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Newsletters

Employment Practices Newsletter - July 2011

July 11, 2011

Supreme Court Rejects Massive Class Action Against Wal-Mart

In a highly anticipated ruling, the U.S. Supreme Court recently issued its opinion in *Wal-Mart Stores, Inc. v. Dukes,* et al. (S. Ct. June 20, 2011). Plaintiffs claimed that the discretion afforded to local store managers over pay and promotions had an unfair, discriminatory impact on female employees. The proposed class in the case covered approximately 1.5 million current and former Wal-Mart employees, and would have involved billions of dollars in potential damages. The Court's opinion hinged on the application of Fed. R. Civ. P. 23, which regulates class actions. Among other things, Rule 23 requires that the claims of all potential class members share a common issue of law or fact. Here, that would require evidence that women were the victim of one common discriminatory practice. With respect to this issue, the Court recognized that sufficient commonality might be established where an employer operated under a general policy of discrimination through which discrimination occurred via entirely subjective decision-making processes, it made clear that such a showing must rest on "substantial proof." Moreover, the Court recognized that allowing such discretion is a common, presumptively reasonable business practice that raises no inference of discriminatory conduct.

The Court then held that plaintiffs' proffered statistical evidence regarding national and regional data did little to explain whether discrimination was occurring at a store-by-store level. Moreover, the Court held that testimony from a small number of potential class members was insufficient to establish that the claims of the named class members shared anything in common with other members of the proposed class. The significance of this aspect of the Court's opinion cannot be overstated. Without requiring a thorough evidentiary showing before a class can be certified based on the amorphous concept of managerial discretion, it would be possible to string together loosely connected claims into large class actions too costly to defend on the merits.

In a portion of its opinion joined in by all of the justices, the Court held that Fed. R. Civ. P. 23(b)(2) does not authorize class certification when each class member would be entitled to an individualized award of monetary damages. This aspect of the Court's holding was not surprising. But it is important because it forces employees to seek certification through the more rigorous standards of Fed. R. Civ. P. 23(b)(3), which requires heightened analysis by a court regarding the appropriateness of class certification.

Wal-Mart Stores, Inc. v. Dukes, et al. (S. Ct. June 20, 2011)

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Service Areas

Employee Benefits

Immigration

Labor & Employment

Workers' Compensation Defense

For more information, please contact your regular Hinshaw attorney.

Illinois Enacts Major Workers' Compensation Reform

On June 28, 2011, Illinois Governor Pat Quinn signed into law HB1698, a major workers' compensation reform package. The bill's intended effect is to reduce employer medical costs, limit indemnity payouts on certain claims, including loss of trade cases; strengthen rules on fraud; and provide more equity in Commission decisions and awards. Some of the changes apply to accidents that occur on or after September 1, 2011; others apply to existing cases where benefits accrue after September 1, 2011. This is touted as a major piece of business-friendly legislation.

Read a summary of the new law here: Summary of HB1698
Read the court's opinion here: Public Act 097-0018

For more information, please contact Robert J. Finley or your regular Hinshaw attorney.

U.S. Supreme Court Evaluates Entitlement to Attorney's Fees Under 42 U.S.C. 1983

A successful candidate for police chief sued the incumbent chief of police and the town, alleging defamation, federal civil rights claims, and other state law claims. After discovery and investigation concluded that the federal claims had no merit, the federal court dismissed those claims and sent the case back to state court where it originated. Based upon a statutory provision providing for the recovery of fees for the prevailing party in such a claim, the town and incumbent chief asked the court to award attorneys' fees for their work on the federal court claims. The U.S. Supreme Court reviewed 42 U.S.C. § § 1983 and 1988, and determined that while defendants may recover fees as the "prevailing party," defendants may not obtain recovery for fees associated with non-frivolous, successful claims. Thus, when a suit involves both frivolous and non-frivolous claims, under the statute at issue, the courts may award reasonable attorney's fees to the prevailing party, but only for costs that the prevailing party would not have incurred but for the frivolous claims. The potential for attorney's fees awards is part and parcel of every lawsuit, and must be considered when undertaking the defense of any employment-related claim, especially where there is the possibility of an award of fees in favor of a prevailing *defendant*.

Fox v. Vice, Case No. 10-114 (S. Ct. June 6, 2011)

For more information, please contact your regular Hinshaw attorney.

Eighth Circuit Adopts Narrow Definition of "Mass Layoff" Under the WARN Act

An employer hired more than 100 workers to replace its employees who went on strike. Upon resolution of the strike, the employer fired 123 of the replacement workers and then reinstated 103 of the returning employees. The replacement workers sued, alleging that the employer had failed to provide an adequate termination notice under the Worker Adjustment and Retraining Notification Act (WARN Act). Under the WARN Act, an employer that conducts a "mass layoff" must provide notice to employees 60 days prior to the layoff. Under the Act, a "mass layoff" occurs when an employer terminates at least 33 percent of its active workforce or more than 500 workers. The replacement workers argued that the court had to consider the number of workers the employer fired, rather than the number of positions the employer eliminated to determine whether a "mass layoff" had occurred. The U.S. Court of Appeals for the Eighth Circuit disagreed and held that simply firing one worker and replacing him with another does not result in a reduction in force as required by the WARN Act. Rather, a reduction-in-force requires a net loss in productivity measured by the numerosity requirements set out in the Act. Accordingly, the employer did not conduct a "mass layoff" because it terminated 123 of the replacement workers, and filled their positions with 103 returning employees, meaning only 20 positions were eliminated. This case clarifies the requirements for a "mass layoff" under the WARN Act for both employers and employees in the Eighth Circuit. Employers must be aware that when positions are eliminated for more than 500 employees, or for at least 33 percent of their workforce, the WARN Act's notice requirements must be followed.

Sanders v. Kohler Co., Case No. 10-1848 (8th Cir. June 8, 2011)

For more information, please contact regular Hinshaw attorney.

Unanimous Board Determines Make-Whole Relief Is Fundamental

A Florida food products wholesaler unilaterally changed the health care plan for its bargaining unit employees twice in two years. Each change led to increased premiums and copayments for the unionized employees. The administrative law judge (ALJ) and reviewing bodies that subsequently reviewed these facts agreed that the unilateral change violated Section 8(a)(5) of the National Labor Relations Act, but disagreed about the appropriate remedy. The ALJ ordered the wholesaler to: cease and desist from changing the health plan; restore the health coverage in place prior to the unilateral changes, upon the union's request; and make the employees whole for losses suffered as a result of the unilateral changes. A two-member National Labor Relations Board (NLRB) modified the remedy to eliminate the make whole relief if the union exercised its option to retain the final unilaterally implemented health insurance plan. The case eventually was argued before the U.S. Supreme Court, which remanded it after ruling that at least three members must convene in order to exercise the delegated authority of the NLRB. On second review, the four-member NLRB unanimously restored the make whole-relief award, regardless of whether the union requested rescission of the health care plan change. In doing so, the NLRB found that its earlier remedy was based on mechanical adherence to *Brooklyn Hospital Center,* 344 NLRB 404 (2005), a decision that itself ignored 40 years of NLRB precedent, without explanation. The unanimous NLRB held that a make-whole remedy is a fundamental element of the Board's remedial approach. Make-whole relief fully compensates employees for economic losses caused by unfair labor practices. Also, it operates as a financial disincentive against the commission of unlawful unilateral changes. Employers should note that unlawful unilateral changes that result in economic losses to unit employees are recoverable independent of a union's judgment on whether to seek rescission.

Goya Foods of Florida and Unite Here, CLC, 12-CA-023524, 356 NLRB 184 (June 22, 2011)

For more information, please contact your regular Hinshaw attorney.

Seventh Circuit Emphasizes That Prompt Investigation Is Key to Eliminating Employer Liability for Co-Worker Harassment Under Title VII

An African-American employee was involved in a personal feud with several co-workers, leading her to file 10 complaints of racial harassment within a two-year period. The employer promptly investigated each of the complaints, determining in only one case that the alleged harassment had occurred and that discipline was appropriate. Where the evidence was inconclusive, the employer counseled all parties involved to treat one another with respect. The employee was unsatisfied with those responses, however, and sued the employer. He alleged that the employer had allowed its employees to create a racially hostile work environment in violation of Title VII of the Civil Rights Act of 1964, as amended. An employer is liable under Title VII for an employee's harassment when it fails to take reasonable steps to discover and remedy the harassment. The U.S. Court of Appeals for the Seventh Circuit found no basis for employer liability because the employer had investigated each of the employee's complaints with vigor and had taken appropriate corrective action when necessary. The court concluded: "As we have said before, prompt investigation is the hallmark of reasonable corrective action." Employers should remember that when they become aware of a potential complaint of harassment, it is imperative to immediately investigate and respond accordingly; by doing so, the employer will avoid liability for employee's misconduct.

Vance v. Ball State University, et al., Case No. 1:06-cv-1452 (June 3, 2011)

For more information, please contact your regular Hinshaw attorney.

Unlicensed Accountants May Be Exempt From Overtime Pay Requirements

Unlicensed junior accounts who performed audits and provided other accounting services for their employer's clients brought a wage-and-hour class action against the employer for overtime pay they were allegedly owed. The employer argued that the accountants were exempt from the wage-and-hour law's overtime provisions under the "professional" exemption. Under California law, to claim the "professional" exemption, the employer must show that the employees were: (1) licensed or certified by the State of California and primarily engaged in law, medicine, dentistry, or accounting; or (2) primarily engaged in an occupation commonly recognized as a learned or artistic profession. The U.S. Court of Appeals for the Ninth Circuit held that the accountants could be exempt if their job duties indicated that they were engaged in a "learned profession," even though they did not have CPA licenses. The court emphasized that when determining whether

an unlicensed accountant is exempt or non-exempt, a "fact-specific inquiry" is required. This case serves as a reminder that whether an employee is exempt or non-exempt should not be determined categorically, but should be determined according to the job duties the employee actually performs.

Campbell v. PricewaterhouseCoopers LLP, Case No. 09-16370 (9th Cir. June 15, 2011)

For more information, please contact your regular Hinshaw attorney.

Seventh Circuit Rejects Nurses' Racial Discrimination Lawsuit Based on Monkey References

Four African-American nurses worked at a jail facility and asserted that they experienced racial discrimination that caused them to resign. The nurses alleged that: (1) there were excerpts from the book, *The One Minute Manager Meets the Monkey,* with notes in the margins, found in a former administrator's office; (2) comments about "monkeys" were made over the jail intercom; (3) a jail employee wore a t-shirt depicting a confederate flag; (4) a jail doctor referred to an inmate named Cole as "black as coal" or "black ass coal"; and (5) their shifts were rotated on a monthly basis. Fed up with the alleged discriminatory treatment, the nurses quit and sued the jail, claiming that they were subject to a hostile work environment. The U.S. Court of Appeals for the Seventh Circuit held that the alleged conduct did not create actionable discrimination. In so doing, the court explained that to establish a "hostile work environment," the nurses needed to show that their work environment was both objectively and subjectively offensive. The court determined that excerpts from the book found in the administrator's office were not something that a reasonable person would find offensive, as the book was plainly directed at management concerns and the metaphor was unlikely to cause confusion. Further, the court found no evidence that the alleged references to monkeys over the intercom were directed at nurses or a subset of them. The court determined that the observance of an employee wearing a shirt that contained a confederate flag as well as the doctor's "black as coal" and "black ass coal" remarks were isolated incidents that were insufficiently severe to support a hostile work environment claim. The court further found that the jail's policy of rotating nurse shifts constituted a legitimate response to the tension between employees in different shifts. While this case demonstrates that not all conduct an employee finds offensive will support a hostile work environment claim, employers should enforce comprehensive policies that prohibit all forms of discrimination and harassment to ensure that their employees are treated respectfully.

Ellis, et al. v. CCA of Tennessee LLC, Case No. 10-2768 (7th Cir. June 9, 2011)

For more information, please contact V. Brette Bensinger or your regular Hinshaw attorney.

EEOC Holds Public Hearing on Leave As a Reasonable Accommodation

On June 8, 2011, the U.S. Equal Employment Opportunity Commission (EEOC) considered the use of leave as a reasonable accommodation under the Americans with Disabilities Act (ADA) by assembling a diverse panel of experts to voice their opinions. Under the ADA, an employer must provide a disabled employee with reasonable accommodations that will allow him or her to perform the essential functions of the job. However, an employer does not need to provide accommodations that subject it to an undue hardship. When disabled employees request a leave of absence as a reasonable accommodation, employers are faced with the question of how much leave they must provide in order to comply with the ADA. That question often arises when a disabled employee exhausts all available leave time, and is still not able to return to work. At the June 8 hearing, representatives for employers expressed their view that attendance itself can be an "essential function of the job" and that unplanned or extended absences are difficult for employers to manage. Employee representatives responded that leave is a critical accommodation that allows many disabled employees to stay in the workforce, and that the "entire purpose of the leave is vitiated if the employee recovers but is terminated or otherwise barred from returning to work." The EEOC's dominant message was that employers need to be flexible when applying their leave policies to disabled employees, and that employers which enforce a bright line rule requiring a disabled employee to return to work or be terminated when his/her available leave is exhausted could be exposing themselves to liability under the ADA. Employers should instead analyze whether extended leave is a reasonable accommodation in the same way that they would analyze any other request for accommodation—by performing a individualized analysis to determine whether the accommodation is required by the ADA (i.e., whether the extended leave will allow the employee to perform the essential functions of the job without subjecting the employer to an undue hardship). The EEOC plans to issue updated guidance on when extended leave is warranted under the ADA, potentially by

the end of this summer.

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