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St. Louis Chapter

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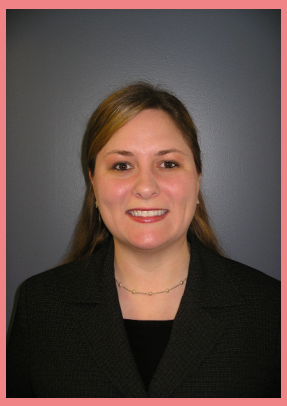

President's Message

The summer is sizzling, and so is the ACC events calendar! Please check out the upcoming events on our website, and join us!

We would also like to celebrate our Large Law Members. If your legal department has nine or more attorneys (whether locally or globally), your department can realize significant savings by signing up to be a Large Law Member. Several companies in the St. Louis region have taken advantage of this special membership. Large Law Membership includes ACC membership at a discount, along with an on-site personalized demonstration of ACC services to help the attorneys in your department maximize their membership.

The ACC-St. Louis Chapter would like to thank the following Large Law Member Departments:

American Water Company
Anheuser-Busch Companies, Inc.
Anthem Blue Cross and Blue Shield
The Boeing Company
Bunge Global Markets, Inc.
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Covidien
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Wells Fargo Advisors
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Zurich North America Group

If you would like to know more about Large Law Membership, please contact Danielle Boshart at boshart@acc.com or 202-293-4103 ex. 307.

If you have any questions, comments or suggestions for the ACC-St. Louis Chapter, please contact our Chapter Administrator, Kathleen Yarborough.

Enjoy the rest of your summer!

Kathleen Molamphy
Chapter President, St. Louis

Wal-Mart Stores, Inc. v. Betty Dukes: Without Commonality, There Is No Class

By: Brad Goss, Partner - SmithAmundsen LLC

Wal-Mart Stores, Inc. still may have low prices but the company no longer has a class action suit pending against it as the United States Supreme Court issued its decision on June 20, 2011 in Wal-Mart Stores, Inc. v. Betty Dukes, et al., 2011 U.S. Lexis 4567 in favor of Wal-Mart. The massive class action suit had been pending for approximately ten years against Wal-Mart Stores, Inc.

The District Court and Ninth Circuit Court of Appeals had previously approved certification of the class, represented by three class representatives, who alleged that discretion exercised by local store managers over pay and promotion matters violated Title VII by discriminating against women. The class action was one of the most expansive ever, involving a class of approximately 1.5 million members. The ruling is extremely significant because it raises barriers to class action suits by setting stricter requirements for the commonality test under Rule 23(a)(2) and prohibiting all but incidental damages claims in suits brought for injunctive or declaratory relief under Rule 23(b)(2).

Wal-Mart operated its more than 3,400 stores with a set of policies that placed broad discretion with respect to pay and promotion decisions in the hands of local managers. Within limits, local managers could increase wages of hourly employees with limited corporate oversight and with respect to salaried employees higher corporate authorities had discretion with respect to pay. Promotions were also governed by a discretionary system that allowed store managers to use subjective criteria in selecting management candidates with some objective criteria such as certain minimum performance ratings and a year of service. Wal-Mart had an express policy against gender discrimination.

Respondents claimed that the company discriminated against all women employees on the basis of sex by denying them equal pay or promotions in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. §2000E-1et seq. The Respondents claimed that a strong and uniform culture allowed bias against women to affect the discretionary decision making of managers, thus making all women employees victims of one common discriminatory practice.

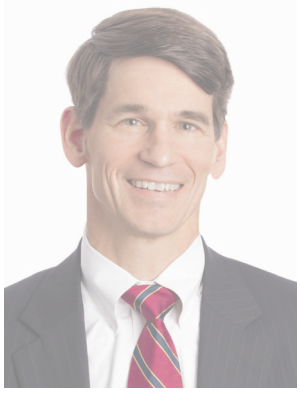
Rule 23(a) of the Federal Rules of Civil Procedure requires that a party seeking class certification must show that all of the following four tests are met: 1. the class is so numerous that joining all members is impracticable; 2. there are questions of law or fact common to the class; 3. the claims or defenses of the representative parties are typical of the claims or defenses of the class; and 4. the representative parties will fairly and adequately protect the interests of the class. Second, Rule 23(b) requires that the party seeking class certification meet at least one of the following three requirements: 1. prosecuting separate actions by or against individuals would create a risk of either inconsistent or varying adjudications or adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interest of the other members; 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 questions of law or fact 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.

In overturning the class certification, the Court focused on the so-called "commonality" requirement of Rule 23(a)(2), stating that "the crux of this case is commonality – the rule requiring a plaintiff to show that there are questions of law or fact common to the class." Citing its prior opinion in General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982), the Court explained that this requirement means that the plaintiff must demonstrate that the class members have suffered the same injury. Thus, the requirement does not mean that class members have suffered the same violation of the law (e.g., a Title VII injury or a disparate impact injury) but that a single class wide remedy will provide relief for all class members.

Significantly, the Court stated that satisfying Rule 23 is not a mere pleading standard but rather, the party seeking class certification must affirmatively demonstrate compliance with the Rule and the trial court must satisfy itself "after a rigorous analysis" that all of the Rule 23 requirements are met. Therefore, in certifying a class a court must give consideration to the merits of the claims. In enunciating these principles, the Court clarified its prior ruling in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974) that had been cited, erroneously, for the idea that in considering class certification a preliminary inquiry into the merits of a class action was improper. In applying this principle, the court noted that the proof of commonality necessarily overlaps with Respondents' contention that Wal-Mart engages in a pattern and practice of discrimination because in resolving a Title VII claim, the crux of the inquiry is the reason for a particular employment decision.

The Court reiterated the two means set out in its prior opinion in Falcon, supra, by which the link between an individual's claim of discrimination and the existence of a class of persons who had suffered the same injury could be shown for purposes of class certification: evidence of a biased testing procedure, or significant proof that an employer operated under a general policy of discrimination. After noting that Wal-Mart had not used any company-wide testing procedure, the Court examined the evidence produced by the Respondent to demonstrate discrimination on the part of Wal-Mart and found the Respondent's evidence lacking. The only evidence Respondent produced of a general policy of discrimination on the part of Wal-Mart was expert testimony by a sociologist using "social framework" analysis. This analysis, according to the expert, showed that Wal-Mart had a strong corporate culture that made it vulnerable to gender bias. However, the Court rejected this evidence as insufficient (setting aside the Daubert issues) because the expert was unable to state what percent of employment decisions at Wal-Mart were influenced by such stereotyped thinking. The Court was also critical of the lack of any verifiable method to measure or test the expert's variables that led to his conclusions regarding bias.

(Continued on page 3)



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Wal-Mart Stores, Inc. v. Betty Dukes: Without Commonality, There Is No Class

By: Brad Goss, SmithAmundsen LLC

(Continued from page 2)

The Court recognized and, indeed, cited its earlier opinion in Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988) that a corporate culture that allowed discretion by local supervisors in employment matters could be the basis of a Title VII claim under a disparate impact theory. However, the Court emphasized that the possibility of such discriminatory bias and meeting the requirement of the commonality test by showing a common mode of exercising discretion by Wal-Mart employees that was actually infected with such bias was a different burden that the Respondent had not met. The Court found similarly unpersuasive the statistical evidence produced by the Respondent because the evidence did not address conduct at the individual stores but merely showed disparities at the national and regional level between pay and promotions for female employees as opposed to male employees. Further, the statistical analysis was deficient because it wholly failed to identify specific common discriminatory employment practices. Finally, the Court found the 120 affidavits reporting discriminatory conduct were unpersuasive because they were the equivalent of approximately one comment for every 12,500 class members, related to only 235 of Wal-Mart's 3,400 stores and were concentrated in only six states. Thus, these anecdotes failed to show that the company operated on a general policy of discrimination.

In justifying its analysis of the dissimilarities between class members, the Court rejected the argument made by the dissent that the Court was blending the requirements of Rule 23(a)(2) and those of Rule 23(b)(3) regarding the predominance of common questions over individual ones. The Court noted that the analysis was necessary in the context of a Rule 23(a)(2) examination to establish whether there was even a single common question. The Court concluded that no such common question was shown to exist in this case because Respondents provided no convincing proof of a company-wide discriminatory pay and promotion policy.

The Court also ruled that the Respondent's claims for back-pay were improperly certified under Rule 23(b)(2) and more broadly held that claims for monetary relief may not be brought under Rule 23(b)(2) where such monetary relief is not incidental to the injunctive or declaratory relief sought under a Rule 23(b)(2). The Court did not decide the question of whether there were any forms of "incidental" monetary relief that would be available under Rule 23(b)(2) and comply with the Due Process clause.

In reaching this conclusion, the Court noted that an action brought under Rule 23(b)(2) provides relief that is appropriate to the class as a whole in the form of injunctive or declaratory relief. Thus, the single injunction or ruling provides relief for the entire class as a whole. In contrast, claims for back-pay or compensatory relief vary by individual and Rule 23(b)(2) does not authorize certification when each class member is entitled to an individualized award of damages. The Court distinguished actions under Rule 23(b)(3) that allow for notice and opting out by members of the class who may wish to pursue their individual damage claims, protections not available to a member in a Rule 23(b)(1) or (b)(2) class. Finally, the Court criticized and rejected the approach of the Ninth Circuit Court of Appeals that would allow damages claims to proceed under "Trial by Formula" where a sample set of class members would be selected for examination by a special master as to liability for sex discrimination and owed back-pay to determine an average back-pay award that would be awarded to the entire class. Such an approach would adversely affect the substantive rights of the party opposing the class action who to be afforded due process was entitled to litigate its statutory defenses to individual claims.

The significance of this opinion is several-fold. First and foremost, the Court emphasized the importance of establishing "commonality" as a matter of evidence and more than mere pleading and clearly explains the test necessary to establish commonality. Second, the opinion provides clear guidance regarding the evidence necessary to establish commonality. Third, the rulings and approaches in Falcon were affirmed while the suggestion in Eisen that examination of the merits to establish evidence to satisfy class certification was improper was rejected. Finally, the Court clearly enunciated the incompatibility of damages claims for relief under Rule 23(b)(2) cases.

ACC Launches Diversity Committee
Diversity Award Presented

Our chapter recently launched a Diversity Committee with the objective to improve diversity and inclusion in the St. Louis area legal profession. Committee members are Ronda Williams, Jen McCoy, Kristol Whatley, and Jan Alonzo.

We co-sponsored the 11th Annual Unity Dinner held on April 21, and the Diversity Summit organized by The Diversity Awareness Partnership held on May 24. At the Diversity Summit, Professor David B. Wilkins of Harvard School of Law provided stimulating reflection and insight into the progress that has been made and the challenges that remain. Each event was attended by more than 250 individuals.

We launched a Joint Diversity Initiative made up of representatives from the Mound City Bar Association, Missouri Asian American Bar Association, and the ACC-St. Louis Diversity Committee. The Joint Initiative established two awards – one for a law firm and another for a legal department – to recognize, promote, and celebrate diversity efforts in the St. Louis legal community. At the Unity Dinner, we were pleased to recognize the first recipients of these awards – Monsanto, represented by Reuben Shelton, and Thompson Coburn, represented by Tom Minogue.

The Joint Diversity Initiative conducted a CLE program entitled "Best Practices in Diversity" which was presented by an outstanding panel: Reuben Shelton of Monsanto, Jeff Lewis of AT&T, Roman Wuller of Thompson Coburn, and Jovita Foster of Armstrong Teasdale who hosted the event.

The Diversity Committee welcomes new members. Please contact Jan Alonzo at jan_alonzo@unigroupinc.com if you are interested in joining us.

LSEM Representatives Address the ACC St. Louis Board

By: Jan Alonzo, 2011 ACC St. Louis Diversity Committee Chair

The Board welcomed the following representatives of Legal Services of Eastern Missouri to its board meeting on June 9: President Reuben Shelton, Executive Director and General Counsel Dan Glazier, Development Director Judy Miniace, and Judge Stephen N. Limbaugh, Sr., Chair of the Bar Campaign.

They thanked the chapter for its past support and discussed ways our organizations might work together in the future. Our guests shared important information about LSEM and its current funding challenges. The number of cases LSEM completed in 2010 increased by 30% over 2009. The calls for help increased by 18%. That trend is continuing in 2011.

LSEM is facing a "Perfect Storm" of increased client needs while resources are declining. With the current low interest rates, a decrease of over $200,000 in LSEM IOLTA funding is expected. LSEM's portion of the cut from the 2011 Federal budget is $90,000. The renewal of grants is uncertain.

ACC members can assist LSEM in applying to Corporate Foundations. Funding has been received from: The Monsanto Fund, UniGroup, Emerson, and US Bank.

Judge Stephen N. Limbaugh, Sr. spoke about the ethical responsibility of attorneys to provide civil legal representation for those who cannot afford it.

LSEM is working on raising sufficient funds to launch a Community Economic Development Program for low-income individuals wishing to start a business in which a number of banks have expressed interest. This could be a pro bono opportunity for ACC members.

ACC members might also remember LSEM if they are involved in litigation or other matters where there may be unclaimed funds. LSEM may be designated as a recipient of these "Cy Pres" funds. Additional information from Judge Limbaugh can be found by clicking here.

Look for an announcement and invitation to an event to be hosted by Reuben Shelton at Monsanto.

DOUBLE YOUR CHANCES IN THE "EVERYBODY WINS" NEW MEMBER PROMOTION

The "Everybody Wins" new member promotion that is being sponsored by ACC National has been extended through August 31, 2011. If you haven't already heard, our St. Louis Chapter is "sweetening the pot" even more!

Here's what National is offering:

- o For each new member recruited: A StarbucksTM Card loaded with $5.00 (for each new member you recruit) and a free online CLE program through WEST LegalEd Center.
- o 2 or 3 members recruited: A chance to win a portable DVD player.
- o 4 or 5 members recruited: A chance to win a digital camera
- o 6 or more members recruited: A chance to win a digital video recorder, or a free Annual Meeting, CCU, or ACC Europe Meeting registration with a $1,000.00 travel stipend

On top of that, for every new member that you recruit between now and the end of the promotion, you will not only receive the StarbucksTM card and the chances at the prizes offered by National, but your name will also be entered in a local chapter drawing for an iPad2! Participating is easy. *Just:*

a. Identify a colleague or friend at another company who isn't an ACC member.
b. Bring them to an ACC event, or just use your advocacy skills to convince them of the benefits of ACC membership.
c. Then help them sign up online at www.acc.com; print out an application and give it to them; or bring them to an event before July 31 and have then sign up at the Membership table. However they do it, make sure that they put your name in the application where it asks how they learned about ACC.

The Chapter needs your help to grow, and you need a new iPad 2, or a trip to the ACC meeting in Europe, or both! So get persuasive and get lucky times two!

3rd Annual Ethics Seminar & Golf/Spa Retreat

August 12, 2011 • The Courses at Forest Park and Sante at The Chase Park Plaza

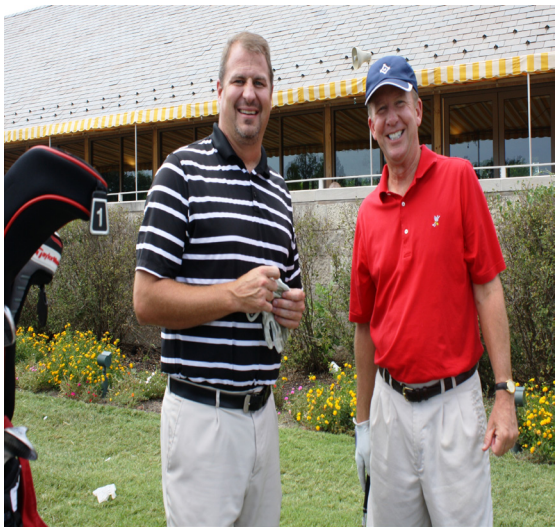
Not even a little rainstorm could put a damper on the ACC St. Louis Chapter's 3rd Annual Ethics Seminar & Golf/Spa Retreat, which was held at The Courses at Forest Park and Santé at The Chase Park Plaza on Friday, August 12. Close to 100 Chapter members, sponsors and guests participated! Attendees enjoyed two excellent Ethics presentations: *Ethical Issues that Arise During the Tug-of-War Between Legal & Business Concerns*, and *Mandatory Arbitration Clauses: How to Effectively Use Them in Your Business*, as well as a lunch presentation by Joseph Bell of Practical Law Company. Guests then headed to the courses for a leisurely round of golf, or to Santé for an afternoon of pampering and networking. The Ethics Seminar & Golf/Spa Retreat provides an opportunity for the Chapter to thank its Annual Sponsors and supporters, as well as enjoy a relaxing afternoon with fellow in-house counsel. The event was the perfect conclusion to a busy and exciting summer.

We would like to thank our Golf/Spa Sponsors, as well as our raffle prize donors for helping to make the 3rd Annual Ethics Seminar & Golf/Spa Retreat the most successful one yet!

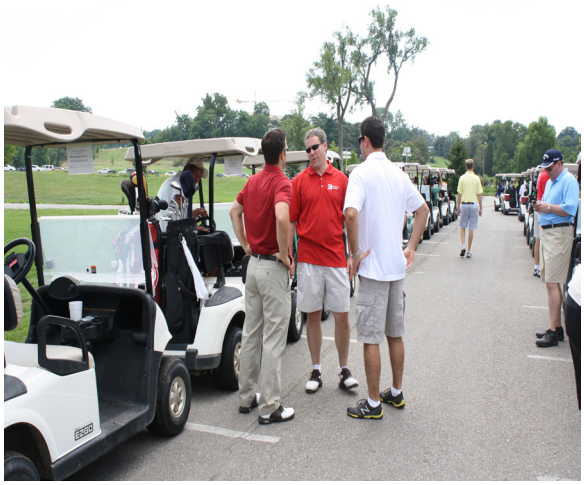
Golf/Spa Sponsors
Practical Law Company (Lunch)
Polsinelli Shughart (Beverage Cart)
Robert Half Legal (Premium Hole)

Raffle Prize Donors
Thompson Coburn, LLP (Duffle Bags & Golf Goodies)
Williams, Venker & Sanders, LLC (Garmin Golf GPS & Amazon Kindle)
ACC St. Louis (Gift Card to Fleming's Steakhouse & Wine Bar)

(Above) Attendees listen intentely to the *Ethical Issues that Arise During the Tug-of-War Between Legal & Business Concerns* panelists.



(Left) Not even a chance of rain could take the excitement away from these golfers!



(Above) Golfers talk-up their game and prepare to head to the courses.

(Above) A few ACC members chat while they wait for the spa appointments.

2011 Committees

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Jeana McFerron-Berron - Chair

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Barry Klinckhardt - Chair
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Kate Molamphy
Daniel Woodruff
Tim Luft
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Sandra Bequette
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Welcome New Members!

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Savvis Communications Corporation (Large Law)

Brian Wahlquist
Senior Counsel
Sigma-Aldrich Coorporation

Kelly Zigaitis
Senior Staff Attorney
Scottrade, Inc.

D. Scott Casanover, Esq.
General Counsel
Vatterott Educational Centers, Inc.

Kassie Wooton
Senior Corporate Counsel
Solutia, Inc.

Save the Date for
Corporate Counsel Day at Washington University

Tuesday, October 11, 2011 • Washington University

More details to follow.

ACC Would like to Thank Our 2011 Annual Sponsors

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Polsinelli Shugart

Spencer Fane Britt & Browne LLP

Upcoming ACC Events:

Whistle While You Work: Expanded Protections for Whistleblowers Under Dodd-Frank and Recent U.S. Supreme Court Decisions CLE
September 15, 2011 from 4:00 - 6:00pm at the Forest Park Visitor Center - Trolley Room
Sponsored by Ogletree Deakins

Fall Social
September 22, 2011 from 5:30 - 7:30pm at Saint Louis Cellars
Sponsored by Polsinelli Shughart

October CLE
October 20, 2011 from 11:30am - 1:00pm at the Offices of Stinson Morrison Hecker
Sponsored by Stinson Morrison Hecker LLP

You can find more information on these and other events at:
www.acc.com/chapters/stlouis/

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