

07 CV 2067 (NGG)(RLM)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-and-

VULCAN SOCIETY, INC., et al.,

Plaintiffs-Intervenors,

-against-

CITY OF NEW YORK; et al.,

Defendants.

**DEFENDANTS' MEMORANDUM OF LAW
ADDRESSING THE IMPACT OF THE SUPREME
COURT'S DECISION IN WAL-MART STORES,
INC. V. DUKES ON PLAINTIFFS-INTERVENORS'
MOTION TO DEFINE SUBCLASSES**

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PRELIMINARY STATEMENT

This memorandum of law is submitted by the defendant, the City of New York (“City”), pursuant to the Court’s Order, dated June 20, 2011 (Dkt # 643), directing that the parties submit memoranda of law on the impact of the Supreme Court’s decision in Wal-Mart Stores, Inc. v. Dukes, No. 10-277, slip op. ___, 56 U.S. ___ (June 20, 2011) on the Plaintiffs-Intervenors’ pending motion for certification of a class for non-economic and make-whole relief.¹

For the remedial phase of this litigation, Plaintiffs-Intervenors have sought certification of separate subclasses for the non-hire claimants (“Non-Hire Subclass”) and the delayed-hire claimants (“Delayed-Hire Subclass”). The nature of the non-economic and make-whole relief sought for each subclass is identical, with one exception: the Non-Hire subclass is also seeking a determination as to the number of individuals who will be entitled to apply for firefighter positions as priority hires. In their June 13, 2011 Memorandum of Law in Support of Motion to Define Subclasses (Dkt # 643-1)(“Plaintiffs-Intervenors’ June 13th Memo of Law”), Plaintiffs-Intervenors sought certification of both subclasses under Rule 23(b)(2) and, in the alternative, under Rule 23(b)(3).

¹ In light of the Wal-Mart decision, the City respectfully submits that the Court should also direct the parties to submit memoranda of law addressing the decision’s impact on the Court’s May 11, 2009 Order certifying the liability phase of the lawsuit (dkt # 281).

POINT I

**THE COURT SHOULD DENY PLAINTIFFS-
INTERVENORS' REQUEST FOR
CERTIFICATION OF THE NON-ECONOMIC
AND MAKE-WHOLE RELIEF SUBCLASSES
UNDER RULE 23(b)(2)**

In light of the Wal-Mart decision, a Rule 23(b)(2) certification of the non-economic and make-whole subclasses would be inappropriate.² The Supreme Court specifically ruled that Rule 23(b)(2) “does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.” Wal-Mart, slip op. at 20-21. Furthermore, it held that “Permitting the combination of individualized and class-wide relief in a (b)(2) class is also inconsistent with the structure of Rule 23(b).” Wal-Mart, slip op. at 21.

Recognizing the uncertainty engendered by Supreme Court’s grant of certiorari in the Wal-Mart case, Plaintiffs-Intervenors argued in the alternative that both the Non-Hire and Delayed-Hire subclasses should be certified under Rule 23(b)(3). Plaintiffs-Intervenors’ June 13th Memo of Law at 6-7. For the reasons stated below, the City objects to the Plaintiffs-Intervenors’ overly broad definition of the issues that will be encompassed within the proposed subclasses. The City does not object to a Rule 23(b)(3) certification of these subclasses provided that the City’s right to individualized determinations of each employee’s eligibility for back pay, mitigation and compensatory damages is preserved.

² However, the Court’s Rule 23(b)(2) certification of a subclass for injunctive relief such as compliance monitoring, however, continues to be appropriate.

POINT II

THE COURT SHOULD LIMIT ANY RULE 23(b)(3) CERTIFICATION OF THE NON-ECONOMIC AND MAKE-WHOLE RELIEF SUBCLASSES TO ISSUES THAT DO NOT INFRINGE UPON THE CITY'S RIGHT TO INDIVIDUALIZED HEARINGS

A. Non-Economic Relief

The Wal-Mart decision impacts the Court's Rule 23(b)(3) certification of the following issue as to non-economic relief: the calculation of the monetary value of the intangible benefits of being a New York City firefighter on a class-wide basis.³ Admittedly, compensatory damages were not at issue in Wal-Mart as the named plaintiffs made the strategic decision to forego seeking compensatory damages. However, the City contends that the rationale for the Supreme Court's dismissal of a sampling or "Trial by Formula" approach to back pay applies with equal force to the valuation of the intangible benefits of being a New York City firefighter. Wal-Mart, slip op. at 7, 27.

The sampling approach dismissed by the Supreme Court as unworkable when applied to back pay awards originated in a Ninth Circuit decision that dealt with compensatory damages, Hilao v. Estate of Marcos, 103 F.3d 767, 782-787 (1996). According to the Supreme Court, in Hilao, "compensatory damages for some 9,541 class members were calculated by selecting 137 claims at random, referring those claims to a special master for valuation, and then extrapolating the validity and value of the untested claims from the sample set." Wal-Mart, slip op. at 7.

³ The Court correctly ruled that "Plaintiffs-Intervenors are not entitled to mandatory class certification under rule 23(b)(2) because the non-economic loss subclass seeks an award of monetary damages." June 6, 2011 Order at 30 n 14.

Plaintiffs-Intervenors' approach to the class-wide calculation of non-economic damages is similarly flawed. In support of their summary judgment motion, Plaintiffs-Intervenors offered declarations from four current firefighters and two applicants who did not receive job offers and argued that based on that limited testimony the Court could extrapolate the monetary value of the intangible benefits of being a New York City firefighter to all 7,400 black and Hispanic test applicants. Plaintiffs-Intervenors' Memorandum of Law in Support of Motion for Summary Judgment on Class-Wide Compensatory Damages, dated September 29, 2010 (Dkt # 577) at 6-12. As the Court itself acknowledged in its June 6, 2011 class certification decision, "it would be difficult to argue that a class member has actually suffered a noneconomic loss where he has greater overall job satisfaction in his interim employment than he would have had if he had been hired as a firefighter." June 6, 2011 Order (Dkt # 640) at 32. The City contends that it is equally difficult to argue that the value of this intangible benefit, a euphemism for compensatory damages, can be determined without an individualized assessment of each claimant's state of mind and job status during the damage period. The City should be able to obtain discovery and litigate each individual claim for monetary damages for the intangible benefit of being a firefighter.

B. MAKE-WHOLE RELIEF

The City agrees that the gross amount of back pay and benefits eligible for distribution to the actual victims of discrimination should be calculated on a class-wide basis. However, the issues of mitigation and the determination of each claimant's back pay and benefits award must be calculated on an individual basis after the City has had the opportunity to offer proof as to interim earnings, failure to mitigate, and the individual claimant's eligibility for relief throughout the damage period. To the extent that the City is successful during the individual

claims process in proving class members' failure to mitigate, its overall monetary liability must be reduced. Otherwise, the individualized hearings would be hollow undertakings.

Therefore, the City objects to the Plaintiffs-Intervenors' suggestion that the Court should create a subclass-wide back pay fund. Plaintiffs-Intervenors' June 13th Memo of Law at 8. That suggestion runs counter to the Supreme Court's holding that employers have the right to individualized hearings on their defenses to individual claims for monetary relief. Wal-Mart, slip op. at 26-27. It also misunderstands the theory behind calculating back pay on a class-wide basis. Class-wide calculations of gross back pay are initially based on the amount that would have been earned by the actual number of additional black and Hispanic candidates who would have been hired absent discrimination, i.e. the shortfall. The gross back pay amount would then have to be reduced by class members' mitigation efforts. A class member's share of the back pay would not increase due to his fellow class members' successful mitigation efforts. If an individual class member's make-whole relief was increased due to the successful mitigation efforts of others, he would obtain a windfall and the City would be unjustly penalized.

CONCLUSION

For the foregoing reasons defendants respectfully request that the Court deny subclass certification under Rule 23(b)(2) and narrowly limit its Rule 23(b)(3) certification to

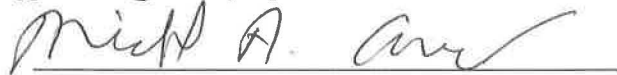
those issues that do not infringe on the City's right to individualized relief.

Dated: New York, New York
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Respectfully Submitted,

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