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California Employment Law Alert

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In a ruling that should make all employers a little uncomfortable, regardless of their size, the Ninth Circuit Court of Appeals upheld the Northern District of California's historic decision to certify a nationwide class of over 1.5 million current and former female employees who claim to have been the victims of gender discrimination. *Dukes v. Wal-Mart Stores, Inc.*, Case Nos. 04-16688 and 04-16720 (9th Cir. April 26, 2010)(en banc)

BACKGROUND

The *Dukes* action was brought by six current and former employees of Wal-Mart for alleged sex discrimination under Title VII of the Civil Rights Act of 1964. Plaintiffs allege that they and other women were paid less than men in comparable positions and that they received fewer, and had to wait longer for, promotions to management positions than their male counterparts. What made the *Dukes* action historic was that the six plaintiffs sought to represent over 1.5 million women working since 1998 in approximately 3,400 stores spread across this country. In order to obtain class certification under Rule 23(a) of the Federal Rules of Civil Procedure, Plaintiffs needed to prove that: (1) the class was so numerous that joinder of all members of separate litigants is impracticable (this was not disputed); (2) that there were issues of law or fact common to all class members; (3) that the claims of the six named plaintiffs were typical of the other 1.5 million class members; and (4) that the six named plaintiffs and their attorneys were adequate representatives. Given the size of the Class, the commonality question became the focus of the litigants and Court. The district court certified the class finding that Plaintiffs "exceeded the permissive and minimal burden of establishing 'commonality' by providing: (1) significant evidence of company-wide corporate practices and policies, which include (a) excessive subjectivity in personnel decisions, (b) gender stereotyping, and (c) maintenance of a strong corporate culture; (2) statistical evidence of gender disparities caused by discrimination; and (3) anecdotal evidence of gender bias."

THE NINTH CIRCUIT'S LATEST RULING

Most of the district court's decision was upheld by a slim six to five majority. The 236-page opinion provides ample ammunition for lawyers to engage in vigorous debate. Three critical differences between the majority and the dissent highlight the importance of this decision for employers.

Standard of Proof

The most significant difference between the majority and the dissent was a discussion of how much evidence should be required of Plaintiffs to support a nationwide class, especially one of this size. The majority took the position that a district court's decision on certification is properly based on the *theory* underlying the plaintiffs' case, not the plaintiffs' chances of success on the merits. In cases where the plaintiffs claim a pattern and practice of discrimination, review of the facts can be unavoidable in determining whether to certify a class. However, the district court must take care at the certification stage not to delve further into the factual issues than is necessary to evaluate the plaintiffs' theory. The dissent criticized this approach for setting the evidentiary bar too low, arguing instead that a certification is only proper where the plaintiffs have offered "significant proof" that all requirements for class certification have been met. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147 (1982). This distinction is significant for employers because it makes certification in the Ninth Circuit a much easier task.

Due Process

Another key difference between the majority and the dissent concerned the employer's due process rights. The majority concluded that due process was satisfied, even without individualized hearings, by limiting back pay awards to individuals whose back pay could be easily calculated from Wal-Mart's extensive salary database. The dissent countered that individualized hearings are unavoidable where individual back pay claims are at issue. Employers may have different affirmative defenses to different back pay claims, and elimination of the need for individualized hearings denies the employer due process by precluding its ability to raise those defenses. By reducing the standards for satisfying due process, the majority makes it easier for employers to be saddled with liability even where a viable defense exists.

Daubert

Finally, the majority and dissent differed on the application of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993), concerning admissibility of expert testimony in the class certification context. In allowing plaintiffs' expert sociologist to testify regarding Wal-Mart's employment practices, the majority drew a distinction between *raising* a common question and *answering* a common question – here, the sociologist's opinion was admissible under *Daubert* because it raised but did not answer the question of whether Wal-Mart was discriminating against women. Because the sociologist's methodology did not lack fatal flaws, the district court properly admitted it. Again, the dissent attacked the leniency of this approach. In a *Daubert* analysis, the dissent argued, the district court must be satisfied that an expert's testimony is affirmatively *reliable*, not merely *lacking in fatal flaws*, before admitting it into evidence. Issues surrounding the admissibility of expert testimony can be hotly contested, and the majority's ruling potentially favors plaintiffs by allowing greater latitude in selecting experts.

CONCLUSION

Although this article focused on the Ninth Circuit's affirmation of the certification ruling, Wal-Mart could claim some minor victories. The class was limited to women who were employed by Wal-Mart as of the date the original complaint was filed, which should have the effect of reducing the class size. The district court was also ordered to reconsider whether the punitive damage claim should be included in its certification order, suggesting that the claim might be more appropriately certified under Rule 23(b)(3). Nevertheless, it is hardly the victory that Wal-Mart and employers were seeking.

Given the potential monetary exposure, it can be expected that Wal-Mart will challenge this ruling by seeking a petition for review by the United States Supreme Court. The U.S. Supreme Court denies review in the majority of cases; however, given the substantial differences between the reasoning of the majority and the dissent and the historical implications of the decision, most pundits believe that the Supreme Court will be persuaded to hear arguments on the case. In the mean time, this case should serve as a reminder to all employers of the importance of monitoring the fairness, perceived and real, of their own policies and procedures to avoid involvement in similar class action lawsuits.

Cathy L. Arias is the chair of Burnham Brown's Employment Law Department and specializes in counseling and representing employers. Ms. Arias and Burnham Brown have extensive experience and proven success in defending employers in class action lawsuits. Ms. Arias brings this experience with her when asked to perform labor and employment policy audits, especially those designed to test employers' vulnerability to class based liability. Ms. Arias can be reached at 510-835-6806 and carias@burnhambrown.com. Robert Bodzin is a partner at Burnham Brown and one of the leaders of its Business and Commercial Practice Group. He has been trying and litigating cases in both New York and California for over 15 years. Mr. Bodzin is on the Steering Committee of the DRI Commercial Litigation Section where he is Publications Chair. Mr. Bodzin is also a member of the California State Bar Executive Committee for the Litigation Section where he is Educational Programs Chair. Mr. Bodzin can be reached at 510-835-6833 and rbodzin@burnhambrown.com. Brendan M. Brownfield is a litigation associate with Burnham Brown. He is a member of the firm's Business and Commercial, Employment, and Transportation Practice Groups. Mr. Brownfield can be reached at 510-835-6732 and bbrownfield@burnhambrown.com.