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Class Actions: One Size Fits All – at Least for Now – in the Ninth Circuit

In a sharply divided *en banc* decision yesterday, the Ninth Circuit has allowed class certification in the largest employment discrimination lawsuit in history. In a 6-5 ruling, the Ninth Circuit affirmed the district court's certification of a class — estimated by plaintiffs' counsel at well over one million female employees — under Rule 23(b)(2) for injunctive and declaratory relief and back pay. *Dukes v. Wal-Mart Stores, Inc.,* Case Nos. 04-16688 and 04-16720. The Ninth Circuit remanded the case back to the trial court to determine whether certification under Rule 23(b)(2) or (b)(3) is appropriate for punitive damages claims and whether an additional class should be certified under Rule 23(b)(3) as to claims of former female employees.

The implications from this decision are potentially enormous for companies, at least in the Ninth Circuit. Once a class has been certified, the costs of defense and the scope of the litigation are magnified exponentially. Class action defense practitioners, particularly in the employment context, have traditionally focused on the inherently individualized nature of plaintiffs' discrimination claims to defeat class certification. Because much of the rationale for proceeding on a class action basis stems from the economy of trying similar claims together in one lawsuit, defense litigators often underscore the importance of the existence of a uniform class-wide policy to realize this economy as opposed to trying each plaintiff's individual experience. The *Dukes* decision, however, does not require the plaintiffs to identify a

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specific written company policy or practice illegally applied to the women in order to proceed as a class action. Rather, the court held it was sufficient to just raise the broad common question of whether Wal-Mart's female employees nationwide were subjected to a discriminatory set of corporate policies, regardless of the individual experiences or individual impact upon the various class members.

The majority opinion began by clarifying the standard and scope of review the Ninth Circuit will apply when determining whether to certify a class pursuant to Federal Rule of Civil Procedure 23: "[a] district court must sometimes resolve factual issues related to the merits to properly satisfy itself that Rule 23's requirements are met, but the purpose of the district court's inquiry at this stage remains 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." Slip Op. at 6169 (emphasis in original). As for commonality, the majority ruled that "Plaintiffs' factual evidence, expert opinions, statistical evidence, and anecdotal evidence provide 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." *Id.* at 6209 (emphasis in original). The concurring opinion described the majority's holding as "unremarkable," stating: "If the employer had 500 female employees, I doubt that any of my colleagues would question the certification of such a class. Certification does not become an abuse of discretion merely because the class has 500,000 members." *Id.* at 6237-8.

The dissent reasoned that when a small number of plaintiffs allege company-wide discrimination, the plaintiffs must allege that the employer used a biased testing procedure or must adduce "'[s]ignificant proof that an employer operated under a general policy of discrimination'" in order to bridge the gap between the individuals' claims and the existence of company-wide discrimination. Slip Op. at 6245, quoting *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 159 n.15 (1982). The dissent considered that the anecdotal and statistical evidence, as well as the expert testimony, submitted by the *Dukes* plaintiffs "does not come close to meeting the *Falcon* requirements for demonstrating commonality and typicality." Slip Op. at 6248. Responding to the concurring opinion, Chief Judge Kozinski stated: "Maybe there'd be no difference between 500 employees and 500,000 employees if they all had similar jobs, worked

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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. ... They have little in common but their sex and this lawsuit." *Id.* at 6279.

Wal-Mart is considering asking the United States Supreme Court to review the Ninth Circuit's decision.

For more information on the *Dukes* case or Squire Sanders' class action practice, please contact your principal Squire Sanders lawyer or one of the lawyers listed in this Alert.

Squire Sanders labor and employment lawyers have been at the forefront of today's most critical employment and labor relations issues and pride themselves on their knowledge and experience in such areas as employment discrimination, noncompete agreements and trade secrets, wage and hour litigation, the Employee Retirement Income Security Act (ERISA), executive litigation and M&A/transactional labor issues.

Squire Sanders class action litigation lawyers have successfully represented clients throughout the United States in nationwide, multistate and statewide class action lawsuits. They have defended clients in a number of multidistrict litigation (MDL) proceedings and have appeared before the Judicial Panel on Multidistrict Litigation. Their class action experience covers a variety of industries, and they have litigated class actions in nearly every area of the law including labor and employment, banking and finance, securities, antitrust, consumer fraud, products liability, environmental and ERISA.

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