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Client Alert

Seventh Circuit Authorizes An "Issue Class Action" in Response to *Dukes*

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Since the U.S. Supreme Court's decision last summer in *Wal-Mart v. Dukes*, 131 S.Ct. 2541 (2011), there has been no shortage of discussion about the significance of the Court's decision. The Seventh Circuit's recent decision in *McReynolds v. Merrill Lynch*, 672 F. 3d 482 (7th Cir. Feb. 24, 2012) shows that courts will continue to be receptive to creative class action theories. Indeed, a second reading of *McReynolds* suggests that class action litigation in this area may be poised for a dramatic, and worrisome, change in focus.

McReynolds is a class action alleging race discrimination brought by seven hundred black stock brokers working for Merrill Lynch. Among other things, plaintiffs claim that black brokers make significantly less money than whites. Plaintiffs' counsel apparently didn't believe the initial press reports that *Dukes* was the death knell for employment discrimination class actions. Just a month after the Supreme Court's decision, plaintiffs sought reconsideration of the district court's prior denial of their motion for class certification. They relied on *Dukes.* While denying plaintiffs' motion, the district court encouraged an interlocutory appeal under Rule 23(f). The Seventh Circuit took the appeal, and in an opinion written by Judge Posner, reversed. The court concluded that a class action should have been certified pursuant to Rule 23(c)(4)(A) as to two specific issues raised by plaintiffs.

In *Dukes*, the Court reversed a decision certifying a class of 1.5 million employees claiming disparate impact sex discrimination. Wal-Mart afforded local managers discretion over employment decisions such as pay and promotions, with only very basic and objective limitations (which were not challenged). The class alleged that managers exercised their discretion disproportionately in favor of men. The Supreme Court held that class certification was inappropriate because it would be impossible to determine the reasons behind each of the employment decisions on a class-wide basis. *Dukes*, 131 S.Ct. at2552 ("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*.").

According to Judge Posner, the critical difference between *McReynolds* and *Dukes* was the existence, in the former case, of company-wide policies that significantly limit the discretion of individual supervisors and managers. Plaintiffs in *McReynolds* challenge two features of Merrill Lynch's broker incentive compensation system. The first is a policy authorizing brokers, rather than managers, to form and staff sales teams. This teaming policy is optional; individual brokers decide with whom they wish to team, if anyone, and whom to admit to the team. The second is Merrill Lynch's account distribution policy, which governs the transfer of a former broker's accounts to a current broker in the same office. Brokers compete for account distributions, which are awarded by management based on records of revenue generated and the number and investments of clients retained. The *McReynolds* plaintiffs claim these policies facilitate racial discrimination by white brokers; they allege the teaming policy makes it more difficult for black brokers to join teams (or, more accurately, high

performing teams). This barrier decreases the likelihood that class members can obtain valuable account distributions, thus contributing to a significant race-based statistical disparity in compensation.

The Seventh Circuit endorsed this theory. It rejected the employer's argument that any racial discrimination that may exist as a result of these practices is necessarily the outcome of individual decisions by supervisors that are inappropriate for class treatment after *Dukes.* The court recognized that Merrill Lynch managers had a "measure of discretion" in implementing these policies, including the ability to veto teams and supplement the company criteria for distribution of former broker accounts. Yet the court concluded that these facts distinguished *Dukes*, because the managerial discretion is inevitably influenced by the company-wide policies. Judge Posner summarized the plaintiffs' allegation that the teaming policy effectively create "little fraternities" in which brokers choose as team members "people who are like themselves." In concluding that this practice supported a disparate impact class claim, the court observed: "[t]here is bound to be uncertainty about who will be effective in bringing and keeping shared clients; and when there is uncertainty people tend to base decisions on emotions and preconceptions, for want of objective criteria." *McReynolds*, 672 F.3d at 489.

The court held that Rule 23(c)(4)(A) made class resolution appropriate as to the questions of whether these policies were illegal. This provision permits a district court to exercise its discretion to certify a class "with respect to particular issues." Judge Posner relied on decisions in several mass tort cases to support his conclusion. Case law in that area is characterized by a spirited debate as to whether "issue class actions" are appropriate for resolution of common legal or factual issues that often arise in such cases. Judge Posner apparently believes that, as with some types of mass tort cases, courts can reconcile the competing considerations presented by disparate impact Title VII case by "carving at the joints of the parties' dispute. If there are genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop while leaving the remaining claimant specific issues to individual follow-on proceedings." *McReynolds,* 672 F.3d at 491. Judge Posner professed concern for one of the competing issues present in many mass tort cases – the financial solvency of the defendant. But he concluded that Merrill Lynch is "in no danger of being destroyed by a binding class-wide determination that it has committed disparate impact discrimination against 700 brokers." *Id.*

In his inimitable style, Judge Posner's opinion addresses standards for applying Rule 23(f)'s provisions for interlocutory review of class action rulings. And, in rejecting the argument that plaintiffs' motion was time-barred, he provides a fascinating perspective (at least to this lawyer) on the technical issue of whether such appeals are jurisdictional.

But the real significance of *McReynolds* is Judge Posner's suggestion that the concepts used in "issue class actions" in the mass tort world are appropriately applied to employment class action litigation. This is big news because the use of this device in mass tort litigation remains highly controversial. *See, e.g., Castano v. American Tobacco Company*, 84 F.3d. 734 (5th Cir. 1996) (reversing district court ruling certifying several issues pursuant to Rule 23(c)(4)(A) in a multistate class action brought on behalf of tobacco users). There are serious questions as to whether an expansive view of "issue class actions" is consistent with the requirements of Rule 23(a) and Rule 23(b), particularly the requirements that plaintiffs demonstrate both that a class action is superior to

individual litigation and that common questions of law and fact actually predominate. Many of these cases raise important Seventh Amendment issues, for both plaintiffs and defendants. Scholars have criticized the aggressive use of "issue class actions" for a variety of reasons. These include the argument that they are inconsistent with important individual autonomy interests protected by the predominance and superiority requirements of Rule 23. *See, e.g.,* Banks, *The Dangerous Allure of Issue Class Actions,* 79 Ind. L. Rev. 567 (2004). None of these issues were addressed in *Dukes.*

We probably won't have long to wait before lawyers begin citing Judge Posner's opinion in *McReynolds* as an endorsement of efforts to export concepts borrowed from mass tort decisions into employment law. This alone makes *McReynolds* worth a closer read. It is hard to imagine that the widespread use of issue class actions under Rule 23(c)(4)(A) in employment law would be a positive development for employers trying to comply with today's jumble of federal and state employment discrimination law.

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