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Seventh Circuit Weighs In On Commonality Requirement in Class Actions

By Staci Ketay Rotman February 09, 2012



The Seventh Circuit recently applied the Supreme Court's *Wal-Mart Stores, Inc. v. Dukes* decision to class certification in a wage and hour action, and affirmed the certification of two classes. *Ross v. RBS Citizens N.A. d/b/a Charter One*. The Seventh Circuit held that the district court did not abuse its discretion in certifying two classes of bank employees and that this certification met the commonality requirement clarified in *Dukes*.

The district court had certified two classes of bank employees: (1) nonexempt hourly employees who alleged that the Charter One's unofficial policy denied them overtime pay; and (2) assistant branch managers who claim that they were misclassified as exempt employees. On appeal, Charter One's sole argument was that the certification order did not comply with Rule 23(c)(1)(B), because it did not adequately define the class, claims, issues or defenses. After the Supreme Court issued its *Dukes* opinion, the Seventh Circuit asked that the parties address the commonality requirement in light of that decision.

After reviewing the parties' position statements, the Seventh Circuit determined that the classes met Rule 23(a)(2)'s commonality requirement under *Dukes*. The court reasoned that the classes present a common claim based on a broadly enforced policy denying overtime pay to nonexempt employees and requiring assistant branch managers to perform nonexempt work without overtime, and that this policy potentially drives the resolution of this case. While there might have been slight variations in how Charter One enforced its overtime policy, the Court found that both classes maintained a common claim, and this "common claim" was the "glue" necessary to satisfy the commonality requirement. Unlike in *Dukes*, an individualized assessment of each assistant manager's job duties was not necessary and did not destroy commonality. The Court found such an assessment to be irrelevant as to whether a company-wide policy existed to deny them overtime pay. Moreover, the Court focused on the fact that the class members at issue were substantially fewer than in *Dukes* and all were located in Illinois.

Finally, in an issue of first impression, the Seventh Circuit upheld the district court's class certification order under Rule 23(c)(1)(B). The Court felt there was no doubt as to which current and former employees would be included in the hourly and assistant manager classes because the order and memorandum indicate that this includes "all current and former employees who worked at an Illinois Charter One location within the last three years." The order also identified the claims and types of

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evidence that could be presented. The Court declined to require a district court to list any and all possible methods of proof, suggesting this would border on the absurd.

While *Dukes*' clarification of the commonality requirement is helpful to employers in defeating class certification, *Charter One* demonstrates that there are limits. Just because a class can number in the thousands does not mean a court will find commonality lacking, particularly where there is a broadly enforced policy. While the commonality argument will continue to develop, we will likely see more appellate courts weighing in as to how to apply *Dukes*.

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