Employment Law 2012 –

10 Hot New Developments All Lawyers Need to Know

OBERTI/
SULLIVAN LLP

Mark J. Oberti
Edwin Sullivan
Oberti Sullivan LLP
723 Main Street, Suite 340
Houston, Texas 77002
(713) 401-3555 (main)
mark@osattorneys.com
ed@osattorneys.com

Micah Heilbrun
Patterson-UTI Management Services LLC
450 Gears Road, Suite 500
Houston, Texas 77067
(281) 765-7111
micah.heilbrun@patenergy.com

Joseph Y. Ahmad
Ahmad, Zavitsanos & Anaipakos, P.C.
1221 McKinney Street
3460 One Houston Center
Houston, Texas 77010
(713) 655-1101
joeahmad@azalaw.com

All Board Certified – Labor in Employment Law – Texas Board of Legal Specialization

1. The EEOC's new official position that transgendered employees are protected under Title VII. What does this mean to employers?

- *Macy v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, EEOC Appeal No. 0120120821 (Apr. 20, 2012)
  - EEOC broadly ruled that a complaint of discrimination based on "gender identity, change of sex, and/or transgender status" is cognizable under Title VII
  - EEOC largely relied on *Price Waterhouse v. Hopkins*
  - EEOC did not limit claim to "gender stereotyping."
  - It provided a variety of bases upon which discrimination on transgendered status could constitute "sex" discrimination under Title VII

1. The EEOC's new official position that transgendered employees are protected under Title VII. What does this mean to employers?

- Most, but not all, federal courts have also found that Title VII affords some protection against discrimination toward transgendered individuals

  - *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (employer who fired a transgender individual because he considered it "inappropriate" for employee to come to work dressed as a woman and found it "unsettling" and unnatural that she would wear women's clothing was direct evidence of discrimination based on gender in violation of Title VII)

  - *Barnes v. Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (upholding a nearly one million dollar verdict and finding a transgender police officer was discriminated against on the basis of sex in violation of Title VII; "[plaintiff] established that he was a member of a protected class by alleging discrimination against the City for his failure to conform to sex stereotypes.")

1. The EEOC's new official position that transgendered employees are protected under Title VII. What does this mean to employers?

- Most, but not all, federal courts have also found that Title VII affords some protection against discrimination toward transgendered individuals
  - *Smith v. Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (finding that a transgender individual who was suspended because of her gender non-conforming behavior had stated a claim for impermissible discrimination under Title VII)
  - *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (finding that, when an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment "related to the sex of the victim")

1. The EEOC's new official position that transgendered employees are protected under Title VII. What does this mean to employers?

Employer take aways:

1. Review and revise anti-discrimination and anti-harassment policies to prohibit and protect against discrimination against transgendered individuals.

2. Train managers and employees on rule prohibiting discrimination against transgendered individuals, and provide “best practices” for complying with the rule.

3. Include this issue as part of the company’s regular EEO and anti-harassment training.

2. The EEOC's recent warnings to employers who use arrest and conviction records to screen applicants

- On April 25, 2012, the EEOC issued "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964."

- In January 2012, the EEOC announced a $3.13 million settlement with Pepsi Beverages over its use of criminal background checks that adversely affected African-American job applicants.

- So, this is a hot issue that the EEOC is focused on.

2. The EEOC's recent warnings to employers who use arrest and conviction records to screen applicants

The EEOC's Guidance largely focuses on the use of criminal records under a *disparate impact* theory

1. Disparate impact: The EEOC suggest that nationally, and in most areas, use of criminal records to screen out applicants will have a disparate impact on minorities

2. Job Related And Consistent With Business Necessity Defense:

    a. EEOC indicates that using arrest records is almost never a business necessity

    b. EEOC indicates that to satisfy this defense, the employer must prove an effective link exists between the specific criminal conduct and its dangers with the risks inherent in the job position

2. The EEOC's recent warnings to employers who use arrest and conviction records to screen applicants

To satisfy the “effective link” requirement, the EEOC says that an employer may deploy a "targeted screen" that considers the three *Green* factors:

i. The nature and gravity of the offense;

ii. The time that has passed since the offense and/or completion of the sentence; and

iii. The nature of the job held or sought.

These factors are derived from *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1975), and have been the basis of the EEOC's guidance for the past 25 years.

2. The EEOC's recent warnings to employers who use arrest and conviction records to screen applicants

The guidance takes the position that an "individualized assessment" should be made by an employer in virtually all instances before the employer disqualifies an individual for employment based on past criminal conduct, using the following specific factors :

1. the facts or circumstances surrounding the offense or conduct;
2. the number of offenses for which the individual was convicted;
3. older age at the time of conviction or release from prison;
4. evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct;

2. The EEOC's recent warnings to employers who use arrest and conviction records to screen applicants

5. the length and consistency of employment history before and after the offense or conduct;

6. rehabilitation efforts, *e.g.*, education and training;

7. employment or character references and any other information regarding fitness for the particular position; and

8. whether the individual is bonded under a federal, state, or local bonding program.

2. The EEOC's recent warnings to employers who use arrest and conviction records to screen applicants

In conducting an individualized assessment, the guidance suggests that the employer:

1. inform the applicant that he or she may be excluded based on the past criminal conduct;

2. provide an opportunity to the individual to establish that the exclusion should not apply; and

3. consider whether the individual assessment shows that the policy should not be applied to the applicant.

2. The EEOC's recent warnings to employers who use arrest and conviction records to screen applicants

The EEOC asserts that an employer may be able to justify a targeted criminal records screen solely under the *Green* factors (*i.e.*, one *without* an individualized inquiry), but only where the targeted records screen is "narrowly tailored to identify criminal conduct with a *demonstrably tight nexus* to the position in question."

- Therefore, "per se" disqualification policies and practices are suspect, according to the EEOC, and will be heavily scrutinized

- This is significant, because many employers use matrixes that automatically exclude applicants for certain positions if they have been convicted of certain offenses.

2. The EEOC's recent warnings to employers who use arrest and conviction records to screen applicants

EEOC's "Employer Best Practices" suggests that employers:

- Identify essential job requirements and the "actual circumstances under which the jobs are performed"
- Determine the specific offenses that may demonstrate unfitness for performing such jobs, and determine the duration of exclusions for criminal conduct (including an individualized assessment).

2. The EEOC's recent warnings to employers who use arrest and conviction records to screen applicants

EEOC's "Employer Best Practices":

- It "Recommends" that employers not ask about convictions on job applications, and advises that if they do, that such inquiries be "limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity."

- The EEOC further recommends recording the justification for the policy and procedure, providing related training and education to managers, hiring officials and decisionmakers, and maintaining criminal record information in a confidential manner.

3. The EEOC's focus on suing employers under the revised ADA, over: (1) rigid maximum leave of absence and attendance control policies; (2) terminating employees based on their supposed "direct threat"; and (3) employers' failure to fulfill the interactive process requirement.

Rigid Maximum LOA and Attendance Control Policies

- *EEOC v. Sears Roebuck & Co.*, No. 04 C 7282 (N.D. Ill. 2009). $6.2 million to settle claim that Sears' policy calling for termination once an employee exhausts workers' compensation leave violated the ADA.

- *EEOC v. SUPERVALU*, No 09-cv-5637 (ND Ill. 2011). $3.2 million to settle claim that employer's policy requiring termination if employee was on medical leave more than 12 months unless they were released to return to work with no restrictions violated the ADA.

3. The EEOC's focus on suing employers under the revised ADA, over: (1) rigid maximum leave of absence and attendance control policies; (2) terminating employees based on their supposed "direct threat"; and (3) employers' failure to fulfill the interactive process requirement.

Rigid Maximum LOA and Attendance Control Policies

- *EEOC v. Verizon*, No. 1-11-cv-01832-JKB (D. Md. 2011). $20 million to settle claim that Verizon's policy – which was per a union negotiated CBA – of allegedly refusing to make exceptions to its "no fault" attendance policy violated the ADA because it counted absences caused by disabilities against employees.

- In June 2011, the EEOC held hearing regarding the use of leave to provide reasonable accommodation under the ADA. Guidance on the subject may be forthcoming.

3. The EEOC's focus on suing employers under the revised ADA, over: (1) rigid maximum leave of absence and attendance control policies; (2) terminating employees based on their supposed "direct threat"; and (3) employers' failure to fulfill the interactive process requirement.

Claims that maximum leave of absence policies, and 100% healed policies violate the ADA are not new:

- *Garcia-Ayala v. Lederle Parenterlas, Inc*., 212 F.3d 638 (1st Cir. 2000) (employer may have violated the ADA by refusing employee's request for short extension of its one-year maximum leave of absence policy, and terminating her instead).

- *Barber v. Nabors Drilling, U.S.A., Inc*., 130 F.3d 702 (5th Cir. 1997) (affirming jury verdict for the plaintiff in an ADA case; the employer refused to allow an employee to return to work because he could not obtain a "full medical release" even though he could perform all the essential functions of his job)

3. The EEOC's focus on suing employers under the revised ADA, over: (1) rigid maximum leave of absence and attendance control policies; (2) terminating employees based on their supposed "direct threat"; and (3) employers' failure to fulfill the interactive process requirement.

Terminating Employees Based On Their Supposed Direct Threat

- *E.E.O.C. v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724 (5th Cir. 2007) (affirming $300,000 punitive damages award after "direct threat" defense was rejected)

- *E.E.O.C. v. Hibbing Taconite Co.*, 720 F. Supp. 2d 1073 (D. Minn. 2010) (fact issue existed as to whether applicant with a hearing impairment posed a direct threat to other workers for purposes of affirmative defense)

3. The EEOC's focus on suing employers under the revised ADA, over: (1) rigid maximum leave of absence and attendance control policies; (2) terminating employees based on their supposed "direct threat"; and (3) employers' failure to fulfill the interactive process requirement.

Terminating Employees Based On Their Supposed Direct Threat

- *EEOC v. Hussey Copper Ltd.*, 696 F. Supp. 2d 505 (W.D. Pa. 2010) (denying employer's motion for summary judgment based on claim that recovered drug addict presented a direct threat)

- *E.E.O.C. v. Burlington Northern & Santa Fe Ry. Co.*, 621 F. Supp. 2d 587 (W.D. Tenn. 2009) (genuine issue of material fact, as to whether railroad's decision that a train conductor with a prosthetic limb posed direct safety threat was objectively reasonable, precluded summary judgment for employer on ADA claim based on direct threat defense)

3. The EEOC's focus on suing employers under the revised ADA, over: (1) rigid maximum leave of absence and attendance control policies; (2) terminating employees based on their supposed "direct threat"; and (3) employers' failure to fulfill the interactive process requirement.

- The direct threat defense must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence, and upon an expressly individualized assessment of the individual's present ability to safely perform the essential functions of the job. *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 86, 122 S. Ct. 2045, 2053 (2002) (internal quotation marks and citation omitted).

- A "slightly increased risk is not enough to constitute a direct threat, there must be a high probability of substantial harm." *E.E.O.C. v. Hibbing Taconite Co.*, 720 F. Supp. 2d 1073, 1082 (D. Minn. 2010) (citing *Dipol v. N.Y. City Transit Auth.*, 999 F. Supp. 309, 316 (E.D.N.Y. 1998)).

3. The EEOC's focus on suing employers under the revised ADA, over: (1) rigid maximum leave of absence and attendance control policies; (2) terminating employees based on their supposed "direct threat"; and (3) employers' failure to fulfill the interactive process requirement.

In determining whether an individual presents a direct threat, the factors to be considered include:

1. the duration of the risk;
2. the nature and severity of the potential harm;
3. the likelihood that the potential harm will occur; and
4. the imminence of the potential harm.

29 C.F.R. § 1630.2(r)

3. The EEOC's focus on suing employers under the revised ADA, over: (1) rigid maximum leave of absence and attendance control policies; (2) terminating employees based on their supposed "direct threat"; and (3) employers' failure to fulfill the interactive process requirement.

To prevail on the "direct threat" affirmative defense, an employer must show that any threat the employee may have posed could not be eliminated by reasonable accommodation. *Hibbing Taconite Co.*, 720 F. Supp. 2d at 1082-83 (employer's failure to make such a demonstration defeated its "direct threat" defense on summary judgment)

Speculation by laypersons rarely satisfies the defense. *See, e.g., Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758, 764 (5th Cir. 1996) (reversing summary judgment as to a bus driver with a hearing impairment, and stating that, "[w]hether a person who can hear emergency vehicles, but cannot hear a choking child, is a direct threat is question of fact.")

3. The EEOC's focus on suing employers under the revised ADA, over: (1) rigid maximum leave of absence and attendance control policies; (2) terminating employees based on their supposed "direct threat"; and (3) employers' failure to fulfill the interactive process requirement.

Employers' Failure to Fulfill the Interactive Process Requirement

E.E.O.C. v. Chevron Phillips Chemical Co., LP, 570 F.3d 606 (5th Cir. 2009)

- The employee allegedly sought an accommodation by presenting a doctors note. The employer argued that the note was insufficient notice, and the district court agreed. However, the Fifth Circuit rejected that finding based on the fact that the employer had long been on notice of the employee's medical condition (Chronic Fatigue Syndrome), and the note clearly related to that condition.

3. The EEOC's focus on suing employers under the revised ADA, over: (1) rigid maximum leave of absence and attendance control policies; (2) terminating employees based on their supposed "direct threat"; and (3) employers' failure to fulfill the interactive process requirement.

- Once an employer receives a request for accommodation, the employer "is required to engage in the interactive process so that *together* they can determine what reasonable accommodations might be available." (italics in original).

- In this case, there was substantial evidence that the employer failed to engage in the interactive process, and instead set about to find a reason to terminate the plaintiff. Id. at 621-32. Accordingly, the district court's summary judgment was reversed and the case was remanded.

4. The EEOC's new regulations on disparate impact liability under the ADEA and what constitutes "reasonable factors other than age."

Background:

- In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the Supreme Court held that disparate impact claims may be brought under the ADEA, but a neutral practice producing a disparate impact is still lawful so long as the practice is based on "reasonable factors other than age." ("RFOA").

- For example, in *Smith*, the Court held that a city's decision to grant larger raises to lower tier employees was lawful –even though the policy had a disparate impact on the city's older police officers who had more seniority – because the policy was reasonable in its purpose to bring salaries in line with surrounding police forces and retain police officers.

4. The EEOC's new regulations on disparate impact liability under the ADEA and what constitutes "reasonable factors other than age."

- In *Meacham v. Knolls Atomic Power Laboratory,* 554 U.S. 84 (2008), the Court held that the employer bears the burden of production and persuasion when using a RFOA defense.

    - But, importantly, so long as an employer's practices are based on reasonable factors other than age, an employer is not required to mitigate the potential harm of a practice or consider alternative practices to prevail on a RFOA defense.

    - *Meacham* confirmed that "the business necessity test should have no place in ADEA disparate impact cases." *Id*. at at 99. "Unlike the business necessity test [which employers must satisfy in Title VII disparate impact cases], which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement." *Meacham*, *Id.* at 99 n. 14 (quoting *Smith*, 544 U.S. at 243).

4. The EEOC's new regulations on disparate impact liability under the ADEA and what constitutes "reasonable factors other than age."

The New EEOC Regulations, Issued March 30, 2012, state that:

"Considerations that are relevant to whether a practice is based on a [RFOA] include but are not limited to . . .

(ii) The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including *the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination*;

(iii) The extent to which the employer limited supervisors' discretion to assess employees subjectively, *particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes*;

4. The EEOC's new regulations on disparate impact liability under the ADEA and what constitutes "reasonable factors other than age."

(iv) The extent to which the employer *assessed the adverse impact of its employment practice on older workers*; and

(v) The *degree of the harm to individuals within the protected age group*, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps."

29 C.F.R. § 1625.7(e)(2) (emphasis added).

4. The EEOC's new regulations on disparate impact liability under the ADEA and what constitutes "reasonable factors other than age."

- Some commentators believe the new regulations contradict *Smith* and *Meacham* by suggesting that an employer may be held liable for a facially neutral practice if it negligently or unreasonably failed to mitigate the disparate impact associated with its practice.
- Nonetheless, employers would be wise to review practices that disproportionately impact older workers based on these guidelines.
- Likewise, when conducting a RIF, employers should ensure selection criteria are "reasonable," given its purpose, and are not age-based.

4. The EEOC's new regulations on disparate impact liability under the ADEA and what constitutes "reasonable factors other than age."

- Also, be aware that some courts have held that if an employer knows it facial neutral practice has an adverse impact on a certain protected category of workers, and is not legally justified, then if it retains that practice, the adversely affected workers could sue for intentional discrimination. *EEOC v. Dial Corp*., 469 F.3d 735, 742 (8th Cir. 2006).

- In other words, a policy that was implemented with non-discriminatory intent may give rise to an intentional discrimination claim.

5. Surprising new retaliation decisions, ruling for employees who expressed desires to kill their manager, and "knock the teeth out of" a HR manager. How did these employees still prevail?

Expressing A Desire To Kill A Supervisor: *Coleman v. Donahoe*, 667 F.3d 835 (7th Cir. 2012)

- An African-American plaintiff who had filed EEO complaints took a leave of absence. While on leave, she told her psychiatrist she was having homicidal thoughts towards her white supervisor. The psychiatrist broke privilege and told the supervisor. The plaintiff was then fired for making a threat of violence. She sued for retaliation and the trial court dismissed her case on summary judgment.

5. Surprising new retaliation decisions, ruling for employees who expressed desires to kill their manager, and "knock the teeth out of" a HR manager. How did these employees still prevail?

The Seventh Circuit U.S. Court of Appeals reversed the district court's grant of summary judgment. The court found that:

- Two white workers who allegedly held a knife to the neck of an African-American employee, who were suspended, but not terminated, were appropriate comparators to prove disparate treatment. The court explained at length its standard for proving disparate treatment through such comparisons, and articulated a pragmatic approach that does not turn on overly technical distinctions. *Id*. at 846-52, 858-59.

- The close timing between the plaintiff's protected activities and her subsequent alleged mistreatment, suspension, and termination, supported her retaliation claim. *Id*. at 860-61.

5. Surprising new retaliation decisions, ruling for employees who expressed desires to kill their manager, and "knock the teeth out of" a HR manager. How did these employees still prevail?

- Evidence suggested that the plaintiff's alleged "threat" was not a "true threat," and regardless, "a number of background facts cast doubt on the assertion that [she] was dangerous." *Id*. at 855-56.

- The Postal Service admittedly had options short of termination to gauge the plaintiff's propensity for violence, such as seeking a "fitness for duty" certificate. *Id*. at 856-57.

- The fact that the plaintiff made the statement to her psychiatrist somehow favored the plaintiff because "[i]t would be troubling to think that anyone who confides to her psychiatrist that she has fantasized about killing her boss could automatically be subject to termination for cause." *Id*. at 856.

5. Surprising new retaliation decisions, ruling for employees who expressed desires to kill their manager, and "knock the teeth out of" a HR manager. How did these employees still prevail?

Expressing A Desire To Knock Out A HR Manager's Teeth: *Miller v. Illinois Dept. of Transp.*, 643 F.3d 190 (7th Cir. 2011)

- Miller requested an accommodation under the ADA. After much wrangling back and forth, it was denied. Angie Ritter, an IDOT personnel manager, allegedly told Miller "we don't grant requests." Two months later, on his first day back at work after a company-mandated leave of absence that was related to his request for accommodation, Miller was at an IDOT office, where he encountered Ritter. Referring to Ritter, Miller then said to another employee: "Right there is Arch enemy Number 1. I have never hit a woman. Sometimes I would like to knock her teeth out." Miller was fired. He sued for retaliation, and the trial court dismissed his case on summary judgment.

5. Surprising new retaliation decisions, ruling for employees who expressed desires to kill their manager, and "knock the teeth out of" a HR manager. How did these employees still prevail?

The Seventh Circuit Reversed, finding that:

- "A reasonable jury could find that Miller's statement about Ritter was not a "threat" at all, or that even if IDOT properly construed it as such, its decision to terminate Miller was a disingenuous overreaction to justify dismissal of an annoying employee who asserted his rights under the ADA." *Id*. at 200.

- Another employee made death threats, and was not disciplined at all.

- Closing timing supported Miller's claim of retaliation.

- The HR manager's alleged statement that "we don't grant requests" could be regarded as preexisting animus towards Miller's protected activity of seeking such an accommodation.

6. The U.S. Supreme Court's long awaited high-dollar FLSA decision on Big Pharma and the outside sales exemption in *Christopher v. SmithKline Beecham Corp. d/b/a GlaxoSmithKline*.

On June 18, 2012, the U.S. Supreme Court held in a 5-4 decision that pharmaceutical sales representatives employed by SmithKline Beecham Corp. were exempt under the FLSA's "outside sales" exemption.

- The Court emphasized the plaintiffs' high pay as a reason for finding them exempt.
- It also cited the lack of prior enforcement actions
- It discussed in depth what a "sale" actually is
- Writing for the majority, Justice Alito said the Labor Department's interpretation was "quite unpersuasive" and not entitled to deference.
- Justices Stephen Breyer, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan dissented.

6. The U.S. Supreme Court's long awaited high-dollar FLSA decision on Big Pharma and the outside sales exemption in *Christopher v. SmithKline Beecham Corp. d/b/a GlaxoSmithKline*.

This is a double whammy for plaintiffs' lawyers suing on behalf of pharmaceutical sales reps.

A month earlier, on May 8, 2012, the Seventh Circuit U.S. Court of Appeals found such sales reps working for were exempt under the FLSA's "administrative" exemption because they:

(1) perform work directly related to the general business operations of their employers, and (2) exercise independent judgment and discretion in carrying out that work.

The Seventh Circuit interpreted the administrative exemption broadly as to both the "directly related" and "discretion and independent judgment" prongs of the duties test.

Schaefer-Larose v. Eli Lilly & Abott Labs, 2012 WL 1592552 (7th Cir. 2012)

7. Employers' attempts to use the U.S. Supreme Court's 2011 *Dukes v. Wal-Mart* decision to defeat FLSA collection actions – what have courts said so far?

- In *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct 2541 (2011), the Supreme Court held that employees seeking to maintain a class under FRCP 23(a)(2) must meet the high burden of establishing a common question that ties together the claims of each and every plaintiff in the purported class.

- FRCP 23 does not apply to FLSA collective actions. Rather, Section 216(b) of the FLSA controls, and requires only that the claimants be "similarly situated."

- But, because FRCP 23(a)(2)'s commonality requirement is arguably similar to the similarly situated requirement for collective actions under the FLSA, some defendants have argued that the *Dukes* decision should also apply to Section 216(b) collective actions.

7. Employers' attempts to use the U.S. Supreme Court's 2011 *Dukes v. Wal-Mart* decision to defeat FLSA collection actions – what have courts said so far?

So far, *almost* ever court to confront the issue has refused to apply *Dukes* in the FLSA's conditional certification analysis.

<u>2012 Cases Rejecting Reliance On *Dukes* in FLSA Conditional Certification Context</u>

See, e.g., Smith v. Pizza Hut, Inc., NO. 09-CV-01632-CMA-BNB, 2012 WL 1414325, at *5 (D. Colo. Apr 21, 2012) *("*numerous courts have rejected the argument that *Dukes* alters the standard to certify a FLSA collective action*"); Butler v. DirectSAT USA, LLC,* NO. CIV.A. DKC 10-2747, 2012 WL 1203980, at *4 n. 9 (D. Md. Apr 10, 2012); *Chapman v. Hy-Vee, Inc.,* No. 10–CV–6128–W–HFS, 2012 WL 1067736, at *3 (Mar. 29, 2012 W.D.Mo. 2012); *Essame v. SSC Lauren Operating Co., LLC*, Civil Action No. 8:10–cv–03519–AW, __ F. Supp. 2d __, ___2012 WL 762895, at *5 (D. Md. Mar.12, 2012) (Defendant's "remark about the Supreme Court's decision in *Dukes* is likewise a red herring."); *Darrow v. WKRP Management, LLC*, NO. 09-CV-01613-CMA-BNB, 2012 WL 638119, at *3 n. 6 (D. Colo. Feb 28, 2012) ("Defendants' reliance on *Dukes* is misplaced."); *Winfield v. Citibank, N.A.,* NO. 10 CIV. 5950 JGK, 10 CIV. 7304 JGK, __ F. Supp. 2d ___, ___, 2012 WL 423346, at *10 (S.D.N.Y. Feb. 09, 2012); *Pippins v. KPMG LLP*, No. 11 Civ. 0377, 2012 WL 19379, at *7 (S.D.N.Y. Jan. 3, 2012); *Hargrove v. Ryla Teleservices, Inc.*, NO. 2:11CV344, 2012 WL 489216, at *4 (E.D. Va. Jan. 03, 2012) ("The Court finds even Defendant's modified dependence on *Dukes* is misplaced and inapplicable to the instant case.")

7. Employers' attempts to use the U.S. Supreme Court's 2011 *Dukes v. Wal-Mart* decision to defeat FLSA collection actions – what have courts said so far?

2011 Cases Rejecting Reliance On *Dukes* in FLSA Conditional Certification Context

Mitchell v. Acosta Sales, LLC, Case No. CV 11–1796 GAF (Opx), __F .Supp. 2d __, __, 2011 WL 7068384, at *14 n. 2 (C.D. Cal. Dec. 16, 2011); *Ware v. T–Mobile USA*, No. 11 Civ. 411, ––– F.Supp.2d ———, ––, 2011 WL 5244396, at *6 (M.D. Tenn. Nov. 2, 2011); *Faust v. Comcast Cable Commc'ns Mgmt., LLC*, No. 10 WMN 2336, 2011 WL 5244421, at *1 n. 1 (D. Md. Nov. 1, 2011); *Troy v. Kehe Food Distribs., Inc.*, 276 F.R.D. 642, 651–52 (W.D. Wash. 2011); *Nehmelman v. Penn Nat. Gaming, Inc*., 822 F. Supp. 2d 745, 755-56 (N.D. Ill. 2011); *Alli v. Boston Market Co*., No. 10 Civ. 4, 2011 WL 4006691, at *5 n. 3 (D. Conn. Sept. 8, 2011); *Sliger v. Prospect Mortg., LLC*, No. 11 Civ. 465, 2011 WL 3747947, at *2 n. 25 (E.D. Cal. Aug. 24, 2011); *Spellman v. Am. Eagle Express, Inc*., No. 10–1764, 2011 WL 4014351, at *1 n. 1 (E.D. Pa. July 21, 2011) (finding that *Dukes* did not affect the Court's analysis of whether collective action plaintiffs had shown that they were "similarly situated"); *Creely v. HCR ManorCare, Inc*., No. 09 CV 2879, 2011 WL 3794142, at *1 (N.D. Ohio July 1, 2011) (same).

7. Employers' attempts to use the U.S. Supreme Court's 2011 *Dukes v. Wal-Mart* decision to defeat FLSA collection actions – what have courts said so far?

But, two courts have relied on *Dukes* in denying FLSA cond. certification:

- In *MacGregor v. Farmers Ins. Exch*., Civil No. 2:10–CV–03088, 2011 WL 2981466, at *4 (D.S.C. July 22, 2011), regarding the manner in which individual supervisors administered an alleged "unwritten policy" in violation of the FLSA, the district court cited to and relied to some extent on Dukes in denying the plaintiffs' motion for conditional certification under Section 216(b) of the FLSA.

- And, in *Ruiz v. Serco, Inc*., Civ. No. 10–394, 2011 WL 7138732, *6 (W.D. Wis. Aug. 5, 2011), the court found *Dukes* "instructive" in denying the plaintiffs' Section 216(b) motion for conditional certification.

There is no doubt employers will continue to try to interject *Dukes* into Section 216(b) FLSA collective action analysis, so this is an issue to watch.

8. The dramatic reversal of fortune for SOX whistleblower plaintiffs in the last year – what employers need to know now about SOX, before it's too late.

Before May 2011, SOX claimants lost almost every time, usually based on the argument that they did not engage in any activity protected by SOX (*e.g.*, not material, complaint did not state a claim of securities fraud, complaint regarded future fears of fraud, complaint did not definitively and specifically relate to one of the identified statutes in Section 806, etc.)

Between 2002 and 2008, ALJs and the ARB considered 1,273 SOX retaliation claims, and the claimants prevailed in only 17 of those claims.

8. The dramatic reversal of fortune for SOX whistleblower plaintiffs in the last year – what employers need to know now about SOX, before it's too late.

In May 2011, the ARB decided *Sylvester v. Parexel Int'l LLC,* No. 07-123, 2011 WL 2165854 (ARB May 25, 2011), which held:

- The federal pleading standards do not apply to SOX whistleblower claims initiated with OSHA.
- An employee's complaint need not "definitively and specifically" relate to the categories listed in Section 806, and need not relate to fraud on shareholders.
- The "reasonable belief" standard does not require that the complainant actually communicate the reasonableness of his or her belief to management or other authorities.

8. The dramatic reversal of fortune for SOX whistleblower plaintiffs in the last year – what employers need to know now about SOX, before it's too late.

- Section 806 protects complaints regarding a violation of law that has not yet occurred, provided that the employee reasonably believes, based on facts known to him or her, that the violation is about to be committed.

- A complainant need not establish the elements of fraud, including materiality.

8. The dramatic reversal of fortune for SOX whistleblower plaintiffs in the last year – what employers need to know now about SOX, before it's too late.

Since May 25, 2011, the ARB has continued to follow *Parexel* in numerous cases, to the great benefit of SOX claimants:

- *Zinn v. American Commercial Lines, Inc.,* No. 10-029, 2012 WL 1102507, at *4-5 (ARB Mar. 28, 2012) (relying on *Parexel* to conclude that the ALJ "legally erred in analyzing the evidence of Zinn's objective reasonableness of a violation of pertinent law, thus warranting a remand . . . [partially because] an allegation of shareholder fraud is not a necessary component of protected activity under Section 806 of the SOX")

- *Prioleau v. Sikorsky Aircraft Corp*., No. 10-060, 2011 WL 6122422, at *5-7 (ARB Nov. 9, 2011) (reversing ALJ's decision against complainant based largely on *Parexel*)

8. The dramatic reversal of fortune for SOX whistleblower plaintiffs in the last year – what employers need to know now about SOX, before it's too late.

- *Menendez v. Halliburton, Inc*., No. 09-002, 2011 WL 4439090, at *8 (ARB Sept. 13, 2011) (relying on *Parexel* in affirming ALJ's conclusion that the complainant engaged in SOX-protected activity)

- *Funke v. Federal Express Corp*., No. 09-004, 2011 WL 3307574, at *7 (ARB July 8, 2011) (reversing ALJ's decision against complainant based in part on *Parexel*).

- *Inman v. Fannie Mae*, No. 08-060, 2011 WL 2614298, at *6-7 (ARB June 28, 2011) (reversing ALJ's decision against complainant based on *Parexel* and stating that "an allegation of fraud is not a necessary component of protected activity under Section 806.").

8. The dramatic reversal of fortune for SOX whistleblower plaintiffs in the last year – what employers need to know now about SOX, before it's too late.

The ARB Has Expanded SOX In Other Ways Too:

- For example, on May 31, 2012, the ARB held that the whistleblower provisions of Section 806 apply to employees of private companies that contract with publicly traded companies. *Spinner v. David Landau & Assocs. LLC*, 2012 WL 1999677, No. 10-111 (ARB May 31, 2012).

- In doing so, the ARB rejected the First Circuit's decision on the very same issue in *Lawson v. FMR LLC,* 670 F.3d 61 (1st Cir. 2012).

9. Social media and the National Labor Relations Act – are employees who rant against their employers on Facebook protected by law from being fired? Get the latest rulings.

Background: Section 7 of the NLRA protects employee activity from retaliation or interference if it:

1. is "concerted" – meaning engaged with or on the authority of other employees"; and
2. for "mutual aid or protection" – meaning its goal is to "improve terms and conditions of employment or otherwise improve [employee's] lot . . . through channels outside the immediate employer-employee relationship.

* These definitions have been broadly interpreted in many different factual contexts. *See, e.g.*, *Timekeeping Sys., Inc.*, 323 NLRB No. 244 (1997) (one employee's sarcasm laced e-mail attack on company's vacation policy was protected).

9. Social media and the National Labor Relations Act – are employees who rant against their employers on Facebook protected by law from being fired? Get the latest rulings.

But even where these two requirements are satisfied, an employee's activity may be so "disloyal, reckless, or maliciously untrue [so as] to lose the Act's protection." To determine if this is the case, the NLRB considers:

1. The place of the discussion;

2. The subject matter of the discussion;

3. The nature of the employee's outburst; and

4. Whether the outburst was provoked by an employer's unfair labor practice.

9. Social media and the National Labor Relations Act – are employees who rant against their employers on Facebook protected by law from being fired? Get the latest rulings.

Example Of Application to Social Media: *Hispanics United of Buffalo, Inc.*, No. 3-CA-27872 (2011).

- Five employees on Facebook bashed a coworker who had criticized their job performances. The coworker complained, and the employer fired the employees for violating its policy on bullying and harassment.
- The ALJ found the employer violated the five employees' Section 7 rights, holding that:
  - "Explicit or implicit criticism by a co-worker of the manner in which they are performing their jobs is a subject about which employee discussion is protected by Section 7."
  - The employees' actions on Facebook were not so "opprobrious" to lose Section 7 protection.

9. Social media and the National Labor Relations Act – are employees who rant against their employers on Facebook protected by law from being fired? Get the latest rulings.

Overbroad Social Media Policies May Violate Section 7 Too

Giant Eagle, Inc., No. 6-CA-3760 (2011)

- The NLRB's Office of General Counsel found that an employer's social media policy was unlawful because it prohibited disclosure of personal information of co-workers, the use of company logos, and photographs of stores.

- The Office of General Counsel concluded that such prohibitions could tend to restrain employees from organizing together to protest conditions of employment, as is their right under Section 7.

9. Social media and the National Labor Relations Act – are employees who rant against their employers on Facebook protected by law from being fired? Get the latest rulings.

In January 2012, the NLRB's General Counsel issued a second report on social media issues. It underscores two of the points made in the NLRB GC's first report, which was issued in August 2011:

- Companies' social media policies should not be so sweeping that they infringe on employee rights protected under federal labor laws

- Employees' comments on social media sites generally are not protected if they are mere gripes not made in relation to group activity among employees

The NLRB conducted a survey last year that is described in its first report. It reviewed more than 120 cases on companies' social media policies and determined that companies may need to take a closer look at whether they are breaking the law when they fire employees over social media usage.

9. Social media and the National Labor Relations Act – are employees who rant against their employers on Facebook protected by law from being fired? Get the latest rulings.

A Breakthrough: On May 30, 2012, the NLRB's GC issued a third report on social media issues.

- In that report, he took the opportunity to approve one employer's social media policy, a move that provides employers clear guidance in connection with the regulation of this rapidly evolving area of the law. The Acting GC's guidance, which was published in the form of an Operations Management Memorandum, was accompanied by an Advice Memorandum in Walmart, Case No. 11-CA-067171. It is in this case that the agency articulated its reasoning and found, for the first time, a social media policy that was acceptable in its entirety.

- The Acting GC's two previous Advice Memoranda focused almost exclusively on social media policy provisions which, according to the Acting GC, violated the NLRA.

9. Social media and the National Labor Relations Act – are employees who rant against their employers on Facebook protected by law from being fired? Get the latest rulings.

Which Commonly Used Social Media Policy Provisions Did the Acting GC Approve in his May 30, 2012 Guidance?

- Provisions narrowly protecting the company's confidential info.
- Provisions prohibiting "inappropriate postings" that include qualifying language to eliminate confusion (e.g., "such as discriminatory remarks, harassment, or threats of violence").
- Provisions prohibiting postings that prohibit defamatory content, bullying, etc. – but merely requiring "respectful" or "courteous" postings not ok, as they could chill Section 7 activity.
- Provisions prohibiting employees from representing themselves as a spokesperson for the company, and requiring employees to be clear that they are not speaking on the employer's behalf.

9. Social media and the National Labor Relations Act – are employees who rant against their employers on Facebook protected by law from being fired? Get the latest rulings.

Which Social Media Policy Provisions Did the Acting GC Find Unlawful?

- Ban on "friending" coworkers unlawful.
- Requirement or heavy-handed suggestion that employees resolve workplace complaints internally, rather than by using social media. But, employer can still reasonably suggest employees try to work out workplace concerns through internal procedures.
- "nothing in here is intended to interfere with employees' rights to . . ." savings clause cannot save an otherwise overbroad and unlawful social media policy.
- Blanket bans on "no social media" use at work are not lawful. But, can restrict such use consistent with normal policies, such as prohibiting it during working time without manager approval and work-related.

10. The Texas Supreme Court's decision in *Safeshred Inc. v. Martinez*: Are Texas employers essentially immune from punitive damages in employment cases now?

Safeshred, Inc. v. Martinez, No. 10-0426 (Apr. 20, 2012)

- Reversed $200,000 punitive damages award to prevailing plaintiff in a *Sabine Pilot* lawsuit.
- Held that firing an employee for refusing to commit an illegal act is not, by itself, sufficient to prove "malice" even if done with evil intent.
- Stated that to prove "malice" in a *Sabine Pilot* claim, the plaintiff must show that the employer did something independent and qualitatively different, such as circulate false rumors about the plaintiff, interfere with their attempts to find new work, or harassed the plaintiff in connection with their termination.

10. The Texas Supreme Court's decision in *Safeshred Inc. v. Martinez*: Are Texas employers essentially immune from punitive damages in employment cases now?

- Also stated that malice may be proven by evidence that the employer knew it was illegal to fire an employee for refusing to commit an illegal act, but did so anyway.
- The court held that the dangerousness of the illegal act Martinez was asked to perform was not relevant to the malice inquiry.
- Bottom line: Martinez won his case in front of a jury, and ended up with a grand total of $7,569.18 in damages.
- *So, what's the take away for the future of punitive damages in Texas in employment cases in general?*

Bounty Bonus: Dodd-Frank's Bounty Hunter Provision—With millions at stake, employers and employees need to know the rules.

- SEC created Office of the Whistleblower to administer progam, as set out in Dodd-Frank.
- Whistleblowers who provide original information to SEC that leads SEC sanctions of $1 million or more, are eligible to receive a "bounty" of 10% to 30%.
- Whistleblowers are protected from retaliation, and give a cause of action for same with a long SOLs, double-damages, and direct access to federal court.
- Courts have already held that some forms of internal reporting are protected by Dodd-Frank.
- For a detailed paper on this topic, go to www.osattorneys.com, and click on the "Presentations" link on the left hand side of the home page.

THE END

Mark J. Oberti
Edwin Sullivan
Oberti Sullivan LLP

– and –

Micah Heilbrun
Patterson-UTI Management Services LLC

– and –

Joseph Y. Ahmad
Ahmad, Zavitsanos & Anaipakos, P.C.

All Board Certified – Labor in Employment Law –
Texas Board of Legal Specialization

