THE RECORDER

134RD YEAR NO. 26 www.therecorder.com MONDAY, JULY 18, 2011

Class action on the ropes

The Supreme Court's decision in 'Wal-Mart' could result in more cases being filed in state courts


M.C. Sungaila and Greg Marshall

Litigation

In one of the most closely watched cases of the term, the U.S. Supreme Court rejected a nationwide Title VII class action filed on behalf of more than 1.5 million current and former female Wal-Mart employees. *Wal-Mart Stores v. Dukes*, 11 C.D.O.S. 7485. In a 5-4 ruling, the court held that plaintiffs failed to provide proof of a common company-wide policy of discrimination necessary to certify a class under Rule 23(a)(2). Justice Antonin Scalia, writing for the majority, concluded that the necessary "glue holding the alleged reasons" for all of the individual employment decisions at issue together was missing. A separate unanimous ruling by the court held that the plaintiffs' claims for back pay were also improperly certified.

While decided in the context of a Title VII claim, the *Wal-Mart* holding applies with equal force to other types of class actions. It also provides important guidelines for companies defending against class actions, bases for decertifying federal class actions that might run afoul of the standards set by the case, and signals the move of the class action battlefront to state courts.

M.C. Sungaila is an appellate partner at Snell & Wilmer in Orange County. She filed an amicus curiae *brief for the International Association of Defense Counsel in support of Wal-Mart's position in* Wal-Mart v. Dukes. *She can be reached at mcsungaila@swlaw.com. Greg Marshall is a litigation partner at Snell & Wilmer in Phoenix. He focuses his practice on general civil litigation with an emphasis in the defense of financial institutions in consumer financial services litigation. He can be reached at gmarshall@swlaw.com.*

CASE OVERVIEW

Betty Dukes started her career at Walmart as a cashier and was later promoted to a customer service manager. When she was subsequently demoted, Dukes contended the demotion was the result of gender discrimination. She filed suit on behalf of a purported class of female employees against Walmart in the U.S. District Court in San Francisco in June 2001, claiming a pattern and practice of discrimination in pay and promotion of female workers. The proposed class, which encompassed a projected 1.6 million current and former Walmart employees, sought, among other things, declaratory relief, injunctive relief and monetary relief in the form of back pay.

The district court certified the class and a three-judge panel of the Ninth Circuit U.S. Court of Appeals affirmed. In turn, a divided Ninth Circuit, sitting *en banc*, affirmed the district court's certification of this nationwide class of female workers. As Chief Judge Alex Kozinski pointed out, dissenting from the *en banc* determination, the class posed a number of concerns about class representation and commonality of issues. The class included members who "held a multitude of jobs, at different levels of Walmart'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."

The U.S. Supreme Court agreed with Kozinski's assessment, in the process clarifying the commonality standards under FRCP 23(a) and the standards for certifying classes under FRCP 23(b)(2), the injunctive and declaratory relief provision.

REQUIRED COMMONALITY

In determining that the necessary commonality requirements for FRCP 23(a) had not been met, the majority also made clear that, in determining commonality, courts will necessarily have to engage in some analysis of the merits of the claims.

Here, proof of commonality necessarily overlapped with the plaintiffs' contention that Walmart engaged in a pattern or practice of discrimination: "Without some glue holding the alleged reasons" for "literally millions of employment decisions together," Scalia wrote, "it will be impossible to say that examination of all the class members' claims for relief will produce a common answer" to the crucial question of why was I disfavored.

Certainly, Walmart is the nation's largest employer, which made the class in this case particularly unwieldy. Even more detrimental to the class was the lack of evidence tying the allegedly discriminatory hiring practices together at a companywide level, as required in a pattern and practice discrimination case like the one the plaintiffs had filed.

Why did Walmart make the particular employment decisions with respect to each individual class member? There was no express corporate policy against the advancement of women. The plaintiffs argued on one hand that Walmart's policy of permitting local managers to make pay and promotion decisions dis-

proportionately favored men, but then also argued that Walmart's corporate culture was influencing how that discretion was exercised.

However, as Scalia pointed out at oral argument, "if somebody tells you how to exercise discretion, you don't have discretion." Nor can the mere fact that decisions are left to local managers support a corporate policy of bias. As the majority noted, such delegation is a reasonable business practice that should raise no inference of discriminatory conduct absent a "specific employment practice" that is challenged as biased.

STATISTICAL AND ANECDOTAL DATA NOT ENOUGH

Because plaintiffs were proceeding under a "policy of discrimination" theory, they were required to present "significant proof" of the policy's existence. Plaintiffs presented three methods of proving there was a pattern or practice of discrimination.

First, plaintiffs presented experts to show that regionally, Walmart's pay and promotion decisions disproportionately favored men and that Walmart promoted fewer women as compared with its competitors. The experts said the only explanation was bias. But the regional pay disparities were at most attributable to a small set of Walmart stores, and therefore could not establish the existence of a general policy that affected the entire company.

Second, plaintiffs offered anecdotal evidence in the form of 120 affidavits of class members who detailed their experiences of discrimination. The affiants represented one for every 12,500 class members and worked in 235 of Walmart's 3,400 stores. Operations in 14 of the 50 states were not represented at all in the affidavits. The majority found that this evidence could not demonstrate that the entire company operated under a general policy of discrimination. "A few anecdotes selected from literally millions of employment decisions prove nothing at all," the majority concluded.

Third, the plaintiffs presented a sociological expert who opined that Walmart's culture was vulnerable to bias using a "social framework analysis," but the majority dispensed with this evidence regardless of its reliability or admissibility under *Daubert*. The sociologist could not determine with any specificity how often bias played into pay or promotion decisions. Specifically, he could not opine whether bias played a role in .5 percent or 95 percent of the pay or promotion decisions implicated in the lawsuit. Because the expert "admittedly ha[d] no answer to that question," the majority felt they could "safely disregard what he ha[d] to say" because it was "worlds away from 'significant proof' that Walmart 'operated under a general policy of discrimination.'"

DAMAGES CERTIFIED ONLY UNDER FRCP 23(B)(3)

A unanimous court further held that claims for individualized damages — such as the back pay claims sought — could not be certified as part of a Rule 23(b)(2) class. Rather, claims for individualized monetary relief may only be certified as a Rule 23(b)(3) class, which includes due process safeguards not available in a (b)(2) class. These safeguards included notice, an opt-out procedure and the additional requirements of predominance and superiority.

The court also rejected the "Trial by Formula" method endorsed by the Ninth Circuit, citing due process concerns. The full court observed that under the Rules Enabling Act, the Federal Rules of Civil Procedure can neither expand, nor restrict, substantive rights. The court noted that Walmart must be allowed to present its defenses to individual class member claims and the proposed statistical sampling would deprive it of the right to due process.

THE 'WAL-MART' FALLOUT

Senate Judiciary Committee Chairman Patrick Leahy plans to hold a hearing scrutinizing the court's decision in *Wal-Mart*, along with two other cases the court decided in favor of corporate defendants this term. The hearings will examine how the decisions "will impact Americans' access to justice and affect corporate behavior." In the past, the committee has held hearings on *Ledbetter v. Goodyear Tire* (a gender discrimination case), *Gross v. FBL Financial Services* (an age discrimination case), and the campaign finance case *Citizens United v. Federal Election Commission*. Such hearings have led to legislative activity related to the cases being scrutinized.

In the *Wal-Mart* case itself, plaintiffs' counsel have suggested they might pursue a series of store-based or regional class actions, as well as individual plaintiff actions. However, it is unlikely that, under the same pattern or practice theory, storewide or regional class actions will survive the Supreme Court's decision because the necessary "glue" between a company-directed practice or policy of discrimination and the individual discretionary decisions by store managers would be missing.

Meanwhile, clients and counsel facing federal class action allegations — from discrimination to securities and product liability claims — should examine the contours of the *Wal-Mart* decision to determine whether there may be grounds for decertifying pending class actions or opposing class certification motions. Counsel should also consider raising *Daubert* challenges at the certification stage. While the court did not expressly decide whether such challenges were proper at the certification stage of a case, a majority of the court did express "doubt" that certification-stage *Daubert* challenges should be categorically excluded. This is consistent with their determination that some analysis of the merits of a case are necessarily intertwined with the certification determination.

There is also a possibility that class actions may now become more rampant in the state courts, which have varying standards for certification that are not governed by *Wal-Mart*. On June 27, the court was presented with the opportunity to clarify the permissible scope of state class actions as well. The *certiorari* petition in *Philip Morris v. Jackson* asked the next question after *Wal-Mart* — what are the corresponding due process limitations on state court class actions? The court declined review in *Jackson*, which means that the contours of state class actions will need to be worked out state by state.