

Management Alert

Ninth Circuit Panel Rules Against Wal-Mart in Gender Discrimination Class Action and Sets a Potentially Dangerous Precedent for Employers

On February 6, 2007, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit issued a long-awaited ruling in *Dukes, et al. v. Wal-Mart Stores, Inc.*, Nos. 04-16688 & 04-16720 (9th Cir. Feb. 6, 2007), a nationwide gender discrimination class action. In its ruling, the Ninth Circuit affirmed a controversial class certification order from the U.S. District Court for the Northern District of California from June, 2004 that had certified a class of nearly 1.5 million current and former employees challenging Wal-Mart's pay and promotional practices as discriminatory. The decision addresses several cutting-edge class action issues of substantial importance to employment discrimination litigation. In affirming the district court's decision to certify a class, the Ninth Circuit has now positioned itself separately from other federal circuits.

The litigation began in 2000, when Betty Dukes filed a sex discrimination claim against Wal-Mart in California. Ms. Dukes claims that she and other similarly situated women were denied opportunities to advance to higher, salaried positions. After extensive discovery, briefing, and an oral hearing, the district court certified a class consisting of "[a]ll women employed at any Wal-Mart domestic retail

store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices," seeking injunctive and declaratory relief, as well as punitive damages. While no decision has been reached on the merits, the district court and a majority of the Ninth Circuit panel have now determined that Ms. Dukes and the other plaintiffs presented enough evidence to certify the largest employment discrimination class in history. The decision will affect more than 3,400 Wal-Mart stores across the country.

Historically, employees seeking class certification of nationwide employment discrimination suits against employers have had difficulty establishing the legal requirements for class certification. Specifically, before a court can certify a class, the law requires plaintiffs to show that the claims of the potential class members are common and typical. It is often difficult for plaintiffs to establish that a decision made at one facility by one manager has relevance to another employee at another facility.

In opposing class certification, Wal-Mart argued that personnel decisions at its stores were made by thousands of individual store managers across the country, thereby making it impossible for the plaintiffs to establish commonality and typicality. The Ninth Circuit determined, however, that the plaintiffs had shown (1) sufficient evidence supporting the existence of company-wide policies and practices; (2) expert opinions supporting the existence of company-wide policies and practices; (3) expert statistical evidence of class-wide gender disparities attributable to discrimination; and (4) anecdotal evidence from class members around the country of discriminatory attitudes held or tolerated by management. The Ninth Circuit found that Wal-Mart's challenges to the evidence, particularly plaintiffs' expert opinions, largely went to the weight—as opposed to the admissibility of the evidence—and thus it was unwilling to find that the district court had abused its discretion in crediting the plaintiffs' expert opinions. The Ninth Circuit's determination on this point was cursory and reflects a very permissive view toward the plaintiffs' burden, thereby making class certification easier to obtain against employers.

Aside from its size, this class action is unprecedented in the employment arena for another reason. The plaintiffs in *Dukes* seek the imposition of punitive damages on a class-wide basis before a jury determines whether individuals have suffered harm. Yet, the Supreme Court has determined that an award of punitive damages must be related to the monetary harm suffered by individual plaintiffs. To determine harm to individual plaintiffs, juries must make individualized determinations, which are inconsistent with a class-wide approach to assessing punitive damages. For this reason, courts have traditionally rejected certification of a class with this approach to the imposition of punitive damages.

Wal-Mart argued that it would be unconstitutional for a jury to award punitive damages before it determined whether an individual had been harmed. Wal-Mart also argued that, by allowing the court to apply a formula to determine lost pay and punitive damages, the court essentially stripped Wal-Mart of its ability to defend itself. It also asserted that the inevitable result of such a trial plan would result in a windfall for class members who suffered no injury. In these circumstances, Wal-Mart argued that it was entitled to individualized hearings on both punitive damages and lost pay issues, so that it would have an opportunity to present defenses to individual employee claims. Wal-Mart further argued that class certification was impossible because examination of these issues would devolve into mini-trials upon mini-trials for each class member, thereby making the action unmanageable (and thus not amenable to class certification). In rejecting these arguments, the Ninth Circuit determined that no legal authority required individualized hearings, and that statistical methods could be used to determine the appropriate relief for plaintiffs in a manageable fashion.

The Ninth Circuit also rejected Wal-Mart's argument that class certification was inappropriate under Federal Rule of Civil Procedure 23(b)(2), which requires that injunctive relief predominate over claims for monetary relief. Wal-Mart contended that, because so many of the class members were former employees, they would not benefit from injunctive relief and so such relief could not predominate. Wal-Mart also contended that the district court abused its discretion in finding that injunctive relief predominated—simply because plaintiffs claimed it did—even though plaintiffs are seeking perhaps billions of dollars in damages. The court rejected both contentions, determining that (1) the fact that some putative class members are former employees does not alter the

primary intent of the plaintiffs as a whole (and thus did not subordinate the plaintiffs' injunctive relief claims); and (2) Wal-Mart failed to offer any evidence to cast doubt on the plaintiffs' motivations. This ruling will likely encourage artful pleading by plaintiffs—e.g., “we brought this lawsuit for injunctive relief”—to gain the substantial settlement leverage that accompanies certification of a class.

One aspect of the Ninth Circuit's opinion was decided in favor of Wal-Mart: The Ninth Circuit upheld the district court's refusal to include in the denial-of-promotion class those women who lacked objective evidence that they were interested in promotion. The Ninth Circuit recognized that, in the absence of objective evidence of interest, the district court would need individualized hearings to determine interest. Because such hearings would be unmanageable due to the sheer volume of such inquiries, the Ninth Circuit ruled that the district court did not abuse its discretion in denying certification as to the subset of the class for whom no objective applicant data exists.

Wal-Mart reportedly will seek *en banc* review of the decision before the entire Ninth Circuit and may well ultimately seek review by the U.S. Supreme Court. The two-judge ruling, made over an articulate, vigorous dissent, pushes class action concepts to new ground on issues of substantial concern for all employers. The ruling, if not overturned, heightens the risk for employers in the Ninth Circuit (which includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) that statistical workforce disparities, combined with subjective employment decision-making, may give rise to class action litigation. The ruling also adds fuel to the current cutting-edge “punitive damages” only certification theory, which plaintiffs' lawyers are arguing in other class actions outside of the Ninth Circuit.

If you have any questions concerning this Management Alert, please contact the Seyfarth Shaw LLP attorney with whom you work or any attorney on the website at www.seyfarth.com.

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