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One Minute Memo®

Dukes Redux: Ninth Circuit Revises Its Opinion, With Same Substantive Result

On December 11, 2007, the Ninth Circuit issued a revised 2-1 panel decision in *Dukes, et al. v. Wal-Mart Stores, Inc.*, affirming a class certification order in a gender discrimination action against Wal-Mart challenging pay and management promotion decisions. The Ninth Circuit vacated its earlier decision of February 6, 2007, which had certified, under Rule 23(b)(2), a class of over 1.5 million current and former female employees. In its new decision, the Ninth Circuit reiterated its opinion that the district court did not abuse its discretion in finding that a diverse class of salaried and hourly female employees employed across 3,400 stores was nonetheless united by company-wide practices. The Ninth Circuit found evidence of a link between these practices and discriminatory impacts on women by examining expert opinions, statistical evidence, and anecdotal evidence. The district court had a basis to conclude that claims for injunctive and declaratory relief predominated over monetary claims even though many class members were no longer employed by the company, and despite the plaintiffs' demand for not only back pay but class-wide punitive damages. Rejecting arguments that the trial would be unmanageable because of the class's huge size and unconstitutional because the company would be deprived of its constitutional right to defend individual pay and promotion decisions, the Ninth Circuit determined that if the company were found liable of discrimination at the merits stage, the district court could employ a formula to determine the amount of back pay and punitive damages owed to the class members, and might use "test cases" to give the company some chance to defend some personnel decisions on the merits, with the results being subject to statistical analysis in order to support a class-wide formula. Finally, the Ninth Circuit ruled in favor of Wal-Mart in upholding the district court's decision not to certify promotion claims brought by class members for whom there was no objective evidence of qualifications for and interest in promotions.

The new ruling, while achieving the same substantive outcome of the February 6 decision, reflects various changes. First, the Ninth Circuit indicates that plaintiffs no longer employed when the suit was filed should not be part of the class for purposes of injunctive relief. The district court had approved a class of all current and former female employees starting 300 days before the first EEOC charge was filed in 1999. The Ninth Circuit, however, ruled that the class should be all women still employed when the complaint was filed in June 2001. Women who had already left the company, the Ninth Circuit reasoned, "do not have standing to pursue injunctive or declaratory relief." The Ninth Circuit remanded the question of including some former employees in the class back to the district court. The Ninth Circuit rejected, however, the company's argument that the existence of former employees in the class undermined the plaintiffs' allegation that claims for injunctive or declaratory relief predominate. The Ninth Circuit remained "confident that the primary relief sought by these plaintiffs remains declaratory and injunctive in nature, notwithstanding their request to also be 'made whole' in a monetary sense to the full extent provided under Title VII."

Second, the Ninth Circuit expanded upon its reasoning in response to concerns about manageability and due process. Relying on *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767 (9th Cir. 1996), the Ninth Circuit determined that although the district court's proposal to use a formula to compensate class

members was "somewhat imperfect," it was not a reason to find that due process protections were violated, especially now at the pre-merits stage. The Ninth Circuit reasoned that "[b]ecause there are a range of possibilities—which may or may not include the district court's proposed course of action—that would allow this class action to proceed in a manner that is both manageable and in accordance with due process, manageability concerns present no bar to class certification here."

Third, the new decision contains numerous analytical refinements that make the decision superficially more compatible with Supreme Court law and the trend in other circuits towards meaningful rigorous analysis of Rule 23 requirements. Thus, in footnote 2, for example, the Ninth Circuit acknowledged that district courts must (and not merely may) resolve facts needed for Rule 23 analysis even if those facts go to the merits. Similar adjustments occur at other places in the opinion. Even with the removal of inaccurate pro-certification rhetoric, however, the Ninth Circuit still accepted the opinion of Plaintiffs' expert, who used a "social framework analysis" to examine employment policies. The Ninth Circuit held that the expert's opinion satisfied the standard in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), and that in a class action context, disagreements with the experts' inferences did not mean the testimony could not be admitted as expert evidence to bolster Plaintiffs' arguments on commonality.

The new decision, like the old, contains a vigorous dissent. The dissenting judge argued that the changes to the majority's decision did not alter his belief that the class certification order was unworkable and that the class should not have been certified. The dissent indicated that "[t]he majority's new opinion does not solve the problems of its previous opinion, . . . [for c]lass action certification still violates Rule 23, likely deprives many women who have been discriminated against of the money they are entitled to, and deprives Wal-Mart of its constitutional rights to jury trial and due process of law." The dissent was especially critical of the contention that injunctive and declaratory relief predominated over monetary relief, calling the suggestion "risible." The dissent argued that except for the wealthiest people, "billions of dollars are going predominate over words and solemn commands and promises about how to behave in the future. What Wal-Mart cashier or stocker would care much about how the district court told Wal-Mart to run its business after getting enough cash to quit?" The dissent also questioned the district court's management plan approved by the majority that would permit a bifurcated process and the use of a formula to determine punitive damages. The dissent asserted that "[b]oth phases of this plan are constitutionally defective because they are inadequately individualized," arguing there would never be an adjudication made by an Article III judge and jury because "Wal-Mart will never get a chance, for example, to prove to a jury that [Betty] Dukes was tried as a manager and did not perform well, or that [Edith] Arana did indeed steal time or at least that after a good faith investigation Wal-Mart fired her for that nonpretextual reason."

The re-issued *Dukes* ruling remains the bellwether Rule 23 decision in 2007. Wal-Mart had filed a petition for rehearing *en banc* as to the February 6 opinion before the full Ninth Circuit. The December 11 ruling renders that petition moot. The company may renew its petition for rehearing within the next 21 days. The *Dukes* ruling is a plaintiff-friendly interpretation of Rule 23 that deepens the divisions in the federal circuits on the ability of employers to defeat nationwide class actions where plaintiffs seek far-ranging injunctive relief coupled with requests for class-wide punitive damages.

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