



Cut and Paste Post July, 2011

Since this month's presenter, Jim Nys, always gives up a great update of current legal and legislative news, I'm making this an abbreviated Cut n Paste.

Supreme Court Rules 1.5 Million Female Employees Of WalMart Cannot Proceed With Class Action Discrimination Lawsuit

Current or former employees of WalMart brought this suit for, among other remedies, punitive damages, and backpay, on behalf of themselves and a nationwide class of some 1.5 million female employees, because of Wal-Mart's alleged discrimination against women in violation of Title VII of the Civil Rights Act of 1964. They claimed that local managers exercise their discretion over pay and promotions disproportionately in favor of men, which has an unlawful disparate impact on female employees; and that Wal-Mart's refusal to oversee and limit its managers' authority amounts to disparate treatment.

The District Court certified the class, and the Ninth Circuit affirmed, with some limitations on the employees who may proceed in the case. Walmart appealed to the U.S. Supreme Court, which reversed the 9th Circuit, holding that the proposed class was not consistent with the applicable federal rules of civil procedure.

Rule 23(a) of the Federal Rules of Civil Procedure imposes four initial requirements for class certification: (1) that the class is so numerous that joinder of all members is impractical; (2) that there are questions of law or fact common to the class; (3) that the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) that the representative parties will fairly and adequately protect the interests of the class.

The Supreme Court's decision hinged on two grounds: the lack of commonality of questions of law or fact, and the existence of claims for backpay that were not incidental to the declaratory and injunctive relief sought by the plaintiffs and that would require individualized determinations.

In the case of commonality of questions of law or fact, the crux of a Title VII inquiry is "the reason for a particular employment decision". The Plaintiff's only evidence of a general discrimination policy was a sociologist's analysis asserting that WalMart's corporate culture made it vulnerable to gender bias. But because he could not estimate what percent of WalMart employment decisions might be determined by stereotypical thinking, his testimony was worlds away from "significant proof" that WalMart "operated under a general policy of discrimination. In the decision, Justice Scalia said, "Statistical and anecdotal evidence offered by the plaintiffs, showing disparities between men and women with respect to pay and promotion to management positions, did not identify a specific employment practice, much less one that tied all of the putative class claimants' 1.5 million claims together". Scalia added, "Merely showing that WalMart's policy of discretion has produced an overall sex-based disparity does not suffice".

Thus, the Court determined that although the employees all worked for the same employer, there was a lack of glue holding together the alleged reasons for discrimination, so it would be impossible to say that examination of all the class members' claims would produce a common answer to the discrimination question.

In regard to the certification of class for backpay purposes, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. This rule does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant. It also does not authorize class certification when each class member would be entitled to an individualized award of monetary damages. Rather, individualized claims for monetary relief belong in Rule 23(b)(3), which requires that the questions of law or fact common to class members predominate over any questions affecting only individual members.

In its decision the Court found that once a plaintiff establishes a pattern or practice of discrimination, a district court must usually conduct “additional proceedings ... to determine the scope of individual relief.” and the company can then raise individual affirmative defenses and demonstrate that its action was lawful. The Court chided the Ninth Circuit, saying it erred in trying to replace such proceedings with “Trial by Formula” and found that in this case a class could not be certified because WalMart is entitled to provide statutory defenses to the individual claims.

In summary, the Court found that, in this case, the plaintiffs had failed to demonstrate similar discriminatory practices and, if these practices had indeed occurred, Walmart was entitled to wage its defense. Therefore, a class action could not proceed.

Non-legal take away: The Supreme Court's decision in this case will not put an end to class action/collective lawsuits. It will, however, mean that classes may be smaller and that employers may have stronger support to defeat attempts at certification for class action suits.

Read the case: *Wal-Mart Stores, Inc. v. Dukes* <http://www.supremecourt.gov/opinions/10pdf/10-277.pdf>

Medical Marijuana Statute Did Not Protect Employee From Discharge Because Of Authorized Marijuana Use

In 1998, Washington enacted the Medical Use of Marijuana Act (MUMA), which provides an affirmative defense against criminal prosecution of physicians for prescribing medical marijuana and of qualified patients and their designated primary caregivers for engaging in the medical use of marijuana. In *Roe v. TeleTech*, the Washington Supreme Court held that MUMA does not provide a private cause of action for discharge of an employee who uses medical marijuana, either expressly or impliedly, nor does MUMA create a clear public policy that would support a claim for wrongful discharge in violation of such a policy. Therefore, an employer was free to discharge an at-will employee who failed a drug test due to her use of medical marijuana.

Case cite, incase you're interested... Roe v. TeleTech Customer Care Management LLC

Note! In Montana, the Supreme Court found that employers also have the right to prohibit medical marijuana in the workplace.

Montana Supreme Court Prohibits the Automatic Elimination of Workers' Compensation Rehabilitation Benefits Once a Person Reaches Social Security Age

This is an interesting case decided within the last 30 days. Here's a "Teaser line" from the Court's decision:

“Caldwell’s work history demonstrates the irrationality of categorically eliminating rehabilitation benefits once a person becomes eligible for social security. Caldwell served the workforce for 15 years *after* becoming eligible to draw social security benefits and for 33 years *after* “retirement” from the U.S. Army... Section 39-71-710, MCA, violates the Equal Protection Clause of the Montana Constitution insofar as it deems disabled workers ineligible to receive rehabilitation benefits based on their eligibility for social security benefits.”

Read the case: [Caldwell vs. MACO](#)