IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GEORGE MCREYNOLDS, MAROC HOWARD, LARUE GIBSON, JENNIFER MADRID, FRANKIE ROSS, MARVA YORK, LESLIE BROWNE, HENRY WILSON, LEROY BROWN, GLENN CAPEL, CHRISTINA COLEMAN, J. YVES LABORDE, MARSHELL MILLER, CARNELL MOORE, MARK JOHNSON, CATHY BENDER-JACKSON, and STEPHEN SMARTT, individually on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

Defendant.

No. 05 C 6583

Judge Robert W. Gettleman

ORDER

After this court's August 9, 2010, amended memorandum opinion and order denying plaintiff's motion to certify the class,[1] and its February 14, 2011, memorandum opinion and order denying plaintiff's motion to reconsider,[2] the Supreme Court issued its opinion in Wal-Mart Stores, Inc. v. Dukes, __ U.S. __, 131 S.Ct. 2541 (June 20, 2011). Although the Wal-Mart decision has been described as the death knell of employment class actions,[3] plaintiffs' counsel, being the fine lawyers they are, persuaded this court to allow them to file an "amended post-Wal-Mart motion for class certification," in which they argue that the Wal-Mart decision actually

[1]McReynolds v. Merrill Lynch, 2010 WL 3184179 (N.D. Ill. 2010).

[2]McReynolds v. Merrill Lynch, 2011 WL 658155 (N.D. Ill. 2011).

[3]Defendant's paraphrase, citing John C. Coffee, Jr., "You Just Can't Get There From Here": A Primer on Wal-Mart v. Dukes, 80 U.S. Law Week 93 (July 19, 2011).

supports the certification of a class alleging strictly a disparate impact claim in this litigation. Thus, the court allowed the parties to brief the issue of whether Wal-Mart actually changes the conclusion that this court had reached on two prior occasions that the class could not be certified in this litigation under either plaintiff's original disparate treatment/impact claim or a new strictly disparate impact claim.

Having considered this court's prior opinions and the rationale supporting those opinions, the parties' excellent briefs on plaintiff's amended post-Wal-Mart motion, and the Wal-Mart decision itself, the court concludes that plaintiff's amended motion for class certification must be denied.

Without belaboring the point or repeating the analyses that this court has previously articulated, the parties appear to agree that in a strictly disparate impact case plaintiffs must identify a specific, uniform employment policy and offer sufficient evidence of disparate impact in order to certify a class under Fed R. Civ. P. 23. In the instant motion, plaintiffs argue that the court should certify a hybrid class employing both Rule 23(b)(2) (injunctive and declaratory relief only) and 23(b)(3) (to allow subsequent recovery of back wages) in a bench trial on the issue of liability, followed (if successful) by the appointment of a special master to conduct individual damages proceedings.

Plaintiffs appear to have identified two specific employment policies: the so-called National Teaming Policy; and the National Account Distribution Policy. In addition, they have offered statistical evidence to show that African-American Financial Advisors ("FAs") earned far less on a company-wide basis than their white counterparts, thus demonstrating a disparate impact. This, plaintiffs argue, is enough to compel the certification of a disparate impact class.

The court disagrees. In the context of this case, even assuming that plaintiffs have identified a specific employment policy and a disparate impact, the nature of the employment relationship at issue does not permit the certification of a class because plaintiffs cannot establish that "there are questions of law or fact common to the class," as a threshold requirement of Rule 23(a)(2).

As Judge Scalia held in Wal-Mart (131 S.Ct. at 2551):

> Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate -impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention–for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution–which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.
>
> "What matters to class certification . . . is not the raising of common`questions'–even in droves–but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." [Quoting Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 132 (2009).]

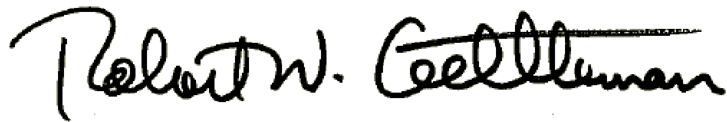
The Wal-Mart Court denied class certification because Wal-Mart's "policy" of allowing discretion by local supervisors over employment matters "[o]n its face . . . is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy against having uniform employment practices." Id. at 2554 (emphasis in original).

The problem with plaintiffs' analysis of the Wal-Mart decision is their failure to account for the requirement that the identified policy must have caused the disparate impact. The two policies in question in the instant case depend in their implementation on discretionary decisions that affect each of the class members. Thus, with respect to the National Teaming Policy, the

decision on whether to join a team or to be invited to join a team would depend on a myriad other decisions by supervisors and the FAs themselves. For example, a manager might choose to suggest a particular FA to a team and the FA may decline for personal or professional reasons. Similarly, an FA and an FA's teammates might balk at his or her joining a team for discriminatory reasons. Each such decision would have to be examined to determine whether the particular FA was the victim of discrimination. Consequently, even though plaintiffs might be able to raise a common question or questions, there is no "capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." Thus, "the [d]issimilarities within the proposed class . . . impede the generation of common answers," id. at 2551, and preclude class certification.

The problems and impediments to certifying a class in this case that were identified in the court's previous opinions were therefore confirmed by the Supreme Court's holding in Wal-Mart, which was a disparate treatment and disparate impact case. Despite plaintiffs' counsels' heroic efforts, the court denies their amended motion for class certification. Because of the importance of this decision, and the potential influence of the Supreme Court's recent decision in Wal-Mart, this court would support a motion for an interlocutory appeal to the United States Court of Appeals for the Seventh Circuit under Fed. R. Civ. P. 23(f) or 28 U.S.C. § 1292(b).

ENTER: September 19, 2011



Robert W. Gettleman
United States District Judge