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LABOR & EMPLOYMENT LAW ALERT

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Summer Explodes with Important Developments in Labor and Employment Law

The advent of summer turns thoughts to vacations, sunny beaches and best-selling novels, but given the recent explosion of important new developments in labor and employment law, you may want to take along the court decisions and new laws that make up this month's update. Among this month's hot topics is a U.S. Supreme Court case which struck down the certification of a class of 1.5 million women workers. In another case closer to home, the New Jersey Supreme Court decided that, under New Jersey's whistleblower law, a worker who resigns because of mental illness may be entitled to front and back pay even though the worker was neither fired nor constructively discharged. On the Union front, the National Labor Relations Board ("NLRB") proposed new regulations which would dramatically shorten the period between the filing of a union representation petition and the election, effectively limiting employer participation in representation elections. Finally, in our social media column, we discuss the NLRB's more aggressive approach to social media. Read on; all this will be on the test when you return in the fall. ■

A Limit to Everything: *Wal-Mart Stores v. Dukes* and the Million-and-a-Half Women Class

In *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277, 564 U.S. 2011 U.S. LEXIS 4567 (U.S. June 20, 2011) at *1-3, the U.S. Supreme Court held that a class action suit, representing over 1.5 million women employees against Wal-Mart, is inconsistent with the Federal Rules for class certification. In this controversial and technical 5-4 split decision, the majority found that the employees failed to proffer significant evidence of a "companywide discriminatory pay and promotion policy." All nine justices were in agreement that the case could not proceed in its current form on equitable relief.

The named Plaintiffs represented women employees of Wal-Mart and its other operated retail stores from December 1998 on, who claimed that they were victims of Wal-Mart's pattern and practice of permitting local managers to make discriminatory pay and promotion decisions, contrary to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.§§ 2000e-1, *et seq*. Wal-Mart, the nation's largest private employer, denied having a discriminatory policy or complicity with any alleged local managers' discriminatory practices.

The District Court of the Northern District of California certified the class in accordance with Federal Rules of Civil Procedure 23(a) and 23(b)(2). The Ninth Circuit affirmed in part and remanded in part, holding, among other things,

that: the class met the Rule 23(a) commonality requirement; the back pay claims were permissible under Rule 23(b)(2) as incidental to the injunctive relief sought; and the class was manageable, approving the District Court's use of randomly selected samples to test all claims, a/k/a "Trial by Formula."

The Supreme Court reversed the Ninth Circuit's decision, halting this colossal class action. Writing for the majority, Justice Antonin Scalia reasoned that the Plaintiffs were unable to show that there was a companywide policy of discriminating against women; that the only evidence put forth by Plaintiffs was Wal-Mart's policy of giving discretion to its local supervisors over employment matters, about which policy Justice Scalia stated, "[o]n its face . . . that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy against having uniform employment practices." Further, the Court held that back pay claims were individualized, thus excluded under Rule 23(b), and more appropriately brought under Rule 23(c). Lastly, the Court found that the Ninth Circuit erred in certifying the class on the basis that Wal-Mart's statutory defenses would not be available against the individual claims.

The Bottom Line. Despite the controversy, the *Wal-Mart* decision does not spell the end of class actions or encourage unlawful discrimination. There will be many opportunities to bring class actions on a smaller scale, perhaps regionally, where it is more likely than not that one could show a general policy, or, stealing a phrase from Justice Scalia, "some glue holding together the alleged reasons for those [employment] decisions." Some very large employers may reorganize and give their store managers and regional managers far more autonomy in decision making. While that may solve one problem, *i.e.*, national class actions, it may create a larger one, that is, more discrimination lawsuits. Our advice - stay the course; invest in training and guidance. ■

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The Sky's the Limit: *Donelson v. DuPont Chambers Works*

The perspectives of the U.S. Supreme Court and the New Jersey Supreme Court may, and do, differ. A case in point is the New Jersey Supreme Court decision on June 9, 2011 that a whistle-blowing plaintiff who brings suit under New Jersey's Conscientious Employee Protection Act ("CEPA"), can obtain back pay and front pay as damages even though he was neither fired nor constructively discharged; all he need show is that he became psychologically disabled because of the employer's alleged retaliation. In other words, to obtain damages for lost wages, the employee need only make allegations of wrongdoing, immediately stop coming to work, go on disability leave, and then claim having suffered psychological damage at work. *See Donelson v. DuPont Chambers Works*, No. A-112-09, 065628, 2011 N.J. LEXIS 638 (N.J. June 9, 2011).

The *Donelson* appeal involved a thirty-year employee of DuPont, John Seddon, who reported safety concerns about the company's operation to DuPont management and OSHA. Seddon claimed that DuPont retaliated

against him after he engaged in whistle-blowing activities, including involuntarily putting him on paid short-term disability. When Seddon went back to work, DuPont assigned him to work in isolation for 12-hour shifts, an assignment which Seddon characterized as "torture." The retaliatory acts caused Seddon to suffer, in effect, a mental breakdown rendering him unfit for continued employment at DuPont.

Seddon sued but never alleged a constructive discharge. The trial judge, however, permitted the employee to argue for lost wages even though Seddon did not plead or put forth proofs to support a constructive discharge claim. The jury found for Seddon, finding that his lost wages were the proximate result of DuPont's retaliation. They awarded him both economic and punitive damages. Importantly, the jury awarded no money for his psychiatric injury or for pain and suffering. The Appellate Division reversed the verdict and damages award, reasoning that the trial judge erred by not instructing the jury that Seddon could be awarded lost wages only if he was found to be constructively discharged. In its decision, the Appellate Division compared CEPA to the LAD and held that Seddon was not entitled to lost wages unless "[t]he employer's conduct [was] so intolerable that a reasonable person would be forced to resign rather than continue to endure it." *Donelson v. DuPont Chambers Works*, 412 N.J. Super. 17, 31 (App. Div. 2010).

The New Jersey Supreme Court reversed, holding that lost wages are recoverable in a CEPA case even where the plaintiff has not been constructively discharged. The introduction of medical testimony (that the reprisals against him for his whistle-blowing activities mentally disabled him from continued employment at DuPont) was a sufficient basis for the award of lost wages. Ultimately, the Court held that Seddon was not required to show that a "reasonable person" — one not psychologically injured — would have left DuPont because of the intolerable conditions of his employment. In a strongly worded dissent, Justice LaVecchia, joined by Justice Hoens, argued that the majority's decision represented a significant departure from past precedents and presents significant practical problems for litigants and their advocates. The Court implemented a lower standard for obtaining lost wages, permitting an employee to present his claim to the jury merely by offering expert testimony that he suffered psychiatric impairment sufficient to force him to take retirement.

Bottom Line. *Donelson* creates serious problems for employers in New Jersey. Who needs a constructive discharge in New Jersey when you can simply allege that an employer's retaliation caused you psychological harm that prevented you from working? Although the case dealt only with damages under CEPA, you can be sure that New Jersey courts will soon apply *Donelson* to other laws, such as the New Jersey Law Against Discrimination. Employers would therefore be wise to immediately review their protocol for investigating and remedying discrimination and other claims. Carefully and aggressively investigate claims of discrimination, harassment, retaliation, or violations of law or regulation. Take immediate action and train employees about policies and complaint procedures. Now is the time to act, before there is a lawsuit. ■

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What Cannot Be Done By Law, Do By Regulation: The National Labor Relations Board and Union Elections

The National Labor Relations Board ("NLRB") has published, in the Federal Register, a Notice of Proposed Rule Making to amend its existing rules and regulations regarding representation elections. These amendments, if enacted, would dramatically shorten the period between the filing of a representation petition and the election, and would limit the opportunities for Board review of certification determinations made by the Regional Offices. These proposed rules attempt to limit employer participation in representation elections and to achieve, via rulemaking, some of the goals of the now-defunct Employee Free Choice Act. The proposed rules would alter current mechanisms for hearings, the manner of filing petitions, and the elections themselves. Here is a quick review:

Changes to Hearing Process. The Board's current policy encourages the NLRB to hold representation elections within 45 days following the filing of a representation petition. Under the proposed amendments, however, that period would be dramatically curtailed. The Board would defer most voting/bargaining unit issues until after the election and would eliminate the right of parties to request review of a Regional Director's decision before an election is held.

Under the proposed rules, a pre-election hearing would have to begin no more than seven days following the service of notice of the representation petition. Before the hearing is to begin, the employer would be required to state its position on any election-related issues that it plans to raise at the hearing. Those issues could include the Board's jurisdiction, the appropriateness of the proposed bargaining unit, and the type, date, and location of the election. The possibility exists that any issue not raised would not be considered later in an appeal to the Board. Following the employer's presentation, the union would respond to the employer's positions and, after the hearing, an ALJ would identify any disagreements. The ALJ would accept evidence only if a genuine issue of material fact existed regarding those issues.

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Under the proposed rules, there would be no pre-election litigation of the disputes, unless the disputed issue affects at least 20 percent of the proposed bargaining unit. Even in instances where unit issues are litigated before the election, the proposed new rules would not allow parties to request Board review prior to the election. The Board would have the discretion not to review, as opposed to the mandatory review under the current rules. The Board believes that these steps would consolidate all election-related appeals into a single post-election appeals process, thus eliminating the delay in holding elections that the Board blames on "the possibility of pre-election appeals."

Pre-election Requirements. After the Regional Director issues a direction of election, the proposed rules give employers only two days, not the current seven, to provide the union with a final list of eligible voters. Such lists must also contain both phone numbers and email addresses, not just names and addresses, as the current rules allow.

Filing Changes. The proposed rules would also expand use of modern communication technologies. Petitioners could, for the first time, file election

petitions electronically. The Board itself would be able to give notice of the election to employees, if their email addresses are available.

The Bottom Line. It appears that the NLRB is working very hard to stack the deck against employers by making it almost impossible for them to give their opinions to employees about unions. These rules are not yet in effect, but employers would be wise to start putting together pro-active policies in anticipation of expedited elections in the future. Union avoidance always begins with a careful look at policies, procedures, compensation, and treatment. Now is the time to review and revise solicitation and distribution policies. If none exist, it is time to acquire one, to do everything that will assure fair treatment. Supervisory training is very important. Supervisors are the first line of defense. They must learn what to look for and be ready to report any incidents to the employer immediately. In short, these proposed rules will usher in the 24/7/365 campaign. Get ready for it. ■

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Social Media Update:

NLRB "Faces-Off" with Employers Who Fire Employees for Facebook Posts

The NLRB recently issued two more complaints against employers who fired employees for Facebook posts. These complaints are more examples of the NLRB's continuing interest in employees' and employers' use of social media.

On May 9, 2011, the NLRB Regional Director in Buffalo, New York issued a complaint against Hispanics United of Buffalo, a non-profit organization providing social services to low-income clients, alleging that Hispanics United unlawfully terminated five employees after they criticized working conditions (including work loads and staffing issues) on their Facebook accounts. The complaint in this case alleges that one of the employees, in advance of a meeting with management about working conditions, posted on her Facebook wall a co-worker's allegation that employees did not do enough to help the organization's clients. The initial post generated responses from other employees who defended their job performance and criticized working conditions, including work load and staffing issues. After learning of the posts, Hispanics United discharged the five employees who participated in the Facebook posts. The organization terminated their employment on the basis that the comments constituted harassment of the employee originally mentioned in the post.

On May 20, 2011, the Regional Director in Chicago issued a complaint against a Chicago-area BMW car dealership, Karl Knauz Motors, Inc. This case involved the firing of a car salesman, Robert Becker, for

allegedly posting comments on his Facebook wall criticizing the dealership for offering hotdogs to clients during a promotional event for a new car model. The criticism was surrounded by concerns that the choice and quality of the refreshments could negatively affect sales and commissions. Mr. Becker's criticism included photographic evidence of the unremarkable snacks. Other co-workers made similar comments relating to his original posts. After management learned of the posts, it asked Mr. Becker to remove them. Even though he immediately removed them, the dealership still terminated his employment.

In earlier Alerts, we discussed two prior highly publicized NLRB complaints against employers in Connecticut (American Medical Response of Connecticut Inc.) and in Phoenix, Arizona (the Newspaper Guild). Both cases were settled, and no administrative or judicial determinations were made on those issues. AMR of Connecticut has since, however, revised its policy to be less restrictive, and the Newspaper Guild agreed to negotiate a new social media policy that would more effectively protect employees' rights to communicate regarding work conditions.

Bottom Line. These cases show that the current NLRB aims to make it easier for employees to use social media for alleged "concerted activity." The NLRB will consider many online comments to be protected even if they are disparaging or disrespectful to the employer and/or its supervisors. Some lessons for employers from the NLRB's "Facebook Firing" cases are: 1) when disciplining an employee for social media activities, seek legal advice; and 2) review social media policies to make sure they comply with the NLRA and other legal requirements. ■

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