Alert: *Dukes v. Wal-Mart Stores*: Closer Analysis of Key Issues and Lessons for Employers

I. Further Analysis of Key Legal Issues

Centralized Employment Practices

Most large companies have multiple departments, locations, and divisions, with local supervisors and managers making day-to-day employment decisions. Limits on corporate control, while at times frustrating, can be an employer's friend in the class action context. "The consensus among [most] courts … is that a plaintiff may represent a multi-facility class only where centralized and uniform employment practices affect all facilities the same way." Reid v. Lockheed Martin Aeronautics, 205 F.R.D. 655, 667-68 (N.D. Ga. 2001). In affirming class certification, the Ninth Circuit in Dukes ruled that "the record provides significant evidence of central control," but included little discussion of this evidence. 2010 WL 1644259 at *18. As the lower court noted, the plaintiffs argued that a "strong, centralized corporate culture" exists based on Wal-Mart's orientation process, policy of promoting from within, control of temperature and music in stores, transferring managers among stores, centralized IT system, and slogan of the "Wal-Mart Way." On appeal, the dissent insisted that "the mere existence of [Wal-Mart's] company-wide policies says nothing about whether such policies are discriminatory." Id. at *49. We similarly question what the temperature of stores and a catchy slogan have to do with discrimination through centralized employment practices.

Delegated Decision-Making and Excessive Subjectivity

It has long been held that plaintiffs in broad "across-the-board" class actions can support certification by showing that an employer has engaged in an "entirely subjective decision-making process." Exactly when a class becomes "across-the-board" is unclear, but the Ninth Circuit at least recognized that the Dukes class is "broad and diverse." 2010 WL 1644259 at *19. Not surprisingly, plaintiffs rarely can show that a decision-making process is devoid of at least some objective factors. Dukes lightens the burden by allowing plaintiffs to support certification by merely showing delegation to supervisors of the ability to make decisions using "excessive subjectivity." Id. at *21. Notably, the lower court conceded that "some level of subjectivity is inherent in, and in fact a useful part of, personnel decisions." The Ninth Circuit provided no guideline as to how much subjectivity is too much. To borrow from former Supreme Court Justice Potter Stewart, this amounts to an "I know it when I see it" standard. A number of courts from other jurisdictions, including the Sixth Circuit (including Tennessee) have rejected this approach and ruled that delegation of employment decisions actually is a factor against class certification.

Statistical Aggregation

The parties in employment class actions often debate whether statistical experts should analyze employment actions on an aggregated (*i.e.*, lumping multiple locations or job groups together) or disaggregated (*i.e.*, reviewing locations and job groups separately) basis. Plaintiffs favor

aggregation since a larger sample size allows smaller disparities to establish discrimination. For example, if you flip a coin ten times and it comes up heads six times, this would not be significant. On the other hand, if you flip a coin 1000 times and it comes up heads 600 times, you should get a new coin. Aggregated statistics also may allow plaintiffs to represent a broad, nationwide class. Wal-Mart argued that the plaintiffs' aggregated statistics ignored the fact that no significant disparity existed in the large majority of its stores. Based on its finding of a centralized corporate culture, though, the Ninth Circuit allowed the plaintiffs to aggregate statistics. 2010 WL 1644259 at *24-26. The court also applied a permissive standard to the review of statistical evidence at the class certification stage. Id. at *25. A number of courts have applied a more employer-friendly approach. As the dissent argued, the plaintiffs' nationwide aggregation of statistics actually "is contrary to the thrust of plaintiffs' theory, namely, that the decisions of individual managers … are subjective and not subject to uniform 'parameters and guidelines.'" Id. at *51. Furthermore, the national trend has been to conduct a more rigorous analysis of statistics at the class certification stage. Id. at *52-53.

Anecdotal Evidence

The plaintiffs in Dukes offered 120 declarations providing anecdotal evidence of alleged discrimination. 2010 WL 1644259 at *29. While this may sound impressive, it represented only "one anecdote for every 12,500 class members" and these anecdotes were disproportionately concentrated in a small subset of stores. Id. at *49. Nevertheless, the majority declined to require "a specific number of declarations" and ruled that the anecdotal evidence should be considered along with evidence of a "strong corporate culture" and statistical evidence. Id. at *29.

The dissent roundly criticized this approach of glossing over the defects in each piece of evidence by referring to the cumulative effect of similarly flawed evidence.

Every piece of evidence merely purports to support another. While plaintiffs' anecdotes do not show company-wide discrimination, plaintiffs argue they support the statistical evidence. The statistics are not probative of a company-wide policy of discrimination, but plaintiffs allege they may be "attributable" to such a policy when viewed in connection with Wal-Mart's uniform corporate policies. The uniform corporate policies are not themselves discriminatory but, according to plaintiffs, provide a potential "conduit" for discrimination. The expert opinions do not point to discrimination on a companywide basis, but merely "support[ ] the existence of companywide policies and practices that *likely* include a culture of gender stereotyping." And Wal-Mart's corporate policy of subjective decision making is not discriminatory in itself but, plaintiffs urge, may be evidence of company-wide discrimination in light of the statistical evidence and anecdotes. Like the proverbial shell game, the plaintiffs' circular presentation cannot conceal the fact that they have failed to offer any significant proof of a company-wide policy of discrimination, no matter which shell is lifted.

Id. at *53.

Punitive Damages and the Right to Defend Against Individual Awards

The majority of circuits, including the Sixth and Eleventh (covering Tennessee, Georgia, and

five other states), has ruled that requests for punitive damages present major obstacles to class certification. By contrast, the Second and Ninth Circuits (covering New York, California, and ten other states) have adopted a more permissive standard. The Ninth Circuit in Dukes ruled that the standard set forth by the Second Circuit, which it previously had followed, was "fatally flawed" but still continued to reject the more conservative approach followed by other circuits. 2010 WL 1644259 at *35. Instead, the Ninth Circuit created a new multi-factor test and remanded the case to the lower court to apply this test to the plaintiffs' claim for punitive damages. Finally, the Ninth Circuit suggested that the lower court may adopt a "sampling" or formulaic approach to back pay and punitive damage calculations. Id. at *42-43. Wal-Mart maintains, and the dissent agreed, that this approach will result in windfalls for certain class members and deprive it of its statutory and constitutional rights to defend itself. Id. at *53-60.

II. Lessons for Employers

Focus on Objective Factors

Some level of subjectivity is inevitable in employment decisions. Still, increasing objective variables will counter arguments that the employer is basing decisions on subjective stereotypes. The employer also will better position itself to defend against single plaintiff cases. Additionally, the process can enhance morale and improve employment decisions.

Post Jobs and Track Applications

Because Wal-Mart failed to post all job openings, the plaintiffs' expert focused on "feeder pool" positions with high percentages of females. While Wal-Mart argued that women often were not interested in promotions that may require relocation – and limited applicant flow data suggested as much – it lacked adequate data to support this argument. A posting policy also is helpful in single plaintiff cases. Often, plaintiffs complain about not receiving jobs when the employer has no record of the plaintiff's interest in the position. From a business perspective, posting all jobs can attract a broader group of qualified candidates.

Consider Employment Audits

The time to learn if your company has significant statistical problems is not after a lawsuit has been filed. You may want to audit your employment demographics and pay equity periodically. You should act in concert with outside counsel to maximize your chance of preserving confidentiality. Investigating apparent disparities and addressing outliers can improve employee morale, decrease litigation risks, and correct business inefficiencies.

Scrutinize EEO-1 Reports

Employers with 100 or more employees must file annual EEO-1 Reports regarding their workforces. Wal-Mart maintained that it had not included department managers in the EEO-1 managers category, whereas other retailers did so. Including these managers would have almost doubled the percentage of women among in-store managers. Employers should carefully review any required EEO-1 Reports to avoid any such results.