

## Retail Detail



### Retail Employers Should Consider Moving to Strike Inadequate Class Claims Immediately

On April 12, 2013, a federal judge in the Western District of Pennsylvania issued an order striking Plaintiff's class claims in *Semenko v. Wendy's International Inc.*, No. 12-CV-00836 (W.D. Pa. April 12, 2013). Specifically, the Court held that Semenko's purported class-wide disability discrimination claims did not satisfy Fed.R.Civ.P. 23(a) or (b), and thus Wendy's was able to limit Semenko to pursuing only her individual claims at this very early stage in the litigation.

The ruling is noteworthy for employers seeking to preempt expensive class-wide discovery before getting the chance to oppose class certification theories in a future motion for class certification.

#### Factual Background

Semenko, a former manager at one of Wendy's International, Inc.'s ("Wendy's") fast food restaurants, claimed that she suffers from degenerative arthritis. In January 2007, she took a disability leave from work to treat her lower back issues. *Id.* at 2. According to the Complaint, Semenko's treating physician released her to return to work full-time, but with restrictions on November 14, 2007. *Id.* Semenko maintained that she wanted to return to work, but Wendy's refused to accommodate her by (i) reassigning her to other available positions, or (iii) providing her a reasonable extension on her medical leave. Wendy's allegedly terminated Semenko's employment on January 11, 2013. *Id.* Semenko alleged a failure to accommodate under the Americans With Disabilities Act and the Pennsylvania Human Relations Act and she brought her claims on behalf of herself and class claims for those similarly-situated. *Id.* at 1. Semenko defined the proposed class as "all persons who have been terminated or separated from employment following a leave of absence and/or otherwise not accommodated by defendant's failure to transfer to vacant and funded positions." *Id.* at 6.

It is the timing of Wendy's motion that is important here. Wendy's responded to Semenko's class claims immediately by filing a motion to strike pursuant to Rules 12(f), 23(c)(1)(A), and 23(d)(1)(D). In essence, Wendy's argued that Semenko's claims were not appropriate as a class action because, Semenko's disability discrimination claims as alleged would require the Court to determine whether each of the putative class members is a "qualified" individual with a disability. Wendy's argued that this is "an assessment that encompasses inquiries . . . too individualized and divergent . . . to warrant certification under Rule 23(a) and (b)(2)." *Id.* at\*2 (internal citations and quotations omitted). Significantly, Semenko argued that Wendy's motion was premature because she had not even filed a motion for class certification and the parties had not engaged in any pre-certification discovery. *Id.*

#### The Court's Ruling

The case is important because the Court held that neither discovery nor a class certification motion was a prerequisite for the Court to render a decision on Wendy's motion to strike. *Id.* at 5. Indeed, the Court stated that "[i]n rare cases where it is clear from the complaint itself that the requirements for maintaining a class action cannot be met, a defendant may move to strike the class allegations before a motion for class certification is filed." *Id.* (emphasis in original). The Court also noted

## Seyfarth Shaw — Retail Detail

that it is appropriate to grant a motion to strike class allegations “where no amount of additional class discovery will alter the conclusion that the class is not maintainable.” *Id.* at 3 (internal citations and quotations omitted).

Specifically, the Court reviewed whether Semenکو’s pleadings satisfied Rule 23’s prerequisites for bringing a class action and held that Semenکو could not establish commonality or typicality under Rule 23(a), and she could not satisfy Rule 23(b). Regarding commonality, Semenکو argued that commonality exists because Wendy’s employed a “written policy . . . not to provide reasonable accommodation for permanent restrictions,” and this policy applied to the entire class. *Id.* at 8, 10. The Court acknowledged that there are situations in which class actions asserting disability discrimination can be certified. *Id.* at 13. The Court noted that those cases appear to have “some unifying criteria, such as a common disability or requested accommodation” so that a class-wide determination is possible. *Id.* at 14. The Court went on to distinguish this action. Here the Court determined that Semenکو’s class-wide disability discrimination claims would require the Court to employ an individualized “multi-step legal analysis.” *Id.* at 11. For example, as to each putative class member, the Court would have to determine: (1) if the individual is a “qualified individual with a disability” as defined under the applicable anti-discrimination statutes; (2) whether the individual can perform the essential job functions with or without a reasonable accommodation; (3) if the individual alleges a failure to accommodate and, if so, whether the accommodation reasonable; (4) whether the accommodation represented an undue hardship; and then (5) if the individual experienced prohibited discrimination. *Id.* at 12-13. In other words, the Court would have to make individualized inquiries into the nature of each putative class member’s disability and requested accommodation before making a determination of unlawful conduct. *Id.* at 10. Accordingly, the Court held that Semenکو’s proposed class cannot satisfy Rule 23(a)(2)’s commonality requirement. *Id.* at 14.

As for typicality, the Court stated that “[a] plaintiff’s claims are ‘typical’ of other members of the class only if proof of the plaintiff’s factual circumstances will also automatically prove the claims of all other members of the class. *Id.* at 16. As indicated above, the Court concluded that the relevant facts and evidence are unique to each putative class member. *Id.* For example, factual differences may exist between putative class members regarding the type of impairment, degree of limitation, essential job functions, accommodations sought, and undue hardships. *Id.* at 5. Likewise, the Court found that they would have to apply different legal theories and standards to class members before and after the Americans With Disabilities Act Amendments Act became effective on January 1, 2009. *Id.* at 12, 15. The Court further noted that Wendy’s may have unique defenses with respect to some class members, including judicial estoppel, statute of limitations, and undue hardship defenses. *Id.* at 15.

Regarding Rule 23(b), the Court held that Semenکو could not satisfy Rule 23(b)(2) because the Court would have to make individualized inquiries regarding back pay, compensatory damages, and punitive damages in order to address each class member’s damages. *Id.* at 18 (citing *Wal-Mart Stores, Inc. v. Dukes*, -- U.S. --, 131 S.Ct. 2541, 2557-58 (2011)). Finally, the Court held that Plaintiff could not satisfy Rule 23(b)(3)’s predominance and superiority requirements in this case because of the “highly individualized inquiries that will be necessary given the disability discrimination allegations” at issue. *Id.* at 19.

## Implications For Employers

This is a significant decision. It adds to the small but growing body of case law that allows employers to litigate a preemptive strike in those cases where it is clear from the complaint that Plaintiff has not satisfied the prerequisites for bringing a Rule 23 class action, thereby saving the staggering attorney’s fees and costs they would otherwise incur during pre-certification discovery and certification briefing.

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