

Morgan Lewis

Emerging Issues in Systemic Litigation

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Presenters:

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Post-*Dukes*: What Follows

- Application of *Dukes v. Wal-Mart*'s central holding regarding what constitutes a common question under Rule 23(a)(2) will likely be the most hotly contested aspect of *Dukes* in the nonemployment litigation context.
- Federal appellate decisions in the months ahead stemming from Rule 23(f) petitions will likely shape class litigation on this point for years to come.
- *Dukes* may also impact parties' ability to certify classes for settlement purposes.

Post-*Dukes*: Title VII Decisions

- *Ellis v. Costco Wholesale Corp.* (9th Circuit) (Court recently certified class despite *Wal-Mart*).
- *Bennett v. Nucor Corp.* (8th Circuit) (affirming denial of certification where promotion, discipline, and training policies varied substantially across the plant's production departments).
- *McReynolds v. Merrill Lynch* (7th Circuit) (reversing denial of certification of Plaintiffs' alleged disparate impact claim where the policies at issue were company-wide, despite acknowledging that "hundreds of separate trials may be necessary" because each decision would have to be examined individually).
- *Cronas v. Willis Group Holdings, Ltd.* (S.D.N.Y.) (granting class certification for settlement of sex discrimination and retaliation claims for a class of female company officers and emphasizing that, unlike *Wal-Mart*, the class was limited in geographic scope to a single New York office where pay and promotion decisions were subject to a single ultimate decision maker).
- *United States v. City of New York* (E.D.N.Y.) (holding that injunctive relief claims could be certified under Rule 23(b)(2) despite plaintiffs' request for classwide backpay and compensatory damages, and that the need for individual hearings did not defeat predominance or superiority).

Post-*Dukes*: Title VII Decisions

- *Barghout v. Bayer Healthcare Pharmaceuticals* (D.N.J.) (denying Bayer’s motion to dismiss Equal Pay Act and Title VII claims finding that the applicability of *Dukes* was “tenuous” at such an early stage in the litigation and finding that plaintiffs had adequately pled Title VII disparate impact and Equal Pay Act claims).
- *Bolden v. Walsh Group* (7th Cir.) (reversing class certification, rejecting Plaintiffs’ argument that allowing hundreds of local supervisors to make to make subjective decisions regarding work hours, overtime and promotions without reference to objective criteria constituted a “general policy of discrimination” and ruling that Plaintiffs’ proposed hostile work environment claims did not meet commonality standards where the allegations arose across numerous work sites).
- *Hagler v. True Mfg., Inc.* (E.D. Mo.) (granting defendant’s motion to dismiss in putative class action alleging retaliation for exercising FMLA rights where the court found that “in essence... Plaintiff proposes a class which would include any employee who had his or her FMLA rights violated, for any reason, during the three years prior to the filing of the lawsuit”).

Post-*Dukes*: Wage and Hour Decisions

- *Cruz v. Dollar Tree Stores, Inc.* (N.D. Cal.) (reversing earlier certification decision in misclassification case after concluding that *Wal-Mart* required plaintiffs “to produce common proof of class-wide liability”).
- *Wong v. AT&T Mobility Services* (C.D. Cal.) (holding that common issues do not predominate where “the variation in store managers’ actual work activities will make a need for individualized (and predominating) mini-trials almost inescapable”).
- *In re Taco Bell Wage & Hour Actions* (E.D. Cal.) (finding no evidence that the class was subject to the same practice or policy of paying tardy final paychecks or vacation pay to establish a common question).
- *Hughes v. WinCo Foods* (C.D. Cal.) (holding that decision-making regarding when employees took meal periods varied from store to store and department to department such that the timing of meal periods could not be proven on behalf of the class in “a single stroke”).

Post-*Dukes*: Wage and Hour Decisions

- *Brady v. Deloitte & Touche LLP* (N.D. Cal.) (granting defendant's motion to decertify, finding that "while part of the inquiry can be decided on a class-wide basis, common issues do not predominate because exempt status turns on what employees actually do" and, as such, "there is a significant risk that the trial would become an unmanageable set of mini-trials on the particular individuals presented as witnesses").
- *Chavez v. Lumber Liquidators* (N.D. Cal.) (denying plaintiffs' motion for class certification in part since "[p]laintiffs [] offered no common proof that Store Managers' job requirements are consistent from day to day or from store to store, the Court would need to engage in an individualized, fact-intensive analysis to determine how each Store manager spends his or her time").

What to Expect

- Smaller, More Targeted Class Actions
- Continued Attacks on Allegedly Subjective Policies
- Nonsubjectivity Disparate Impact Claims
- Equal Pay Act Claims
- More EEOC Litigation and Plaintiffs' Counsel Partnering with the EEOC
- Use of *Dukes* to Justify Broad Discovery
- Issue Certification

Smaller, More Targeted Class Actions

- In light of *Dukes*, plaintiffs will likely pursue narrower, more localized classes. For example:
 - The *Dukes* plaintiffs filed complaints in California and Texas limiting each respective potential class to current and former employees in those states. Counsel has also indicated that similar complaints will be filed in other states and regions. These smaller lawsuits have met with mixed results.

Continued Attacks on Subjective Policies

- Plaintiffs have started to challenge allegedly “objective” policies and practices, which they argue have a disparate impact.
- *De Silva Moore v. Publicis Groupe*, (S.D.N.Y.)
 - Defendant asked the court to dismiss plaintiffs’ class and collective action claims after *Dukes*.
 - Plaintiffs argued that *Dukes* was decided after extensive discovery, at the class certification stage, and expressly tied its holdings to the failings of the evidence offered by the plaintiffs there.
 - Examples of continued attacks on allegedly subjective policies.

Areas of Risk

- Promotion
- Compensation
- Assignments
- Scheduling
- Invitations to Social Events (Internal and External)
- Training
- Evaluation

Practical Advice for Mitigating Risk

- Review/Refine Existing Policies to Mitigate Class Action Risk:
 - Confirm that existing policies are consistent with business necessity.
 - Consider whether any component of a policy may be subject to a disparate impact challenge.
- Determine Compliance with Existing Policies:
 - Audit effectiveness of policies and impact.
 - Hold managers accountable for implementing policies.

Practical Advice for Mitigating Risk

- Continually Monitor Compliance.
- Conduct Internal Audits:
 - Review data to identify whether any statistically significant discrepancies exist.
 - *Pay, promotions, performance evaluations, etc.*
 - *Make sure employees are paid within range.*
- Determine if Data Systems Capture Variables That Impact Pay and Promotion Decisions.
- Maintain Robust Applicant Flow Data.

Practical Advice for Mitigating Risk

- Develop a Clear System for Setting Compensation:
 - Determine abilities and behaviors to reward and incentivize employees.
 - Determine how to best assess these abilities and behaviors:
 - *Objective criteria provide uniformity in application and transparency for employees and reduce risk because they are the most defensible.*
 - *Provide managers with concrete, if not validated, criteria to make reasoned pay decisions.*

Practical Advice for Mitigating Risk

- Conduct Regular Manager and HR Training.
 - Make sure state-mandated training has occurred, e.g., California training on sexual harassment.
- Post and Regularly Disseminate EEO/Antiharassment Policies and Reporting Procedures.
- Ensure Retention of Relevant Electronic Data.

Practical Advice for Mitigating Risk

- Train HR on how to conduct investigations.
- Have a tracking system for complaints of discrimination and harassment to watch for repeat offenders.
- Fully investigate claims of discrimination and harassment.
- If you hire a consultant to give advice on diversity issues, be prepared to follow the advice.



EEOC'S FOCUS ON SYSTEMIC LITIGATION

EEOC's Pursuit of Systemic Litigation

- Even before the Supreme Court's ruling in *Wal-Mart Stores, Inc. v. Dukes*, the EEOC stated that it is “uniquely positioned to litigate systemic cases” because
 - It is not required to meet the stringent requirements of Rule 23 when it files class suits or alleges a “pattern or practice” of discrimination, and
 - It is more willing to litigate cases involving only injunctive relief and limited monetary damages
- Post-*Dukes*, EEOC-initiated litigation is likely to become even more common

FY 2012 Systemic Statistics Investigations

- EEOC resolved 240 systemic investigations in FY 2012, up from 235 in FY 2011 and 165 in FY 2010
 - These included 46 successful conciliations and 19 pre-determination settlements that resulted in a total of \$36.2 million in monetary benefits
 - *The number of successful conciliations increased nearly three times over the number in FY 2011*
 - *The amount of monetary benefits was nearly four times greater than the amount obtained in FY 2011*
 - EEOC issued cause findings in 94 investigations
 - *Although not stated expressly, 81 charges (or 34%) resulted in no cause findings or were otherwise disposed of*
 - EEOC filed 12 new commissioner charges

FY 2012 Systemic Statistics Litigation

- At the end of FY 2012, EEOC was actively pursuing 62 systemic cases
 - These represent 20% of all active cases, up from 14% in FY 2011
 - The agency projects that systemic cases will represent 22%-24% of its active cases by FY 2016
- EEOC resolved 21 systemic cases in FY 2012



EEOC'S AREAS OF INTEREST

EEOC's Strategic Plan for 2012-2016

- On September 4, 2012, EEOC issued its draft strategic plan for 2012-2016. The key priorities include
 - *“Eliminating systemic barriers in recruitment and hiring”*
 - *“Addressing emerging issues”* including:
 - *ADA Amendments Act issues,*
 - *LGBT coverage under Title VII, and*
 - *Pregnancy accommodations*
 - *“Preserving access to the legal system”*
 - *Combating harassment through education*

Systemic Areas of Focus

- In light of EEOC's Strategic Plan, EEOC's systemic pursuits will likely focus on
 - Criminal Background Checks
 - Hiring Policies
 - Maximum Leave Policies
 - ADA Claims
 - Pregnancy-Related Claims
- In addition, EEOC will likely continue to challenge pay and promotion policies that it alleges have a disparate impact on protected groups

Criminal Background Checks

- In April 2012, EEOC updated its enforcement guidance concerning the use of arrest and conviction records when making employment decisions
- Policies with blanket prohibitions against hiring applicants with criminal convictions will be subject to EEOC scrutiny as the EEOC's guidance assumes that such policies have a disparate impact on minorities
 - Where a criminal background check has a disparate impact, its use must be consistent with business necessity

Criminal Background Checks Business Necessity Checklist

Is criminal background exclusion job related?

What is the nature and gravity of the offense?

How much time has passed since the offense?

What is the nature of the job sought?

Are there relevant individual factors?

Rehabilitation, bonding, post-conviction work history, etc.?

Are there less discriminatory alternatives?

Are there less discriminatory ways to serve the goals?

Criminal Background Checks

- Recent EEOC Activity: Pepsi Beverages entered into a \$3.13 million conciliation agreement with EEOC based on a criminal background check policy that denied employment to
 - Job applicants who had been arrested and were pending prosecution even if they had never been convicted of any offense, and
 - Job applicants who had been arrested or convicted of certain minor offenses

Criminal Background Checks Mitigating the Risk

- Proactive Steps to Mitigate the Risk:
 - Proceed with caution when utilizing criminal background checks during the hiring process
 - Reevaluate policies that contain blanket exclusions
 - Ensure that job descriptions accurately reflect the duties and responsibilities of all jobs
 - Document the job-related justification for all positions for which criminal background checks are used during the hiring process

Hiring Policies

- EEOC has stated that it “will target class-based intentional hiring discrimination and facially neutral hiring practices that adversely impact particular groups”
- EEOC has identified discriminatory hiring policies as including:
 - The channeling/steering of individuals into specific jobs due to their status in a particular group
 - Restrictive application processes
 - The use of screening tools
 - *In addition to criminal background checks, this includes screens such as medical evaluations, physical tests, and credit checks, and date-of-birth screens*
- Recent EEOC Activity: EEOC entered into a \$2.23 million conciliation agreement with a heavy equipment manufacturer that maintained a lifting test, which EEOC alleged had a disparate impact on female applicants

Hiring Policies: Mitigating the Risk

- Proactive Steps to Mitigate the Risk:
 - Evaluate each step of the hiring process and conduct privileged analyses to determine whether any step has an adverse impact
 - Ensure that job descriptions accurately reflect the job's duties, responsibilities and requirements
 - Review the use of and need for screening tools that will raise red flags with EEOC

ADA Claims

- EEOC is aggressively pursuing systemic matters arising under the ADA, including both discrimination cases and cases alleging failure to accommodate
- Recent EEOC activity includes:
 - *EEOC v. Henry's Turkey* – EEOC successfully moved for summary judgment and the district court awarded \$1.3 million in damages based on allegations that the employer hired a group of intellectually disabled employees and paid them lower wages than non-disabled employees
 - *EEOC v. Dura Automotive* – EEOC entered into a consent decree providing for \$750,000 in damages based on allegations that the employer subjected its employees to medical tests and prescription drug screens and took adverse actions against employees based on the results
 - *EEOC v. United Airlines* – EEOC challenged policy requiring competitive transfers rather than reassignments as a reasonable accommodation

ADA Claims: Mitigating the Risk

- Proactive Steps to Mitigate the Risk:
 - Engage in individualized interactive processes for each employee requesting reasonable accommodation
 - Avoid using a standard one-size-fits-all form for accommodation requests—written accommodation forms may be permissible, but they cannot be the only acceptable means of requesting accommodations
 - Confirm that medical examinations and drug screens are job related

Maximum Leave Policies

- EEOC is aggressively pursuing employers with maximum leave policies
 - Maximum leave policies provide that if an employee is unable to return to work after exhausting the maximum leave available under the company's policies, his or her employment will be terminated
 - EEOC takes the position that automatically terminating the employment of an employee without considering additional leave as a reasonable accommodation violates the ADA
- Recent EEOC Activity: Interstate Distributor Co. entered into a \$4.85 million consent decree with EEOC based on maximum leave policy

Maximum Leave Policies: Mitigating the Risk

- Proactive Steps to Mitigate the Risk:
 - Revise policies that require the termination of an employee's employment upon the expiration of all available leave
 - Engage in an individualized interactive process with all employees in need of reasonable accommodation and evaluate whether additional leave is a reasonable accommodation

Pregnancy-Related Claims

- EEOC is giving greater focus to pursuing cases involving discriminatory treatment tied to gender-specific traits such as pregnancy and breastfeeding
 - EEOC argues that differential treatment based on such traits is gender discrimination
- Recent EEOC Activity: Muskegon River Youth Home entered into a 10-year consent decree based on its pregnancy policy, which required all pregnant employees to obtain a medical certification stating that they could continue to work or to take leave if they could not provide such a certification

Pregnancy-Related Claims: Mitigating the Risk

- Review policies relating to topics such as pregnancy and lactation
 - Lactation policies should also be reviewed to ensure compliance with any applicable state laws
- Consider accommodations for pregnant employees
 - The Pregnant Workers Fairness Act, if passed, will require employers to provide pregnant women with the same reasonable accommodations currently available to people with disabilities

Polling Question

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Questions?



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