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Wal-Mart Decision Raises the Bar on Class Actions

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Before concluding the October 2010 Term, the United States Supreme Court issued a ruling in the largest employment law class action in U.S. History, Wal-Mart Stores, Inc. v. Dukes, et al.. The decision created a stir because it reversed the lower courts' certification of a class of approximately 1.5 million female employees. The lawsuit's crux is that Wal-Mart discriminates against females based on their sex, particularly in promotion decisions. The Supreme Court found that the class members did not have enough in common under the applicable federal standards to proceed as a nationwide class action.

Many employers are wondering about the effect of the Dukes decision. Will employment law class actions disappear now? No. The decision may affect the size and types of class actions that proceed. But it will not end employment law class actions altogether.

Class Actions and the Fight Over Class Certification

What is a class action? A group of individuals may join together in a "class action" in both federal and state courts. Named plaintiffs file a lawsuit on behalf a defined class of people. The plaintiffs seek relief (e.g., an injunction and/or monetary damages) on behalf of themselves and all potential class members. The court supervises the distribution of a settlement or recovery to ensure the named plaintiff, unnamed class members, and defendants receive due process.

But not every claim is appropriate for resolution as a class action. The "class certification" process permits the court to determine whether class treatment is proper. If the court denies a motion for certification, the named plaintiff may proceed in her own individual action, but not on behalf of others.

The adage "there is strength in numbers" applies here. A class action can turn an individual lawsuit over a few cents for each individual into multi-million dollar potential liability. Therefore, plaintiffs gain significant leverage to force settlement once the court certifies a class. For these reasons, the class certification stage is one of the most hotly litigated and important pre-trial procedures in civil litigation.

Class Certification Standards

Whether a case ends up in federal or state court depends on one or both parties' choice, as well as whether there is a basis for federal court jurisdiction. The Federal Rules of Civil Procedure ("FRCP") apply in federal court. Each state has its own rules of procedure. The Dukes case deals with the FRCP. However, California and other states pattern their procedures on the federal rules.

The FRCP prescribes two tests for class certification. Plaintiffs must pass both to maintain a class action. First, under FRCP Rule 23(a), the named plaintiffs must establish: (i) there are many potential class members; (ii) their own claims are typical of those in the potential class; (iii) the class representatives are qualified to represent and protect the interests of the class; and (iv) the class members have common legal or factual claims. Establishing this last element of "commonality" is often the biggest hurdle in obtaining class certification.

If the plaintiffs establish all four of these elements, they must then pass a second test under Rule 23(b) before the class can be certified: (i) bringing the claims as individual lawsuits could likely lead to conflicting results; (ii) the defendant has treated all members of the class in the same manner so that ordering injunctive relief would redress the rights of all class members ("injunctive relief"); or (iii) a class action is the best way to resolve the dispute because there are more common questions of law or fact affecting the entire class than there are questions affecting individuals. If the plaintiffs cannot establish at least one of these three elements, the matter will not proceed as a class action in federal court.

Procedurally, it is easiest to obtain class certification for injunctive relief, where plaintiffs ask the court to order a defendant to take a particular action such as "stop administering a discriminatory promotional examination." In such cases, plaintiffs historically have also included requests for "equitable" monetary relief. As discussed below,

that likely is no long possible after Dukes.

Wal-Mart and the Class of 1.5 Million Female Employees

Wal-Mart operates approximately 3,400 stores and employs more than one million people nationwide. The company entrusts local pay and promotion decisions to local managers, who exercise their discretion in a largely subjective manner.

In Dukes, the plaintiffs claimed Wal-Mart favored men over women in both pay and promotional opportunities on a nationwide basis notwithstanding the company's delegation of authority to local management. Their argued Wal-Mart had a corporate culture that fostered sexual stereotypes, even if decisions were made locally. This centralized bias against women, in combination with the localized decision-making practice, worked to discriminate against every female employee who worked at Wal-Mart.

Dukes, a Wal-Mart manager, and several other females sued Wal-Mart, seeking an injunction to stop the alleged sex discrimination. However, as part of the "equitable" claim, they also sought an award back pay money damages for each potential class member, amounting to billions of dollars.

The plaintiffs sued under Title VII of the Civil Rights Act of 1964, the federal law prohibiting employment discrimination. They attempted to certify a class made up of all "women employed at any Wal-Mart domestic retail store at any time since December 26, 1998." The class includes approximately 1.5 million female employees working in a wide range of positions in thousands of Wal-Mart stores across the United States.

The U.S. District Court for the Northern District of California certified the class, holding that the potential class members shared enough in common to move the litigation forward as a class, instead of via individual actions. The Ninth Circuit Court of Appeals affirmed.

Wal-Mart obtained review in the United States Supreme Court, arguing that there were too many differences among the potential class members to allow the lawsuit to proceed as a class action. Wal-Mart also argued that it was not proper to allow the class to seek back pay damages under the lower standards of a claim for injunctive relief.

The Supreme Court's Decision

The Court decided plaintiffs cannot simply claim there are sufficient "common questions" to satisfy the first test under FRCP 23(a). Rather, they must prove to a court, conducting a "rigorous analysis," that "there are in fact . . . common questions of law or fact." Further, a question is not sufficiently common for class certification purposes unless the answer to that common question would resolve the dispute for all class members.

Under these standards, the Court found that plaintiffs failed to show that there was a question common to all 1.5 million class members. For example: (i) the only common established policy actually prohibited sex discrimination; (ii) the practice of allowing localized decision making "is the opposite of a uniform employment practice that would provide the commonality needed for a class action"; and (iii) the plaintiffs' declarations from approximately 120 women regarding alleged discriminatory actions against them could not establish a class-wide practice of discrimination where that sampling represented one for every 12,500 class members and 235 stores out of 3,400 stores at issue. Thus, the Court held that the lower court improperly certified the class.

The Court also considered whether the plaintiffs could seek back pay damages in conjunction with a claim for injunctive relief. The Court unanimously held that plaintiffs cannot obtain class certification through the less rigorous process applicable to injunctive relief claims unless all class members would receive the same relief, whether monetary or otherwise. In other words, if each plaintiff's recovery must be separately calculated, a claim for injunctive relief is not available.

Dukes will result in several changes to the treatment of class actions in federal court. Courts will now take a much more "rigorous" look at named plaintiffs' claims regarding commonality under Rule 23(a). And, they will use the new "common answer" standard for defining commonality. These changes mean there will be fewer certifications of federal class actions that involve complex facts affecting individual rights to recovery. Plaintiffs likely will bring smaller class actions, where it will be easier to establish commonality.

Applying Dukes in California

The Dukes decision likely will affect standards for California courts as well, although perhaps to a lesser degree. California courts often follow federal class action jurisprudence. So, the Supreme Court's explanation of what constitutes "common questions of law or fact" may influence trial courts' decisions regarding whether to certify a class.

If a California court follows Dukes, the plaintiffs cannot argue that "common questions of law or fact predominate" by introducing irrelevant common issues, such as the fact that all class members work for the same company or they all work in California. As stated, courts will require common questions that resolve liability for the entire class.

Still, Dukes probably will not significantly curb employment law class actions brought in California state courts. The most prevalent employment law class actions in California are based on alleged wage-hour violations occurring within the state. Such actions may involve a few hundred or even a few thousand workers, but generally nothing close to a million employees. Depending on the substantive claim, it is easier for courts to find sufficient common questions when there are far fewer potential plaintiffs.

Finally, the California courts are free to disagree with Dukes because the Court evaluated the FRCP. That said, employers may "remove" or transfer class actions and other cases to federal court under certain circumstances. Depending on how courts within the Ninth Circuit interpret Dukes, employers and their lawyers should consider removing cases when possible.

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