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CLASS ACTIONS: ALIVE & WELL

by: Laura K. Sitar, Esq.

Speaking of class actions, earlier this year, the Ninth Circuit Court of Appeal upheld certification of what appears to be the largest employment class action in the United States history, *Dukes v. Wal-Mart Stores*. The *Dukes* case, which was first brought by California employee, Betty Dukes, alleges female employees at Wal-Mart were routinely subjected to sex discrimination in pay, job assignments and promotions. The class may ultimately include all females employed in 3400 Wal-Mart stores since 1998. The potential numbers are staggering! Just as three residents in *Lavender v. Skilled Healthcare Group, Inc.* represented a class greater than the 32,000 residents, six females who worked for Wal-Mart could represent millions of current and former female employees in *Dukes v. Wal-Mart*.

Interestingly, evidence presented by both sides in various hearings held in the case to date has shown that hiring and promotion decision at Wal-Mart are made at an individual store level. Pay decisions are made at the store and district levels as well. Wal-Mart argued that with such a large number of individual decision makers at 3400 stores across the country there was not enough "commonality" to justify the class treatment. In other words, there is little to no evidence that a female employee's experience in one store relative pay or promotion was the same or similar to that of female employees in any other stores. The Court of Appeal disagreed and ruled that evidence of Wal-Mart's excessively subjective decision making in a corporate culture of uniformity and gender stereotyping suggests there are common legal or factual questions regarding whether Wal-Mart's policies or practices are discriminatory.

THIS IS A CASE WORTH WATCHING

Whether you are a Wal-Mart fan or a vocal detractor, this case is worth watching! The Supreme Court's decision whether or not to grant review will have major implications for all employers. Certification of discrimination cases as class actions has generally been disfavored absent evidence of clear discriminatory company policies and procedures. The individual nature of employment decisions surrounding hiring, firing and promotions makes every situation unique and not well suited to class treatment. Add hundreds of supervisors making those employment decisions and commonality is virtually gone. Unfortunately, at least for the time being, that lack of commonality does not appear to be a problem in class certification of employment discrimination cases.

If the Ninth Circuit's decision is allowed to stand, employers should anticipate a significant increase in the number of employment discrimination class actions filed. Claims will not be limited to sex discrimination, but are likely to include discrimination based on age, race, disability and a number of other protected categories. The stakes are high for employers.

Some employers may not see claims of sex discrimination as a significant concern in the long term environment based on the general make-up of the workforce, but what about age discrimination?

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Imagine a class action alleging discrimination in promotion brought on behalf of all aides or Certified Nursing Assistants in a number of states in a particular protected category. Class action treatment would potentially deny the employer the opportunity to examine and defend each promotional decision on an individual basis.

A shareholder at Wroten & Associates, Laura Sitar defends medical malpractice, employment, and elder abuse cases. She litigates cases on behalf of doctors, dentists and long-term care facilities involving all types of employment actions including sexual harassment, wrongful termination, retaliation and wage and hour claims. She also provides employment related risk management services to help clients avoid litigation.

Ms. Sitar became an attorney after a 15-year career in corporate management where she directed the human resource function of a 2000 employee, \$100 million region. Since commencing a second career in law 10 years ago, she was a senior associate with a prestigious healthcare defense firm before joining Wroten & Associates, where she is a shareholder.

Ms. Sitar graduated cum laude from Tufts University, in Boston Massachusetts in 1979. She attended Western State University, College of Law, where she graduated summa cum laude and valedictorian of her class in 1998. While at Western State she clerked for Justice William Rylaarsdam on the California Court of Appeals and successfully argued a sexual harassment and retaliation claim before the Ninth Circuit Court of Appeals. She was a recipient of the 1998 Fellowship of the American Board of Trial Advocates. Ms. Sitar has been a member of the California State Bar since 1998 and is admitted to practice in the U.S. District Court for the Central District of California.