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EMPLOYMENT PRACTICES UPDATE

SUMMER 2011

SUPREME COURT STOPS CERTIFICATION OF COLOSSAL CLASS IN DISCRIMINATION CASE BROUGHT AGAINST WAL-MART

On June 20, 2011, the Supreme Court of the United States, in *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277, issued an opinion denying certification of what would have been the largest employment class action in history. The named plaintiffs in the lawsuit, who sought to represent 1.5 million present and former female employees of Wal-Mart, alleged that the company discriminated against them on the basis of their sex by denying them equal pay and/or promotions, in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. §2000e-1 *et seq*.

Betty Dukes began working at Wal-Mart in Pittsburg, California as a Cashier in 1994. She was promoted to Customer Service Manager, but was later demoted back to Cashier and then to Greeter after a series of disciplinary violations. Dukes alleged that similarly situated male employees were not disciplined for the same or similar infractions, and that she was disciplined in retaliation for having invoked Wal-Mart's internal complaint procedures. Dukes also alleged that two male Greeters in the Pittsburg store were paid more than her.

Christine Kwapnowski was a long-time employee of Sam's Club stores, having held various positions, including a supervisory position, in Missouri and California. She alleged that she and other female employees were yelled at by a male manager while male employees were not similarly subjected to the manager's screaming. She also alleged that the same male manager told her to "doll up," to "wear some makeup," and to "dress a little better."

Edith Arana, the third named plaintiff, worked at Wal-Mart in Duarte, California from 1995 to 2001. When she inquired about management training in 2001, she was brushed off. Feeling that the response to her inquiry was based on her sex, Arana

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initiated internal complaint procedures. When she complained, she was told to apply directly to the district manager if she felt that her own manager was being unfair. Arana did not apply and her employment was terminated in 2001 for failing to comply with Wal-Mart's timekeeping policy.

These women claimed that Wal-Mart's delegation of discretion over pay and promotions to local managers had a disparate impact on female employees. The women also alleged that Wal-Mart's awareness of the effect of its policy and refusal to intervene amounted to disparate treatment.

Dukes, Kwapnowski, and Arana claimed that the discrimination to which they had been subjected reached farther than just them. They claimed that Wal-Mart's corporate culture trickled down to Wal-Mart's managers who had discretion as a result of Wal-Mart's policy, making all female employees of Wal-Mart stores across the country victims of discrimination. These women did not just seek their own injunctive and declaratory relief, punitive damages, and back pay. Rather, the women sought to litigate their Title VII claims in a nationwide class action.

Class Certification Requirements

In order to become certified as a class, the party seeking certification must meet the requirements of Federal Rule of Civil Procedure 23. First, pursuant to Rule 23(a), the party must demonstrate that:

(1) the class is so numerous that joinder of all members is impracticable (numerosity),

(2) there are questions of law or fact common to the class (commonality),

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality), and

(4) the representative parties will fairly and adequately protect the interests of the class (adequate representation).

Second, the class must satisfy one of any of the three requirements listed in Rule 23(b). The named plaintiffs chose to rely on Rule 23(b)(2), which applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Reasoning that Wal-Mart could present individual defenses in randomly selected "sample cases," the Court of Appeals for the Ninth Circuit determined that the case could be manageably tried as a class action. On December 6, 2010, the Supreme Court agreed to hear Wal-Mart's appeal.

Commonality

Class actions are permitted as an exception to the rule that litigation be brought by the individual named party only. This exception is justified only when the named plaintiff is one of all class members who all have the same interest and have suffered the same injury. The reasoning behind the Supreme Court's decision to reverse the Court of Appeals basically came down to the following: the fact that employees of the same company assert that they have been subjected to the same type of discrimination is not enough to justify class action litigation. All of their claims must depend on common contention, the truth or falsity of which would resolve the central underlying issue of each and every claim.

The named plaintiffs in the action did not show that Wal-Mart engaged in any specific employment practice that tied all 1.5 million women together. Instead, the plaintiffs relied on Wal-Mart's policy of delegated discretion having an overall disparate impact on the women. Wal-Mart's policy was actually the antithesis of the type of uniform employment practice that would provide the commonality necessary for a class action. Employment discrimination claims are fact-specific. The case-by-case approach taken in determining violations of Title VII precluded the availability of a class action lawsuit for determining whether countless employment decisions made regarding 1.5 million women were discriminatory. Had one employment decision been made that affected only female employees of Wal-Mart, then, perhaps Wal-Mart would have had a class action on its hands.

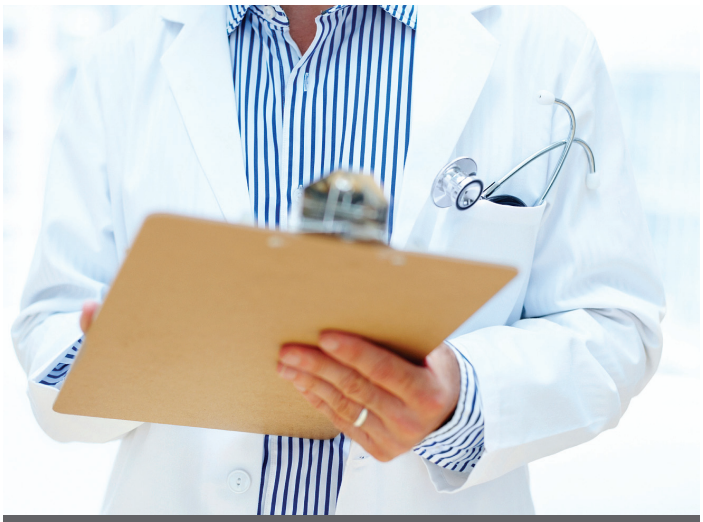
Employers May Continue to Assess Liability on a Case by Case Basis

The Supreme Court's decision not only prevented inappropriate distortion of Title VII and the Federal Rule of Civil Procedure 23, but prevented the frivolous filing of myriad class action lawsuits of similar size and nature. Had the certification of the proposed class been affirmed, a wave of unwarranted class actions lawsuits would likely have been

filed against employers all over the country. Such large class certifications would put oppressive pressure on employers to settle all super-class action cases filed, even those that lack merit.

EMPLOYERS ENTITLED TO THE REAL REASON GIVING RISE TO AN EMPLOYEE'S NEED FOR LEAVE

On June 23, 2011, the United States Court of Appeals for the Third Circuit held in *Prigge v. Sears Holding Corp.*, No. 10-3397, that the termination of an employee who lied about his illness was not in violation of the Family Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), or the Pennsylvania Human Relations Act (PHRA). The plaintiff, Prigge, worked for Sears Holding Corp. (Sears) from April of 2007 until February of 2008 as a Store Coach. Prigge had been



diagnosed as bipolar in 2002, but did not inform his employer of his condition at the time of his hire.

In December of 2007, Prigge missed 2 days of work and left work early on multiple other occasions in connection with his bipolar disorder. Rather than inform Sears that his absences were due to the condition with which he had been diagnosed, he lied and told his supervisors that he had prostate cancer and had missed work for radiation treatment. In January of 2008, Prigge was admitted to a clinic for seven days in connection with his bipolar disorder. After his release, Prigge contacted his supervisor and explained that he had spent the past week at a mental health hospital. Prigge's supervisor informed him that he needed to provide Sears with a note from both the mental health hospital and the doctor treating him for prostate cancer before he could be permitted to return to work.

Shortly thereafter, Prigge confessed to his supervisor that he never had prostate cancer, and that he had not actually undergone radiation treatment. Nevertheless, Prigge's supervisor informed him that he would need both notes to return to work. When Prigge finally turned over a note from his urologist stating that he did not suffer from a "serious health condition," and a note from the mental health clinic verifying his absence for the week in January of 2008, Sears terminated Prigge's employment for failure to supply medical certifications excusing all of his absences.

Prigge filed suit in January of 2009 alleging discrimination and retaliation in violation of the FMLA, the ADA, and the PHRA. The Court of Appeals affirmed the holding of the United States District Court for the Eastern District of Pennsylvania that Prigge failed to demonstrate that Sears' articulated reasons for his termination were pretext and that Prigge failed to establish a prima facie case of retaliation in that he failed to show that he engaged in a protected activity. Prigge admitted both that he was absent in December of 2007 and that he had made misrepresentations as to why. Therefore, Prigge was unable to provide a physician's release for his unexcused absences. His admissions precluded him from rebutting Sears' legitimate, nondiscriminatory reason for terminating his employment: failure to provide required medical certification to return to work. Additionally, had Sears known that Prigge did not actually have prostate cancer, it would have terminated his employment for lying.

Advice

Employers are entitled to know the real reason an employee requires medical leave. Had Prigge been honest from the beginning with respect to his bipolar disorder, it is likely he would have been able to provide the medical documentation necessary to return to work and ultimately would not have been terminated.

EMPLOYER'S MANDATORY RETIREMENT POLICY RESULTS IN $100,000 PAY OUT TO 74-YEAR-OLD-EMPLOYEE

One May 24, 2011, the United States Equal Employment Opportunity Commission (EEOC) released that Asian World of Martial Arts, Inc. (AWMA), a Philadelphia-based mail and retail distributor of martial arts supplies, agreed to pay $100,000 to settle Morris Pashko's age discrimination claim. AMWA terminated Pashko, its Controller of 26 years, pursuant to its new retirement policy.

The policy called for mandatory retirement at the age of 67, and, upon implementation, required that all employees over age 67 be fired. Pashko was 74 at the time the policy was put into place, and therefore forced to retire.

The EEOC filed suit in the U.S. District Court for the Eastern District of Pennsylvania, No. 10-5062, alleging that AWMA had violated the Age Discrimination in Employment Act (ADEA). The ADEA protects employees age 40 or older from age discrimination in employment and prohibits employers from mandatory retirement policies based on age, with only very narrow exceptions (the employee must be a "bona fide executive" or a "high policymaker").

In addition to paying Pashko $100,000, AWMA is enjoined from engaging in further age discrimination or retaliation, is required to provide annual training on the ADEA, and must post a notice on the settlement. AWMA has also abolished its mandatory retirement policy.

Advice

Employers should avoid implementing policies that apply to individuals based solely on their age, particularly if the age of applicability is 40 or older.

VERIZON TO PAY LARGEST DISABILITY DISCRIMINATION SETTLEMENT IN EEOC HISTORY

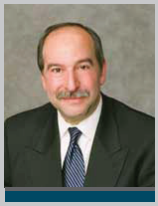
On July 6, 2011, the United States Equal Employment Opportunity Commission (EEOC) released that Verizon Communications will pay $20 million and provide other equitable relief in order to resolve a nationwide class disability discrimination lawsuit. This agreement, which is pending judicial approval, represents the largest disability discrimination settlement in a single lawsuit in the EEOC's history.

After a failed attempt to reach a pre-litigation settlement through its conciliation process, the EEOC filed suit against 24 named subsidiaries of Verizon Communications in the U.S. District Court for the District of Maryland, Civil Action No. 1-11-cv-018320-JKB. The EEOC alleged that Verizon's refusal to made exceptions to its "no fault" attendance plan constituted a failure to accommodate employees with disabilities, in violation of the Americans with Disabilities Act (ADA). The attendance plan provided progressive discipline for employees who accumulated set numbers of "chargeable absences," up to and including termination.

What the attendance plan failed to account for is employees whose "chargeable absences" were caused by their disabilities. Verizon's policy resulted in disabled employees being disciplined and/or terminated because their disabilities had caused them to be absent from work. The ADA does more than just prohibit intentional discrimination based on disability – it requires an employer to provide employees with disabilities reasonable accommodation, unless it would be an undue burden on the employer to do so. An employer is further required to engage in an interactive process with an employee in order to determine what, if any, reasonable accommodation can be made. Paid or unpaid leave and/or a flexible work schedule are just some of the reasonable accommodations an employer might provide a disabled employee.

Advice

Beware of attendance policies that cut off the interactive process. If your attendance policy provides for discipline and/or termination, make sure that it addresses the possibility of providing reasonable accommodations to individuals with disabilities. The ADA Amendments Act (ADAAA) significantly broadened the definition of "disability," thereby increasing the spectrum of individuals protected by the ADA. This makes it even more important for employers to work flexibility into their attendance policies for individuals with disabilities.



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