

Class Action Lawsuits: Is Your Company Safe?

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Dukes v. Wal-Mart, Inc., 474 F.3d 1214 (9th Cir. 2007) is a monumental class action lawsuit, and employers across the country – especially those with policies governing key employment areas as compensation and promotion – need to pay attention to it. The class action alleges that Wal-Mart discriminated, in both pay and promotion, against female employees at its stores across the country. Experts suggest that this will be the first ever *billion dollar* employment discrimination case. Consequently, we may see class action lawsuits continue to gain momentum as the preferred vehicle for combating widespread discrimination. The sheer size and potential financial impact of the *Dukes v. Wal-Mart* decision puts employers on notice that widespread discriminatory employment practices may be challenged and could lead to devastating results.

Dukes v. Wal-Mart: A Lesson in Class Actions

In a class action lawsuit, one or more plaintiffs, as the purported representative of numerous unnamed individuals, assert there is a common practice or policy that has damaged the members of the class in a similar fashion. Further, they contend it would be far more efficient for the court to proceed on a class basis because the number of class members is too large to make the traditional joinder of multiple plaintiffs practical. The court must decide initially whether to certify a class considering four elements:

- **Class size:** is the class so large that traditional multiple lawsuits are impractical?
- **Commonality:** do the plaintiff's allegations share common questions of law and fact?
- **Typicality:** are the claims made by the members of the class typical of the whole class?
- **Adequacy:** do the named plaintiffs and their lawyers adequately represent the entire class?

Several months ago the 9th Circuit Court of Appeals upheld a decision certifying a nationwide class action suit against Wal-Mart, Inc. involving more than 1.5 million current and former female Wal-Mart employees. It's an alarming decision for employers across the country. What happened and what actions should you take to avoid a similar situation in your own organization?

A Troubling Decision for Employers

The *Dukes* decision is most troubling to employers because of the court's finding that "commonality" had been shown. In effect, it ruled that one and one-half million current and former female employees, who had allegedly been denied promotions and treated discriminatorily regarding compensation, were similarly affected by the claimed discriminatory practice or policy. These 1.5 million individuals had been employed in more than 3,000 stores nationwide. The plaintiffs, however, had conceded Wal-Mart lacked any standard policy concerning the employment law decisions in question. In fact, individual store managers made the decisions based on their subjective view without being restricted by company-wide policies and guidelines.

Yet, the court found that the claimants had shared common questions of law and fact to meet the commonality requirement for class action status. A review of the evidence the plaintiffs presented in support of their class certification highlights the risk companies are exposed to if they fail to take sufficient precautions to standardize and control their promotional and compensation policies and practices.

Three Types of Evidence Presented

The plaintiffs presented three types of evidence to show that the proposed class of a very diverse group of women were treated in a discriminatory manner, even though they were

employed in different positions, were both salaried and hourly workers, and were supervised by different managers located at other of Wal-Mart's more than 3,000 stores. This evidence consisted of: (1) the corporate culture and gender stereotyping; (2) statistical evidence; and (3) anecdotal evidence. A review of each type of evidence is helpful to determine whether your corporate culture (or demographics) could expose your company to a fate similar to Wal-Mart's.

Corporate Culture and Gender Stereotyping

Prior to *Dukes*, courts were reluctant to certify class actions where a company used at least some objective standards which were job related. The U. S. Supreme Court noted that: "Significant proof of a general policy of discrimination conceivably could justify a class . . . if the discrimination manifested itself in hiring and promotion practices . . . such as through *entirely subjective decision making processes* (emphasis added)." The reason behind this reluctance was that courts did not want to tell companies how to conduct business. As a result, company-wide personnel decisions, even those which may be discriminatory, were usually not subject to class action lawsuits as long as some objective criteria was used.

■ class action lawsuits — continued on page 26 ■

The *Dukes* case threw out the “entirely subjective” standard and replaced it with an “excessively subjective” requirement. This deviation was shocking to Wal-Mart which felt safe after producing evidence of objective criteria such as satisfactory evaluations and willingness to relocate.

Further, at least one prior federal court of appeals had held that pay and promotional decisions, placed entirely in the hands of local managers, did not satisfy the commonality requirement. The *Dukes* court, however, rejected Wal-Mart’s contention that since the “policy” was too localized, plaintiffs could not establish commonality.

The court pointed out that the plaintiffs had presented evidence of a culture of corporate uniformity and gender stereotyping on a company-wide basis. Wal-Mart admitted to constructing and nurturing the “Wal-Mart way;” a strong centrally controlled corporate culture which sustains uniformity of operational and personnel practices. Employees became well versed in the “Wal-Mart way” through an orientation process, daily meetings, and corporate culture lessons.

Store managers were regularly selected from within the company and once promoted were transferred between stores, approximately three times during their tenure at Wal-Mart. Because store managers were trained to think in a standardized way, the court looked past differences in geographical locations and store size and found Wal-Mart’s discriminatory treatment of female employees satisfied the commonality requirement.

The plaintiffs also claimed gender stereotyping played a vital role in discriminating against female employees. Plaintiffs’ expert testified that when managers are given discretion to make choices based on totally subjective criteria, gender stereotypes are likely to come into play, resulting in the creation of gender barriers. Further, as the court found, in an environment that permits or encourages stereotypes, decision makers will likely act on assumptions, whether they are true or not. The *Dukes* court recognized that, “While some subjectivity is inherent in, and in fact a useful part of, personnel decisions . . . deliberate and routine use of excessive subjectivity is susceptible to being infected by a discriminatory animus.”

Failure to Post Jobs

Wal-Mart’s policy of not posting promotional opportunities was detrimental to female employees who had no way of showing their availability or interest in being promoted. This practice made it easy for decision makers to validate their own stereotypes by overlooking or discounting the possibility that women employees might be interested in and qualified for a

promotion. The culture thus dictated the decision or substantially influenced the outcome, creating a ceiling beyond which female employees could not advance.

Statistical Evidence of Discrimination

Plaintiffs also presented statistical evidence and corresponding expert testimony to show female Wal-Mart employees were paid less than males in every region; that pay disparities existed in most job categories; and that women took longer to enter management positions. For example:

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

In general, plaintiffs’ experts testified there were statistically significant gender-based disparities for all job classifications in all 41 Wal-Mart regions nationwide.

Benchmarking Analysis

The most overwhelming statistical evidence, though, came from plaintiffs’ “benchmarking” analysis used to determine the availability of Wal-Mart female employees who were qualified for and interested in management positions. Plaintiffs contrasted Wal-Mart’s data against other comparable retail establishments. The premise was that because other retail chains were employing women as managers at a designated rate, there must also be women who are qualified, interested and available to hold comparable management positions at Wal-Mart.

Plaintiffs’ expert determined that more than one-half of the managers at the comparison stores were female, as opposed to only one-third at Wal-Mart. According to the expert witness, these findings were of “highly statistical significance,” and it was “virtually impossible for the pattern to be geographically localized.”

Certification Stage

The certification stage is probably the most crucial point in class action lawsuits because most cases are settled if and when the class is certified. Certification hearings may be each side’s only chance to present evidence, in light of the fact that most class actions will never make it to trial. A number of courts have ruled that disputes over technical concerns (i.e. validity of a certain expert methodology) have no place in certification hearings and are best left for judgment on the merits during trial. The *Dukes* court, however, allowed detailed testimony to be presented at the certification stage. In proposed class actions, courts will

vary in how thoroughly and at what point in the proceedings statistical evidence will be analyzed. Since most judges do not possess an advanced mathematics degree, it is impossible to accurately predict what types of statistics they will find most persuasive, if any.

Anecdotal Evidence of Discrimination

Plaintiffs presented evidence from 114 female employees across the country. Alleged comments such as, "Men are here to make a career and women aren't. Retail is for housewives who just need extra money;" "We need you in toys . . . you're a girl. Why do you want to be in hardware?" were indicative of the evidence presented.

What Can You Do?

In the aftermath of *Dukes*, it is essential that human resource specialists take a closer look at, and become familiar with, all employment policies, especially those pertaining to hiring, compensation and promotion. Obviously, some degree of subjectivity will be present in any personnel decision. However, employers should implement policies containing enough objective criteria to avoid being labeled "excessively subjective." The following are suggested policies and practices to consider:

- **Job Posting.** In addition to evidence of other discriminatory policies, the *Dukes* court stated that Wal-Mart's policy of not posting promotional opportunities enabled its managers to act on gender biases in selecting preferred candidates without seeking out all qualified employees. Hence, employers are advised to post promotional opportunities throughout their company. Applicants should be permitted to submit their showing of interest in some documented form. This process would eliminate the "tap on the shoulder" method of selection and minimize the class of potential claimants by eliminating

those who have not posted for promotional opportunities.

- **Promotional Criteria.** Companies should consider establishing a list of skills to be considered for each promotional position. Each skill should be weighted based on its importance to the successful performance of the promoted position. Applicants who have responded to the posted position should be assessed based on each of the skills listed. A ranking of the total scores for each applicant should then lead to the selection pro-

cess. Prior evaluations need not be utilized since they normally reflect performance in a different position, and often have a halo effect by being associated with a compensation increase process.

- **Self Analysis of Statistical Data.** Employers should consider analyzing the demographics in each of its supervisory levels. Raw statistical data should be compiled to assist in determining whether promotional po-

■ class action lawsuits
— continued on page 28 ■

sitions are being filled without a discriminatory effect on a protected group, whether female or minority.

To do this properly, data must be retained based on applicant flow, i.e. job posting applicants and outside hires. In order to protect the confidentiality of such analysis, the raw data should be collected at the direction of, and analyzed by, outside counsel to establish an appropriate attorney-client privilege or attorney work product. The evaluation of such data could thereafter be presented to top management who could formulate policies to correct any deficiencies that may have been found. The same analysis could be performed for a compensation review, although more sophisticated software programs would be necessary to accomplish this task in a cost-effective way.

- **Diversity Training.** To curtail the possibility of existing anecdotal evidence of discrimination, supervisors who make employment decisions affecting others should receive sufficient diversity and equal opportunity training to help eliminate stereotyping, which often leads to damaging statements being made, and possible discrimination.

Conclusion

Plaintiffs' attorneys are on the lookout for opportunities to bring class action litigation. If they are successful, recovery can be substantial and perhaps astronomical, as it could be in the *Dukes* case. Now more than ever it is necessary to take a proactive approach to reduce the probabilities of becoming a target. Top management will likely look to you, as its human resources expert, for advice on the company's potential exposure, and the steps to be taken to minimize the risk. It will consider why, especially if a class action is commenced, such advice was never given or such steps not considered or taken. ▀



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