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The Ninth Circuit Court of Appeals affirms the certification of a nationwide class of over 1.6 million current and former female Wal-Mart employees who claim that women were discriminated against in pay and promotion.

Class Action
A Littler Mendelson Newsletter specifically for Class Action

Dukes v. Wal-Mart: Wal-Mart Loses Initial 9th Circuit Battle, but Who Will Win the Class Certification War?

By Margaret Parnell Hogan

On February 6, 2007, the Ninth Circuit Court of Appeals affirmed a federal district court's 2004 decision certifying a nationwide class of approximately 1.6 million current and former female employees alleging sex discrimination.

Within hours of the Ninth Circuit's decision, Wal-Mart declared its intention to seek further appeals, ultimately to the U.S. Supreme Court if necessary. After the dust settles and the interviews are over, the ultimate question remains (and will likely remain unanswered for some time): Wal-Mart has lost some early battles, but who will win this class certification war?

Background and the Ninth Circuit Decision

On June 21, 2004, the United States District Court in San Francisco certified a nationwide case of approximately (at that time) 1.6 million current and former employees of Wal-Mart.[1] The *Dukes* Third Amended Complaint asserted that Wal-Mart discriminated against women as a class in both compensation and promotion, through Wal-Mart's company-wide policies and practices. In an eighty-four page opinion, the district court agreed and certified the class. Wal-Mart filed an immediate interlocutory appeal.[2]

Rule 23 (a)

As in the district court's decision, there was significant discussion by the Ninth Circuit of Federal Rules of Civil Procedure, Rule 23(a)'s requirements of numerosity, commonality, typicality and adequacy of representation. Wal-Mart did not contest Rule 23(a)(1)'s numerosity requirement, as the proposed class consisted of approximately 1.5 million women. Wal-Mart did, however, vigorously contest Rule 23(a)'s remaining requirements, putting forth arguments that were as soundly rejected by the Ninth Circuit's majority opinion as by the district court below. Indeed, in large part, the Ninth Circuit adopted the findings and analysis of the district court. Consequently, this ASAP does not attempt to cover all points covered in the Ninth Circuit opinion, but rather seeks to highlight key points, discuss its ramifications, and offer some suggestions for employers while the case winds its way towards the U.S. Supreme Court.

Commonality

Like the district court, the Ninth Circuit focused a great deal of attention on Rule 23(a)(2)'s requirement that there be "questions of law or fact common to the class." The court stated that the test is "qualitative rather than quantitative" and

[1] Given that more than two years have passed since the district court's order, this number has undoubtedly increased. News articles covering the Ninth Circuit's ruling quote lead class counsel as stating that the class is likely now more than 2 million current and former female employees. Bob Egelko, *Wal-Mart Sex Discrimination Suit Advances*, San Francisco Chronicle, Feb. 7, 2007, at B-1

[2] The district court's opinion certified a class as to the equal pay claims as well as promotion claims and allowed injunctive and declaratory relief as to the promotion claims. The district court declined, however, to certify a class with respect to back pay related to the challenged promotions decisions because data was not available. Plaintiffs cross-appealed that denial.

held that the two groups of evidence offered by the plaintiffs – (1) the existence of a corporate practice of discrimination and (2) the existence of a subjective decision-making process – satisfied the commonality requirement.

Corporate Policy of Discrimination

The court agreed with the plaintiffs' contention that Wal-Mart is a highly centralized company and pointed to evidence of uniform personnel and management structure across all Wal-Mart stores; extensive oversight from corporate headquarters of store operations, compensation, and promotion decisions; and a strong corporate culture. The court gave greater attention, though, to the plaintiffs' sociological expert.

In *Dukes*, the plaintiffs' sociological expert asserted that Wal-Mart's strong corporate culture was manifested in a centralized company with uniform personnel policies and practices. He asserted that these policies and practices were deficient with respect to equal employment opportunities and that these same policies and practices were such that promotion and compensation decisions made pursuant to those policies were highly susceptible to gender bias. The plaintiffs' sociological expert did not, however, identify a specific discriminatory policy.

Wal-Mart asserted on appeal that the plaintiffs' sociological expert did not meet the necessary standards for experts, generally known as the "*Daubert* test," set forth in *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993). The court, however, rejected Wal-Mart's arguments, instead adopting the district court's reasoning that these arguments went to the weight of the expert opinion, not its admissibility. The weight of evidence, like the merits of the claims, the court stated, were not to be considered at the class certification stage.

The court went even further and stated, affirmatively, that "social science statistics may add probative value to plaintiffs' class action claims." It also noted that, if a full-blown *Daubert* analysis *was* proper at the class certification stage, "[the plaintiffs' sociological expert's] testimony would satisfy the *Daubert* test because [he] employed a well-accepted methodology to reach his opinions and because his testimony has a 'reliable basis in the knowledge and experience of [the relevant] discipline.'"

The opinion gives social science testimony the Ninth Circuit's stamp of approval. Moreover, while the court was careful to note that the district court's *Daubert* ruling had not been appealed, the Ninth Circuit's dicta – that the plaintiffs' sociologist would have been approved – will certainly be cited by plaintiffs' counsel in opposition to any *Daubert* motion seeking to exclude a sociologist. It should also be anticipated that the plaintiffs' class action bar will now proffer social scientists as regularly as they proffer statisticians and economists to support their motions for class certification.

The appeals court also adopted the findings of the district court with respect to the plaintiffs' statistical expert and rejected the contrary findings of Wal-Mart's statistical expert. The report of the plaintiffs' statistical expert (which examined data at a regional level) was found to be more probative than Wal-Mart's statistical expert (who examined data on a store department level).

Likewise, the court agreed that the district court properly credited 120 declarations from named plaintiffs and putative class members – alleging they received lower pay than similarly situated men as well as fewer promotions than similarly situated men – in its commonality analysis. The court flatly rejected Wal-Mart's argument that the number of declarations was too few in relationship to the size of the class.

Subjective Decision-Making

The allegation of subjective decision-making authority given to Wal-Mart managers further supported a finding of commonality. The court first noted that "discretionary decision-making *by itself* is insufficient to meet Plaintiffs' burden of proof." The court held, however, that this discretion was merely one of *several* factors supporting the finding of commonality. The Ninth Circuit noted that when this subjective decision-making is part of a "consistent corporate policy" and is in addition to other evidence, courts have not hesitated to find commonality.

Remaining Rule 23(a) Requirements

The court also affirmed the district court's analysis with respect to the remaining requirements under Rule 23(a). With respect to the requirement that "the claims or defenses of the representative parties are typical of the claims or defenses of the class," the court noted that the absence of a class representative for each management category was not, as Wal-Mart suggested, fatal to class certification, because discrimination allegedly was the same across all categories. Likewise, with respect to the adequacy of representation requirement, the court quickly rejected the idea that class certification should be denied merely because the class included both supervisors and those they supervised among its members.

Rule 23 (b)

Monetary Relief Versus Injunctive and Declaratory Relief

The district court certified the class under Rule 23(b)(2), which requires that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . . with respect to the class as a whole." Courts have held that monetary damages may be claimed so long as those monetary damages are not the "predominant" relief and are secondary to the injunctive or declaratory relief claims.

The court stated that the issue before it was "whether Plaintiffs' primary goal in bringing this action is to obtain injunctive relief; not whether they will prevail," and proceeded to test this goal through Plaintiffs' subjective declaration. Pointing to the Ninth Circuit's earlier decision in *Molski v. Gleich*, 318 F.3d 937, 946 (9th Cir. 2003), the court stated that it must look to the plaintiffs' intent in bringing the action and, because the plaintiffs stated that their primary goal was injunctive relief and Wal-Mart failed to rebut these statements, the court held that the district court properly found that damages – despite their potentially astronomical amount – did not predominate over claims for injunctive and declaratory relief. It is, of course, somewhat ironic that the test that the Ninth Circuit deemed appropriate to determine intent at this juncture was *purely subjective* and requires that the declarations of the putative class be taken at face value. The Ninth Circuit's analysis also is in sharp contrast to the majority of circuits that require the court to examine whether or not the final relief sought relates exclusively or predominantly to money damages.

Wal-Mart's Defenses

Wal-Mart argued on appeal that the district court's decision improperly denied it of the right to defend itself. Specifically, Wal-Mart contended that it was entitled to individualized hearings, both to offer certain defenses to individual class members' claims and to contest claims for damages. The Court rejected these arguments.

Specifically, the court held that neither the U.S. Supreme Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), nor the Civil Rights Act of 1991 provided an absolute right to individualized hearings for the purpose of asserting defenses. Likewise, the Court rejected the idea that 42 U.S.C section 1981 or the U.S. Supreme Court's decision in *State Farm Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), provided the right to individualized hearings to contest damages in a class action and further pointed out that the district court had put safeguards in place to protect against unjust enrichment.

Dissent – A Ray of Hope?

The dissent noted that the class lacked commonality in large part because, except for excessive subjectivity, no common policy could be found. It also noted that the "Plaintiffs' only evidence of sex discrimination is that around 2/3 of Wal-Mart employees are female, but only about 1/3 of its managers are female." But as the Supreme Court recognized in *Watson*, "It is entirely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance."

With respect to typicality, the dissent noted and examined in detail the widely divergent claims of the seven named plaintiffs who had varying experiences and were at times hourly employees and at other times managers who made the "subjective decisions" about which the class complains. It also pointed out that in addition to the claims of sex discrimination, many claimed race discrimination and some simply claimed unfairness. This diverse collection of individual claims were not, according to the dissent, "typical."

The dissent also noted the short shrift paid by the district court and majority opinion to the adequacy of representation requirement. The sharpest views from the dissent came in discussing the Rule 23(b)(2) analysis, where it was suggested that the punitive damages claims violate Wal-Mart's due process rights and ignores the Supreme Court's guidance in *State Farm*.

Gearing Up for War

Some will have felt a sense of *déjà vu* reading the Ninth Circuit opinion (and perhaps this ASAP) because the court of appeals adopted so much of the district court's findings and analysis. Consequently, much of our initial advice to employers remains the same as after the publication of *Dukes I*. Specifically, employers should continue to take the following steps.

- Become familiar with your employment statistics (and the inferences that can be drawn from them) now, before you face a class action, and do so in *a privileged fashion*;
- If you are fortunate enough to have already completed the previous step, examine your employment policies (specifically hiring, promotion, and pay policies) in *a privileged fashion* and determine if modifications can be made to eliminate subjective criteria;
- Adopt or modify a posting system so that promotional opportunities (or more of them) are publicized internally;
- Conduct a systematic assessment, in *a privileged fashion*, of potential barriers to the advancement of women and minorities;
- Consider adopting an appeal process for decisions denying promotions or pay raises.

For more information, see *Dukes v. Wal-Mart: A Foreboding Class Certification Decision for Employers*, July 2004 ASAP.

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