

**DEPARTMENT OF ENERGY  
CONTRACTOR ATTORNEYS'  
ASSOCIATION**

**SPRING 2012 CONFERENCE  
KEY EMPLOYMENT LAW  
DEVELOPMENTS**

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***Wal-Mart Stores, Inc. v. Dukes,***  
--- U.S. ---, Case No. 10-277 (June 20, 2011)

- Basic facts
- Theory
- Lower courts
- The Supreme Court says...
- Practical impact for employers

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## Arbitration of Employment Claims

- Background
  - *Alexander v. Gardner-Denver Co.* (1974)
    - Employees' rights under collective bargaining agreement separate from rights granted by federal statutes
    - Employees can raise similar or identical claims in two forums, arbitration and court
  - *Gilmer v. Interstate/Johnson Lane Corp.* (1991)
    - Arbitration under individual agreements appropriate for resolving statutory claims
    - Heavy burden for arbitration foes to show that Congress intended statutory claims to be litigated only in court

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## Arbitration of Employment Claims

- Background
  - *14 Penn Plaza v. Pyett* (2009)
    - Collective bargaining agreements that “*clearly and unmistakably*” require union members to arbitrate statutory claims are enforceable
    - Misconceptions about arbitration that were raised in *Gardner-Denver* have been corrected
    - Arbitration is on equal footing with court litigation

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## Arbitration of Employment Claims

- Background
  - Class action waivers
  - Samples:
    - “The arbitrator shall not consolidate claims of different Associates into one (1) proceeding, nor shall the Arbitrator have the power to hear an arbitration as a class action (a class action involves representative members of a large group, who claim to share a common interest, seeking relief on behalf of the group.” (Macy’s Department Stores)

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## Arbitration of Employment Claims

- Background
  - Samples:
    - “IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.” (Nissan Motor Acceptance Corp.)

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## Arbitration of Employment Claims

- Background
  - Samples:
    - “... This mutual obligation to arbitrate claims also means that both you and [Employer] forego any right either may have to a jury trial on claims relating in any way to your employment, and both you and [Employer] forego and waive any right to join or consolidate claims in arbitration with others or to make claims in arbitration as a representative or as a member of a class or in a private attorney general capacity, unless such procedures are agreed to by both you and [Employer]. ...” (U-Haul Co. of California)

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## Arbitration of Employment Claims

- *AT&T Mobility LLC v. Concepcion*, 563 U.S. ---, 131 S.Ct. 1740 (April 27, 2011)
  - Non-employment context
  - Telephone contract stated that all disputes would be submitted to arbitration and prohibited class wide arbitration
  - Supreme Court enforces arbitration agreement, in part, based on FAA and the principles expressed in *14 Penn Plaza*

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## Arbitration of Employment Claims

- *CompuCredit Corp. v. Greenwood*, --- U.S. ---, 132 S.Ct. 665 (Jan. 10, 2012)
  - Not an employment dispute, statutory claims under the Credit Repair Organization Act
  - CROA provides for “right to sue,” but does not specify a forum
  - Supreme Court reads statutory language to allow for arbitration absent strong statutory language prohibiting arbitration

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## Arbitration of Employment Claims

- *Ralphs Grocery Co. v. Brown*, No. 11-880 (April 16, 2012)
  - State wage and hour claims filed by individual under California Private Attorney General Act
  - California Court of Appeal held that class waivers would not be enforced, *Concepcion* would not be applied. 197 Cal.App.4th 489 (July 11, 2011)
  - Supreme Court denies petition for certiorari

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## Arbitration of Employment Claims

- The agencies' myopic view of the world
  - NLRB
    - *D.R. Horton, Inc.* (2012)
      - Employment agreement preventing employees from engaging in collective or class action suits violates National Labor Relations Act
      - FAA bows to NLRA
      - On appeal

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## Arbitration of Employment Claims

- The agencies' myopic view of the world
  - EEOC
    - “Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment” (July 10, 1997) still on website
    - “The *Gilmer* decision is not dispositive of whether employment agreements that mandate binding arbitration of discrimination claims are enforceable. As explicitly noted by the Court, the arbitration agreement at issue in *Gilmer* was not contained in an employment contract.”

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## Affirmative Action

- OFCCP's Proposed Rule on Advancement of Disabled
  - Published December 9, 2011, comment period ended February 7, 2012 – no projected date for final agency action
  - Each contractor and subcontractor would have utilization goal of employing disabled persons, to be 7% of each job classification (comment also invited on 4% - 10%)
  - Disabled persons given priority in hiring and promotions, three specific types of outreach and recruitment

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## Affirmative Action

- OFCCP's Proposed Rule on Advancement of Disabled (cont'd)
  - Written procedures to address requests for accommodation
  - Response to request required within 5-10 business days
  - Any denial of a request
    - In writing
    - Giving reasons
    - Advising of employee's right to complain to OFCCP

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## Affirmative Action

- OFCCP's Proposed Rule on Protected Veterans
  - Published April 26, 2011, comment period ended July 11, 2011 – projected final agency action July 2012
  - Would apply to apply to contracts after December 1, 2003, of \$100,000 or more

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## Affirmative Action

- OFCCP's Proposed Rule on Protected Veterans
  - Increased data collection – every year and retained five years
    - # of referrals from state employment services
    - # of those referrals who are known, protected veterans
    - # of applicants for employment
    - # of job openings
    - # of hires who are known, protected veterans

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## Affirmative Action

- OFCCP's Proposed Rule on Protected Veterans
  - From this data, computations:
    - “Referral ratio” = known, protected veteran referrals/total referrals
    - “Applicant ratio” = known, protected veteran applicants/total applicants
    - “Hiring ratio” = known, protected veterans hired/total hires
  - Hiring benchmarks
    - % of protected veterans (relative to total hires) contractor will strive for

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## Affirmative Action

- OFCCP's Proposed Rule on Protected Veterans
  - Annual review of hiring, training and promotion decisions
    - Each time a veteran applied
    - For each one, written statement of the reasons for rejecting the veteran
    - If veteran was disabled, and not selected, written statement of all accommodations that were considered
    - If veteran was disabled, and selected, written statement of all accommodations that were provided

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## EEOC

- Still acting like the New Sheriff in Town
  - Bigger budget
  - Record number of charges (almost 100,000 in 2011)
  - Substantial monetary recoveries
- Strategies
  - Each charge used as a launchpad for national discovery
  - Treating episodic cases as if systemic discrimination
  - Increased use of fact-finding conferences
  - Subpoenas

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## Retaliation Law Developments

- Protected opposition/participation
  - Making a complaint or grievance
  - Witness in investigation
- Unprotected actions
  - Processing a complaint or grievance
  - Objecting to hiring record
  - Objecting to how investigation was conducted

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## Retaliation Law Developments

- *Thompson v. North Amer. Stainless, LP*, --- U.S. ---, 131 S.Ct. 863 (2011)
  - Basic facts
  - Legal theory
  - Supreme Court says... “within the zone of interests protected by Title VII”
  - Practical impact for employers

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## Associational Discrimination

- Theory
- Risk areas
- Practical impact for employers

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## **Familial Duties Discrimination**

- Theory
- Risk areas
- Practical impact for employers

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## **More Theories**

- Criminal history discrimination
- Unemployment discrimination
- Credit discrimination
- H.S./GED discrimination
- Social networking

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## Employer Takeaways

- *Dukes* - Revise job descriptions
- *EEOC* – Write Congress
- *Concepcion* - Rethink arbitration agreements
- *Retaliation* – Add to discipline checklists
- *Affirmative Action*
  - Get more server space
  - Brace for self-IDs
  - Written procedures for RA requests
- *Criminal/Unemployment/Credit/H.S.*
  - No blanket rules
  - Job-related
  - Business necessity
- *Social Networking* - Stop it!

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## DEPARTMENT OF ENERGY CONTRACTOR ATTORNEYS' ASSOCIATION

### SPRING 2012 CONFERENCE KEY EMPLOYMENT LAW DEVELOPMENTS

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