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A Sharply Divided Ninth Circuit Upholds Certification of Largest Employment Discrimination Class Action in History

On April 26, 2010, the Ninth Circuit sitting *en banc* issued a long anticipated and sharply divided 6-5 opinion in *Dukes, et al. v. Wal-Mart*. The interlocutory appeal, taken pursuant to Rule 23(f), has been before the Ninth Circuit since 2005 (first before a three-judge panel, and then before an eleven-member *en banc* panel). The majority affirmed the district court's certification of a nationwide class of current female employees of Wal-Mart with respect to their claims for injunctive and declaratory relief and back pay. The Court remanded the claims for punitive damages and those of putative class members who no longer worked for Wal-Mart when the complaint was filed. Given the divided court, the size of the class and the conflicts with other circuits, Supreme Court review seems likely. Wal-Mart's attorneys have already suggested that they intend to seek such review.

The class asserts claims against Wal-Mart for sex discrimination under Title VII of the 1964 Civil Rights Act on behalf of every female employee who has worked in any U.S. Wal-Mart store since December 26, 1998. As Wal-Mart is the largest private employer in the world, that class is estimated to include more than 1.5 million members. Plaintiffs' central theory is Wal-Mart vests its managers with discretion to make excessively subjective decisions regarding compensation and promotion. Plaintiffs allege that this excessive subjectivity results in a pattern and practice of Wal-Mart discriminating against its female employees. In particular, plaintiffs claim that Wal-Mart pays its female employees less than comparable males, and awards them fewer and less frequent promotions. Billions of dollars are potentially at stake.

Employment law attorneys have watched this lawsuit closely since it was filed in 2001, primarily because of the unprecedented size of the alleged class and the potentially daunting manageability issues. Although acknowledging the mammoth size of the class, the majority concluded that "manageability concerns present no bar to class certification here."

The majority opinion is notable on several levels. As an initial matter, the majority concluded that the district court did not abuse its discretion in holding that plaintiffs met the commonality and typicality requirements of Rule 23(a). The majority held that plaintiffs presented evidence of (a) uniform personnel and management structure across stores, (b) Wal-Mart headquarters' extensive oversight of store operations, (c) company-wide policies governing pay and promotion decisions, (d) a strong, centralized corporate culture, and (e) consistent gender-related disparities in every region of the company. It also credited the testimony of plaintiffs' sociology

expert that Wal-Mart's strong corporate culture may foster gender stereotyping. The majority further accepted plaintiffs' statistical evidence as evidence, at least at the class certification stage, that gender is a statistically significant variable in accounting for the salary and promotion differentials between male and female employees at Wal-Mart. It also found that the anecdotal evidence submitted by plaintiffs supported commonality.

Significantly, the majority also devised a new test for determining when monetary relief "predominates" over declaratory and injunctive relief, which precludes certification of a Rule 23(b)(2) class. Resorting to the dictionary definition of "predominant," the Ninth Circuit ruled that certification under Rule 23(b)(2) is inappropriate if monetary damages are "superior [in] strength, influence, or authority" to injunctive and declaratory relief. The majority thus held that a district court should consider, on a case-by-case basis, the objective "effect of the relief sought" on the litigation, including (a) whether the monetary relief sought determines the key procedures that will be used, (b) whether it introduces new and significant legal and factual issues, (c) whether it requires individualized hearings, and (d) whether its size and nature raise particular due process and manageability concerns. In adopting this test, the majority both overruled the previous Ninth Circuit standard and departed from the standard followed by several other circuits.

The majority flatly rejected Wal-Mart's argument that the large size of the class and potential claims in the billions of dollars undermine plaintiffs' claim that injunctive and declaratory relief predominate. The majority did, however, agree that the district court abused its discretion by failing to analyze whether punitive damages could be certified under Rule 23(b)(2). It encouraged the district court to consider, on remand, whether class certification of the punitive damages is instead appropriate under Rule 23(b)(3). The majority also agreed with Wal-Mart that putative class members who were no longer employed when the complaint was filed lack standing to pursue injunctive or declaratory relief. The majority stated that on remand the district court may, in its discretion, certify a separate Rule 23(b)(3) class of former employees seeking to pursue back pay and punitive damages.

The sharply worded dissent, from which the expected petition for *certiorari* will no doubt draw a number of arguments, maintained that in order to bridge the gap between their individual treatment and class treatment, Supreme Court precedent required plaintiffs to adduce "significant proof that an employer operated under a general policy of discrimination." The dissent criticized the majority for erroneously accepting "a chain of weak inferences" as sufficient evidence that gender discrimination was Wal-Mart's standard operating procedure. Dismissing plaintiffs' statistical, sociological and anecdotal proof as inadequate, the dissent stated: "Like the proverbial shell game, the plaintiffs' circular presentation cannot conceal the fact that they have failed to offer any significant proof of a company-wide policy of discrimination, no matter which shell is lifted."

The dissent declared the majority's newly minted test for predominance under Rule 23(b)(2) "unusable," and criticized the majority for failing to consider its own factors. In addition, the dissent evinced serious concerns about the due process and manageability issues that the majority seemingly brushed aside. The dissent opined that the certification of this class and the district court's trial plan to apply a damage formula for back pay would violate Wal-Mart's statutory and constitutional due process right to raise individual defenses in response to requests for back pay. According to the dissent, "[n]ever before has such a low bar been set for certifying such a gargantuan class."

We suspect that the Ninth Circuit's decision will not be the last word here. The case raises a number of critical issues about the proper scope of the class action device, many of which have divided the Courts of Appeals and some of which have constitutional dimensions. The Supreme Court therefore may find this case too appealing to pass up.

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This alert is not intended to provide legal advice, and no legal or business decision should be based on its content. Any questions concerning the issues addressed in this alert may be directed to Jay Cohen (212-373-3163), Daniel J. Toal (212-373-3869) or Maria Helen Keane (212-373-3202).