Gender Discrimination in Pay and Promotions: Emerging Litigation Threat
Employer Strategies for Avoiding and Defending Lawsuits

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Gender Discrimination in Pay and Promotions: Emerging Litigation Threat

March 1, 2011

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Slides for Section I – Recent legal developments
Gender Statistics

- Dept. of Labor Report (June 2010)
  - In 2009, women earned on average about 80% of their male counterparts across all industries

- EEOC Statistics (Jan. 2011)
  - 99,922 total charges in FY 2010
  - Of those, 29,029 charges raised sex / gender claims
  - Both are record highs
Key Statutes / Causes of Action

- Title VII of Civil Rights Act
  - Disparate treatment
  - Disparate impact
  - Retaliation

- Equal Pay Act (FLSA)

- State Law
  - Anti-discrimination statutes, common law torts
Potential Remedies (depending on claim)

- Back pay
- Interest
- Liquidated damages
- Front pay
- Emotional distress / pain and suffering
- Punitive damages
- Injunction / equitable relief
- Attorney’s fees
Executive / Legislative Priority

- Lilly Ledbetter Fair Pay Act of 2009
  - Discriminatory compensation decision or other practice is actionable with each discriminatory paycheck

- Increased funding for EEOC, DOL, DOJ Civil Rights Division

- New DOL Wage/Hour Division program: Bridge to Justice

- Proposed Legislation: Paycheck Fairness Act
  - Would expand recourse for claims of gender pay disparity
  - Blocked in Senate, Nov. 2010
$250 Million Verdict – Velez v. Novartis

- Class action in NY district court by 19 women in 16 states alleging systematic gender discrimination, representing class of 5,600 female sales reps nationwide
  - Discrimination in selection, promotion and advancement, disparate pay, differential treatment, gender hostility, hostile work environment, pregnancy discrimination, retaliation

- Jury verdict (May 2010): $3.3 million compensatory damages to named plaintiffs + $250 million punitive damages to class

- Settlement (July 2010): $175 million
Recently Filed Case – Goldman Sachs

Chen-Oster v. Goldman Sachs (Sept. 2010)

– Nationwide class action by three female financial services employees alleging gender discrimination, pregnancy discrimination, retaliation

– Allegations that overwhelming majority of managers are men, managers have unfettered discretion resulting in gender bias in compensation, promotions, business opportunities, professional support
Recently Filed Case – Toshiba

*Cyphers v. Toshiba* (Jan. 2011)

- Class action by HR manager seeking to represent class of all female employees in the US
- Allegations that only 3.4% of managers are women, women treated less favorably than men in job assignments, pay and promotions, and are retaliated against for complaining
- Complaint seeks, among other things, compensatory and punitive damages not less than $100 million
Dukes v. Wal-Mart – History of Litigation

- 2001: six female employees sue to represent nationwide class of 1.5 million women in 3,400 stores, alleging gender discrimination in pay and promotions

- 2004: CA district court grants class cert, estimated billions potential liability

- 2007: 9th Circuit issues 2-1 opinion affirming class cert, nine months later withdraws and replaces with similar opinion

- 2009: 9th Circuit grants en banc review, hearing before 11-judge panel

- 2010: 9th Circuit issues 6-5 opinion affirming class cert, but limited to current employees so class size reduced to 500,000 members

- 2010: Supreme Court grants review (pending)
Dukes v. Wal-Mart – Basis for Class Cert

In opposing class cert, Wal-Mart argued salaries and promotions were decided in each store locally, decisions too decentralized to create any issues common to the class.

District Court and 9th Circuit disagreed, certified nationwide class based on “excessive subjectivity” in decision-making:
  – Strong, centrally-controlled corporate culture resulted in an environment of gender stereotyping
  – Lack of objective criteria for pay and promotion decisions
  – Excessive subjectivity provided a conduit for gender bias that affected all class members similarly
Dukes v. Wal-Mart – Class Cert Evidence

(1) Statistics
- Plaintiffs: regression analyses for each of 41 regions, finding women earned 5 to 15% less than similarly situated men, took 1 ½ years longer to be promoted to higher management
- Wal-Mart: decisions made within each store department, 7,500 separate regression analyses showed lack of broad-based gender differential

(2) Social Sciences Expert
- Plaintiffs: gender stereotypes especially likely to influence personnel decisions if subjective, more likely biased if no clear objective criteria
- Wal-Mart: opinions are imprecise and unfounded

(3) Anecdotal
- Plaintiffs: 120 declarations from women around the country
- Wal-Mart: 239 declarations from store managers describing different individual factors they each consider in deciding pay and promotions
**Dukes v. Wal-Mart – Key Issues**

- Clarification of FRCP 23 class certification standards, and extent to which district courts are to consider the merits of claims at certification stage

- Propriety of certifying class under FRCP 23(b)(2) (for injunctive and declaratory relief) when plaintiffs seek substantial money damages and punitive damages

- Whether there is sufficient commonality among class members in a nationwide class action of enormous size and breadth

- Whether employers have due process right to individualized defenses

- Extent to which expert evidence can be challenged as unreliable at the class certification stage (*Daubert*)
Takeaways

- Statistics show that gender disparities persist in workplaces
- Recent legislation, government initiatives, court decisions and jury verdicts have placed gender discrimination at the forefront
- Litigation trend focuses on class-wide statistics and expert opinions rather than individual decisions
- The Supreme Court’s upcoming ruling in *Dukes v. Wal-Mart* will be hugely important in clarifying potential exposure for employment class action liability
Gender Discrimination in Pay and Promotions: Emerging Litigation Threat

Presentation to Strafford CLE
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National Equal Pay Enforcement Task Force

● Combines resources of Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ), the Department of Labor (DOL) and the Office of Personnel Management (OPM)

● Objectives:
  – Improving coordination and collaboration between EEOC, DOJ, DOL, and OPM and increasing their enforcement efforts to maximize the effectiveness of existing laws and regulations against pay discrimination
  – Collecting data from private sector employers to better understand the nature and scope of pay gaps between men and women and target enforcement efforts
  – Undertaking a public education campaign to educate employers about their obligations and employees about their rights
The Perfect Storm

- Lily Ledbetter Fair Pay Act expands the statute of limitations
- Increased agency funding, collaboration efforts of National Equal Pay Enforcement Task Force and emphasis on systemic investigations increases the risk of pattern and practice cases
- Substantial verdicts and pro-plaintiff procedural rulings have made these complex cases more attractive to the plaintiffs’ bar
Substantial Verdicts and Pro-Plaintiff Procedural Rulings

- In May 2010, a jury in New York awarded $3.4 million in compensatory damages and followed up with $250 million in punitive damages in a gender discrimination class action against Novartis. A class action was certified on behalf of more than 5,600 women who worked in sales jobs at Novartis since 2002. The case was ultimately settled for $175 million.

- *Wal-Mart v. Dukes* (9th Cir. 2010). Affirmed District Court Order certifying class of more than 500,000 female Wal-Mart employees in action alleging gender bias in pay and promotions. Petition for certiorari granted and oral argument is scheduled for March 29, 2011. Largest employment discrimination class ever certified.
Role of Statistical Evidence in Pay and Promotion Discrimination Cases

- Plaintiff has burden of showing that intentional discrimination was employer’s standard operating procedure. Must produce proof of a discriminatory policy that manifested itself in similar ways across the company.

- Can present statistical evidence of discriminatory policy/pattern and practice of discrimination.

- Wal-Mart District Court: In short, regressions [prepared by plaintiffs’ expert] show that gender is a statistically significant variable in accounting for the salary differentials between female class members and male employees at Wal-Mart stores.” p. 156
Dukes v. Wal-Mart

Allegations:

• Wal-Mart paid women less than men in comparable positions, even where women had higher performance ratings and greater seniority

• Women received fewer promotions than similarly situated men

• “Wal-Mart’s strong, centralized structure fosters or facilitates gender stereotyping and discrimination”
Dukes v. Wal-Mart (cont’d)

- Testimony that Executive Vice President for People [”EVPP”] regularly reported that Wal-Mart lagged behind its competitors in the advancement of women into management
- Testimony that EVPP “saw nothing wrong with a district manager holding management meetings at Hooters restaurants”
- Diversity efforts described as “lip service”
- Promotion class limited to class members with objective evidence to confirm their interest in promotion
- Unequal promotional opportunities “Roughly 65% of hourly employees are women, while roughly 33% of management employees are women”
Dukes v. Wal-Mart – District Court Findings

● “The subjectivity in promotion decisions occurs in two fundamental ways: (a) a largely subjective selection practice hindered by only minimal objective criteria, combined with (b) a failure to post a large proportion of promotional opportunities.”

● “Class members had no ability to apply to, or otherwise formally express their interest in, openings as they arose.”

● “Managers did not have to consider all interested and qualified candidates, thus further intensifying the subjective nature of the promotion process.”

● Plaintiffs provided “significant evidence of company-wide practices and policies” that “raise an inference that Wal-Mart engages in discriminatory practices in compensation and promotion that affect all plaintiffs in a common manner.”
Not Just Wal-Mart and Novartis

- Smith Barney: Class monetary fund of $33 million paid to class of female Financial Advisors in Smith Barney’s retail brokerages. (2008) (class estimated at 2500 members)

- *August Johnson, et al. v. Morgan Stanley* (class estimated at 2700 members): Settlement fund of $46 million paid to women employed as Financial Advisors or Registered Financial Advisor Trainees in Global Wealth Management Group of Morgan Stanley; approximately $7.5 million for training, education and other programs; intent that earnings of female Financial Advisors would increase at least $16 million over class period.
Recently Filed Cases

- **Cyphers v. Toshiba America**, putative class action complaint filed in Southern District of New York on 1/31/2011, brought by Human Resources Manager at Toshiba American Nuclear Energy Corporation, alleging an “astounding lack of women in leadership positions companywide” and a “systemic pattern and/or practice of gender discrimination against female employees.”

- Alleges that subjective practices resulted in: a) female employees received less salary, bonus and benefits than similarly situated men; b) female employees either not promoted or waited longer for promotions; and c) female employees received less desirable assignments, inequitable evaluations and more rigid discipline.

- “Selection and advancement opportunities are driven by personal familiarity, subjective decision-making, preselection, and interaction among male managers, supervisors, and subordinates, rather than by merit or equality of opportunity.”
Putative class action alleging that women receive less compensation and fewer promotions than male comparators “as a result of the firm’s discriminatory policies, patterns and/or practices.

“Specifically, Goldman Sachs gives its managers, the overwhelming majority of whom are men, unchecked discretion to assign responsibilities, accounts, and projects to their subordinates… managers, whether based on conscious or examined bias, most often assign the most lucrative and promising opportunities, assignments, and ‘seats’ to men . . . . Which in turn earn them greater compensation and career advancement.”

(cont’d.)
“Goldman Sachs also grants manager unbridled discretion to allocate resources among its employees, including but not limited to administrative support, training opportunities, and informal mentoring.” “In practice, Goldman Sachs managers exercise this discretion in a way that provides disproportionately greater resources to their male subordinates than their female subordinates. These policies, patterns and/or practices have the effect of unfairly benefiting men at Goldman Sachs while depriving their female co-workers of the same resources. Such resource assignments may also give male employees the impression of higher power and seniority that often becomes a self-fulfilling prophecy. As a result, men at Goldman Sachs are viewed more favorably, receive more compensation, and are more likely to be promoted.”
Goldman Sachs also has constructed and maintained a system for evaluating employees’ performance that systematically discriminates against female professionals. Its performance review system permits unacceptable levels of subjectivity and bias that results in the systematic undervaluation of female employees’ performance. This disparity between the evaluation of male and female employees further exacerbates the inequality between their respective compensation and opportunities for promotion.

These company-wide polices and practices, while facially neutral, have had an adverse impact on the compensation, promotion, and performance evaluations of female employees as compared to their male counterparts.
Goffney v. Lockheed, Martin, filed August 6, 2010
U.S. District Court for the District of New Jersey

- Putative Class Action alleging a pattern and practice of gender discrimination
- Alleges that male employees are promoted more frequently and in less time than equally or more qualified female employees
- Alleges discrimination in compensation, including with respect to pay grade, annual and promotional increases, merit pay increases and bonuses
- Alleges that failure to post open positions at senior levels is a discriminatory practice
- Uniform policies for determining education and experience requirements alleged to “require excessive subjectivity in their implementation”

(cont’d)
Goffney v. Lockheed, Martin, filed August 6, 2010
U.S. District Court for the District of New Jersey (cont’d.)

● Alleges reliance in “subjective, inconsistently applied criteria in performance review, assignments, training, pay and promotional decisions”

● Alleges that female employees receive less training and support, including fewer stretch assignments and other training and advancement opportunities
Common Themes

- Percentage of women decreases at higher levels of corporate structure
- Few women in executive or board positions
- Subjective compensation, evaluation and promotion practices which allegedly permit and encourage the incorporation of gender stereotypes
- Threatened or actual retaliation
- Disparate impact claims
- Practices not validated
Gender Discrimination 3.0: New Approaches

- New Lingo: Plaintiffs bar has new focus on practices and policies that have an element of subjectivity
  - In-group favoritism
  - Out-group aversion
  - Stereotyping
- Technology makes historical data available and easy to analyze
- Agency focus on systemic cases
- Transparency makes it easier for employees to know where they stand
Looking Ahead

- Expect more class action complaints alleging that female employees receive disparate treatment with respect to terms and conditions of employment, including training, assignments, advancement opportunities and compensation.

- Even employees with sound practices will face claims that the processes are subjective and leave the door open for disparate treatment and bias, conscious or otherwise.

- Know your numbers. Use software to identify gender disparities in compensation and promotions. Start with a spreadsheet.

(cont’d)
Looking Ahead (cont’d.)

- Document exceptions and retain the documentation
  - Which applicants were interviewed?
  - Why candidates were not promoted?
  - Who made the decision?
  - If candidate selected was “more qualified,” document the qualifications
Lessons Learned

● Know what your workforce looks like
● Are men and women in similar positions receiving similar compensation?
● If not, why not? Make sure it’s documented.
● Avoid Women’s Initiatives/Diversity Initiatives that look like window dressing
● Be consistent and document exceptions
● Train managers to listen for complains and respond promptly – not every complaint is obvious
● Take retaliation issues very seriously – it only takes one plaintiff to start a class action
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Initial Planning and Goal Setting

General Considerations

- Steps company can take to limit ongoing potential exposure while the case is pending
- Whether litigation in one state is likely to lead to similar litigation in other states
- Whether company believes it may have some exposure and may want to explore settlement at some point
- Timing and financial disclosure implications of decisions
Investigation and Initial Assessment

Litigation Hold and Data Preservation Notices Must be Issued Promptly


- Duty to preserve evidence arises not when a litigation begins, but when a party “reasonably anticipates litigation.”
- “Failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.”
- Court stressed the extreme importance to be placed on a party’s preservation of records regarding former employees that are exclusively in the control of that party.
- Backup tapes need only be preserved when “they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.”
Conduct an Initial Assessment

- Collect and review documents involving the pay/promotion policies and practices at issue.
- Assess what records exist.
- Collect and analyze electronic records.
- Create a list of all potential class members, including their addresses, telephone numbers, the locations where they worked, the dates they worked there, rate(s) of pay, and other related information.
- Interview all named parties, witnesses, and unnamed witnesses as soon as practical after Complaint comes in, while facts are fresh, and before persons with knowledge and information leave the employ of the company and to assess exposure early on.
Carefully Examine Allegations in Complaint to Determine if Lilly Ledbetter Fair Pay Act is Applicable

• Characterize the policies/practices at issue in the litigation as promotions or other non-direct pay-setting decisions.
  
  • The D.C. Circuit, the Second Circuit, and the Third Circuit have addressed the meaning of “compensation decision” or “other practice.” Judge Ginsburg recently authored a decision for the D.C. Circuit holding that the “compensation decision” and “other practice” language in the Ledbetter Act does not encompass failure to promote claims. Schuler v. PriceWaterHouseCoopers, LLP, 2010 WL 522345 (D.C. Cir. 2010).
  
  • But plaintiffs are arguing that the phrase “or other practice” in the statute covers the full panoply of employment decisions, such as promotions and demotions, and not just pay-setting decisions or policies. At least two courts have bought this argument: Bush v. Orange County Corrections Dept. (M.D. Fla. Feb. 2, 2009) and Gilmore v. Macy’s Retail Holdings (D.N.J. Feb. 4, 2009).
Responding to the Complaint and Formulating the Defense Strategy

Don’t Forget Differences between Title VII and Equal Pay Act—and Remember to Attack Concurrent Actions

• FRCP Rule 23 "opt-out" class action vs. FLSA “opt-in” collective action—Is there an inherent conflict?
• Privilege issues: Reliance on counsel defense?
• Declaration blitz
Responding to the Complaint and Formulating the Defense Strategy

Title VII Defenses

• Plaintiff must exhaust administrative remedies

• *Disparate Treatment*: Legitimate, non-discriminatory reason for pay differential

• *Disparate Impact*: Job-related and consistent with business necessity and no alternative employment practice exists
Equal Pay Act Defenses

• Under the EPA, employers are prohibited from paying women less than men for performing the same or "substantially equal" work in the same “establishment” unless the differential results from: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv)... any... factor other than sex." 29 U.S.C. §206(d)(1).

• No liquidated damages where employer made good faith efforts to comply with EPA

• Did plaintiff attempt to mitigate damages?
Responding to the Complaint and Formulating the Defense Strategy

You want a good story to tell!

• Proactively manage biggest areas of vulnerability:
  • Access to management training programs.
  • Glass ceiling issues.
  • Pay/career path following pregnancy leave.
• You want to show that the company used objective criteria for pay and promotion decisions.
• Gather anecdotal evidence from managers describing different individual factors they each consider in deciding pay and promotions.
A Note on e-Discovery

• Under Federal Rule of Civil Procedure 26(b)(2), information requested by plaintiffs’ attorneys may be unreasonable as cumulative, duplicative, or obtainable from some other source.

• Some courts may be willing to consider the argument that, rather than enduring the time-consuming process and expense of copying electronic information and reviewing it, existing paper documents containing the same information as the electronic versions will be more suitable for production.
Defense tips for a human resources manager, supervisor, or other management official prior to being deposed by plaintiffs’ counsel:

• Do not memorize testimony or study documents outside the presence of counsel unless instructed to do so.
• Do not answer the question you think the lawyer meant to ask.
• This is not a normal conversation. Keep answers brief.
• Be judicious with long narrative responses (e.g., to further a theme in the case).
• Refrain from identifying others with knowledge unless specifically asked to do so.
• Refrain from identifying potential relevant documents unless specifically asked to do so.
• Do not hesitate to admit a lack of recall or certainty when answering a question, if the answer truly cannot be recalled.
• Do not speculate or guess.
• Do not testify as to what “probably” happened or “assume” anything.
• Listen to the entire question before answering.
• Avoid humor (especially sarcasm) in answering questions.
Experts

Get your experts early!

- You will need a statistician and social sciences expert to counter plaintiffs’ claims and argue against class certification.

- Questions remain regarding the extent to which expert evidence can be challenged as unreliable at the class certification/summary judgment stage (*Daubert*). “[I] is not the province of the Court to insert itself between dueling experts, which is what we have here. Nor is it the Court's role to determine whether plaintiffs' anecdotal evidence actually proves their manifold claims. Plaintiffs' evidence - all of it – is sufficient to get the disputed class claims beyond the first McDonnell Douglas question, as to which their burden is minimal. Whether this Court finds that evidence persuasive is of no moment. Plaintiffs have demanded a jury, and a jury they shall have.” *Novartis* ruling on Motion for Partial Summary Judgment (Oct. 20, 2009).
Class Certification

Rule 23 Class Certification Requirements

• Plaintiffs generally must prove that:
  • (1) the class is so numerous that joinder of all members as separate litigants is impracticable;
  • (2) there are questions of law and fact common to the class;
  • (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
  • (4) the representative parties will fairly and adequately protect the interests of the class.

• In addition, plaintiffs seeking class certification must satisfy the conditions of one of the Rule 23(b) sub-sections. Rule 23(b)(2) mandates that the defendant acted in a manner “generally applicable to the class” and plaintiffs’ claims for declaratory and injunctive relief “predominate” over monetary relief.
Questions Remain

- Supreme Court to decide whether Federal Rule of Civil Procedure 23(b)(2) (which, by its terms, relates only to class action claims for injunctive or declaratory relief) was a proper basis for certifying the plaintiffs’ claims for monetary relief under Title VII. *Wal-Mart v. Dukes*, No. 10-277
Mediation

Pros

• May save litigation costs by resolving the matter early.
• Potentially maintains the matters as confidential and out of the public eye.
• May allow management and non-management employees to get back to work and not be distracted by the ongoing litigation.
• May expedite the litigation process.

Cons

• Typically private mediation requires payment of outside mediator costs, whereas litigating in court is “free.”
• Not binding.
• Process is dependent on the mediator. An ineffective mediator may make the mediation unproductive.
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