

The Landscape of Employment Law in 2012: Legal/Administrative/Regulatory and Legislative Update

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This Paper has been prepared for general information and is not intended to be relied upon as legal advice.

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TABLE OF CONTENTS

Introduction	1
Part I – The Litigation Swell and Employment Litigation Statistics	2
Part II – Regulatory/Governmental Agency Activity	4
A. The Equal Employment Opportunity Commission	4
B. U.S. Department of Labor	5
C. The National Labor Relations Board	6
1. New Notice Requirement	7
2. Report on Discipline for Social Media Activity	8
3. NLRB Rejects Arbitration Class Waivers in <i>D.R. Horton, Inc. and Michael Cuda</i>	10
a. Background of <i>D.R. Horton</i>	10
b. The Board’s Rationale	10
c. The Impact of <i>D.R. Horton</i>	11
Part III -- Workplace Bullying	12
1. What the HWB Does for Employers	14
2. What the HWB Does for Workers	14
3. What the HWB Does Not Do	15
Part IV -- United States Supreme Court Decisions	16
A. The Supreme Court says “No” to a Wal-Mart Mass Class Action	16
1. Background of the <i>Wal-Mart v. Dukes</i>	16
2. The High Court’s Decision: Rule 23(a)(2)	17
3. The High Court’s Decision: Rule 23(b)(2)	19
4. The Impact of the <i>Wal-Mart v. Dukes</i>	20
B. The Supreme Court Speaks on the First Amendment And Religious Discrimination	21

1.	The Background of the <i>Hosanna-Tabor v. EEOC</i>	22
2.	Ministerial Exception is Valid, Enforceable under the First Amendment	22
3.	The Impact of <i>Hosanna-Tabor</i>	23
Part V -- Conclusion		25

Introduction

Employers continue to face difficult times. Over recent years, the failing economy has resulted in lost jobs because employers can no longer afford to carry dead weight. In 2010, employee lawsuits soared¹ and a number of hot button employment litigation trends made headlines news. In 2011, businesses faced slightly less litigation than 2010, but regulatory and internal investigations climbed.²

As expected, there were relatively few legislative changes in 2011 with a new Congress. During this presidential election year, there is unlikely to be any major new legislation. However, since 2011, the regulatory agencies have been very active and regulatory activity is expected to increase over the coming year. In the employment arena, the United States Supreme Court has also been busy issuing several important decisions. First, the high court issued a First Amendment opinion affecting religious employers. Also, in a case that was closely watched, the Supreme Court last summer denied class certification to current and former female employees of Wal-Mart in what the employees and their lawyers had hoped would be the largest employment discrimination class action ever in this country.

In Part I, we provide an overview of recent employment litigation statistics and trends. Part II discusses regulatory and administrative activity, including in the Equal Employment Opportunity Commission and the National Labor Relations Board. We also address the *D.R. Horton* case, in which the National Labor Relations Board ruled that employers violate federal labor law by requiring employees to sign arbitration agreements that prevent them from joining together to pursue employment-related legal claims in any forum, whether in arbitration or in

¹ See, 2010 Fulbright & Jaworski L.L.P. Litigation Trends Survey, available at <http://www.fulbright.com/litigationtrends>.

² See, 2011 Fulbright & Jaworski L.L.P. Litigation Trends Survey, available at <http://www.fulbright.com/litigationtrends>

court. Part III provides an overview of various states' legislative activity to enact laws to prevent workplace bullying and to hold employers responsible -- even if the bullying is not the result of a victim's protected class. In Part IV, we round out our discussion concerning two seminal Supreme Court decisions in *Wal-Mart Stores, Inc. v. Dukes* and *Hosanna-Tabor Evangelical Lutheran Church and School*. In the *Wal-Mart* decision, denying class certification to a class of 1.5 million female workers, the high Court reasoned that although there may have been isolated instances of discrimination against women at Wal-Mart, plaintiffs submitted no evidence of a uniform, company-wide policy of discriminating against women; hence, plaintiffs could not meet their burden under Rule 23(a) of showing common questions of law or fact. In *Hosanna-Tabor*, the Court, relying on the ministerial exception under the Establishment and Free Exercise Clauses of the First Amendment, ruled that employment discrimination claims by ministers against religious employers were barred because the First Amendment precludes interference with a religious organization's internal governance.

Part I

The Litigation Swell and Employment Litigation Statistics

Gripped by economic anxiety, employers continue to trim their ranks and reduce wages, and employees are capitalizing on opportunities to file suit.³ In 2010, over 400 in-house counsel and corporate law departments in the United States and the United Kingdom surveyed on the state of global litigation issues and trends reported an increase in multi-plaintiff employment litigation cases.⁴ The majority of these suits involved wage and hour claims premised on

³<http://laconiclawblog.com/index.php/2010/10/13/2010-fulbright-litigation-trends-survey-shows-increase-in-employment-litigation>

⁴ One interpretation of the survey results showed that 18% of those polled reported increases in wage and hour disputes under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 ("FLSA"); 11% reported a rise in traditional labor union related matters; 10% reported an increase in age discrimination cases; 7% reported increases in race discrimination suits and ERISA suits; and 6% reported increases in sex discrimination suits and disability discrimination suits. See, <http://blog.larrybodine.com/2010/10/articles/clients/fulbright-report-sees-upswing-in->

misclassification and overtime and evidenced a reduction in claims involving meals and breaks.⁵ No one, it seems, was immune to wage dispute litigation -- twenty-seven workers recently filed suit in Manhattan federal court against Del Posto, Chef Mario Batali's restaurant, claiming the restaurant illegally pooled workers' tips in violation of state labor laws.⁶ It can prove difficult to stay positive in this grim economic climate -- this is not the first time employees have sued Chef Batali over wages,⁷ but the most recent lawsuit was filed just after Del Posto was awarded a rare fourth star by *The New York Times*. Indeed, when asked to identify the most frequent type of litigation pending against their company, 40% of survey respondents cited labor and employment cases.⁸

Discrimination claims accounted for much of the swell in employment litigation in recent years.⁹ *According to survey respondents, race, age, and wage and hour claims subjected employers to the most monetary exposure.*¹⁰ Part of the reason employment litigation may be popular among plaintiffs and defendants alike is because it is effective. Survey respondents

litigation/. See, also, <http://insurancenewsnet.com/article.aspx?id=229869&type=newswires>. See, also, Mercedes Colwin, Joshua Hurwit, Jane Regina, Robert Christie, Elizabeth Lorell and Michelle Ballard Miller, "Beware: The Hidden Dangers In Employment", FDCC Winter Meeting 2011, www.thefederation.org.

⁵ <http://blog.larrybodine.com/2010/10/articles/clients/fulbright-report-sees-upswing-in-litigation/>

⁶ The lawsuit seeks compensation including backpay, unspecified damages and attorney's fees and alleges that the restaurant created a point system that determined how much each worker received in tips. For example, captains were allotted six points, while stockers received two points. See http://blogs.findlaw.com/law_and_life/employment-law/; See, also, <http://blogs.wsj.com/metropolis/2010/10/12/del-posto-worker-sue-mario-batali-over-wages-tips/>

⁷ <http://blogs.wsj.com/metropolis/2010/10/12/del-posto-worker-sue-mario-batali-over-wages-tips/>

⁸ http://blogs.findlaw.com/law_and_life/2010/10/chef-mario-batali-sued-in-wage-dispute.html

⁹ <http://www.fulbright.com/litigationtrends2010and2011>

¹⁰ In an attempt to prevent employment discrimination claims, five major companies in Germany have agreed to participate in a pilot scheme using anonymous application forms for certain categories of employees (including apprentices). The forms will not include photographs or supply information about the candidate's age, ethnic origin, sex, marital status, or number of children. The pilot will be evaluated in a year to see whether it causes a reduction in discrimination. However, there are no current plans to make the anonymous application forms compulsory in Germany. See, "Employment Trends in Europe" (September 2010), available at <http://www.elexica.com/newsletter.aspx?id=1399>. See, also, footnote 2.

agreed that litigation is the preferred method for resolving disputes that are not international in nature.¹¹

In 2011, law departments saw a little less litigation but more regulation.¹² Over 73% of the 400 lawyers who identified themselves as general counsel (or like positions) for American and United Kingdom companies reported that one or more suits had been filed against their company during the 12-month period before they responded to the survey.¹³ Companies are spending more money on litigation and labor, while employment litigation comprises the largest portion of the companies' cases.¹⁴ Moreover, the number one concern identified by the respondents was increased regulation.¹⁵ U.S. law departments saw an increase in their median litigation budgets to \$1.4 million (up from \$1 million in 2010).¹⁶

Part II

Regulatory/Governmental Agency Activity

A. The Equal Employment Opportunity Commission

The EEOC had a busy year in 2011. In its Fiscal Year 2011 Performance and Accountability Report issued in January 2012, the EEOC reported a record number of new charges in FY 2010 with more being filed in FY 2011, a total of 99,947. With the emphasis on retaliation, it comes as no surprise that retaliation charges top the list. The charges filed for the next three most frequently cited allegations were sexual discrimination (28,534 charges), disability discrimination (25,742 charges) and age discrimination (23,465 charges).¹⁷ The

¹¹ See, <http://www.fulbright.com/litigationtrends20> . See, also [http://insurancenewsnet.com/article.aspx?id=229869 &type=newswires](http://insurancenewsnet.com/article.aspx?id=229869&type=newswires)

¹² Id.

¹³ Id.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

¹⁷ The report is available online at the EEOC's website: www.eeoc.gov/eeoc/plan/2011par.cfm.

EEOC also reports that it recovered the highest level of monetary relief ever, \$364.6 million, for private sector complainants.¹⁸

The EEOC's implementing regulations for the Genetic Information Nondiscrimination Act of 2008 (GINA) became effective on January 10, 2011.¹⁹ GINA prohibits employers from gathering genetic information when certifying an employee's own serious health condition for leave under the Family Medical Leave Act ("FMLA"). The GINA regulations apply to both private and public employers with fifteen or more employees. As recently as February 3, 2012, the EEOC published a final rule regarding recordkeeping requirements under Title II of GINA that will become effective on April 3, 2012. Under the recordkeeping rules, employers are required to maintain the same records under GINA as under Title VII and the ADA. The rule did not create any new requirements for record creation or reporting.²⁰

The EEOC also published a final rule implementing the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) on March 25, 2011. On April 22, 2012, it will hold a public meeting to discuss best practices that can be implemented to address workers with caregiving responsibilities and to avoid discrimination against them.

B. U.S. Department of Labor

The U.S. Department of Labor's ("DOL") Family and Medical Leave Act forms were set to expire on December 31, 2011, and changes to the forms were anticipated in light of military family leave changes made by the National Defense Authorization Act of 2010 (NDAA). The existing forms, however, remain valid -- the DOL has requested approval to renew them and has added this notice to accompany the forms on its website "This form has been submitted for

¹⁸ Id.

¹⁹ The complete regulations are available at www.federalregister.gov/articles/2010/11/09/2010-28011/regulations-under-the-genetic-information-nondiscrimination-act-of-2008.

²⁰ The final recordkeeping rules are available at www.gpo.gov/fdsys/pkg/FR-2012-02-03/html/2012-2420.htm

renewal to the Office of Management and Budget (OMB). According to law [5 CFR 1320.10(e)(2)], the agency may continue to use the form while its renewal is pending at Office of Management and Budget ("OMB")." It remains to be seen whether the forms for military leave will be corrected to reflect the NDAA amendments.

In late January 2012, the DOL's Wage and Hour Division issued an announcement regarding its intention to issue a Notice of Proposed Rulemaking for FMLA amendments relating to military family leave and the special eligibility requirements for airline flight crew members. The Notice has not been published yet in the Federal Register, but has been approved by OMB.²¹

In December 2011, the DOL issued a new fact sheet relating to retaliation under the Fair Labor Standards Act (FLSA). Fact Sheet 77A reminds employers that retaliation is prohibited against employees who have complained both orally or in writing and against those who have participated in an investigation, regardless as to whether the employer is subject to the FLSA, the employee's work is covered under the Act, or the "employee" is still on the payroll.²²

C. **The National Labor Relations Board**

The National Labor Relations Board (NLRB) has been extremely active and controversial. Non-union and union employers alike should take notice of two new developments from the NLRB. Recently, the NLRB issued a rule requiring that all employees be informed of their National Labor Relations Act (NLRA) rights, and published a memorandum analyzing when discipline for employee social media conduct violates the NLRA.

²¹ Additional information is available at www.dol.gov/whd/fmla/NPRM/index.htm

²² The Fact Sheet is available at the DOL website, www.dol.gov/whd/regs/compliance/whdfs77a.htm

1. New Posting Requirement

The NLRB finalized a rule requiring employers to post a new workplace notice informing employees of their rights under the NLRA. The poster informs employees that the NLRA guarantees their right to organize, to form, join or assist a union, to bargain collectively, and to engage in other protected concerted activity. It also provides examples of employee rights and employer and union misconduct and includes information on how employees can contact the NLRB.

Originally, the NLRB set a posting deadline of November 14, 2011, but has been pushed back a number of times -- most recently to April 30, 2012 -- in light of court challenges to the NLRB's authority to require the posting. In early March 2012, a court upheld the NLRB's authority to require the poster, so employers should be ready to comply with the notice requirement come April 30. The posting requirement applies to private-sector union and non-union employers, with the exception of agricultural, railroad and airline employers. Federal contractors are also covered by the rule but will be deemed in compliance if they post the existing U.S. Department of Labor notice required by Executive Order 13496 ("Employee Rights Under the National Labor Relations Act").

The NLRB notice must be physically posted in a conspicuous area where it can easily be seen and read by employees. In addition, an employer must electronically post the notice if it typically communicates personnel rules and policies to employees electronically, whether via the internet or an intranet. The employer can electronically display an exact copy of the poster or provide a link labeled "Employee Rights under the National Labor Relations Act" to the NLRB's web site.²³

²³ The notice must be posted in English, and where 20% or more of an employer's workforce is not proficient in English and speaks a language other than English, the employer must post the notice in that other language. If two

The NLRB's rule provides that failure to post the notice may constitute an unfair labor practice under the NLRA, although a court recently ruled that the NLRB lacked authority to issue a rule that "labels any failure to post the notice to be an unfair labor practice;" the court, however, said that the NLRB could find, in "any individual case," that a "failure to post constitutes an unfair labor practice" if the agency makes "a specific finding based on the facts and circumstances in the individual case...that the failure to post interfered with the employee's exercise of his or her rights."

The NLRB will not initiate an enforcement action on its own for a failure to post, but could investigate cases based on complaints by employees or other parties. The new poster could trigger increased interest in union organizing in non-union workplaces, as well as an increase in complaints from non-union employees about work rules that may run afoul of the NLRA according to the information on the poster. As a proactive measure, these employers should review their workplace policies and procedures on matters such as solicitation, distribution, and confidentiality to ensure, to the extent possible, that they are not in conflict with the NLRA.

2. Reports on Discipline for Social Media Activity

In today's world, the possibilities for social networking and other online activities are almost endless. Blogs, YouTube, Twitter, MySpace, Facebook, email, texting, online chat rooms. And while most employees are probably participating in online social media to some extent -- whether they are blogging about their personal and professional lives, uploading photos of themselves, or watching YouTube videos. Keep in mind that statistics show that many

or more groups comprising at least 20% of the workforce speak different languages, the employer must either physically post the notice in each of those languages or post the notice in the language spoken by the largest group of employees and provide a copy in the other language(s) to each of the other employees. More information about the poster is available on the NLRB's website at www.nlr.gov/.

employers are also using social technology to further their own business strategies.²⁴ More than 25% of surveyed corporate counsel said their company utilizes profiles on LinkedIn.com for recruiting; 22% of respondents use Twitter.com as a means of marketing; and 17% use Facebook.com for developing business.²⁵ Nearly one-quarter of companies also reported their use of some form of corporate blog.²⁶ Increased online activity in the workplace may contain hidden dangers, however, because the acceptance of social networking by both employees and employers can enable abusive behavior such as cyber-bullying, disclosure of trade secrets and other confidential information, and more. Interestingly, the NLRB has inserted itself into the controversy, taking the position that employer social media policies and discipline of employees for social media use may implicate employee rights under the NLRA. The NLRB's Acting General Counsel has now published two reports on the impact of the NLRA on employer social media policies. The most recent report was published on January 24, 2012, providing a review of 14 recent cases before the NLRB regarding social media policies and their impact on concerted activity. The report analyzed various employer policies and their compliance with the NLRA. This report supplements a prior report issued on August 18, 2011, analyzing Facebook, Twitter and blogging activities and employer's policies regulating them. The NLRB has made its position clear that it will find a policy unlawful if an employee could reasonably interpret it as prohibiting collective activity, including prohibitions against criticism of an employer's labor policies, of an employer's treatment of employees or of an employee's terms and conditions of employment.²⁷

²⁴ <http://www.fulbright.com/litigationtrends>

²⁵ <http://blog.larrybodine.com/2010/10/articles/clients/fulbright-report-sees-upswing-in-litigation/>

²⁶ Id.

²⁷ A link to the latest report can be found at www.nlr.gov/news/acting-general-counsel-issues-second-social-media-report.

3. NLRB Rejects Arbitration Class Waivers in *D.R. Horton, Inc. and Michael Cuda*

In a decision published on January 3, 2012 in *D.R. Horton, Inc. and Michael Cuda*, 357 NLRB No. 184, the NLRB held that a non-union homebuilder's mandatory arbitration agreement that required individual arbitration of all claims violated Section 8(a)(1) of the NLRA since it precluded class or collective action in both an arbitral and judicial forum. Employers who require such agreements as a condition of employment engage in an unfair labor practice, according to the NLRB.²⁸

a. Background of *D.R. Horton* Case

The *D.R. Horton* case arose after an attorney representing an employee (a superintendent) sought to arbitrate a nationwide class action on behalf of all of the employers similarly situated employees. The attorney alleged that the employer was misclassifying its superintendents as exempt under the Fair Labor Standards Act. The employer refused to arbitrate, citing the language in the mandatory arbitration agreement barring collective claims. An unfair labor practice charge was filed with the Board alleging, in pertinent part, that the employers mandatory arbitration provision precluding class or collective actions violated Section 8(a)(1) of the NLRA by interfering with the employees' Section 7 rights.

b. The NLRB's Rationale

The NLRB agreed. In so finding, the Board asserted that courts have previously held that Section 7 provides employees the right to join together to pursue workplace grievances, including through litigation or arbitration. Based on this, the Board concluded that "employees who join together to bring employment-related claims on a class-wide or collective basis in court

²⁸ The authors of this paper gratefully acknowledge the contributions of Gina Haggerty Lindell and Tara Gillman, attorneys at the San Diego, California office of Gordon & Rees for their analysis of the *D.R. Horton* decision. See, Gordon & Rees' Client Advisory, "NLRB Rejects Arbitration Class Waivers", March 2012, www.gordonrees.com.

or before an arbitrator are exercising substantive rights protected by Section 7 of the NLRA."

The Board then cited the U.S. Supreme Court's opinion in *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20 for the proposition that the Federal Arbitration Act (FAA) permits enforcement of agreements to arbitrate federal statutory claims, including employment claims, only where the agreement does not require a party to "forgo the substantive rights afforded by the statute." Consequently, the Board concluded that because the employer made the arbitration agreement a condition of employment, the employer explicitly restricted activities protected by Section 7, and therefore the arbitration agreement was unenforceable.

The NLRB distinguished the case from the Supreme Court's recent opinion in *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011), wherein the Supreme Court rejected a claim that a class action waiver in an arbitration agreement service contract was unconscionable under California law and therefore unenforceable as it conflicted with the FAA. The Board asserted that the FAA's purpose was to encourage an alternative forum for dispute resolution that was quicker, less expensive and less formal than traditional judicial cases. The Board further stated that class-wide arbitration of employment disputes was not inconsistent with this purpose, unlike class-action suits in cases like *Concepcion*, which involved consumer retail service agreements that might have thousands of class-members.

c. The Impact of *D.R. Horton*

Employers evaluating the potential impact of the *D.R. Horton* decision on their business should understand that the case is subject to some important limitations:

- The case only applies to private sector employers covered by the NLRA and not to agricultural employers, government employees, or employees covered by the Railway Labor Act.

- This holding is only applicable to private sector employers and does not apply to those individuals employed by the employer as a statutory supervisor, manager or independent contractor.
- The Board explicitly indicated that employers may require that the arbitration of employment claims be conducted on an individual basis, so long as the employer permits employees to bring class action employment claims in a judicial forum.
- Similarly, an employer can require the mandatory arbitration of all employment claims, so long as the employee can bring a class-wide employment claim in an arbitral forum.

The case did not address whether a mandatory arbitration agreement precluding class-wide arbitration would be enforceable where the employer did not make acceptance of the arbitration agreement a condition of continued employment. Similarly, the case did not address whether a mandatory arbitration agreement precluding class-wide arbitration would be enforceable if the employer provided the employee additional consideration in exchange for agreeing to waive its right to class-wide arbitration.

At this point, employers who have mandatory arbitration agreements precluding class-wide arbitration should not rush out and amend those agreements. First, it is likely that the employer in *D.R. Horton* will file a lawsuit to challenge the Board's ruling. Thus, this is not settled law and may be overturned. Additionally, in the interim, it is likely that an employee will attempt to challenge the enforceability of a similar arbitration agreement in court, and it is quite possible that the court will find such agreement enforceable under prior Supreme Court and circuit court precedent, irrespective of the Board's holding.

Part III

Workplace Bullying

During the work day, employees often spend time Facebooking their friends, Tweeting the latest updates to their followers, or just surfing the web. Though these activities may

decrease productivity, they likely will not result in any additional harm to the employer. In more extreme cases, however, employees may harass or bully their co-workers, reveal confidential company information, endorse products or services without proper disclosure, or engage in criminal conduct. A recent study revealed that 35 percent of employees have reported being the victim of workplace bullying.²⁹ Common forms of bullying include verbal abuse, conduct (*i.e.*, threatening, intimidating behavior, etc.), abuse of authority, interference with work performance, and destruction of workplace relationships. And when one considers the prevalence and accessibility of technology, it only stands to reason that bullies may make social networks or other online forums their weapon of choice.

As one Chicago Tribune columnist aptly wrote:

As a species, it seems we are doomed to interact with jerks. It happens in high school and we think “Once, I get to college, things will be different.” Then it happens in college, and we think “Once I get a job, people will be more mature.” Not so much, jerks abound and as fate would have it, the workplace is as much of a breeding ground for bullies as the playground.³⁰

For decades, the United States has had status-based harassment and discrimination laws in place. These protected characteristics include, among others, race, color, religion, sex and national origin (under Title VII). However, there is no federal legislation which has been introduced for those whom are victims of bullying in the workplace. Much like what many perceive to be a failed federal immigration policy in which in response, states have enacted their

²⁹ Results of the 2010 WBI U.S. Workplace Bullying Survey, Workplace Bullying Institute (Nov. 2, 2010), <http://www.workplacebullying.org/research/WBI-NatlSurvey2010.html>.

³⁰ Rex Heppke, *Bullies Bad for Bottom Line*, Chicago Tribune, September 18, 2011, <http://chicagotribune.com/features/tribu/ct-biz-0919-work-advice-heppke-2.0110918.0.8040477column>.

own immigration laws (which are currently being challenged before the U.S. Supreme Court), states are attempting to enact laws to fill the “stop bullying in the workplace” gap. Currently, there are no states with laws making workplace bullying illegal, but such legislation has been considered in many states.³¹ Generally, these bills are referred to as Healthy Workplace bills (“HWB”) and per the website of the Healthy Workplace Campaign – an organization dedicated to passage of anti-bullying legislation -- here is an overview of what HWB legislation seeks to accomplish:

1. What the HWB Does for Employers

- Precisely defines an “abusive work environment” – it is a high standard for misconduct
- Requires proof of health harm by licensed health or mental health professionals
- Protects conscientious employers from vicarious liability risk when internal correction and prevention mechanisms are in effect
- Gives employers the reason to terminate or sanction offenders
- Requires plaintiffs to use private attorneys
- Plugs the gaps in current state and federal civil rights protections

2. What the HWB Does for Workers

- Provides an avenue for legal redress for health harming cruelty at work
- Allows you to sue the bully as an individual
- Holds the employer accountable
- Seeks restoration of lost wages and benefits

³¹ Washington, Utah, Minnesota, Wisconsin, Illinois, West Virginia, Maryland, New Jersey, New York, Connecticut, Massachusetts, Oregon, California, Nevada, Oklahoma, New Hampshire, Montana, Colorado, Kansas, Missouri, and Hawaii have introduced healthy workplace legislation. Healthy Workplace Bill (March 22, 2012), <http://www.healthyworkplacebill.org>.

- Compels employers to prevent and correct future instances

3. What the HWB Does Not Do

- Involve state agencies to enforce any provisions of the law
- Incur costs for adopting states
- Require plaintiffs to be members of protected status groups (it is “status-blind”)
- Use the term “workplace bullying”³²

Since 2003, 21 states have introduced a HWB in their state legislatures.³³ In 2011, 13 states were active in this area and as of February 2012, there were currently 18 bills pending in various legislatures.³⁴ In New York, a bill was introduced establishing “a civil cause of action for employees who are subjected to an abusive work environment” which provides a remedy for victims of harassment that is not based on a protected category and would hold employers civilly liable for maintaining abusive work environments.³⁵

In May 2010, the New York State Senate passed healthy workplace legislation, but it has since been put on hold in the State Assembly. In early 2011, “an identical bill was introduced in the New York Assembly and Senate and is currently under consideration.”³⁶ If it passes, New York would be the first state in the country to pass it.

In the meantime, even without “bullying” laws, employees may still be successful in bringing unlawful harassment claims under Title VII or the state equivalent.³⁷ Employers are

³² See, <http://www.healthyworkplacebill.org/bill.php>.

³³ *Id.*

³⁴ *Id.*

³⁵ Ericka C. Collins, *Workplace Bullying: a Global Issue*, October 24, 2011, Law.com www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202519795096.

³⁶ *Id.*

³⁷ See, *EEOC v. Nat'l Educ. Ass'n*, 422 F.3d 840 (9th Cir. 2005) (holding that the “reasonable woman” standard applies to workplace abusive conduct, even if there is no sexual content to the behavior.). For California employers, see also *Garcia v. Los Banos*, 2006 U.S. Dist. LEXIS 8683 (E.D. 2006) (holding the *EEOC v. Nat'l Educ. Ass'n* analysis would apply under California’s Fair Employment and Housing Act).

wise to get ahead of this trend and address workplace bullies in a proactive manner. Whether HWBs are passed (which will surely spike employment lawsuits), current personnel policies should be examined to ensure that bullying is prohibited, that there is a policy in place for employees to report such misconduct, and that all reports of bullying (whether they are based on protected characteristics or not) are taken seriously.

Part IV

United States Supreme Court Decisions

A. The Supreme Court Says "No" to Wal-Mart Mass Class Action:

Handing a big win to employers, the U.S. Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), reversed a Ninth Circuit decision that upheld certification of a nationwide employee class action alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964.³⁸ The Supreme Court dubbed the case as “one of the most expansive class actions ever,” and for good reason -- the class was comprised of approximately 1.5 million women and Wal-Mart’s potential exposure was estimated to be around \$4 billion. This sprawling class set the stage for the Court’s consideration of the nature of proof a named plaintiff must present to satisfy the commonality requirement of Federal Rule of Civil Procedure 23(a)(2) and whether class certification is appropriate under Rule 23(b)(2) when the class seeks individualized monetary relief.

1. Background of *Wal-Mart v. Dukes*

The plaintiffs are current and former female Wal-Mart employees who contended that Wal-Mart violated Title VII by engaging in gender bias with respect to pay and promotions. In particular, they alleged that Wal-Mart’s policy of vesting local managers with discretion in pay and promotion decisions had a disparate impact on women as those decisions tended to

³⁸ The full text of the *Wal-Mart* opinion is available at www.supremecourt.gov/opinions/11pdf/10-277.pdf.

favor men, and that Wal-Mart's knowledge of the problem amounted to disparate treatment. On behalf of themselves and the putative class members, the plaintiffs sought injunctive and declaratory relief, punitive damages and back pay.

In seeking to satisfy Rule 23(a)(2)'s requirement that the action present "questions of law or fact common to" all class members, the plaintiffs relied on several forms of proof: statistical evidence about pay and promotion disparities; anecdotal reports of discrimination from about 120 female employees; and testimony from 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 bias. Plaintiffs also contended that even though they were asking for monetary relief, in addition to injunctive and declaratory relief, it was appropriate to certify the class under Rule 23(b)(2), which requires that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . . with respect to the class as a whole."

The district court certified the class, and Wal-Mart appealed. A divided *en banc* Ninth Circuit panel substantially affirmed the district court's certification order. Wal-Mart then asked the Supreme Court to reverse the certification decision on the grounds that the class of hourly and salaried female employees who worked at Wal-Mart stores nationwide at any time since 1998 was too large and diverse to meet class certification requirements under the Federal Rules of Civil Procedure.

2. The High Court's Decision: Rule 23(a)(2)

Wal-Mart's argument that the class action failed to satisfy Rule 23(a)(2)'s commonality requirement split the Court. Justice Scalia authored the majority opinion, in

which the Chief Justice Roberts and Justices Kennedy, Thomas and Alito joined. Justices Ginsburg, Breyer, Sotomayor and Kagan dissented.

The majority opinion sets a high bar for plaintiffs to meet to demonstrate commonality under Rule 23(a)(2), holding that a court must perform a "rigorous analysis" at the class certification stage to ensure that plaintiffs have "significant proof" that they have "suffered the same injury," not merely that the defendant allegedly violated the "same provision of law." The Court emphasized that the claims must rest upon a common contention that "must be of such a nature that it is capable of class-wide resolution -- which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." The Court further explained: "What matters to class certification . . . is not the raising of common 'questions' - even in droves - but, rather the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."

Applying this standard, the Supreme Court concluded that the evidence presented by the Wal-Mart plaintiffs regarding the company's policy of allowing managers discretion in promotions and pay decisions was "worlds away" from significant proof that Wal-Mart operated under a general policy of discrimination. Not only does Wal-Mart have a written policy barring sex discrimination, said the Court, but in a corporation as large as Wal-Mart, proof about how one manager may exercise discretion does nothing to prove how other managers make their decisions. Indeed, as the Court noted, the plaintiffs' expert admittedly could not identify, even within a very broad range, what percentage or number of employment

decisions were in fact biased, and the Court found that anecdotal evidence of bias (from 120 putative class members) was too limited relative to the class size and geographic scope.

The Court also pointed out that a policy of allowing local supervisors to exercise discretion was “just the opposite of a uniform employment practice” that would provide the commonality needed for class certification. Rather, it was “a policy against having uniform employment practices,” particularly in light of a lack of evidence demonstrating any common way that the managers actually exercised that discretion.

3. The High Court’s Decision: Rule 23(b)(2)

The Supreme Court then held, unanimously, that the plaintiffs’ back pay claims were improperly certified under Rule 23(b)(2), concluding that such claims for individualized relief do not satisfy the rule. In particular, once a class qualifies for certification under Rule 23(a), the next inquiry is whether the class can be certified under either Rules 23(b)(1), (b)(2), or (b)(3). The lower court certified the *Dukes* class under Rule 23(b)(2), which requires that “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . . with respect to the class as a whole.” Courts in previous cases have allowed claims for monetary relief -- such as back pay - - in 23(b)(2) cases, if the monetary relief is not the “predominant” type of relief sought.

In rejecting certification, the Supreme Court explained: “The key to the (b)(2) class is ‘the indivisible nature of the injunctive or declaratory remedy warranted -- the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.’” The Rule, said the Court, does not allow for class certification when each class member would be entitled to an individualized award of money damages. While the plaintiffs argued that any back pay was merely incidental to injunctive or declaratory

relief, the Court made clear that Wal-Mart was entitled to litigate any statutory defenses to individual back pay claims, which was not a possibility in a case certified under 23(b)(2).

4. The Impact of *Wal-Mart v. Dukes*

The Supreme Court's decision places a heavy evidentiary burden on plaintiffs who seek to pursue class certification in large cases. In employment class actions in particular, the case makes clear that alleging a corporate practice of delegating decision-making to lower level managers will not be sufficient to support class certification absent detailed proof that the practice injured all class members in the same way.

At the same time, however, employers should tread carefully and not assume that the case automatically forecloses all, or even a significant number of, class actions. Employers may remain vulnerable to systemic discrimination claims by the U.S. Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs. Furthermore, while the decision clarifies important principles of *federal* class action jurisprudence to the benefit of corporate defendants, the plaintiffs' bar is likely to file similar cases in the friendlier climes of state courts, where more relaxed class certification standards may apply. Employers can also expect that plaintiffs' attorneys will take care to assert claims based on policies and practices that have a more visible common impact, such as the use of a biased testing procedure or a single decision-maker, and that they will seek to file smaller, focused class actions that more easily meet the *Dukes* commonality standard.

The Supreme Court's decision also teaches that employers may consider taking several steps as a means of reducing class action risks, and the risk of employment litigation more generally:

- Review pay and promotion practices and decision-making -- subjective or not -- to determine whether they are adversely impacting any protected class.
- Consider eliminating subjective decision-making processes by clearly linking promotions, demotions, raises or bonuses to objective goals and job performance. Despite Wal-Mart's win, subjective decision-making in the hands of the wrong supervisor can lay the groundwork for employment litigation.
- Alternatively, carefully tailor any processes that include subjective decision-making so that managers make effective, lawful decisions, and provide effective training to ensure that managers understand their legal obligations.
- Have an appeal process for employees who are considered, but not selected, for promotion or training opportunities. The ability to review challenged decisions at the early stages may help fend off lawsuits, including class actions.
- Similarly, take employee complaints seriously, document the company's response and follow up, and promptly address each issue/complaint on its merits.
- As a general matter, implement corporate policies that have the purpose and effect of increasing diversity in the workplace and preventing discriminatory practices

B. The Supreme Court Speaks on First Amendment and Religious Bias

In another key employment-related decision, the U.S. Supreme Court unanimously recognized the "ministerial exception" under the Establishment and Free Exercise Clauses of the First Amendment and barred employment discrimination suits brought on behalf of ministers against church or religious organizations. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,³⁹ 131 S.Ct. 1783 (2012).⁴⁰

³⁹ The full text of the *Hosanna-Tabor* opinion is available at www.supremecourt.gov/opinions/11pdf/10-553.pdf.

⁴⁰ The authors of this paper gratefully acknowledge the contributions of Paul Patten (Chicago, Illinois), David E. Nagle (Richmond, Virginia) and Antone Melton-Neaux (Minneapolis, Minnesota) from Jackson Lewis for their analysis of the *Hosanna-Tabor* case. See, "Ministerial Exception Bars Ministers' Discrimination Claims, U.S. Supreme Court Rules", January 12, 2012, www.jacksonlewis.com.

1. The Background of *Hosanna-Tabor v. EEOC*

Cheryl Perich was a "called" teacher for Hosanna-Tabor Evangelical Lutheran Church and School in Redford, Michigan. Hosanna-Tabor called teachers have completed certain academic and theological studies and are given the formal title of "Minister of Religion, Commissioned." It also used "lay" teachers who have not completed certain academic courses or are not Lutheran. Lay and called teachers performed the same duties, but Hosanna-Tabor only used lay teachers if no called teachers are available. Perich taught religion, led in prayer and devotional exercises, and conducted chapel services. But a majority of the subjects she taught were not religious.

Perich took a medical leave of absence in 2004. When she tried to return to work, Hosanna-Tabor told her it already had hired a substitute for the school year. Perich later showed up at the school and threatened legal action to get her job back. Hosanna-Tabor fired her because it concluded her behavior violated Lutheran doctrine.

Perich filed a complaint with the Equal Employment Opportunity Commission and the EEOC sued Hosanna-Tabor for retaliation in violation of the Americans with Disabilities Act. Hosanna-Tabor argued that the "ministerial exception" under the First Amendment barred the discrimination lawsuit. The federal district court agreed and dismissed the suit. The Sixth Circuit, although recognizing the ministerial exception, vacated and remanded the decision of the district court on the grounds that Perich was not considered a "minister."

2. Ministerial Exception Is Valid, Enforceable under First Amendment

In an opinion written by Chief Justice John Roberts, the Court acknowledged the existence of a "ministerial exception," which keeps the government out of church affairs and uniformly has been recognized by the Courts of Appeals, based on the Establishment and Free

Exercise Clauses of the First Amendment. This is the first time the Court has considered the ministerial exception. The Court reasoned, "Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs."

The Court overruled the Sixth Circuit, finding the lower court mistakenly had concluded Perich was not a minister. It noted that she was a commissioned teacher, had religious responsibilities and held herself out to be a minister. The secular duties she performed were not determinative. According to the Court, the Sixth Circuit placed too much on the fact that Perich's secular duties consumed most of her workday, while her religious duties took up only 45 minutes. The Court said, "The issue before us is not one that can be resolved by a stopwatch." While the Supreme Court declined to provide a test for deciding whether an employee qualifies as a minister, it made clear that the ministerial exception was not to be construed too narrowly: "Every Court of Appeals to have considered the question has concluded that the ministerial exception is not limited to the head of the religious congregation, and we agree." The Court also declined to address whether the ministerial exception barred other types of suits by employees, such as breach of contract or tort claims, against their religious employers.

3. The Impact of *Hosanna-Tabor*

If an employer is a church or other religious organization, it cannot be sued by a minister for employment discrimination. The Court's decision addresses only suits brought by ministers and should not be read to include workers who cannot be considered ministers. The decision does not establish a specific framework for identifying who qualifies as a minister. Rather, such determinations will be made on a case-by-case basis. While a pastor or other clearly identified

religious leader may be easily categorized as a minister, other individuals working for the church or religious organization may not. The factors the Court found relevant in this case include the understanding of the employer and employee, an official acknowledgment of the position, and having religious duties.

While employers may applaud the Supreme Court's decisions in *Wal-Mart* and *Hosanna –Tabor*, which limited employee's causes of actions, caution bears noting. On January 24, 2011, the high court in *Thompson v. North American Stainless*, 131 S.Ct. 863 (2011), held, in an unanimous decision, that Title VII's ban on workplace retaliation against an employee who challenges discrimination also protects a co-worker who is a relative or close associate of the targeted employee.⁴¹ Many perceive this decision as a slippery slope and fear that plaintiffs' lawyers will be using the *Thompson* case to argue that co-employee family members (even if they are distant relatives) or acquaintances (like a next door neighbor) of a targeted employee can bring their own retaliation claims, even if he or she does not directly engage in the protected activity (e.g., complaints of harassment or discrimination). This is an issue that will bear watching as the district and circuit courts throughout the country interpret this high court's decision over the next several years.

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⁴¹ A full copy of this decision can be found on the Supreme Court's website, www.supremecourt.gov/opinions/10pdf/09-291.pdf.

Part V

Conclusion

We witness advances in the law every day. The only constant is change. In challenging economic times and as companies strive to be more efficient, changes in traditional work environments are emerging and employees are expected to be more productive. The reality also exists that human work power is critical to the success of many businesses and those who are not willing to work hard may not have jobs in a slowing economy. As more employees lose their jobs, there will inevitably be more lawsuits and administrative actions. Since litigation, regulatory, administrative and legislative activity is increasing in the employment arena, employees, their lawyers and their insurers need to anticipate and adapt proactively to the challenges of this brave new world. This will foster the implementation of new policies, as well as creative forward thinking defense strategies, to minimize litigation costs and risks. After all, “we are all in this together!”