Ogletree Deakins

The Employment Law
AUTHORITY

Today's Hot Topics in Labor & Employment Law July/August 2011

THIS ISSUE

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AND MUCH MORE

HIGH COURT RULES AGAINST CERTIFICATION OF CLASS

Finds Wal-Mart Workers' Claims Lack "Commonality"

The U.S. Supreme Court recently ruled that a case brought on behalf of some 1.5 million female current and former employees of Wal-Mart should not have been certified as a class action. According to the Court, the plaintiffs were required to show that their claims depended on a common contention of such a nature that it was capable of classwide resolution – in this case, evidence that Wal-Mart "operated under a general policy of discrimination." But, the Court found that "[o]ther than the bare existence of delegated discretion, respondents have identified no 'specific employment practice' – much less one that ties all their 1.5 million claims together." ***Wal-Mart Stores, Inc. v. Dukes,*** *No. 10-277, U.S. Supreme Court (June 20, 2011).*

Factual Background

Three current and former Wal-Mart employees filed suit alleging that the company discriminated against them because of their sex by denying them equal pay or promotions in violation of Title VII of the Civil Rights Act. The workers sought judgment against the company for injunctive and declaratory relief, punitive damages and back pay on behalf of themselves and approximately 1.5 million other female Wal-Mart employees.

The plaintiffs alleged that their local

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A NEW LOOK FOR OGLETREEDEAKINS.COM

Enhanced Benefits, Better Tools Now Available

A visit to OgletreeDeakins.com will lead to an entirely new experience for clients and friends of the firm. There are new images, a new navigation format, and many new tools to explore.

Specifically, it is now easier and more efficient to search for information. Social media tools such as RSS and a Twitter feed (@OgletreeDeakins) also are available for those who like to receive information through these platforms. From the homepage, visitors can: download timely articles across the full spectrum of labor and employment law topics; register for upcoming events (such as webinars, seminars and breakfast briefings); and see the latest news about the firm. In addition, the website features unique graphics – distinguishable from any other law firm.

The website incorporates a tabbed format which better organizes the data, making it easier for users to find news and information relevant to their needs. The search options have also been expanded and improved and can now be used to identify upcoming seminars and events on a particular topic.

Many clients turn to our website for attorney bios. With the new website, users are able to view specific information about an attorney in one click. The new tabbed bios are sorted to include an attorney's profile, experience, education and honors, professional activities, and press coverage.

The enhanced functionality of the seminars and events section allows users to search for an event by type, office location, practice area, keyword and date. The event registration process also has been improved in response to suggestions from users.

We hope you will visit our new website soon and experience all that it has to offer. ■

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COURT "DELETES" WORKER'S AGE BIAS CLAIM

Finds Responsibilities Were Assumed By New Computer Program, Not Younger Employee

A federal appellate court recently ruled that an employee whose job functions were replaced by a computer program had not been the victim of age discrimination. According to the Eleventh Circuit Court of Appeals, an employee who acted as an intermediary in the product design process was not replaced by the younger employee who oversaw the new streamlined system. ***Gortemoller v. International Furniture Marketing, Inc.,*** *No. 10-15689, Eleventh Circuit Court of Appeals (July 20, 2011).*

Factual Background

Thomas Gortemoller filed a lawsuit against International Furniture Marketing, Inc. and Standard Furniture Manufacturing Company, Inc. under the Age Discrimination in Employment Act (ADEA). Gortemoller had worked in the furniture companies' product design process. His responsibilities included:

(1) Conducting research to identify new products;

(2) Creating specifications and working with designers on products;

(3) Selecting designs produced by designers;

(4) Developing and merchandising products;

(5) Traveling overseas to inspect products; and

(6) Traveling to markets to sell products and evaluate the competition.

After firing Gortemoller, the companies streamlined their product design process through the use of a web-based computer program called Design Net, which allowed salespeople and designers to communicate directly with each other. The new program also allowed customers to provide feedback directly to the salespeople and designers. Todd Evans, who had worked for the companies for eight years, was assigned to oversee the new streamlined process.

Gortemoller argued that he was the victim of discrimination because he had been replaced by Evans, who was younger. A federal judge in Alabama granted summary judgment in favor of the companies and Gortemoller appealed this ruling to the Eleventh Circuit Court of Appeals.

Legal Analysis

The Eleventh Circuit rejected Gortemoller's age discrimination clam, concluding that he was not replaced by a younger individual. In arriving at this conclusion, the court first noted that to establish a *prima facie* case of illegal bias Gortemoller must show:

(1) He was a member of the protected age group;

(2) He was subjected to an adverse employment action;

(3) He was qualified to do the job; and

(4) He was replaced by or lost his position to a younger individual.

The only disputed issue was whether Gortemoller was replaced by a younger employee.

The Eleventh Circuit found that the companies replaced their "top-down process," in which Gortemoller was an intermediary between salespeople, customers, and designers, with a decentralized process in which the three parties communicated with each other directly. The new system allowed salespeople, customers and designers to make decisions together about what and how products were made.

According to the court, Evans oversees this process but does not perform Gortemoller's former duties, which no one does under the new system. The only duty that Evans performs that "arguably resembles a duty Gortemoller used to perform," the court found, is traveling oversees to inspect products. However, Evans performed this duty before Gortemoller was fired. The court further noted that traveling "is not a duty for which Evans became responsible after Gortemoller was terminated."

In light of this evidence, the Eleventh Circuit concluded that Evans did not replace Gortemoller and that, after his termination, his responsibilities were satisfied by Design Net. Thus, the court affirmed the trial judge's decision to dismiss Gortemoller's age discrimination claim.

Practical Impact

According to Richard Carrigan, a shareholder in Ogletree Deakins' Birmingham office: "The court properly recognized the importance of changes in the work process, as a result of technology, to evaluate an age discrimination claim based on alleged replacement by a younger individual. Performance of a single duty by a younger employee was not sufficient to create a *prima facie* case of age discrimination, where the plaintiff had no direct evidence of discrimination and did not timely raise a 'reduction in force' theory." ■

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Additional Information
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Ogletree Deakins State Office Round-Up

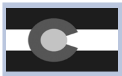
ALABAMA*

The Beason-Hammon Alabama Taxpayer and Citizen Protection Act, House Bill 56, was signed into law on June 9 by Governor Robert Bentley. Intended to address illegal immigration, the law requires business entities or employers seeking economic incentives to verify the employment eligibility of their employees with E-Verify.

CALIFORNIA

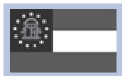
On August 3, Governor Jerry Brown signed S.B. 272, a bill to clarify the recently enacted law allowing employees to take protected paid leave to donate an organ or bone marrow. The new legislation, which takes effect on January 1, 2012, states that employers must provide health insurance at the same level while employees are on leave. It also clarifies that the 30 days of paid leave are business days (not calendar days).

COLORADO*



The Job Protection and Civil Rights Enforcement Act of 2010 (SB-72) recently died in House Committee by a close 5-4 vote. SB-72, similar to previous bills that have been introduced the last two years, would have amended the Colorado Anti-Discrimination Act to make available compensatory and punitive damages in employment discrimination cases brought under state law.

GEORGIA*

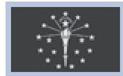


Governor Nathan Deal recently signed Georgia's Illegal Immigration Reform and Enforcement Act of 2011, which will require private employers with 500 or more employees to begin using E-Verify to check the employment authorization of newly hired employees by January 1, 2012. Employers with 100 or more employees must start using E-Verify on July 1, 2012, and employers with 11 or more employees must begin using E-Verify on July 1, 2013.

ILLINOIS*

On June 28, Governor Pat Quinn signed HB 1698, ushering in a comprehensive overhaul of Illinois' workers' compensation system and the state's Workers' Compensation Commission. Under the reformed system, Illinois businesses are expected to save up to $500 million on workers' compensation premiums and injured workers will be provided with additional protections. The reforms take effect on September 1, 2011.

INDIANA*

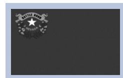


Governor Mitch Daniels recently signed into law a measure (SB 411) that further restricts employers from regulating the possession of firearms by their employees. Specifically, the new law prohibits employers from requiring current employees or job applicants to divulge information about their ownership, use, possession or transportation of firearms or ammunition.

MICHIGAN

The Sixth Circuit Court of Appeals recently dismissed a lawsuit brought by a Michigan UPS driver who claimed that the company discriminated against him on the basis of his age by replacing him with a 48-year old co-worker. The court ruled that a replacement selected pursuant to a collective bargaining agreement does not give rise to an inference of discrimination. *MacDonald v. UPS*, No. 09-2617 (July 14, 2011).

NEVADA*

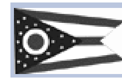


On June 1, Governor Brian Sandoval approved SB 328, which adds another exemption from overtime requirements by expanding the definition of "professional" to include individuals employed in creative arts. This new exemption follows closely on the heels of the Nevada Labor Commissioner's determination that Nevada's minimum wage will not increase on July 1, 2011.

NEW JERSEY*

The Third Circuit Court of Appeals has ruled that failing to provide an employee with specific training related to her job does not amount to an adverse employment action. The court found that there was no evidence that the employee's work suffered or that her advancement or earning potential was affected. *Pagan v. Gonzalez*, No. 10-4274 (June 9, 2011).

OHIO*



The Ohio Supreme Court recently held that R.C. 4123.90, the state law that prohibits employers from discriminating against employees for filing workers' comp claims, expresses a clear public policy against the retaliatory firing of injured employees, including those who are fired *before* they file a workers' comp claim. *Sutton v. Tomco Machining, Inc.*, No. 2011-Ohio-2723 (June 9, 2011).

TENNESSEE

The Sixth Circuit Court of Appeals has rejected a sex discrimination claim brought by an openly-gay Nashville stage producer who argued that a union hiring hall refused to provide him with work after he complained that a co-worker threatened to stab him. The Sixth Circuit ruled that under Title VII, sexual orientation is not a prohibited basis for discriminatory acts. *Gilbert v. Country Music Ass'n Inc.*, No. 09-6398 (August 2, 2011).

TEXAS*

On June 24, the Texas Supreme Court further relaxed the requirements of covenants not to compete, moving away from the technical questions of contractual enforceability. The court held that an employer may obtain a covenant not to compete in return for an employee's acceptance of a stock option grant, so long as the covenant is reasonable in time, scope and geography. *Marsh USA Inc. v. Cook*, No. 09-0558 (June 24, 2011).

**For more information on these state-specific rulings or developments, visit www.ogletreedeakins.com.*

"What Did You Say?" – Social Media And The NLRB

*by Rodolfo R. (Fito) Agraz**

The website Wikipedia defines *social media* as "media for social interaction, using highly accessible and scalable communication techniques." Key to social media is "the use of web-based and mobile technologies to turn communication into interactive dialogue." Social media has a natural tendency to allow the user to connect with multitudes of users and provide each of those users the ability to instantly respond to both the original author and those undefined multitudes. Social media offers the power to connect and influence in ways never before possible.

Many employers have decided to address the use of social media by their employees. Questions include whether to promote its use, discourage its use, and/or limit its use. And, the Acting General Counsel for the National Labor Relations Board (NLRB) clearly intends to broadly protect employee use of social media to discuss workplace issues. While at this point there are likely more questions than answers, in this article we will provide what guidance we have from the NLRB and attempt to design a roadmap for employer action based on those rules and implications drawn from enforcement efforts by the Acting General Counsel.

Legal Issues

The current NLRB is concerned not only with maintaining the traditional balance of employee and employer rights but also with, in its view, zealously guarding employee rights to band together to address employment concerns. And, as evidenced by actions such as the decision of the Acting General Counsel to issue a complaint against Boeing for creating an additional manufacturing facility in South Carolina, the NLRB is not hesitating to act when it feels organized labor is threatened by employer actions. In the case of social media, the NLRB's primary areas of concern are "protected concerted activity" and "surveillance" of such employee activity.

* Fito Agraz is a shareholder in Ogletree Deakins' Dallas office, where he represents management in labor and employment related matters.

Protected Concerted Activity

Section 7 of the National Labor Relations Act protects employees who engage in union organizing activity, but also "other concerted activities" for the purpose of collective bargaining or "mutual aid or protection." Complaints about management and conversations regarding wages, hours, and working conditions can be protected. However, guidance on the subject of what speech and action is protected has been, at best, confusing and, at worst, conflicting. For example, the NLRB has reviewed employee statements and actions and found them to be protected even when they reveal confidential information, yet found a rule prohibiting "slanderous or detrimental statements" to be lawful.

The definition of "concerted" has been tortured from the common-sense definition of "two or more" to include employee activity:

- "Engaged with or on the behalf of other employees";
- One employee bringing a *group concern* to management; and
- Individual action "seeking to initiate group action" or "with a purpose of furthering group goals."

Outside of the social media context, NLRB regional offices have concluded that: (1) an employee who highlighted and posted changes to a vacation policy on the employer's bulletin boards did engage in protected concerted activity; (2) an employee who complained during a department meeting about her pay did not engage in protected concerted activity; and (3) an employee who complained loudly to her manager and to co-workers about the impact on her of a change in the schedule was engaged in protected concerted activity.

Posts On Social Media

Not surprisingly, the NLRB has continued to send mixed messages when applying the protected concerted activity standards in the social media context, challenging employers to carefully provide guidance to employees regarding expectations about behavior while not running afoul of the NLRB's interpretation of protected concerted activity. One thing is clear, however: the current NLRB is likely to apply an expansive definition of the term. For example, the following actions will likely be considered concerted and/or protected activity:

- A blog or post to which others can reply;
- Critical comments posted on a social media site;
- An employee calling a supervisor "psychotic"; and
- Posted employee complaints regarding staffing levels and working conditions.

On the other hand, the Office of Advice of the General Counsel recently found that a newspaper reporter who posted derogatory comments regarding a television news competitor and repeatedly posted tweets that were considered in poor taste by the employer engaged in conduct which was neither concerted nor protected. The employer had set out specific examples of unacceptable behavior and the Office of Advice recommended dismissal of the charge despite clear evidence that the employer made statements that could be interpreted to prohibit Section 7 activities, such as directing the employee to "stop airing his grievances or commenting about the Employer in any public forum."

Activity Not Protected

Activity can be so extreme that it loses the protection of Section 7, even if it is concerted and even if it deals with terms and conditions of employment. Such conduct typically involves unlawful or violent acts, such as defamation, theft, battery, assault, or discriminatory conduct or statements. The current NLRB would likely find conduct involving mere disparagement, simple profanity, rudeness, and shouting to be protected.

Surveillance

Employers also must be mindful that it is arguably unlawful to engage in surveillance of Section 7 protected employee activities, including protected concerted activity, or to create the impression of surveillance. While an

employer's review of a post in the public domain does not likely constitute "surveillance," the current General Counsel would likely challenge as unlawful a comment to an employee about the employer's review of the post. More clearly, an employer must honor password protection, should not use a password voluntarily provided by one with legitimate access, and cannot ask another employee to monitor posts on its behalf. An employer may review posts provided to it by another employee.

Policy Guidelines

There are a number of factors critical to the legality of a social media policy:

Timing Of The Policy

As an initial matter, the NLRB will look to whether the policy was created in advance of or in response to union organizing activity or other protected concerted activity.

Application Of The Policy To Discipline An Employee

Although the NLRB has taken the position that a policy can be unlawful on its face, the NLRB has used the imposition of discipline as an added indicator that a policy is unlawful.

Other Violations

An employer found to have engaged in other unlawful conduct is more likely to have its social media policy found to be unlawful.

Does The Policy "Reasonably Tend To Chill Employees" From Exercising Their Section 7 Rights?

A review of non-precedential guidelines issued by the General Counsel's office and the General Counsel's decisions to issue complaints in several recent cases, lead to the following guidelines to determine whether a policy will be found to "reasonably tend to chill employees" from exercising their rights:

- Disparaging remarks, critical statements or complaints cannot be prohibited;
- Product disparagement can be limited, but comments generally critical of the company or management cannot;
- Policies cannot simply prohibit negativity or negative comments;
- Unlawful harassment can be prohibited, but some impulsive behavior, including some profanity, must be tolerated;
- Rules that employees must follow the "chain of command" cannot be enforced in the social media context;
- Employers cannot prohibit employees from identifying themselves as an employee of the company (in fact, the FTC requires identification as an employee of the company when endorsing the company's product);
- The disclosure of confidential information obtained without permission can be prohibited;
- Trade secrets can be protected from disclosure;
- Copyrights can be protected;
- Defamation can be prohibited;
- Discriminatory statements can be prohibited;
- "Maliciously false" statements can be prohibited, but merely "false" statements cannot; and
- Mentally or physically abusive statements/conduct can be prohibited.

> *"The NLRB's primary areas of concern are 'protected concerted activity' and 'surveillance'."*

Disclaimers

An employer also must consider whether to include a disclaimer intended to minimize the potential for an employee to believe that protected concerted activity is restricted by the employer's policy. This is primarily a matter of risk tolerance. Employers should consider the following policy options, providing minimum to maximum protection:

- "This policy is not intended to interfere in any way with any applicable federal, state or local law";
- "Application of this policy will be consistent with the National Labor Relations Act";
- "This policy will not be interpreted or enforced in a manner that would interfere with employees' rights to discuss work related issues with one another"; or
- "This policy is not intended to interfere with employee rights to form, join or assist unions or to engage in other concerted activity protected by the National Labor Relations Act."

Recommendations

The NLRB's approach to employer regulation of employee participation in social media is evolving quickly. Employers should carefully consider their objectives for social media policies and draft their policies to address those concerns. It is tempting to pull down a social media policy from the Internet and be able to say "done" with this task. However, there is obviously more to it than a copy and paste exercise.

Employers should first ask "what is it that we seek to promote, what is it that we seek to limit, and why do we want to limit it?" The development of an effective and sustainable social media policy depends not only on the legal boundaries, but also the business objectives of the organization. And, the reality is that employers must be prepared to accept some public statements it would prefer not be made.

The more a policy is crafted to protect an employer's legitimate business interests, the more likely it is to (1) be a useful tool and guide to employees, and (2) survive legal review. Once implemented, the policy should be carefully monitored to ensure that it remains consistent with the organization's objectives and in line with the NLRB's most recent pronouncements.

The Obama NLRB and its venture into the social media arena will be discussed in detail at this year's Not Your Father's NLRB seminar, which will be held on October 27-28 at the InterContinental New Orleans. The program is sponsored by Help Center Seminars and features several speakers from Ogletree Deakins. Attendees will receive information from Washington "insiders" and experienced practitioners about the latest NLRB initiatives, decisions and directions. For a detailed agenda and registration information, see the enclosed brochure or visit www.helpcenterseminars.com. ■

New To The Firm

Several lawyers recently have joined the firm. The new attorneys include: Sarah Hawk (Atlanta); Katherine Reeves (Birmingham); Kwabena Appenteng and Kimberly Jones (Chicago); Marcela Mendoza (Denver); Eric Penkert and Daniel Sulton (Greenville); Traer Galyean (Kansas City); Nicole Kamm, Hardy Murphy and Truc Nguyen (Los Angeles); Carl Morrison (Memphis); Gregory Hawran (Miami); Jaime Cole (Minneapolis); Robert Wennagel (Orange County); Lindsey Baldwin and Charles Gillman (Raleigh); T. Cullen Wallace (San Antonio); and Jill Cartwright (San Francisco).

"SUPREME COURT"

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managers' discretion over pay and promotions was exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees. Further, because Wal-Mart was aware of this effect, its refusal to properly restrain its managers' decision-making authority constituted disparate treatment, according to the workers.

The plaintiffs argued that all of Wal-Mart's female employees were subjected to this bias. According to the complaint, Wal-Mart has a strong and uniform "corporate culture" that permits bias against women that affects the discretionary decision-making of all of Wal-Mart's managers. As a result, the plaintiffs claimed, every female employee is the victim of one common discriminatory practice.

The plaintiffs asked the trial judge to certify a class consisting of "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices." The trial judge certified the plaintiffs' proposed class and the Ninth Circuit Court of Appeals substantially affirmed the certification order. The case eventually reached the U.S. Supreme Court.

Legal Analysis

Federal Rule of Civil Procedure 23 governs whether a case may proceed as a class action. Under Rule 23(a), the party seeking certification must demonstrate, among other things, that "there are questions of law or fact common to the class" – the so-called commonality requirement. To meet this requirement, Justice Antonin Scalia explained (on behalf of a 5-4 majority), the plaintiffs must show that their claims depended on common contentions that are capable of classwide 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."

In this case, Justice Scalia noted, proof of commonality necessarily overlaps with the merits of the plaintiffs' claim that Wal-Mart engages in a pattern or practice of discrimination because the crux of a Title VII inquiry is "the reason for a particular employment decision." Thus, to satisfy the commonality requirement, the Court ruled, the plaintiffs must show that Wal-Mart "operated under a general policy of discrimination."

The high court ruled that the plaintiffs did not present significant proof of such a policy. In arriving at this conclusion, Justice Scalia noted that Wal-Mart's published policy forbids sex discrimination and imposes penalties for denying equal employment opportunity. Moreover, the Court found that the only policy that the plaintiffs did establish "is Wal-Mart's 'policy' of allowing discretion by local supervisors over employment matters." In a company using such a system of discretion, the Court ruled, "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's."

In the absence of a corporate policy of discrimination, the Court also disregarded the testimony of the plaintiffs' sociological expert (as well as their statistical and anecdotal evidence). Thus, because the plaintiffs did not provide "convincing proof of a company-wide discriminatory pay and promotion policy," the Court concluded that no common question was established.

The Court next turned to whether the plaintiffs' claims for back pay were properly certified under Rule 23(b)(2), which applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." According to the Court, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class – not when each individual class member would be entitled to a different injunction or declaratory judgment or when each class member would be entitled to an individualized award of monetary damages.

The Court ruled that claims for monetary relief may not be certified under Rule 23(b)(2), "at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief." Thus, the Court held that the plaintiffs' claims for back pay were improperly certified under Rule 23(b)(2). Significantly, all members of the Court joined in that part of the majority opinion.

Practical Impact

According to Meg Campbell, a shareholder in Ogletree Deakins' Atlanta office: "The *Dukes* majority quite thoroughly analyzed and harmonized the Court's class action precedent to provide lower courts – and defendants' counsel – with a helpful framework for testing rigorously the plaintiffs' proof of commonality, including expert and anecdotal evidence, in considering class certification motions. The majority particularly focused on the 'common *answers*' test of commonality, and emphasized the requirements of '*significant* proof' of a general policy of discrimination and identification of a '*specific* [discriminatory] employment practice' that ties all of the putative class members' claims together. The Court thus reaffirmed that the bar for class certification in Title VII cases is a high one, and the practical effect ought to be

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EEOC WEIGHS IN ON "GINA" AND EMPLOYEE WELLNESS PROGRAMS

Finds Law Prohibits Financial Incentives As Inducement To Provide Genetic Information

The Genetic Information Nondiscrimination Act (GINA) generally prohibits employers from requesting, requiring or purchasing genetic information regarding employees. However, the Act sets forth specific exceptions, one of which allows an employer to acquire genetic information about an employee (or his or her family members) when the employer offers a wellness program to employees on a voluntary basis. In June of this year, the Equal Employment Opportunity Commission (EEOC) provided guidance – in the form of an opinion letter – on certain issues affecting wellness programs.

The EEOC begins the opinion letter by pointing out that it classifies wellness programs as a type "voluntary" medical exam/activity. Title I of the Americans with Disabilities Act (ADA) allows employers to conduct "voluntary" medical exams – specifically those that involve obtaining medical histories – so long as any medical information obtained is kept separate and apart from personnel records. However, the EEOC has not taken a position on whether the ADA allows an employer to offer financial incentives for employees who participate in wellness programs that include disability-related inquiries or medical examinations.

The EEOC's opinion letter states that GINA allows an employer to use genetic information voluntarily provided by an employee to "guide that individual into an appropriate disease management program." However, the letter also spells out parameters related to the gathering and compilation of such information.

First, an employer must obtain prior voluntary and knowing authorization from an employee, in writing, before acquiring genetic information for the wellness program. Further, any individually identifiable genetic information provided under the wellness program exception must be used only for purposes of such services in aggregate terms that do not disclose the identity of specific individuals. Finally, an employer may not offer any financial inducement for individuals to provide genetic information as part of a wellness program.

However, according to the EEOC's opinion letter, the wellness program may offer financial inducements for completion of health risk assessments that include questions about family medical history or other genetic information. However, the covered entity must make clear, in language reasonably likely to be understood by those completing the health risk assessment, that the inducement will be made available whether or not the participant answers specific questions regarding genetic information. In other words, if the assessment contains a mix of questions, certain of which are related to genetic information, any financial incentive offered for participating in the assessment must be paid without regard to whether the individual answers the genetic information questions. ■

"SUPREME COURT"

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that there will be fewer company-wide cases filed, certified and settled."

According to Craig Cleland, a shareholder in the firm's Atlanta office: "By disapproving the Ninth Circuit's relaxed standard for establishing commonality, the Supreme Court brings much needed rigor to Rule 23(a)(2)'s commonality requirement. Of course, from the four dissenters' point of view, the majority improperly imports into the commonality requirement the higher hurdle of predominance under Rule 23(b)(3). That said, even the dissenters agree with the majority that this class cannot be certified under Rule 23(b)(2). What's also remarkable is the majority's wholesale rejection of the plaintiffs' statistical and anecdotal case, including their proposal to try the case using a statistical formula. The Court brings sanity to these areas too.

"Where will plaintiffs turn now? I never underestimate the creativity of the plaintiffs' bar. But even so the landscape has changed dramatically and unfavorably for them with this ruling."

According to Elizabeth Washko, managing shareholder of Ogletree Deakins' Nashville office: "The Supreme Court's decision in *Dukes* is good news for employers. Much of this good news relates to important, legal and technical issues concerning statistical analyses and class action rules. However, the decision also provides some helpful language supporting certain common aspects of business operations and decision-making.

"Initially, the Court provided very helpful reinforcement to the concept that a court assessing a Rule 23 class certification request must apply a 'rigorous analysis' and may need to and is permitted to evaluate merits evidence when conducting this analysis. The Court noted that the class action device is an 'exception' to the concept of litigation on an individual basis. This kind of reinforcement is comforting in the current litigation environment in which some plaintiffs' attorneys seem to believe that every discrimination claim should proceed on a class basis.

"While the decision is highly technical and focused on class certification issues, we can glean some practical guidance from it. The Court's rejection of the plaintiffs' complaint about discretionary decision-making provides some validation for the business need for decision-makers to exercise discretion when making employment decisions. As the Court observed, this concept is a 'common and presumptively reasonable way of doing business.'

"Notably, employers that permit their decision-makers to exercise discretion should take steps to ensure that such discretion is not being used inappropriately or in a manner that may expose the employer to at least individual claims of discrimination. In addition, the Court's several references to the fact that Wal-Mart's policy prohibited discrimination highlight the importance of employers having effective, well-established EEO policies that clearly prohibit discrimination in connection with employment decisions, having means to enforce those policies and punish violators, and, in fact, enforcing the policies." ■

CALIFORNIA OVERTIME LAWS EXTENDED TO VISITING EMPLOYEES

◣ *Court Finds Labor Code Applies Even To Short Assignments*

A unanimous California Supreme Court recently held that California-based employers must pay out-of-state resident employees pursuant to the more restrictive provisions of the California Labor Code even if these employees only visit the state on a limited, temporary basis. The unanimous decision held that the state's overtime laws were intended by the California legislature to apply broadly to "protect" workers visiting California (even temporarily); therefore, California's laws trump the laws of states in which employees actually reside and primarily work. ***Sullivan v. Oracle Corp.****, No. S170577, California Supreme Court (June 30, 2011).*

Factual Background

Donald Sullivan, Deanna Evich and Richard Burkow worked for Oracle Corporation as instructors, with the responsibility to train Oracle's customers in the use of the company's products. Sullivan and Evich resided in Colorado and Burkow lived in Arizona. Although the three worked mainly in their home states, they periodically traveled to California and other states to provide training.

Oracle treated its instructors as teachers exempt from state and federal overtime laws. In 2003, Oracle's instructors sued the company in a federal class action alleging misclassification and sought unpaid overtime compensation. Oracle then reclassified its instructors and began paying them overtime. In 2005, the federal action was settled and the class claims were dismissed, except for claims brought by the non-California resident instructors.

These plaintiffs asserted three additional claims. First, the non-California resident instuctors alleged that Oracle was required to pay them overtime in compliance with the more restrictive requirements of the California Labor Code for periods when they were in California temporarily. In California, overtime must be paid for hours worked in excess of eight per day or 40 per week. By contrast, the federal Fair Labor Standards Act (FLSA) requires overtime pay only for work in excess of 40 hours in a week, and many states, including Colorado, have differing requirements (such as the payment of daily overtime only after 12 hours in a workday).

Second, the plaintiffs asserted that the failure to pay these out-of-state employees in compliance with the California Labor Code constituted an unfair business practice in violation of California's Unfair Competition Law (UCL), Business & Professions Code Section 17200. Third, the plaintiffs claimed that pursuant to the UCL, they are entitled to overtime pay due under the FLSA for workweeks exceeding 40 hours worked entirely outside California. The Ninth Circuit Court of Appeals (which has jurisdiction in California) certified these questions to the California Supreme Court to obtain its guidance on these state law issues.

> *"To exclude nonresidents from the overtime laws' protection would tend to defeat their purpose."*

Legal Analysis

On the first question, the California Supreme Court ruled that the Labor Code's overtime provisions do not distinguish between residents and nonresidents; thus, its provisions should apply to any worker who enters California for at least a full day while working for a California-based employer. "The Legislature knows how to create exceptions for nonresidents when that is its intent," Justice Kathryn Mickle Werdegar wrote for the court. "To exclude nonresidents from the overtime laws' protection," she continued, "would tend to defeat their purpose by encouraging employers to import unprotected workers from other states."

On the second question, the California Supreme Court held that the UCL did apply to temporary work performed by nonresident employees, thereby extending the applicable statute of limitations of these claims from three years to four years. On the third question, the court held that the UCL did not apply to overtime work outside California by out-of-state employees based solely on the failure to comply with the overtime provisions of the FLSA.

Practical Impact

According to Thomas M. McInerney, a shareholder in Ogletree Deakins' San Francisco office: "The *Sullivan* decision raises several troubling concerns for employers attempting to do business in the state of California. While the California Supreme Court stated that its ruling only applied to overtime claims, it undoubtedly will be read broadly by plaintiffs and possibly some courts as also requiring that other provisions of the California Labor Code or the state's Wage Orders apply to employees in California on a temporary basis, including state law requirements regarding meal and rest breaks, pay stubs, vacation accrual or forfeiture, etc. There is little doubt that we will now face a decade of litigation over whether the decision applies to all business travelers."

This decision also imposes added administrative burdens on employers operating in California as they now must organize their workforce in such a manner as to either avoid having workers in California on a limited basis or, if they do, organize their pay systems to ensure that they are paid in compliance with California's often onerous pay requirements. Moreover, while the decision ostensibly rejected the application of the UCL to overtime work outside California, it did so based on the facts in this case, and left open the possibility that under different circumstances the UCL might be applied beyond California's borders depending on where the wages were paid. ■