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Briefly

August 2011 Volume 11, Issue 8

EMPLOYERS DODGE A BULLET – PLAINTIFF CLASS ACTIONS BECOME UNLIKELY

Patty K. Wheeler

"…the Court found that the plaintiffs provided no convincing proof of a company-wide discriminatory pay and promotion policy, and thus did not establish the existence of any common question"

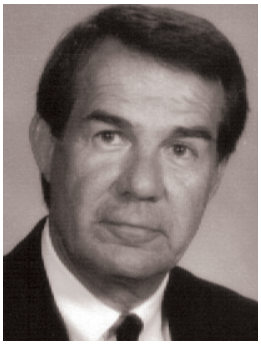
As a result of a ruling of the U.S. Supreme Court on June 20, 2011, class actions will be much more difficult to bring in general, and particularly in employment cases where individual determinations of back pay are necessary. *Wal-Mart Stores, Inc. v. Dukes, 2011 WL 2437013*. In *Wal-Mart*, three representative plaintiffs pursued a class action seeking injunctive and declaratory relief, punitive damages and back pay, on behalf of themselves and a nationwide class of some 1.5 million female employees. They claimed that local managers in some 3,400 stores exercised their discretion over pay and promotions disproportionately in favor of men. Women fill some 70% of the hourly jobs in the stores, but made up only 33% of management employees, and the higher one looks in the organization the lower the percentage of women. Wal-Mart's compensation policies left open a $2.00 band for every position's hourly rate, and the retailer provided no standards or criteria for setting wages within that band. The selection of employees for a promotion was described as a "tap on the shoulder" process, as vacancies were not regularly posted and managers chose whom to promote on the basis of their own subjective impressions. The plaintiffs used an expert witness, a sociologist who conducted a "social framework analysis" of Wal-Mart's "culture" and personnel practices, and concluded that the company was "vulnerable" to gender discrimination. Perhaps significantly, however, he could not "determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart. . . .[he] conceded that he could not calculate whether 0.5% or 95% of the employment decisions at Wal-Mart might be determined by stereotyped thinking." The lower courts had determined that the action could be manageably tried as a class action in spite of its massive size, in part by using a formula to determine compensatory damages, by selecting certain representative claims at random, referring those claims to a special master for valuation, and them extrapolating the validity and value of the untested claims from the sample set.

The case proceeded under Federal Class Action Rule 23(b)(2), but the Court decided that the crux of the case was the commonality requirement that a plaintiff show that "there are questions of law or fact common to the class" under Rule 23(a)(2). For several reasons, the Court found that the plaintiffs provided no convincing proof of a company-wide discriminatory pay and promotion policy, and thus did not establish the existence of any common question. The Court finds that the only corporate policy that the plaintiffs' evidence convincingly established was Wal-Mart's "policy" of allowing discretion by local supervisors over employment matters. Such a policy was deemed just the opposite of a uniform employment practice that would provide the commonality needed for a class action. Further, statistical proof, even if it established a pay or promotion pattern that differed from the nationwide figures or the regional figures in all of Wal-Mart's 3,400 stores, still would not demonstrate that commonality of issue exists. "Some managers will claim that the availability of women, or qualified women, or interested women, in their stores' area does not mirror the national or regional statistics. And almost all of them will claim to have been applying some sex-neutral, performance-based criteria – whose nature and effects will differ from store-to-store." Further, ". . . demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's." In short, the plaintiffs ". . . wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged reasons for all these decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question why was I disfavored."

The analysis of the "commonality" issue is joined in by five justices, with four justices dissenting on this point. There was a second grounds for denying the Federal Rule 23(b)(2) class action, however, that was joined in by Continued on page 4

LABOR BOARD PROPOSES RULE
FOR "QUICKIE" UNION ELECTIONS TO ASSIST UNION ORGANIZING

Apparently not content with the fact that unions today win over 66% of all secret ballot Labor Board elections, the Labor Board has proposed new rules for quickie elections and other changes to facilitate union organizing efforts. Unions and the Labor Board have traditionally believed, perhaps accurately, that the success of union organizing campaigns is reduced by long delays between the filing of the election petition and the conducting of the election. Back in 1961, the median number of days necessary to conduct the election was reduced from 82 days in 1960 to 43 days in 1962. Currently, the median time between the filing of the petition and election has been reduced to less than 38 days. Although the Labor Board's new proposed rules do not specify the number of days it will result from the changes, most predict that the rules as proposed would shorten the time frame to 20 days or as few as 10 days. The Labor Board's proposal takes various steps to reduce the time period, including the following:



Ronald G. Daves

"The proposed rules severely limit an employer's opportunity to communicate with its employees regarding the question of unionization."

1. The NLRB would permit the electronic filing of election petitions and a pre-election hearing would be set to begin 7 days after a hearing notice is served.
2. Parties would be required to state their positions, on issues such as voter eligibility, no later than the start of the hearing and the employer would be required to provide full names, work locations, shifts, and job classifications of all individuals in the proposed unit.
3. Most election eligibility issues would be deferred until after the election, particularly if disputed voters involve less than 20% of the putative bargaining unit.
4. Within 2 days of the notice of election, the employer would be obligated to provide a final voter list in electronic form including voters' telephone numbers and e-mail addresses when available.
5. An employer's failure to meet various detailed requirements would waive any right to contest the issues later, and post-election issues would be reviewable only at the election of the Labor Board rather than automatic.

The Labor Board members supporting the proposed rule are all former union attorneys, and the lone Republican on the Board stated the following in dissent:

By administrative fiat in lieu of Congressional action, the Board will impose organized labor's much sought-after "quickie and ambush election" option, a procedure under which elections will be held in 10 to 21 days after the filing of the petition. Make no mistake, the principal purpose for this radical manipulation of our election process is to minimize, or rather, to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining.

The NLRB heard arguments by both employer and labor representatives at a public hearing July 18 -19, 2011. Both the U.S. Chamber of Commerce and SHRM opposed the Board's proposals. Testimony included arguments such as the fact that the NLRB has not identified a need for, nor established a record to support the change in rules and that the proposed rules would deprive employers of their rights under Sec. 9 of the NLRA. The proposed rules severely limit an employer's opportunity to communicate with its employees regarding the question of unionization.

President Barack Obama has now achieved a majority of appointees on the Board, and he has appointed a former union attorney as General Counsel of the NLRB. The Chamber and other business leaders have continually criticized the NLRB for its activist agenda favoring unions at the expense of business under Obama's administration. Following the Obama administration's failure to get the so-called "Employee Free Choice Act" (basically the card-check law) passed, its emphasis has continued with regulatory actions designed to accomplish the pro-labor assault on business.

Editor's Note – The combination of the proposed Labor Board rule for quickie elections and the proposed Labor Department rule on reporting persuader activities (See, Howard Jackson's article herein), present a "double whammy" to employers should

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NEW DOL RULE ATTEMPTS TO "GAG" AN EMPLOYER IN UNION ORGANIZING CAMPAIGNS

Howard B. Jackson

"The current rules have an exception that allows employers and consultants not to file the reports when consultants are giving "advice" to the employer."

In a dramatic and important move, the Obama administration has announced a proposed change in the rules concerning the role consultants play in union organizing campaigns, a move advocated by organized labor. The issue comes from the 1959 Labor-Management Reporting and Disclosure Act, which provides that employers must report arrangements with third-party consultants hired to influence employees in connection with union organizing campaigns and even with union bargaining. The current rules have an exception that allows employers and consultants not to file the reports when consultants are giving "advice" to the employer. In effect, this means that only consultants who communicated directly with employees have to file such reports with the Labor Department.

Under the proposed rule, however, employers would have to disclose arrangements with consultants that issue communications on behalf of an employer designed to "directly or indirectly persuade workers concerning their rights to organize or bargain collectively," whether or not the consultants contact employees directly.

Thus, under the proposed rule, an employer and consultant each must file a report concerning an agreement or arrangement pursuant to which the consultant engages in activities that have as a direct or indirect object to, explicitly or implicitly, influence the decisions of employees with respect to forming, joining or assisting a union, collective bargaining, or any protected concerted activity in the workplace.

Specific examples of persuader activities that, either alone or in combination, would trigger the reporting requirements include but are not limited to: drafting, revising, or providing a persuader speech, written material, website content, an audiovisual or multimedia presentation, or other material or communication of any sort, to an employer for presentation, dissemination, or distribution to employees, directly or indirectly; planning or conducting individual or group meetings designed to persuade employees; developing or administering employee attitude surveys concerning union awareness, sympathy, or proneness; training supervisors or employer representatives to conduct individual or group meetings designed to persuade employees; coordinating or directing the activities of supervisors or employer representatives to engage in the persuasion of employees; establishing or facilitating employee committees; developing employer personnel policies or practices designed to persuade employees; deciding which employees to target for persuader activity or disciplinary action; and coordinating the timing and sequencing of persuader tactics and strategies.

No report is required concerning an agreement or arrangement to exclusively provide advice to an employer. For example, a consultant who exclusively counsels employer representatives on what they may lawfully say to employees, ensures a client's compliance with the law, or provides guidance on NLRB practice or precedent, is providing "advice." Reports are not required concerning agreements or arrangements to exclusively provide such advice.

Should the proposed rule go into effect, the required reports must be filed as early as 30 days after entering into the reportable agreement or arrangement, and the report must show the date and amount of each such payment, agreement,

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KNOW YOUR ATTORNEY

ANNE T. MCKNIGHT

ANNE T. McKNIGHT is an Associate in the Nashville, Tennessee office of Wimberly Lawson Wright Daves & Jones, PLLC, which she joined in October 2009. Anne's practice includes an emphasis in workers' compensation, insurance defense and general civil defense litigation. Anne received her Bachelor of Science degree in Communication from the University of Kentucky in 2003, and a Doctor of Jurisprudence Degree from the University of Kentucky, College of Law in 2007. Prior to joining the Firm, she spent over two years with general civil defense firms in Nashville, Tennessee.

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"EMPLOYERS DODGE A BULLET" continued from page 1

all nine justices, a rarity for such an important issue. All the justices conclude that a class action should not have been allowed under Rule 23(b)(2) because the plaintiffs sought monetary relief that was not merely incidental to any injunctive or declaratory relief that might be available. The majority would find that class claims for individualized relief (like back pay claims) do not satisfy the Rule, because the employer was entitled to an individualized determination of each employee's eligibility for back pay. The Court indicated it is not possible to replace such individualized determinations with a "trial by formula," without an individualized determination involving each individual employee.

Editor's Note – This decision is monumental, not only for employers worried about being defendants in an employment class action suit, but any other entity fearing such class proceedings. While much of the decision is technical, there are several general principles that can be gleaned from the decision that are quite important. First, it is going to be quite difficult for any plaintiff to meet the Court's "commonality" requirement of bringing a class action, absent some type of objective selection criteria like an employment test that is being attacked as discriminatory. Ironically, the ruling suggests that the more subjective and ad hoc the employer's decision making process is, the less commonality is involved and therefore the less likelihood there is for a class action. Even plaintiff lawyers seem to agree with this analysis, indicating that in the future they will have to bring smaller, more focused class-action suits. Obviously, any claimant can still file an individual charge and bring an individual suit.

Second, historically a majority of class action employment cases have been brought under Rule 23(b)(2), which the Court now says requires an individual determination of each single employee's monetary claims and the employer's defenses. This analysis, joined in by all nine justices, would apparently mean that class action employment cases under Rule 23(b)(2) will rarely exist. While such class claims can still be brought under another federal rule, Rule 23(b)(3), this Rule contains much more demanding criteria for a plaintiff to meet, requiring that the common questions "predominate over any questions affecting only individual members and that a class action is superior to other available methods for adjudicating the controversy." A court is much less likely to allow a class action to proceed under the more demanding requirements of Rule 23(b)(3), although it is possible.

"LABOR BOARD PROPOSES RULE" continued from page 2

they go into effect. Who needs EFCA (the card-check law) when policies like this apply? There is no obligation for a union to notify an employer that it is conducting an organizing campaign, so should these new proposed rules go into effect an employer could receive a petition one day without any prior knowledge of union activity, and be subject to a secret ballot election as early as 10 days later, with limited ability to get "advice" as to how to handle a campaign. The Labor Board apparently does not believe there should be an adequate opportunity for the issues to be explored and free speech to be exercised by both sides concerning the election issues. Can you imagine the outcry against a political process where any candidate could announce one day an election to be held 10 days later? This proposed rule, the editor submits, is not a good example of democracy in action.

"NEW DOL RULE" continued from page 3

or arrangement, and a full explanation of the circumstances of all such payments, including the terms of any agreement or understanding pursuant to which they were made. Although the statute exempts attorney-client communications from reporting, the DOL construes an attorney's advice as privileged but concludes that if the advice includes engaging in persuader activity, the attorney-client privilege is waived and the reporting requirements apply.

Comments to the notice of proposed rulemaking must be received on or before August 22, 2011.

Editor's Note - Although the purported purpose of these rules is to expose to public view so-called "union-busting" activities, the proposed rule actually serves to deter an employer from getting advice, thus increasing the likelihood of committing unfair labor practices. The unfair labor practice rules are highly difficult and technical, and even labor attorneys have difficulty interpreting and applying them. Under the proposed rules, however, if a consultant or attorney does nothing more than revise a questionable statement in a speech prepared by the employer, the reporting requirements are triggered. It should not be lost on readers that the reporting requirements go far beyond union organizing campaigns, and could include matters pertaining to collective bargaining by unionized employers, and include farfetched issues like drafting personnel policies and conducting seminars. There undoubtedly will be a great deal of litigation on the enforceability of these rules should they go into effect. Further, the rules seem to present more regulatory burden on employers at a time our economy needs exactly the opposite. Unions are currently winning NLRB secret ballot elections at one of the highest rates in history, over two-thirds of all such elections. Do they really need more help? The proposed rules seem to be a "solution in search of a problem."

Wimberly Lawson
Attorneys & Counselors at Law

We invite you to attend our 32nd Annual Labor and Employment Law Update

TARGET OUT OF RANGE

THE WIMBERLY LAWSON LABOR & EMPLOYMENT LAW UPDATE

Knoxville Marriott Downtown
500 Hill Avenue, Knoxville, Tennessee
November 3 & 4, 2011

KEYNOTE SPEAKER

Dr. Farris Jordan

Licensed Psychologist
and author of
"Stress! Are You in Control?"

SPECIAL GUESTS
EEOC OFFICIALS

Opportunities to participate in panel discussions entitled *"EEOC Officials Talk Directly With You"* with guest speakers Sarah L. Smith, Director, Sylvia Hall, Enforcement Supervisory Federal Investigator, and Sally Ramsey, Senior Trial Attorney, with the Nashville,Tennessee office of the EEOC.

A FEW COMMENTS FROM LAST YEAR

- "A wealth of beneficial information"
- "Very informative, helpful and enjoyable"
- "All pertinent areas of HR covered"
- "Well presented, understandable, relevant"

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Wimberly Lawson
Attorneys & Counselors at Law

TARGET OUT OF RANGE

Dear Clients and Friends:

Our Annual Fall 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 thirty-five or more topics are:

- Healthcare Reform Headaches for 2012
- FLSA Hot Buttons and Enhanced Federal Enforcement
- Social Media in the Workplace – Unforeseen Dangers for Employers
- Nuts and Bolts of Unemployment Claims
- Employment Contracts and Agreements – How They Can Protect Employers
- Wage and Hour Compliance Tips/Class-Action Alerts
- Employer Policies/Handbooks – For Better or Worse
- Records Retention Guidelines/Litigation Holds
- Employee Conduct and Appearance – On and Off the Job
- Workplace Crisis/Violence in the Workplace – How to Prevent and Protect
- Workers Compensation Update/Strategies – One of Your Biggest Employment Costs
- EEOC Compliance/Charge Responses – EEOC Officials Talk Directly With You
- USERRA (Uniformed Services Employment and Reemployment Rights Act)
- Labor Update/Impacts of Continuing Recession/Union Initiatives
- Employer Access to Employee Medical Information: GINA, ADA and FMLA
- Affirmative Action Requirements – Who and What

Join us in Knoxville on November 3rd and 4th! 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

LexisNexis Martindale-Hubbell Peer Review Rated
For Ethical Standards and Legal Ability

AGENDA

Thursday, November 3, 2011 (9:15 a.m. - 5:15 p.m.)

8:00 a.m. – 9:00 a.m. Registration and Continental Breakfast

9:15 a.m. - 10:45 a.m. - General Session
The Year in Review
Overview of Department of Labor Initiatives
Healthcare Reform Headaches
Labor Unions Impact on Upcoming Elections
Class Actions and Implications for Employers

11:00 a.m. - 12:00 p.m. - Breakout Sessions
Social Media Implications in Employment/Labor
FLSA Hot Buttons and Enhanced Federal Enforcement
Overview of EEOC Initiatives
ADAAA - Forget What You Always Knew
Practical Strategies to Defend Workers' Compensation Claims
Handbooks and Policies - Do We Really Need All This?
Labor/NLRB Update in Depth

12:00 p.m. - 1:15 p.m. - Lunch *(As Guests of Wimberly Lawson)*

1:30 p.m. - 2:30 p.m. - General Session
Keynote Speaker, Dr. Farris Jordan, "*Staying Motivated Through Comic Vision*"

2:45 p.m. - 3:45 p.m. - Breakout Sessions
EEOC Compliance - EEOC Officials Talk Directly With You
How to Avoid Class Action Litigation/Consequences
ICE Enforcement and Current Trends in I-9 Audits
Employee Contracts: Who Needs 'Em?
Affirmative Action Update
FMLA - Beyond the Basics
HR Jeopardy - Interplay Between ADA, FMLA and WC

4:00 p.m. - 5:15 p.m. - General Session
Legislative Developments in Workers' Compensation
Constitutional Impact on Employment Issues
Whistleblowing Gone Wild
Internal Investigations
Challenges for Corporate General Counsel

5:15 p.m. - 7:00 p.m. Reception *(please join us for scrumptious hors d'oeuvres)*

Friday, November 4, 2011 (8:30 a.m. - 1:00 p.m.)

8:00 a.m. - 8:30 a.m. - Continental Breakfast

8:30 a.m. - 9:30 a.m. - General Session
USERRA
Independent Contractors - More Dangerous Than Ever
Sexual Harassment - Still Don't Get It!
Employment Litigation Trends

9:45 a.m. - 10:45 a.m. - Breakout Sessions
FMLA - Beyond the Basics
There's Something About "GINA"
OSHA 2011: Bigger and Meaner, and Heading Your Way
Practical Strategies to Defend Workers' Compensation Claims
EEOC Compliance - EEOC Officials Talk Directly With You
Strategies for Hiring Criteria - Using Unemployment History, Credit Checks, Criminal Arrests, Convictions and the Like
Unemployment Claims - Tactics and Strategies

11:15 a.m. - 1:00 p.m. - General Session
Records Retention and Litigation Holds
Workers' Compensation Case Law Update
Jury Waivers/Mandatory Arbitration
Documentation Do's and Don'ts
Employment Issues That Will Affect 2012 Political Elections

1:00 p.m. Conclusion

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The use of this seal is not an endorsement by the HR Certification Institute of the quality of the program. It means that this program has met the HR Certification Institute's criteria to be pre-approved for recertification credit.

This program has been approved for 9.50 recertification credit hours toward PHR, SPHR and GPHA recertification through the Human Resource Certification Institute (HRCI). For more information about certification or recertification, please visit the HRCI home page at www.hrci.org.

This program has been accredited by Tennessee CLE for 9.50 general credit hours.

This program has been approved for 9.50 general credit hours by the National Association of Legal Assistants (NALA).

Wimberly Lawson
Attorneys & Counselors at Law

Thirty-Second Annual Labor & Employment Law Update Conference

Knoxville Marriott - Knoxville, Tennessee
November 3-4, 2011

COST:

Early Bird (registration AND payment received by Sept. 30)
- $309 per person
- $299 for each additional person from same company
- $259 for eight or more from same company

Registration and payment received AFTER October 15
- $349 per person
- $339 for each additional person from same company
- $299 for eight or more from same company

REGISTRATION INCLUDES:

Seminar (1 1/2 days), materials, two continental breakfasts, lunch and evening reception on Thursday, November 3, 2011

CANCELLATION CHARGE:

50% cancellation fee will be incurred for cancellations after October 12. Cancellations made after October 25, 2011 will forfeit registration fee (registrants will receive the conference materials post-seminar). Substitutions of attendees within the same company will be permitted at any time.

HOTEL ACCOMMODATIONS

Knoxville Marriott • 500 Hill Avenue

SPECIAL RATES AVAILABLE

Be sure to state you are attending the Wimberly Lawson conference in order to receive the room rate of $105.00/standard.

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RESERVE ONLINE at www.marriott.com/TYSMC
(use the Group Code LAWLAWA to reserve at the conference rate)

KEYNOTE SPEAKER
Dr. Farris Jordan
Licensed Psychologist and author of "Stress! Are You in Control?"

No one is immune from stress, but Dr. Farris C. Jordan can teach anyone how to make it productive instead of damaging. And he is a master at having fun and laughing while he does it.

Dr. Jordan is a licensed psychologist who knows what it means to take control of stress. After receiving four degrees from the University of Tennessee, he has been extensively involved in stress research.

Dr. Jordan is the author of four books and numerous articles on the prevention of mental and physical illness. He has received national recognition for his "hands on" research on the effects of stress by becoming personally involved in highly stressful events such as Brahma Bull riding, NASCAR race driving, sky diving, Giant Canadian Bear wrestling, alligator wrestling, 13 consecutive Boston Marathons, completion of the 2,150 mile Appalachian Trail from Georgia to Maine in 139 days, and the 2,552 mile Mississippi River in a small canoe in 57 days. These experiences have enabled him to teach others how to control stress and stay motivated without fear or hesitancy.

Dr. Jordan's presentation will help you learn:
- what your stress-coping behavior reveals about you
- if you have a stress-prone or stress-tolerant personality
- why you experience worry and depression
- how well you are satisfying your 6 basic psychological needs
- your happiness IQ
- your social awareness score
- if you are in the right job

FIVE WAYS TO REGISTER

1. *Mail to:* Bernice Houle
   Wimberly Lawson Wright
   Daves & Jones, PLLC
   P.O. Box 2231
   Knoxville, TN 37901
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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*Email*_____

*BPR and State for CLE:*_____ *No. Attending Reception:* _____

Special Needs? If you should have any special needs, such as wheel chair access or special dietary requirements, please contact Bernice Houle at 865-546-1000 no later than 10 days before the event.