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N.J. District Court: Statistical Evidence is Insufficient for Certifying Class Action

Holding that statistical evidence alone is insufficient to meet the requirements of sustaining a class action, the United States District Court for the District of New Jersey, on December 19, 2006, denied a motion for class certification filed by four African-American and Hispanic former employees of Johnson & Johnson who claimed that the company discriminatorily denied pay raises and promotions to African-American and Hispanic employees by permitting unmonitored and excessively subjective pay and promotion decisions by company managers. (*Gutierrez v. Johnson & Johnson, Civil Action No. 01-5302 (WHW), 12/19/06*). Because plaintiffs had presented no evidence to demonstrate that the human resources departments in Johnson & Johnson's various operating companies abused their discretion in "operationalizing" corporate guidelines, the court held that plaintiffs could not establish the elements necessary for maintaining a class action. The court held that statistical evidence alone is insufficient to satisfy a plaintiff's burden of showing commonality, typicality, and adequacy necessary to sustain a class action.

In their complaint, plaintiffs alleged that they had been underpaid relative to comparable Caucasian employees and had been denied promotions on account of their race and ethnicity. Plaintiffs filed a motion to certify a class of approximately 8,600 members of African and/or Hispanic descent employed by Johnson & Johnson in its 35 operating companies in any permanent salaried position in the United States from November 15, 1997, through the present. Plaintiffs alleged that employment policies adopted by Johnson & Johnson wrongfully permitted unmonitored managerial discretion as a regular component of pay and promotion decisions, which led to a pattern and practice of subjective and discriminatory decision-making that permeated Johnson & Johnson's domestic operations.

In denying plaintiffs' class certification motion, the court pointed to Johnson & Johnson's decentralized management structure, under which corporate headquarters sets general guidelines for the company as a whole. The court noted, however, that each of the 35 operating companies is responsible for running its own day-to-day business operations and for managing its own personnel. Although Johnson & Johnson's corporate headquarters issued employment guidelines to the operating companies

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regarding compensation, promotion, and performance evaluation, the court found that these guidelines were implemented differently by the human resources departments of each of the operating companies. The record showed that each operating company had its own independent human resources organization that developed employment policies according to the corporate guidelines and that, as a consequence, corporate headquarters was involved in employment decisions only with respect to top-level positions at the operating companies. The court noted that the disparity in implementing the guidelines by the various operating companies had resulted in significantly different employment practices.

Obtaining class action certification required plaintiffs to establish: (1) numerosity; (2) commonality of claims; (3) typicality of claims; and (4) adequacy of representation. The court determined that plaintiffs easily met the numerosity requirement, because the proposed class encompassed approximately 8,600 current and former employees.

The commonality and typicality requirements, the court noted, “tend to merge,” because both serve as guideposts in determining whether maintenance of the class action is economical and whether the interests of the class members would be adequately protected. These requirements are generally satisfied if the named plaintiffs share at least one question of law or fact with the grievances of the prospective class. In employment discrimination claims, plaintiffs must make a “significant showing” to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the employer’s challenged employment decisions. The court explained that in order for plaintiffs to establish commonality, they would have to show the existence of a companywide policy or practice of discrimination common to the aggrieved class.

Plaintiffs relied upon an expert report pointing to statistical disparities between the pay and promotions of Caucasian employees and the pay and promotions of African-American and Hispanic employees to support their allegations of common harm; however, the court determined that an expert report alone cannot establish commonality. The court explained that “[t]o prove commonality for class certification, Plaintiffs must identify a specific policy or practice of discrimination that was excessively subjective.” The court rejected plaintiffs’ motion for class certification because they failed to identify any policy alleged to be the source of the discrimination. Further, plaintiffs failed to establish that any of the policies implemented at any of the operating companies were excessively subjective. The court stated that “statistical disparities are insufficient to satisfy commonality unless they are linked to an allegedly discriminatory practice that affected the aggrieved class.”

In the wake of the *Gutierrez* decision, employers should be reminded to revisit their employment guidelines and policies. Employers should work to ensure that their employment policies are not excessively subjective and that they are consistent with best practices, as these may prevent class action litigation and litigation in general. The *Gutierrez* decision also clarifies that statistical evidence alone is insufficient to satisfy a plaintiff’s burden of showing commonality, typicality, and adequacy necessary to sustain a class action.



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Please feel free to contact **Maxine Neuhauser** in the Firm's **Newark office**, at 973/639-8269 if you have any questions or comments. Ms. Neuhauser's e-mail address is mneuhauser@ebglaw.com. **Daniel R. Levy**, an associate in the **Labor and Employment Practice**, assisted in the preparation of this Client Alert.

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