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THE IMPACT OF THE "*DUKES*" CASE ON RETAIL EMPLOYERS

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I. Introduction

Large retailers are certainly not unfamiliar with discrimination lawsuits. Yet, any good human resources team seeks to avoid such suits as they can be costly, both in terms of money and reputational damages. Class action discrimination lawsuits alleging systemic discrimination are potentially even more damaging for the company. The very nature of such a suit – the fact that multiple employees are alleging discrimination by the company – makes them that much more powerful. No large retailer (or small retailer, for that matter) wants to face a suit alleging any type of discrimination by multiple former employees. Regardless of the merits of the case, in the court of public opinion, the existence of numerous plaintiffs is generally equated with wrongdoing on the part of the employer. When that "something wrong" is discrimination, the stakes are particularly high.

In the past, the notion of a large class action discrimination suit against a national retailer has been a true threat- a tool in the arsenal of the employees- to be feared by the employer. With the Supreme Court decision in *Wal-Mart Stores, Inc. v. Dukes*, that arsenal has been significantly depleted and the large retailer now treads on somewhat new ground when thinking about discrimination lawsuits.

This paper will discuss some of the more recent class action discrimination suits against large U.S. retailers. It will then discuss the narrative behind the *Dukes* case, the way in which the opinion could potentially affect the substance of Title VII, and the consequences the *Dukes* decision holds for human resource departments at large retailers throughout the country.

II. Recent Systemic Discrimination Claims

A quick search of employment discrimination class action and systemic suits over the last 10 years yields far too many results to discuss here. However, sorting through the results of the search, it becomes clear that the class action suit which alleges systemic discrimination has been a powerful weapon for employees in combating perceived discrimination in the workplace. A few such cases will be discussed in more detail.

In 2002, Target was sued by the EEOC for racial discrimination against African-Americans in entry-level hiring. The suit focused on 11 different stores in the Midwest and alleged that African-American employees were not given interviews while white employees with similar resumes were and that Target employees "routinely destroyed applications of African-Americans…" The case eventually ended in 2007 with a consent decree whereby Target agreed to pay a total of $510,000 to the plaintiffs. "As part of the decree, Target also agreed to revise its document retention policies; provide training to supervisors on employment discrimination and record-keeping; report on hiring decisions; and post a notice about the consent decree to employees in its District 110 stores and offices."

In 2005, Abercrombie and Fitch settled a race and sex discrimination lawsuit involving over 10,000 class members. The consent decree includes provisions about benchmarks for hiring and promotion of women and certain racial minorities, advertising available employment positions in publications targeting minorities of both genders, the creation of a new Office and Vice President of Diversity, diversity training for all employees with hiring authority, and the hiring of 25 recruiters to seek out women and minority employees.

More recently, Best Buy agreed to settle a class-action race and sex discrimination lawsuit, stemming from allegations by multiple plaintiffs that the company denied desirable job assignments and promotions and transfers to African American, Latino, and female employees. Under the terms of the consent decree, the electronics retail giant not only has to pay a $200,000 to the nine named plaintiffs—on top of the $10 million in legal fees and costs—but also has agreed "to implement comprehensive affirmative relief addressing the hiring assignment, promotion, and exempt compensation claims."

Most recently, Menards, a "home-improvement retail giant" settled a $1 million class action lawsuit which alleged racial discrimination against as many as 700 former employees in several of its retail stores. The settlement also included an agreement by Menards to change its promotion processes.

These are just a handful among the many systemic employment discrimination cases filed each year. But while each of these cases was won by the employees, future wins may be harder to come by. This is because the way in which these cases can be framed and litigated may change given the Supreme Court's recent decision in *Dukes*.

III. The History of *Dukes*

In June 2001, seven named plaintiffs, including Betty Dukes, filed a class action lawsuit against Wal-Mart alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e-1 *et seq.* The named plaintiffs sought to represent a class of "all women employed at any Wal-Mart domestic retail store at any time since December 26, 1998 who have been or may have been subjected to Wal-Mart's challenged pay and management track promotions and policies practices."

Specifically, the plaintiffs alleged that women employed in Wal-Mart stores are paid less than men, even though the women have more seniority and higher performance ratings. Plaintiffs also alleged that women employees received fewer promotions to in-store management positions than did men, and even when women were promoted, they had to wait longer than their male counterparts for such advancement.

Importantly, the plaintiffs' discrimination claims did not rest on any express policy of Wal-Mart; rather, they claimed that Wal-Mart delegated decision-making authority for pay and promotion decisions to local managers, who disproportionately used this discretion to favor men. This delegation of authority formed the basis for plaintiffs' disparate impact claim, while Wal-Mart's refusal to constrain such discretion, despite the corporation's awareness of its discriminatory effect, formed the basis of their disparate treatment claim.

The plaintiffs moved for class certification before the United States District Court for the Northern District of California. The proposed class covered at least 1.5 million women who had been employed at approximately 3,400 stores. The District Court granted plaintiffs' motion with respect to their claims for equal pay and granted, in part, plaintiffs' motion with respect to the promotion claims, narrowing the class a bit for certain putative class members seeking lost pay. The District Court found that all four requirements of class certification pursuant to Federal Rule of Civil Procedure 23(a) – numerosity, commonality, typicality and adequacy— were met.

Significantly, the District Court accepted Plaintiffs' commonality evidence that focused on Wal-Mart's pay and promotion policies across stores, writing:

> Plaintiffs present evidence that Wal-Mart's policies governing compensation and promotions are similar across all stores, and build in a common feature of excessive subjectivity which provides a conduit for gender bias that affects all class members in a similar fashion. Second, Plaintiffs submit evidence that Wal-Mart cultivates and maintains a strong corporate culture which includes gender stereotyping. While there parties vigorously dispute certain aspects of this evidence, and certainly draw different inferences therefrom, it is sufficient at this juncture to support Plaintiffs' claim that there are common issues as to whether Wal-Mart engages in discriminatory policies and practices that affect putative class members in a similar manner.

The District Court's ruling was affirmed by the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit noted, "[i]t is well-established that subjective decision-making is a 'ready-mechanism for discrimination' and that courts should scrutinize it carefully… Indeed, courts from around the country have found '[a]llegations of similar discriminatory employment practices, such as the use of entirely subjective personnel processes that operate to discriminate, [sufficient to] satisfy the commonality and typicality requirements of Rule 23(a)."

On appeal, the United States Supreme Court, in a breathtakingly sweeping opinion, reversed the Ninth Circuit's holding that class certification was appropriate. The Supreme Court, noting that "[t]he crux of this case is commonality" ultimately decided that commonality was lacking because Plaintiffs could not demonstrate that they had all suffered the same injury and not merely a violation of their rights under the same law. The Court appeared to require common policy or practice behind the injury and did not

find that the delegation of subjective decision-making authority to store managers qualifies.

IV. How *Dukes* Changes the Disparate Impact Analysis

Dukes has the potential to disable the aggregation of claims based on delegation of subjective decision-making authority to individual supervisors. This is a stunning reversal of the Supreme Court's traditional approach to such disparate impact cases—such as the *Watson v. Fort Worth Bank and Trust* Supreme Court case involving the promotion standards for bank tellers. In that case, the bank did not have precise criteria for evaluating candidates for promotion, but instead relied on "the subjective judgment of supervisors who were acquainted with the candidates and with the nature of the jobs to be filled." The Court held that the class action could proceed based on the disparate impact theory of liability. Specifically, the Court noted that the employer's practice of delegating subjective decision-making authority to its supervisors is no less susceptible to disparate impact analysis than objective employer practice, such as requiring a high school diploma and the passage of written tests. In fact, the Court was quite emphatic about the potential evasion of the anti-discriminatory effects of the disparate impact theory of litigation should such subjective practices be deemed not to be cognizable under Title VII.

Strikingly, in *Dukes*, the Court, although purportedly focusing on class certification, takes aim at disparate impact as applied to the delegation of decision-making authority. The Court ultimately holds that commonality does not exist because a finding of commonality based upon such subjective decision-making "requires significant proof that Wal-Mart operated under a general policy of discrimination." According to the Court, this is lacking here because "Wal-Mart's announced policy forbids sex discrimination."

The Court explains that Wal-Mart's policy of allowing local supervisors to exercise discretion in pay and promotion decisions is not really a policy at all; rather, the Court reasons that this is "a policy against having a policy." Therefore, from the Court's perspective, this practice can never serve to provide the commonality needed for a class action.

From the perspective of human resources managers at large retail chains with many stores located throughout the nation, this is potentially game-changing. Somewhat reminiscent of the affirmative defense recognized by the Supreme Court in sexual harassment cases, this notion, if carried over into substantive Title VII case law, translates into protection for large employers from disparate impact suits based on delegation of authority as long as the employer has a written policy against discrimination. This seemingly would serve as proof that the retailer does not operate under a general policy of discrimination and would negate any contention that the delegation of supervisorial decision-making authority has discriminatory effects by mere reference to the stores' written anti-discrimination policy.

V. How *Dukes* Changes Systemic Disparate Treatment Cases

In examining the *Dukes* opinion, it becomes clear that it will likely also affect systemic disparate treatment cases brought under Title VII.

In *International Brotherhood of Teamsters v. United States*, the Supreme Court first developed the framework for a cause of action for systemic disparate treatment. In the case, the Court was called on to interpret the statutory language prohibiting any "pattern or practice of resistance to the full enjoyment of any of the rights secured by [Title VII when] the pattern or practice is of such a nature and is intended to deny the full exercise of rights…".

The Court stated that the "ultimate factual issues are thus simply whether there was a pattern or practice of such disparate treatment and, if so, whether the differences were racially premised." The Court made clear that the Government bore the burden of proving "more than the mere occurrence of isolated or accidental or sporadic discriminatory acts. It had to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice."

In discussing how the Government could meet this burden of proof, the Court put heavy emphasis on statistics—specifically, the Government needed to, and did, provided statistics showing the wide disparity between the number of African Americans and Hispanics in the disputed position as compared to those in the relevant qualified population. The Court stated, "[O]ur cases make it unmistakably clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue." In general, in systemic disparate treatment cases, courts are trying to envision the racial composition of the company's workforce absent discrimination; statistics are a powerful way to do this.

In examining class certification based on plaintiffs' disparate treatment claims, the majority rejects the contention that Wal-Mart's pay and promotion systems resulted from a pattern or practice of discrimination because plaintiffs' "claims must depend on a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor… Here, respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*." The Court reasons that since Wal-Mart has no policy of discrimination, but rather has a specific policy forbidding discrimination, the plaintiffs cannot meet their burden.

The language of *Dukes* possesses the potential to insulate large retailers from systemic discrimination suits based on supervisorial decisions with the crafting of a thorough anti-discrimination policy that explicitly advises supervisors against allowing discriminatory influences to infiltrate their decision-making process. Again, the Court's demand for a policy leading to a common injury has broad implications for human resources managers at large retail chains. For, simply ignoring the known discriminatory effect of individual supervisor's decisions is not sufficient to make out a case of systemic disparate treatment. Rather, the discrimination has to be embodied in some formal policy of the employer. Therefore, as noted above, a well-developed anti-discrimination policy specifically focusing on the ways in which supervisors can avoid allowing discrimination to influence their decision-making would seem to go a long way towards defeating any

type of systemic disparate treatment claim based on delegation of authority to supervisors. א

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