Life After Dukes --- Disparate Impact Claims for Compensation Discrimination Are Certified in
McReynolds v. Merrill Lynch, 2012 WL 572745, ___ F.3d ___ (7th Cir. 2012)

2012 ABA National Conference on Equal Employment Opportunity Law
Presented by the Equal Employment Opportunity Committee
March 21-24, 2012
Fairmont San Francisco
San Francisco, California

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Richard Posner is a civil rights hero, at least sometimes. Who knew.\(^1\) In *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2012 WL 592745, ___ F.3d ___ (7th Cir. Feb. 24, 2012), Judge Posner, writing for a unanimous panel, held that claims that African American brokers of Merrill Lynch received lower compensation as the result of (1) Company policies regarding the distribution of the accounts of departing brokers, and (2) the Company’s failure to regulate the formation of broker partnerships, should have been certified, at least for a liability determination, under Fed. R. Civ. P. 23(c)(4). *McReynolds* comes to this conclusion although acknowledging that the company decisions at issue involved discretion delegation of the local decisionmakers. Although such a ruling might have been unremarkable a few years ago, it is a source of great relief to Plaintiffs’ class action attorneys in the wake of the U.S. Supreme Court’s decision last June in *Wal-Mart Stores v. Dukes*, 131 S.Ct. 2541 (2011).

In *Dukes*, the Supreme Court reversed a decision certifying claims of gender discrimination in pay arising out of the theory that individual managers making pay decisions were not given adequate guidance, and that their unbridled discretionary decisionmaking was influence by stereotyping, resulting in statistically significant pay disparities adverse to women. Plaintiffs argued that even controlling for job, seniority, store, and performance review score, women were paid less than men. The Supreme Court reasoned that if individual managers making pay decisions had discretion, the commonality requirement of Rule 23(a)(2) was not satisfied, since individual managers might exercise their discretion differently. The Supreme Court did not find Plaintiff’s evidence persuasive on this point, since the statistics were presented on a regional basis; the anecdotal evidence was from a small percentage of the class; and

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\(^1\) The *McReynolds* decision takes a far more favorable approach to class certification than Judge Posner’s opinion in *Randall v. Rolls-Royce Corp.*, 637 F.3d 818 (7th Cir. 2011), where Judge Posner affirmed the dismissal of class certification in a gender pay and promotion case.
 Plaintiff’s social science expert did not “determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at WalMart.” *Id* at 2553.

In *Dukes*, the Supreme Court expressly reaffirmed the holding from *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) that “‘in appropriate cases’ giving discretion to lower-level superiors can be the basis of Title VII liability under a disparate-impact theory – since ‘an employer’s undisputed system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination.’” *Id.* at 2554. The Supreme Court did not make clear, however, what those appropriate cases are. *McReynolds* offers a few examples.

The *McReynolds* case involved Merrill Lynch’s “teaming” policy and its “account distribution” policy. The teaming policy permits, but does not require, brokers in the same office to form teams. Teams are formed by the brokers themselves. Merril Lynch does not form the teams, or set the partnership terms among team members, but Merril Lynch can veto teams.

Analogizing the formation of broker teams to a police department that authorized each senior police officer to select a junior officer to be his or her partner, where white officers never select black officers as their partners, Judge Posner concluded that the disparate impact resulting from the team formation “would be an employment decision by top management.” Judge Posner recognized that the discretionary decisions of brokers when forming teams might result in disparate impact due to stereotypes: “[T]here is bound to be uncertainty about who will be effective in bringing and keeping shared clients; and when there is uncertainty people tend to base decisions on emotions and preconceptions, for want of objective criteria.” 2012 WL 592745 at *6.
With respect to account distribution, Merrill sets criteria for the distribution of the
accounts of departing brokers, but Merrill managers can “supplement the company criteria for
distribution.” *Id.* As with teaming, in connection with account distributions, the district court
judge found that Merrill had delegated “discretion over decisions that influence the
compensation of all the company’s 15,000 brokers … to 135 Complex Directors.” Although
acknowledging that the delegation of discrimination to local decisionmakers influenced by
stereotypes was in some ways similar to Wal-Mart, Judge Posner nevertheless found that the
account distribution policy was a “company-wide” policy that, if it disadvantages African-
American brokers, must be justified by business necessity, or else exposes Merrill to civil
liability for disparate impact. *Id.* at *7.

Finding company-wide policies governing account distribution and team formation,
Judge Posner held that claims challenging those policies could properly be certified under Rule
23(c)(4), for the purpose of determining whether the employment practices are unlawful.
Individual proceedings might then be needed to determine which class members were actually
adversely affected by one or both of the practices and, if so, what loss each class member
sustained.

Perhaps *McReynolds* can best be harmonized with *Dukes* on the basis that *Dukes*
involved no policies at all other than the Company’s anti-discrimination policy, and a policy of
delegating employment decisions to local managers. *McReynolds.* at *5. In *McReynolds*, Judge
Posner identified company-wide policies governing account distribution and teaming.
*McReynolds* indicates that where there is a company-wide policy, class certification, under Rule
23(c)(4) is appropriate to determine the lawfulness of that policy, even if the implementation of
the policy involves substantial discretion by local decisionmakers.
Dukes itself contains language supporting such a harmonization. In Dukes, Justice Scalia’s opinion confirms that certification is appropriate in cases involving a “‘biased testing procedure’”, 131 S.Ct. at 2553, (quoting Falcon) and “the assertion of discriminatory bias on the part of the same supervisor,” 131 S.Ct. at 2552. The requirement in Dukes that a plaintiff, in the absence of a test, policy or single decisionmaker, must show that “‘an employer operated under a general policy of discrimination … that manifested itself in the same general fashion’”, 131 S.Ct. at 2553 (quoting Falcon) appears to be limited to cases involving “‘entirely subjective decisionmaking processes’,” id, that do not involve company policies. Where a company policy or practice affects compensation, that policy or practice can be challenged under a disparate impact theory, and the lawfulness of that policy or practice is properly certified under Fed. R. Civ. P. 23(c)(4), even if its implementation involves substantial discretion by local decisionmakers.