

WSGR ALERT

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NEW NINTH CIRCUIT DECISION AFFIRMS CERTIFICATION
OF CLASS OF HUNDREDS OF THOUSANDS OF WAL-MART
EMPLOYEES ALLEGING GENDER DISCRIMINATION

In a key opinion this week, the United States Court of Appeals for the Ninth Circuit clarified the standards that district courts are to apply in determining whether to grant class action status to a case. In *Dukes v. Wal-Mart Stores, Inc.*, No. 04-16688 (9th Cir. Apr. 26, 2010), the court, in a 6-5 decision, affirmed in part a decision by the District Court for the Northern District of California to certify a class of hundreds of thousands of female Wal-Mart employees allegedly subjected to gender discrimination. The decision reaffirms that district courts must undertake a rigorous analysis at the class certification stage to ensure that the requirements of Rule 23 of the Federal Rules of Civil Procedure are met, while simultaneously opening the door to a potential increase in large-scale class actions.

Background

The plaintiffs, six current or former employees of Wal-Mart Stores, Inc., allege that Wal-Mart discriminates against women in violation of Title VII of the Civil Rights Act of 1964. The plaintiffs contend that Wal-Mart pays women less than men in comparable positions and despite higher performance ratings and greater seniority, and awards fewer women than men promotions to in-store management positions. They allege that such discrimination is the result of Wal-Mart's strong, centralized structure, which fosters gender stereotyping and discrimination, and that the policies and practices underlying such discriminatory treatment are consistent throughout Wal-Mart stores. The plaintiffs seek injunctive and

declaratory relief, back pay, and punitive damages.

The district court granted in part the plaintiffs' motion for class certification, certifying a single class under Rule 23(b)(2) of the Federal Rules of Civil Procedure. The certified class, however, differed in two ways from the class proposed by the plaintiffs. First, the court excluded promotion claims for back pay from the class, on the grounds that data relating to the challenged promotions is not available for all class members. Second, the district court provided for notice and an opportunity for employees to opt out of the punitive-damages portion of the class.

The Ninth Circuit's Decision

The Ninth Circuit affirmed the district court's decision in part, holding that the district court properly certified a class of current female Wal-Mart employees with claims for declaratory and injunctive relief, as well as—for the equal-pay allegations—back pay. The Ninth Circuit remanded so that the district court could further consider the proper treatment of claims by former employees and claims for punitive damages.

The Ninth Circuit began its analysis with a lengthy discussion of the standards that district courts are to apply in deciding whether class certification is appropriate. The court explained that Supreme Court precedent on the subject has been "sometimes misunderstood" by lower courts that have found themselves to be prohibited from considering any aspects of the merits of a

case when ruling on a class certification motion. The Ninth Circuit clarified that it, like most other federal appellate courts, understands Supreme Court precedent only to preclude a court from making determinations on the merits that do not overlap with the Rule 23 inquiry. Where, however, there is overlap between the merits and the requirements for class certification set forth in Rule 23, district courts "must" determine that each such requirement is met.

Applying the aforementioned standards to the case before it, the Ninth Circuit found that the district court undertook a sufficiently "rigorous" analysis of the statistical, anecdotal, and other evidence provided by the plaintiffs, and declined to find an abuse of discretion in the district court's certification of a class of current Wal-Mart employees. However, the Ninth Circuit found that the district court did abuse its discretion by including former employees—whose claims are purely monetary—in a non-opt-out, Rule 23(b)(2) class, and further abused its discretion by failing to undertake a comprehensive analysis of whether it was appropriate to include punitive-damages claims in the class. The Ninth Circuit therefore remanded so that the district court could reconsider whether to certify one or more classes containing former employees and punitive-damages claims.

Finally, the Ninth Circuit rejected the argument that the sheer size of the class would render the case unmanageable. The court explained that there exists a "range of possibilities" that would allow the case to be

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managed in a manner that comports with due process. The Ninth Circuit noted, for instance, a prior case in which it had approved of the determination of compensatory damages for thousands of claimants by applying a formula to verdicts rendered by a jury on a random sampling of claims. The Ninth Circuit was careful to explain that such a method was not the only conceivable way in which the district court could proceed, and that the matter was left to the lower court's discretion.

Implications

The *Dukes* case is important in that it confirms the rigorous standard that district courts must apply in deciding whether a case warrants class certification. This standard requires courts to determine factual issues related to the merits of the plaintiffs' case where those factual issues overlap with the requirements set forth in Rule 23. At the same time, the Ninth Circuit's willingness to affirm certification of a class of such magnitude may embolden the plaintiffs' bar and lead to more and larger class action suits in the future.

For more information on the *Dukes* case or any related matter, please contact Fred Alvarez, Kristen Dumont, Bryan Ketrosier, or another member of Wilson Sonsini Goodrich & Rosati's litigation department.



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