

Federal Court Rejects Certification of Gender Discrimination Class Action Premised on Novel Theory

March 22, 2010

On March 12, in *Randall et al. v. Rolls-Royce Corporation*, No. 06-cv-860-SEB-JMS, the Honorable Sarah Evans Barker of the U.S. District Court for the Southern District of Indiana denied certification of a putative gender discrimination class action litigated by Morgan Lewis in partnership with Barnes & Thornburg LLP. Judge Barker's decision is notable not only due to the novel nature of the class theory that she rejected, but also due to its thorough analysis of the competing statistical evidence before the court. The decision highlights the significance of powerful expert reports and testimony in class actions and provides a helpful roadmap for employers preparing to defend or prevent discrimination class actions.

The *Randall* case and Judge Barker's decision are unique because the case represents the first time, to our knowledge, that a discrimination class action has been based solely on a theory arising out of the Lily Ledbetter Fair Pay Act of 2009 (the LLFPA). As you may know, that act reversed the Supreme Court's decision in *Ledbetter v. Goodyear Tire and Rubber Co.*, 550 U.S. 618 (2007), and created the right of an employee to seek damages for the present "effects" of a compensation decision made many years before the limitation period. As Morgan Lewis advised clients shortly after the LLFPA was enacted, the act presents new issues for class litigation that would attract the plaintiffs' bar.

Relying on the LLFPA, a leading national plaintiffs' class action firm advanced the theory in *Randall* that the putative class members uniformly suffered discrimination by virtue of the company's percentage-based system for awarding merit increases. Of course, many (if not most) employers follow the same approach for awarding merit increases. According to the plaintiffs and their counsel in *Randall*, although it was undisputed that women were treated as being equal to or better than men during the class period in terms of percentage merit increases, this system perpetuated alleged gender disparities in salary levels that had existed a decade ago, long before the class period. Based on this theory, Rolls-Royce was liable for classwide discrimination—even when it treated women the same as men with respect to compensation decisions made during the class period—unless it took affirmative steps to make sure that the salaries of female employees "caught up" to those of comparable male employees.

In the first decision of its kind, Judge Barker rejected this theory of classwide liability. She recognized that because the percentage-based merit increase system still required individualized decisions by supervisors, it was "hardly a compensation-setting circumstance which is readily amenable [sic] to a common class-wide analysis."

Judge Barker’s decision turned largely on her resolution of the competing statistical reports offered by each party’s expert. In contrast to some judges who have been reluctant to delve too deeply into conflicting expert testimony, her opinion explained at the outset that “if there is a dispute as to the value or applicability or efficacy of either side’s expert statistical analysis, the way in which that dispute is resolved impacts both the underlying systemic discrimination claim and the determination of whether a viable class action exists.”

Although Judge Barker acknowledged that the commonality requirement of Rule 23(a) for class certification presents a “relatively low hurdle,” she concluded that that requirement was not met here, primarily because “we do not find Dr. Drogin’s [the Plaintiffs’ expert’s] statistical analysis convincing.” This is partly in light of variables that it failed to account for and its dubious definition of the relevant pool of employees to study. On the other hand, the court concluded that “Dr. Siskin [the company’s expert] has in our view convincingly demonstrated that there is no common gender effect across the putative class.” In doing so, the court credited Dr. Siskin’s alternative approach to defining the relevant population for his analyses and his unique studies of the varying gender effect in compensation observed across different salary grade levels, business units, and time periods. Judge Barker’s decision goes on to also engage in a detailed analysis of the statistical evidence relating to the typicality requirement of Federal Rule 23(a), and to similarly adopt the conclusions of Dr. Siskin as “substantially more convincing than the less substantially complete analysis of Dr. Drogin.”

The significance of careful attention to expert reports and testimony in discrimination class actions is evident throughout the *Randall* decision. In particular, the court’s favorable view of Dr. Siskin’s analyses demonstrates the benefits of close collaboration between counsel (as the masters of the factual record and relevant legal principles) and statistical experts. This ensures that the statistical models are tracking the actual decisionmaking processes at issue and are aligned with the relevant legal inquiries under Rule 23 (for example, commonality and typicality). As another example, *Randall* highlights the benefits of creative and aggressive expert discovery. Subpoenas for the plaintiffs’ expert’s programs and datasets and careful analysis of that data revealed multiple analyses by Dr. Drogin refuting the plaintiffs’ theory of classwide discrimination, which Dr. Drogin had conveniently failed to disclose in his report filed with the court.

Beyond its significance for future defense of class action claims in litigation, however, the discussion of statistical evidence in *Randall* is instructive for employers considering prophylactic measures to reduce their exposure to class litigation. First, in light of the theory advanced by the *Randall* plaintiffs—that the current “effect” on salaries resulting from pay disparities that may date back years before the class period—employers should carefully consider their retention periods for compensation data and documentation of compensation decisions. Second, as compensation decisions are being made, employers should question how the documentation of those decisions would later align with a defense relying on the existence of individualized decisions by varying decisionmakers that are tied to varying factors across different business units.

Similarly, because the *Randall* decision criticized the plaintiffs’ expert’s failure to account for certain fundamental variables such as job title and pay grade, employers should consider whether documentation of their compensation decisions clearly captures the contributing variables that would be used to defend those decisions in litigation. Finally, provided that they take steps to properly preserve the attorney-client privilege for the studies, employers are well advised to continue to engage outside counsel and consulting experts in privileged analyses of their annual compensation and employment decisions to identify and address their vulnerability to class litigation.

If you would like further information regarding the issues raised in this Morgan Lewis LawFlash, please contact any of the following Morgan Lewis attorneys:

Chicago

Sari M. Alamuddin	312.324.1158	salamuddin@morganlewis.com
Barry A. Hartstein	312.324.1140	bhartstein@morganlewis.com

Dallas

Ann Marie Painter	214.466.4121	annmarie.painter@morganlewis.com
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Houston

Nancy L. Patterson	713.890.5195	npatterson@morganlewis.com
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Irvine

Anne M. Brafford	949.399.7117	abrafford@morganlewis.com
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Los Angeles

George A. Stohner	213.612.1015	gstohner@morganlewis.com
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Miami

Anne Marie Estevez	305.415.3330	aestevez@morganlewis.com
Mark E. Zelek	305.415.3303	mzelek@morganlewis.com

New York

Andrew J. Schaffran	212.309.6380	aschaffran@morganlewis.com
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Palo Alto

Melinda S. Riechert	650.843.7530	mriechert@morganlewis.com
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Philadelphia

Michael Burkhardt	215.963.5130	mburkhardt@morganlewis.com
Mark S. Dichter	215.963.5291	mdichter@morganlewis.com
Michael J. Puma	215.963.5305	mpuma@morganlewis.com

Princeton

Rene M. Johnson	609.919.6607	rjohnson@morganlewis.com
Richard G. Rosenblatt	609.919.6609	rrosenblatt@morganlewis.com

San Francisco

Daryl S. Landy	415.442.1376	dlandy@morganlewis.com
Cecily A. Waterman	415.442.1269	cwaterman@morganlewis.com

Washington, D.C.

Grace E. Speights	202.739.5189	gspeights@morganlewis.com
Robert J. Smith	202.739.5065	rsmith@morganlewis.com

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