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The Ninth Circuit Court of Appeals recently affirmed, in large part, a federal district court's 2004 decision certifying a nationwide class of female employees alleging sex discrimination in the company's pay and promotion practices. The Ninth Circuit opinion attempts to clarify existing Ninth Circuit class certification standards. In so doing, a circuit split on at least one important issue related to class certification has been created.

## Setting the Stage for a Potential Supreme Court Battle in *Dukes v. Wal-Mart*: A Sharply Divided Ninth Circuit Attempts to Articulate New Standards that Could Impact Employers

By Margaret Parnell Hogan and Danielle L. Kitson

On April 26, 2010, in *Dukes v. Wal-Mart*, Nos. 04-16688 and 04-16720, the full Ninth Circuit Court of Appeals affirmed, in large part, a federal district court's 2004 decision certifying a nationwide class of female employees alleging sex discrimination in the company's pay and promotion practices. The *en banc* decision follows a ruling by a three-judge panel of the Ninth Circuit in 2007, also affirming class certification. But the new 6-5 ruling is not a complete loss for Wal-Mart. The appeals court not only potentially cut the size of the class from approximately **1.5 million** women to **500,000**, but it also narrowed the scope of claims that could be certified under Rule 23(b)(2) of the Federal Rules of Civil Procedure.

In a 94-page majority opinion written by Judge Michael Daly Hawkins, the court attempted to clarify existing Ninth Circuit standards for evaluating class certification as well as articulated new ones for the circuit. Wal-Mart has stated that it is considering whether to seek review by the U.S. Supreme Court. What do the new standards mean for employers, and who will win the Supreme Court battle, if there is one?

### The District Court and *En Banc* Ninth Circuit Rulings

On June 21, 2004, the United States District Court for the Northern District of California certified a nationwide case of approximately (at that time) 1.5 million current and former employees of Wal-Mart. The Third Amended Complaint in *Dukes* asserted that Wal-Mart discriminated against women as a class in both compensation and promotion through Wal-Mart's company-wide policies and practices. In an 84-page opinion, the district court agreed and certified the class. Wal-Mart filed an immediate interlocutory appeal.<sup>1</sup>

The Ninth Circuit, sitting *en banc*, has now affirmed the district court's certification as to current employees' claims for injunctive relief, declaratory relief, and back

pay,<sup>2</sup> but has remanded with respect to the employees' punitive damages claims, instructing the district court to consider whether punitive damage claims could be certified under Rule 23(b)(2) or (b)(3). The appeals court additionally has remanded with respect to the claims of putative class members who no longer worked for Wal-Mart when the complaint was filed in 2001, also instructing the district court to consider whether to certify an additional class or classes under Rule 23(b)(3).

## The Ninth Circuit's Analysis

### *The "Rigorous Analysis" Standard*

As did the district court, the Ninth Circuit spent significant time discussing the requirements of Rule 23 of the Federal Rules of Civil Procedure.<sup>3</sup> The Ninth Circuit expanded the discussion, however, devoting approximately one third of the majority's opinion to its attempted clarification of the overall standard to be applied by the courts in the Ninth Circuit assessing Rule 23's requirements. However, the Ninth Circuit's discussion also serves to heighten the split within the federal circuits on these standards.

The appeals court reiterated that a district court must perform a "rigorous analysis" of Rule 23's requirements, and explained that such an analysis will "often, though not always, require looking behind the pleadings to issues overlapping with the merits of the underlying claims." The Ninth Circuit was careful to warn district courts, however, not to reach out to decide merits issues unnecessary to Rule 23's requirements. Moreover, the Ninth Circuit emphasized that the district courts should be mindful that different parts of Rule 23 require different levels of analysis, as do different types of cases.

### *Rule 23(a) Application*

#### *Commonality – "Significant Proof" Standard Rejected*

Like the district court, the Ninth Circuit focused a great deal of attention on Rule 23(a)(2)'s requirement that there be "questions of law or fact common to the class." Again expanding the district court's analysis, the appeals court rejected the notion that plaintiffs must adduce "significant proof" of commonality in order to obtain class certification, wording that was discussed in dicta by the U.S. Supreme Court in *General Telephone Co. of Southwest v. Falcon*.<sup>4</sup> Rather, the court explained that plaintiffs need only raise "common questions of law and fact." In doing so, the Ninth Circuit arguably has lowered the bar for what plaintiffs must show in order to obtain class certification in the Ninth Circuit in Title VII cases.

The court went on to state that the test is "qualitative rather than quantitative" and agreed with the district court that the plaintiffs provided "(1) significant evidence of company-wide corporate practices and policies that included (a) excessive subjectivity in personnel decisions, (b) gender stereo-typing, and (c) maintenance of a strong corporate culture; (2) statistical evidence of gender disparity caused by discrimination; and (3) anecdotal evidence of gender bias." Applying its new standard, the Ninth Circuit held that this evidence was sufficient to "raise the common question whether Wal-Mart's female employees nationwide were subjected to a *single set of corporate policies* (not merely a number of independent discriminatory acts)."

#### *Evidence of Company-Wide Corporate Practices and Policies*

Plaintiffs' evidence of company-wide corporate practices and policies was based largely on the opinion of a sociologist. The sociologist asserted that Wal-Mart had a strong corporate culture with centralized coordination, and deficiencies in its equal employment opportunity policies and practices that made pay and promotion decisions vulnerable to gender bias. In support of his conclusions, plaintiffs' expert opined that the practice of allowing substantial discretion to decision makers "tends to allow people to seek out and retain stereotyping-confirming information and ignore or minimize information that defies stereotypes." While the court noted that "discretionary decision-making by *itself* is insufficient to meet plaintiffs' burden of proof," the Ninth Circuit affirmed the district court's conclusion that where "subjectivity is part of a consistent corporate culture," managerial discretion may be one of several factors that support a finding of commonality.

Wal-Mart challenged plaintiffs' sociological expert under *Daubert v. Merrell Dow Pharmaceuticals Inc.*,<sup>5</sup> but the appeals court characterized Wal-Mart's attacks as going to the *persuasiveness* of the expert's testimony, rather than to the reliability of the expert's methodology in reaching his opinion. The court stated that the persuasiveness of the sociological expert's opinion and the inferences that may be drawn from it were not questions to be decided for purposes of class certification. "While a *jury* may ultimately agree with Wal-Mart that, in the absence of a specific discriminatory policy promulgated by Wal-Mart, it is not more likely than not. . . that Wal-Mart engaged in actual gender discrimination, that question must be left to the merits stage of the litigation."

The majority's decision regarding expert testimony – that a full *Daubert* analysis is not necessary at the class certification stage – is in contrast to a decision issued by the Seventh Circuit Court of Appeals on April 7, 2010. There, in *American Honda v. Allen, et al.*, the Seventh Circuit clearly held that "when an expert's report or testimony is critical to class certification . . . the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants."<sup>6</sup> These divergent positions – issued within twenty days of each other – indicate the presence of a circuit split on this important issue alone.

Further, in this regard, the Ninth Circuit's opinion leaves the door open for more lax evidentiary standards to be applied to social science testimony at the class certification stage (at least in the Ninth Circuit). It should be anticipated that the plaintiffs' class action bar will continue the increasing trend of proffering social scientists as regularly as they proffer statisticians and economists to support their motions for class certification.

#### Statistical Evidence of Gender Disparity Caused by Discrimination

The appeals court also adopted the findings of the district court with respect to plaintiffs' statistical expert (who examined data at a regional level), and rejected Wal-Mart's statistical evidence, which examined data on a store department level. Again, the court emphasized that the proper inquiry was whether plaintiffs' expert testimony was enough to raise *common questions* of fact, and not to evaluate the persuasiveness of plaintiffs' expert testimony *vis a vis* Wal-Mart's expert testimony. The very fact that there was a disagreement on statistical evidence, the court reasoned, raised a common question, "and deciding which side ha[d] been more persuasive [was] an issue for the next phase of the litigation." As noted above, this reasoning is distinct from, at least, that recently articulated by the Seventh Circuit.

#### Anecdotal Evidence of Gender Bias

Likewise, the court agreed that the district court properly credited 120 declarations from named plaintiffs and putative class members – alleging they received lower pay than similarly situated men as well as fewer promotions than similarly situated men – in its commonality analysis. The court flatly rejected Wal-Mart's argument that the number of declarations was too few in relationship to the size of the class.

#### Remaining Rule 23(a) Requirements

The court also affirmed the district court's analysis with respect to the remaining requirements under Rule 23(a). Regarding the requirement that "the claims or defenses of the representative parties are typical of the claims or defenses of the class," the court noted that the absence of a class representative for each management category was not, as Wal-Mart suggested, fatal to class certification because discrimination allegedly was the same across all categories. Likewise, with respect to the adequacy of representation requirement, the court quickly rejected the idea that class certification should be denied merely because the class included both supervisors and those they supervised among its members.

#### Rule 23(b) Application

##### *Monetary Relief Versus Injunctive and Declaratory Relief – New Standards*

The district court certified the class under Rule 23(b)(2), which requires that "the party opposing the class has acted or refused to

act on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . . with respect to the class as a whole.” Courts have held that monetary relief (e.g., in the form of back pay) may be claimed so long as the monetary relief is not the “predominant” relief and is secondary to the injunctive or declaratory relief sought.

Departing from and overruling its earlier decision in *Molski v. Gleich*,<sup>7</sup> the Ninth Circuit stated that the focus of this predominance inquiry should *not* be on plaintiffs’ subjective intent in bringing the lawsuit, but rather, on the pragmatic impact of a request for monetary relief. The test should now be whether monetary damages are “superior [in] strength, influence, or authority” to injunctive and declaratory relief.

The Ninth Circuit articulated four non-exhaustive factors that district courts should consider in determining the objective effect of the relief sought on the litigation: (1) whether the monetary relief sought determines the key procedures that will be used; (2) whether it introduces new and significant legal and factual issues; (3) whether it requires individualized hearings; and (4) whether its size and nature – as measured by recovery per class member – raise particular due process and manageability concerns. No single factor is determinative, the court explained.

#### *Remanding Class Certification As to Punitive Damages Claims*

Applying its newly articulated standard, the Ninth Circuit held that the district court properly certified the class as to plaintiffs’ claims for injunctive relief, declaratory relief, and back pay. In doing so, the court noted that the large size of the class did not militate against certification because the proper inquiry was the amount of back pay available in relation to *each* plaintiff, rather than the total back pay award for the class as a whole. Further, a monetary back pay award was not an obstacle because back pay awards are equitable in nature, weighing in on the injunctive relief side of the equation.

With respect to plaintiffs’ punitive damages claims, however, the court found that the district court did not engage in an analysis of whether certification of the punitive damages claims rendered all of plaintiffs’ claims as a whole “predominantly” related to monetary relief. The Ninth Circuit remanded on this issue, instructing the district court to undertake such an analysis, and noting that the district court, in its discretion, could certify a separate class seeking punitive damages under Rule 23(b)(3), thereby taking a “hybrid certification” approach with different types of classes within the same action.<sup>8</sup>

Perhaps signaling to the district court that punitive damages claims should not be certified under Rule 23(b)(2), the Ninth Circuit discussed four factors relevant to the predominance inquiry, noting that three of them (procedural change, new legal and factual issues, and size) weighed against certification, while only one factor (individualized hearings) did not weigh *against* certification.

With respect to procedural change, the court noted that the addition of punitive damages would mean that liability would be decided by a jury rather than a judge, a significant change. Regarding new issues, the addition of punitive damages would add the inquiry of whether Wal-Mart acted “with malice or with reckless indifference to the federally protected rights” of plaintiffs – a new legal issue. The size of the punitive damages award as to each plaintiff could be significant (up to \$300,000 under Title VII), raising due process and manageability concerns. With respect to individualized hearings, however, the Ninth Circuit concluded that, unlike other compensatory and punitive damages cases, individualized punitive damages determinations would not be required because plaintiffs’ “class-wide theory is based on a company policy that allegedly affects all class members in a similar way.”

#### *Remanding Class Certification as to Class Members Not Employed as of the Filing of Plaintiffs’ Complaint*

The Ninth Circuit also departed from the district court with respect to certain former employees. The court agreed with Wal-Mart that putative class members who were not employees of Wal-Mart as of the date that plaintiffs filed their complaint on June 8, 2001, did not have standing to pursue injunctive or declaratory relief. Because such relief could not possibly predominate over monetary relief for former employee putative class members, there could be no Rule 23(b)(2) certification with respect to such putative class members. The appeals court therefore remanded on this issue, instructing the district court to consider whether a class might be certified under Rule 23(b)(3) as to former employees’ back pay and punitive damages claims.

### *Wal-Mart's Defenses*

Wal-Mart argued on appeal that the district court's decision improperly denied it the right to defend itself. Specifically, Wal-Mart contended that it was entitled to individualized hearings, both to offer certain defenses to individual class members' claims and to contest claims for damages. The Ninth Circuit agreed with the district court in rejecting these arguments.

Specifically, the court cited to its opinion in *Hilao v. Estate of Marcos*<sup>9</sup> as an example of how the district court might implement a trial plan in conformity with the U.S. Supreme Court's requirements for Title VII class action procedure as articulated in *International Brotherhood of Teamsters v. United States*.<sup>10</sup> In *Hilao* – a case involving approximately 10,000 alleged torture victims – the district court applied a statistical formula to award compensatory damages to class members, rather than allow individualized hearings. Without expressing an opinion on the trial plan that the district court had proposed in its opinion, the Ninth Circuit found that, since there existed at least one method of managing the class action without violating Wal-Mart's due process rights, then the class could be certified. The usefulness of *Hilao's* **compensatory** damages formula in the *Dukes* case is questionable at best given that compensatory damages are not at issue.

### *The Dissent – Teeing Up the Issues for Supreme Court Review*

In a 41-page dissenting opinion by Judge Sandra Ikuta, the dissenters raised two major challenges to the majority holding and reasoning, crystallizing the issues for potential review by the U.S. Supreme Court.

#### *Error Regarding The Proper Standard Of Proof*

First, the dissent argued that the proper standard for evaluating commonality under Rule 23(a) is whether plaintiffs have adduced "significant proof" that "an employer operated under a general policy of discrimination" (the *Falcon* standard), and not the majority's more lax "raises common questions" test. The dissent pointed out that *Falcon* is the only U.S. Supreme Court case to have addressed Rule 23(a) in the Title VII discrimination context, and argued that *Falcon* was binding and directly on point.

Applying *Falcon*, the dissent argued that the evidence advanced by plaintiffs in this case ("(i) 120 anecdotes; (ii) statistical evidence; and (iii) expert testimony") did not come close to meeting the significant proof standard. The dissent characterized the evidence as a "chain of weak inferences" constituting a "proverbial shell game," since even the majority seemed to concede that no one category of evidence was enough, in and of itself, to support class certification.

With respect to anecdotes, the dissent pointed out that 120 anecdotes were equivalent to one anecdote for every 12,500 class members – far short of what would be necessary under U.S. Supreme Court precedent to be probative of pattern and practice discrimination. At most, the affidavits submitted by plaintiffs' counsel described the experience of class members in 235 of Wal-Mart's 3,400 stores, providing no information whatsoever with respect to working conditions in the remaining 3,165 stores. Further, more than half of the affidavits were from class members concentrated in only six states, with fourteen states not represented at all. Given the size of the class, the dissent argued, 120 affidavits amounted to "nothing more than evidence of 'isolated or sporadic' incidents of discrimination."

With respect to statistics, the dissent argued that the district court engaged in only a "superficial examination" of the statistics proffered by plaintiffs' expert, which could not constitute significant proof because the statistics were based on aggregated data at a regional and national level – a fatal flaw. Pointing to the testimony of Wal-Mart statistical expert, the dissent argued that statistical disparities at the regional level could be due to decisions made at only a small percentage of Wal-Mart stores. An examination of data at the store level revealed that over 90 percent of Wal-Mart's stores showed no statistical difference in the hourly pay rates between men and women.

Finally, with respect to plaintiffs' sociological expert, the dissent argued that the district court erred in not engaging in a full Daubert analysis, applying the same standards to test the reliability of expert testimony at the class certification stage just as a

judge would assess any other prerequisite for continuing a lawsuit. Citing to the Seventh Circuit's opinion in *American Honda*, the dissent argued that "[l]ike any other evidence," evidence submitted to establish a Rule 23 requirement must meet the reliability requirements of Rule 702 of the Federal Rules of Evidence.

#### *Error Regarding Violation Of Wal-Mart's Due Process Rights*

Second, the dissent also argued that class certification under Rule 23(b)(2) violates Wal-Mart's due process rights because, under Title VII and the Rules Enabling Act, Wal-Mart must have the right to prove that its actions against individual employees were not discriminatory. The "formula" approach advanced by the majority, the dissent argued, violates that right by stripping Wal-Mart of the opportunity to establish affirmative defenses on an individualized basis. The fact that the district court could not find a way to certify a class under the framework established by the U.S. Supreme Court in *Teamsters*, the dissent argued, obviously compelled the conclusion that it should not certify the class at all.

Further, the dissent argued, this class simply does not fit the historical model of a Rule 23(b)(2) class, which was designed for strictly injunctive and declaratory relief claims without a monetary component, where the class actions sought "the correction of a specific discriminatory policy affecting all members of the class in the same way." According to the dissent, the class proposed by plaintiffs could only be certified, if at all, under the more "adventurous" mechanism of Rule 23(b)(3), which allows for individualized monetary relief for class members only because it includes additional procedural safeguards, namely requiring that common questions of law or fact predominate over any questions affecting only individual class members, and that class members be given notice of the class action and an opportunity to opt out of it.

## What Does the Opinion Mean for Employers?

In terms of what employers can expect, a quote from the dissenting opinion is apropos:

Put simply, the door is now open to Title VII lawsuits targeting national and international companies, regardless of size and diversity, based on nothing more than general and conclusory allegations, a handful of anecdotes, and statistical disparities that bear little relation to the alleged discriminatory decisions.<sup>11</sup>

As a result, employers can expect to see more Title VII class actions, and greater use of social science experts to bolster plaintiffs' claims. Also, plaintiffs' lawyers can be expected to assert more claims of discrimination based on decentralized decision-making that allows for managerial discretion – a theory that had, until the first *Dukes* decision, gone out of favor as a basis for a class action. After all, many courts had reasoned, how can you have a "common policy or practice" if managers in a wide range of facilities and departments each make separate discretionary decisions?

While disheartening, employers still may take heart from the fact that the Ninth Circuit did cut the size of the original class to exclude former employees, and did restrict the claims that could be pursued as part of a Rule 23(b)(2) class to exclude punitive damages (at least for now, pending the district court's further analysis). And the story may not end here. It remains to be seen whether this is a decision the U.S. Supreme Court will examine .

For more information, see *Dukes v. Wal-Mart: A Foreboding Class Certification Decision for Employers*, July 2004 ASAP; and *Dukes v. Wal-Mart: Wal-Mart Loses Initial 9th Circuit Battle, but Who Will Win the Class Certification War?*, February 2007 ASAP.

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<sup>1</sup> The district court's opinion certified a class as to the discriminatory pay claims as well as promotion claims and allowed injunctive and declaratory relief as to the promotion claims. The district court declined, however, to certify a class with respect to back pay related to the challenged promotions decisions because data regarding qualifications and interest was not available. Plaintiffs cross-appealed that denial.

<sup>2</sup> As did the district court, the Ninth Circuit limited the back pay claims for the promotion class to those plaintiffs for whom proof of qualification and interests exist.

<sup>3</sup> Wal-Mart did not contest Rule 23(a)(1)'s numerosity requirement, as the proposed class consisted of approximately 1.5 million women.

<sup>4</sup> 457 U.S. 147 (1982).

<sup>5</sup> 509 U.S. 579 (1993).

<sup>6</sup> Case No. 09-8051, 2010 U.S. App. LEXIS 7153, \*7 (7th Cir. Apr. 7, 2010).

<sup>7</sup> 318 F.3d 937 (9th Cir. 2003).

<sup>8</sup> The practical difference between a Rule 23(b)(2) and a Rule 23(b)(3) class is that the latter requires plaintiffs to jump two additional hurdles in order to obtain class certification. First, they must show that common questions of law or fact predominate (not just exist) over individualized facts, and second, they must provide notice to class members and an opportunity to opt out of the class. In *Dukes*, the predominance inquiry arguably could be fatal to class certification with respect to monetary relief, since each individual plaintiff in the action has a unique set of facts and circumstances related to alleged discrimination, aside from just the application of nationwide corporate policies. In addition, putative class members must be afforded the right to opt-out of a (b)(3) class.

<sup>9</sup> 103 F.3d 767 (9th Cir. 1996).

<sup>10</sup> 431 U.S. 324 (1977).

<sup>11</sup> An additional dissenting opinion by Chief Judge Alex Kozinski also underscores the foreboding nature of the majority holding, noting that plaintiffs may now obtain class certification with "little in common but their [protected class] and th[e] lawsuit."