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Age Discrimination

Ninth Circuit Revives Police Officers' Age Bias Class Action Over Scrapped Exam

A group of over-40 San Francisco police officers denied promotion when the city scrapped the results of a 1998 promotional exam may be entitled to proceed with their age bias allegations as a class, the U.S. Court of Appeals for the Ninth Circuit ruled April 24 (*Stockwell v. City & Cnty. of San Francisco*, 2014 BL 113930, 9th Cir., No. 12-15070, 4/24/14).

Reinstating the officers' class claim under California's Fair Employment and Housing Act, the appeals court applied U.S. Supreme Court precedent from a securities fraud case to find that a lower court used the wrong approach in rejecting the proposed class for failure to raise a common question of law or fact warranting class treatment.

At the class certification stage, a court reviewing a proposed class under federal procedural rules may only consider the merits of the underlying allegations to the extent necessary to determine whether commonality or some other prerequisite for class treatment has been met, Judge Marsha S. Berzon said for a unanimous appeals panel.

Plaintiffs' and management lawyers told Bloomberg BNA that the decision is a novel one. They also agreed that the impact of the decision on employment class actions will likely be significant and felt well beyond the Ninth Circuit. They disagreed, however, on whether that is a welcome development.

''This is a very important issue that I think will have resonance for courts throughout the country,'' Joseph M. Sellers of plaintiffs' class action law firm Cohen Milstein Sellers & Toll PLLC in Washington said April 25. He said class certification has gotten increasingly costly, onerous and time-consuming for both employees and employers.

''This decision should help that a bit'' by avoiding protracted litigation of the merits of a case at the class certification stage, he said. The ''foreshortening'' of the certification process ''should benefit everyone,'' he added.

But Gerald L. Maatman Jr., a senior partner with management-side firm Seyfarth Shaw LLP in Chicago and New York, told Bloomberg BNA April 25 that the decision ''dilutes'' the Supreme Court's holding in the landmark employment class action *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 112 FEP Cases 769 (2011) (118 DLR AA-1, 6/20/11). *Dukes* is widely viewed as limiting the ability of large groups of employees to sue collectively for employment discrimination.

''*Stockwell* makes it easier for the plaintiffs' bar to litigate workplace class actions,'' he said. ''Cases will be easier to certify, and litigation will last longer and pose more risks'' for employers, Maatman said.

Court Says Merits Analysis Too Extensive. The appeals court found that the U.S. District Court for the Northern District of California went beyond the limited merits review in faulting the proposed class's statistical showing of an age-based disparate impact in the city's 2005 change in its policy for promotion to the position of assistant inspector.

The trial court ruled that the evidence didn't include a regression analysis accounting for possible alternative explanations—other than age—for the statistical disparity.

But under the Supreme Court's decisions in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013) and *Dukes*, Berzon said, to satisfy the commonality requirement of Rule 23 of the Federal Rules of Civil Procedure, the officers only needed to identify a single common question of law or fact, and they didn't need to prove that they ultimately will prevail on that common question.

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The officers met their burden by pointing to the San Francisco Police Department's one-time change in its promotional process eliminating the results of a 1998 exam that the officers had all passed and expected to eventually result in their promotion to assistant inspector, the appeals court ruled.

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The court added that the officers backed their identification of a single, common discriminatory policy with a statistical study that presumably establishes the age-based disparate impact of the policy, which is all they needed to do to meet Rule 23(a)(2)'s commonality requirement.

''[W]hatever the failings of the class's statistical analysis, they affect every class member's claims uniformly, just as the materiality issue in *Amgen* affected every class member uniformly,'' Berzon wrote. The quality of their proof, she said, is an issue for later in the case, not the class certification stage.

Officers Were on List for Promotion. According to the opinion, the proposed class members are all police officers over the age of 40 who took and passed the department's Q-35 exam for promotion to assistant inspector in 1998 and were placed on a list of candidates eligible for promotion.

However, they had not yet been promoted by 2005, when the city announced a new promotion policy aimed at improving operational flexibility and promotional progression. As a result of the change, assistant inspectors were no longer hired for the SFPD's investigations bureau from the Q-35 list and a new Q-50 sergeant's exam was used instead to fill the duties that previously had been assigned to assistant inspectors.

The officers sued, initially asserting both age-based disparate impact and pattern-or-practice claims under FEHA and the Age Discrimination in Employment Act. However, after their first request for class certification was denied, they amended their complaint by dropping the pattern-or-practice claim.

A second class certification motion likewise was denied in August 2010 on the ground that the officers' statistical proof fell short of establishing common questions among the potential class members, and the officers sought immediate appellate review of the issue.

ADEA Claim Forfeited. The Ninth Circuit granted the motion for interlocutory review, but noted that the officers failed to adequately brief their ADEA claim on appeal and thus forfeited it. However, the appeals court found that the district court committed a legal error in denying certification of their FEHA age bias claim.

Berzon said under *Dukes,* identifying even a single common question is sufficient to establish class commonality for purposes of Rule 23(a)(2). She said *Dukes* further held that while ''some overlap'' with the case's underlying merits is inevitable at the class certification stage, any merits review at that point should be limited to the extent necessary to determine whether an issue common to the class as a whole exists.

Amgen—which was ''published over a year after the district court decision here''—clarified the application of those principles by holding that ''commonality does not require proof that the putative class will prevail on whatever common questions it identifies,'' the Ninth Circuit found. That *Amgen* was a securities fraud case in which class certification was sought under Rule 23(b)(3)—rather than Rule 23(a)(2)—was without consequence, the court said.

''Rule 23(b)(3) imposes a 'far more demanding' standard than 23(a)(2),'' Berzon wrote.

Reliance on *Amgen* Proper? Class certification bids under Rule 23(b)(3) also require proof that the common question is predominant over individual issues in the case and that the proposed class will be manageable for the court, Maatman told Bloomberg BNA.

He said the Ninth Circuit's reliance on a Rule 23(b)(3) ruling ''to make its Rule 23(a)(2) pronouncements'' was ironic and somewhat surprising.

''Rule 23(a)(2) is often a huge road block'' in employment class actions involving pay, promotion and similar decisions ''due to individualized personnel decision-making and individualized damages,'' and *Dukes* ''put real teeth into the commonality requirement,'' Maatman said. The Supreme Court in *Dukes* confirmed that an analysis of the merits isn't impermissible provided ''the analysis is part and parcel of looking at the issue of whether plaintiffs established their burden to show all the Rule 23 prerequisites.''

Since *Amgen* came down, he said, plaintiffs' attorneys have used it ''to argue that district court judges abuse their discretion by delving 'too much' into the merits.'' In other words, they use *Amgen* to try to ''tone down'' *Dukes*, he said.

The instant case ''is one of the first to adopt this argument of the plaintiffs' bar in an employment-related class action context,'' Maatman said.

But Sellers said the Ninth Circuit's reliance on *Amgen* was ''logical and easily foreseen.'' The principle that *Amgen* supports is broad and applies equally in the Rule 23(b)(3) and Rule 23(a)(2)—and the securities fraud and employment—contexts, he said.

Potential Influence and Takeaways. Sellers and Maatman agreed, however, that the Ninth Circuit's ruling might prove to be far-reaching in influence.

''I believe the decision will have influence beyond the Ninth Circuit,'' Sellers said. *Dukes* and *Amgen* are both relatively recent decisions by the Supreme Court, which lower courts are still trying to make sense of, he noted.

From that standpoint, any case interpreting either *Dukes* or *Amgen* is ''significant,'' he said. In addition, the issue decided by the Ninth Circuit of where to draw the line on merits analyses at the class certification stage really ''hasn't been addressed yet,'' Sellers said.

He added that the decision also ''reminds us'' that *Amgen*, *Dukes* and other recent Supreme Court class action rulings affect class cases that are already pending, and may even alter the outcome in such cases.

''There is a lot of recalibration going on'' as a result of the high court's class rulings, Sellers said.

Maatman told Bloomberg BNA that he expects ''to see widespread citation of the decision by the plaintiffs' bar all over the country.'' The case also ''underscores how important venue is in class actions,'' he said, noting that the Ninth Circuit is viewed as ''exceedingly

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plaintiff-friendly'' on class certification issues, and ''demonstrates that national employers are more apt to be sued there in class actions than in other circuits.''

In addition, Maatman said, the case demonstrates ''that personnel decisions and policies cutting across large groups of workers are more fertile targets of opportunity for the plaintiffs' bar.''

Judges J. Clifford Wallace and Raymond C. Fisher joined the opinion.

Michael S. Sorgen, Andrea A. Brott and Ryan L. Hicks of Law Offices of Michael S. Sorgen and Richard A. Hoyer of Hoyer and Associates, all in San Francisco, represented the police officers. Christine Van Aken, Jonathan C. Rolnick, Dennis J. Herrer and Elizabeth Salveson of the city attorney's office represented San Francisco.

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