.

The top 10 settlements in 2012 totaled \$48.65 million, a sharp decline from 2010, the year prior to *Dukes*, when the total was \$346.4 million.

This trend may reverse itself in 2013 as the plaintiffs' class action bar "reboots" its approach to litigation, the report predicted.

**Wage and Hour Litigation Still King.** The report said that wage and hour litigation outpaced all other types of workplace class actions in 2012, with a total of 7,672 Fair Labor Standards Act suits filed last year.

That represented an increase of 893 from the then-record 2011 levels.

Generally, the report said the still-flagging U.S. economy in 2012 fueled more class action and collective action litigation.

This trend will likely continue in 2013 "as businesses retool operations in an improving economy and the Obama administration renews an emphasis on enforcing workplace laws."

The report also said that government enforcement remained "white hot" in 2012.

The U.S. Equal Employment Opportunity Commission racked up a four-fold increase in recoveries against employers for its systemic discrimination investigations.

Enforcement actions will accelerate even more in 2013, the report predicted.

[www.seyfarth.com/publications/Ninth-Annual-Workplace-Class-Action](http://www.seyfarth.com/publications/Ninth-Annual-Workplace-Class-Action).

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*For further details, the complete 870-page report is available as an eBook. To request a copy, visit <http://>*

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