What Is Your Employment Law IQ? The 2011 Employment Law Update

2011 ACC Annual Meeting

Megan Belcher, VP & Chief Employment Counsel, ConAgra Foods
Nicky Jatana, Partner, Jackson Lewis
Leslie Stein, Corporate Counsel, Intelident
Greg Watchman, Associate General Counsel, Freddie Mac

U.S. Supreme Court Case Review

Wal-Mart Stores v. Dukes

- Seven female Wal-Mart employees filed class action suits alleging female employees receive lower pay and fewer and slower promotions
- Plaintiffs were seeking injunctive and declaratory relief, back pay, and punitive damages
- Wal-Mart has 3,400 stores nationwide and the claims covered numerous and different positions
- Ninth Circuit affirmed certification of largest employment class action in history—1.5 million current and former female employees

- The issues presented to the Court were:
  - Whether the class certification was proper under FRCP, Rule 23(a)
  - Whether the claims for monetary relief (backpay) could properly have been certified under FRCP, Rule 23(b)(2)

- The Court's Holdings:
  - By 5-4 majority, Court held Plaintiffs failed to prove claims of putative class members share common questions of law or fact under FRCP 23(a)(2)
  - Court unanimously rejected certification under FRCP 23(b)(2) on the grounds that it does not apply to claims for monetary relief, at least where the monetary relief is not incidental to the injunctive or declaratory relief sought

- Is Rule 23 A Mere Pleading Standard?
  - No. Scalia noted, class actions are the "exception" to the general rule that litigation may be maintained by the named parties only.
- "A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc."
- A "rigorous analysis" is required such that it "will entail some overlap with the merits of plaintiff's underlying claim."

- The Court's Focus on Commonality
  - Not merely raising common questions but the capacity of a classwide proceeding which will generate common answers.
  - "Without some glue holding the alleged reasons for all those 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*?"

- Court Rejects “Trials by Formula”
  - An employer has the right to raise any individual affirmative defenses it may have.
  - These proceedings cannot be replaced with “Trials by Formula.”

- Key Takeaways:
  - The *Dukes* decision placed great significance on Wal-Mart's policy against sex discrimination. Make sure your EEO policies are up to date, widely and consistently disseminated, given to employees, and included in training for current employees. Do not rely on your handbook only.
  - Give more in-depth training to managers regarding EEO policies, than to rank and file. Emphasize that "managing" is what distinguishes them from those they supervise and that failing to address EEO concerns or enforce EEO polices is a serious management performance deficiency.
  - Consider enhanced grievance procedures not just "open door" policy but hotlines and review panels.

Poll: Do your managers have discretion and objective criteria regarding pay and promotion decisions?

A. Yes, our managers have full discretion and objective criteria.

B. Yes, our managers have some discretion and objective criteria but must get approval from Human Resources.

C. Yes, our managers have some discretion and objective criteria but must get approval from upper management.

D. Yes, our managers have some discretion but no objective criteria.

E. No, our managers have no discretion or objective criteria.

CIGNA Corp. v. Amara

- 1998 Cigna changed its basic pension plan from defined benefit to cash balance.
- Suit filed on behalf of 25,000 beneficiaries claiming failure to give proper notice.
- District Court found violation of ERISA due to Cigna supplying intentionally misleading Summary Plan Description implying cash balance plan benefits would be greater than defined benefits.
- District Court reformed the plan on the ground that the notice failures caused employees "likely harm" and required Cigna to pay additional benefits employees would have received under the defined benefit plan.

- Supreme Court held that the District Court did not have the right to reform the plan under Section 502(a)(1)(B) of ERISA but that it could afford equitable relief under 502(a)(3) which could include:
  - reformation of the plan;
  - estoppels;
  - injunctive relief or surcharge for a loss resulting for a trustee's breach of duty or to prevent a trustee's unjust enrichment.
- Case remanded for the District Court to decide appropriate equitable relief standard for determining harm.
- Need for accurate Summary Plan Descriptions and notices underscored.

AT&T Mobility v. Concepcion

- Concepcions received “free” phones from AT&T pursuant to a calling plan, but were charged $30.22 in sales tax for the phones.
- Concepcions sued over sales tax, claiming false advertising and fraud; case consolidated with class action.
- AT&T moved to compel arbitration; contract provided for arbitration and included waiver of class claims.
- Issue for Supreme Court: Does FAA preempt California case law which invalidates class action waivers?

- Holding: FAA preempts California case law allowing invalidation of class action waivers
  - even where the arbitration would make claimants whole
  - even in cases involving contracts of adhesion
- Reasoning:
  - Federal policy underlying FAA favors arbitration of disputes
  - Parties may agree on limiting the issues subject to arbitration.
  - Arbitration is poorly suited to class cases.

ATT Mobility v. Concepcion (2011)

Poll: Do you have an arbitration agreement with a class action waiver?

A. Yes, it precedes *Concepcion*
B. Yes, we had an arbitration program and recently added or are adding a class action waiver provision in light of *Concepcion*
C. We are considering adding a class action waiver to our arbitration agreement in light of *Concepcion*
D. We have no arbitration agreement but are reconsidering the issue—including the inclusion of a class action waiver—in light of *Concepcion*
E. We are not contemplating any changes in light of *Concepcion*

Staub v. Proctor Hospital

- Employee (Staub) was a member of the United States Army Reserve, which involved drills one weekend a month and full time two to three weeks a year.
- Staub claimed that as a result of hostility to his military service, his employer fabricated a work rule violation to justify a "corrective action" requiring Staub to report to the supervisors whenever he had completed his work.
- Four months later, one of the supervisors informed the hospital's vice president of human resources, Linda Buck, that Staub had violated the "corrective action." Relying on this accusation and Staub's personnel file, Buck fired Staub.
- Staub did not claim that Buck herself harbored any animus toward Staub's military service, but that instead she relied on Staub's supervisors, who did bear such animus.

- Jury found in Staub's favor. Seventh Circuit reversed, holding that the hospital was entitled to judgment as a matter of law, because the only claimed animus was attributable to supervisors, who did not make the ultimate employment decision.
- Supreme court overturned the circuit's strict application of the "cat's paw" doctrine.
- Employer is liable if a discriminatory actor influences an employment decision.
- Takeaway: Employers are responsible for the actions of allegedly biased supervisors acting within the scope of their employment.

Kasten v. Saint Gobain

Poll: Would you treat an oral complaint under the FLSA, or parallel state law claim, as protected activity?

A. Yes

B. No

- Plaintiff claimed he repeatedly called the unlawful time clock location to his employer's attention (verbally), which caused him to be disciplined and ultimately dismissed.
- Plaintiff subsequently claimed his employer fired him as a result of the complaint.
- Held: Phrase "filed any complaint" under the FLSA, includes oral and written complaints. Thus, expressly including oral complaints as protected under the FLSA anti-retaliation provision.

Thompson v. North American Stainless

- Eric Thompson and his fiancée-then-wife, Miriam Regalado, worked for North American Stainless
- Regalado filed a complaint with the Equal Employment Opportunity Commission (EEOC) in September 2002, alleging that her supervisors discriminated against her based on her gender.
- On February 13, 2003, the EEOC notified North American Stainless of the charge.
- Slightly more than three weeks later, North American Stainless terminated Thompson's employment.
- Thompson filed a complaint, which alleged that he was fired in retaliation for Regalado's EEOC charge.

- Terminated employee had a retaliation claim because his fiancée had filed a complaint against mutual employer.
- Broad legal test: “zone of interests”.
- Left open several unanswered questions.
- Takeaway: Opened the door for aggrieved 3rd parties to file plausible retaliation claims under federal law, i.e. while "close family members" are in the zone of protection it will be up to future cases to decide if friends, acquaintances, or even sympathetic strangers could file similar actions.

NASA v. Nelson

- Unanimous Decision

- Government background checks of existing contractors at NASA's Jet Propulsion Laboratory including questions about treatment and counseling for illegal drug use, FBI and federal data base checks, and open ended questions to employees' designated references do not violate the right to informational privacy.

- Court concluded that such background checks are reasonable and employment related inquiries that further government interest when it is the employer reasonably aimed at identifying capable employees that will protect the government's interest.

- The Court further concluded that NASA's Privacy Act regulations protect the information from further disclosure

- What is the impact of this case?

- In making an assessment as to the appropriateness of background checks private employers must weigh the risks vs. the benefits.

ADA Update

ADA: Procedural Rulings

- *Cochran v. Holder* (4th Cir. 2011): No retroactive application of ADAAA to pre-2009 claims (joins 4 other circuit circuits)
- *Lexis v. Humboldt Acquis. Corp.* (6th Cir. 2011): Plaintiff must show disability discrimination was "sole factor" in adverse action
  - Follows circuit precedent contrary to ten other circuits, which use a "motivating factor" test
- *Stansberry v. Air Wisconsin Airlines Corp.* (6th Cir. 2011): For ADA association claim, prima facie case requires plaintiff to show i) qualified for position; ii) adverse action; iii) known association with a disabled individual; and iv) facts raise reasonable inference that relative's disability was a determining factor in the decision.

ADA: What Values Can We Learn From "the Sheen"?

- Ever had a "star" employee who is good for business but hard to control?
- In February 2011, Warner Bros. fired Charlie Sheen from his starring role in the TV sitcom "Two and a Half Men" because "the public spectacle of his self-inflicted disintegration" precluded Sheen from performing the essential functions of his job, to wit:
  - Sheen had a "rampage" at a NY hotel with a "paid escort" (Sheen's publicist told the media Sheen had had an allergic reaction, but Sheen said later, "I probably could have come up with something better");
  - Sheen challenged the show's producer to fight him in the "octagon".
  - Sheen had a "three-day bender" in Las Vegas involving alcohol & cocaine;
  - Sheen's need to move his mark on stage so he could lean on something during his scenes;
  - Sheen publicly admitted to "banging seven gram rocks and finishing them" because "that's the way I roll"
  - Sheen fired his "sobriety coach" and refused to leave his home for treatment
  - In reference to his disability, Sheen stated "I'm not bipolar, I'm bi-winning . . . My brain fires in a way that is maybe not from this particular terrestrial realm."

"I am on a drug . . . It's called Charlie Sheen." Yes Mr. Sheen, but is that a disability under the ADA?

- Sheen responded to the termination by suing Warner for "bazillions" ($100M) in damages, claiming breach of contract and failure to accommodate his perceived medical disabilities, and contending that Warner's proffered reasons for the termination were a pretext for disability discrimination.
- Warner enforced the contract's arbitration clause.
- Sheen said publicly that if he had a disease, he "cured it . . .with my mind"—but remember, mitigating measures can no longer be considered in assessing a disability.
- Lesson learned: Don't look the other way when a "star" employee misbehaves, no matter how much you like "winning"! Such conduct creates employee morale issues, legal exposure, and potential reputational harm.
- Lesson learned: Anyone who describes himself as a "Vatican rock-star assassin" is probably a high-risk hire.

ADA: Job Reassignment

- *Fink v. Richmond* (4th Cir. 2011): In considering job reassignment as an accommodation, employers may require disabled employee to compete for job where employer has neutral policy of hiring the best qualified applicant for the job.
  - Circuits split on whether employee must compete.

ADA: The Broadened Definition of "Disability"

- *Markham v. Salinas Concrete* (D. Kan. 12/8/10): Assertion of back pain sufficient proof of impairment to survive motion to dismiss.
- *Naber v. Dover Healthcare Ass'n* (D. Del. 2/24/2011): Inability to sleep due to depression constituted disability.
- *Feldblum v. Law Enforcement Assocs. Corp.* (E.D.N.C. 3/10/11): Multiple Sclerosis and TIA (mini-strokes) constituted disabilities.
- *Keyes v. Catholic Charities of Archdiocese of Phila.* (3d Cir. 2011): Plaintiff's sleep apnea was not a disability under ADA; plaintiff waited six months to seek treatment, and CPAP machine fully cured night-time impairment.
  - Court disregarded ADAAA provision precluding consideration of mitigating measures

Poll: Which of these is most likely to be the next cutting edge workplace trend?

- A. Employers replacing health care plans with free ibuprofen and bandaids
- B. Union certification based on organizer's extra-sensory perception
- C. Horses as service animals
- D. Dirty looks constitute actionable adverse employment actions for purposes of retaliation claims

What's Next Under the ADA: Hold Your (Miniature) Horses!

- Revised DOJ ADA Regulations (effective 3/15/11) discuss use of service animals for individuals with sight or psychiatric impairments.
- Definition of "service animal" includes dogs and, in some circumstances, miniature horses.
- Miniature horses can be housebroken, and are described as having "excellent judgment". Plus, they are "not addicted to human affection" (take that, dogs!).
- These ADA rules do not yet apply in the employment context—but courts may well look to them when adjudicating ADA accommodation cases in the future.
- We may yet learn to have a different understanding of what it means to have "stable" employment.

EEO Update

- In January, the EEOC reported that charges of job discrimination hit record highs in 2010
- EEOC has stated its desire to focus more on systemic discrimination initiatives
- EEOC submitted to the OMB a Preliminary Plan for Retrospective Review of Significant Regulations (Preliminary Plan)
- In June, the EEOC held Public Hearings on leave as a reasonable accommodation under the ADA

- Harassment - *EEOC v. Cromer Food Services, Inc* (4th Cir.): Employers can be liable for harassment of employees by non-employees

- Retroactivity of Claims - *Groesch v. Springfield* (7th Cir.): Ledbetter Act revives Title VII pay discrimination claims with appeals pending as of May 28, 2007

- Politics v. Religion: *Adams v. Trustees of the University of North Carolina* (4th Cir.): Adverse employment action based on religiously motivated political views does not constitute religious discrimination

- ADEA Cat's Paw - *Simmons v. Sykes Enterprises* (10th Cir.): Plaintiffs must show the discriminatory animus of a subordinate was the "but for" cause of adverse employment action to hold the employer liable

- Disparate Impact - *Lauture v. St. Agnes Hospit*al (4th Cir.): Employers need not take exactly same disciplinary action against employees in each circumstance so long as it is in the same range

Poll: Does your company ensure consistent disciplinary action, and if so, how?

A. Yes, there are centralized Human Resources' functions which oversee the consistency of disciplinary action.

B. Yes, there are consistent disciplinary actions on a regional basis.

C. Yes, our managers are tasked with implementing consistent disciplinary actions.

D. No, disciplinary action is taken at the discretion of each individual manager.

E. No, disciplinary action varies per division, region or state.

- Disparate Impact Statute of Limitations - *Lewis v. City of Chicago* (7th Cir.): SOL on disparate impact litigation starts anew each time an employer uses a discriminatory test or practice to make a hiring decision

Retaliation Update

- *Tides v. The Boeing Co.* (9th Cir. 2011):
  - The anti-retaliation portion of the Sarbanes-Oxley Act does not protect employee leaks to the media.
- *Templeton v. First Tenn. Bank* (4th Cir. 2011):
  - The mere passage of time will not defeat a retaliation claim.
- *Young-Losee v. Graphic Packaging Int'l Inc.* (8th Cir. 2011):
  - Even if a discharge is rescinded after two days, the employer's initial choice to fire a complaining employee constitutes direct evidence of retaliation.

New SEC Anti-Retaliation Protections

- SEC 2011updated rules expand employee protection:
  - "[y]ou are a whistleblower if, alone or jointly with others, you provide the Commission . . . information [that] *relates to a possible violation* . . . ." (emphasis added).
- Key:
  - To be afforded protection from retaliation, the whistleblower only needs a "*reasonable belief*" that the employer is violating the securities laws.
- Employee is protected even if no awards granted by SEC.
- Takeaway:
  - The new rules protect more employees from retaliatory acts.

FMLA Update

- New Definition of Serious Healthcare Condition

  Poll: What is the minimum number of days an Employee has to be incapacitated to qualify as having a Serious Health Condition under the FMLA?

  A. One
  B. Three
  C. Five
  D. Twenty

- More than three consecutive, full calendar days due to incapacity plus "two visits to a health care provider," the first of which must take place within seven days of the first day of incapacity.

- More than three consecutive, full calendar days of incapacity plus a regimen of continuing treatment – the first visit to the health care provider must take place within seven days of the first day of incapacity.

- Although normally a three day rule, any period of incapacity or treatment for such incapacity due to a chronic serious health condition may qualify.

- A chronic serious health condition is one which:
  - (a) requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;
  - (b) continues over an extended period of time (including recurring episodes of a single underlying condition); and
  - (c) may cause episodic rather than a continuing period of incapacity.

- Difficulty of determining a serious health condition becomes even more complex when dealing with Employees who take time off to care for relatives with a serious health condition.

Tayag v. Lahey Clinic Hospital, Inc.

632 F.3d 788 (2011)

Poll: Which of the following can FMLA be used for?

A. morning sickness
B. bonding with newborn during first 12 weeks
C. intermittent bonding for the first two years
D. to care for a husband enduring the trials of pregnancy

- Can an employee on FMLA be terminated in connection with a reduction in force?
  - *Creech v. Tift*

- Can an employee on FMLA be terminated due to shoddy work the employer discovers while the employee is out on FMLA?
  - *Daugherty v. Wabash Center, Inc., 577 F.3d 747 (2009)*
  - *Cracco v. Vitran Express, Inc., 559 F.3d 635 (7th Cir. 2009)*
  - *Spakes v. Broward County Sheriff's Office 631 F.3d 1307 (11th Cir. 2011)*

NLRA Update

- NLRB final rule requiring employers to notify employees of rights under NLRA through uniform workplace posting
- NLRB proposed rules to change election rules and expedite union election process, making it much easier to organize
- NLRB Acting General Counsel encouraged NLRB to change arbitration deferral policy

Significant NLRB Cases

- Employer Rhetoric - Regency House of Wallingford: A letter to a single union official containing sharp comments could violate the NLRA

- Secret Recordings- Stephens Media LLC: An employee's recording of a workplace meeting could be protected activity

- Social Media - NLRB filed two complaints against employers who fired employees for comments about their workplace made on Facebook

- Inflatable Rats: Sheet Metal Workers Local 15: inflatable rats are ok at a secondary employer to protest nonunion contractor, so long as not a barrier to entrance of business

Era of immense NLRB activity!

Changes since CLE materials submitted?

Poll: What effect do you think these new NLRA changes will have on the number of unionized employees at your workplace?

A. Increase in number of unionized employees
B. Decrease in number of unionized employees
C. No change in number of unionized employees

Wage & Hour Update

FLSA cases are currently on the rise.

From 2000 to 2010 the number of FLSA cases filed has more than tripled.

Poll: Has your company seen a change in the number of wage and hour actions over the last three years?

A. Yes, there has been an increase.
B. Yes, there has been a decrease.
C. No, there has been no change.

- DOL online searchable database of enforcement data now available including the number of FLSA violations per employer.

- DOL guidance issued to aid employees in using smart phones to track time for potential lawsuits.

- In *Desmond v. PNGI Charles Town Gaming, L.L.C.*, the Fourth Circuit joined the other five Circuit Courts that have adopted the "half time" approach for misclassification damages.

- In *Ervin v. OS Restaurant Services, Inc.*, the Seventh Circuit held FLSA collective actions and state law wage and hour class actions are not incompatible.

- Offer of judgment **may** moot collective action, but only if all rules are followed.

- In *Salazar v. Butterball*, the Tenth Circuit held that the donning and doffing of personal protective equipment at a turkey processing plant was non-compensable "changing clothes" time under FLSA Section 203(o).

- The Seventh and Third Circuits, issued new opinions endorsing a broader interpretation of the "administrative exemption."

- In *Ramos v. Baldor Specialty Foods*, New York courts applying the FLSA's executive exemption, upheld the application of the exemption to a group of warehouse "Captains."

OSHA Update

OSHA Developments

- Injury & Illness Prevention Programs Standard
  - SBREFA Panel gathering small business input
  - OSHA surveying employers to gather evidence of safety & health program usage
  - Proposed rule modeled on California standard
  - Elements will include management commitment, employee participation, hazard identification and correction, training, and periodic program evaluation.

Poll: Do you have a safety & health program?

A. Yes, we have a formal written program with all of the elements the standard will include.
B. Yes, we have a formal written program with some of the elements the standard will include.
C. Yes, we have an informal program under which we find and fix hazards on a regular basis.
D. We do not presently have a safety & health program, but address safety & health issues as they arise.
E. We do not presently have a safety & health program.

- Severe Violators Enforcement Program
- Revisions to Penalty Calculus
- Recordkeeping National Emphasis Program
- Revisions to Consultation Programs
- Revisions to Recordkeeping & Reporting Requirements
  - Ergonomics column
  - Reporting of hospitalizations and amputations

OFCCP Update

- Watchwords: Enforcement and Expanded Enforcement

- Recent Settlements:
  - Astra Zeneca
  - ThyssenKrupp
  - Alcoa Mill Products

OFCCP'S Greater Collaboration with Other Agencies

- Referral of possible violations of law to appropriate agencies for further investigation.
- Use of data collected from other agencies to target potential violations of the laws the OFCCP enforces.
- EXPANDED ENFORCEMENT
- Automatic on-site for every 25th investigation.
- 2 or 2 Test

- Watch for New Regulations/Directives.
- Executive Order 13496 Notice Requirement.

ERISA Update

- *Spano v. The Boeing Co.* (7th Cir. 2011): The court of appeals rejected the certification of classes in two ERISA cases in which employees challenged the management fees charged by their employer's defined contribution plan.
  - The court found that the plaintiffs met the commonality and numerosity requirements of Rule 23, but failed the "typicality" and "representative" requirements because each employee had different investments and potentially divergent interests.

- *Howell v. Motorola* (7th Cir. 2011): ERISA safe harbor provision protected defined contribution plan's fiduciary from non-disclosure claims; no violation of duty of prudence found in plan's investment option that performed poorly.

What Is Your Employment Law IQ? The 2011 Employment Law Update

2011 ACC Annual Meeting

Megan Belcher, VP & Chief Employment Counsel, ConAgra Foods
Nicky Jatana, Partner, Jackson Lewis
Leslie Stein, Corporate Counsel, Intelident
Greg Watchman, Associate General Counsel, Freddie Mac