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For Whom the Class Tolls: “No Piggybacking Rule” Does In Would-Be Class in Ongoing Wal-Mart Saga

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In 2011, the United States Supreme Court issued its landmark decision in *Wal-Mart Stores, Inc., v. Betty Dukes, et al.,* decertifying a putative class of approximately 1.6 million current and former female Wal-Mart employees who claimed gender discrimination in wages and promotions in violation of Title VII. 564 U.S. 338 (2011). The Court reversed the Ninth Circuit’s affirmation of class certification and determined the plaintiffs failed to meet the class “commonality” standard set out in Federal Rule of Civil Procedure 23. Id. at 349-60. The *Dukes* decision set in motion a number of spinoff regional cases, one of which – barring another grant of certiorari to the high court – met its end somewhat anticlimactically, when the Eleventh Circuit issued its August 3, 2017 order in *Love, et. al. v. Wal-Mart Stores, Inc.* No. 15-15260.

The *Love* plaintiffs included a sub-group of the *Dukes* plaintiffs who worked in the southeastern United States. These holdover *Dukes* plaintiffs were able to refile their claims because of the requirement that federal court discrimination plaintiffs first file with the Equal Employment Opportunity Commission. This rule effectively tolled the statute of limitations during the pendency of *Dukes.* But critically, under the Eleventh Circuit’s “no piggybacking rule”, tolling is limited to individual claims only, *not* class claims, which has also been adopted by the Fifth and Sixth Circuits. The *Love* court previously left little room for argument when it noted in a 2013 order that “[t]he Eleventh Circuit categorically refuses to toll the limitations period for subsequent class actions by members of the original class once class certification is denied in the original suit.” Thus, on October 16, 2015 the individual named plaintiffs and Wal-Mart settled and jointly filed a “stipulation of voluntary dismissal.”

On November 6, 2015, the *Love* appellants, made up of unnamed members of the would-be class, filed a motion to intervene solely to appeal the dismissal of class claims. This motion was denied 13 days later as moot, which, to make matters worse for the appellants, took them outside of their 30-day deadline to appeal the October 16 stipulated dismissal. The Eleventh Circuit thus found the appeal jurisdictionally barred, providing a rather sudden end to the winding multi-year litigation.

In light of this tangled and technical history, employers and their counsel should be sure to understand the differences in treatment of class actions and individuals under the relevant rules, regulations, and statutes. Though it can be tempting to move immediately to the standard substantive arguments against numerosity, commonality, typicality, and adequacy of the proposed class, the *Wal-Mart* cases show that knowing your way around the procedural thicket is another useful skill in

avoiding or minimizing the cost of class litigation.

[1] https://www.supremecourt.gov/opinions/10pdf/10-277.pdf

[2] http://hr.cch.com/eld/LoveWalmart080317.pdf

[3] *Salazar–Calderon v. Presido Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir.1985) and *Andrews v. Orr*, 851 F.2d 146 (6th Cir.1988)

[4] 2013 WL 5434565, at *2.

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