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Three years after the case was initially filed, a federal district court in San Francisco certified that female employees of Wal-Mart, the nation's largest employer, could proceed in their gender discrimination lawsuit against the company, making *Dukes, et al. v. Wal-Mart* possibly the largest employment discrimination class action in U.S. history.

Dukes v. Wal-Mart: A Foreboding Class Certification Decision for Employers

by James J. Oh

On June 21, 2004, a federal district court in San Francisco certified a nationwide class of approximately **1.6 million** current and former female employees of Wal-Mart who claim sex discrimination in promotions and pay at Wal-Mart stores around the country. *Dukes, et al. v. Wal-Mart Stores, Inc.*, No. C 01-02252 (N.D. Cal. June 21, 2004). Not only does the size of the class dwarf other previous employment class actions, but this may also be the first **billion** dollar employment discrimination case ever. The implications of this decision are profound and potentially frightening. This ASAP summarizes the court's opinion, discusses ramifications and offers practical suggestions that companies should consider in light of this decision.

The Dukes Decision

The main issues on which the court focused in its 84-page opinion were "commonality" and "manageability." Commonality centers on the relationship of common facts and legal issues among class members. Manageability concerns whether class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy.

A. Commonality

In support of their commonality claim, plaintiffs presented three types of evidence: (1) facts and expert opinions supporting the existence of company-wide policies and practices that discriminated against women; (2) expert statistical evidence of class-wide gender disparities attributable to discrimination; and (3) anecdotal evidence of discrimination.

1. Company Policy and Practice

The court found that Wal-Mart store managers have "substantial discretion" in making promotion and salary decisions for hourly employees, leading the court to conclude that such decisions are characterized by "excessive **subjectivity**." For example, while the court concluded that the company has minimal requirements for promotion (e.g., employee has a current "above average" evaluation, is not in a "high shrink" department or store and is willing to relocate), beyond that, it found that selection for management training is the product of a "tap on the shoulder" process. Similarly, the court concluded that, in making salary decisions, store managers were not constrained by objective criteria or oversight. Moreover, the court referred to evidence that Wal-Mart did not post job vacancies for many management positions, and employees who wished to apply for a store manager position needed the permission of the district manager.

These findings were problematic. The court noted that case law has "long recognized that the deliberate and routine use of excessive subjectivity is an

'employment practice' that is susceptible to being infected by discriminatory animus." Rejecting Wal-Mart's argument against commonality that pay and promotion decisions are made locally by individual store managers, the court instead found a nexus between the subjective decision-making and discrimination in the evidence of gender stereotyping and corporate culture at Wal-Mart stores nationwide.

a. Corporate Culture of Uniformity

The court found that Wal-Mart actively fosters a strong and distinctive, centrally-controlled, corporate culture. According to the "Wal-Mart Way," for example, new employees go through the same orientation process, employees attend daily meetings where managers discuss company culture and employees do the Wal-Mart cheer, and store managers are provided with corporate culture lessons and training materials to present at weekly meetings. Plaintiff's sociology expert opined that, through the company's efforts, "employees achieve a common understanding of the company's way of conducting business." The court concluded that this strongly imbued culture supported a finding of commonality among class members.

b. Gender Stereotyping

The same sociologist also opined that managerial decision-making based on subjective factors and with substantial discretion allows managers to perpetuate stereotypes. The expert concluded that promotion and pay decisions "are **likely to be biased** unless they are assessed in a systematic and valid manner, with clear criteria and careful attention to the integrity of the decision-making process." For example, although Wal-Mart has diversity and EEO policies, the expert opined that the company has neither undertaken a systematic assessment to identify possible barriers to women's advancement nor performed any surveys addressing diversity or gender issues. Recognizing that the expert's opinions "have a built-in degree of conjecture," the court nonetheless concluded that there was sufficient scientific foundation for the opinions, and ultimately their validity would be a question for the jury.

2. Statistical Evidence of Discrimination

Plaintiffs' statistical expert opined that female employees are paid less than males in every region; pay disparities exist in most job categories; the salary gap between men and women widens over time; women take longer to enter into management positions; and the higher up the corporate ladder, the lower the percentage of women. For example, according to plaintiffs' expert:

- Women's total earnings are between 5% and 15% less than total earnings of similarly situated men;
- Roughly 65% of hourly employees are women, but women comprise only 33% of management employees.
- On average, women take 4.38 years from date of hire to be promoted to assistant manager, while men take 2.86 years.
- Women take 10.12 years to reach the store manager level, compared with 8.64 years for men.

The court found as sufficient, for this stage of the litigation, plaintiffs' expert's opinions that gender is a statistically significant variable in accounting for salary differentials between men and women, and that there was a shortfall of women promoted to in-store management during the relevant period. The court also rejected Wal-Mart's challenges to the opinions of plaintiffs' statistical experts, including the failure to utilize actual applicant flow data when looking at promotions; the excluding of certain variables such as seniority, recent promotion or demotion, and store size in arriving at conclusions regarding pay; and aggregating data at the regional level rather than the store or sub-store level.

Finally, the court allowed another expert to offer evidence of "external benchmarking," *i.e.*, statistical comparisons to other large retailers. This expert claimed that there is a shortfall of women in managerial positions at 79.5% of Wal-Mart stores, making it "impossible for the pattern to be geographically localized." He further claimed that, at the comparison retailers, females held 56.5% of the managerial positions, whereas women held only 34.5% of the managerial positions at Wal-Mart — a significant differential of 47 standard deviations.

3. Anecdotal Evidence of Discrimination

Plaintiffs submitted 114 declarations from employees around the country. For example, one declarant attested that she was told: "Men are here to make a career and women aren't. Retail is for housewives who just need to earn extra money." Another declarant who sought a transfer to the hardware department claimed that she was told: "We need you in toys … you're a girl, why do you want to be in hardware?" A third alleged that her store manager gave the sporting goods manager position to a male because she needed "a man in the job."

B. Manageability

Wal-Mart argued that the number of potential class members alone made this case impossible to manage. The court rejected this argument, noting that Title VII "contains no special exception for large employers," and that insulating large companies from such actions would "seriously undermine" the purpose of Title VII. The court held that Wal-Mart could not try each class member's individual claim, nor was it entitled to individual store-by-store trials. Instead, Wal-Mart could introduce evidence at trial to rebut plaintiffs' evidence of centralized, nationwide policies regarding corporate culture, subjective personnel policies or gender stereotyping.

Regarding the manageability of the damages phase, the court agreed in part

with Wal-Mart's arguments. While the company's PeopleSoft database — which the court characterized as extraordinarily sophisticated — eliminated the need for individualized hearings on the *qualifications* component of determining eligibility for sharing in a backpay award for discriminatory failures to promote, the database could not determine employees' *interest* in promotions. Accordingly, the court limited the sharing of any backpay remedy to those who could present objective evidence of application or interest in a promotion. Rather than require evidence of actual lost pay, the court approved the use of a formula to calculate a lump sum backpay award which, while imprecise, was better than no remedy at all, according to the court. The court also certified the entire class with regard to an equal pay remedy.

Ramifications For Employers

In his first inaugural address, Franklin D. Roosevelt spoke of being in the midst of a "national emergency" and identified a "nameless, unreasoning unjustified terror which paralyzes needed efforts to convert retreat into advance." In this speech, Roosevelt uttered his famous words: "[T]he only thing we have to fear is fear itself."

At first blush, the *Dukes* decision is ominous for employers, not only because of the sheer size of the class and potential award, but also because the court credited plaintiffs' sociology expert's opinions despite acknowledging they were replete with conjecture. (Littler Mendelson had this same expert stricken in a class action employment case in which he expressed similar opinions). In addition, the court allowed aggregation of the statistical data at the regional and national level, and accepted the use of a formula for determining damages instead of individualized findings. Further, the court's focus on alleged "excessive subjectivity" in Wal-Mart's policies calls into question the decision-making processes of other employers, large and small. Most ominous, the *Dukes* court gave short shrift to the multiple defenses raised in opposition to the plaintiffs' class certification motion. Roadblocks that defendants have successfully used against other class certification motions were summarily brushed aside, making molehills out of what previously were mountains.

Successful results breed copycats, and there likely will be an uptick in employment discrimination class actions following *Dukes*. While wage-hour issues have recently predominated over employment discrimination in the class action arena, this decision may cause the pendulum to swing back the other way.

Our question: Will your company be struthious in the wake of the *Dukes* decision, or will your company take proactive measures to avoid a similar result? Employers should not be paralyzed in the wake of Dukes; rather, they should aggressively determine whether their statistics and policies are a harbinger of class certification and then take corrective steps. We suggest the following:

- *In a privileged fashion*, become familiar with your employment statistics and the inferences that can be drawn from them;
- If your company already has that familiarity, examine your policies regarding hiring, promotion and pay — again *in a privileged fashion* — to assess whether modifications can be made so that they do not appear to rely too much on subjective criteria;
- Adopt or modify a posting system so that promotional opportunities (or more of them) are publicized internally;
- Conduct a systematic assessment *in a privileged fashion* of potential barriers to the advancement of women and minorities;
- Consider adopting an appeals process for decisions denying promotions or pay raises.

The *Dukes* decision can be used to turn potential weaknesses into strengths. The only thing to fear is fear itself. Advance instead of retreat.

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