Wimberly Lawson
Wright Daves & Jones, PLLC
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Briefly

July 2010 Volume 10, Issue 7

PAY DISCRIMINATION CLASS ACTION CASES SNARE EMPLOYERS

Rebecca Brake Murray

"The plaintiffs requested certification of a nation-wide class of current and former female employees holding a wide range of positions, seeking back pay and punitive damages."

A closely divided Ninth Circuit Court of Appeals has ruled that female employees of Wal-Mart may bring a nation-wide class action for pay discrimination, in what is likely the largest class action in history. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010). The case arose in 2001 when several current and former female employees sued Wal-Mart alleging that the company pays women less than men in comparable positions even when the women have higher performance ratings and greater seniority, and that the company gives women fewer promotions. The plaintiffs allege that Wal-Mart has a strong, centralized corporate structure that fosters sex stereotyping and discrimination in its 3,400 stores, that policies and practices supporting such discrimination are consistent throughout all the stores, and that sex discrimination is common to all women who work or have worked for the company. The plaintiffs requested certification of a nation-wide class of current and former female employees holding a wide range of positions, seeking back pay and punitive damages. Plaintiffs ask that the class include women who worked for Wal-Mart as far back as 1998.

A lower court had certified the class for the pay allegations, and the current Ninth Circuit ruling on April 26 was a 6-5 *en banc* ruling. Among other things, the majority ruling indicated that the district court did not abuse its discretion in finding that the six named plaintiffs' claims were typical of the class, finding that "even though individual employees in different stores with different managers may have received different levels of pay or may have been denied promotion or promoted at different rates, because the discrimination they claim to have suffered occurred through alleged common practices – e.g. excessively subjective decision making in a corporate culture of uniformity and gender stereotyping – the district court" properly found the typicality requirement was satisfied. The dissenting opinion stated that "No court has ever certified a class like this one, until now. And with good reason. . ." The dissent pointed out that the six named plaintiffs have worked in 13 of Wal-Mart's 3,400 stores and yet "seek to represent every woman who has worked in those stores over the course of the last decade – a class estimated in 2001 to include more than 1.5 million women. . . . This means the court must allow up to 1.5 million individual determinations of liability. On its face, a class action of this sort makes no sense" and undermines the rights of defendants, the dissenting opinion said. The majority did order the district judge to determine whether punitive damages should be part of the suit and whether former employees at the time that the complaint was filed should be allowed to be part of the plaintiff class. The district court had previously denied the plaintiffs' motion for certification on the promotion issue, citing "unmanageability."

Another large employer found out what a jury trial of a nation-wide class action for discrimination in pay can lead to. On May 17, a federal jury in New York awarded some $3.4 million for compensatory damages to 12 female plaintiffs who testified as witnesses against the Novartis Corp., in a nation-wide class action of female sales representatives. On May 19, the same federal jury awarded $250 million in punitive damages in the same case, an amount described by the plaintiffs' attorney as the largest ever in a sex discrimination verdict. These punitive damages were in addition to $3.4 million in compensatory damages already awarded to the 12 testifying plaintiffs on May 17. It is likely that these damages will be reduced, however, as there is a federal damages cap of $300,000 per person for compensatory or punitive damages in cases under Title VII, but the plaintiffs' attorneys fees must also be added to the total. The case involves a nation-wide class of some 5,600 current and former female sales representatives who worked for the company between 2002 and 2007.

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The plaintiffs' attorney stated that four major areas were targeted in the case including the company's performance management system, compensation system, access to promotion, and responsiveness to evidence of wrongdoing. Ironically, *Working Mother* magazine has designated Novartis as one of the top 100 companies for working mothers, and the company has been included on a Top 50 list named by *Diversity Inc.* magazine.

UNION UPDATE

Howard Jackson

"The unions have won more than half of all NLRB representation elections… over the past 13 years."

A. What States Have the Highest Level of Unionized Workers?

According to an analysis of government data released February 3 by the Center For Economic And Policy Research, New York was the state with the highest rate of unionization among its workforce (26.4%). Other states with high unionization rates included Hawaii (25.2%), Alaska (24%), and Michigan (21.1%). The states with the lowest rates of unionization last year were North Carolina (4.1%) and South Carolina (4.9%).

In a separate report of January 22 from the Labor Department's Business of Labor Statistics (BLS), the proportion of all wage and salary workers who belong to a labor union remained at 12.3%, approximately the same level as 2008. BLS first began tracking the data in 1983, when the level of union membership was 20.1%. In the private sector, the share of workers who are members of unions fell to 7.2% last year from 7.6% in 2008. In contrast, the union membership rate among government workers rose to 37.4% from 36.8%. As a result, the majority of union members last year for the first time were employed in government service (52%). It should be noted that the above figures do not include workers who are represented by unions but are not union members. Adding those persons who are represented by unions but are not union members, the unionization rate, or the share of employee wage and salary workers represented by unions, held roughly steady at 13.6%.

By industry, the unionization rate declined in the factory sector, from 12.3% in 2008 to 11.9% in 2009; in construction, from 16.2% to 15.8%; and in the information technology sector, from 13.7% to 11.2%. Unionization in the transportation and utility industry held steady at 23.4% in 2009, the highest rate for any broad industry sector. The unionization rates stayed about the same both in wholesale and retail trade sectors, at 5.8%, and in leisure and hospitality, 3.6%, while edging down in education and health services, from 10.3% to 9.9%.

B. Who Needs EFCA - NLRB Union Win Rate Tops 68%

The Bureau of National Affairs has released a report stating that unions won 68.5% of representation elections conducted by the NLRB in 2009, the highest win rate since BNA began analyzing NLRB data in 1984. At the same time, the number of elections held in 2009 dropped to the lowest level since 1984. The unions have won more than half of all NLRB representation elections in each over the past 13 years. Of course, the NLRB statistics do not reflect the full extent of organizing being conducted by unions. Many unions organize through neutrality and card check recognition agreements and the like.

C. The Supreme Court Invalidates Hundreds of NLRB Decisions

On June 17, the U.S. Supreme Court ruled that hundreds of NLRB rulings are invalid because the five-member National Relations Board ("NLRB") issued the decisions with only two members. New Process Steel v. NLRB, No.08-1457. The NLRB consists of five members who are appointed by the President with approval from Congress. Often, three are from the party occupying the White House. During the last months of the Bush Administration, Democrats blocked President Bush's nominees, claiming that they were biased in favor of business. Subsequently, Republicans fought President Obama's nominees, complaining they were biased in favor of unions. As a result, the NLRB shrunk to only two members. Before existing members' appointments ended, they delegated the authority to issue decisions to two members of the Board in order to keep moving the cases.

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OSHA INSPECTION WARRANT QUASHED; AGENCY REBUKED FOR EXCEEDING BOUNDS

Mary Moffatt Helms

"It is rare for OSHA to seek a warrant to conduct an inspection, and rarer still for an employer to successfully have a warrant quashed."

In an unusual ruling issued March 30, 2010, a U.S. District Court Magistrate Judge for the Southern District of Georgia granted an emergency motion filed by attorneys in our Wimberly Lawson Atlanta affiliate office to quash (invalidate) a warrant secured by the Occupational Safety and Health Administration (OSHA) to conduct a wall-to-wall inspection of a poultry processing plant.

OSHA initially entered the facility with the employer's consent, to conduct a limited inspection related to four specific complaint items. When the compliance officer tried to expand the inspection beyond the scope of the complaint, the employer called Wimberly Lawson. Wimberly Lawson advised the compliance officer that the employer would not consent to an expansion of the inspection absent a showing of probable cause. Although the parties' recollections differed as to the details, the upshot was that after Wimberly Lawson defended its client's rights, the OSHA inspector left the facility and returned with a warrant that authorized a comprehensive, or "wall-to-wall," inspection.

Wimberly Lawson moved the court to quash the warrant, citing binding Eleventh Circuit precedent that limits OSHA's ability to expand a complaint-based inspection absent probable cause. After full briefing by both parties, the court issued a report and recommendation finding that the warrant was not supported by probable cause, and granted the motion to quash. The court found that the risk of an employer being harassed by a vindictive employee or an inspector with a grudge required the agency to show either that it had a factual basis for expanding the inspection, or that the employer had been selected for inspection based on a neutral plan or program. The court also confirmed that, at least in the Eleventh Circuit, OSHA may not use a complaint to trigger a programmed inspection; other Circuits have allowed that practice. OSHA remains free to seek another warrant, but it will have to justify any warrant application by showing that there is probable cause to believe that OSHA standards are being violated, based on observation or neutral selection criteria.

It is rare for OSHA to seek a warrant to conduct an inspection, and rarer still for an employer to successfully have a warrant quashed. With this ruling the court is reminding OSHA that the agency must respect Constitutional protections against unreasonable search and seizure. In these days of expanding Government authority and aggressive agency actions, it is encouraging to see the judiciary fulfill its Constitutional role of defending rights guaranteed to all citizens – even corporate citizens – by the U.S. Constitution.

KNOW YOUR ATTORNEY

FREDRICK R. BAKER

FREDRICK R. BAKER is a Member in the Cookeville, Tennessee office of the firm, which he joined in 2001. His law practice includes an emphasis in workers' compensation and employment discrimination, as well as ADA and FMLA compliance. Mr. Baker is the Editor of the Tennessee Workers' Compensation Handbook, 4th edition (available Fall 2010), published by M. Lee Smith Publishers. He is also on the Advisory Board for the Tennessee Workers' Comp. Reporter. Mr. Baker received his Bachelor of Arts degree in Philosophy, *summa cum laude*, from Transylvania University and his law degree, *magna cum laude*, from the University of Tennessee.

THE 2010 LABOR EMPLOYMENT UPDATE CONFERENCE

November 18 & 19, 2010

KNOXVILLE MARRIOTT
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KNOXVILLE, TENNESSEE

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EARLY RETIREES HEALTHCARE SUPPLEMENT AVAILABLE NOW

Catherine Shuck

A temporary reinsurance program to assist employers providing health insurance for early retirees became available on June 23, 2010. This voluntary reinsurance program, created as part of the Patient Protection and Affordable Care Act, will reimburse participating employers 80% of their per-employee cost between $15,000 and $90,000 a year, to entice employers to offer health insurance to retirees between the ages of 55 and 64. The reinsurance payments are to be used to lower plan costs or to reduce participants' costs, including premiums, deductibles, co-insurance, or other out-of-pocket expenses. The program ends on the earlier of January 1, 2014, or when the $5 billion program allotment is exhausted.

The application and other informational materials are available at the Department of Health and Human Services' website: *http://www.hhs.gov/ociio/regulations/#early_retiree*.

HEALTHCARE REFORM UPDATE - JULY 2010

Each month this column will be dedicated to bringing you the most up to date information concerning the Patient Protection and Affordable Care Act (the "PPACA"). For a full review of the PPACA, please see the May 2010 issue of Briefly, http://www.wimberlylawson.com/CM/Custom/TOCFirmNews.asp. You may also contact Cathy Shuck at cshuck@wimberlylawson.com or (865) 546-1000 for more information.

EBSA Issues Model Notices on Grandfathered Status Disclosure, Other Requirements

The Patient Protection and Affordable Care Act contains numerous notification requirements. To assist employers with compliance, the Employee Benefits Security Administration (EBSA) began issuing model notices in late June. Visitors to EBSA's health reform website, *http://www.dol.gov/ebsa/healthreform/* can download model notices disclosing a plan's grandfathered status, announcing coverage for adult children, announcing the abolition of lifetime limits, and more.

"UNION UPDATE" continued from page 2

The National Labor Relations Act requires there to be three members to act for the Board. Accordingly, in a 5-4 ruling authored by Justice John Paul Stevens, the U.S. Supreme Court ruled that less than three members lacked a quorum. Therefore, a two member NLRB could not issue decisions. Justice Stevens further wrote that allowing two members to run the NLRB because Congress and the White House can't agree on new members would be like letting the Board "create a tail that would not only wag the dog, but would continue to wag after the dog has died."

The decision means that more than 500 of the cases decided by the NLRB while its membership had dropped to two may have to be reopened by the NLRB. The NLRB can act now because is currently has four members, three members appointed by President Obama (all union lawyers), and one Republican. It is likely however, that the current four-member NLRB will in effect "rubber-stamp" many of the prior rulings.

Be sure to visit our website often
www.wimberlylawson.com
for the latest legal updates, seminars, alerts and firm biographical information!

Wimberly Lawson
Wright Daves & Jones, PLLC
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TARGET OUT OF RANGE

Dear Clients and Friends:

Our Annual Conference is truly the high point of the year for us -- a time to gather with friends and discuss important, contemporary employment issues. **PLEASE PLAN NOW TO JOIN US.**

Our day and a half program covers important legal decisions and societal trends affecting employment. Topics are carefully selected to address the concerns of all employers and to give you an opportunity to select from a wide array of topics dealt with in detail. Some of the twenty-five or more topics are:

- Impact of Healthcare Reform on Employers
- FMLA Intermittent Leave Regs and How They Affect You
- Social Media in the Workplace
- COBRA Expansion
- 21st Century Contracts and Agreements
- Avoiding Issues Later with Effective Hiring Now
- When is Mediation Best?
- Avoid Top Wage-Hour Violations
- Sweatpants, Tattoos and Body Piercings – Issues and What You Need to Know
- Violence in the Workplace
- Latest Developments in Workers Compensation
- Understanding the EEOC – EEOC Officials Will Comprise Panel

Join us in Knoxville on November 18 and 19! We promise you an informative, but light-hearted, thorough and practical journey through today's workplace issues.

Hope to see you there!

Respectfully,

Ronald G. Daves
Managing Member

Wimberly Lawson
Wright Daves & Jones, PLLC
Attorneys & Counselors at Law

TARGET OUT OF RANGE

THE WIMBERLY LAWSON LABOR & EMPLOYMENT LAW UPDATE

Knoxville Marriott - Knoxville, Tennessee - November 18 – 19, 2010

COST:

Early Bird (registration AND payment received by October 15, 2010)
$299 per person
$289 for each additional person from same company
$239 for eight or more from same company

Registration and payment received AFTER October 15, 2010
$339 per person
$329 for each additional person from same company
$299 for eight or more from same company

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REGISTRATION INCLUDES:
Seminar (1½ days), materials, two continental breakfasts, lunch and evening reception on Thursday

CANCELLATION POLICY: 50% cancellation fee will be incurred for cancellations after October 29, 2010. Cancellations made after November 10, 2010 will forfeit registration fee (registrants will receive the conference materials post-seminar).

FIVE WAYS TO REGISTER:

1. ***Mail to*: Bernice Houle**
   Wimberly Lawson Wright
   Daves & Jones, PLLC
   P.O. Box 2231
   Knoxville, TN 37901-2231
2. ***Fax to*: 865-546-1001**
3. ***Email to*: bhoule@wimberlylawson.com**
4. ***Via website*: www.wimberlylawson.com**
5. ***Phone*: 865-546-1000**

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This program will be submitted for HRCI recertification credit hours and Tennessee CLE general credit hours.