

**March 2, 2009**

COURT AGREES TO RECONSIDER MASSIVE CLASS ACTION SUIT

(Dukes v. Wal-Mart Stores, Inc.)

The U.S. Court of Appeals for the Ninth Circuit in San Francisco last week agreed to rehear an appeal from a lower court decision that certified a massive class action against retailer Wal-Mart. The decision to rehear the case *en banc* (that is, before 11 judges instead of the usual three-judge panel) was a victory for the Washington Legal Foundation (WLF), which had urged the appeals court to reconsider its initial decision to deny the appeal. The case will be re-argued on March 24, 2009.

The underlying suit was filed by a small number of female Wal-Mart employees who claim that the company denied them equal pay and opportunities for promotion. But the trial court decided to certify them as representatives of a class of 1.6 million current and former female employees, and a three-judge appeals court panel upheld that decision. In its brief urging rehearing, WLF argued that the plaintiffs have failed to demonstrate that the case could manageably be tried as a class action. WLF argued that the plaintiffs failed to demonstrate that there are questions of fact and law that are common to the class -- an absolute prerequisite for certification of a class action. WLF's brief was drafted with the pro bono assistance of Jennifer L. Brown and Anthony J. Capozzola, attorneys in the San Francisco office of the law firm of Shook, Hardy & Bacon.

In its initial panel decision affirming class certification, the appeals court disagreed with WLF, holding that "commonality" was established by the plaintiffs' evidence that nationwide Wal-Mart employment policy permitted "excessive subjectivity in personnel decisions" -- a policy the court deemed "vulnerable" to sex stereotyping. The appeals court panel voted 2-1 to uphold the district court's class certification, with Judge Andrew Kleinfeld dissenting. Last week's order granting rehearing *en banc* did not specify which judges supported rehearing; such an order requires the vote of a majority of active-duty Ninth Circuit judges.

"There is little doubt that the only reason the plaintiffs' lawyers sought class certification was to coerce the defendant into settling the case without regard to the merits of the plaintiffs' claims," said WLF Chief Counsel Richard Samp after reviewing the order granting rehearing. "Class actions of this magnitude are virtually never appropriate

because they could never be brought to trial; yet they serve the purposes of the plaintiffs' bar by imposing tremendous settlement pressure on defendants," Samp said.

The plaintiffs do not allege that Wal-Mart has a company policy of discriminating against female employees. Rather, they allege that Wal-Mart maintains an amorphous "corporate culture" that can "perpetuate gender stereotypes" and lead to differences in pay and promotion between men and women. WLF argued that class treatment of such vague claims is never appropriate; rather, WLF argued that every case of alleged discrimination must stand or fall on its own merits.

In its briefs (filed before the initial three-judge panel and again in support of the rehearing petition), WLF was particularly critical of the trial court's decision to admit into evidence and rely on the testimony of Dr. Bielby, the plaintiffs' sociology expert witness. Dr. Bielby testified that gender stereotyping was "likely" to exist at Wal-Mart, but he conceded that his opinion was largely conjectural. The trial court nonetheless admitted Dr. Bielby's testimony and relied on it in its certification decision. WLF argued that this conjectural testimony did not meet the standard of scientific reliability established by the U.S. Supreme Court's *Daubert* decision and thus should have been excluded. The three-judge panel disagreed, holding that the strict *Daubert* evidentiary standard should not be applied during class certification proceedings.

The three-judge panel reasoned that the strict *Daubert* standard only applies when a case is being decided on the merits, not at preliminary stages such as when a court is considering whether to certify a class. In its brief in support of rehearing *en banc*, WLF argued that the strict *Daubert* standard should apply *whenever* a court is considering whether to admit expert testimony into evidence. WLF argued that anything less permits "junk science" to seep into the judicial process. Exclusion of unscientific, and thus unreliable, evidence should be an important goal at all stages of litigation, WLF argued.

WLF argued that the trial court's certification of the plaintiff class, consisting of 1.6 million women who worked for Wal-Mart at any time since 1998, should be overturned because it was based in significant part on unscientific, unreliable evidence.

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting tort reform and reining in excessive litigation.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.