California LAWYER

APPELLATE LAW

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The moment oral argument ended last March in *Wal-Mart Stores, Inc. v. Dukes*, it was clear that Boutrous was going to win big at the U.S. Supreme Court. The only question was how many votes he would get. The justices ruled unanimously in favor of his client, Wal-Mart, to deny class certification to 1.5 million women employees who said they were discriminated against in the workplace. The June decision reversed the Ninth U.S. Circuit Court of Appeals, which held in 2010 that the claims for back pay could proceed (*Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)).

Although the Court's vote was unanimous, Justice Antonin Scalia's majority opinion—which four other justices joined—went further, making clear that in the future plaintiffs attorneys will have a harder time certifying huge class actions against big companies. Scalia stressed the need for "commonality" of claims. In other words, the bigger the company and the more its authority is decentralized around the country, the harder it will become to certify a nationwide class action.

"Because respondents provide no convincing proof of a company-wide discriminatory pay and promotion policy," Scalia wrote, "we have concluded that they have not established the existence of any common question." The minority opinion, written by Justice Ruth Bader Ginsburg, stated that the plaintiffs should have had the opportunity on remand to show that common questions of fact predominated under Rule 23(b)(3). The ruling's ramifications have already been felt in other cases, with big companies having an easier time defeating class certification. They have Boutrous to thank.

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