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How to Avoid Rule 23 'Commonality' in Class Action Employment Litigation

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In many class action cases, plaintiffs seek to certify a class encompassing thousands of employees across multiple facilities and job titles. Fortunately for employers, before such a broad class can be certified, Rule 23 of the Federal Rules of Civil Procedure requires plaintiffs to establish, among other things, that there are common questions of law or fact among the proposed class members (the "commonality test").

One way employers seek to defeat class certification is by claiming that their employment decisions are decentralized and left largely (if not entirely) to the discretion of local management, thereby precluding the kind of commonality among putative class members that is necessary under Rule 23. However, some courts have certified broad classes spanning multiple facilities and job titles notwithstanding the presence of decentralized decision-making. These courts have held that, in decentralizing the decision-making process, the employer permits local managers to rely on overly subjective decision-making criteria, which results in discriminatory employment actions. In other words, ironically, the absence of centralized decision-making is treated as a factor that unifies the claims of the class members.

This article assesses whether and to what extent employers can defeat class certification based upon the existence of a decentralized, subjective decision-making. After surveying the pertinent case-law in the Second, Third, Sixth, Seventh and Ninth Circuits over the past 10 years, we offer practical guidelines that employers may use to avoid the certification of broad classes.

Split in Case Law

Can employment discrimination cases be maintained as class actions due to subjective, decentralized decision-making? Following is a review of the Supreme Court's Decision in *General Telephone Co. of Southwest v. Falcon*.

In that case, the Supreme Court made clear that "across-the-board" class actions would not be sufficient to satisfy the procedural requirements of Rule 23. 457 U.S. 147 (1982). Thus, a mere allegation of group discrimination is not enough to meet Rule 23(a)'s commonality test. However, the Supreme Court also identified an exception to this general rule: An employer's alleged general policy of discrimination can justify the certification of a broad class "if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through *entirely subjective decision-making processes*." *Id.* at 159 n.15 (emphasis added). Over the past 10 years, lower courts have not applied *Falcon* consistently.

Courts Acknowledging the Obvious

If plaintiffs submit evidence of a company-wide policy of discrimination, the employer cannot rely upon the existence of decentralized decision-making to defeat class certification. In *Wilfong v. Rent-A-Center, Inc.*, No. 00-CV-680, 2001 WL 1795093, at *1 (S.D. Ill. Dec. 27, 2001), plaintiffs sought to certify a class consisting of all women who had worked for the employer, which operated more than 2200 stores. Plaintiffs submitted hundreds of sworn declarations alleging that top company executives had made discriminatory comments about female employees. *Id.*

In certifying the proposed class, the court held that the employer's argument that local managers were responsible for making employment decisions was mooted by the fact that plaintiffs proffered evidence of a company-wide policy of sex discrimination. As the court stated, "[w]here, as here, there is strong evidence of a uniform policy [of discrimination], decentralization of the actual decision-making process, even if it exists, does not preclude a finding of commonality ..." *Id.* at *4.

In sum, if an employer is foolish enough to engage in a centralized policy of discriminating against a particular class, it should not be surprised if a court is unsympathetic to its position that decentralized decision-making precludes a finding of commonality.

Courts That Have Liberally Applied Rule 23's Commonality Test

With respect to decentralized decision-making, some courts have held that Rule 23's commonality test is satisfied if plaintiffs provide: 1) any evidence that the employer's decentralized decision-making includes subjective components; and 2) expert statistical evidence establishing that the decentralized, subjective decision-making process resulted in discrimination. Put another way, decentralized, subjective decision-making plus statistics equals "commonality." In *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999), plaintiffs sought to certify a class consisting of approximately 1300 African-American employees across 220 different occupations. Plaintiffs alleged that the employer had a company-wide policy of vesting supervisors with discretionary authority to discipline and promote employees. Plaintiffs also submitted statistical and anecdotal evidence showing that this policy resulted in discrimination. *Id.* at 286.

In reversing the district court, the Second Circuit held that "the fact that the Class Plaintiffs challenge the subjective components of company-wide employment practices does not bar a finding of commonality ... [w]here the decision-making process is difficult to review because of the role of subjective assessment, significant statistical disparities are relevant to determining whether the challenged employment practice has a class-wide impact." *Id.* at 292. The Second Circuit concluded that plaintiffs' statistical and anecdotal evidence satisfied plaintiffs' burden of demonstrating commonality. The Second Circuit also held that employers cannot rely upon their own statistical evidence to rebut plaintiffs' statistical evidence at the class certification stage and, consequently, rejected the district court's decision to credit the employer's statistical evidence over plaintiffs in denying class certification. See *Caridad*, 191 F.3d at 292.

Following the Second Circuit's lead, the district court in *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004) certified a nationwide class of over 1 million women who were allegedly subjected to discriminatory employment practices by Wal-Mart. In support of class certification, plaintiffs submitted: 1) evidence that Wal-Mart's compensation and promotion policies were similar across all stores; 2) expert statistical evidence of class-wide gender disparities; and 3) anecdotal evidence of discriminatory attitudes held or tolerated by management. *Id.* at 145.

The district court rejected Wal-Mart's argument that its practice of granting local managers substantial discretion in making employment decisions defeated commonality. Citing *Caridad*, the court held that "while the presence of excessive subjectivity, alone, does not necessarily create a common question of fact, where ... such subjectivity is part of a consistent corporate policy and supported by other evidence giving rise to an inference of discrimination, courts have not hesitated to find that commonality is satisfied." *Id.* at 149-50. Applying this standard to the facts, the court concluded that plaintiffs had submitted sufficient evidence establishing that Wal-Mart's policy of subjective decision-making resulted in discrimination, thereby satisfying Rule 23's commonality test. Following *Caridad*'s lead, the district court also rejected Wal-Mart's attempt to rebut plaintiff's statistical evidence through the use of its own statistical evidence, noting that it is inappropriate to engage in "statistical dueling" at the class certification stage. See *Dukes*, 222 F.R.D. at 154-55.

As a practical matter, it will be extremely difficult for employers in the Second Circuit and the Northern District of California to defeat commonality based upon the existence of decentralized, subjective decision-making. This is because the courts in these jurisdictions simply re-cast the employer's argument by concluding that the employer has a centralized policy -- thereby establishing commonality -- of allowing decentralized, subjective decision-making. According to the *Caridad* and *Dukes* courts, Rule 23 commonality will be present in almost any imaginable factual scenario: If decision-making is centralized, that centralization will create commonality among the plaintiff class members. And if, on the other hand, the employer leaves employment-related decision-making to individual managers in the field, this "policy" of decentralization will be-come the factor that unifies the claims of the class members.

Courts That Have Strictly Applied Rule 23's Commonality Test

With respect to decentralized decision-making, contrary to *Caridad* and *Dukes*, one district court has held that, absent an allegation that the employer adopted a decentralized, subjective decision-making policy for discriminatory reasons, plaintiffs cannot meet Rule 23's commonality test. In *Reap v. Cont'l Cas. Co.*, 199 F.R.D. 536 (D.N.J. 2001), plaintiffs sought to certify a company-wide class of approximately 5000 employees across 284 facilities. Plaintiffs alleged that the employer's policy of delegating discretionary authority to managers, without sufficient oversight, gave rise to common questions of fact warranting class certification. *Id.* at 538-39.

The district court denied class certification, stating that "[a]lthough there is some authority ... that a company's policy of delegating discretionary authority to subordinate managers [satisfies Rule 23's commonality test] ... we decline to follow these cases ... Instead, we believe that disparate treatment claims alleging ... [decentralized, discretionary decision-making] are not appropriate for class certification absent an allegation that the company intended to use this policy to discriminate against a protected class." *Id.* at 544 (internal citations omitted) (emphasis added). The court noted that plaintiffs did not allege that the employer used its policy for discriminatory reasons. *Id.* at 545. See also *Reeb v. Ohio Dep't of Rehab. & Corr.*, No. 04-3994, 2006 WL 162836, at **5-6 (6th Cir. Jan. 24, 2006) (denying class certification and stating that, "in order to find ... commonality, the precise nature of the various claims must be examined ... a general policy of discrimination is not sufficient to allow a court to find commonality").

Although cases like *Reap* take a stricter view of Rule 23's commonality test, it is unclear precisely how beneficial these cases are to employers. For example, is it sufficient for plaintiffs merely to allege (without providing any evidence) that an employer adopted a decentralized, subjective decision-making policy for discriminatory reasons? If so, this would be an easy standard to meet. However, if plaintiffs are required to proffer evidence to support this allegation, this truly would make it more difficult for plaintiffs to obtain the certification of broad classes. See *Reeb v. Ohio Dep't of Rehab. & Corr.*, 81 F. App'x 550, 558 (6th Cir. 2003) ("an allegation of discrimination neither demonstrates that the action satisfies Rule 23(a)'s requirements nor defines the proper scope of any class"). Unfortunately, issues such as these remain unresolved at the present time.

Other Important Factors Courts Consider

In determining whether a decentralized decision-making policy satisfies Rule 23's commonality test, it is important to be aware of other factors that may influence a court's decision.

One such factor is whether an employer's decentralized decision-making makes use of objective standards, in addition to subjective criteria. If employment decisions are motivated at least in part by objective standards, courts normally are less likely to find commonality. In *Donaldson v. Microsoft Corp.*, 205 F.R.D. 558 (W.D. Wash. 2001), plaintiffs sought to certify a class of all women and African-American employees, alleging that the employer utilized "an excessively subjective" system that resulted in discrimination. *Id.* at 562.

In denying class certification, the district court held that plaintiffs did not satisfy Rule 23's commonality test because the employer's system "appears, on its surface at least, to be a well-crafted combination of both objective and subjective measures. Employees are hired and slotted in a salary ladder ... Microsoft evaluates its employees twice a year. The bi-annual evaluations are conducted on a bell curve, with personnel in similar jobs competing against one another for 'grades.' However, the *subjectivity inherent in such a review process is tempered by a requirement that employee goals and objectives be mapped out well in advance* ... " *Id.* at 566 (emphasis added). See also *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 571 (6th Cir.), reh'g en banc denied, 2004 U.S. App. LEXIS 20702 (2004) (refusing to certify class where decision-making used objective criteria for promotions, such as time in service, attendance records and test scores); *but see Dukes*, 222 F.R.D. at 150 n.14 (distinguishing *Donaldson* and noting that, in *Donaldson*, "the court denied class certification in part based on a lack of commonality. Wal-Mart's practices, however, are significantly more subjective than those described in *Donaldson*") (citation omitted); *Warren v. Xerox Corp.*, No. 01-CV-2909, 2004 WL 1562884, at *11 (E.D.N.Y. Jan. 26, 2004) ("the existence of some objective factors does not negate a claim that the process is 'entirely subjective' where those variables are alleged to have been inappropriately applied").

Another important factor courts consider is the diversity of jobs and practices within the proposed class. Courts are less likely to find commonality when plaintiffs allege discrimination affecting many different positions at different levels or different locations within a company, because the proposed class is too widespread and diverse to "achieve the efficiencies that the class action suit was

created to achieve." *Beck v. Boeing Co.*, 203 F.R.D. 459, 464 (W.D. Wash. 2001), aff'd, 60 F. App'x 38 (9th Cir. 2003); see also *Bacon*, 370 F.3d at 571 ("[b]ecause class members have such different jobs, we find it difficult to envisage a common policy regarding promotion that would affect them all in the same manner"); *Grosz v. Boeing Co.*, 136 F. App'x 960 (9th Cir. 2005) ("plaintiffs are diverse in a way that affects commonality ... [t]he diversity within job classifications, with their varying degrees of complexity and analysis, affects the determination of whether the alleged discriminatory practice, excessive subjectivity, is discriminatory or a legitimate business practice"); but see *Staton v. Boeing Co.*, 313 F.3d 447, 462-65 (9th Cir. 2002) (affirming certification of class consisting of salaried and non-salaried employees where plaintiff provided substantial evidence that employer engaged in system-wide discrimination).

Practical Tips to Help Avoid Class Certification

As the foregoing discussion makes clear, the case-law is, to put it mildly, all over the map with respect to whether the existence of decentralized, subjective decision-making satisfies Rule 23's commonality test. Notwithstanding the lack of uniformity in the case-law, there are steps employers can take to help avoid a commonality finding under Rule 23:

- Establish that the challenged policies are not uniform in nature. Develop the record to establish that, over time, different locations and departments have utilized their own varying policies and practices regarding hiring, compensation, promotion and the like.
- Establish that the policy-making and decision-making process is de-centralized. For example, with respect to a promotion at a location, establish that the person with the final decision-making authority resides at that location, not at a single, centralized corporate headquarters.
- Establish that the putative class members were subject to different decision-makers relying on different criteria. For example, the decision-maker in Illinois might base his decision solely on experience, while a decision-maker in Texas might base her decision more on education.
- Establish that the decision-makers rely, at least in part, on objective information (eg, seniority, attendance, objectively measurable productivity) in making the challenged employment decisions.
- Establish the geographic dispersion of the putative class.
- Establish the organizational dispersion of the putative class, ie, the putative class members work for different divisions, affiliates, and reporting structures.

Develop facts regarding the broad diversity among the job positions and duties at each division/location/ department; develop facts showing how dispersed and complex the employer's workforce is (ie, the number of states with employees, the types of facilities, the types of occupations, etc.).

Conclusion

In recent years, courts have made it increasingly more difficult for employers to defeat the certification of broad classes by asserting that the class plaintiffs cannot satisfy Federal Rule of Civil Procedure 23(a)'s commonality test. Indeed, in many jurisdictions, it no longer is sufficient for employers simply to assert that employment decisions are decentralized and left to the discretion of local management. Given this trend in the law, and given that the case law applying Rule 23(a) varies significantly across jurisdictions, employers should familiarize themselves with the law in their jurisdiction so that they can understand precisely what steps they may take to best position themselves to argue that decentralized, discretionary decision-making defeats a finding of commonality -- and thus class certification.

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