

Claremont Management Group Presents WalMart Class Action & Recent Cases August 2, 2011

By

**DAVID D. SCHEIN, President and General Counsel,
Claremont Management Group, Inc.**

1. *WalMart vs. Dukes* – US Supreme Court, 06/30/11:

Betty Dukes, CA Employee of WalMart, leads a class action of up to 1.5 million women claiming systemic discrimination against women.

CA District Court and infamous 9th Circuit CA both certify class for plaintiffs.

USSC tosses the case, but note two sets of rulings:

- a. Conservative majority rule 5-4 that there are insufficient bonds of law and fact, FRCP 23 a (2), among the many plaintiffs. Suggests it would be impossible to show this given that WalMart with 3,400 stores in the US, is so large and decentralized. A sociologist tried to show on behalf of the plaintiffs that WalMart's corporate culture made it vulnerable to gender bias.
- b. Unanimous Court rules that plaintiffs attempted to proceed under the wrong section of FRCP b. They attempted to proceed under the injunctive/declaratory section (2), instead of section (3). The administration requirements of (3) caused the plaintiffs pick (2), instead, but the court said that the plaintiffs were seeking monetary damages. See excerpts below:

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

c. Impact on other pending cases:

- (1) *Chen-Oster et al vs. Goldman Sachs & Co and The Goldman Sachs Group Inc*, U.S. District Court, Southern District of New York, case no. 1:10-cv-06950
- (2) Costco
- (3) Toshiba Corp
- (4) Bayer
- (5) Cigna

d. General Rules as a Result:

- (1) Have a company policy against discrimination and promulgate that policy.
- (2) Enforce the policy consistently. Take complaints against managers and supervisors especially seriously.
- (3) Where appropriate, discipline employees and managers for discriminatory conduct.
- (4) Conduct training and document the training that takes place.

2. Stay out of California:

New ruling by CA Supreme Court, *Sullivan v. Oracle Corp*, says that out-of-state employees of in-state companies must be paid under CA OT rules when they are working in CA. This means: OT after 8 or 40, 2x after 12 in a day or after 8 hours in the 7th day of a workweek.

3. Independent Contractors:

- a. Crack down at all levels
- b. Watch for unemployment claims by ICs
- c. Approach:
 - (1) Evaluate the position from the beginning
 - (2) Have clear understanding
 - (3) Use lawyer-approved ICA for each IC
 - (4) Monitor what is happening with each IC

4. Texas Unemployment Compensation:

- a. Many claims granted at first level
- b. Appeals tend to run in favor of the employer
- c. Most claimants are calling in for their appeals, no easy wins.
 - (1) Submit all documents in advance. If there are new docs, make sure you submit them.
 - (2) Line up your witnesses! This is the most critical step in winning these cases.
 - (3) Be consistent! Reasons for termination should be same from day before the termination through the day of the last appeal.