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July 2011 Management Update

Supreme Court Rejects Nation-Wide Sex Discrimination Class Action

Executive Summary: In a decision that may curtail the proliferation of employment-related class actions, the U.S. Supreme Court recently ruled in favor of Wal-Mart and decertified a nation-wide class of sex discrimination plaintiffs in a Title VII action against the company. *Wal-Mart v. Dukes*, No. 10-277 (June 20, 2011). The Court held that class certification was inappropriate because the plaintiffs could not show that there were issues of law or fact that are common to the class as a whole. The Court also held that the plaintiffs' back pay claims should not have been certified under Federal Rule of Civil Procedure 23(b)(2). This is significant because it means that plaintiffs requesting back pay in Title VII discrimination claims may now be required to seek certification under the more demanding procedures of Rule 23(b)(3).

Background

Wal-Mart operates approximately 3,400 stores and employs more than one million people. Pay and promotion decisions at Wal-Mart are generally committed to local managers' broad discretion, which is exercised in a largely subjective manner. The plaintiffs in this case claimed that local managers' discretion over pay and promotions was exercised disproportionately in favor of men, which had an unlawful disparate impact on female employees. The plaintiffs also claimed that Wal-Mart was aware of this effect and that its failure to limit local managers' authority resulted in discrimination against female employees. The plaintiffs sought injunctive and declaratory relief, punitive damages, and back pay but did not seek compensatory damages.

Class Proceedings

The plaintiffs claimed that Wal-Mart has a corporate culture of sex discrimination that affects every female Wal-Mart employee and sought to represent all female employees of the company in a nation-wide class action.

A class action is a lawsuit by an individual or a group of individuals (the "class representatives") seeking to represent a larger group of individuals (the "putative class"). Generally, the class representatives claim that they and the members of the putative class have suffered injuries that share common issues of fact and law. Therefore, adjudicating the claims of the class representatives will effectively resolve the class members' claims without requiring the individual class members to file suit.

Before the substance of the discrimination claims of a class may be resolved, a court must determine whether a particular claim can proceed as a class action (generally

known as the class certification stage). Discrimination claims under Title VII, such as this case, follow the procedures for certification set forth in Rule 23 of the Federal Rules of Civil Procedure.[1]

Rule 23(a) requires the plaintiffs to meet four requirements: (1) numerosity – that the class is so numerous that joinder of all members is impracticable; (2) commonality – that there are questions of law or fact common to the class, (3) typicality – that the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) adequacy of representation – that the representative parties will fairly and adequately protect the interests of the class. In addition to meeting the requirements of Rule 23(a), the plaintiffs must satisfy one of the requirements of Rule 23(b). In *Dukes*, the plaintiffs relied on the requirements of Rule 23(b)(2) – that the "party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

The Plaintiffs Failed to Show Commonality

The Court's decision focused on the requirement of commonality – whether there are issues of fact or law that are common to the class as a whole. In finding that the plaintiffs failed to present evidence of a common issue of fact or law, the Court concluded that the plaintiffs in this case "have little in common but their sex and this lawsuit."

The Court held that commonality means that the class members "have suffered the same injury," not just that all have suffered a violation of the same provision of law. Moreover, the common contention must be of such a nature that it is capable of class-wide resolution – "which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."

The Court emphasized that Rule 23 is not merely a pleading requirement and that class certification demands a "rigorous analysis" that shows that the requirements of Rule 23(a) have been met – that is "actual, not presumed, conformance with Rule 23(a)." The Court acknowledged that this "rigorous analysis" frequently "will entail some overlap with the merits of the plaintiff's underlying claim" which "cannot be helped."[2]

No General Policy of Discrimination

The Court held that the plaintiffs failed to meet their burden of establishing commonality by presenting "significant proof" that Wal-Mart "operated under a general policy of discrimination." The Court noted that Wal-Mart has a policy forbidding sex discrimination and imposing penalties for the denial of equal employment opportunity. The only proof the plaintiffs submitted on this issue was the testimony of their "expert" who relied on "social framework" analysis to conclude that Wal-Mart had a strong corporate culture that made it "vulnerable" to "gender bias." However, the expert could not determine with any specificity "how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart." The Court held that even if this evidence was properly considered (an issue which it questioned but did not decide),[3] the expert's testimony did nothing to advance the plaintiffs' case. Accordingly, the Court disregarded his testimony, finding that it was "worlds away from 'significant proof' that Wal-Mart 'operated under a general policy of discrimination.'"

Supervisory Discretion Raises No Inference of Discrimination

The Court noted that the only company-wide policy the plaintiffs could point to was Wal-Mart's policy of allowing local supervisors to have discretion over employment matters. According to the Court, such a policy is the opposite of a uniform employment practice that would provide the commonality needed for a class action. Further, the Court held that this is a very common and presumptively reasonable way of doing business – one that "should itself raise no inference of discriminatory conduct."

Here, the plaintiffs failed to identify a common mode of exercising discretion that pervades the entire company or any other specific employment practice – other than the bare existence of delegated discretion – that would tie together the claims of all 1.5 million class members. In rejecting the plaintiffs' statistical evidence, the Court reiterated that "[m]erely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice" to establish Title VII liability under a disparate impact theory.

The Court also found the plaintiffs' anecdotal evidence of discrimination failed to show that the company operates under a general policy of discrimination. The Court noted that the affidavits describing specific incidents of sex discrimination submitted by the plaintiffs (about 1 for every 12,500 class members) related to only 235 out of Wal-Mart's 3,400 stores. Further, more than half of those incidents occurred in just six states, and there was no anecdotal evidence from fourteen of the states in which the company has stores. The Court held that "even if every single one of these accounts is true, that would not demonstrate that the entire company 'operate[s] under a general policy of discrimination,' . . . which is what respondents must show to certify a companywide class."

Back Pay Claims Should not have been Certified under Rule 23(b)(2)

The Court further clarified that the plaintiffs' claims for back pay should not have been certified under Rule 23(b)(2). Rule 23(b)(2) allows class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

Although the Court did not determine whether Rule 23(b)(2) should apply only to claims for injunctive or declaratory relief and not to monetary claims at all, the Court held that claims for individualized relief, like the claims for back pay in this case, do not satisfy the requirements of Rule 23(b)(2). Instead, Rule 23(b)(2) applies "only when a single injunction or declaratory judgment would provide relief to each member of the class." The Court held that this rule "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." Because Rule 23(b)(3) provides for greater procedural protections, including the right to opt out of the class (which Rule 23(b)(2) does not provide), the Court found it "clear that individualized monetary claims belong in Rule 23(b)(3)."

Justice Scalia wrote the opinion, which was joined by Chief Justice Roberts and Justices Kennedy, Thomas and Alito.

Partial Dissent

In a partial dissent, Justice Ginsburg agreed that certification is improper under Rule 23(b)(2) but argued that the case should have been remanded so that the lower court could determine whether the case should be certified under Rule 23(b)(3). Justice Ginsburg argued that by finding the claims failed to meet the commonality requirement under Rule 23(a), the majority improperly imposed a determination that should be made at the Rule 23(b)(3) stage. Justices Breyer, Sotomayor, and Kagan joined in the partial dissent.

Employers' Bottom Line

The Court's decision in this case will require trial courts to more rigorously examine class action complaints to determine whether a claim should proceed as a class action. This may mean that claims are less likely to be certified as class actions.

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1. Claims under the Fair Labor Standards Act (FLSA) and the Age Discrimination in Employment Act are brought as collective actions under procedures set forth in the FLSA, which are somewhat different from the procedures set forth in Rule 23.

2. The Court specifically rejected the notion that its prior decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) reached a contrary conclusion.

3. The Court noted that the parties disputed whether this testimony met the requirements for admission of expert testimony under the Federal Rules of Civil Procedure and the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993). The Court also questioned the trial court's determination that Daubert does not apply at the certification stage of a class action proceeding, but did not rule on this issue.

Nevada Prohibits Discrimination Based Upon a Person's "Gender Identity or Expression"

Executive Summary: Following a targeted lobbying effort by LGBT and civil liberties activists, Nevada recently became the 15th state,[1] along with the District of Columbia, to adopt legislation expressly prohibiting workplace discrimination against transgendered employees.

What Does the Law Provide?

Nevada currently prohibits employment discrimination based upon a person's color, religion, sex, sexual orientation, age, disability, or national origin. Assembly Bill No. 211 adds to that list "gender identity or expression," defined as "a gender-related identity, appearance, expression, or behavior of a person, regardless of the person's assigned sex at birth." Under Nevada law, an employer commits an unlawful employment practice if, based on any of these protected classes, it discriminates against any person "with respect to the person's compensation, terms, conditions, or privileges of employment."

Although the bill adds the transgender category to anti-discrimination statutes, it does not alter an employee's procedural requirements for pursuing a claim under state law.

In expanding legal protections to transgender employees, the bill further addresses some of the practical implications that may affect employers. For instance, the bill allows employers to enforce gender-specific dress codes and grooming policies. In doing so, however, employers must allow employees to "appear, groom and dress consistent with the employee's gender identity or expression." In other words, employers must defer to an employee's self-identified gender when applying workplace grooming policies and dress codes.

The bill also permits employers, in limited circumstances, to indicate a "preference, limitation, specification or discrimination . . . based on gender identity or expression." Specifically, to qualify for this exception, an employer must show that an employee's gender identity or expression is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

Employers' Bottom Line

Nevada's transgender law goes into effect on October 1, 2011. The new law applies to employers with 15 or more employees, employment agencies, labor organizations, and apprenticeship programs. It does not apply to out-of-state employment or § 501(c)(3) tax-exempt entities. To facilitate timely compliance with the new legislation, employers should revise their employee handbooks and internal policies (such as dressing and grooming, harassment, and equal employment opportunity). Employers should also educate supervisors, employees, and orientees alike on the prohibition against discrimination based on gender identity or expression. Employers might also find value in preliminarily assessing their restroom accommodations in the event the Nevada courts and/or regulatory bodies later interpret the law to assign restroom use based on an employee's self-identification. In that case, gender-neutral, stand-alone restrooms that are available to any employee might help minimize exposure to harassment and discrimination claims so long as transgendered employees are not pressured into using the alternate restrooms exclusively.

If you have any questions regarding the new law or other labor or employment related issues, please contact the author of this article Aisha Sanchez, asanchez@fordharrison.com, an attorney in our Tampa office, or the Ford & Harrison attorney with whom you usually work.

1. California, Colorado, Hawaii, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Nevada, Oregon, Rhode Island, Vermont, and Washington also prohibit discrimination based on gender identity.

Refusal to Hire Applicant Did Not Violate Bankruptcy Code

Executive Summary: According to the Eleventh Circuit, private employers may consider a prospective employee's past bankruptcy filing during the hiring process. In other words, any private employer in Georgia, Florida, or Alabama[1] may take into account an applicant's past bankruptcy filing when determining whether to offer a job to the applicant without fear of civil liability.[2]

Background

In *Myers v. Toojay's Mgmt. Corp.* (May 2011), a job applicant (Myers) sued after a private employer rescinded an offer of employment because Myers had filed for bankruptcy in the past. Myers claimed, among other things, that the company violated Section 525(b) of the Bankruptcy Code (11 U.S.C. § 525(b)), which states:

No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt…

The trial court rejected this claim, holding that Section 525(b) only prohibits discrimination against individuals who are ***already employees***. Because applicants are not employees they are not covered by Section 525(b).

The Eleventh Circuit upheld the trial court's decision, rejecting Myers' argument that Section 525(b)'s statutory language "or discriminate with respect to employment" should be broadly construed to include denial of employment. In reaching this conclusion, the Eleventh Circuit compared the language of this section to that of Section 525(a) (addressing governmental employers), which specifically prohibits denying employment because of bankruptcy. Specifically, Section 525(a), states:

[A] governmental unit may not…***deny employment*** to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated…

The Eleventh Circuit noted that its prior decisions, as well as those of the U.S. Supreme Court, have often held that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Therefore, if Congress had intended to cover a private employer's hiring policies in Section 525(b), it could have mirrored the language used for governmental employers in Section 525(a).

The Eleventh Circuit also rejected Myers' argument because it would be illogical to read the identical language ("or discriminate with respect to employment") in two successive subsections to have different meanings. Additionally, the court held that interpreting the language "discriminate with respect to employment" to include denial of employment would render the "deny employment" language in 525(a) superfluous, which is "an interpretive no-no."

Finally, the court rejected Myers' argument that it recast the meaning of Section 525(b) to better achieve Congress' goal of giving debtors who go through bankruptcy a fresh start because it is the role of the courts to "interpret and apply statutes, not congressional purposes."

For all these reasons, the court held that the defendant, a private employer, did not violate Section 525(b) when it refused to hire Myers because of his prior bankruptcy.

If you have any questions regarding this decision or other labor or employment related issues, please contact the author of this article, Heath Edwards, hedwards@fordharrison.com, an attorney in our Atlanta office, or the Ford & Harrison attorney with whom you usually work.

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1 - These are the states that fall within the Eleventh Circuit's jurisdiction.

2 - Although this case did not involve allegations of violations of the federal Fair Credit Reporting Act, employers should be aware of the requirements of this Act when making employment-related decisions based on an individual's credit history, including the filing of bankruptcy.