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**UPDATE: Ninth Circuit Court Of Appeals Issues En Banc Opinion That Upholds Certification Of A Proposed Class Of Female Wal-Mart Employees For A Class Action Sex Discrimination Lawsuit**

In *Dukes v. Wal-Mart, Inc.*, (--- F.3d ---, C.A.9 (Cal.), April 26, 2010), the United States Court of Appeals for the Ninth Circuit sitting *en banc* considered whether a federal district court abused its discretion when it certified a proposed class of all female employees who have worked at a store for Wal-Mart, Inc. ("Wal-Mart") anytime since December 26, 1998. A three-judge panel had previously affirmed a district court's certification of the proposed class, which was then estimated to be over 1.5 million women, for the lawsuit against Wal-Mart.

A panel of eleven judges on the Ninth Circuit Court of Appeals participated in a rehearing of the appeal. In a 6-5 decision, the court sitting *en banc* affirmed the certification of the class of current employees as to their claims for injunctive relief, declaratory relief, and back pay. However, with respect to the current employees' claims for punitive damages, the Court of Appeals remanded the matter back to the district court to consider whether to certify the class under Federal Rule of Civil Procedure 23(b)(2) or 23(b)(3). The Court of Appeals also remanded the matter for the district court to determine whether an additional class should be certified that consists of members who no longer work for Wal-Mart.

**Facts**

Several women ("Employees") brought a lawsuit against Wal-Mart, alleging women who are employed in Wal-Mart stores "(1) are paid less than men in comparable positions, despite having higher performance ratings and greater seniority; and (2) receive fewer—and wait longer for—promotions to in-store management positions than men." Employees claim "Wal-Mart's strong, centralized structure fosters or facilitates gender stereotyping and discrimination, that the policies and practices underlying this discriminatory treatment are consistent throughout Wal-Mart stores, and

**Update:**

Please see our Legal Alert discussing the Supreme Court ruling at "UPDATE: U.S. Supreme Court Rejects Class Certification In Wal-Mart Sex Discrimination Case", June 21, 2011.

that this discrimination is common to all women who work or have worked in Wal-Mart stores."

Employees wanted to bring the lawsuit as a class action so they sought to certify a proposed nationwide class of women employed in a range of positions at Wal-Mart stores "from part-time entry-level hourly employees to salaried managers." Employees seek back pay, injunctive and declaratory relief, and punitive damages. The proposed class consists 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."

The trial court granted Employees' request for class certification with respect to their claims for equal pay. As for Employees' promotion claims, the trial court certified the class with respect to issues of alleged discrimination except for the issues relating to back pay. The court determined that data about the challenged promotions were not available for all class members. A three-judge panel of the Ninth Circuit Court of Appeals held that the trial court did not abuse its discretion in certifying the class. However, the Ninth Circuit Court of Appeals decided to rehear the case *en banc*.

**Decision**

Federal Rule of Civil Procedure 23(a) provides that a district court may certify a class for a class action lawsuit if (1) the proposed "class is so numerous that joinder of all members is

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impracticable;” (2) issues of fact and law are common to members of the proposed class; (3) the claims or defenses of the parties bringing the lawsuit as representatives are typical of the claims or defenses of the entire class; (4) the parties representing the class “will fairly and adequately protect the interest of the class.” Additionally, a court must find one of the following: “(1) the prosecution of separate actions would create a risk of: (a) inconsistent or varying adjudications, or (b) individual adjudications dispositive of the interests of other members not a party to those adjudications; (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class; or (3) questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”

The Court of Appeals found that when a district court is determining whether to certify a class, it “must analyze underlying facts and legal issues going to the certification questions regardless of any overlap with the merits.” Specifically, the court found that a “district court must sometimes resolve factual issues related to the merits to properly satisfy itself that Rule 23’s requirements are met.” However, the court’s inquiry at this stage must remain “focused on, for example, common *questions* of law or fact under Rule 23(a)(2), or predominance under Rule 23(b)(3), not the proof of answers to those questions or the likelihood of success on the merits.” The district courts, however, “may not analyze any portion of the merits of a claim that do not overlap with the Rule 23 requirements. The district court also “must keep in mind that different parts of Rule 23 require different inquiries.” The Court of Appeals noted that “district courts retain wide discretion in class certification decisions, including the ability to cut off discovery to avoid a mini-trial on the merits at the certification stage. Furthermore, “different types of cases will result in diverging frequencies with which the district court will properly invoke its discretion to abrogate discovery.”

The Court of Appeals addressed each requirement of Rule 23 in turn. The numerosity requirement was not contested. Employees presented 4 categories of commonality evidence including facts regarding company-wide policies and practices, expert opinions, expert statistical evidence, and anecdotal evidence from class members about management. The Court of Appeals found Employees’ evidence provides “sufficient support 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) that may have worked to unlawfully discriminate against them in violation of Title VII.” The “[e]vidence of Wal-Mart’s subjective decision-making policies suggests a common legal or factual question regarding whether Wal-Mart’s policies or practices are discriminatory.”

In regard to the typicality requirement, the court found Employees demonstrated their claims and class representatives were sufficiently typical of the proposed class. The court noted that it must inquire into “whether the injury allegedly suffered by the named plaintiffs and the rest of the class resulted from the same allegedly discriminatory practice.” The court found that although “individual employees in different stores with different managers may have received different levels of pay or may have been denied promotion or promoted at different rates, because the discrimination they claim to have suffered occurred through alleged common practices . . . the district court did not abuse its discretion by finding that their claims are sufficiently typical.” The court rejected Wal-Mart’s contention that the class representatives are not typical of all female in-store managers because only one of the named representatives holds a salaried management position. All of the female employees faced the same alleged discrimination, therefore, “the lack of a class representative for each management category does not undermine [Employees’] certification goal.”

The court found the adequate representation requirement was met. The Court of Appeals also affirmed the conclusion of the district

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court “that a back pay remedy for promotion claims would be manageable

only ‘with respect to those positions for which objective applicant data is available to document class member interest.’”

Pursuant to Rule 23(b)(2), certification of a class “is not appropriate where monetary relief is ‘predominant’ over injunctive relief or declaratory relief.” The Court of Appeal concluded the decision “to include claims for back pay in a class certified under Rule 23(b)(2) was not an abuse of its discretion.” The large size of the class does not mean that monetary relief will predominate. The Court of Appeals concluded “that a request for back pay in a Title VII case is fully consistent with the certification of a Rule 23(b)(2) class action.”

However, the district court did abuse “its discretion by failing to analyze whether certifying [Employees’] punitive damages claims under Rule 23(b)(2) caused monetary damages to predominate, notwithstanding its decision to require notice and an opportunity for [p]laintiffs to opt-out of the punitive damages claims.” The court noted, however, “that unlike in other punitive and compensatory damages cases, this case does not require individualized punitive damages determinations” because Employees’ “theory of liability is a class-wide theory that is based on a company policy that allegedly affects all class members in a similar way.” The Court of Appeals ordered that on remand “the district court must determine whether certification under Rule 23(b)(2) of the punitive damages claims would cause monetary relief to predominate.”

The Court of Appeals concluded class certification may not be proper for potential class members who were not employed by Wal-Mart when Employees filed their lawsuit because these employees do not have standing to pursue injunctive or declaratory relief. Because of this lack of standing, “it is difficult to say that monetary relief does not predominate with respect to claims by plaintiffs who lack standing to seek injunctive or declaratory relief.” This fact does not preclude the former employees from receiving any form

of relief. Women who were not employed on the date the complaint was filed may be eligible to receive back pay and punitive damages. The district court has the discretion to “certify a separate Rule 23(b)(3) class of former employees for back pay and punitive damages.”

**Questions**

If you have any questions concerning the content of this Legal Alert, please contact the following from our office, or the attorney with whom you normally consult.

Bruce A. Scheidt, Laura Izon Powell or David W. Tyra | 916.321.4500