NINTH CIRCUIT UPHOLDS CERTIFICATION OF SEX DISCRIMINATION CLASS ACTION LAWSUIT FILED AGAINST WAL-MART,

Gregory S. Fisher*

Introduction

The Ninth Circuit issued a lengthy opinion today (April 26, 2010) by the full court addressing a class action sex discrimination lawsuit that has been pending against Wal-Mart for nearly ten (10) years. The court's opinion addresses the initial procedural issue of class certification. The court upheld certification of a class of approximately 1.5 million women who worked in 3,400 Wal-Mart stores nationwide. It is believed to be the largest class ever certified. This summary briefly reviews the case and its significance.

The Case

In 2001, Betty Dukes and six colleagues filed suit against Wal-Mart alleging that women working for Wal-Mart were paid less than men in similar positions and that women received fewer promotions to management positions. Plaintiffs sought to certify a class of all women who had worked for Wal-Mart since December 26, 1998 who had been or were subjected to Wal-Mart's challenged pay and management track policies. The class size was estimated to be 1.5 million women who worked in 3,400 stores in 41 different regions. Claims were believed to be in the range of $11 billion. It would be the largest class ever certified in history.

In order to certify a class, four initial points must be satisfied under Federal Rule of Civil Procedure 23(a). The class must be so numerous that it is not practical to join all members. There must be questions of law and fact common to all members of the class. The claims or defenses of the representative parties must be typical of all class members. And the representative parties must fairly and adequately protect the interests of the class. These four 23(a) elements are often stated as numerosity, commonality, typicality, and adequacy of representation.

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In addition to these four initial points, a second level of inquiry under Federal Rule of Civil Procedure 23(b) must be satisfied. To satisfy Rule 23(b), the district court must conclude that class representatives showed that prosecuting separate cases would run the risk of inconsistent judgments, or that the party opposing the class has refused to act or acted on grounds affecting all class members, or that the common questions of law or fact predominate over individual claims, and that a class action would be the most efficient means to fairly adjudicate the case.

The district court granted the motion for class certification with minor modification. The district court found that all four Rule 23(a) elements were established. On the second level of inquiry, the district court concluded that class certification was appropriate under Rule 23(b) because Wal-Mart had refused to act or acted on grounds affecting all class members. Wal-Mart appealed.

The three judge panel assigned to hear the case (Judge Pregerson, Judge Hawkins, and Judge Kleinfeld) affirmed by a 2-1 vote. The opinion was issued in February 2007 (three years ago). Judge Pregerson wrote for the majority. Judge Hawkins joined him. The majority largely adopted the district court's analysis, concluding that the commonality and typicality prongs were satisfied (these were the primary arguments that Wal-Mart made to oppose class certification), and that certification was appropriate under Rule 23(b).

Judge Kleinfeld dissented. He pointed out that the claims of Dukes and her colleagues lacked commonality and typicality because the claims were all different—they ran the gamut from race discrimination to race and gender discrimination to just gender discrimination. Different defenses were also applicable. Judge Kleinfeld further observed that the reliance on the Rule 23(b) argument that Wal-Mart had refused to act or acted on grounds affecting all class members was not appropriate because this particular prong was customarily reserved for situations where declaratory or injunctive relief was the predominate claim. Here, instead, the predominate claim was for damages. Dukes and the proposed class were seeking compensatory and punitive damages. Judge Kleinfeld also criticized the district court's proposed case management plan because it would allow liability to be determined on a case-wide basis without adjudicating the merits of any individual claim. Finally, Judge Kleinfeld noted a concern that women with potential claims might have their interests adversely affected if the class were certified. If the class lost, their claims would be precluded. If the class won, all women would share damages regardless of the proportionate share of their actual damages.

Wal-Mart sought en banc review, pointing out several analytical flaws in the majority's opinion. The panel issued an amended opinion on December 11, 2007 in which it corrected the major errors. Wal-Mart again filed a petition for review with a suggestion for en banc review. The Ninth Circuit accepted review on Friday February 13, 2009. An en banc panel of 11 judges heard argument. The court issued its opinion on April 26, 2010.

En banc opinion

A sharply divided en banc panel generally affirmed the district court's class certification by a 6-5 vote. Judge Hawkins wrote for the majority joined by Judges Reinhardt, Fisher, Paez, Berzon, and Graber. The court held that the district court correctly certified a class of current employees concerning claims for injunctive relief, declaratory relief, and back pay damages. On the availability of punitive damages, the court remanded for the district court to consider whether certification was appropriate under 23(b)(2) or (3) (whether Wal-Mart refused to act or acted on grounds affecting all class members, or whether common questions of law or fact predominated over individual claims, and that a class action would be the most efficient means to fairly adjudicate the case). With respect to former employees who no longer worked for Wal-Mart, the court remanded for the district court to determine whether an additional class or classes should be certified.

Judge Ikuta dissented, joined by Chief Judge Kozinski and Judges Rymer, Silverman, and Bea. The dissent objected that there was no significant proof of a discriminatory policy or practice that would justify certifying a class of potentially 1.5 million women who had worked in 3,400 stores nationwide. The dissent raised further concerns as to how affirmative defenses would be litigated to address each individual's potential recovery. Concurring in the dissent, Chief Judge Kozinski succinctly observed:

> Maybe there'd be no difference between 500 employees and 500,000 employees if they all had similar jobs, worked at the same half-billion square foot store and were supervised by the same managers. But the half-million members of the majority's approved class held a multitude of jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed depending on each class member's job, location and period of employment. Some thrived while others did poorly. They have little in common but their sex and this lawsuit.

Significance

This is a fairly important case. Stated generally, class actions for employment discrimination claims have found less favor with the courts than other forms of class actions. Indeed, in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), the United States Supreme court held it was inappropriate to certify a Title VII class allowing one Mexican-American to pursue employment discrimination claims on

behalf of all Mexican-American job applicants who applied to work for an employer. It has often been thought that employment discrimination claims are uniquely individualized claims that are not readily susceptible to treatment in a class action format. There will, of course, be appropriate employment discrimination cases for class certification, especially on a more localized basis. However, as Judge Kleinfeld noted in his panel dissent, the underlying policy reasons for class actions are not often present in typical employment discrimination cases because federal remedial statutes offer statutory awards of fees. Few, if any, plaintiffs or potential plaintiffs with reasonable claims lack for representation.

In addition, Judge Kleinfeld spotlighted a range of constitutional issues in his dissent. As a question of due process, punitive damages cannot exceed a ratio determined by reference to the amount of compensatory damages, yet the district court's case management plan would allow punitive damages to be imposed without ever ascertaining compensatory damages. Judge Kleinfeld also ventured his opinion that the Seventh Amendment's protection of jury trial rights is infringed if individualized determinations of liability and damages are not made.

The en banc dissent echoed many of these same concerns.

It is probable that Wal-Mart will petition for certiorari with the United States Supreme Court.

Conclusion

This legal summary is for informational purposes and is not intended as legal advice. Employers with questions or seeking additional information should confer with counsel.[1]

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NINTH CIRCUIT GRANTS EN BANC REVIEW TO HEAR CLASS ACTION SEX DISCRIMINATION SUIT FILED AGAINST WAL-MART,

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Introduction

On February 13, 2009, the Ninth Circuit granted en banc review of a class action sex discrimination lawsuit pending against Wal-Mart. This is a significant case that has been pending for almost nine (9) years now, but that has never reached any merits-based issues. Instead, the parties have been fighting over the initial procedural issue of class certification. The court's ultimate decision will likely have a significant impact on whether and when class action employment discrimination claims may be filed. This summary briefly reviews the case and its significance.

The Case

Betty Dukes and six colleagues filed suit against Wal-Mart alleging that women working for Wal-Mart were paid less than men in similar positions and that women received fewer promotions to management positions. Plaintiffs sought to certify a class of all women who had worked for Wal-Mart since December 26, 1998 who had been or were subjected to Wal-Mart's challenged pay and management track policies. The class size was estimated to be 1.5 million women who worked in 3,400 stores in 41 different regions. Claims were believed to be in the range of $11 billion. It would be the largest class ever certified in history.

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The three judge panel assigned to hear the case (Judge Pregerson, Judge Hawkins, and Judge Kleinfeld) affirmed by a 2-1 vote. The opinion was issued in February 2007 (two years ago). Judge Pregerson wrote for the majority. Judge Hawkins joined him. The majority largely adopted the district court's analysis, concluding that the commonality and typicality prongs were satisfied (these were the primary arguments that Wal-Mart made to oppose class certification), and that certification was appropriate under Rule 23(b).

Judge Kleinfeld dissented. He pointed out that the claims of Dukes and her colleagues lacked commonality and typicality because the claims were all different—they ran the gamut from race discrimination to race and gender discrimination to just gender discrimination. Different defenses were also applicable. Judge Kleinfeld further observed that the reliance on the Rule 23(b) argument that Wal-Mart had refused to act or acted on grounds affecting all class members was not appropriate because this particular prong was customarily reserved for situations where declaratory or injunctive relief was the predominate claim. The predominate claim was for damages. Dukes and the proposed class were seeking compensatory and punitive damages. Judge Kleinfeld also criticized the district court's proposed case management plan because it would allow liability to be determined on a case-wide basis without adjudicating the merits of any individual claim. Finally, Judge Kleinfeld noted a concern that women with potential claims might have their interests adversely affected if the class were certified. If the class lost, their claims would be precluded. If the class won, all women would share damages regardless of the proportionate share of their actual damages.

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Significance

This is a fairly important case. Stated generally, class actions for employment discrimination claims have found less favor with the courts than other forms of class actions. Indeed, in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), the United States Supreme court held it was inappropriate to certify a Title VII class allowing one Mexican-American to pursue employment discrimination claims on behalf of all Mexican-American job applicants who applied to work for an employer. It has often been thought that employment discrimination claims are uniquely individualized claims that are not readily susceptible to treatment in a class action format. There will, of course, be appropriate employment discrimination cases for class certification, especially on a more localized basis. However, as Judge Kleinfeld noted in his dissent, the underlying policy reasons for class actions are not often present in typical employment discrimination cases because federal remedial statutes offer statutory awards of fees. Few, if any, plaintiffs or potential plaintiffs with reasonable claims lack for representation.

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How the Ninth Circuit addresses and resolves the class action issue in *Dukes v. Wal-Mart* will likely have a major impact on employment discrimination claims in this Circuit.

Conclusion

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