

Employment Group Of The Year: Seyfarth Shaw

By **Ben James**

Law360, New York (January 06, 2012, 6:46 PM ET) -- Seyfarth Shaw LLP filed two amicus briefs that helped shape the U.S. Supreme Court's landmark decision in *Wal-Mart v. Dukes*, and then used the *Dukes* ruling to successfully fight collective action and class certification in cases against Farmers Insurance Exchange and Costco Wholesale Corp., landing the firm's labor and employment team a spot among Law360's Employment Groups of 2011.

Seyfarth employment lawyers also snuffed out a proposed Worker Adjustment and Retraining Notification Act class action against DHL Express Inc. — the Supreme Court rejected the ex-DHL worker plaintiffs' bid for high court review in October — and obtained favorable rulings in pending U.S. Equal Opportunity Commission cases, including a case against Kauai Coffee Co. Inc. and others involving allegations of human trafficking.

The firm obtained a summary judgment win for DHL unit Excel Direct Inc. in September in a proposed wage-and-hour class action that was pared down to a contract case before being dismissed. And in the wake of former Hewlett Packard CEO Mark Hurd's abrupt and well-publicized departure, HP turned to firms including Seyfarth in a trade secrets and contract suit against Hurd, which led to a 2010 settlement in which Hurd agreed to relinquish \$14 million in stock he would have received under his separation agreement.

“We are the best at what we do. We are battle-ready, and we are primed to win,” said Lisa Damon, chairwoman of Seyfarth's labor and employment group, which is comprised of around 365 of the firm's 750 lawyers. “We win for our clients, and we do it in a way that's innovative and thoughtful and leads to positive change.”

Seyfarth's litany of recent achievements on the employment front goes on. The firm even won a \$15.5 million arbitration award for plaintiffs' class action firm Sprenger & Lang in March, in a dispute over how to divide the attorneys' fees stemming from a \$70 million settlement in age discrimination litigation brought by television writers.

However, Seyfarth's involvement in the *Dukes* gender discrimination case — in which the nation's highest court struck down a class of some 1.5 million current and former female Wal-Mart employees in June — and its work applying the Supreme Court's rationale to defeat class certification in other cases, stands out as a highlight, said Camille Olson, a Seyfarth Shaw partner and chairwoman of the firm's complex discrimination litigation practice group.

"I don't think you can think about our year and not think about our impact in the Dukes case and the cases that came afterward," Olson said.

In January 2011, ahead of the March oral arguments in the Dukes case, Seyfarth submitted two amicus briefs, one on behalf of Costco and another on behalf of the Society For Human Resource Management and the HR Policy Association.

It's tough to read the Dukes decision and come to any conclusion other than that the majority had adopted the positions taken in those two briefs, according to Olson, who added that the fact that Seyfarth represented multiple amicus parties in the case was a testament to the firm's advocacy.

Those briefs "presented the only evidence for the Supreme Court regarding centralized company culture and decentralized, nonformulaic decision-making, and whether or not it was inherently discriminatory," Olson said.

The SHRM brief argued there had been no reason for the Ninth Circuit to conclude that "countless individualized personnel decisions" made by thousands of Wal-Mart managers amounted to a "single, inherently discriminatory policy."

The Costco brief bolstered Wal-Mart's position by focusing on the statistical infirmities in the plaintiffs' case and using strategies Seyfarth had developed in other cases to "backstop" Wal-Mart's defense counsel, said Seyfarth partner Gerald Maatman, co-chairman of the firm's class action group and one of the attorneys for Costco in the Dukes matter.

"While no one will ever know what really motivated the Supreme Court's votes on the case, we thought our brief and our argument was a critical component of the overall structure of the defense presentation," Maatman said.

Just over a month after the Dukes decision, Seyfarth successfully applied it to quash a motion for notice-stage certification in a Fair Labor Standards Act case in South Carolina against Farmers Insurance Exchange.

The judge's July 22 ruling in the conditional certification bid in that case said that while Dukes was a Title VII, Rule 23 case and the Farmers Exchange case was an FLSA suit, the high court's decision in Dukes was "nonetheless illuminating."

That marked the first time a management-side firm had successfully applied Dukes to a collective action, Seyfarth said.

Then in September, Seyfarth achieved a similar result for Costco in the Ninth Circuit. The appeals court, tipping its hat to the "new precedent" arising from the Dukes case, vacated class certification in a gender discrimination case over Costco's promotional practices.

In addition to its work defending class actions brought by private parties, Seyfarth is also at the head of the class when it comes to EEOC cases.

"We believe we are representing employers in the three biggest EEOC lawsuits presently pending in the U.S.," Maatman said. "Employers are seeking us out to oppose the commission in light of our track record of success in these cases."

Those cases are a nationwide pattern and practice case gender discrimination case over pay and promotions against Sterling Jewelers Inc. in New York federal court; a case the EEOC filed in Ohio in Dec. 2010 alleging that Kaplan Higher Education Corp.'s practice of rejecting job applicants based on their credit history had a disparate on black job seekers; and the human trafficking litigation against Kauai and others.

The trafficking litigation was filed in April in Hawaii and Washington State, against labor contractor Global Horizons Inc. and eight farms, including Kauai. Global Horizons engaged in discrimination, harassment and retaliation by trafficking more than 200 Thai men to farms where they faced severe abuse, the EEOC alleges, adding that the farms ignored abuses and took part in the mistreatment and unequal pay of the Thai workers.

In a Nov. 2 order, a federal judge in Hawaii granted dismissal bids from Kauai and others, and tossed the EEOC's amended July 15 complaint. However, the dismissal was without prejudice, and the EEOC filed a second amended complaint on Dec. 16.

In May, Maatman convinced the judge overseeing the Kaplan case to allow the company to explore in discovery the EEOC's own use of background checks, despite the commission's opposition. Maatman noted that it is believed to be the first ruling ever allowing discovery against the EEOC regarding its own personnel practices.

The court ruled that because the agency asserted that Kaplan's use of credit history checks was not job-related or consistent with business necessity, and that there were less discriminatory alternatives available, whether the EEOC itself used background or credit checks during the hiring process was relevant to the question of whether such measures were a business necessity.

In March, Seyfarth won a \$15.5 million award for plaintiffs' firm Sprenger & Lang, which specializes in bringing the type of cases that Seyfarth devotes itself to fighting. Five plaintiffs' firms fought over how to divvy up the \$25 million in fees from the TV writers litigation, but Sprenger & Lang, represented by Seyfarth, walked away with the lion's share.

Seyfarth also successfully defended the arbitration award in Superior Court of the District of Columbia in December.

The fact that a plaintiffs' firm would turn to Seyfarth is a tribute to the Seyfarth's skills, Maatman said.

"When there's a very tough case, we get called," Maatman said.

Methodology: In November, Law360 solicited submissions from over 500 law firms for its practice group of the year series. The more than 550 submissions received were reviewed by a committee of Law360 editors. Winners were selected based on the significance of the litigation wins or deals worked on; the size and complexity of the litigation wins or deals worked on; and the number of significant, large or complex deals the firms worked on or lawsuits the firm had wins in. Only accomplishments from Dec. 1, 2010 to Dec. 1, 2011 were considered.

--Editing by John Quinn.