

DUKES V. WAL-MART: ROAD MAP FOR CRITICAL SELF-ANALYSIS

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The decision in the well-publicized *Wal-Mart* case, issued this June, certified the largest private civil rights class action in U.S. history. (*Dukes v. Wal-Mart Stores, Inc.*, No. C01-02252, ___ F.R.D. ___, 2004 WL 1385490 (N.D. Cal. June 21, 2004).) While many employers may be concerned about the impact of the ruling, it is important to note that the Court's decision turned largely on a cluster of facts distinctive to Wal-Mart and founded on Ninth Circuit case law. The impact of this decision on subsequent litigation will depend largely on an organization's similarities to Wal-Mart's corporate structure, its employment policies and practices, and the applicable Circuit precedent.

Employers that have practices similar to Wal-Mart's can use the decision to make their own litigation risk assessment. But even for employers that believe their practices differ from Wal-Mart's, the decision is instructive because it highlights the scheme that virtually all plaintiffs' lawyers seek to apply in class actions to try to show a common link among a large number of diverse potential class members.

This White Paper focuses on how the *Wal-Mart* decision can be used as a "road map" for employer risk assessments and corrective measures. Having litigated against the most prominent class action plaintiffs' counsel (including plaintiffs' counsel in *Wal-Mart*), Morgan Lewis lawyers are uniquely qualified to help employers in this task.

Summary of Decision: Certification of a Class of a Million Employees in 3,400 Stores Based on Theory of "Excessive Subjectivity"

The *Wal-Mart* court certified a Title VII class action brought by seven women claiming gender discrimination in promotions and pay. Their claims covered more than one million women in both hourly and salaried jobs in Wal-Mart's 3,400 stores across the nation. To achieve class action certification, the plaintiffs were required to satisfy both Rule 23(a)'s prerequisites (i.e., numerosity, commonality, typicality, and adequacy of representation) and one of Rule 23(b)'s standards for maintaining a class action.

Rule 23(a)-"Commonality" and Other Factors

The court's Rule 23(a) analysis focused primarily on "commonality"-a common factual and "claim-related" link among putative class members-and dispensed fairly quickly with the other prerequisites under Rule 23(a). The Court analyzed three broad categories of facts to assess commonality: (1) facts and expert opinion supporting the existence of company-wide policies and practices, (2) expert statistical evidence of class-wide gender disparities attributable to discrimination, and (3) anecdotal evidence of a discriminatory attitude being tolerated by management.

Wal-Mart's primary strategy to thwart plaintiffs' showing commonality was to seek to differentiate the policies, practices and decision-makers in each of its thousands of stores across the nation. As discussed in detail below, the court found that the common thread

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of “excessive subjectivity” in decision making outweighed all of those store-based differences and justified class certification. Plaintiffs’ definition of “excessive subjectivity” in *Wal-Mart* (as well as that relied upon by plaintiffs’ counsel in other cases) was (1) a lack of sufficient objective criteria and written policies to guide the decision makers when making employment decisions as well as (2) insufficient mechanisms to monitor decisions for compliance with policy and for biased outcomes. According to the plaintiffs in the case, excessive subjectivity inevitably leads to unlawfully biased pay and promotion decisions-made by all decision makers across all stores. As to class certification, the opinion of plaintiffs’ expert sociologist about how bias might seep into subjective assessments of employees and affect decisions at Wal-Mart coupled with evidence of corporate-wide policies was enough for the court to accept the subjectivity theory as a basis for class certification. Citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), the court repeatedly noted that it was barred from inquiring into the merits of the case, including any attempt by Wal-Mart to discredit plaintiffs’ sociological and statistical experts.

Rule 23(b)- Basis For Maintaining A Class Action

Having satisfied Rule 23(a), plaintiffs faced the considerable obstacle of convincing the Court that, despite a highly diverse class of people dispersed among thousands of stores, a class was maintainable under Rule 23(b)(2) (as opposed to (b)(3)). Rule 23(b)(2) authorizes certification where “the party opposing class certification has acted or refused to act on grounds generally applicable to the class.” Plaintiffs argued that a (b)(2) class was proper because the alleged thread of excessive subjectivity in decisions across all Wal-Mart stores was generally applicable to all class members. The Court agreed and certified under (b)(2) the promotion and equal pay claims and claims for back-pay and punitive damages.

The court’s decision was notable because a typical (b)(2) class is not permitted where plaintiffs seek an award of damages that would require an inquiry into factual issues of individual unnamed class members. Binding unnamed class members to damage awards without giving them notice and an opportunity to be heard-procedures not expressly allowed by the language of (b)(2)-would violate Due Process. The language of Rule 23(b)(2) notwithstanding, the Court authorized the (b)(2) class but also ordered a notice and opt-out procedure to overcome Wal-Mart’s objections. This issue-whether a (b)(2) class action can be certified despite plaintiffs’ request for damages-is one about which the Circuits are currently split. The overwhelming majority of courts outside of the Ninth Circuit have held that claims for compensatory and punitive damages sought under Title VII are not appropriate for class treatment under Rule 23(b)(2).

Because the court’s Rule 23(a) commonality analysis was the true centerpiece of the opinion, and because there can be lessons learned from the analysis, it is discussed in more detail below.

Proving Class Member “Commonality” Under Rule 23(a)

To secure class action certification, plaintiffs must show (among other things) that there is some common link among all putative class members that warrants treating their cases

together in a single action. The *Wal-Mart* court's extensive decision on commonality highlights the types of evidentiary issues on which employers should focus to minimize the risk of class certification. In that regard, the Court analyzed three broad categories of facts to assess commonality: (1) expert statistical evidence, (2) anecdotal evidence of a discriminatory attitude being tolerated by management, and (3) evidence of company-wide policies and practices, which included an expert sociologist's opinion about how stereotyping can influence employment decisions.

Statistical Evidence

The court's treatment of the statistical evidence was not particularly unique, but it highlights how courts may look at workforce data during litigation and, therefore, how employers should perform statistical analyses during their own litigation risk assessments. What is noteworthy is the court's rejection of Wal-Mart's statistical analysis, which took a more microscopic or disaggregated view of the workforce data—a view adopted by most employers when doing internal self-analyses.

One of the key issues in the court's analysis was whether compensation data aggregated across many stores is reliable and can support class certification. Plaintiffs' statistical expert ran regression analyses of the compensation data for each of the 41 regions. Wal-Mart objected to aggregation of the data at the regional level because it did not reflect how decisions actually were made. It offered an alternative expert report that performed *7,500 separate regression analyses* of the data at the sub-store level. Plaintiffs' expert found statistically significant disparities in compensation across all regions. Wal-Mart's expert found a lack of broad-based gender differential in pay for hourly employees.

The court rejected Wal-Mart's attack on plaintiffs' statistical expert as merits-based, and as relevant only to the weight of the expert's opinion. According to the court, the only question at class certification was whether plaintiffs' regional approach was at least "a reasonable means" of conducting a statistical analysis. The court found that the analysis met this standard.

The decision, at a minimum, counsels in favor of performing internal self-analyses of data at various levels of aggregation to determine whether would-be plaintiffs could reasonably show class-wide disparities. It also suggests that such an analysis could assist in the preparation of an effective defense strategy.

Anecdotal Evidence

The anecdotal evidence in *Wal-Mart* consisted of sworn statements by class members claiming that, compared to similarly situated men, they not only received less pay, but it also took longer for them to be promoted. However, an employee's personal opinion that she has been discriminated against in pay and promotion is not necessarily accurate. The reliability of such opinions is especially uncertain when there is no other evidence of gender-motivation, such as sexist comments by a decision-maker. Although 114 declarations had been submitted by plaintiffs, the court cited only three examples of alleged sexist comments. The court's reliance on even minimal evidence of sex stereotyping serves as a reminder of the importance of effective employer programs to

prevent, detect and correct discrimination. Even the mere perception of discrimination must be addressed to avoid employee morale issues that could snowball into class allegations.

Company-Wide Policies

Plaintiffs relied on Wal-Mart's company-wide policies to link the statistical disparities found by their expert to unlawful gender-motivation (as opposed to some permissible cause). To do so, plaintiffs offered the expert testimony of a social scientist, Dr. William Bielby, who had reviewed, among other things, Wal-Mart's written policies governing promotions and compensation, EEO policies, and diversity program. Dr. Bielby found little written guidance and criteria for decision-makers, and a weak EEO and diversity program.

Although Wal-Mart challenged the scientific validity of Dr. Bielby's opinion, it does not appear that Wal-Mart offered an opposing social science expert. Instead, it argued that its stores each used their own distinct systems for compensating and promoting people, and that pay and promotion decisions were too decentralized (i.e., made at the store level) to create any questions common to the broad class sought. Discounting Wal-Mart's arguments, the court found that Dr. Bielby's opinion provided sufficient support for the notion that excessive subjectivity served as a conduit for gender bias that may affect all class members in all Wal-Mart stores in a similar way.

Morgan Lewis lawyers have encountered Dr. Bielby-and experts like him-in other cases. The basic elements of his analysis are predictable and are illustrated by his opinion in *Wal-Mart*. Dr. Bielby first opined that evidence of a strong, centralized corporate culture served as evidence that everyone at Wal-Mart's 3,400 stores was exercising his or her discretion in employment decisions in a uniform way. From that premise, Dr. Bielby theorized that the existence of a strong, distinctive corporate culture and a uniform company-wide mechanism (i.e., subjective decision making) for gender stereotyping in decision-making-coupled with ineffective EEO and diversity programs, which if viable, could minimize the effect of gender stereotyping-could lead to a dominant corporate culture characterized by gender stereotyping. Endorsing Dr. Bielby's opinion, the court found a key similarity in Wal-Mart's pay and promotion policies across all stores that could lead to gender disparities-i.e., they have built-in excessive subjectivity.

It should be noted that the use of "excessive subjectivity" as a common link to justify class certification is highly controversial. Other courts have rejected the theory-at least on the facts of the cases before them. And no court has ever attempted to define when subjectivity is "excessive" and when it is not. But the prominence of Dr. Bielby's opinion in the *Wal-Mart* decision demonstrates how critical it is for an employer in the pre-certification phase to take such social science evidence seriously and to devote the resources needed to ensure that no expert presented by the plaintiffs goes un rebutted, no matter how feeble the employer believes the expert's opinion to be. Prior to litigation, understanding the "subjectivity" theory also can help employers assess the vulnerability of their own employment policies and practices to arguments based on the sociological theory. Consequently, the elements of Dr. Bielby's opinion are discussed in more detail below.

Excessively Subjective Decision Making and the Absence of Written Standards

The key to Dr. Bielby's theory-and the court's finding of commonality-was evidence of "excessive subjectivity" in Wal-Mart's pay and promotion decisions. The court found that "the deliberate and routine use of excessive subjectivity is an 'employment practice' that is susceptible to being infected by discriminatory animus." Wal-Mart actually conceded that managers make pay and promotion decisions in a largely subjective manner.

But there were, in fact, some objective constraints and pay guidelines for some positions. For example, the court recognized that there were some constraints on the managers' discretion in determining pay for hourly positions. "Exception reports" were generated for upper management to approve when a store manager wanted to pay an employee a rate more than 6% above the minimum rate set by the home office. But, according to the court, this still left store managers with "substantial discretion" and limited oversight. According to one Wal-Mart manager's deposition, he could "basically do what he wants" up to the 6% limit. Managers also could increase pay for exceptional performance with limited guidance and oversight.

For promotion decisions, there was evidence that at least minimum criteria were established, but that there were no objective criteria for selecting among those candidates who were minimally qualified. Evidence was also offered that there were *no written guidelines* to inform hourly workers how to get promoted into the management training program.

Failure to Post Job Vacancies

The court found that the subjectivity in promotion decisions was compounded by Wal-Mart's failure to systematically post job vacancies and to "monitor the promotion decisions being made or otherwise to systematically review the grounds on which candidates are selected for promotion." Wal-Mart did not post job vacancies for its assistant management training program until 2003, but did not post 80% of job openings for Support Manager. Although Wal-Mart posted all store manager openings, the selection process for those jobs was not "open" because candidates had to obtain their regional managers' approval prior to applying.

Subjectivity Is Not Enough

While Wal-Mart conceded that pay and promotion decision making was largely subjective, it argued that subjectivity alone was not enough. Commonality was destroyed, Wal-Mart argued, because those same pay and promotion decisions are made locally by individual store managers. The court acknowledged that, while "the presence of excessive subjectivity, alone, does not necessarily create a common question of fact," plaintiffs did not limit their evidence to subjective decision making. Instead, they also submitted two forms of "other evidence" to raise an inference of discrimination-a strong corporate culture reflected in company-wide policies and practices, and potential gender stereotyping. The court found that it was this "other evidence" that distinguished the *Wal-Mart* case from certain unsuccessful class actions because the strong corporate culture

and gender stereotyping provided a “nexus” between the subjective decision making and discrimination.

Strong Corporate Culture

As evidence of a “strong corporate culture,” the court followed Dr. Bielby’s lead-in identifying the following: a common orientation session for new employees; a policy of “promoting from within,” which maintains the effectiveness of prior culture lessons; doing the Wal-Mart cheer at meetings; regular meetings about culture issues; testimony about the “Wal-Mart Way”; company-wide communications through computers and “Wal-Mart TV”; and frequent transfers among stores, which demonstrates a high degree of store-to-store uniformity. Based on these facts, Dr. Bielby found that Wal-Mart has a distinctive corporate culture. He opined that “a strong and widely shared organizational culture promotes uniformity of practices throughout an organization.”

The court’s reliance on this evidence does not suggest that employers must dilute their company culture to avoid a successful class action. But employers should be aware that, in class action litigation, plaintiffs will look for any evidence that company culture aids discrimination.

Gender Stereotyping

The second variety of “other evidence” concerned gender stereotyping. Dr. Bielby opined that gender stereotyping *may* be part of Wal-Mart’s corporate culture. He stated that gender stereotypes are especially likely to influence personnel decisions when they are based on subjective factors. Dr. Bielby found that Wal-Mart managers make decisions with considerable discretion and little oversight. He therefore concluded that pay and promotion decisions are “likely to be biased” unless they are “assessed in a systematic and valid manner, with clear criteria and careful attention to the integrity of the decision-making process.”

Dr. Bielby concluded that, although Wal-Mart had taken some systematic steps to minimize bias, there were “weaknesses” that limited their effectiveness for identifying and eliminating discriminatory barriers. For example, although Wal-Mart had EEO and diversity policies as well as diversity goals, the goals were “largely ad hoc” and were often set based on an individual manager’s subjective judgment as to what would be an incremental improvement. Wal-Mart had also recently raised awareness of diversity issues, but did not have sufficient accountability measures, such as tying diversity achievement to managers’ compensation. While Wal-Mart regularly conducted employee surveys to identify employee concerns, it did not ask questions specifically about diversity or gender issues. Due to these “weaknesses,” the court rejected Wal-Mart’s argument that its “strong corporate culture” actually promotes diversity.

Significantly, although Dr. Bielby gave an expert opinion that Wal-Mart, in fact, had a strong corporate culture, he did not draw any conclusion at all about whether and to what extent gender stereotyping, in fact, occurred company-wide, in all of Wal-Mart’s 3,400 stores. The court did not cite even a single example of gender stereotyping identified by Dr. Bielby. Further, it does not appear that there was any significant evidence of gender

stereotyping in the record to reasonably justify a conclusion that it was widespread. As noted above, the court cited only three examples of alleged sexist comments after reviewing 114 declarations by class members. This evidence hardly shows a company-wide practice, and certainly did not constitute a reliable scientific survey to assess the extent of gender stereotyping at Wal-Mart.

In fact, one of the more disturbing aspects of the *Wal-Mart* decision is the court's reliance on Dr. Bielby's opinion as a basis for class certification despite its highly speculative nature. A separate ruling on the expert reports submitted by the parties cites Dr. Bielby as saying he could not determine whether 0.5% or 95% of employment decisions at Wal-Mart were based on stereotyping. The court acknowledged that Dr. Bielby's opinions have "a built-in degree of conjecture," but tolerated the lack of reliability as simply "the nature of this particular field of science." It reasoned that the Federal Rules allow not only "scientific" expert opinions, but also opinions based on "specialized knowledge" that will "assist the trier of fact to understand the evidence." If Dr. Bielby himself was unable to determine the extent to which Wal-Mart's decisions were infected with bias-or even to set out guidelines for making such a determination-it is hard to understand how a jury would be able to reasonably do so.

Conclusion

The *Wal-Mart* case is troubling in the size of the class approved, the reliance on speculative expert opinion, and the relaxed application of Rule 23 with respect to punitive damages. It also is one more endorsement of plaintiffs' counsel's "excessive subjectivity" theory as a basis for class certification. Nonetheless, employers can benefit from the decision by viewing it as a template or road map to guide their own self-analyses or assessments of workforce statistical data and policies and to take needed proactive measures to address revealed vulnerabilities.

For more information about these issues or to discuss how you can conduct your company's self-assessment, please contact your Morgan Lewis attorney, or one of the contacts listed below:

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