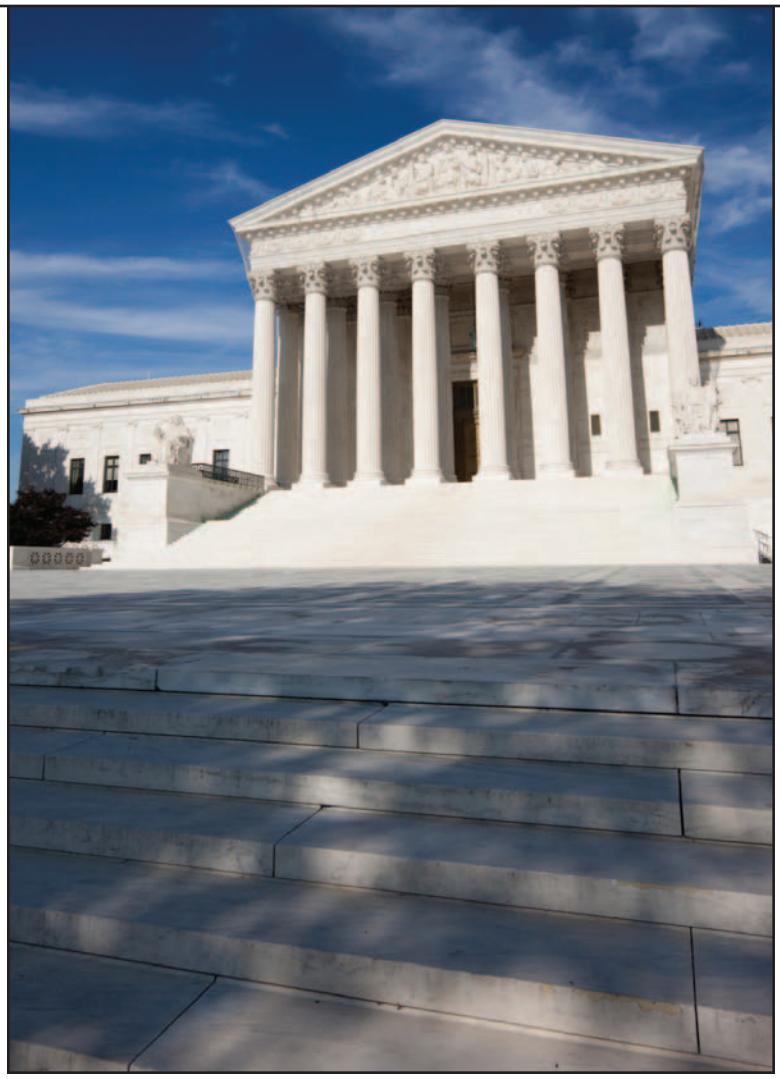
Employment Law Briefing



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Supreme Court doesn't buy Wal-Mart workers' case

In June 2011, the U.S. Supreme Court issued its decision denying class certification for female Wal-Mart employees alleging gender bias. The decision, *Wal-Mart Stores v. Dukes*, was the largest civil rights class action lawsuit in U.S. history and holds important lessons for employers about how courts may treat such broad-based discrimination cases going forward.

Questioning commonality

The primary issue before the Court concerned "commonality," a prerequisite all potential classes must prove before they may be certified. Writing for the 5-4 majority, Justice Scalia held that the Wal-Mart workers hadn't proven commonality, noting that the women "have little in common but their sex and this lawsuit." Without this showing, the plaintiffs couldn't certify a class on a nationwide basis.

The Supreme Court also held that claims for individualized relief, such as back pay, could never be certified under Rule 23(b)(2). This is significant because precedent had long held that back pay is recoverable in employment discrimination class actions certified under Rule 23(b)(2) of the Federal Rules of Civil Procedure.

Playing by the rules

The *Wal-Mart* decision appears to suggest that the larger the company and the more varied and decentralized its job practices, the less likely it will be to face a class-action suit. But we've probably not seen the last of class action employment discrimination claims.

In *United States v. The City of New York* — a notable post–*Wal-Mart* case — the plaintiffs claimed that two firefighter exams administered by the defendant city in 1999 and then from 2002 forward discriminated against minority applicants. Although *Wal-Mart* eliminated the plaintiffs' 23(b)(2) claim, the U.S. District Court for the Eastern District of New York noted that they still had some options for bringing a class action lawsuit.

We've probably not seen the last of class action employment discrimination claims.

First, while the court agreed that *Wal-Mart* eliminated most monetary claims brought under Rule 23(b)(2), its ruling doesn't apply to the liability phase wherein a plaintiff class asserts either a pattern-or-practice or a disparate impact lawsuit. (In pattern-or-practice and disparate impact claims, the district court must first determine the defendant's liability — that is, whether the employer-defendant discriminated against the plaintiff class.)

The key to certification under Rule 23(b)(2) is that the relief sought must be "indivisible" in nature, which is why, in *Wal-Mart*, the Supreme Court held that individualized monetary relief cannot be reconciled with the Rule 23(b)(2) requirements because such relief is divisible. A finding of liability, on the contrary, is completely indivisible — either the defendant discriminated against the class or it didn't.

Therefore, though these classes would most likely have to decertify under Rule 23(b)(2) for any remedial phase (which follows the liability phase and involves the individual issues of the case), Rule 23(b)(2) may still be used for the liability phase.

Second, and perhaps more important, the court in *City of New York* held that, because *Wal-Mart* dealt only with Rule 23(b)(2), plaintiff classes could still use Rule 23(b)(3). To qualify for certification under Rule 23(b)(3), the class must satisfy two requirements in addition to the general class prerequisites: predominance and superiority.

With predominance, the question is whether the common issues that apply to the class are more substantial than the individual issues. With superiority, the question is whether class treatment is superior to individual treatment or vice versa. In *City of New York*, the court found that the plaintiffs met both prongs, which will allow the class to seek individualized "make whole" relief not available under Rule 23(b)(2).

Looking ahead

Although it represents a substantial victory for employers, *Wal-Mart* hasn't eliminated employment class action suits. In the future, employers should expect smaller and more creative classes that answer the commonality question as well as monetary claims brought under Rule 23(b)(2). ♦

Beware of the cat's paw

Theory of subordinate bias looms large in ADEA case

In *Simmons v. Sykes Enterprises, Inc.*, the U.S. Court of Appeals for the Tenth Circuit looked into whether, under the "cat's paw" theory, an employer could be held liable for the discriminatory conduct of a supervisor who'd contributed to the decision to terminate an employee. And the recent U.S. Supreme Court decision in *Staub v. Proctor Hospital* played a key role in the case's outcome.

Disclosed information

The plaintiff began working for Sykes Enterprises in 1997, first as a phone technician and later as a technician/assistant within the HR department. In 2007, the recently promoted site director allegedly directed several comments toward the plaintiff that reflected an age bias.

Specifically, the site director allegedly told the plaintiff that she thought the plaintiff "had already retired" and, on another occasion, that the plaintiff had "better slow down because, at your age, you're going to have a heart attack if you keep this up." Another supervisor also allegedly made age-related comments to the plaintiff.

In August 2007, a Sykes employee complained to the supervisor in question that someone within the company had improperly disclosed the employee's confidential medical information. The site director and supervisor investigated the complaint and concluded that it was the plaintiff who'd disclosed the information to a fellow HR employee, who then disclosed it outside the department.

Sykes' employment counsel then interviewed the plaintiff and her HR co-worker, and the plaintiff repeatedly denied any wrongdoing. But the counsel believed that she gave inconsistent answers regarding her knowledge of the confidential information, and both the plaintiff, who was 62 years old at the time, and her HR co-worker, who was 23, were terminated.

"Because of" and "but-for"

Under the Age Discrimination in Employment Act (ADEA), it's "unlawful for an employer … to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age." (Emphasis added.)

According to the Supreme Court, "because of" an individual's age requires that the employee's age be the "but-for" cause of the employment action, and not just one motivating factor. Thus, finding that Sykes' justification for terminating the plaintiff was, in the eyes of the final decision makers, not "because of" her age, the Tenth Circuit rejected the plaintiff's claim of age discrimination.

Looking at the paw

The plaintiff also invoked the cat's paw theory, alleging that, even if the employment counsel didn't discriminate against her, the counsel based its decision on information provided by the site director and supervisor — two people who did allegedly discriminate against the plaintiff.

According to the cat's paw theory, recently affirmed by the Supreme Court in *Staub*, an employer is liable if:

1. A supervisor performs an act motivated by a discriminatory animus that's intended to cause an adverse employment action, and

2. That act is a proximate cause of an adverse employment action.

In *Staub*, the plaintiff was a military reservist with supervisors hostile to his military obligations. In that case, the plaintiff claimed that his supervisors fabricated allegations against him, leading to his discharge. He sued his employer for discrimination under the Uniformed Services Employment and Reemployment Rights Act (USERRA), asserting that, though his employer may not have been motivated by a discriminatory animus, it discharged him in reliance on individuals who were.

In *Simmons*, the Tenth Circuit concluded that the cat's paw theory *does* apply to ADEA cases, noting that "the underlying principles of agency upon which subordinate bias theories are based apply equally to all types of employment discrimination."

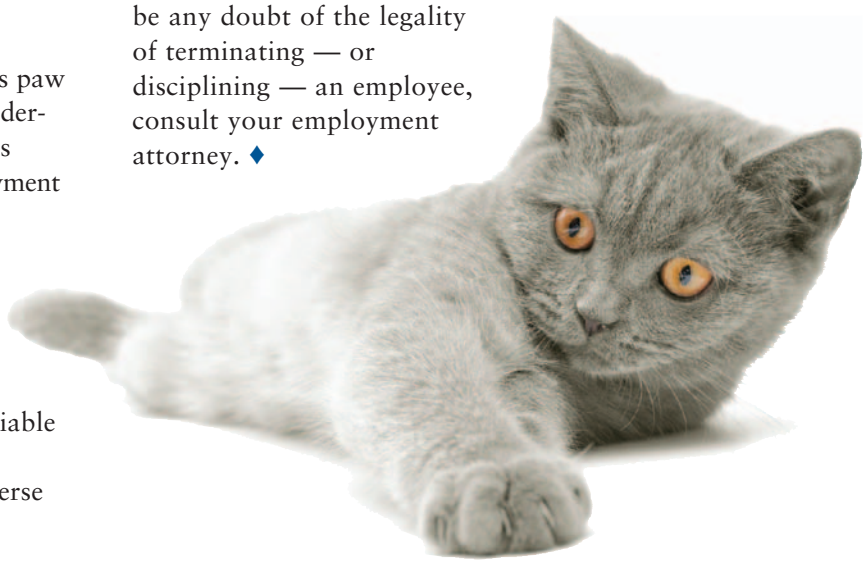
However, the court noted that, unlike Title VII and USERRA, the text of the ADEA doesn't contain any "motivating factor" language. Rather, the employee's age must be the "determinative" factor. So an ADEA plaintiff can hold his or her employer liable under the cat's paw theory only by showing that the subordinate's animus was a but-for cause of the adverse employment action.

There was undisputed evidence in *Simmons* that the plaintiff was fired for violating a company policy reported through channels independent of the site director and supervisor. In addition, the employment counsel received input from individuals other than the allegedly biased site director and supervisor. Thus, the court didn't find but-for cause and held that Sykes would have fired the plaintiff regardless of the claimed animus.

Too much authority

Although Sykes was absolved of liability in this case, the *Simmons* decision highlights the danger of placing too much authority and influence in the hands of lower-level supervisors.

Train your upper-level managers to assess potentially adverse employment decisions for the risk of legal exposure because of subordinate bias. Should there be any doubt of the legality of terminating — or disciplining — an employee, consult your employment attorney. ♦



2 more claws of the cat's paw

In *Simmons v. Sykes Enterprises, Inc.* (see main article), the U.S. Court of Appeals for the Tenth Circuit looked into whether the "cat's paw" theory — that a lower-level employee's discriminatory bias could influence an employer's adverse employment decision — could apply to cases involving the Age Discrimination in Employment Act (ADEA).

In making its decision in that case, the Tenth Circuit provided two additional examples of what could trigger liability:

1. **A biased supervisor falsely reports that an employee has violated company policies, leading to an investigation supported by that same supervisor and resulting in the employee's eventual termination.**

2. **A biased supervisor writes a series of unfavorable reviews that, when seen by the final decision makers, serves as the basis for an adverse employment action against the employee.**

Final EEOC regulations change the meaning of "disability"

The ADA Amendments Act of 2008 (ADAAA) significantly changed the Americans with Disabilities Act (ADA). This year, at long last, the U.S. Equal Employment Opportunity Commission (EEOC) amended its regulations to harmonize with the ADAAA. The final EEOC regs change the legal meaning of the word "disability" in ways every employer should know.

Too restrictive

In enacting the ADAAA, Congress reacted to U.S. Supreme Court decisions in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* and *Sutton et al. v. United Air Lines, Inc.*, which it felt were too restrictive in defining "disability." Under the ADA, a disability must "substantially limit" a major life activity.

In *Toyota*, the plaintiff, who suffered from carpal tunnel syndrome and related ailments and was discharged, brought suit claiming that the company had failed to provide her with a reasonable accommodation. The Court held in Toyota's favor, finding that, though the plaintiff may have been unable to perform major life activities associated with her specific job, her employer wasn't obligated to provide a reasonable accommodation because her impairments didn't prevent or restrict her from performing major life activities that were central to people's daily lives.

In *Sutton*, identical twins with acute visual myopia were denied employment because United required all pilots to possess 20/100 or better uncorrected vision. The twins brought suit, claiming that their vision was better than 20/100 while wearing glasses and that they were, therefore, denied employment because of their disability. The Court rejected this claim, ruling that, though the twins' myopia "substantially limited" a major life activity, they weren't disabled under the ADA because their impairment was correctable with eyeglasses.

Rules of construction

The ADAAA and final EEOC regulations make it clear that, going forward, courts are to use a broader definition of "disability." The final regs include "rules of construction" that are to be used to determine whether an individual is disabled within the meaning of the statute. In other words, is he or she substantially limited in performing major life activities? These rules include:

A rejection of *Toyota*. The final regulations state that the word "major" shouldn't be interpreted strictly to create a demanding standard for disability. In other words, whether an activity is a *major* life activity isn't to be determined based on whether it's of "central importance to daily life."

A rejection of *Sutton*. Any positive effects that an individual gains from a "mitigating measure" have no bearing on the determination of whether that impairment is a disability under the ADA. But these positive effects may be used in other ADA determinations, such as the need to provide reasonable accommodations.

For example, if a deaf person uses a hearing aid, that individual is still deaf and, therefore, disabled under the ADA. But the positive effects gained from the hearing aid eliminate the employer's obligation to provide a reasonable accommodation for that individual.

Expansion of "episodic." Impairments that are "episodic" or in remission will be considered disabilities if the impairment

would substantially limit the individual when active. The final regulations list several examples, including epilepsy, bipolar disorder and schizophrenia.

Perceived disabilities

The ADAAA and final EEOC regs also changed the definition of "perceived disabilities." In addition to covering individuals who have (or previously had) impairments that substantially limit (or have limited) major life activities, the statute also provides coverage for individuals who are perceived — or "regarded as" — having a disability.

Under the ADAAA and final EEOC regulations, individuals may be able to more easily gain coverage under the perceived disability prong. Being "regarded as" disabled under the ADA used to mean the employee would have to prove that his or her employer believed that his or her actual or perceived impairment was substantially limiting. But the ADAAA and final EEOC regs have changed that subjective analysis into an objective one. Now individuals gain "regarded as" coverage whenever an adverse employment action is taken based on their actual or perceived impairment, so long as the impairment isn't "transitory and minor," meaning the impairment has an actual or expected duration of six months or less.

However, individuals who are perceived to be disabled but aren't actually disabled aren't entitled to reasonable accommodations.

Tread more cautiously

It's expected that, in light of the broadened definition of "disability," courts will more readily find merit in disability cases brought before them. With this in mind, employers should tread even more cautiously when circumstances arise that could trigger a disability discrimination claim. ♦

No prejudice

Eighth Circuit sidesteps quirky aspect of FMLA case

When an employee misses work for an extended period because of an illness or injury, it can create many uncertainties for his or her employer. And when questions of allowable leave under the Family and Medical Leave Act (FMLA) come into play, such uncertainties are hardly alleviated.

In *Hearst v. Progressive Foam Technologies, Inc.*, the U.S. Court of Appeals for the Eighth Circuit faced a situation involving an employee who was mistakenly granted FMLA leave before he was actually eligible.

Prolonged recovery

The plaintiff began working for Progressive Foam Technologies on March 15, 2006. At the end of that year, he was injured in a non–work-related car accident and, in early January 2007, he sought treatment for his injuries.

The plaintiff requested and was granted a leave of absence beginning Jan. 3 and ending on Feb. 5. Before this leave was set to start, Progressive sent the plaintiff a memorandum incorrectly informing him that he was "eligible for leave under the FMLA" and that the "requested leave [would] be counted against [his] annual leave entitlement."

The plaintiff's recovery took much longer than anticipated, and his physician repeatedly sent notes to Progressive pushing back his return date. The first letter, sent in mid-January, recommended an additional four weeks. A second note, received toward the end of February, set a return date of April 10.

On March 16, Progressive sent the plaintiff a letter notifying him his leave period would be exhausted on March 28. Additionally, this letter informed the plaintiff that he was being granted a 30-day extension past March 28. But the letter also warned that, if he didn't communicate to the company a specific return date, Progressive would assume that he wasn't returning.

The doctor responded with a "final" return date of May 1. But the plaintiff failed to report to work on May 1, and Progressive fired him for "job abandonment." After this, the doctor revised the date two more times, requesting two more months on May 15 and three more months in late June.

Eligibility requirements

Under the FMLA, eligible employees are entitled to 12 weeks of leave during any 12-month period for, among other things, "a serious health condition that makes the employee unable to perform the functions of the position."

But, in order to qualify for eligibility, the individual must have been employed for at least one year with the employer where leave is requested. With the plaintiff being granted leave on Jan. 3 — about 10 weeks before his eligibility date of March 15 — this case raised the unusual question of how to classify leave given *before* an employee is eligible under the FMLA.

The Eighth Circuit, however, didn't resolve this question. Rather, it sidestepped the issue and decided the case without it.

No harm done

In order to succeed in an FMLA suit, a plaintiff must demonstrate that he or she was prejudiced by the firing. That is, the plaintiff must show that he or she was harmed by the firing, with the most common showing being a loss in compensation.

On this issue, the U.S. Supreme Court has held that, if the condition renders the employee unable to work "for substantially longer" than the FMLA's 12-week period, the plaintiff cannot show prejudice because he or she would have been unable to return to work even if the employer hadn't violated the act.

In order to qualify for FMLA eligibility, the individual must have been employed for at least one year with the employer where leave is requested.

In *Hearst*, the court found that, whether the 12 weeks started on Jan. 3 or March 15, the plaintiff couldn't demonstrate prejudice for either period. He was terminated on May 1, and, two weeks after that, his physician

informed Progressive that the plaintiff would need yet another two months. And then, in June, an additional three months of recovery was reportedly needed.

So even if, as the plaintiff argued, the 12-week period started on March 15, he would have needed to show that he was able to return to work by mid-June, which he clearly couldn't in light of his doctor's most recent letters. Without this showing of prejudice, the plaintiff couldn't succeed on his FMLA claim.

Critical details

In this case, the plaintiff's claim failed because, regardless of Progressive's mistake regarding his FMLA leave, the plaintiff wouldn't have been able to return to work by the end of the 12-week period.

Nonetheless, *Hearst* illustrates the dangers of an employer being unfamiliar with — or simply mishandling — the critical details of FMLA leave. Indeed, it's possible that, if the Eighth Circuit had *had* to rule on the eligibility issue, it might have held that the pre-eligibility leave didn't count toward the 12 weeks to which the plaintiff was entitled. ♦

A message to our clients and friends …

The attorneys in our Employment and Labor Section are available to answer your questions about the articles in the Briefing. We also stand ready to respond to any other questions you might have. It has always been our goal to provide timely and practical advice whenever and wherever a client has a problem. You can contact each of us directly. Call us or send us an email message. We will be there for you.

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