HOSPITALITY EMPLOYMENT LAW SURVEY OF CURRENT ISSUES

GENDER CLASS ACTIONS

UPDATE ON SOX WHISTLEBLOWER RULES

Provided by
Laura Franze of Akin Gump Strauss Hauer & Feld LLP

TABLE OF CONTENTS

I. INTRODUCTION

Gender discrimination lawsuits are nothing new. Traditionally, they have been conducted one plaintiff at a time. In the last decade, however, we have seen the rise of the large gender class actions, which raises the stakes exponentially. And the cases seem to be proliferating. Fortune Magazine recently named the flow of new cases in this area a "deluge." *How Corporate America Is Betraying Women*, Fortune, Jan. 10, 2005, at 64. These claims may allege discrimination in compensation (including wages, salary, and fringe benefits), in job assignments, or in promotional opportunities on the basis of sex. For example, in May 2004, Boeing agreed to pay as much as $72 million to settle a class action lawsuit alleging the company paid female employees less and did not promote them as quickly as men. Then in July 2004, Morgan Stanley agreed to a settlement of $54 million to resolve another class action suit with similar allegations. Meanwhile, the press is full of stories about the record-breaking class size certification decision in the case against Wal-Mart for discriminatory pay and promotion practices which may affect as many as 1.6 million women. The similarity in demographics between retail and hotels makes it a pretty good bet that the hospitality industry is vulnerable to this type of litigation.[1] This article explores the law applicable to these claims and suggests practical approaches employers can take to avoid this kind of costly litigation and mitigate any potential liability.

A discussion of whistleblower and retaliation claims is also extremely timely in today's employment litigation arena. Between 1997 and 2003, the median compensatory award for whistleblower claims in the United States was $338,386.00, more than twice the median award for employment cases overall. This article generally evaluates the laws protecting employee-whistleblowers.

II. GENDER PAY, PROMOTION, AND STEREOTYPE CLASS ACTION UPDATE

The last decade has brought a steadily growing body of cases challenging gender discrimination in pay practices, job assignment and promotion. The legal frontier has moved beyond mere entry level access to higher level job positions within those industries. Studies show that women continue to trail men in wages earned and in access to the higher paying jobs. Women have found advancement complicated by employers' reliance on strict and traditional lines of advancement, by women's traditional and biological roles within our culture and in the family, and by stereotypical assumptions about not only what women *can* do, but also about what they *want* to do. Collectively, these and other less readily identifiable barriers have been called the "glass ceiling."

Despite much progress in the last four decades in eradicating discriminatory policies and practices, claims of sex segregation in employment, by occupation, pecking-order, compensation, and promotional opportunities, persist. *See generally* Marion Crain, *Confronting the Structural Character of Working Women's Economic Subordination: Collective Action v. Individual Rights Strategies*, 3 Kan. J.L. & Pol'y (Spring 1994); *see also How Corporate America Is Betraying Women*, Fortune, Jan. 10, 2005, at 66 (citing studies that women are still paid less for comparable jobs than men). Who is a good target for gender based discrimination in promotions class action litigation? There is little question that statistics were the most

[1] Several recent cases indicate that the impact on hospitality may already be starting. In recent moves, the ACLU filed suit against a Manhattan hotel and three Manhattan retail stores alleging sexual and wage exploitation of Latina employees. *See ACLU Sues Manhattan Hotel Under 'Victims of Trafficking and Violence Protection Act* (May 27, 2004), *available at* http://www.aclu.org/WomensRights/WomensRights.cfm?ID=15867&c=175; *Latina Workers at New York Discount Stores Were Sexually Harassed, Exploited by Owner, ACLU Charges* (May 13, 2004) *available at* http://www.aclu.org/WomensRights/WomensRights.cfm?ID=15728&c=175. Should these suits be successful and result in substantial jury verdicts or settlements, the private plaintiffs' bar will quickly file copy-cat lawsuits.

important factor in many of the recent cases garnering attention from the news media. In some cases, the statistics are quite stark at the bottom-line. In the *Dukes v. Wal-Mart* class action case, for example, plaintiffs presented studies showing that while more than 72% of the hourly workers are women, only about one-third of the store managers are women.[2] These studies and statistics may be misleading, but there is little doubt that they fuel the litigation trend.

A. Gender Class Pay Claims

Until recently, class action Title VII sex discrimination litigation has focused primarily on strict issues of wage or direct salary comparisons relevant under the Equal Pay Act, 29 U.S.C. § 206. The focus of such wage litigation has been basically this: were men and women paid equally for equal work. Generally, women had to show that the jobs they were comparing to their own were "substantially equal." The substantially equal requirement meant that discrimination issues were not raised where, for example, female medical personnel were called "nurses' aids" and male personnel with similar qualifications and duties were called "orderlies." *See Am. Nurses Ass'n v. Illinois*, 783 F.2d 716 (7th Cir. 1986). Courts traditionally have applied the "substantially equal" standard strictly, and any jobs more than nominally different have failed to meet that standard. *See, e.g., Corning Glass Works v. Brennan*, 417 U.S. 188, 203 n.24 (discussing equal work).[3]

During the 1970s and 1980s, plaintiffs argued that jobs which were "different, but equal," that is, worth the same, should and could form the basis of a successful discrimination lawsuit. Most jurisdictions rejected this so-called "comparable worth" theory, and courts reaffirmed the plaintiff's burden of proving near absolute equivalency of work in order to make out an Equal Pay Act or similar Title VII discrimination claim. Although these theoretical barriers remain in the current spate of class action wage claims, plaintiffs lawyers have developed (or are, at least, utilizing with greater efficiency) technological advances to gather and analyze the huge amounts of data used to support these types of claims and recruit more plaintiffs.[4]

---

[2] Wal-Mart disputes these figures and the figures, by themselves, do not prove gender discrimination. Indeed, a multitude of factors only indirectly related to gender may account for pay differences and fewer women in higher management positions.

[3] The central issue in many EPA cases is whether the jobs in question are, in fact, equal. In several EPA lawsuits, the plaintiffs have argued they are entitled to equal pay based upon the comparable "worth" of their jobs. *See, e.g., Beavers v. Am. Cast Iron Pipe Co.*, 975 F.2d 792, 801 (11th Cir. 1992); *EEOC v. Madison Community Unit Sch. Dist.*, 818 F.2d 577, 580 (7th Cir. 1985). This argument is based on the premise that the skills, responsibilities, and job training of certain female-dominated jobs are greater than those of certain male-dominated (and higher paying) jobs. Under the comparable worth theory, an employer unlawfully discriminates if it pays less to its employees in female-dominated jobs. Most courts have rejected the comparable worth analysis under both the EPA and Title VII. *See, e.g., Loyd v. Phillips Bros., Inc.*, 25 F.3d 518, 524 (7th Cir. 1994). While courts have applied the EPA to "similar" jobs, no court has stretched the act to cover truly dissimilar (although equal in worth) jobs.

[4] There are two theories of proof to establish a claim for unlawful sex discrimination under Title VII – disparate treatment and disparate impact. Disparate treatment sex discrimination is intentional discrimination based on, or because of, an employee's gender. This type of discrimination occurs, for example, when an employer intentionally excludes women from certain jobs based on a belief or stereotype that women cannot or should not perform that type of work. Another example of disparate treatment sex discrimination would be where a neutral policy or practice is applied unequally or enforced only against certain employees for gender related reasons. *See Vaughn v. Edel*, 918 F.2d 517 (5th Cir. 1990). Disparate impact, on the other hand, occurs when a neutral policy or practice, applied evenhandedly, nonetheless has a measurably greater and significantly adverse impact on one gender. *See, e.g., Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 (1977). Under Title VII, such policies or practices are illegal unless they are shown to be job-related and based on business necessity. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1970). Disparate impact theory may be applied to subjective or discretionary employment practices, such as promotion or employment decisions for managerial or professional positions. Disparate impact analysis may also apply in cases where the employee claims the employer is enforcing policies that perpetuate the effects of past discrimination. For example, it may be illegal sex discrimination to perpetuate past gender-based wage discrepancies, even if the discrepancies began prior to coverage of the workgroup by Title VII. *See Bazemore v. Friday*, 478 U.S. 385 (1986).

Moreover, the true fight in many of these pay gap and promotions lawsuits is not, and never will be, the merits of the claim themselves. The legal question whether these lawsuits shall proceed as class actions consume an extreme amount of resources, expended by both plaintiffs' lawyers and companies and, if a class is certified, the pressures on companies to settle for high dollar value increases exponentially. For example, Lucky Stores settled a class action sex discrimination lawsuit for $107 million in 1993, Mitsubishi for $34 million in 1996, Home Depot for $104.5 million in 1997, Merrill Lynch for an undisclosed sum in 1998, American Express for $42 million in 2002, and Boeing for $72.5 million and Morgan Stanley for $54 million in 2004. Each of these cases are discussed *infra* at Section II.B.1.

B. Gender Class Job Assignment And Promotion Claims[5]

While the comparable worth battle was being fought, plaintiffs also challenged the perceived practice of assigning or steering male and female applicants or new hires into specific entry level positions based on gender. *See, e.g., Jones v. Firestone Tire & Rubber Co.*, 977 F.2d 527, 533 (11th Cir. 1992). The courts required a high standard of proof to show that an employer had engaged in discriminatory job assignment or "funneling." A statistical disparity in actual job assignments usually was not enough. Most courts confronted with discriminatory funneling and/or promotion claims required that complainants prove they had actually applied for or otherwise requested the more desirable position. While some litigants were successful, most found the burden of proving intentional funneling too difficult to overcome. *See, e.g., EEOC v. Madison Community Unit Sch. Dist.*, 818 F.2d 577, 588 (7th Cir. 1987).[6]

In response to funneling cases, employers traditionally argued they play no role in creating sex segregation and point to the applicant flow, and relative dearth of female applicants, for the desired positions. This "lack of interest" argument seems to have first been made in 1967 and enjoyed some success. *See Cypress v. Newport News Gen'l & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967); *see also, e.g., Teamsters*, 431 U.S. 340 (1977) (courts must apply an individualized approach to determine, as a factual matter, whether a minority non-applicant failed to apply for a job because of discrimination). More recent cases dealing with the "interest defense" show an increasing skepticism and progressive shift away from the defense.

In the 1990s, class action lawsuits for sex discrimination in job assignment (funneling) and/or promotion consistently have garnered judgments and/or settlement well into the tens of millions of dollars. More sophisticated plaintiffs' counsel, a shift in the effective burden of proof and a rejection of the "interest defense," and a judiciary more educated about the practical effects of sexual stereotypes all may be contributing to employer losses. Recent cases also have examined historical causes of discrimination, such as whether promotion track assignments are the result of funneling into initially equal parallel tracks – one with upper promotion potential, the other without. Employers who do not have and do not follow a structural promotion protocol are finding that traditional methods of selection and implementation of upward advancement, such as "the tap on the shoulder" offer little, if any, protection against claims that disparate statistics are the result of discriminatory practices.

---

[5] The term "glass ceiling" describes the so-called "invisible" barriers thought to prevent the advancement of women and minorities in the workplace. As recently as 2001, a report commissioned by congressional representatives suggest that the "glass ceiling" is hardening in management positions. U.S. General Accounting Office, Report to Congressional Requesters, *Women In Management*, GAO-12-156 (Oct. 2001). This report concludes that earnings differentials in seven of the ten industries widened between 1995 and 2000 and full-time women managers earned less than their male counterparts in all ten industries.

[6] Moreover, even where plaintiffs were successful, damages were often limited to the difference in pay between the assigned job and the target job, with the possibility of future promotions (*i.e.*, if the target job was on a "promotion track" while the assigned job was not) to be too speculative.

C. Recent And Pending Gender Class Pay and Promotion Cases

In addition to the *Dukes v. Wal-Mart* case mentioned above, several other currently pending or recently resolved class action or pattern and practice lawsuits raise issues of sexual stereotyping. As one employment law specialist postulates, "We're at the threshold of a new 10-year wave of gender-based class action suits. . . . These cases are easy to certify because the numbers are so large and the statistics are so powerful" Justin M. Norton, *Costco Latest in Wave of Gender Bias Suits*, The Recorder (Aug. 18, 2004), *available at* http://www.law.com/jsp/article.jsp?id=1090180358192. For example:

- *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004). As mentioned previously, the *Dukes* lawsuit was recently certified as the largest class action suit ever, with a potential class size of approximately 1.6 million current and former employees. The suit alleges that Wal-Mart committed sex discrimination in hiring, pay, and promotion across the nation. In the trial court's class certification decision, the judge found that Wal-Mart store managers exercised "substantial discretion" in making promotion and salary decisions for hourly employees, leading to decisions that are characterized by "excessive subjectivity." The court stated that "case law has long recognized that the deliberate and routine use of excessive subjectivity is an 'employment practice' that is susceptible to being infected by discriminatory animus." The court also credited the plaintiffs' sociology expert's conclusion that Wal-Mart's pay and promotion decisions were "especially vulnerable to gender stereotyping." The court also credited the plaintiffs' statistical expert who concluded that female Wal-Mart employees are paid less than males in every region, the pay disparities between the sexes exist in most job categories, the salary gap widens over time, women take longer to enter into a management position, and the higher up the corporate ladder, the lower the percentage of women and that these statistical differences can only be explained by gender discrimination. The court rejected Wal-Mart's arguments that these statistics fail to take into account applicant flow (the "interest defense") or the effects of seniority, store size, and recent promotion or demotions in the pay comparisons. In July 2004, Wal-Mart filed an appeal of this decision, which is still pending.

- *Ellis v. Costco* (D. Colo.). In this pending case, plaintiffs allege they have been denied advancement to higher paying management jobs. This suit, like the Wal-Mart case, has recently been certified for class action treatment.

- *Beck v. Boeing* (W.D. Wash.). The Seattle-based manufacturer of aircrafts agreed to settle class claims on behalf of potentially 29,000 female employees for $72 million. The employees alleged Boeing denied female workers promotional and training opportunities, paid female workers an average of $1,000 less per year than men in the same job, and denied women overtime.

- *EEOC v. Morgan Stanley & Co.*, Civ. A. No. 01-8421 (S.D.N.Y.). On July 12, 2004, the EEOC and Morgan Stanley announced they had reached a settlement (on the eve of trial) in the EEOC's lawsuit alleging Morgan Stanley had a pattern and practice of denying women promotions, paying higher salaries to less productive men, and withholding raises and desirable assignments from women who took maternity leave. Pursuant to the consent order, Morgan Stanley is required to pay $40 million to a claims fund, $12 million to the lead plaintiff, and $2 for diversity programs aimed at enhancing compensation and promotional opportunities for women at Morgan Stanley.

- *Butler v. Home Depot, Inc.* (N.D. Cal.), *Griffin v. Home Depot, Inc.* (E.D. La.), *EEOC v. Home Depot, Inc.* (D. Colo.). Between 1997 and 2004, Home Depot settled claims filed by female employees challenging systematic discrimination in hiring, assignment, promotion and pay in Home Depot's various regional divisions. In 1997, Home Depot agreed to pay $104.5 million in settlement of these claims, and recently settled another lawsuit against the EEOC for $5.5 million in Colorado.

- *Meiresonne v. Marriott Corp.*, No. 88-C-3716 (N.D. Ill.). In March 1991, this case alleging sex discrimination in the failure to promote and train female food and beverage managers was settled for $3.3 million, along with the promotion of the two named plaintiffs to managerial positions.

- *Stender v. Lucky Stores, Inc.*, No. C-88-1467 (N.D. Cal.). On April 20, 1994, the court approved a $107.25 million damage settlement against Lucky Stores following a decision by the court that Lucky Stores had discriminated against women. The court held that segregation of female supermarket employees in "peripheral assignments" was a consequence of "ambiguous and subjective" placement, promotion and training of women and credited testimony that women were more often hired into lower paying departments such as bakeries, delicatessens and floral shops than were men and that women were less likely to progress from part-time to full-time employment. *See Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259 (N.D. Cal. 1992). The court rejected Lucky's claim that these differences were due to gender differences in job interests rather than in discrimination. *Id.* at 326 ("even in a situation where gender stereotypes about work interests reflect reality, it is unlawful for an employer to discriminate against those whose work interests deviate from the stereotypes"). Under the settlement agreement, Lucky established a personnel program that includes an entry-level management training program, a bidding process for eligible workers seeking management promotions, goals for increasing women managers, and new procedures for job assignments, work hour allocation and promotions.

- *Barnhart v. Safeway Stores, Inc.*, No. S-92-0803-WBS JFM (E.D. Cal. 1992). Filed in 1990, this lawsuit concluded in a $7.5 million settlement in April 1994 covering 20,000 employees. This settlement is far smaller than the one reached against Lucky for a smaller (14,000) group of employees. Saperstein, lead counsel for the Safeway plaintiffs (as well as the Wal-Mart and Costco plaintiffs), said they were willing to settle for less because Safeway offers programs to enhance opportunities for women and its record in promoting women into management may be the best in the industry. Under the consent decree, Safeway was to provide certain affirmative action goals for middle-management positions, formalize the promotional system, and provide a program for women to transfer from the largely female deli/bakery departments into management-track food departments without their losing seniority or decreasing their hourly wages.

- *Kraszewski v. State Farm Gen'l Ins. Co.* (California). Settlement of long-running class action sex discrimination lawsuit alleging failure to hire, promote, and train women. Court approved a final settlement in April 1994 in the amount of $245 million with an estimated $140 million in attorneys' fees.

pending is a putative class action against Costco Wholesale Corp. for allegedly denying women promotions to higher paying managerial positions.[7]

D. Stereotyping Claims and Cases

Sexual stereotyping often contributes to the "glass ceiling" phenomenon in corporate America. *Emmel v. Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627 (7th Cir. 1996), illustrates this connection. Emmel began working at Coca-Cola as an account manager. She progressed rapidly in her career for approximately 16 years, until she became pregnant. *Id.* at 633. In July 1992, Emmel was passed over for promotion in favor of younger, less experienced men whom she had supervised. In September 1993, Emmel was again passed over for promotion in favor of male employees with less experience and less seniority with the company. *Id.* Emmel sued Coca-Cola for sex discrimination, claiming she was placed on a "mommy track" after becoming pregnant. At trial, Emmel presented evidence of gender stereotyping that included biased statements by Coca-Cola executives such as "the company owner no longer wants women in route management," "women aren't meant to be in the beverage industry," and "I wouldn't want my daughters doing such work." *Id.* at 632. The jury found in favor of Emmel on three of four counts of sex discrimination.

In general, sexual stereotyping stems from perceived differences in ability or behavior based on gender. Common sexual stereotypes include:

- Women's emotions are close to the surface. They will not shrug off insensitivity the way men do.
- Women turn disagreements into personal conflicts.
- Women want to play the game, but cry if the going gets rough.
- Women just can't take a joke.
- Women should be attractive, sexy, nurturing, and affectionate.
- Men have families to support, men are here to make a career and women aren't, and working women are "housewives who just need to earn extra money."[8]

Making assumptions, even logical ones, about the individual members of a protected group is the essence of discriminatory action. Even real differences in behavior, ability or aptitude between the genders, demonstrable on a statistical basis, may give rise to claims of illegal discrimination when extrapolated into assumptions about individual women. For example, if it is true, on a statistical basis, that men are more competent than women in activities requiring upper body strength, an employer may reasonably assume that a job that requires lifting of up to 50 pounds will be better suited to a male applicant than a female applicant.

[7] Notably, both the Wal-Mart and Costco cases were filed by the same group of plaintiffs' attorneys. These plaintiffs' lawyers often target companies for litigation based on (i) statistics (by far the most important factor), (ii) the vulnerability of the entire industry, (iii) availability and ease of recruiting potential class members, (iv) use of testers, (v) the financial condition of the target company, (vi) the reputation and profile of the target company as an employer, (vii) the likely venue for trial, (vii) the employer's growth rate or turnover in management positions (thus increasing potential liability), and (viii) potential allies, such as unions.

[8] The *Dukes v. Wal-Mart* plaintiffs submitted affidavits attributing such statements to Wal-Mart management.

While this assumption may be true, excluding all female applicants on the basis of this assumption would be illegal. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973); *Capaci v. Katz & Besthall, Inc.*, 711 F.2d 647 (5th Cir. 1983). An individual woman might be qualified for this job, just as an individual man may be unqualified. The woman who is able to do the job and wants the position should have the same opportunity to compete as the equally qualified male. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the plaintiff was a senior manager in an office of a nationwide accounting firm. Hopkins was first proposed for partnership in 1982, at which time she was held for reconsideration. *Id.* at 231. The next year, the partners in her office refused to re-propose her, and she sued for sex discrimination under Title VII. Hopkins presented direct evidence of sexual stereotyping in the form of comments made by the partners who evaluated her. The partners described Hopkins as "macho" and "overcompensat[ing] for being a woman." *Id.* at 235. Additionally, Hopkins was advised to take a "course in charm school" and to "walk more femininely, talk more femininely, dress more femininely, wear makeup, have [her] hair styled and wear jewelry." *Id.*

Price Waterhouse argued that although such comments may have been made, the plaintiff's lack of interpersonal skills was a valid reason for not offering her a partnership. *Id.* at 236. The Court required the employer to show, by a preponderance of the evidence, that the same decision would have been made absent the illegitimate considerations. The Court found Price Waterhouse failed to meet this burden, and held sexual stereotypes played a motivating factor in the employer's decision not to promote the plaintiff. *Id.* at 251. The Court noted that "[a]n employer who objects to aggressiveness in women, but whose positions require this trait, places women in an intolerable and impermissible catch-22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind." *Id.* at 250.

Generally, courts have held private employers may require certain grooming standards and may require male employees to adhere to different modes of dress and grooming than female employees. *See, e.g., Jespersen v. Harrah's Oper. Co.*, -- F.3d --, 2004 WL 2984306 (9th Cir. Dec. 28, 2004) (casino grooming policy requiring female bartenders to wear makeup is not sex discrimination because it imposes equal burdens on men and women); *Tavora v. New York Mercantile Exch.*, 101 F.3d 907 (2d Cir. 1996) (policy that requires male employees to have short hair but imposes no such restrictions on female employees does not violate Title VII).

In *Jesperson*, a female bartender who had worked for Harrah's Casino in Reno, Nevada for nearly twenty years, and was by all accounts an excellent employee, was terminated when she refused to comply with Harrah's new "Personal Best" grooming standard or apply for another non-bar position. *Jesperson*, 2004 WL 2984306, *1. Under this policy, female bartenders were required to wear makeup (while men were prohibited from doing so) and men were prohibited from wearing ponytails while women's hair had to be "teased, curled or styled." *Id.* at *2-3. In evaluating Jesperson's claim, the Ninth Circuit compared the overall burden placed on men to comply with the grooming standards (including the requirement to maintain short haircuts and neatly trimmed nails) with that placed on women and concluded the plaintiff had not set forth any evidence to support a finding that women bear greater burdens under this policy. *Id.* at *4. While reaffirming the unequal burden standard for evaluating appearance and grooming standards, the Ninth Circuit's decision ultimately leaves this issue unresolved. Should the next plaintiff be able to establish evidence of tangible burdens such as the cost of cosmetics and investment in time to apply them, a different result might be obtained.

Notably, however, in *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853 (3d Cir. 1990), a female market researcher alleged her employer made demands upon her concerning her makeup and clothing. The district court dismissed the case, but the Third Circuit reversed, stating "[u]ndue preoccupation with what female employees look like is not permissible under anti-discrimination laws if the same kind of attention is not paid to male employees. Traditional ideas about what a woman should look like are not legitimate criteria for evaluating women in the workplace." *Id.* at 862 (citations omitted). In another recent example,

United Airlines settled a suit in early February of 2004 for $36.5 million with a group of former female flight attendants who charged the airline with discrimination because United imposed weight restrictions that required women to weigh up to 27 pounds less than men of the same height. *See* Associated Press, *United Airlines ordered to Pay $36.5 Million to Settle Sex-Discrimination Lawsuit* (Feb. 12, 2004).

E. Practical Steps To Avoid Liability For Gender Discrimination

If success breed copycats (and in litigation, it surely does), we can expect to see many more gender- and pay- based class action lawsuits following the formula used in *Dukes v. Wal-Mart*. In this environment, companies should critically assess their compensation and promotion practices and make changes to stave off, to the extent possible, these costly lawsuits.[9] *Dukes* illustrates the value of job postings and accurately recording applicant flow data, especially in circumstances where the interest or sill level of any protected group may be different than "expected." But *Dukes* also instructs us that applicant flow data may not be enough to insulate an employer from class action discrimination litigation and the associated costs. Procedures designed to promote even-handed selection procedures, rein in subjectivity, and check supervisory decision making are needed. Employers should:[10]

- use well-designed decision-making process for determining pay rates, job assignments and promotions;
- expressly state the objective qualifications for the job;
- periodically, *and in a privileged way*, perform statistical analysis for purposes of obtaining legal advice concerning problem areas;
- establish internal peer review of decisions;
- establish an appeal process for unsuccessful applicants for promotion;
- establish clear to-the-point, written performance-based appraisal systems, have supervisors trained in application and share results with employees;
- establish a behavior- (not trait-) based counseling system with clear advance guidelines;
- avoid analysis based on vague attitude or traits and safeguards against use of stereotypes;
- implement joint decision-making authority;
- take care to have a gender mix in the evaluation pool;
- use objective factors in conjunction with the subjective;
- advertise job openings within and without the current workforce; and
- avoid word-of-mouth efforts or "shoulder tapping" in the selection process.

[9] Before embarking on any internal study of this nature, companies should discuss privilege concerns with their legal counsel. As reported in Fortune, "Boeing spent four years and enough legal challenges to fill 31 feet of shelf space, according to plaintiffs' lawyers, just to keep from having to reveal that it was indeed underpaying its women. Boeing settled one day before the start of trial, which would have forced the company to share those details." *How Corporate America Is Betraying Women*, Fortune, Jan. 10, 2005, at 74.

10 After the *Dukes v. Wal-Mart* plaintiffs filed suit, Wal-Mart implemented broad changes to its employee practices, despite the potential increase these changes will cause to Wal-Mart's operations costs. *How Corporate America Is Betraying Women*, Fortune, Jan. 10, 2005, at 72. Some of the changes instituted by Wal-Mart include tying 15% of a manager's bonus, which can amount to 85% of salary for top executives, to meeting diversity goals. *Id.* Wal-Mart has also begun to require that new hourly employees hired with the same experience receive the same starting pay, regardless of what their pay was in the past. While these policies may work for Wal-Mart, they may not be applicable to all employers.

Companies also should consider implementing a formal method of selecting and promoting employees, posting vacancies and clearly defining the required competencies and factors upon which candidates will be evaluated. Very often, employers will find themselves subject to a discrimination lawsuit after awarding a promotion to an individual who might be perceived as less deserving when the rest of the workforce was not even aware a promotional opportunity existed. The suit against Costco, for example, alleges that Costco has no job-posting or application procedures for assistant manager and general manager positions, nor any written promotion standards or criteria for these jobs.

III. WHISTLEBLOWER PROTECTION AND SARBANES-OXLEY

Some may find it surprising to learn that a manager could spend as much as 10 years in jail for terminating an employee who exposes corporate fraud and 20 years in jail for destroying certain documents. However, that is exactly the message sent by he Corporate and Criminal Fraud Accountability Act of 2002, better known as the Sarbanes-Oxley Act. This Act establishes a new federal cause of action, "Whistleblower Protection for Employees of Publicly Traded Companies," shielding employees from retaliation when they provide information that they reasonably believe to be a violation of federal securities law, the rules of the SEC or "any Federal law relating to fraud against shareholders." By promulgating this legislation, Congress took an integrated approach to the matter of whistleblowing. Not only does the Act prohibit retaliation against whistleblowers, but it also solicits, encourages, and reinforces the very act of whistleblowing. The statute requires public companies to adopt a code of business ethics, to set up an internal apparatus to receive, review, and solicit employee reports concerning fraud and/or ethical violations, and enact policies to prevent the destruction of certain documents. The teeth of the statute may be found in an enforcement scheme that includes administrative, civil *and* criminal enforcement mechanisms and provides for both corporate *and* individual liability. Sarbanes-Oxley is certainly not the first federal whistleblower protection law, but given its multi-faceted enforcement scheme, its aggressive potential penalties, and its broad application, it is arguably the most forceful and the most important.

A. Covered Employers

Under this statute, individuals, including officers and other employees of covered public companies, are subject to liability in their personal capacities. 18 U.S.C. § 1514A(a). A body of legal authority is quickly developing that interprets covered employers far more broadly under Sarbanes-Oxley than other whistleblower statutes. For example, in *Platone v. Atlantic Coast Airlines*, 2003-SOX-27 (ALJ Apr. 30, 2004), a Department of Labor administrative law judge (ALJ) ruled that the non-public subsidiary of a public company was subject to Sarbanes-Oxley. The ALJ relied on record evidence that showed corporate titles and logos were used interchangeably and that the publicly-traded parent holding company substantially controlled the subsidiary. Similarly, in *Morefield v. Exelon Services, Inc.*, 2004-SOX-2 (ALJ Jan. 28, 2004), an ALJ connected a non-publicly traded subsidiary of another non-publicly traded subsidiary to that subsidiary's publicly traded company to find coverage under the Act. The judge held that the Act covers "all employees of every constituent part of a publicly traded company, including, but not limited to, subsidiaries and subsidiaries of subsidiaries which are subject to internal controls, the oversight of its audit committee, or contribute information, directly or indirectly, to its financial reports. *But see Powers v. Pinnacle Airlines, Inc.*, 2003-AIR-12 (ALJ Mar. 5, 2003) (nonpublic subsidiary of public company was not subject to the Act).

B. Protected Activities

Sarbanes-Oxley Act creates a new civil cause of action in favor of employees of public companies who are retaliated against for their covered disclosures concerning fraud against shareholders, including accountancy violations, violations of SEC rules, and related matters. Covered disclosures include providing

information or assistance in the investigation of conduct that the employee "reasonably believes" violates securities laws or regulations to a federal regulatory or law enforcement agency, a member of Congress, a congressional committee, any of their supervisors within the company, or any person at the employer with the power to "investigate, discover or terminate misconduct." 18 U.S.C. § 1514A(a)(1)(C). The statute also protects an employee who assists in any proceeding actually filed or about to be filed relating to securities fraud or fraud against shareholders. *Id.* § 1514A(a)(2).

Even where the disclosed conduct is later determined to be legal, employees are protected if they have a "reasonable belief" that the reported acts were illegal. For example, in *Halloum v. Intel Corp.*, 2003-SOX-7 (ALJ Mar. 4, 2004), the complainant reported the SEC that he had been asked by Intel to delay the payment of invoices to subsequent quarters. Although the SEC investigation found no wrongdoing by Intel, the ALJ held that "[a] belief that an activity is illegal may be reasonable even when subsequent investigation proves a complainant entirely wrong. The accuracy or falsity of the allegation is immaterial." Moreover, a complainant is not required to prove that the individual who made employment decisions affecting the complainant actually knew the employee had engaged in protected activity. *Platone v. Atlantic Coast Airlines*, 2003-SOX-27 (ALJ Apr. 30, 2004) (supervisor who knew of complainant's protected activity participated in group discussions culminating in complainant's termination).

C. Administrative Complaint Procedure

As with Title VII retaliation claims, an individual alleging retaliation under Sarbanes-Oxley must exhaust administrative procedures. However, under this Act, a "person who believes that he has been discriminated against in violation of the whistleblower provisions of the Sarbanes-Oxley Act must first file a complaint with the Secretary of Labor within ninety days of the alleged violation." *Murray v. TXU Corp.*, 279 F. Supp. 2d 799, 802 (N.D. Tex. 2003); 18 U.S.C. § 1514A(b)(1).

After receiving a complaint from an employee claiming retaliation, the Secretary of Labor is required to conduct an investigation, except that the Secretary of Labor is not permitted to investigate an employee's complaint unless the employee makes a *prima facie* showing that his or her protected conduct was a contributing factor in the adverse employment action taken by the employer. 29 C.F.R. § 1980.104(b). If the employee makes this showing, the Secretary must nevertheless refuse to conduct an investigation if the employer can demonstrate, by clear and convincing evidence, that it would have taken the adverse employment action despite the employee engaging in protected conduct. *Id.* § 1980.104(c).

If, on the basis of its investigation, the DOL finds that the employee has been subject to retaliation, the DOL must order the employer to immediately reinstate the employee. *Id.* § 1980.105(a). Either an employee or employer may appeal the investigative findings. Upon appeal, the parties are entitled to an on-the-record hearing. *Id.* § 1980.106(a).

If the Secretary does not issue a final decision within 180 days of the complaint being filed, and the delay was not caused by any bad faith conduct by the claimant, the claimant may then file a lawsuit in federal court. 18 U.S.C. § 1514A(b)(2). However, a "federal district court lacks jurisdiction over a suit brought under § 806 of the Sarbanes-Oxley Act if (1) the plaintiff failed to file a complaint with the Secretary of Labor within ninety days of the alleged violation; (2) the Secretary issued a final decision within 180 days of the filing of a § 806 complaint; (3) the plaintiff filed suit in a federal district court less than 180 days after filing such a complaint; or (4) there is a showing that the Secretary failed to issue a final decision within 180 days due to the plaintiff's bad faith." *Murray*, 279 F. Supp. 2d at 802.

D. Remedies Available To Whistleblowers

A protected employee may not be discharged, demoted, suspended, harassed or otherwise discriminated against in any way because of a protected disclosure. This statute prohibits not only the potential retaliatory actions by the publicly traded corporate employer, but also such actions by any officer, employee, contractor, subcontractor or agent of such company. Employees who prevail in whistleblower cases (whether determined by the DOL or a court) are entitled to damages, which may include reinstatement to the same seniority status that the employee would have had but for the adverse employment action, back pay plus interest, all compensatory damages to make the employee whole, and "special damages" including litigation costs, reasonably attorney's fees and costs, expert witness fees, and all other relief necessary to make the employee whole. 29 C.F.R. § 1980.105(a)(1). Sarbanes-Oxley does not provide for punitive damages. The Act does, however, contain a provision making clear that the statute does not preempt state and other federal laws, which may permit punitive damages.[11]

On the criminal side, the retaliatory action becomes criminal if the employee provides information to a law enforcement officer concerning the commission of a possible federal offense. The offender could be personally be filed or imprisoned for not more than 10 years or both.

E. How to Protect Your Company

Some steps that an employer may take to minimize liability under Sarbanes-Oxley include:

Create an Open-Door Policy for Reports of Corporate Fraud. Policies will need to be reviewed, revised or created to reflect the focus of the Act on accounting and auditing matters. Also, you will need to ensure that your company has a confidential, anonymous complaint procedure that is capable of receiving and acting on complaints. Many companies have ethics hotlines in place, which may be modified to address the new mandates from the Act.

Establish a Complaint and Investigation Protocol. The Act expects investigation and action regarding complaints of corporate fraud. The question is who should handle and investigate these complaints and what protocol should be used to conduct the investigation.

Create an Ethics and Conflict-of-Interest Policy. Although the Act focuses on s4enior financial management, these policies are advisable for all employees. Beyond being required by the Act, an effective ethics and compliance program can assist in reducing fraud and eliminating or reducing criminal sentences under the Federal Organizational Sentencing Guidelines.

Retaliation Must Be Prohibited. This message must be communicated to your employees in writing and through training. As with other forms of protected conduct such as complaints of discrimination or harassment, employees who complain of corporate fraud must be protected from retaliation. The stakes are high, with personal criminal penalties looming.

Create or Amend Your Document Retention Policy. Documents should not be destroyed in contemplation or in the midst of a federal investigation, official proceeding, or Chapter 11 bankruptcy proceeding. Your document retention policy must be amended to address the requirements of the Act.

[11] As with state-specific anti-discrimination laws, an analysis of the applicable state whistleblower protection laws is beyond the scope of this Article.

Training. As with all policies, they are meaningless unless employees know about them. Training will be of paramount importance here where violations could result in criminal conduct.

Monitor Compliance. Consider designation of a well-trained compliance officer responsible for implementing the program and overseeing compliance matters. Consider internal compliance audits performed on a regular basis beyond those required by law. Consider annual written certifications by employees that they have reviewed, understood, and will comply with applicable compliance policies. Review hiring policies to ensure that the company conducts reasonable due diligence to avoid hiring employees prone to fraud.

Check Insurance Coverage. In addition to the above, employers should review insurance policies to determine whether officers and agents are covered under existing coverage for allegations of whistleblower violations or interference with employment violations. Consider whether your company needs special employment practice liability insurance (EPLI). This coverage may provide you some degree of protection defending against whistleblower and retaliation claims when the company already has established policies and procedures. Be cautious, however, before accepting a policy that interferes with your right to select counsel and/or the right to decide whether to settle non-meritorious claims. There may be consequences to settlement or how a claim is handled beyond the normal "cost-benefit" analysis performed by insurance companies.