



## California Law Update

Cathy L. Arias, Robert Bodzin and Brendan M. Brownfield

September 2010

### 1.5 Million Member Gender Discrimination Class Action Possibly Headed to the United States Supreme Court

On August 25, 2010, Wal-Mart Stores, Inc. ("Wal-Mart") appealed the Ninth Circuit Court of Appeals' 6-5 en banc decision in Dukes v. Wal-Mart Stores, Inc., 603 F. 3d 571 (9th Cir. 2010), to the United States Supreme Court. In Dukes, the Ninth Circuit Court of Appeals upheld the Northern District of California's historic decision to certify a nationwide class of over 1.5 million current and former female employees who claim to have been the victim of gender discrimination. Dukes v. Wal-Mart Stores, Inc., Case Nos. 04-16688 and 04-16720 (9th Cir. April 26, 2010) (en banc).

Relying heavily on Judge Ikuta's vigorous dissent in that opinion, Wal-Mart implores the Supreme Court to resolve the new three-way circuit split over the standard which must be met to determine whether the class members' monetary damage claims predominate over claims for equitable relief, so as to make certification of the class appropriate under Federal Rule of Civil Procedure 23(b)(2). The Ninth Circuit, Wal-Mart contends, muddies the waters by rejecting the majority "incidental damages" test followed by the Fifth, Sixth, Seventh, and Eleventh Circuits, as well as the minority "intent" test used by the Second Circuit, in favor of its own new (and purportedly defective) multi-factor test. Such variable standards, Wal-Mart argues, will encourage forum shopping by opportunistic plaintiffs.

Wal-Mart also advances the argument that the Ninth Circuit's decision violates the Rules Enabling Act, the Due Process Clause, and the Seventh Amendment by allowing Rule 23's procedural requirements to trump substantive rights, which in the process strips Wal-Mart and other large employers of the individualized defenses they are entitled to raise in response to discrimination claims. Wal-Mart cautions that if the Ninth Circuit decision is allowed to stand, class certification will become much easier across the board, and employers will be pushed to abandon legitimate business practices in favor of quotas and preferential treatment in order to avoid litigation.

The plaintiffs' opposition to Wal-Mart's petition is due on October 25, and if the Supreme Court grants review, a decision will probably come down before the current term concludes in June 2011. A Supreme Court decision in this case may clarify much of the uncertainty surrounding class certification under Rule 23, and employers throughout the United States, of any size, should pay close attention. We will continue to provide updates as they develop.

*Cathy L. Arias is the chair of Burnham Brown's Employment Law Department and specializes in counseling and representing employers. Ms. Arias and Burnham Brown have extensive experience and proven success in defending employers in class action lawsuits. Ms. Arias brings this experience with her when asked to perform labor and employment policy audits, especially those designed to test employers' vulnerability to class based liability. Ms. Arias can be reached at 510-835-6806 and [carias@burnhambrown.com](mailto:carias@burnhambrown.com). Robert Bodzin is a partner at Burnham Brown and one of the leaders of its Business and Commercial Practice Group. He has been trying and litigating cases in both New York and California for over 15 years. Mr. Bodzin is on the Steering Committee of the DRI Commercial Litigation Section where he is Publications Chair. Mr. Bodzin is also a member of the California State Bar Executive Committee for the Litigation Section where he is Educational Programs Chair. Mr. Bodzin can be reached at 510-835-6833 and [rbodzin@burnhambrown.com](mailto:rbodzin@burnhambrown.com). Brendan M. Brownfield is a litigation associate with Burnham Brown. He is a member of the firm's Business and Commercial, Employment, and Transportation Practice Groups. Mr. Brownfield can be reached at 510-835-6732 and [bbrownfield@burnhambrown.com](mailto:bbrownfield@burnhambrown.com).*