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## Plaintiffs' Reliance on Dukes Wins Class Certification

By Allan King and Alex Frondorf

While much has been written – and will continue to be written – about the U.S. Supreme Court's blockbuster decision in *Wal-Mart v. Dukes*, it remains too early to discern the lasting impact of *Dukes* on class action litigation. Yet, one thing was, initially, universally agreed upon: *Dukes* helps defendants and hinders plaintiffs.

That simple conclusion, however, was questioned by the Seventh Circuit Court of Appeal's recent holding in *McReynolds v. Merrill Lynch* where it was the plaintiffs who relied upon *Dukes* in their successful appeal of the district court's denial of class certification in a Title VII employment race discrimination case.

### ***Wal-Mart v. Dukes* – Delegation of Authority**

The U.S. Supreme Court in *Dukes* held that a Title VII class action could not proceed against Wal-Mart because the company delegated to its local managers significant discretion with regard to employee promotions and pay. There was no company-wide policy for plaintiffs to challenge – in fact, the only relevant policies were those forbidding sex discrimination and a policy of delegating employment decisions to local managers. It is unlikely that all managers would exercise their discretion in a common way without some common direction. Consequently, the incidents of discrimination complained of did not present a common issue that could be resolved efficiently in a single proceeding. Rather, an *individualized* determination would need to be made for each class member as to both liability and damages. With a nationwide class of 1.5 million people, such claims are not appropriate for class litigation.

With 1.4 million current U.S. employees, Wal-Mart's delegation of employment decisions to its local managers was a legitimate business practice. The only "policy" was giving local supervisors discretion over employment decisions. Thus, an unintended benefit of the policy against having a company-wide policy was to insulate the company from certain types of class actions.

### **The Disparate Impact Claims – Avoiding Individual Determinations**

Merrill Lynch, like Wal-Mart, delegated certain employment decisions to local managers and brokers. And, like Wal-Mart, that delegation would seem to remove a "common issue" that plaintiffs could attack on a class-wide basis.

However, in *McReynolds*, the plaintiffs alleged that Merrill Lynch required the discretion it delegated to its local managers and brokers be exercised in a particular fashion—by forming informal teams to generate and manage business, and in distributing accounts to its brokers. In other words, the plaintiffs do not allege that Merrill Lynch intentionally discriminates, but that the delegation of employment decisions in these ways “exacerbates racial discrimination by brokers.”

The Court summarized the policy challenged by plaintiffs:

Two elements of that framework are challenged: the company’s ‘teaming’ policy and its ‘account distribution’ policy. The teaming policy permits brokers in the same office to form teams. They are not required to form or join teams, and many prefer to work by themselves. But many others prefer to work as part of a team. Team members share clients, and the aim in forming or joining a team is to gain access to additional clients, or if one is already rich in clients to share some of them with brokers who have complementary skills that will secure the clients’ loyalty and maybe persuade them to invest more with Merrill Lynch. As we said, there are lone wolves, but there is no doubt that for many brokers team membership is a plus; certainly the plaintiffs think so.

The court analogized the above to the following hypothetical:

Suppose a police department authorizes each police officer to select an officer junior to him to be his partner. And suppose it turns out that male police officers never select female officers as their partners and white officers never select black officers as their partners. There would be no intentional discrimination at the departmental level, but the practice of allowing police officers to choose their partners could be challenged as enabling sexual and racial discrimination—as having in the jargon of discrimination law a ‘disparate impact’ on a protected group—and if a discriminatory effect was proved, then to avoid an adverse judgment the department would have to prove that the policy was essential to the department’s mission.

In view of this analysis, the court concluded that a jury could decide this common question without addressing the individualized claims that doomed the plaintiffs’ class claims in *Dukes*. The court also noted that if the plaintiffs prevailed on their claim of adverse impact, they would be entitled to injunctive relief. The question of the monetary relief owed to each class member, if any, then could be determined by a subsequent series of individual trials in which each plaintiff could invoke the benefit of the jury’s disparate impact finding in the class action. In effect, the Seventh Circuit concluded that the class could be certified as an “issue class,” which is authorized under Federal Rule of Civil Procedure 23(c)(4). Once that issue is resolved, each class member then must pursue litigation on his or her own behalf, raising individualized claims and permitting the employer to raise individualized defenses. Thus, the court held that “challenging those [Merrill Lynch] policies in a class action is not forbidden by the *Wal-Mart* decision; rather that decision helps . . . to show on which side of the line that separates a company-wide practice from an exercise of discretion by local managers this case falls.” Furthermore, the court held that such policies – when challenged by a disparate impact claim – “could be most efficiently determined on a class-wide basis.” Accordingly, the court reversed and remanded the case to proceed as a class action.

*McReynolds* demonstrates that merely decentralizing employment decisions may not insulate an employer from class litigation if the employer implements top down control over the particulars of how that discretion is exercised. In addition, this decision may signal the rise of the “issue class action,” in which plaintiffs attempt to litigate class claims piecemeal—first seeking class-wide determination of common questions, and then individual lawsuits that build upon those class-wide answers.

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