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NINTH CIRCUIT UPHOLDS CERTIFICATION OF NATIONWIDE CLASS OF MORE THAN 1.5 MILLION FEMALE EMPLOYEES IN SEX DISCRIMINATION CASE

*In **Dukes v. Wal-Mart, Inc.**, No 04-16688 (9th Cir. Feb. 6, 2007), the Court of Appeals for the Ninth Circuit upheld a district court decision certifying a nationwide class of more than 1.5 million women in a case alleging sex discrimination with regard to such matters as pay and promotions. The class, which some observers believe may ultimately exceed 2 million members, appears to be the largest class ever certified in an employment action filed in the United States. In a 2-1 decision, the Court concluded that the district court had not abused its discretion in certifying the massive class, holding that the mere size of the class did not render it unmanageable. While the Ninth Circuit's ruling may not have changed the law, it may well change the landscape for employment class actions. The decision may lead to the filing of more, and larger, employment class actions, and perhaps to renewed discussions about class action reform.*

This Alert provides a summary of the Court's decision and highlights concerns for employers.

CLASS ACTION OVERVIEW

The class action mechanism is intended to conserve resources in matters in which the claims of multiple individuals are so similar that they can be resolved together in a single action. The rules governing class actions in federal lawsuits are set forth in the Federal Rules of Civil Procedure.

Generally speaking, Rule 23(a) of the Federal Rules of Civil Procedure provides that a district court may only certify a class if four elements are established: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties would fairly and adequately protect the interests of the class." These four requirements are commonly referred to as *numerosity*, *commonality*, *typicality* and *adequacy of representation*.

In addition to these four requirements, Rule 23(b) of the Federal Rules of Civil Procedure provides that the district court must also find that at least one of the following three conditions are satisfied: (1) the prosecution of separate actions would create a risk of inconsistent or varying adjudications, or individual adjudications dispositive of the interests of the 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) the questions of law or fact common to the members of the class predominate over questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Importantly, the district courts are given broad discretion in ruling on motions for class certification. Appellate review is generally limited to determining whether the district court's decision constituted an "abuse of discretion." Appellate courts will not normally reverse a district court's ruling on class certification without evidence that the district court relied on an improper factor, omitted a factor that is deserving of substantial weight, or made a clear error of judgment in applying the facts to the law.

THE NINTH CIRCUIT UPHOLDS A DISTRICT COURT DECISION GRANTING CLASS CERTIFICATION TO A NATIONWIDE CLASS OF MORE THAN 1.5 MILLION FEMALE EMPLOYEES

In 2001, six female Wal-Mart employees filed a proposed class action in the United States District Court for the Northern District of California, seeking to represent all female employees at Wal-Mart's 3,400 stores nationwide on claims that, among other things, the company's pay and promotion policies discriminated against such individuals in violation of Title VII of the Civil Rights Act of 1964. They have contended that the company's subjective promotion system, which they alleged was not replaced with a job posting system until after suit was filed, prevented women from being considered for promotions. The lawsuit seeks lost wages and punitive damages, in addition to injunctive and declaratory relief.

In June 2004, the district court granted the plaintiffs' motion to certify the class as to the pay claim. It also granted the motion to certify the class as to the promotion claim, except as to back pay (holding that only those with objective proof that they showed interest in a contested promotion could receive such an award). In making this ruling, the district court concluded that the plaintiffs had established all of the elements required by Rule 23 of the Federal Rules of Civil Procedure. Although Wal-Mart contended that there were critical differences from store to store, and that individualized inquiries for employees at different stores had to be conducted to determine whether those employees had been the victims of discrimination, the district court concluded that Wal-Mart's policies were sufficiently uniform to warrant class treatment.

Wal-Mart appealed the district court's decision, contending that the district court erred in finding that there was commonality and typicality; denying Wal-Mart the right to respond to individual claims; and failing to recognize that the claims for monetary relief predominated over claims for injunctive or declaratory relief. (The plaintiffs also appealed the denial of class certification as to back pay relief on the promotion claim.)

On February 6, 2007, the Ninth Circuit issued its ruling on the appeal. Analyzing each of the requirements of Rule 23 of the Federal Rules of Civil Procedure, the Court concluded in a 2-1 decision that district court did not abuse its discretion in certifying the class and, as such, upheld the decision. The Court relied heavily upon plaintiffs' expert, anecdotal and statistical evidence supporting the argument that there was a common nationwide practice of discrimination. Writing for the majority, Judge Harry Pregerson stated, "We

Hold that the district court acted within its broad discretion in concluding that it would be better to handle this case as a class action instead of clogging the federal courts with innumerable individual suits.” The Court also concluded that class certification was appropriate even though plaintiffs sought back pay and punitive damages: “Courts should look to the plaintiffs’ intent in bringing the action [to determine the true nature of the suit]. Plaintiffs stated that their primary intention in bringing this case was to obtain injunctive and declaratory relief – not money damages – and Wal-Mart has failed to effectively rebut Plaintiffs’ statements or cast doubt on their reliability.”

Judge Andrew J. Kleinfeld issued a particularly vehement dissent, stating that he believed certification of this class deprived Wal-Mart of due process by denying it the opportunity to defend against individual claims of discrimination, and that it could force the company to settle even if it believed the lawsuit was without merit. He also stated that he believed certification threatened the rights of women who were injured by sex discrimination as they might get smaller awards than they deserved because undeserving class members received awards, or if the class claims were dismissed.

Although reports have varied, it appears that the class of female employees exceeds 1.5 million persons and may actually approach 2 million. If this is so, this appears to be the largest class action employment discrimination case ever certified.

Wal-Mart has already indicated that it intends to seek a rehearing of the case or an *en banc* review by the Ninth Circuit. In response to the historic ruling, plaintiff’s counsel have stated that they believe the economic value of the case is now in the “billions.”

The decision only addresses the procedural question of class certification. It does not address the merits of the case.

LOOKING AHEAD: WHAT DOES THIS CASE MEAN TO EMPLOYERS?

The *Dukes* decision could prove to be a critical case, not necessarily because of what it states, but because of the practical impact it could have. It may not change the law (in seeking review, Wal-Mart will certainly argue that it does in fact change the law), but it is likely to change the landscape.

It is important to note that that Ninth Circuit did not state that the district court’s decision to certify this case was necessarily correct, or that classes of this kind or size should be certified. Instead, it said that the district court did not abuse its discretion in certifying the class. That is the key to the decision – whether there was an abuse of discretion. Had the district court declined to certify the class, as it certainly could have, the Ninth Circuit may very well have upheld that decision, too, on the grounds that it was not an abuse of discretion.

In this way, what this decision does from a legal standpoint is serve as a reminder that the decision whether to certify a class remains in the broad discretion of the district court. What the decision may do from a practical standpoint, however, could be dramatic. It may well lead to a significant increase in the number of nationwide employment class actions filed, or in the sizes of the classes plaintiffs seek to represent. Plaintiffs

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lawyers, emboldened by this historic decision, may well ask themselves why they should file single-plaintiff cases or smaller actions when they could succeed in certifying a large, nationwide class with exponentially larger potential recoveries. In many regards, the **Dukes** decision may provide plaintiffs with a roadmap for how to do it. To a certain extent, plaintiffs could try to replicate what the **Dukes** plaintiffs were able to present to the district court, hoping for the same result. As such, defense counsel may be challenged to devise new and creative strategies to argue against class certification.

Given the amount at stake, Wal-Mart has every reason to seek to have the Ninth Circuit's decision reviewed. It is difficult to predict whether those efforts will be successful. Even if they were unsuccessful, Wal-Mart may well attempt to convince the very same district court to decertify this class at some stage.

It would not be surprising to see this decision lead to renewed discussions about class action reform, particularly if the case proves not to be aberrational and instead leads to other massive, nationwide employment class actions.

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If you have any questions regarding the Ninth Circuit's decision in **Dukes v. Wal-Mart, Inc.** or about employment class actions, please contact **Michael Kun** at (310) 557-9501 or mkun@ebglaw.com.

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorney in connection with any specific questions or issues that may impose additional obligations on you and your company under any applicable local, state or federal laws.

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