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Why Sexual Harassment Victims Face Class Action Hurdles

By **Daniel Messeloff and Emily Knight** (March 7, 2018, 11:26 AM EST)

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In 2011, the United States Supreme Court ruled in Wal-Mart Stores Inc. v. Dukes that 1.5 million women could not bring a class claim for gender discrimination against their employer, Wal-Mart, because factual issues relating to the wide range of underlying allegations could not be resolved "in one stroke."[1] Now, as the #MeToo movement gains increasing momentum, and as more victims of harassment and discrimination come forward and bring claims against their respective employers, courts are faced with how to handle class claims in light of Dukes.

Although some claimants may face the same fate as the plaintiffs in Dukes and have their class claims denied, new legislation aimed at helping victims of sexual harassment, as well as unique litigation strategies, may help such victims establish classwide claims and obtain classwide relief after all.

The Federal Government Proposes an End to Forced Arbitration of Sexual Harassment

On Dec. 6, 2017, U.S. Reps. Cheri Bustos, D-N.Y., Walter Jones, R-N.C., and Elise Stefanik, R-N.Y., and U.S. Senators Kristen Gillibrand, D-N.Y., Kamala Harris, D-Calif., and Lindsey Graham, R-S.C., cosponsored the "Ending Forced Arbitration of Sexual Harassment Act." If passed, the bill would invalidate mandatory employment arbitration for gender-based harassment and discrimination claims, forcing employers to litigate such claims in public proceedings rather than private arbitration.

According to the Economic Policy Institute, more than 60 million American workers currently have mandatory arbitration clauses in their employment contracts. As part of these clauses, employees are required to arbitrate workplace disputes, including employment discrimination or sexual harassment claims, instead of initiating litigation. Employers generally favor arbitration clauses because they result in more timely and efficient resolutions and lower the overall costs of litigation.

The growing #MeToo movement, however, has revealed the oppressive nature of these arbitration clauses in employment agreements, especially in the context of instances of sexual harassment and discrimination. Specifically, as current events make clear, arbitration clauses have allowed employers to quietly resolve allegations of sexual harassment and discrimination by compelling private proceedings that never become part of the public record, and thereby enable such conduct to continue for years.

Settlement agreements also typically require accusers to sign a confidentiality agreement as a prerequisite to settlement, further stifling victims and enabling aggressors. These processes have not only protected employers, but have also perpetuated harassment and discrimination by hiding repeat misconduct committed by the same individual.

As #MeToo continues to gain momentum, advocates and legislators have begun to question whether sexual harassment and discrimination disputes in the employment context should remain private. States such as New York, California and New Jersey have followed the federal government's lead by proposing similar bills intended to reduce the use of mandatory arbitration clauses in employment contracts.

The federal bill awaits committee assignment in the House and Senate, but if passed, it could help victims overcome the first hurdle to class certification by allowing such claims to be litigated in open court in the first place.

The Supreme Court's Decision on Banning Class Actions in Employment Agreements

On another front, the Supreme Court is expected to issue rulings in a series of consolidated appeals of decisions by the National Labor Relations Board, which struck down class arbitration waivers in employment agreements on the grounds that they violate a worker's right to engage in concerted activity.

These cases — Murphy Oil USA Inc. v. NLRB,[2] Lewis v. Epic Sys. Corp.[3] and Morris v. Ernst & Young LLP[4] — each arose when employees filed class action lawsuits against their employers based on labor law violations, prompting the employers to move to compel arbitration.

The Supreme Court heard oral argument in these cases just before the New York Times published its groundbreaking investigation into movie mogul Harvey Weinstein, which led to a flood of accusations against Weinstein and other famous and powerful men. Now, the Supreme Court's ruling will hold new significance in light of the #MeToo movement.

Settling sexual harassment suits on a case-by-case basis forces a victim to oppose her more powerful employer individually, often leaving the victim at the mercy of the company. But when victims of the same perpetrator can band together against their employer, the power structures often shift in favor of the victims.

Nowhere is this clearer than in the #MeToo movement: Over the course of decades, when victims were forced to settle disputes individually and privately, they were quickly silenced while the accused

remained in power. Now, as victims have begun to stand together, a simple hashtag has toppled many of the most powerful men in the country.

A ban on class waivers in employment agreements could be the second necessary step to #MeToo victims obtaining class certification. Together with the proposed federal legislation, it could enable victims to join together in filing claims against their respective employers in court for the first time.

Overcoming Wal-Mart Inc. v. Dukes

Even in light of these potential changes, the critical question remains: Did Dukes seal the fate of #MeToo class claims before it even began?

Both the federal government's proposed legislation and the Supreme Court's anticipated ruling may prove useless if #MeToo victims cannot satisfy the "one stroke" requirement that the court established in Dukes. The 1.5 million female plaintiffs claiming that local managers exercised their discretion over pay and promotions disproportionately in favor of men failed to satisfy the commonality requirement because there was no "glue" to hold the claims together, such as a general policy of discrimination.[5]

Without any such "glue," the Supreme Court ruled that a trial court would be forced to rule based on the millions of individual employment decisions made by each manager.[6] Are the claims resulting from the #MeToo movement really any different?

As in Dukes, many of these claims are based upon the behavior of an individual employee. And since most companies, if not all, implement sexual harassment and discrimination prevention policies, courts could be forced to assess these claims based on the behavior of each individual employee accused of sexual harassment, rather than on the company as a whole.

But the court in Dukes left the door open for class certification when a specific set of facts exists: instances where the victims accuse the same individual for generally the same types of misconduct.[7] In fact, the #MeToo movement may be the perfect test case for this scenario. The movement has already revealed that many of victims are in fact accusing the same individual for the same type of misconduct, and that the employer often used the same tactics to coerce, scare and threaten the victims into silence.

Given the growing number of claims that are being filed, it is only a matter of time before courts determine whether victims in this scenario will be successful in establishing "commonality," and thereby obtaining class certification.

Using RICO to Get Around Dukes

Still, what about the millions of victims who fall outside the foregoing set of facts, who may have been victims of different forms of harassment by different managers, albeit within the same company? Is all hope lost? One class of plaintiffs is attempting to forge a new pathway for redress, and this path begins in an unlikely source: the Racketeer Influenced and Corrupt Organizations Act.

In December 2017, six women filed a proposed RICO class action suit in New York against Harvey Weinstein, his brother, his former company and several of the company's board members. The plaintiffs represent a class of hundreds of actresses who claim they suffered sexual assault, false imprisonment, battery, rape and other acts at the hands of Weinstein.

The women further asserted that all of the defendants colluded together to perpetuate and conceal Weinstein's widespread sexual harassment and assaults. According to the complaint, this coalition became part of the "Weinstein Sexual Enterprise" that engaged in witness tampering, mail and wire fraud, civil battery and assault — all crimes within the reach of RICO.

RICO was passed in 1970 and was aimed at combating organized crime. RICO allows plaintiffs to file class claims against conspirators and co-conspirators who engage in "unsavory business activities." Specifically, it encompasses Title 18 provisions related to obscene material, retaliation against a witness, victim or informant, and fraud, which are exactly what the plaintiffs are alleging against Weinstein.

Nevertheless, these plaintiffs still have an uphill battle. RICO requires that claimants establish a pattern of misconduct, which would likely be demonstrated in their case; but it also requires plaintiffs to establish the existence of an "enterprise," which may prove more difficult.

Congress defines an "enterprise" under RICO as "any individual, partnership, corporation, association or other legal entity, and any union group of individuals associated in fact although not a legal entity." 18 U.S.C.A. § 1961. Despite the broad definition, the mere commission of a few felonies by several individuals does not give rise to an "enterprise" within the meaning of the statute. Instead, the enterprise must be "separate and apart" from the pattern of illegal activity in which it engages.[8] Courts are divided as to what the law means by "separate and apart."

Even if the plaintiffs succeed on their RICO claims, the use of RICO for future #MeToo class actions may be limited. Only the commission of specific serious crimes enumerated by statute fall within its reach, and it is unlikely that most employers facing sexual harassment allegations engaged in conduct serious enough to trigger RICO.

The Future of Classwide Litigation for the #MeToo Movement Is To Be Determined

Although the #MeToo movement continues to gain momentum, the law frequently trails shifts in societal norms, leaving the future of class action litigation for victims of sexual harassment up in the air. Before a wave of litigation may ensue, both the federal government and the Supreme Court will need to invalidate the respective arbitration clauses.

Even then, there are still hurdles to establishing class claims for sexual harassment. If the class claims against Weinstein succeed, plaintiffs may utilize RICO to obtain redress moving forward, but only when an employer commits serious offenses related to the harassment. Either way, the fate of potential

"#MeToo class actions" — and the potential claims of groups of victims of sexual harassment — remains to be seen.

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[1] 564 U.S. 338, 350 (2011).

[2] 808 F.3d 1013 (5th Cir. 2015).

[3] 823 F.3d 1147 (7th Cir. 2016), cert. granted, 137 S. Ct. 809, 196 L. Ed. 2d 595 (2017).

[4] 834 F.3d 975 (9th Cir. 2016), cert. granted, 137 S. Ct. 809, 196 L. Ed. 2d 595 (2017)

[5] Dukes, 564 U.S. at 352.

[6] Id.

[7] Id. at 349.

[8] United States v. Turkette, 452 U.S. 576, 577 (1981).