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On April 26, 2010, the Ninth Circuit U.S. Court of Appeals (the "Ninth Circuit") affirmed in part, and remanded in part, the decision of the district court for the Northern District of California (the "District Court") to certify a class of over one million female Wal-Mart employees pursuant to Federal Rule of Civil Procedure 23 ("FRCP 23"). The case, *Dukes v. Wal-Mart Stores, Inc.* (*"Dukes"*), thereby sets the stage for the largest gender discrimination lawsuit in U.S. history against the world's largest private employer. *Dukes, supra,* — F.3d —, 2010 WL 1644259 (9th Cir. April 26, 2010).

In a sharply divided 6-5 ruling, an 11-judge appeals panel upheld the District Court's decision certifying a class of approximately 1.5 million Wal-Mart employees—including both salaried and hourly employees, in a range of positions at one or more of Wal-Mart's 3,400 stores across the country—allowing them to collectively pursue gender discrimination claims against the retailer. The Ninth Circuit remanded the case back to the District Court to determine whether Plaintiffs' claims for punitive damages should also be certified for class treatment, and whether a separate class or classes should be certified for former Wal-Mart employees who worked for the retailer before June 8, 2001—the date the *Dukes* case was initially filed.

For more than six years, the litigants in *Dukes* have been in a pitched battle over whether the case should be allowed to proceed as a class action, and, if so, the size and scope of the certified class. The six named plaintiffs (the "Plaintiffs"), comprised of current and former Wal-Mart employees, contend that the retail giant systematically and in a common and centralized way discriminates against women in promotions, pay, and job assignments in violation of Title VII of the Civil Rights Act of 1964, and have sought to pursue their claims on behalf of all women employed with the retailer at any time since December 26, 1998.

In contrast, Wal-Mart contends that Plaintiffs' claims are highly individualized and inappropriate for class treatment, with the decisions that are alleged to be discriminatory made by thousands of different managers working in different stores located in different regions of the country. Wal-Mart also argues that Plaintiffs' claims for monetary relief (which it says are highly individualized and could amount to *billions* of dollars) will inappropriately dominate the proceedings.

Notably, Plaintiffs conceded that individual Wal-Mart store managers are granted substantial discretion in making pay, assignment and promotion decisions. Nevertheless, Plaintiffs also noted (and Wal-Mart agreed) that the retailer has a strong corporate culture and has adopted and implemented company-wide employment, pay, training and promotions practices and policies. Based on expert opinions and other evidence—which was hotly contested by Wal-Mart—Plaintiffs argued that the retailer's corporate culture promotes gender stereotyping and gender bias, and that by allowing store managers to exercise discretion and subjectivity in making pay, training and promotion decisions, the retailer allowed gender bias to taint those decisions, with the gender bias allegedly reflected in statistically significant disparities in the promotion and pay of female workers on both a regional and nationwide basis.

In upholding class certification, the Ninth Circuit majority concluded that Plaintiffs submitted sufficient factual evidence, expert opinions, statistical evidence and anecdotal evidence to support the contention that there was a common question as to whether female employees nationwide were subjected to a single set of corporate policies that may have worked to unlawfully discriminate against them in violation of Title VII, and that the District Court "acted within its broad discretion in concluding that it would be better to handle this case as a class action instead of clogging the federal courts with innumerable individual suits litigating the same issues repeatedly[.]" While the court acknowledged the unprecedented size of the class, it held that "mere size does not render a case unmanageable," and noted that, given the size of Wal-Mart's operations, the enormity of the class is not particularly surprising.

The Ninth Circuit emphasized that its decision concerned only the District Court's ruling regarding the *manner* in which Plaintiffs may pursue their discrimination claims, and not the underlying merits of those claims.

The next question is whether Wal-Mart will seek U.S. Supreme Court review of the matter, which seems likely based on the initial statements of Wal-Mart's counsel. In addition, as the Ninth Circuit majority opinion noted, there are substantial differences among the federal appellate courts in applying the FRCP 23 standard for granting class certification, which may prompt U.S. Supreme Court review in order to resolve this conflict.

Cooley's Employment Group practice has in-depth experience representing companies, across a wide array of industries, in various types of employment class actions in both state and federal courts. Likewise, we regularly pro-actively counsel companies to help mitigate and avoid single, class and/or collective actions being filed based on substantive claims regularly alleged in class action lawsuits. If you would like to discuss these issues further, or have questions about this *Alert,* please contact one of the attorneys listed above.

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