



Employment Law Update 2011 ■ August 4, 2011

Class Actions: A Continuing Threat

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Association of Corporate Counsel
Central Ohio Chapter

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Why Are We Here?

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Class Actions Filed In the Last Few Months

- ❑ **Bayer** (gender discrimination)
- ❑ **Cigna Healthcare** (hostile work environment and gender discrimination)
- ❑ **Citigroup** (gender discrimination)
- ❑ **Goldman Sachs** (gender discrimination)
- ❑ **Lockheed Martin** (gender discrimination)
- ❑ **Chipotle Mexican Grill** (wage and hour)
- ❑ **Roto Rooter** (wage and hour)

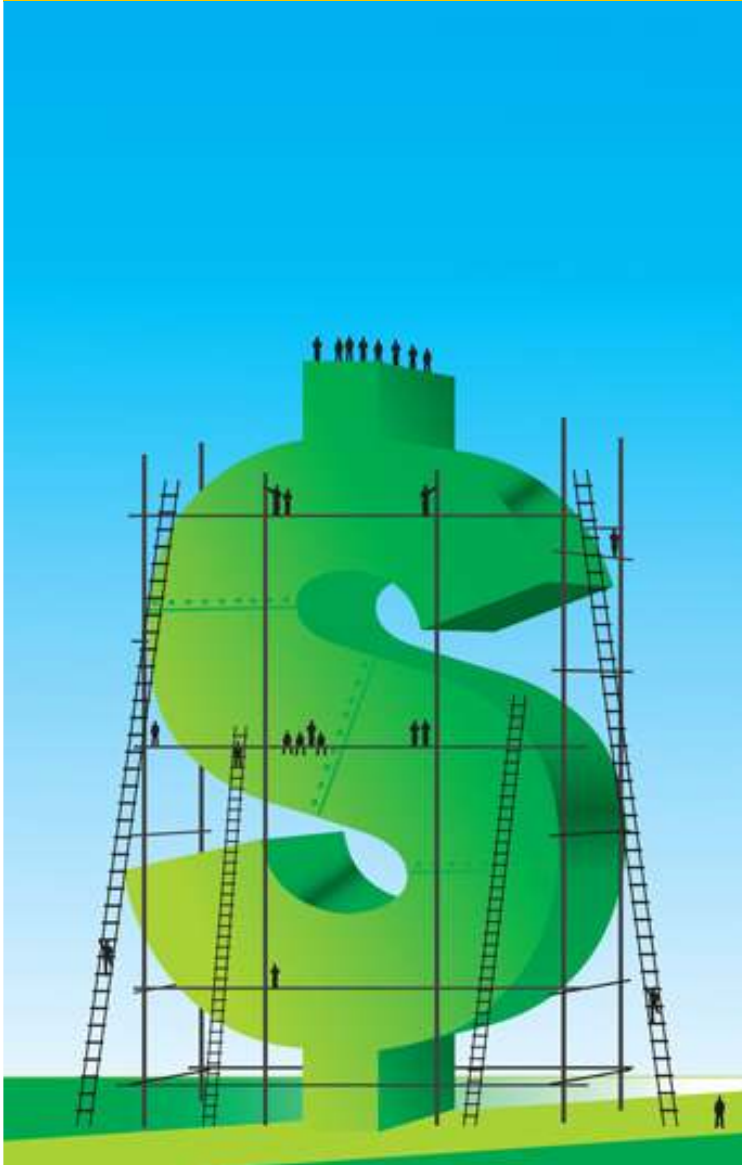


Bayer



Discrimination Class Actions Are Big Business

- ❑ ***Velez v. Novartis:***
Verdict - \$253.3 million
Settlement - \$175 million
- ❑ ***Butler v. Home Depot:***
\$87.5 million settlement
- ❑ ***Beck v. Boeing:*** \$72.5 million
- ❑ ***Amochaev v. Citigroup Global Markets:*** \$33 million
- ❑ ***Bellifemine v. Sanofi-Aventis:***
\$24.2 million settlement





***Dukes v. Wal-
Mart: The Ninth
Circuit Decision***

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The Ninth Circuit's Decision

- Found class treatment appropriate based not on showing of common policy or practice, but on basis of common question of whether female employees nationwide experienced discrimination of company-wide subjectivity in decisionmaking, some gender stereo-typing and anecdotal evidence of gender bias, and aggregated statistics sufficient to meet Rule 23(a)'s requirements





Walmart v. Dukes:
**The Supreme
Court Reverses
Certification**

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Dukes – The Supreme Court Decision

The U.S. Supreme Court held:

- ❑ “[t]he crux of this case is commonality”
- ❑ the alleged common injury must be capable of class-wide resolution
- ❑ “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” (emphasis added)



Dukes – The Supreme Court Decision

- ❑ **Wal-Mart policy of allowing discretion by local supervisors over employment matters not enough**
- ❑ **While subjective decision-making can be the basis of a Title VII claim, “the recognition that this type of Title VII claim ‘can’ exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common”**



Dukes – The Supreme Court Decision

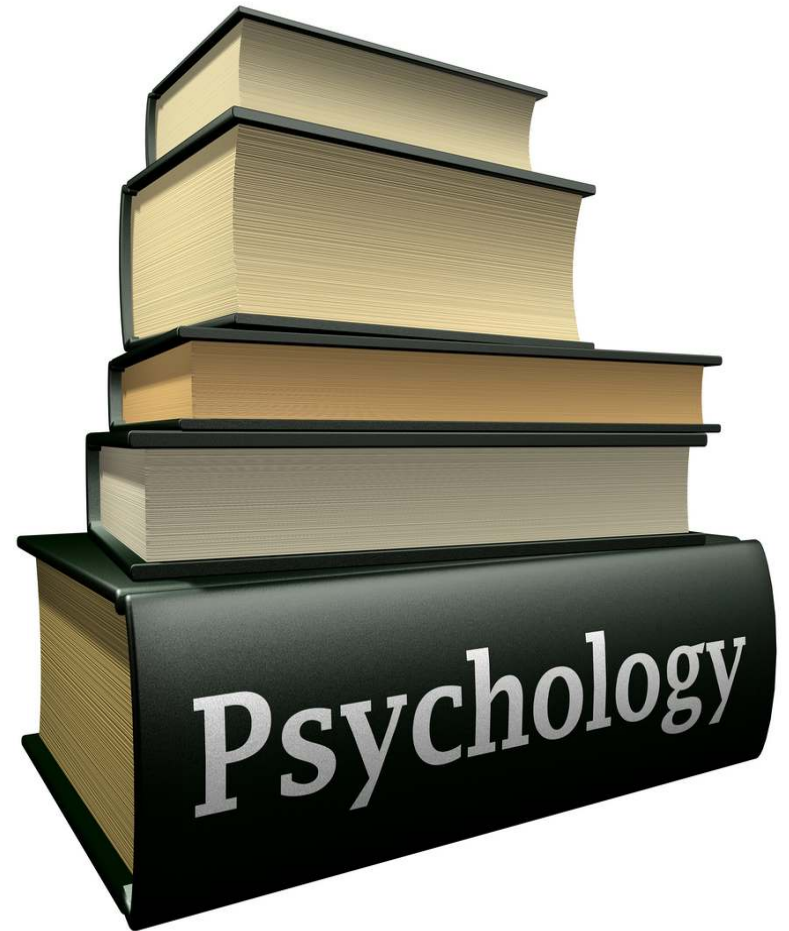
The U.S. Supreme Court held:

- “The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula. A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings. **We disapprove that novel project.**”



Plaintiffs' Legal Theories

- ❑ **Stereotypes distort memory, causing person to store stereotype instead of raw incoming information**
- ❑ **Unconscious bias evidence**
- ❑ **Implicit association tests**
- ❑ **Stereotypes operate largely independent of intent**





*AT&T Mobility v.
Concepcion*

*Class Action Waivers
Are Enforceable*

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The Issue

- Employers may now be able to eliminate the risk of class, collective and/or representative actions by establishing agreements to arbitrate individual claims only



Concepcion – The Facts

- ❑ **AT&T offered free phones with a service contract, but the phones arguably were not free — consumers were charged sales tax for value of the phones**
- ❑ **The Concepcions filed a class action in the U.S. District Court for the Southern District of California, claiming that AT&T committed false advertising and defrauded them**



Concepcion – The Facts

- ▣ **AT&T moved to compel arbitration—the service contract included a clause stating the parties agreed to resolve disputes in arbitration in their, “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding”**



Concepcion – The Decision

▣ The U.S. Supreme Court held:

- The primary purpose of the Federal Arbitration Act is to enforce the express agreement of the parties
- Any state law that creates an obstacle or impediment to enforcement of the express agreement of the parties is preempted



Impact on Employment Arbitration Agreements

- **Concepcion's decision should also apply to class action waivers in employment arbitration agreements**
- **Consider adopting mandatory arbitration policies with class action waivers and jury trial waivers**



**And Don't Forget
the DOL & EEOC**

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Some Significant Recent Recoveries

- ❑ **EEOC v. Outback Steakhouse: \$19 million**
- ❑ **EEOC v. CDG Management: \$7.4 million**
- ❑ **EEOC v. Les Schwab: \$2 million**
- ❑ **Green Bay Dressed Beef:
\$1.7 million (DOL)**
- ❑ **EEOC v. AKAL Security:
\$1.62 million**



THE EEOC Is Stepping Up Systemic Litigation

- **In FY 2010 165 systemic investigations completed:**
 - 29 settlements or conciliation agreements totaling \$6.7 million
 - 50 resolved with reasonable cause determinations referred to field legal divisions for possible litigation
- **20 lawsuits filed with at least 20 known or expected class members:**
 - 8% of all EEOC filings
 - Largest volume of systemic lawsuit filings
- **60 lawsuits on EEOC active docket at end of FY10 were systemic cases**
 - 13% of all active EEOC lawsuits

THE EEOC Is Stepping Up Systemic Litigation

- At end of FY 2010, 465 systemic investigations, involving more than 2,000 charges, were in process
- “Based on the large volume of systemic charges currently in investigation, we expect the quantity of systemic lawsuits and their representation on our total docket to continue to steadily increase”

EEOC Performance and Accountability Report FY2010

<http://www.eeoc.gov/eeoc/plan/2010par.cfm>





Wage & Hour Collective/Class Actions

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Frequently Litigated Issues

- ❑ Exempt misclassifications
- ❑ Exempt v. nonexempt
- ❑ Employee v. independent contractor
- ❑ Paid employee vs. unpaid interns?
- ❑ Regular rate miscalculations
- ❑ Rounding time
- ❑ Auto deductions for meal periods



Frequently Litigated Issues

- ❑ Missed/short meal and rest breaks
- ❑ Off-the-clock work
- ❑ Improperly calculating overtime
- ❑ Remote work
- ❑ Pre- and post- work activities
- ❑ Improper wage deductions
- ❑ Untimely wage payments



Introducing an Effective Compliance Program

- ❑ Many managers are *clueless* about wage & hour legal requirements
- ❑ Some managers may instruct employees to work off-the-clock due to budget restraints
- ❑ Many employees don't understand company policy and are careless timekeepers
- ❑ Some unscrupulous employees may falsely claim off-the-clock work

Measures Employers Can Take



■ The good news:

- Many “remedial steps” can be quickly implemented with little or no cost
- Most employers already have the basic compliance structure in place on which a more elaborate wage & hour compliance model can be built

Questions & Answers





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THANK YOU

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