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Recent Developments in Labor and Employment Class Actions
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In the past twelve months, there has been no shortage of interesting class action litigation developments in the area of labor and employment. This paper addresses four of those developments: the likelihood of class certification in the wake of *Wal-Mart Stores, Inc. v. Dukes*, an emerging conflict over the validity of arbitration policies containing class and collective action waivers, potential new pre-litigation standards for the U.S. Equal Employment Opportunity Commission when pursuing class claims, and the rise of combined class and collective action claims.

I. Class Certification in the Age of *Wal-Mart Inc. v. Dukes*

The most significant decision in this area in the past year is *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). In *Dukes*, current and former female employees of Wal-Mart sought judgment against the company for injunctive and declaratory relief, punitive damages and back pay on behalf of themselves and a nationwide class of approximately 1.5 million female employees based on alleged gender discrimination in violation of Title VII of the Civil Rights Act of 1964. Plaintiffs claimed that Wal-Mart's local managers exercise their discretion over pay and promotion decisions disproportionately in favor of men, having an unlawful disparate impact on women. Plaintiffs further claimed that the company's refusal to rein in its local managers' authority amounted to disparate treatment against women. For purposes of class certification, plaintiffs essentially argued that the discrimination that they experienced was

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common to all female Wal-Mart employees based on a corporate culture that permits bias against women.

The U.S. District Court for the Northern District of California certified the nationwide class. The Ninth Circuit, in a divided *en banc* decision, substantially affirmed certification. The U.S. Supreme Court reversed.

The major issue in *Dukes* centered on commonality – a showing that questions of law or fact are common to the class. Justice Scalia, writing for the majority, explained,

> Their claims must depend upon a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

131 S. Ct. at 2551. The Court further reasoned, "[w]ithout 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."* *Id.* at 2552.

Here, the only corporate policy identified and relied upon by plaintiffs was one of granting local supervisors with discretion over employment decisions, such as promotions and pay increases, and plaintiffs failed to identify a common mode of applying this discretion that could provide the glue to bind the class with a common contention. In this regard, the Court explained, "it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction." *Id.* at 2555.

There is no question that the holding in *Dukes* will have a broad reach on the future of class certification. In the ten months since the opinion was issued, it has already been cited over 1700 times. *Dukes* does not necessarily signal an end to large class-wide employment

discrimination claims, but its holding does suggest that plaintiffs' attorneys seeking class certification must carefully consider and develop the common bond among class members to fight off individuality challenges. *See Howland v. First Am. Title Ins. Co.*, 672 F.3d 525 (7th Cir. 2012) (affirming denial of certification due to lack of showing that common issues predominate); *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481 (7th Cir. 2012) (vacating class certification because class was too broad and claims were highly individualized, lacking in commonality); *In re Aqua Dots Prods. Liability Litigation*, 654 F.3d 748 (7th Cir. 2011) (rejecting proposed nationwide class of consumers as "unmanageable"); *Rowe v. Bankers Life and Casualty Co.*, No. 09 C 491, 2012 WL 1068754 (N.D. Ill. Mar. 29, 2012) (denying certification of nationwide class); *In re Sears, Roebuck & Co.*, No. MDL-1703, 2012 WL 1015808 (N.D. Ill. Mar. 22, 2012) (denying class certification); *Pennsylvania Chiropractic Assoc. v. Blue Cross Blue Shield Assoc.*, No. 09 C 5619, 2011 WL 6819081 (N.D. Ill. Dec. 28, 2011) (same); *Groussman v. Motorola, Inc.*, No. 10 C 911, 2011 WL 5554030 (N.D. Ill. Nov. 15, 2011) (same); *George v. Kraft Foods Global, Inc.*, No. 08 C 3799, 2011 WL 5118815 (N.D. Ill. Oct. 25, 2011) (same); *but see McReynolds v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012) (holding that issue of whether employer's policies had a disparate impact on African-American employees was appropriate for class-wide treatment); *Messner v. Northshore Univ. Healthsystem*, 669 F.3d 802 (7th Cir. 2012) (vacating order denying class certification and stating, "It is well established that the presence of individualized questions regarding damages does not prevent certification under Rule 23(b)(3)"); *Ross v. RBS Citizens, N.A.*, 667 F.3d 900 (7th Cir. 2012) (affirming certification order where commonality existed based on bank's broad enforcement of denying employees earned overtime compensation); *Bolden v. Walsh Group*, No. 06 C 4104, 2012 WL 1079893 (N.D. Ill. Mar. 30, 2012) (certifying

hostile work environment and disparate impact classes); *Driver v. AppleIllinois, LLC*, No. 06 C 6149, 2012 WL 689169 (N.D. Ill. Mar. 2, 2012) (decertification motion denied); *Hawkins v. Securitas Security Servs. USA*, No. 09 C 3633, 2011 WL 5598365 (N.D. Ill. Nov. 16, 2011) (granting class certification of certain minimum wage claims); *Williams-Green v. J. Alexander's Restaurant, Inc.*, 277 F.R.D. 374 (N.D. Ill. 2011) (granting certification of class on state law wage claims).

II. Limiting Employee Rights to Class, Collective or Other Representative Claims through Arbitration Clauses and Other Waivers

In order to expedite the resolution of employee disputes and keep down litigation costs, increasingly, employers have instituted policies requiring employees to submit employment disputes to arbitration, thereby waiving their right to a judicial forum and jury. The scope of these types of waivers is largely at the discretion of the employer, but oftentimes the waivers include a bar to arbitrating collective or class claims, opting instead to limit arbitrations to individual employee claims. The viability of this type of restriction is now in question by a recent National Labor Relations Board ("NLRB") decision, *D.R. Horton, Inc. v. Michael Cuda*, 357 NLRB No. 184 (NLRB Jan. 3, 2012).

Just one year ago, the landscape did not seem so unsettled. The U.S. Supreme Court, in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), upheld a limitation contained in a consumer cell phone contract requiring that claims brought under the arbitration provision only be brought in an individual capacity, and not as a plaintiff or class member of any purported class or representative proceeding. Because California law provides that such provisions are unconscionable (*see Discovery Bank v. Superior Court*, 36 Cal. 4th 148 (2005)), the named plaintiffs argued that the provision was unenforceable. In upholding the arbitration limitation,

the U.S. Supreme Court explained that the Federal Arbitration Act ("FAA") preempts California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748.

After the *Concepcion* decision, many thought that the door for employers to use class and collective action waivers in their arbitration provisions was wide open. *See Sanders v. Swift Transp. Co. of AZ, LLC*, No. 10-cv-03739, 2012 WL 523527, *3 (N.D. Cal. Jan. 17, 2012) (FAA preempted plaintiff's argument that independent contractor agreement was unenforceable due to class arbitration waivers of state labor law claims); *LaVoice v. UBS Financial Servs., Inc.*, No. 230(BSJ)(JLC), 2012 WL 124590, *6 (S.D. Ill. Jan. 13, 2012) (upholding arbitration of individual claims in lieu of class and collective action claims in judicial proceeding).

The NLRB then issued its decision in *D.R. Horton, Inc. and Michael Cuda*, 357 NLRB No. 184 (January 3, 2012). The NLRB had a different take on the viability of such waivers. *D.R. Horton* is a home builder with operations throughout the country. In 2006, it began requiring each new and current employee to sign a Mutual Arbitration Agreement ("MAA") as a condition of employment. The MAA provided that employees would submit all employment-related disputes and claims to arbitration, that the arbitrator could only hear individual employee claims, and that the employee had no right to file a lawsuit or other civil proceeding. In other words, employees completely waived their right to any collective or class action proceeding.

Based on the restrictions set forth in the MAA, the NLRB concluded that the employer committed an unfair labor practice because the "MAA clearly and expressly bars employees from exercising substantive rights that have long been held protected by Section 7 of the

NLRA." *Id.* at 5. The NLRB further held that "employers may not compel employees to waive their [National Labor Relations Act] right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial." *Id.* at *16.

The NLRB also explained that its holding did not conflict with the FAA, or undermine the policy underlying the FAA, because the FAA places private arbitration agreements on the same footing as other contracts, and all contracts of any nature can be trumped by a conflict with federal labor law. The NLRB also dismissed the notion that its decision was inconsistent with *Concepcion* by noting that *Concepcion* involved a conflict between state and federal law, whereas the present issue dealt with potentially conflicting federal laws, the NLRA and FAA.

A Notice of Appeal has been filed in the Fifth Circuit. The NLRB's position is consistent with the district court's opinion in *Raniere v. Citigroup, Inc.*, No. 11-2448, 2011 WL 5881926, *17 (S.D. N.Y. Nov. 22, 2011), which held that the "waiver of the right to proceed collectively under the Fair Labor Standards Act was unenforceable as a matter of law." Given that differing views are beginning to emerge, it is likely that we will see more litigation on this topic in the coming year, and it may be an issue for the U.S. Supreme Court to decide.

III. New Pre-Filing Standards for Class Claims Brought by the U.S. Equal Employment Opportunity Commission

The U.S. Equal Employment Opportunity Commission ("EEOC") is the federal agency responsible for enforcing the federal laws that prohibit employment discrimination, harassment and retaliation, including Title VII of the Civil Rights Act of 1964, the Age Discrimination Act, and the Americans with Disabilities Act. In addition to its administrative enforcement powers, which include receiving, investigating and resolving charge of employment discrimination, harassment and retaliation, the EEOC also has the power to file lawsuits on behalf of aggrieved

individuals. *See* 42 U.S.C. §2000e-5(f)(1). Because the EEOC's resources are limited, the agency often looks toward filing class claims to impact the largest group of individuals possible.

A recent Eighth Circuit decision, *EEOC v. CRST Van Expedited, Inc.*, Nos. 09-3764, 09-3765, 10-1682, 2012 WL 1583026 (8th Cir. May 8, 2012), called into question the adequacy of the EEOC's pre-litigation inquiry in advance of the EEOC's filing of class claims. The EEOC filed suit against CRST, a large interstate trucking firm, alleging that the company subjected female employees to a hostile work environment in violation of Title VII of the Civil Rights Act of 1964. Despite repeated instructions from the district court and requests from defendants, for nearly two years after filing the lawsuit, the EEOC failed to identify the names of the women that comprised its class. The district court noted that the EEOC initially sent out 2,000 letters to former CRST female employees to solicit their participation in the class action, and months later sent out another 730 solicitation letters. Within a matter of a few months, when faced with a deadline, the EEOC went from having identified 49 class members to identifying approximately 270 class members, after informing the district court that it predicted the total class to be between 100 and 150 individuals. These events led the district court to conclude that "the EEOC did not know how many allegedly aggrieved persons on whose behalf it was seeking relief," but "[i]nstead … was using discovery to find them." *EEOC v. CRST Van Expedited, Inc.*, No 07-CV-95-LRR, 2009 WL 2524402 at *9. A series of orders from the district court narrowed the class to 67 women, and the district court barred the EEOC from seeking relief on behalf of those 67 women because it found that the EEOC had failed to conduct a reasonable investigation and *bone fide* conciliation of the claims, which was a statutory condition precedent to filing a lawsuit. For example, it was noted that the EEOC never interviewed any witnesses or subpoenaed any documents related to the 67 allegedly aggrieved persons to determine whether the allegations

were true in advance of filing suit, and some of the 67 aggrieved individuals had not even been sexually harassed at the time that the lawsuit was filed.

On appeal, the Eighth Circuit affirmed the district court's decision to dismiss the EEOC's claims as to the 67 women for its failure to investigate and conciliate in advance of filing a lawsuit. Importantly, while the Eighth Circuit noted that the EEOC did gather a significant amount of information from the company during the investigation stage, the letter of determination failed to provide CRST with the names of potential class members, or even an estimate as to the size of the class, which was necessary for the company to engage in meaningful conciliation discussions. Thus, the Eighth Circuit concluded that the EEOC had failed to satisfy its statutory pre-suit obligations as to the 67 women warranting a bar to relief. *Cf. EEOC v. United Road Towing, Inc.*, 10 C 6259, 2012 WL 1830099 (N.D. Ill. May 11, 2010) (courts may not review EEOC administrative investigations to determine whether a particular investigation sufficiently supports the claims that the EEOC brings in a subsequent lawsuit).

At this point, the holding in *CRST* only directly impacts how the EEOC goes about filing and gathering information for class claims in the Eighth Circuit, which includes Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota. It will be interesting to watch, however, whether courts in other circuits begin to hold the EEOC to the same standards.

IV. The Rise of Combined Class and Collective Action Wage and Hour Claims

For the past several years, wage and hour litigation has been on the rise. Traditionally, wage and hour complaints take one of two forms in federal court: a class action in accordance with Rule 23 of the Federal Rules of Civil Procedure or a collective action in accordance with Section 216 of the Fair Labor Standards Act ("FLSA").

A Rule 23 class action complaint tracks the detailed prerequisites set forth in Rule 23 of the Federal Rules of Civil Procedure. Rule 23(a) requires that a litigant seeking to certify a class establish numerosity, commonality, typicality and adequacy. Fed. R. Civ. P. 23(a). If those requirements are all met, the action must then fall within one of three Rule 23(b) categories: (1) prosecuting separate actions by or against individual class members would create a risk of inconsistent results causing prejudice to any party or impeding or disposing of the interests of those not made parties; (2) the party opposing the class acted adversely toward the general class and where relief is appropriate for the class as a whole; or (3) the court finds that common questions of law or fact predominate over that of individual class members and that a class action is superior to other methods of adjudication. Fed. R. Civ. P. 23(b).

Section 216 collective actions include minimum wage and overtime pay actions under the FLSA, equal pay suits under the Equal Pay for Equal Work Act, and age discrimination claims for non-federal employees under the Age Discrimination in Employment Act. Parties that wish to proceed in a collective action are not bound by the same rigid prerequisites that are delineated in Rule 23.

The most significant distinction between a Rule 23 class action and a Section 216 collective action is in the way in which plaintiffs become included in or excluded from the litigation. Under Rule 23, a plaintiff must affirmatively "opt out" to not be affected by the adjudication, and not be precluded from bringing his or her own claim. Under Section 216, a potential plaintiff can only participate in the action by consenting in writing, or "opting in."

Rather than selecting one of these prescribed methods, plaintiffs' attorneys now seek to combine both claims in one federal court action. This method was recently endorsed by the Seventh Circuit in *Ervin v. OS Restaurant Services, Inc.*, 632 F.3d 971 (7th Cir. 2011). In *Ervin*,

in a matter of first impression, the Seventh Circuit considered whether employees who institute a collective action against their employer under the Fair Labor Standards Act ("FLSA") may at the same time litigate supplemental state law claims as a class action certified in accordance with Rule 23(b)(3).

The district court had rejected such an effort on the basis that there was a "clear incompatibility" between the FLSA proceeding and the proposed class action. *Ervin,* 632 F.3d at 975. The district court reasoned that the problem stemmed from the fact that FLSA collective actions require potential plaintiffs to opt in, while plaintiffs are included in a traditional class action unless they opt out. Based on this distinction alone, the district court concluded that a combined claim could never satisfy the superiority requirement, *i.e.*, that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy, for certification.

The Seventh Circuit held that there is "no categorical rule against certifying a Rule 23(b)(3) state-law class action in a proceeding that also includes a collective action brought under the FLSA." *Id.* at 973-74. Further, the Court noted, "Nothing in the text of the FLSA or the procedures established by the statute suggests either that the FLSA was intended generally to oust other ordinary procedures used in federal court or that class actions in particular could not be combined with an FLSA proceeding." *Id.* at 974. The Court added that any confusion over the dueling opt in and opt out notices would only be exasperated by separate proceeding – at least having both claims in one action would ensure "notice from a single court, in a unified proceeding, where the court and lawyers alike are paying close attention to the overall message the participants will receive." *Id.* at 978.

The holding in *Ervin* has since been recognized and followed by other appellate courts. *See Knepper v. Rite Aid Corp.*, 675 F.3d 249, 259 (3rd Cir. 2012) ("we disagree with the conclusion that jurisdiction over an opt-out class action based on state-law claims that parallel the FLSA is inherently incompatible with the FLSA's opt-in procedure."); *Shahriar v. Smith & Wollensky Rest. Group, Inc.*, 659 F.3d 234, 247-49 (2d Cir. 2011) ("[W]e agree with the Seventh Circuit that … 'the conflict' between the opt-in procedure under the FLSA and the opt-out procedure under Rule 23 is not a proper reason to decline jurisdiction.") This growing recognition will undoubtedly lead to more combined actions, requiring the parties to work through both opt-in and opt-out processes in the same lawsuit.