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Employer Update

Must Experts Duke It Out Before Class Certification?

By Jeffrey S. Klein , Nicholas J. Pappas and John Sullivan

In a prior column, we discussed the U.S. Court of Appeals for the Third Circuit's influential opinion in *In re Hydrogen Peroxide Litig.*, 552 F.3d 305 (3d Cir. 2008), and its potential impact on courts' treatment of expert disputes at the class certification stage.[1] While the Supreme Court has not yet waded squarely into the issue, it did recently dip its toes in the water with some language in *Wal-Mart Stores Inc. v. Dukes*, 564 U.S.—, 131 S. Ct. 2541 (2011), suggesting an endorsement of the Third Circuit's holding that expert disputes related to class certification must be resolved before certification can issue. This language from the nation's highest court should be taken into consideration by lower courts addressing class certification motions. However, as illustrated by the U.S. Court of Appeals for the Eighth Circuit's opinion less than one month later in *In re Zurn Pex Plumbing Products Liability Litigation*, 644 F.3d 604 (8th Cir. 2011), *petition for cert. filed*, No. 11-740 (Dec. 15, 2011), at least one court has not required a full and conclusive *Daubert* review at the class certification stage, a holding that drew a vigorous dissent and that is likely to herald continued disagreement by other circuit courts.

Hydrogen Peroxide

Purchasers of hydrogen peroxide and related chemicals brought forward an expert in an antitrust class action to establish that the impact of an alleged conspiracy among manufacturers to set prices in the hydrogen peroxide industry was capable of proof at trial through evidence common to the class. *Hydrogen Peroxide*, 552 F.3d at 312-13. The defendants responded by bringing forth their own expert to show that the statistical methods employed by the plaintiffs' expert could not feasibly establish commonality to satisfy Rule 23(a). *Id.* at 313-14. The district court declined to weigh the credibility of the competing experts and instead ignored the defendants' expert, holding that plaintiffs need not show at the class certification stage that their proposed statistical methods would actually work, but instead need only "demonstrate their intention to prove a significant portion of their case through factual evidence and legal arguments common to all class members." *Id.* at 321-22.

On appeal, the Third Circuit flatly rejected the district court's position that it was not permitted to weigh the experts' opinions in deciding whether Rule 23 was satisfied and held instead that a district court must weigh admissible expert testimony to the extent necessary to resolve any dispute over Rule 23 requirements. *Id.* at 322-24. Finding that a Rule 23 requirement is met simply because a plaintiff's expert passes *Daubert*, without addressing relevant questions raised by a defendant's competing expert, fails to engage in the required "rigorous analysis" and is error. *Id.* at 322.

The appellate court observed that the requirements of Rule 23 are not mere pleading rules and that some uncertainty may have arisen from the

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Supreme Court's statement in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), that "there is nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." This statement, said the Third Circuit, is not intended to preclude inquiries that are necessary to determining compliance with Rule 23 just because those inquiries overlap with ultimate merits issues. *Hydrogen Peroxide*, 552 F.3d at 317.

Wal-Mart v. Dukes

The Supreme Court vindicated the Third Circuit's reading of *Eisen* in *Dukes*. Reiterating that "Rule 23 does not set forth a mere pleading standard," the Court reasoned that the rigorous analysis required to ensure proper certification will frequently and unavoidably entail some overlap with the merits of the plaintiff's underlying claim. *Dukes*, 131 S. Ct. at 2551. Quoting the same statement from *Eisen* that the Third Circuit had distinguished in *Hydrogen Peroxide*, the Court observed that it is "sometimes mistakenly cited to the contrary" and noted that the judge in *Eisen* had peeked at the merits not to determine certification, which had already been granted, but to shift the cost of notice. *Id.* at 2552 n.6. "To the extent the quoted statement goes beyond the permissibility of a merits inquiry for any other pretrial purpose," the Court held, "it is the purest dictum and is contradicted by our other cases." *Id.*

Moreover, the Court commented on the expert testimony that had been offered in *Dukes*. Specifically, the parties disputed whether the testimony of the plaintiffs' sociological expert, William Bielby, satisfied *Daubert*. The district court held that *Daubert* did not apply to expert testimony at the certification stage, to which the Supreme Court replied, "We doubt that is so...." *Id.* at 2553-54. The Supreme Court then went on to find that the expert testimony did nothing to advance plaintiffs' case and thus was insignificant to the relevant issues even if it had been properly considered. *Id.* at 2554.

A majority of circuits have now indicated that *Daubert* applies at the certification stage.

This expression of "doubt" by the Supreme Court has led a number of lower courts to change course in their approach to certification. For example, in a recent case in the Western District of Oklahoma, the court wrote that "[p]rior to the Supreme Court's decision in [*Dukes*], the Court would have left Dr. Burtis's critiques of Dr. Singer's application of this method for resolution at the *Daubert* motion stage. However, the Supreme Court recently suggested in dicta that *Daubert* applied to expert testimony at the class certification stage.... Therefore, the Court will evaluate Dr. Singer's use of the GRS Test in light of the requirements outlined in *Daubert* and its progeny." *In re Cox Enters. Inc. Set-Top Cable Television Box Antitrust Litig.*, 2011 U.S. Dist. LEXIS 149656, at *59-60 (W.D. Okla. Dec. 28, 2011); *accord In re Aftermarket Automotive Lighting Prods. Antitrust Litig.*, 276 F.R.D. 364, 370 (C.D. Cal. 2011).

The *en banc* U.S. Court of Appeals for the Ninth Circuit had held in *Dukes* that the district court had properly rejected Wal-Mart's *Daubert* challenge to the plaintiff's sociological expert because the district court's role at the certification stage is "to make factual determinations regarding evidence as it relates to common questions of fact or law but not to decide which parties' evidence is ultimately more persuasive as to liability.... [W]hether the jury was ultimately persuaded by these opinions was a question on the merits." *Dukes v. Wal-Mart Stores Inc.*, 603 F.3d 571, 602 (9th Cir. 2010) (*en banc*), *rev'd*, 131 S. Ct. 2541 (2011).

Following the Supreme Court's reversal, however, the Ninth Circuit has stated in a subsequent case that "the merits of the class members' substantive claims are often highly relevant when determining whether to certify a class. More importantly, it is not correct to say a district court may consider the merits to the extent that they overlap with class certification issues; rather, a district court must consider the merits if they overlap with the Rule 23(a) requirements." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011).

Zurn

A majority of circuits have now indicated that *Daubert* applies at the certification stage. *See In re Polymedica Corp. Sec. Litig*, 432 F.3d 1, 5-6 (1st Cir. 2005); *In re IPO*, 471 F.3d 24, 42 (2d Cir. 2006); *Hydrogen Peroxide*, 552 F.3d at 316-20; *Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA)*, 482 F.3d 372, 379-80 (5th Cir. 2007); *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 816 (7th Cir.

2010); *Ellis*, 657 F.3d at 981; *Sher v. Raytheon Co.*, 419 F. App'x 887, 890-91 (11th Cir. 2011); *see also* Gariety v. Grant Thornton, LLP, 368 F.3d 356, 366 (4th Cir. 2004) (citing favorably U.S. Court of Appeals for the Seventh Circuit cases on the necessity of merits review). The Eighth Circuit, however, recently pushed back against this trend in *In re Zurn Pex Plumbing Products Liability Litigation,* 644 F.3d 604 (8th Cir. 2011).

Zurn involved allegedly defective pipe fittings about which both sides sought to introduce expert evidence at the class certification stage. Although both sides agreed that *Daubert* review was necessary, they differed significantly as to the appropriate application. The plaintiffs argued that the expert testimony should be excluded only if it were "so flawed it cannot provide any information as to whether the prerequisites of class certification have been met," *id.* at 610, while the defendant urged a full and conclusive *Daubert* review as endorsed by the Seventh Circuit in *American Honda*. *Id.* at 611. The district court did neither; instead, it conducted a "focused" or "tailored" *Daubert* inquiry to assess whether the experts' opinions, based on their areas of expertise and the reliability of their analyses of the available evidence, should be considered in deciding the issues relating to class certification, an approach the Eight Circuit endorsed on appeal.

"The main purpose of *Daubert*," reasoned the Eighth Circuit, "is to protect juries from being swayed by dubious scientific testimony. That interest is not implicated at the class certification stage where the judge is the decision maker." *Id.* at 613. Moreover, the defendant, Zurn, had sought bifurcated discovery in the case, which resulted in a limited record at the class certification stage and therefore prevented the kind of full and conclusive *Daubert* inquiry it later requested. *Id.* at 612-13. Accordingly, there was no need for the district court to determine at the class certification stage, and before merits discovery, whether the expert opinions ultimately would be admitted at trial, especially as the rulings on such matters are preliminary and may be modified in light of later evidence.

cues from the Supreme Court's dicta." *Zurn*, 644 F.3d at 627 (Gruender, J., dissenting) (quoting Scheduled Skyways Inc. v. Nat'l Mediation Bd, 738 F.2d 339, 342 (8th Cir. 1984)). Observing that both the Seventh and Eleventh circuits had adopted such a requirement, the *Zurn* dissent cautioned that the true concern is not that the district judge cannot weigh admissible expert testimony properly, but rather that the case will proceed beyond class certification on the basis of testimony that is in fact inadmissible or unreliable. *Id.* at 627-30.

Additional targeted discovery may be appropriate to the extent necessary to resolve disputes over expert testimony and permit a conclusive ruling.

The majority's approach nominally complies with the Supreme Court's statement in *Dukes*, although in a limited and modified way. *See Fosmire v. Progressive Max Ins. Co.*, 2011 U.S. Dist. LEXIS 117366, at *9 (W.D. Wash. Oct. 11, 2011) ("This court believes that *Zurn* has struck the right balance. It honors the Supreme Court's dictum in *Dukes* by applying *Daubert* at class certification, but it does so in a manner that recognizes the specific criteria under consideration, as well as the differing stage of discovery and state of the evidence, at the class certification stage.").

The *Zurn* dissent, however, gave greater weight to the *Dukes* dictum and would have required full and conclusive *Daubert* review, noting that "inferior courts can take their

Impressions

Although one district court recently observed, "[t]he proper scope of the court's inquiry into an expert's testimony at the class certification stage is presently unclear," *Fosmire*, 2011 U.S. Dist. LEXIS 117366, at *7, the majority trend among the circuits and the Supreme Court's statements in *Dukes* strongly indicate that the real battle is now over how, not whether, *Daubert* applies at the class certification stage.

The Eighth Circuit's narrow reading of the Supreme Court's signals in *Dukes* and consequent adoption of a "tailored" review appears to be at odds with the "full and conclusive" review required in the Seventh Circuit. *American Honda* stated that "when an expert's report or

testimony is critical to class certification … a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion. That is, the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants." *Am. Honda*, 600 F.3d at 815-16. The Seventh Circuit recently clarified that the situations that do not warrant full *Daubert* analysis are those where an expert's report or testimony is not critical to class certification because there is an adequate independent ground for deciding the motion. *Messner v. Northshore Univ. HealthSystem*, No. 10-2514, slip op. at 16 (7th Cir. Jan. 13, 2012).

The Eighth Circuit attempted to distinguish *American Honda* on the ground that neither party in *Zurn* attacked the experts' qualifications or methods, as in *American Honda*, and instead challenged only the sufficiency of the facts or data underlying the experts' opinions. *Zurn*, 644 F.3d at 611-12, 614 (majority opinion). Relying on the proposition that class certification decisions are tentative, preliminary, and inherently conditional, the Eighth Circuit found no error or abuse of discretion in admitting expert testimony that "may or may not be admissible" in light of further discovery. *Id*. at 613, 615.

In direct conflict with this statement in *Zurn*, *American Honda* holds that an expert's submission must receive a conclusive ruling prior to certification. Moreover, as the *Zurn* dissent points out, the 2003 amendments to Rule 23 eliminated the provision that class certification "may be conditional." *Id*. at 628 (Gruender, J., dissenting); *accord Hydrogen Peroxide*, 552 F.3d at 319-20; *In re IPO*, 471 F.3d at 39.[2] Contrary to *Zurn*, commentators have observed that "courts should not rely on later developments to determine whether certification is appropriate." 5 Moore's Federal Practice §23.80[2]. Instead, as noted by the dissenting judge in *Zurn*, in most jurisdictions additional targeted discovery may be appropriate to the extent necessary to resolve disputes over expert testimony and permit a conclusive ruling. *See Zurn*, 644 F.3d at 629 (Gruender, J., dissenting). Failure to resolve a genuine legal or factual dispute relevant to making a definitive determination that the requirements of Rule 23 have been met before certifying a class is legal error. *See*, *e.g.*, *Hydrogen Peroxide*, 552 F.3d at 320.

Litigants should be keenly aware of this conflict between the "tailored" and "full and conclusive" review approaches and adjust strategies accordingly. Defendants should be prepared to challenge plaintiffs' experts at the class certification stage and may wish to consider whether bifurcating discovery will inhibit their ability to demand full *Daubert* review if a court follows *Zurn*. Tools in the defendant's arsenal for urging a court to follow *American Honda* instead should include taking the Supreme Court's language in *Dukes* seriously, the 2003 amendments to Rule 23 eliminating conditional class certification, and the proposition advanced by the *Zurn* dissent that a high-stakes class action should not proceed before either a bench or a jury on evidence that may not even be admissible.

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1 Jeffrey S. Klein and Nicholas J. Pappas, "Courts Must Resolve 'Battle of the Experts' Before Class Certification," NYLJ, Aug. 3, 2009, *available at* http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202432687972.

2 "The Advisory Committee's note explains: 'A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.' The Standing Committee on Rules of Practice and Procedure advised: 'The provision for conditional class certification is deleted to avoid the unintended suggestion, which some courts have adopted, that class certification may be granted on a tentative basis, even if it is unclear that the rule requirements are satisfied.'" *Hydrogen Peroxide*, 552 F.3d at 319.

Can an Employee Waive His Right to Bring a Collective Action Under the FLSA? Depends on Which Court You Ask

By Michelle Hartmann and Olivia Zimmerman Miller

In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011), the Supreme Court analyzed the goals of the Federal Arbitration Act (FAA). In so doing, it determined that "[a]lthough § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules *that stand as an obstacle to the accomplishment of the FAA's objectives*." *Id*. at 1746 (emphasis added). The Supreme Court further defined the principal objective of the FAA as "ensur[ing] that private arbitration agreements are enforced according to their terms." *Id*. With this view of the FAA in mind, the Supreme Court therefore overturned the Ninth Circuit's decision to deny the motion to compel arbitration and held that "[r]equiring the availability of classwide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[1] *Id*. at 1748. In the wake of *AT&T Mobility*, courts have differed on whether and to what extent precluding collective actions under the Fair Labor Standards Act (FLSA), which establishes, *inter alia*, minimum wage, overtime pay, and recordkeeping standards for certain employees in both the private and public sectors, conflicts with the FAA.

For example, in *LaVoice v. UBS Financial Services, Inc.*, 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012), Judge Barbara Jones in the Southern District of New York granted the employer's motion to compel arbitration, finding no absolute right to a collective action under the FLSA. Although the plaintiff-employee signed agreements agreeing that FLSA-related disputes would be individually arbitrated, he filed suit asserting class and collective claims. In his opposition to the employer's motion to compel arbitration, the plaintiff argued that the "FLSA cannot be gutted by the FAA." *Id*. The court disagreed, recognizing the following:

> This argument effectively suggests that the FLSA guarantees the right to collective action which cannot be lawfully waived in a non-negotiated arbitration agreement, or at all. The Court finds this argument, which assumes that a collective action requirement can be consistent with the FAA, precluded in light of the Supreme Court's decision in *AT & T Mobility*. Given that the Supreme Court held in *AT&TMobility* that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA," this Court must read *AT&TMobility* as standing against any argument that an absolute right to collective action is consistent with the FAA's "overarching purpose" of "ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *AT&TMobility*, 131 S.Ct. at 1748.

Id.

Judge Robert Sweet in the Southern District of New York took a different approach in *Raniere v. Citigroup Inc.*, 2011 WL 5881926 at *12-20 (S.D.N.Y. Nov. 22, 2011). Specifically, the court analyzed the legislative history of the FLSA,[2] and ultimately concluded that the right to proceed collectively under the FLSA is a substantive right that cannot be waived:[3] "It is not enough to respond that such a waiver should be upheld in the name of the broad federal policy favoring arbitration, simply because the waiver was included in an arbitration agreement. An otherwise enforceable arbitration agreement should not become the vehicle to invalidate the particular Congressional purposes of the collective action provision and the policies on which that provision is based." *Id*. at *17.[4] As such, the court held that, even if *AT&TMobility* is read broadly "to acquiesce to the enforcement of an arbitral agreement" that would prevent the vindication of certain *state* rights, it does not "alter the validity of the *federal* statutory" and substantive rights, including those found in the FLSA.

And in the labor context, the National Labor Relations Board (NLRB) recently ruled that an employment agreement precluding

employees from filing class or collective claims was void for violating an employee's statutory rights protected by the National Labor Relations Act (NLRA).[5] Specifically, in *D. R. Horton Inc. v. Cuda*, a former employee charged that his former employer was misclassifying superintendents as exempt from the protections of the FLSA. He sought to represent a class of similarly situated superintendents. The employer-respondent argued that a valid agreement barring arbitration of class or collective claims controlled.

The NLRB disagreed, finding the collective action arbitration waiver to be a violation of Section 7 of the NLRA which protects an employee's right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." Furthermore, the NLRB found that the FAA did not preempt, nor was it in conflict with, the NLRA because the intent of the FAA, at least according to the NLRB, was intended to leave substantive rights undisturbed. The NLRB explained that, unlike the circumstances presented in *AT&T Mobility*, the right to proceed collectively, not just the right to collective arbitration, was protected by *federal* law applying only to employers and their employees. Consequently, according to the NLRB, an employer cannot shield itself from all forms of collective actions under the FLSA because collective action is a core substantive right protected by the FLSA.

Sutherland v. Ernst & Young LLP, 768 F. Supp. 2d 547, 548 (S.D.N.Y. 2011), presents a middle-ground approach between the two foregoing decisions and provides guidance to employers seeking to draft effective and enforceable collection action waivers. After agreeing to arbitrate all claims individually, a former employee brought a collective action under the FLSA. Judge Kimba Wood denied the employer-defendants' motion to compel arbitration on the basis that the plaintiff was a lower-level employee with claims for nominal recovery

In the wake of *AT&T Mobility*, courts have differed on whether and to what extent precluding collective actions under the FLSA conflicts with the FAA.

(approximately $3,800) compared to the high costs of prosecution, and that, as such, she had "substantially demonstrated" that the collective action waiver was "tantamount to an inability to assert her claims at all."[6] Following the Supreme Court's decision in *AT&T Mobility*, the defendant-employer moved for a rehearing. 2012 WL 130420 at *1, *5 (S.D.N.Y. Jan. 17, 2012). Judge Wood denied the motion. The court noted that although the applicability of *AT&T Mobility* was a "close question," the facts at issue differed significantly enough from those in *AT&T Mobility* to preclude the enforcement of the collective arbitration waiver. *Sutherland*, 2012 WL 130420 at *5-6. For unlike the *Sutherland* plaintiff, who was unable to vindicate her statutory rights because of the high costs of individual arbitration, the arbitration agreement in *AT&T Mobility* both benefited and ensured that the plaintiffs would be able to find redress for their claims. *Id.* at *5. Thus, the *Sutherland* court did not find collective arbitration waivers *per se* unenforceable; nor did it hold that the right to proceed collectively is a substantive right that cannot be waived. Instead, it conducted a case-specific analysis to determine whether the waiver in question prevented the employee from vindicating her statutory rights.

Similarly, pre-*AT&T Mobility*, the Third Circuit, in *Vilches v. The Travelers Companion*, 413 Fed. Appx. 487, 494 (3d Cir. 2011), upheld a class arbitration waiver in the FLSA context, finding the provision in question to be neither unconscionably adhesive nor procedurally inadequate. Serving as a precursor to *AT&T Mobility*, the Third Circuit noted that a class arbitration waiver in an arbitration agreement is not unconscionable *per se* under New Jersey law, yet indicated that such a waiver could be unenforceable if the waiver's specific terms are substantively or procedurally unconscionable.

No courts of appeal have ruled on the issue post-*AT&T Mobility*. But the *Sutherland* decision and some of the pre-*AT&T Mobility* decisions provide guidance to employers drafting collective action waivers. For example, employers seeking to enforce collective arbitration waivers should pay careful attention to drafting principles, including the following:

- Include cost-shifting and fee-shifting arrangements if the employee is the prevailing party;
- Offer other financial incentives, such as payment of the filing fees, so that costs of arbitration are not unduly oppressive;

- Include alternatives for expedited and limited discovery;
- Include alternatives for alternative dispute resolution at the employer's expense;
- Do not foreclose all other avenues by which an employee can seek redress for his grievances (*e.g.*, the ability to file charges with the NLRB; internal dispute resolutions policies; Equal Employment Opportunities enforcement policies; mediation); and
- If an agreement is later amended to include a collective arbitration waiver, provide ample time both for the employee to opt out of the waiver and for the waiver to become effective.

According to the NLRB, an employer cannot shield itself from all forms of collective actions under the FLSA because collective action is a core substantive right protected by the FLSA.

1 Reaffirming the liberal arbitration policy of the FAA, a recent Supreme Court decision can be read to hold that federal statutes trump the FAA only when the statutes explicitly preclude arbitration. In *CompuCredit Corp. v. Greenwood*, the Supreme Court held that because the federal Credit Repair Organization Act (CROA) is silent on whether claims under the CROA can proceed through arbitration, CROA claims are arbitrable, and thus, under the FAA, such arbitration agreements must be enforced according to their terms. 132 S. Ct. 665, 673 (2012).

2 The FLSA of 1938, as well as the amended Portal-to-Portal Act of 1947, both contained collective action provisions.

3 In contrast, pre-*AT&T Mobility*, the Fourth Circuit concluded, among other things, that the right to "opt-in" to collective action under the FLSA was *not* a non-waivable substantive right. *Long John Silver's Rest., Inc. v. Cole*, 514 F.3d 345, 351 (4th Cir. 2008). Section 16(b) of the FLSA governs class action procedures and contains an "opt-in" class provision, providing:

> [n]o employee shall be a party plaintiff to any … action [under the FLSA] unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. §16(b). Nonetheless, the *Long John Silver* court upheld the arbitrator's decision to treat a FLSA class as an "opt-out" rather than an "opt-in" class, allowing parties to waive the "opt-in" requirement of Section 16(b). 514 F.3d at 351.

4 As support, the court quoted to the Supreme Court's analysis of the FLSA in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706-07 (1945):

> The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce. The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency as a result of the free movement of goods in interstate commerce.

5 *D. R. Horton Inc. v. Cuda*, 357 NLRB No. 184 (2012); 2012 WL 36274 at *16 (N.L.R.B. Jan. 3, 2012).

6 768 F. Supp. 2d at 553.

First Department Clarifies Summary Judgment Standard for Discrimination Claims Under New York City Human Rights Law

By Emily Friedman

The First Department's recent decision in *Bennett v. Health Mgmt. Systems*[1] has defined the applicable summary judgment standard for discrimination claims brought under the New York City Human Rights Law, N.Y.C. Admin. Code §8-101 *et seq.* (NYCHRL). Using the *McDonnell Douglas*[2] analysis as a backdrop (the standard for assessing claims under most federal and New York State discrimination laws), the *Bennett* court articulated the evidentiary standard for awarding summary judgment on NYCHRL claims. Although the First Department affirmed the grant of summary judgment to the defendant-employer, it outlined what likely will be a more onerous burden for New York City employers to meet at summary judgment. The First Department made clear its intent to uphold the "broad and remedial purposes" of the NYCHRL, which go beyond those of its state (New York State Human Rights Law, N.Y. Exec. Law §290 *et seq.*) and federal counterparts.

Background

The New York City Local Civil Rights Restoration Act of 2005 (the Restoration Act) provides that state and federal law are the minimum standards to be applied when analyzing cases under the NYCHRL, and requires courts to construe city law claims more liberally than federal or state law claims. New York courts interpreting the Restoration Act have emphasized that all provisions of the NYCHRL must be broadly construed "in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible"[3] and that "claims under the NYCHRL "must be reviewed independently from and 'more liberally' than their federal and state counterparts."[4] As a result, New York courts analyzing city law claims of discrimination or harassment have strayed from the traditional legal analysis of such claims brought under the New York State Human Rights Law or Title VII (and other federal statutes). For instance, the New York Court of Appeals has held that the severe-or-pervasive test applicable in state and federal harassment cases is inapplicable in determining liability in discriminatory harassment cases under the NYCHRL.[5] Until the First Department's recent decision in *Bennett*, however, no New York court had examined whether the burden-shifting approach set forth in *McDonnell Douglas v. Green* should be modified for NYCHRL claims.

Under the *McDonnell Douglas* three-prong approach (and subsequent Supreme Court case law interpreting such approach), a plaintiff generally must first make a prima facie showing of membership in a protected class and that an adverse employment action has been taken against him or her. Once such a showing is made, the burden shifts to the defendant to articulate through evidence non-discriminatory reasons that actually motivated the defendant at the time of the challenged action. If the defendant successfully meets this burden then the plaintiff must show those reasons to be false, pretextual or unworthy of credence, though such a showing will not always be adequate to ultimately sustain a jury's finding of liability (especially where the evidence of pretext only created a weak issue of fact and there is other evidence showing no discrimination has occurred).[6] Mindful of the ways in which the *McDonnell Douglas* test had been applied in the summary judgment context to "undercut the [NYCHRL's] intent to maximize the opportunities for discrimination to be exposed," the First Department held that the traditional approach used to analyze NYCHRL claims at the summary judgment stage should be modified.

Modified Three-Step Analysis Under NYCHRL

In discussing the prima facie prong of the analysis, the First Department expressed concern over the fact that courts had too often interpreted such prong as though a plaintiff had to prove his entire case. The court clarified that "a defendant's production of evidence supporting its position that it acted for non-discriminatory reasons does not mean that a prima facie case had not been created in the first instance, and

courts should not treat such evidence as doing so." As a result, the *Bennett* court held the first inquiry should be: "[d]o the initial facts described by the plaintiff, if not otherwise explained, give rise to the *McDonnell Douglas* inference of discrimination?" While the impact of the decision remains to be seen, it appears as though all the First Department requires is for a plaintiff to show some set of facts under which a jury could conclude discrimination has occurred, thus limiting the arguments an employer may have as to whether a plaintiff has met the first prong.

Significantly, however, the First Department questioned the necessity of the prima facie prong all together where a defendant moves for summary judgment by putting forth evidence of one or more non-discriminatory motives for its actions. In such circumstances, the court held that "a court should ordinarily avoid the unnecessary and sometimes confusing effort of going back to the question of whether a prima facie case has been made out." Instead, the court directed that in most instances, a court should begin its analysis with the modified second prong and skip the first prong entirely: "[a court] should turn to the question of whether the defendant has sufficiently met its burden of showing that, based on the evidence before the court and drawing all reasonable inferences in plaintiff's favor, no jury could find defendant liable under any of the evidentiary routes – *McDonnell Douglas*, mixed motive, 'direct' evidence, or some combination thereof." The court was careful to stop short of holding that there is *never* a circumstance under the NYCHRL where a court's evaluation of a plaintiff's prima facie case would be proper, but nonetheless held such a circumstance would be "rare and unusual."

Until the First Department's recent decision in *Bennett*, no New York court had examined whether the burden-shifting approach set forth in *McDonnell Douglas v. Green* should be modified for NYCHRL claims.

With respect to the third prong of the burden-shifting analysis, the court expressed concern over the growing tendency to use summary judgment in discrimination cases to promote "judicial efficiency." Reiterating the legislative intent of the Restoration Act, the court made clear its view that the NYCHRL stands as a safeguard "against any attempt to deprive an alleged victim of discrimination a full and fair hearing before a jury of her peers." Thus, the First Department articulated the modified third prong of the burden-shifting analysis as follows: "[i]f the plaintiff responds with some evidence that at least one of the reasons proffered by defendant is false, misleading, or incomplete, a host of determinations properly made only by a jury come into play, and thus such evidence of pretext should in almost every case indicate to the court that a motion for summary judgment must be denied." In other words, even if a defendant meets its burden at summary judgment, a plaintiff's NYCHRL claim will survive summary judgment "in almost every case" if the plaintiff can cast doubt on any of the employer's proffered reasons. This standard differs from the traditional federal approach in that federal courts are willing to grant summary judgment to an employer even where some evidence of pretext exists, as long as there exist other factors supporting why summary judgment is appropriate.

Takeaways for Employers

The *Bennett* decision creates a new set of principles to be applied to employer's motions for summary judgment under the NYCHRL, which differ from the traditional *McDonnell Douglas* approach. Perhaps the greatest impact for employers is the fact that *Bennett* expands the type of "pretextual" evidence that can defeat a motion for summary judgment. Under *Bennett*, a plaintiff need only present evidence of a misleading or incomplete reason proffered by an employer to defeat summary judgment. Moreover, if an employer provided a plaintiff with multiple reasons for the challenged employment action, a plaintiff need only present evidence that calls into question one of the reasons.

While it is too early to assess exactly how *Bennett* will change the summary judgment landscape for discrimination claims brought under the NYCHRL, the below summarizes steps employers may wish to consider taking to aid in their defense against a city law claim:

- Ensure that employees making and communicating employment decisions to others know how to properly document

employment actions that could be construed as "adverse" (*e.g.*, terminations, demotions or decisions not to hire). Such documentation should include, among other things, the reason(s) for the particular employment action.

- Ensure that all persons involved in making or communicating a particular employment action have discussed the action ahead of time and are prepared to articulate the reason for the particular action to the affected employee.
- Engage legal counsel when there is a question over whether a particular employment action is justified or when there is a question about whether the particular action should be documented or the substance of such documentation.

1 – N.Y.S.2d –, 2011 WL 6347918 (1st Dep't Dec. 20, 2011).

2 *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

3 *Albunio v. City of New York*, 16 N.Y.3d 472, 477-78 (2011).

4 *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 278 (2009).

5 *Nelson v. HSBC Bank*, 87 A.D.3d 995 (2011).

6 411 U.S. at 803; s*ee also Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000).

New OFCCP Initiative on Workers with Disabilities

By Valerie Wicks

On December 9, 2011, the US Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) published for comment proposed regulations under Section 503 of the Rehabilitation Act of 1973 (Section 503) that would greatly increase burdens on federal contractors. The new rule (1) stiffens anti-discrimination rules for workers with disabilities, (2) imposes onerous self-evaluation and monitoring obligations on employers, and (3) adopts a single, uniform affirmative action goal for people with disabilities of seven percent, measured at the job group level.[1] The comment period for this far-reaching regulation closed on February 7, 2012.

Background

Section 503 was enacted in 1973 with the related goals of prohibiting employment discrimination by federal contractors on the basis of disability, and requiring that federal contractors take affirmative action to employ individuals with disabilities. In the press release announcing the new proposed regulations, the director of the OFCCP was quoted as stating: "For nearly 40 years, the rules have said that contractors simply need to make a 'good faith' effort to recruit and hire people with disabilities. Clearly that's not working."[2] Expressing frustration with the present regulations' lack of effectiveness, the OFCCP cited the fact that the current unemployment rate for people with disabilities is 13 percent, 1 1/2 times the rate for people without disabilities.[3] Furthermore, the Bureau of Labor Statistics has recently reported that 79.2 percent of working-age individuals with disabilities are outside the labor force altogether, compared to 30.5 percent of individuals without disabilities.[4] In the face of these statistics, the OFCCP is now attempting to strengthen the requirements in Section 503.[5]

Which Contractors and Subcontractors Are Covered by Section 503?

The nondiscrimination and general affirmative action requirements of Section 503 apply to all government contractors with contracts over $10,000.[6] Contractors who have both more than 50 employees and government contracts of $50,000 or more are also required to develop and maintain an affirmative action program with respect to individuals with disabilities.[7]

What Changes Do the Proposed Regulations Pose for Contractors and Subcontractors?

- ***Expands definition of "disability" in line with the ADAAA***: While the proposed regulations do not change the definition of "disability," they would apply a broader interpretation of what qualifies

as such, as in the ADA Amendments Act (ADAAA), implemented in 2011. For example, the ADAAA (and the proposed Section 503 regulations) apply a broader scope to the terms "substantially limits," "major life activity," and "regarded as," thus expanding who would qualify as an individual with a disability under the Act.[8] The application of the ADAAA definition would mean that many more individuals would qualify as disabled under the proposed regulations. The ADAAA expressly prohibits the consideration of "the ameliorative effects of mitigating measures" in determining whether an individual has a disability.[9] The exception to this prohibition is that the ameliorative effects of "ordinary eyeglasses or contact lenses shall be considered" in determining whether the impairment "substantially limits a major life activity."[10]

- ***Uniform seven percent workforce goal***: The proposed regulations require that all federal contractors and subcontractors establish a goal to have seven percent of their workforces be individuals with disabilities, measured at the job group level. This utilization goal purportedly would not operate as a quota, but rather as a measurable, "equal employment opportunity objective, and an important tool for measuring the contractor's progress . . . and assessing where barriers . . . remain."[11] However, the proposed regulation specifically states that "[i]f individuals with disabilities are employed in a job group at a rate less than the utilization goal, the contractor must take specific measures to address this disparity."[12] The OFCCP also sought comment on a sub-goal of two percent for individuals with particularly severe disabilities, including total deafness, blindness, missing extremities (hand, foot, arm, or leg), partial and complete paralysis, epilepsy, severe intellectual disability, psychiatric disability, and dwarfism.[13]

The new rule (1) stiffens anti-discrimination rules for workers with disabilities, (2) imposes onerous self-evaluation and monitoring obligations on employers, and (3) adopts a single, uniform affirmative action goal for people with disabilities of seven percent, measured at the job group level.

- ***Mandated actions within strengthened affirmative action requirements***: The proposed regulations add requirements to contractors' affirmative action programs with respect to individuals with disabilities, including an annual assessment of outreach and recruitment efforts, an annual review of personnel practices to ensure that they do not stereotype those with disabilities, an annual review of physical and mental job qualification standards to ensure they are job-related and have a business necessity, training for all employees involved in recruitment, training, and discipline, procedures to prevent harassment on the basis of disability, and implementation of an auditing system to determine the effectiveness of all affirmative action programs.[14]
- ***Self-identification***: The proposed regulations require contractors to ask job applicants to self-identify as to the existence of a disability (though not the type). Additionally, contractors would have to survey their current employees annually to give them an opportunity to self-identify as having a disability.[15] In both instances, the applicants or employees could decline to provide the information without any consequences.
- ***Written procedures for reasonable accommodation requests***: The proposed regulations require contractors to develop and use written procedures for handling requests for reasonable accommodations. The goals of this requirement are to ensure consistency in handling such requests and to make sure employees know how to make them.[16]
- ***Priority systems***: A new provision encourages contractors to develop and use priority systems in recruiting and hiring individuals with disabilities. For example, the proposed regulations suggest programs such as weighted "points" systems for

applicants with disabilities, or targeted job training programs designed for people with specific disabilities.[17]

- ***Heightened data collection requirements***: The proposed regulations would transform the current requirement of providing descriptions of recruitment and hiring efforts to additionally supplying quantitative data explaining such efforts in more robust detail. For example, contractors would have to supply "applicant ratio" (compares number of applicants with disabilities to total applicants), "hiring ratio" (compares number of hires with disabilities to total hires), and "job fill ratio" (compares number of job openings to openings filled) information.[18]

What Do These Changes Mean for Contractors?

If adopted in their current form, the proposed regulations will increase significantly the burden on contractors to keep detailed records of their efforts with regard to hiring individuals with disabilities. Some observers have noted that these mandated "paper trails" will subsequently be used by the Department to make findings of discrimination.[19] Accordingly, a more far-reaching effect of the proposed regulations may be an increase in findings of discrimination against contractors, as officials will now have ready access to relevant data. While the seven percent utilization goal may not be a "quota" according to the Department of Labor, it will certainly be a relevant statistic in identifying contractors not in compliance.

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1 *Department of Labor Office of Federal Contract Compliance Programs*, 76 Fed. Reg. 77,070 (proposed December 9, 2011) (to be codified at 41 C.F.R. pt. 60-741).

2 "US Labor Department Seeks to Improve Job Opportunities for Americans with Disabilities by Setting Historic Hiring Goal for Federal Contractors and Subcontractors," *OFCCP News Release* (Dec. 08, 2011), *available at* http://www.dol.gov/opa/media/press/ofccp/ OFCCP20111614.htm.

3 *Id.*

4 *Id.*

5 It is by no means clear that these comparisons are appropriate. The statistical information the OFCCP provides assumes uniform distribution across job classifications. It proceeds, without evidence, on the assumption that people with disabilities are available and qualified for jobs with contractors at the same rate as people without disabilities.

6 General affirmative action obligations include giving applicants and employees the opportunity to self-identify as having a disability. *Department of Labor Office of Federal Contract Compliance Programs*, 76 Fed. Reg. 77,056, 63 (proposed December 9, 2011) (to be codified at 41 C.F.R. pt. 60-741).

7 These affirmative action programs must contain: (1) an equal employment opportunity policy statement, (2) a comprehensive annual review of personnel processes, (3) a review of physical and mental job qualifications, (4) a statement that the contractor is committed to making reasonable accommodations for persons with physical and mental disabilities, (5) a statement that the contractor is committed to ensuring a harassment-free workplace for individuals with disabilities, (6) external dissemination of the contractor's affirmative action policy, (7) internal dissemination of the contractor's affirmative action policy, (8) development and maintenance of an audit and reporting system designed to evaluate affirmative action programs, and (9) training regarding the implementation of the affirmative action program for all personnel involved in employment-related activities, such as the conduct of recruiting, screening, selection, and discipline of employees. *Id.* at 77,063-64.

8 *Id.* at 77,058.

9 *Id.* at 77,060.

10 *Id.*

11 *Id.* at 77,068-69.

12 *Id.* at 77,099.

13 *Id.* at 77,071.

14 *Id.* at 77,095-98.

15 *Id.* at 77,062.

16 *Id.* at 77,067.

17 *Id.* at 77,100.

18 *Id.* at 77,067.

19 David Shadovitz, "OFCCP Sets Sights on Disabled Workers," *Human Resource Executive Online*, *available at* http://www.hreonline.com/HRE/story.jsp?storyId=533344307 (last visited Jan. 31, 2012).

California Wage/Hour Update: Suitable Seating

By Daniel J. Venditti

Amidst the flurry of employment class action litigations arising out of California employment laws, one area has emerged over the past several years that has clearly caught the eye of plaintiffs' class action attorneys involving a decades-old provision that has until recently received little attention. Beginning in late 2010, a growing list of California employers have been sued by employees alleging violations of a regulation requiring the employers to provide "suitable seating" to employees. Reports indicate that the number of "suitable seating" actions filed is now in excess of 100. Employers in California who have found themselves in the crosshairs of "suitable seating" plaintiffs include, to name a few, 99¢ Only Stores, Home Depot, JP Morgan Chase Bank, Bank of America, Target Corp., CVS Pharmacy, Trader Joe's, Ralph's Grocery, Walgreens, Blockbuster, Rite Aid, Disneyland, McKesson Corp., and American Eagle Outfitters, Inc. The catalyst for this wave of "suitable seating" lawsuits appears to have been two California state appellate court decisions which, for the first time, held that California employees may pursue a private right of action against their employers for "suitable seating" violations pursuant to the California Private Attorneys General Enforcement Act of 2004 (PAGA). PAGA claims typically are brought in a class context, often with millions of dollars at issue.[1]

The "suitable seating" cases currently pending remain at their initial stages, thus there has been little substantive interpretation of the requirements of the seating rule. However, the several initial rulings have sought to clarify certain aspects of the law and contain some ammunition for employers to use when confronting this type of lawsuit. It still is too early to determine whether these early favorable rulings will limit the practical impact of these claims on employers. Given the potentially high monetary exposure under PAGA, employers with operations in California should be watching closely.

Background

The "suitable seating" requirement appears in all of California's industry-specific Wage Orders, which establish the minimum terms and conditions of employment in California, including, for example, the requirements to pay minimum wage and overtime, and the rules regarding the provision of meal and rest periods.[2] There are two components to the "suitable seating" rule. Under subsection "A", "[a]ll working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." Under subsection "B", "[w]hen employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties."[3] There are several interpretive questions raised by the language of Wage Orders. For example, when does a job "reasonably permit" the use of a seat or "require standing"? What type of seating is "suitable" (or unsuitable)? How far from the work area is "in reasonable proximity"? How many seats is an "adequate number"? What does it mean to be "actively engaged" in one's job?

Although the seating requirement has been on the books for decades, the courts have not yet had any opportunity to determine these issues and other related questions because plaintiffs' attorneys only recently began filing "suitable seating" lawsuits. One reason why plaintiffs previously did not test the "suitable seating" requirement may have been that they did not believe there was a viable mechanism by which to do so. There is no private right of action for damages built into the Wage Orders or the California Labor Code for "suitable seating" violations and California courts have been hesitant to imply such a private right of action.[4] That would change because of PAGA.

Exposure Under PAGA

Specifically, the legal landscape with regard to "suitable seating" violations changed dramatically in late 2010, following two California state appellate court rulings which, for the first time, held that employees could maintain a private right of action against their employers for violating the

"suitable seating" provision of the Wage Orders through the use of PAGA. PAGA created a private right of action for employees aggrieved by violations of the California Labor Code to recover civil penalties, which previously were recoverable only by the state. The civil penalties that are recovered by an employee in a PAGA action are distributed 75 percent to the California Labor and Workforce Development Agency, and the employee gets to keep the remaining 25 percent.

In November 2010, a California appellate court, in *Bright v. 99¢ Only Stores*, 189 Cal. App. 4th 1472 (Cal. Ct. App. Nov. 12, 2010), became the first appellate court to hold that a PAGA cause of action exists for a "suitable seating" violation. PAGA actions previously had not been used to enforce rights (such as the right to a "suitable seat") that are found exclusively in the Wage Orders. However, the court reasoned that such actions were permissible because a provision of the California Labor Code makes it unlawful to require employees to work under conditions prohibited by the Wage Orders, and PAGA, in turn, allows employees to sue as private attorneys general for any violation of the Labor Code. One month later, in December 2010, a second California appellate court in *Home Depot U.S.A. v. Superior Court*[5] reiterated the holdings of *Bright*. These twin rulings led to the spike in "suitable seating" lawsuits filed in California.

The impact of the rulings in *Bright* and *Home Depot* is significant because the civil penalties available under PAGA can be substantial. The "default" PAGA penalty, which a California court has held applies to "suitable seating" violations, is $100 per employee per pay period for a first violation, and $200 per employee per pay period for subsequent violations. An employer with a workforce in the thousands could easily face exposure to civil penalties in the millions of dollars.

The several initial rulings have sought to clarify certain aspects of the law and contain some ammunition for employers to use when confronting this type of lawsuit.

Initial "Suitable Seating" Decisions Favorable for Employers

The first judicial decision interpreting the "suitable seating" requirement is an unreported California state trial court decision from 2005 which granted summary judgment to a defendant on a "suitable seating" claim. The decision in *Hamilton v. San Francisco Hilton, Inc.*[6] contains an employer-friendly interpretation of the "suitable seating" requirement. The plaintiff in *Hamilton*, a hotel front-desk clerk for the San Francisco Hilton, alleged that she was entitled to PAGA penalties on the basis of a violation of subsection "A" of the seating provision of the applicable Wage Order (*i.e.*, because the nature of her work "reasonably permitted the use of seats"). The court granted summary judgment for the defendant on multiple grounds. First, the court explained that subsection "A" did not apply because standing was required for at least some part of the plaintiff's job. In determining whether a job "reasonably permits" the use of seats, the court specifically rejected a rule that would require "that a seat be provided if some unstated percentage of the job could be performed while seated, with the remaining performed while standing." The court also stated that "great weight" should be given to the employer's business decision, based on "rational business judgment," regarding the need for employees to stand while performing certain jobs.

The court in *Hamilton* also found that the defendant had complied with subsection "B" of the "suitable seating" requirement by permitting the front-desk clerks to go into a back room, which was steps away from the front-desk work area, to sit or rest when it would not interfere with their work. Doing so satisfied the subsection "B" requirement that an employer place "an adequate number of suitable seats . . . in reasonable proximity to the work area" when "employees are not engaged in the active duties of their employment and the nature of the work requires standing."

More recently, a federal District Court in Los Angeles, in the putative class action case of *Green v. Bank of America*,[7] interpreted the "suitable seating" provision and dismissed the claims of two Bank of America tellers, finding that the Wage Orders require employees to affirmatively ask for a seat before the employer becomes obligated to make a seat available. Because the plaintiffs did not allege that they "ever requested a seat, were ever denied a seat, or even that they wanted a seat," they failed to state a claim. *Green* is currently on appeal to the Ninth Circuit.

The decision in *Green* turned on the District Judge's interpretation of the word "provide," which appears in subsection "A" of the "suitable seating" requirement: "All working employees shall be *provided* with suitable seats when the nature of the work reasonably permits the use of seats" (emphasis added). In the context of California's meal period requirement, several California intermediate appellate courts and most federal trial courts have held that the word "provide" means to "make a meal period available," and not to "ensure" that a meal period is taken. In *Green*, the District Judge essentially imported that interpretation into the "suitable seating" context. However, the correct interpretation of the word "provide" in the meal period context currently is being considered by the California Supreme Court in the closely watched and highly anticipated case of *Brinker Restaurant Corp. v. Superior Court*, 165 Cal. App. 4th 25 (2008). A decision in that seminal case is expected in April 2012, and may answer several of the critical questions that have been left open under the California Wage Orders.

Given the potentially high monetary exposure under PAGA, employers with operations in California should be watching closely.

Best Practices

Although the requirements of the "suitable seating" rule remain unsettled, employers nevertheless may take steps to shield themselves from potential civil penalties. A first step for an employer should be to conduct an internal audit of California facilities or operations with respect to the seating requirements. Such an audit would involve reviewing job descriptions, and also discussing with managers the day-to-day duties and responsibilities of any positions that arguably could require some form of seating arrangement. If it is determined, based on that audit, that employees are not entitled to a seat under the Wage Orders, the employer should make sure that their written policies and job descriptions reflect that finding.

1 Making these actions more attractive for the plaintiffs' bar, the California Supreme Court has held that an employee need not satisfy class action requirements to bring a representative action against an employer under PAGA, *see Arias v. Superior Court*, 209 P.3d 923 (Cal. 2009), and several federal district courts have reached the same conclusion with respect to the standard – now more rigorous after *Dukes v. Walmart* – of Rule 23. *See, e.g.*, *Moua v. Int'l Bus. Machs. Corp.*, 2012 WL 370570 (N.D. Cal. Jan. 31, 2012) (rejecting the argument that PAGA claims must meet the Rule 23 class certification requirements; discussing split among the District Courts); *but see, e.g.*, *Ivey v. Apogen Techs., Inc.*, 2011 WL 351936 (S.D. Cal. Aug. 10, 2011) (holding that a plaintiff seeking to bring a representative PAGA action on behalf of other non-party, unnamed aggrieved employees in federal court must meet the requirements of Rule 23).

2 The Wage Orders are pronouncements of the California Industrial Welfare Commission, a department of the Division of Industrial relations, and are codified in California's regulations. There are sixteen industry-specific Wage Orders, most of which contain the same "suitable seating" provision.

3 *See, e.g.*, Cal. Code. Regs. tit. 8, §11070(14).

4 *See, e.g., Jue v. Costco Wholesale Corp.*, 2010 WL 889284 (N.D. Cal. Mar. 11, 2010); *see also, e.g.*, *Johnson v. GMRI, Inc.*, 2007 WL 963209, at *4 (E.D. Cal. Mar. 29, 2007).

5 191 Cal. App. 4th 210 (Cal. Ct. App. Dec. 22, 2010).

6 No. 04-431310 (Cal. Sup. Ct. June 29, 2005). Contrary to the subsequent decisions in *Bright* and *Home Depot*, the *Hamilton* court found that PAGA did not support a "suitable seating" cause of action.

7 *Green v. Bank of Am.*, No. 11-CV-4571-R (C.D. Cal. July 18, 2011).

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Editors

Lawrence J. Baer	(lawrence.baer@weil.com)	+ 1 212 310 8334
Allan Dinkoff	(allan.dinkoff@weil.com)	+ 1 212 310 6771

Practice Group Contacts

Jeffrey S. Klein
Practice Group Leader
New York
+1 212 310 8790
jeffrey.klein@weil.com

Boston
Thomas Frongillo
+1 617 772 8335
thomas.frongillo@weil.com

Dallas
Yvette Ostolaza
+1 214 746 7805
yvette.ostolaza@weil.com

Michelle Hartmann
+1 214 746 7847
michelle.hartmann@weil.com

Frankfurt
Stephan Grauke
+49 69 21659 651
stephan.grauke@weil.com

Houston
Melanie Gray
+1 713 546 5045
melanie.gray@weil.com

London
Joanne Etherton
+44 20 7903 1307
joanne.etherton@weil.com

Ivor Gwilliams
+44 20 7903 1423
ivor.gwilliams@weil.com

Miami
Edward Soto
+1 305 577 3177
edward.soto@weil.com

New York
Lawrence J. Baer
+1 212 310 8334
lawrence.baer@weil.com

Allan Dinkoff
+1 212 310 6771
allan.dinkoff@weil.com

Gary D. Friedman
+1 212 310 8963
gary.friedman@weil.com

Andrew L. Gaines
+1 212 310 8804
andrew.gaines@weil.com

Michael K. Kam
+1 212 310 8240
michael.kam@weil.com

Steven M. Margolis
+1 212 310 8124
steven.margolis@weil.com

Michael Nissan
+1 212 310 8169
michael.nissan@weil.com

Nicholas J. Pappas
+1 212 310 8669
nicholas.pappas@weil.com

Shanghai
Helen Jiang
+86 21 3217 9511
helen.jiang@weil.com

Washington, DC
Michael Lyle
+1 202 682 7157
michael.lyle@weil.com

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