State Of Class Certification: Offense In Workplace Bias Cases

By **Alexandra Harwin and Saba Bireda** (April 21, 2020)

As recent data reveals record levels of class certification grants from federal courts, this Expert Analysis series examines the latest offense and defense strategies in Employee Retirement Income Security Act, workplace bias, and wage and hour class suits.

Alexandra Harwin

Saba Bireda

A recent report from Seyfarth Shaw LLP indicates that class certifications are on the rise in discrimination cases.[1] We can expect more certification decisions as plaintiffs benefit from expansive new pay equity laws, target discrete employer policies, and decision makers pursue cases that capture the zeitgeist.

First, a wave of new state laws has made pay discrimination cases a prime opportunity for class certification. Over the last five years, multiple states have expanded their equal pay laws to make it easier for underpaid employees to vindicate their rights.

The new pay equity laws in New York, New Jersey, Illinois and California now require equal pay not just for equal work but also for work that is substantially similar, taking into account skill, effort and responsibility, and Massachusetts demands equal pay for comparable work.

Notably, the New York and New Jersey laws target discrimination based on a host of protected characteristics beyond gender, including race and color, national origin and nationality, sexual orientation and gender identity, religion, and age. Under these broader state laws, we expect employees to have an easier time qualifying for class certification.

Class members can readily argue that they share common questions of law where there are new laws to interpret, and common questions of fact may be easier to establish where broader swaths of employees may be grouped together. But plaintiffs lawyers should avoid overreach.

Sprawling classes comprised of wholly disparate employees are still risky. The safer bet is to stick with discrete classes of employees who are similar along key criteria such as job duties.

Second, we can expect successful class actions to continue to target workplaces with overtly discriminatory policies. A major class certification win last year came in the high-profile case brought by the U.S. women's national soccer team.[2]

There, the U.S. District Court for the Central District of California granted class certification to a geographically dispersed class of female professional soccer players who challenged the U.S. Soccer Federation Inc.'s vastly different compensation schemes for male versus female players. There, the employees succeeded when they pointed to facially disparate policies for men and women, enshrined in separate employment contracts for the men's and women's teams.

Another favorable class certification decision came last year in approving a settlement over JPMorgan Chase Bank NA's paternity leave policy.[3] There, a policy seemed gender-neutral on paper when it gave more leave to primary caregivers than nonprimary caregivers.

But in practice, Chase apparently presumed that birth mothers qualified for the longer leave but apparently wouldn't let men qualify for the longer leave unless the birth mother had returned to work or was unable to care for the child. As these cases show, whenever companies employ different policies for men and women, class certification prospects are good.

Third, we can expect to see more plaintiffs pursuing classwide hostile work environment claims, following the trend of increased U.S. Equal Employment Opportunity Commission filings and individual lawsuits regarding sexual harassment in the #MeToo era. Defying the conventional wisdom that sexual harassment cases are too individualized to be amenable to class treatment, courts have recently certified several class actions that have alleged hostile work or educational environments.

The #MeToo movement has shifted understanding of how sexual harassment operates in the workplace; many now recognize that sexual harassment can extend beyond individual harassment to affect a group of employees even if all those employees do not experience the exact same individual acts of harassment.

This problem of so-called ambient harassment, long recognized in social science literature, has been recently recognized by courts in determining class certification, suggesting plaintiffs may be successful on this theory if they can show sexual misconduct is so frequent and so extensive that it can be considered a normative aspect of the work experience.

For example, in Howard v. Cook County Sheriff's Office last year, the U.S. District Court for the Northern District of Illinois certified a class of female employees at the Cook County jail and courthouse, finding the "evidence of widespread sexual harassment by detainees shows that there is at least one common question — whether the ambient harassment experienced by female employees ... is sufficiently severe and pervasive to support a Title VII hostile work environment claim."[4]

In Howard, the court rejected the defendants' arguments that the named plaintiffs' experiences with direct sexual harassment did not share the same essential characteristics as the proposed class members who experienced ambient harassment in the workplace. Similarly, in a related hostile work environment class action granted certification at the same time, Brown v. Cook County[5] the Northern District of Illinois rejected the defendants' contention that class claims were undermined by variations in how frequently class members were exposed to overt sexual acts by jail inmates:

The fact that some members of the plaintiff class did not work every day at [the locations where most of the acts occurred] does not mean that they were uninjured by the alleged hostile work environment the attacks created.

Employees seeking class treatment for hostile work environment claims should be buoyed by the Howard and Brown rulings, as they confirm that some variation in how class members experience a hostile work environment is not fatal to class certification.

These cases also served as a reminder that to establish commonality and obtain certification, plaintiffs should avoid relying solely on allegations of supervisor discretion. In

both Howard and Brown, the plaintiffs alleged the defendants employed common policies — for example, in Brown, the defendants' policy of discouraging the plaintiffs from reporting sexual attacks by inmates — that presented questions common to the class and allowed particular discretionary decisions by supervisors to be exercised in the same discriminatory manner.

Plaintiffs attorneys are taking note of the changing class action landscape brought about by the #MeToo movement. In the last year, plaintiffs have filed hostile work environment class actions against some of the country's largest companies and organizations, including McDonald's Corp., Wynn Resorts Ltd. and the Federal Bureau of Investigation. And defendants who may have previously been more confident in their odds of defeating class certification on hostile work environment claims may find themselves giving settlement more serious consideration.

The trend of states expanding employee protections, the continuing impact of the #MeToo movement, and plaintiffs' careful crafting of class allegations are all expected to contribute to another good year for class certification wins for discrimination plaintiffs.

Alexandra Harwin and Saba Bireda are partners and co-chairs of the Title VII practice at Sanford Heisler Sharp LLP.

[1] https://www.law360.com/employment/articles/1232190/class-cert-grants-reach-record-levels-study-says.

[2] https://images.law.com/contrib/content/uploads/documents/403/42641/Womens-Soccer-class-cert-ruling.pdf.

[3] https://www.bloomberglaw.com/public/desktop/document/RotondovJPMorganChaseBankNANoCivilAction 219cv23282019BL447837SDOh?1584155775.

[4] Case No. 17 C 8146, 2019 WL 3776939 (N.D. Ill. Aug. 8, 2019).

[5] Case No. 17 C 8085, 332 F.R.D. 229 (N.D. Ill. 2019).