

New York Court Rejects Class and Collective Certification in Nationwide Sex-Bias Action

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On November 30, 2018, the U.S. District Court for the Southern District of New York determined that a company's decentralized pay and promotion structure made the matter unfit for class and collective certification under Title VII, the Equal Pay Act ("EPA"), and state law. In *Kassman v. KPMG*, No. 11 Civ. 3742 (LGS), 2018 WL 6264835 (S.D.N.Y. Nov. 30, 2018), plaintiffs filed suit under federal and state law, alleging discrimination against thousands of female associates, senior associates, managers, senior managers/directors, and managing directors in their pay and promotions. Plaintiffs asserted both disparate impact and disparate treatment theories.

The court held that plaintiffs could not establish the commonality requirement for a disparate impact class. First, the court noted that the proposed class consisted of at least 10,000 women in various offices across the company and in various positions. Second, while the defendant had uniform and firm-wide pay and promotion procedures, those procedures merely set up a structure for how employees were evaluated, but did not control the manner in which individual decision makers exercised their discretion regarding pay and promotion. Third, the court observed that the employer's evaluation metrics were vague and unweighted, and that its promotion criteria included amorphous considerations like professionalism, integrity, reputation, and potential. Such criteria did not meaningfully constrain discretion. Finally, the employer presented evidence that members of senior management did not review or second-guess individual employee performance, pay, or promotion decisions, and instead simply confirmed the decision as a matter of process and budget.

The court also found that plaintiffs could not establish commonality for a disparate treatment class. The court held that the relevant level of decision-making for the challenged practices was at the practice-area level. Because plaintiffs had not shown that promotion policies and practices were uniform across KPMG, the court found that plaintiffs could not rely on nationwide statistics. The court also rejected the plaintiffs' argument that certification was warranted because the employer was aware of a pay and promotions gap, and its efforts had not completely eradicated the gap. Finally, the court observed that plaintiffs' attempts to use anecdotal evidence to support class certification highlighted individual, rather than common, questions.

The court next rejected plaintiffs' request for EPA final certification because members of the collective did not work at a single "establishment" and were not "similarly situated" to each other. The employer's pay and promotions were not sufficiently centralized to permit a finding that the

many offices and practice areas represented by the proposed collective qualified as a single “establishment” under the EPA. Moreover, the number of opt-ins, positions, offices, and cost centers at issue, as well as the lack of a uniform causal mechanism for pay and promotion, gave rise to procedural difficulties that could not assure fair treatment of all opt-ins.

Kassman highlights the difficulties that plaintiffs have in obtaining certification on nationwide collective and class actions, particularly following the Supreme Court’s holding in *Wal-Mart v. Dukes*.

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