

Court of Appeals' Panel Announces New Standards for Certifying Title VII Class Actions in the Ninth Circuit

Revised Decision in Dukes v. Wal-Mart, Inc. Sets Forth Better Standard Governing Class Certification But Still Approves a Grossly Outsized Class

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The Ninth Circuit panel that announced permissive standards for class certification of Title VII actions last February in *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007) (*Dukes I*), now has revised its earlier class certification rulings in a decision that supersedes the February decision. *Dukes v. Wal-Mart, Inc.*, ___ F.3d ___, Nos. 04-16688 and 04-16720, 2007 WL 4303055 (9th Cir. Dec. 11, 2007) (*Dukes II*). To view the Morgan Lewis LawFlash summarizing the Ninth Circuit's February decision, please visit http://www.morganlewis.com/pubs/LEPG_Dukes.v.WalMart_LF_15feb07.pdf.

Several of the Ninth Circuit's revisions provide more reasonable standards governing class certification: (1) a district court must consider the parties' class certification evidence even if it overlaps substantially with the merits of the claims; (2) Fed. R. Evid. 702's reliability and relevance standards for expert testimony apply at the class certification stage; and (3) individuals who were not employed when the operative complaint was filed cannot be part of a class certified under Rule 23(b)(2) because they lack standing to seek injunctive relief.

The promise of these rulings, however, was offset quickly by the Ninth Circuit's strained application of the revised standards. For example, the court determined that Wal-Mart's challenge to the plaintiffs' social science expert was not proper under Fed. R. Evid. 702 because it was directed not at the expert's methodology or "scientific reliability and relevance" but "*only* [at] whether certain inferences can be persuasively drawn from his data." *Dukes II*, 2007 WL 4303055, at *6. Moreover, as discussed below, the court did not even consider that, in addition to requiring that an expert employ a scientifically reliable methodology, Rule 702 also requires that the expert apply that methodology properly to the relevant facts of the case.

The Ninth Circuit further discussed a radical trial plan as an accommodation of Wal-Mart's constitutional and statutory rights to present evidence beyond statistics in its own defense. Under that trial plan, a random sample of the estimated 1.5 million putative class members would have their claims tried as test cases, and Wal-Mart would be permitted to offer individualized defenses in those individual trials. A formula would be used for calculating the back pay and punitive damages owed to the class, but the amount of such damages would be reduced by the proportion of defense verdicts in the individual trials.

The Ninth Circuit's revised decision offers a marginally better playing field for employers than did its February decision, but the decision retains many troubling rulings that will perpetuate the Ninth Circuit's status as a plaintiff's circuit of choice. As before, employers with operations in the Ninth Circuit should consider a class action risk assessment to ensure that they have the policies, practices, and data in place to defend adequately against class claims under Title VII.

More Reasonable Class Certification Standards

The Ninth Circuit's revised decision provides more reasonable standards governing class certification. First, in its February 2007 decision, the Ninth Circuit panel rejected many of Wal-Mart's challenges as "arguments evaluating the weight of evidence or the merits of a case [that] are improper at the class certification stage." *Dukes I*, 474 F.3d at 1227. Now the panel has reversed itself on this issue, ruling in the revised decision that courts "must 'consider the evidence which goes to the requirements of Rule 23 [at the class certification stage] even [if] the evidence may also relate to the underlying merits of the case.'" *Dukes II*, 2007 WL 4303055, at *4 n.2 (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992)). The Ninth Circuit went so far as to note that a district court that rejected a defendant's "arguments regarding commonality solely because they overlapped with 'merits issues'" would rule in error. *Id.* The Ninth Circuit's revised decision on this issue comes in the wake of the recent significant Second Circuit decision in *Miles v. Merrill Lynch & Co. (In re Pub. Offering Sec. Litig.)*, 471 F.3d 24 (2d Cir. 2006). In *Miles*, the Second Circuit overruled its earlier, much cited decision in *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999), and held, among other things, that *all* of the evidence presented as to a Rule 23 threshold requirement, including competing expert testimony, must be assessed in making that determination, and that a district court must examine all of the evidence and make a complete determination on the Rule 23 issues, even if there is a substantial overlap between a Rule 23 requirement and the merits of the plaintiffs' claim. *Miles*, 471 F.3d at 42. Notably, the Ninth Circuit majority panel's February decision in *Dukes* omitted any discussion of *Miles*.

Second, the Ninth Circuit majority panel in February held that the plaintiffs' expert evidence must meet only an unspecified, lesser *Daubert* standard at the class certification stage of the action. *Dukes I*, 474 F.3d at 1227. In the revised decision, however, the panel rejected the position that *Daubert* and Fed. R. Evid. 702 do not apply at the class certification stage. The panel first explained that, under *Daubert*, a district court must "admit or exclude evidence based on its scientific reliability and relevance." *Dukes II*, 2007 WL 4303055, at *6 (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587-90 (1993)). The panel then ruled unambiguously that, at the class certification stage, plaintiffs must present "properly-analyzed, scientifically reliable evidence" that is relevant to the class certification requirements. *Dukes II*, 2007 WL 4303055, at *6. Importantly, the Ninth Circuit's revised decision, in discussing the controversial "corporate culture" social science evidence presented by the plaintiffs, suggests that such evidence would be subject to challenge on "scientific reliability or relevance" grounds. *Id.*

Third, the Ninth Circuit majority panel addressed Fed. R. Civ. P. 23(b)(2), under which a class may be certified only if the claims involve action or inaction "on grounds generally applicable to the class" and the relief sought is predominantly "final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Rule 23(b)(2) & Adv. Comm. Notes (1966) (explaining that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages"). Wal-Mart argued that certification under Rule 23(b)(2) was inappropriate because many of the class members were former employees who lacked standing to seek injunctive relief. In its

February 2007 decision, the Ninth Circuit rejected this argument, noting that “the plaintiffs, current and former employees alike, state their common intention as ending Wal-Mart’s allegedly discriminatory practices” and that “it is especially likely that even those plaintiffs safe from immediate harm will be concerned about protecting those class members that are suffering as they once did.” *Dukes I*, 474 F.3d at 1234. In the revised decision, however, the Ninth Circuit panel reversed itself and ruled that “those putative class members who were no longer Wal-Mart employees at the time Plaintiffs’ complaint was filed do not have standing to pursue injunctive or declaratory relief.” *Dukes II*, 2007 WL 4303055, at *15. The court held further that, without standing, such putative class members cannot properly be part of a class certified under Rule 23(b)(2). *Id.* The Ninth Circuit instructed the district court to revise the class definition to eliminate former employees from the certified class.

Questionable Application of the Revised Class Certification Standards

Despite adopting more reasonable class certification standards, the Ninth Circuit panel arrived at the same outcome it reached in February: approval of a grossly outsized and unmanageable class. In part, the result did not change much because the Ninth Circuit misapplied the revised class certification standards.

For example, in the revised decision, the Ninth Circuit panel ruled that the district court did not err in evaluating the parties’ evidence regarding commonality under the newly announced standard for evaluating class certification evidence. Under that standard, a district court is required to resolve disputed evidence even if such disputes overlap substantially with the merits of the claims. Despite the district court’s repeated references to avoiding merits inquiries and the inappropriateness of “statistical dueling,” *Dukes*, 222 F.R.D. 137, 143, 153, 155, 159 (N.D. Cal. 2004), the Ninth Circuit panel found that the district court properly concluded that most of Wal-Mart’s evidence and argument regarding commonality “‘related *not* to the Rule 23(a) requirement of commonality but to the ultimate merits.’” *Dukes II*, 2007 WL 4303055, at *4 (quoting *Dukes*, 222 F.R.D. at 166). The conclusion of the Ninth Circuit in the revised decision is questionable because Wal-Mart’s evidence and arguments certainly were offered to challenge the evidence that the plaintiffs offered in support of their class certification motion (such as “expert statistical evidence of class-wide gender disparities attributable to discrimination”). *Dukes*, 222 F.R.D. at 145. To the extent that plaintiffs offered otherwise merits-based evidence to satisfy Rule 23(a) requirements, the evidenced presented by Wal-Mart was not directed at the merits—indeed, that is precisely what is meant by the caveat “even [if] the evidence may also relate to the underlying merits of the case.” *Dukes II*, 2007 WL 4303055, at *4 n.2.

The Ninth Circuit panel also misapplied Fed. R. Evid. 702 and *Daubert* in evaluating Wal-Mart’s challenges to the plaintiffs’ expert testimony. Though it held that *Daubert* was applicable at the class certification stage, the court found that Wal-Mart did not challenge the expert’s “methodology or contend that his findings lack relevance . . . but challenge[d] only whether certain inference can be persuasively drawn from [plaintiffs’ expert’s] data.” *Dukes II*, 2007 WL 4303055, at *6. The Ninth Circuit panel appears not to have considered that, under Rule 702, “the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case.” Fed. R. Evid. 702 (Advisory Comm. 2000). Whether an inference can be drawn accurately from a given set of data depends precisely on whether a reliable methodology has been applied properly. *See General Electric v. Joiner*, 522 U.S. 136, 146 (1997) (“Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.”).

A Radical Trial Plan Suggestion

One of the most problematic aspects of the Ninth Circuit's February decision was its ruling that Wal-Mart would not be permitted to offer individualized defenses regarding whether particular class members were in fact subjected to a pattern or practice of discrimination. *Dukes I*, 474 F.3d at 1238-39. Wal-Mart argued that this approach violated, among other things, its constitutional due process right to present a defense.

The Ninth Circuit's attempted accommodation of Wal-Mart's due process rights generated one of the most remarkable aspects of the revised decision. Though the court began by noting that while it "express[es] no opinion regarding Wal-Mart's objections to the district court's tentative trial plan," it went on to note that "there are a range of [possible trial plans] that would allow this class action to proceed in a manner that is both manageable and in accordance with due process." *Dukes II*, 2007 WL 4303055, at *16. As an example of an acceptable plan, the Ninth Circuit panel implied that the district court could consider a radical structure inspired by *Hilao v. Estate of Fernando Marcos*, 103 F.3d 767, 782-87 (9th Cir. 1996), where the court approved the use of a random sample of test cases to determine the amount of compensatory damages owed to the class members.

While the panel's discussion was not entirely clear, it appears that, under the proposed trial plan, there would be a trial to address whether Wal-Mart engaged in a pattern and practice of discrimination, during which Wal-Mart would be precluded from offering individualized defenses. The jury would also determine the amount of potential punitive damages, if any, to be awarded to the class. If the jury found against Wal-Mart as to the existence of a pattern and practice of discrimination, there would be a determination of the amount of total potential back pay based on a formula. The district court would then randomly select a manageable sample of the class members for individual trials. In those individual trials, Wal-Mart would be permitted to offer individualized defenses, and the jury would return a verdict in each case. The district court would then reduce the total potential back pay and punitive damages awards based on the ratio of the individual trials that resulted in a defense verdict. *Dukes II*, 2007 WL 4303055, at *16-*18. While certainly innovative, the Ninth Circuit's suggested trial plan appears to abrogate the due process rights of both Wal-Mart and the absent class members.

Conclusion

The Ninth Circuit's revised decision provides more reasonable class certification standards that, at least on paper, suggest that employers will have a fighting chance of defeating class certification in the Ninth Circuit (or, at least, a better chance than they were left with after the Ninth Circuit's February decision in *Dukes I*) if they prepare adequately. At the same time, it is likely that the Ninth Circuit will continue to be an attractive forum for plaintiffs to pursue class-based Title VII claims. Thus, employers susceptible to the filing of class action employment discrimination claims in the district courts of the Ninth Circuit should continue to consider taking proactive steps to minimize their risk of exposure to such claims.

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

Nina G. Stillman

312.324.1150

nstillman@morganlewis.com

Dallas

Ann Marie Painter 214.466.4121 annmarie.painter@morganlewis.com

Irvine

Anne M. Brafford 949.399.7117 abrafford@morganlewis.com

Los Angeles

George A. Stohner 213.612.1015 gstohner@morganlewis.com

Miami

Anne Marie Estevez 305.415.3330 aestevez@morganlewis.com

New York

Amber L. Kagan 212.309.6288 akagan@morganlewis.com

Philadelphia

Michael S. Burkhardt 215.963.5130 mburkhardt@morganlewis.com
Mark S. Dichter 215.963.5291 mdichter@morganlewis.com

San Francisco

Brendan G. Dolan 415.442.1000 bdolan@morganlewis.com

Washington, D.C.

William E. Doyle, Jr. 202.739.5208 wdoyle@morganlewis.com
Grace E. Speights 202.739.5189 gspeights@morganlewis.com

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