Fenwick Employment Brief

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Michael A. Sands Editor 650.335.7279
Betsy White Contributor 650.335.7931
Fenwick
FENWICK & WEST LLP

## SHARPLY DIVIDED NINTH CIRCUIT AFFIRMS CLASS CERTIFICATION FOR MORE THAN ONE MILLION WAL-MART EMPLOYEES

The Ninth Circuit recently affirmed a 2004 district court's decision to certify a nationwide class of women in a gender discrimination class action against Wal-Mart, the country's largest retailer. The widely publicized 6-to-5 decision in *Dukes v. Wal-Mart Stores* will permit as many as 1.5 million female employees of Wal-Mart to seek back pay, declaratory relief, and injunctive relief.

The lawsuit was filed in the Northern District of California in 2001 by six female Wal-Mart employees seeking class certification on behalf of all women who had worked at Wal-Mart since December 26, 1998. They alleged that the retailer's nationwide policies violated Title VII by paying female workers less than their male counterparts for the same jobs and by giving fewer and slower promotions to women than to men. The class sought injunctive and declaratory relief, back pay, and punitive damages.

In 2005, after the district court determined that class certification was appropriate under Federal Rule of Civil Procedure 23 because the plaintiffs were united by an array of company-wide discriminatory practices, Wal-Mart sought an interlocutory appeal of the class certification decision. Wal-Mart argued that that the class did not satisfy Rule 23(a)'s commonality and typicality requirements, and that the large size of the class and potential claims in the billions of dollars undermined plaintiffs' claim that injunctive and declaratory relief predominated over monetary relief, as is required to qualify under Rule 23(b)(2). Wal-Mart argued that its stores operate independently of one another and should therefore be sued individually, while the plaintiffs' lawyers countered that individual lawsuits would be impractical and would create inconsistent results.

The issue was first heard by a three-judge panel of the Ninth Circuit and then by an eleven-member *en banc* panel. The *en banc* decision did not address the merits of the underlying discrimination claims against Wal-Mart, but rather it focused exclusively on the class certification procedural questions. The majority held that the district court properly conducted a "rigorous analysis" of the Rule 23 requirements and acted within its discretion in finding that the Rule 23 elements had been satisfied.

The court remanded two issues to the district court for further consideration: 1) whether the plaintiff's claims for punitive damages could be certified under Rule 23(b)(2) or (b)(3); and 2) whether class certification was proper with respect to employees who were no longer working at Wal-Mart by the time the suit was filed in 2001.

The sharply-worded dissent emphasized the unprecedented size of the class and contended that any discriminatory employment actions were the result of discretionary decisions by individual Wal-Mart managers rather than a centralized corporate policy: "Without evidence of a company-wide discriminatory policy implemented by managers through their discretionary decisions, or other evidence of a discriminatory company-wide practice, there is nothing to bind these purported 1.5 million claims together in a single action."

One important outcome of this decision is the Court's holding that a district court must apply a "rigorous analysis" when determining whether to certify a class under Rule 23. The Court explained that this analysis will often require the District Court to look beyond the pleadings—even to issues that may overlap with the merits of the underlying claims, such as statistical evidence of discrimination. Although in this particular case the class certification decision was upheld under the "rigorous analysis" test, it remains to be seen whether this test will favor parties opposing or advocating for class certification. It is also too soon to predict the effects of the Court's four-factor test for determining when monetary relief predominates over injunctive relief such that the class may not be certified under Rule 23(b)(2), though the Ninth Circuit's split with other Circuits on this issue is likely to subject this sharply-divided opinion to U.S. Supreme Court review.

## CALIFORNIA SUPREME COURT BROADENS JUDICIAL REVIEW OF ARBITRATION AWARDS

In *Pearson Dental Supplies, Inc. v. Superior Court*, the California Supreme Court held in a narrow 4-3 decision that arbitration rulings arising out of arbitration agreements in employment contracts are subject to a higher level of judicial review than other arbitration awards, and that the courts may vacate such decisions if based on legal error by the arbitrator.

After being fired, the plaintiff in *Pearson Dental* filed an administrative complaint with the Department of Fair Employment and Housing (DFEH) claiming age discrimination in violation of the Fair Employment and House Act (FEHA). Plaintiff subsequently filed a lawsuit in L.A. Superior Court, which was subsequently removed to an arbitration panel pursuant to an arbitration agreement that the plaintiff had entered into as a condition of employment. The arbitrator ruled in favor of the employer, finding that the claims were time-barred by a provision of the arbitration agreement requiring plaintiff to bring any claims arising from his employment within one year of the date he was fired. The plaintiff challenged that decision in the trial court, arguing that the arbitrator had made a clear error of law by, among other things, misinterpreting the tolling provisions of Code of Civil Procedure section 1281.12. The trial court agreed with the plaintiff, and it vacated the arbitration award in favor of the employer. The Court of Appeal reversed the trial court's decision on the ground that even though the arbitrator *had* misapplied the tolling period, the arbitrator's decision was "insulated" from judicial review and thus the trial court had overstepped its authority in vacating the arbitration award.

The California Supreme Court agreed to hear the case, and it ultimately concluded that arbitration decisions based on arbitration agreements entered into as a mandatory condition of employment are subject to a greater scope of judicial review than other types of arbitration agreements. The Court held that where an arbitrator's decision is based upon a legal error that effectively bars an employee from having its FEHA claims (or claims based on "other unwaivable statutory rights") from being decided on the merits, it is within a trial court's authority to vacate the arbitrator's decision.

In light of this opinion, employers who require arbitration agreements as a mandatory condition to employment may want to review these agreements with an attorney to ensure the enforceability of such agreements.

## NEWS BITES

### Ninth Circuit Refuses to Enforce Arbitration Agreement

In *Pokorny v. Quixtar*, the Ninth Circuit upheld a district court's order that a mandatory arbitration agreement was procedurally and substantively unconscionable under California law and thus unenforceable.

In a class action brought against it by a number of its distributors, Defendant Quixtar, Inc. sought to dismiss the lawsuit based on an arbitration agreement which plaintiffs had been required to sign before entering into business with Quixtar. The agreement would have required the plaintiffs to engage in a two-step conciliation process before entering into binding arbitration. The Ninth Circuit affirmed the district court's determination that California law should apply to the issue of whether the agreement was unconscionable, despite the agreement's choice-of-law clause selecting Michigan, because several of the plaintiffs were located in California. As its basis for finding that the agreement was procedurally unconscionable, the Court emphasized the fact that plaintiffs did not have the opportunity to individually negotiate the terms of the agreement, the agreement was presented on a take-it-or-leave-it basis, and that Quixtar retained the right to unilaterally amend at any time the rules of conduct which were to guide the conciliation and arbitration processes. With respect to upholding the district court's finding of substantive unconscionability, the Court concluded that the arbitration requirements were not mutual in that Quixtar was not obligated, as plaintiffs were, to submit claims to arbitration and that Quixtar maintained the right to alter the rules of conduct for the arbitration proceedings whereas plaintiffs did not.

The lessons for employers to take away from this case are not novel, but they are important nonetheless when drafting arbitration agreements: 1) allow each side the opportunity to negotiate the terms, rather than presenting it on a take-it-or-leave-it basis; 2) any terms of the agreement must be mutual; and 3) do not assume that a choice-of-law provision electing the law of another state will preclude the application of California law in an analysis of the agreement's validity.

### Firing Female Trucker for Failing Physical Fitness Test Raises Triable Issue of Discriminatory Pretext

In *Merritt v. Old Dominion Freight Line Inc*., the Fourth Circuit recently held that a female truck driver had raised a triable issue of fact as to whether her employer's reliance on a physical fitness test as a basis for firing her constituted a pretext for intentional sex discrimination. Plaintiff worked as a pickup and delivery driver for a nationwide trucking firm, and her transition to this position from her previous job as a line haul driver had allegedly been met with resistance by certain managers, who felt that women were not suited for pickup and delivery jobs. Upon returning from a work-related injury, plaintiff failed a physical fitness test administered by her employer because she was unable to place a weighted box on an overhead shelf and walk backward pulling a cable. Citing these test results, the employer fired her.

Plaintiff alleged that her employer had intentionally discriminated against her because of her sex and that the physical fitness test was merely a pretext to shroud the underlying discriminatory intent. Although a federal district court in Virginia dismissed plaintiff's case upon concluding that the physical fitness test constituted a non-discriminatory justification for her firing, the Fourth Circuit disagreed with the grant of summary judgment. It held that the plaintiff had raised a triable issue of fact as to whether the employer's *actual* motivation for her firing had been sex discrimination, particularly in light of the following facts: the employer's inconsistent administration of the test; evidence that male drivers returning from injuries had not been asked to take the test; and the alleged remarks by various managers that women were not suited for pickup and delivery work.

Cases such as this one should remind employers that even a seemingly gender-neutral policy such as a physical fitness test, if not evenly administered and/or carefully tailored to meet its purported safety aims, could be construed by courts as an attempt to conceal discriminatory intent.

**California Supreme Court to Review Issue of Mixed Motive Defense**

As we reported in the March edition of our employment brief, a California of Appeal ruled earlier this year in *Harris v. City of Santa Monica* that employers may now assert a so-called "mixed-motive" defense to discrimination claims brought under the state's Fair Employment and Housing Act ("FEHA"). Under the mixed-motive framework, an employer can escape liability for discrimination, even if a discriminatory motive was involved in an adverse employment action, so long as it can show that it would have taken the same action even without the discriminatory motive due to the presence of other, non-discriminatory, factors. On April 22, 2010, the California Supreme Court granted review of that decision. If upheld, the *Harris* decision will provide employers with a powerful tool for defending against discrimination and retaliation claims brought under the state's FEHA. We will continue to provide updates on this case as it progresses.

**HIV-Positive Manager May Bring Claim Under Amended ADA**

In one of the first reported cases applying the ADA Amendments Act, which took effect on Jan. 1, 2009, a district court in Northern Illinois held in *Horgan v. Simmons* that an employee who was fired a day after disclosing his HIV-positive status to the president of his company could pursue a claim for discrimination and impermissible medical inquiry claims under the amended Americans with Disabilities Act. Citing the EEOC's proposed regulations to implement the ADA Amendments Act, the court held that HIV substantially limits a major life activity—the function of the immune system—and therefore constitutes a disability under the ADA. The court also held that the employer's inquiry into the plaintiff's medical status despite plaintiff's repeated assurances that nothing was affecting his ability to work was an "impermissible medical inquiry" under the ADA Amendments Act, which prohibits "inquiries of an employee as to whether the employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity."

**Same-Sex Couples Sue CalPERS and Federal Government Over Denial of Long-Term Health Insurance**

A class action lawsuit filed last month by three same-sex couples, legally married under California law, alleges that the exclusion of same-sex domestic partners and spouses from coverage under state-run long-term care plans is a violation of their due process and equal protection rights. The case challenges a 1996 federal law that permits states to establish long-term care plans for their employees but excludes coverage for state workers' same-sex partners, including state workers who legally married their same-sex partners between May 2008 and November 2008. Although CalPERS has offered most of its benefits to same-sex couples since 2005, it contends that providing the long-term coverage (used by state employees to pay for extended stays in facilities such as nursing homes or assisted-living centers) to same-sex partners would jeopardize the program's federal tax status.