Supreme Court Rules on Class Actions, Arbitrations, Immigration and Individual Rights

In its recently completed 2010 term, the United States Supreme Court has ruled in ten “cases and controversies” with significant ramifications for the law of the workplace. The high court’s decisions ranged from employee benefits to wage complaints, immigration to retaliation, discrimination to the First Amendment, and more.

By far, the case most closely watched involved the certification of a class of more than 1.5 million women claiming sex discrimination by the nation’s largest employer. Another significant decision concerned the validity of class action waivers in arbitration agreements. In both decisions, a majority of the justices agreed with the defending companies and ruled against class action status, throwing cold water on the growing trend toward multiple-plaintiff actions in litigation and arbitration.

In cases brought before the Court in individual actions, the results were mixed. In one decision, the Court ruled against a police chief who sued his municipal employer for retaliation under the First Amendment’s Petition Clause. In other decisions, the Court sided with the plaintiff-employee, finding:

1) an oral complaint about time-keeping practices was sufficient to invoke anti-retaliation protection under the federal wage-and-hour law;

2) an employer was liable for discrimination when a neutral company official fired an employee upon the recommendation of a biased supervisor; and

3) an employer illegally retaliated against the fiancé of another employee who had filed a grievance.

The Court gave a “thumbs up” to Arizona’s immigration law and to the federal government’s wide-ranging background checks of employees of government contractors. It also clarified that successful defendants may be entitled to attorneys’ fees for the costs of defending frivolous civil rights claims.

Continued
Unanimous Ruling on Improper Certification of Class-wide Claim for Damages

To achieve class certification under the federal rules, plaintiffs must satisfy all of the requirements of Rule 23(a) and one of the three requirements of Rule 23(b). In the Wal-Mart v. Dukes opinion, all nine justices agreed it was improper to certify the class under Rule 23(b)(2), which allows class actions where plaintiffs seek injunctive or other non-monetary relief. Here, the plaintiffs also sought back pay, which, inconsistent with the “indivisible nature” of class-wide relief, would require different injunctions, declaratory judgments or individual awards. The Court firmly rejected the application of that rule where claims for individualized monetary relief are involved.

Wal-Mart v. Dukes: How the Nation’s Largest Employer Defended “One of the Most Expansive Class Actions Ever”

The stakes could not have been much higher: the nation’s largest employer against the largest potential class of plaintiffs in a Title VII sex discrimination suit. The allegation: the employer permitted a corporate culture of bias by granting local managers broad discretion in making pay and promotion decisions that disproportionately favored men. The basis: analytical and anecdotal evidence that women were underrepresented in management in proportion to their numbers company-wide and that subjective decisions by individual managers resulted in disparities in pay between men and women doing the same work. The legal question: did over 1.5 million women share the required “commonality” and other characteristics necessary for a single class of plaintiffs to challenge “the reason for a particular employment decision”? Both the federal trial and appellate courts had answered “yes,” and certified the class of plaintiffs in the litigation.

Ruling 5 to 4, the Supreme Court disagreed. It found the plaintiffs had not satisfied the class action requirements in Rule 23(a) and Rule 23(b)(2) of the Federal Rules of Civil Procedure. Under Rule 23(a), the plaintiffs must show a common injury, not simply common questions raised by the claims. The common injury must be capable of class-wide resolution — one specific contention or issue identified by the plaintiffs must be the key to all of their claims. Where, as in the case before the Court, there is no allegation the employer used a specific, biased testing procedure to evaluate applicants and employees, the plaintiffs must demonstrate “significant proof” the employer “operates under a general policy of discrimination” to show commonality.

Despite statistical and sociological testimony from the plaintiffs’ expert, as well as anecdotal testimony from 40 employees, the plaintiffs failed to meet this burden, the Court concluded. “Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question why was I disfavored” (emphasis in original).


Jackson Lewis attorneys have experience preventing and defending class action and multiple plaintiff litigation, both at administrative agencies and in the courts.

For more information about firm capabilities, go to the Class Actions and Complex Litigation webpage, at www.jacksonlewis.com.

For further analysis of the decision, see “Supreme Court Reverses Certification of Nationwide Class of 1.5 Million Female Workers” at www.jacksonlewis.com.
Court Nixes California’s Refusal to Enforce Class Action Waivers in Arbitration Agreements

Continuing to favor arbitration agreements, the Supreme Court reversed a decision of the California federal appeals court that declined to enforce a consumer arbitration agreement. When individual consumers attempted to pursue their claims against a corporation through a class action lawsuit, the corporation sought enforcement of its arbitration agreement, which specifically waived class claims. The U.S. Court of Appeals for the Ninth Circuit (San Francisco) had upheld the trial court’s decision that the arbitration clause waiving class actions was unconscionable and unenforceable under California law.

In another 5 to 4 ruling, the Supreme Court found the state law was preempted by the Federal Arbitration Act. The FAA, said the Court, reflects the strong federal policy favoring arbitration and the enforcement of arbitration agreements according to their terms. Although this case involved a consumer arbitration agreement, the ruling would appear to apply to employment agreements. In the past, California courts have applied the unconscionability doctrine to deny enforcement of class action waivers in employment agreements. AT&T Mobility LLC v. Concepcion, 563 U.S. ___ (2011).

Public Sector Employee Could Not Sue for Retaliation Under “Petition Clause” for Private Concern

The Supreme Court dealt a blow to a public sector employee when it found he did not have a First Amendment right to petition for redress for retaliation after filing grievances over his termination and other private matters. The chief of police was awarded reinstatement, but he subsequently filed additional grievances over actions taken against him by his employer. Ultimately, the employee sued the municipality, claiming its actions were retaliatory and in violation of his rights under the Petition Clause of the U.S. Constitution.

In an 8 to 1 ruling, the Supreme Court rejected the employee’s claim. Retaliation by a public employer does not trigger Petition Clause rights unless the actions relate to a matter of public concern. Substantial government interests “justify a cautious and restrained approach,” the Court said, to avoid the result that the First Amendment empowers public employees to ‘constitutionalize the employee grievance.’” Borough of Duryea v. Guarnieri, 564 U.S. ___ (2011).

Oral Complaint Is Sufficient to Trigger FLSA Retaliation Provision

Continuing a trend in private sector retaliation claims, the Supreme Court has found an employee’s oral complaint over time-keeping practices constitutes protected activity triggering the anti-retaliation provision of the Fair Labor Standards Act. In a 6 to 2 ruling, the Court said employee complaints need not be written to enjoy statutory protection.

The FLSA forbids employers from “discharg[ing] or in any other manner discriminat[ing] against any employee because such an employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to” the Act (emphasis added). The FLSA’s use of the broad phrase “any complaint” supported the Court’s finding that a complaint made orally is sufficient. Further, the Court noted that the Department of Labor has interpreted the statute to include oral complaints. Kasten v. Saint-Gobain Performance Plastics Corp, 563 U.S. ___ (2011).

Combined with the revision of the “white collar” exemption regulations and the dramatic growth of multiple-plaintiff and class action lawsuits under federal and state wage-and-hour laws, this decision gives employers even more cause for concern about compliance.
For more analysis of the decision, go to, “U.S. Supreme Court Holds Oral Complaint Sufficient to Trigger FLSA Retaliation Provision” at www.jacksonlewis.com.

For information about Jackson Lewis compliance assistance, see the Wage and Hour Compliance practice webpage, at www.jacksonlewis.com.

**Employer Liable If Supervisor’s Bias Causes Neutral Decision-Maker to Take Adverse Action**

When a decision to take adverse employment action is based on recommendations of direct supervisors, who are motivated by discriminatory intent unknown to the decision-maker, the employer may be acting in violation of anti-bias laws. This is known as the “cat’s paw” theory of liability.

Using that theory in a case involving an Army Reservist, the Supreme Court found a hospital liable for discrimination when it terminated an employee protected by the Uniformed Services Employment and Reemployment Rights Act of 1994. The Court ruled unanimously that the anti-military bias and intention of the employee’s supervisor influenced the decision of the human resources director to terminate his employment, and even though the director did not have discriminatory intent, the employer was nonetheless liable under USERRA.

The Court concluded that “if the supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.”


While the implications of the decision are not favorable for employers, the Supreme Court’s language regarding investigations points to an effective way of reducing exposure to discrimination claims: the decision-maker bases his decision on independent information. The Court noted, “[i]f the employer’s investigation resulted in adverse action for reasons unrelated to the supervisor’s original biased action, then the employer will not be liable.”

Arizona’s “Legal Arizona Workers Act” Not Preempted by Federal Law

The U.S. Supreme Court rejected arguments attempting to enjoin the controversial Legal Arizona Workers Act. The LAWA imposes sanctions on employers that knowingly or intentionally hire unauthorized workers that include the suspension or cancellation of business licenses. It also requires employers to participate in the federal E-Verify program. Ruling 5 to 3, the Supreme Court affirmed the decisions of the federal district and appeals courts. Rejecting arguments that LAWA was preempted by federal law, the Court reasoned that, in enacting LAWA, “Arizona has taken the route least likely to cause tension with federal law.” Chamber of Commerce of the United States of America v. Whiting, 563 U.S. ___ (2011).

The Legal Arizona Workers Act applies to Arizona employers of all sizes. It provides for a progressive penalty system that depends on whether the violating employer “knowingly” or “intentionally” employed the unauthorized alien.

For more analysis of the decision, see “Supreme Court Determines Arizona’s ‘Legal Arizona Workers Act’ Not Preempted by Federal Law” at www.jacksonlewis.com.

Federal Government May Conduct Extensive Background Investigations of Contractors’ Employees

In a unanimous opinion, the Supreme Court ruled the federal government may conduct wide-ranging background checks of workers employed by government contractors. When conducting background investigations, the federal government need not show that certain questions are “necessary” or the least restrictive means for furthering its intent, the Court said. The challenge came from current employees at NASA’s Jet Propulsion Laboratory at the California Institute of Technology. The employees were required to submit to background checks after the federal government instituted new requirements for enhanced security of federal facilities. They objected on the grounds that the investigation violated their constitutional privacy rights.

In reaching its decision, the Supreme Court said the questions in the background check simply have to be reasonable to serve the government’s interests. To allay privacy concerns, the Court noted that all information collected through the process would be subject to non-disclosure pursuant to the federal Privacy Act of 1974. National Aeronautics and Space Administration v. Nelson, 562 U.S. ___ (2011).

For more analysis of the decision, see “Supreme Court Broadens Scope of Associational Retaliation,” at www.jacksonlewis.com.

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A Few Good Bikes

Thanks to donations from its attorneys, staff and their families, Jackson Lewis LLP is proud to have contributed $100,000 to the Armed Services YMCA. The fundraiser called “A Few Good Bikes” took place in each of the Firm’s 46 offices. Dick’s Sporting Goods, a client of the firm, participated by donating hundreds of footballs and basketballs. These funds will be used to buy bicycles and to provide assistance to families of the service men and women stationed at Camp Pendleton, in San Diego County, California, including those in the First Marine Division. The donation to the YMCA took place at the Firm’s family weekend event held at La Costa Resort in Carlsbad, California in late June 2011.

In making the presentation, Patrick L. Vaccaro, firm-wide Managing Partner, said, “We can think of no better way to show our gratitude than to raise money for the families of the women and men in our armed services and with this donation to encourage others within the legal community to include the YMCA at Camp Pendleton in future charitable donations.”

The donations were accepted by George Brown, Executive Director of the Armed Services YMCA at Camp Pendleton and Major General Michael R. Regner, then-Commanding General of the First Marine Division. Other highlights of the fundraising event included a blood drive for the American Red Cross Southern California Region, as well as presentations about the Firm’s pro bono support of other charitable organizations such as Susan G. Komen for the Cure, Martin Luther King, Jr. National Memorial, and the Wounded Warrior Project.
The plaintiff charged the defendant with violating his civil rights under federal law and for defamation under state law. Prior to trial, the plaintiff admitted the federal claims were not valid and they were withdrawn. The defendant prevailed on the remaining charges. In his petition for attorneys’ fees, the defendant did not distinguish between the costs of defending the federal and state claims, and the trial court awarded him the full amount of the fees. The plaintiff then argued that the defendant was entitled only to the costs associated with defending the frivolous claims.

In a unanimous opinion, the Supreme Court said the defendant is entitled to an award of attorneys’ fees for the costs associated with defending against the frivolous claims, but not the entire costs of defense. On the question of how such fees should be allocated, the Court adopted a “but for” test: “Section 1988 permits the defendant to receive only the portion of his fees that he would not have paid but for the frivolous claim.”

The same attorneys’ fees statute applies to claims for employment discrimination under §1981, and similar language for fee awards is found in Title VII. As a practical matter, existing case law creates challenges for defendants to establish that a plaintiff’s civil rights lawsuit was “frivolous, unreasonable or without foundation,” but this decision will be a reminder that plaintiffs may have to pay attorneys’ fees for frivolous claims, even if the case also involves meritorious claims.

For more detailed analysis, see “Supreme Court Rules Background Checks on Government Contractors Do Not Violate the Constitution,” at www.jacksonlewis.com.

Additional information and resources on privacy and information management may be found at the Jackson Lewis webpage on Privacy, Social Media and Information Management.

Employer Entitled to Attorneys’ Fees for Cost of Defense of Frivolous Claims

The Supreme Court has ruled that a defendant in a federal civil rights lawsuit is entitled to its attorneys’ fees if a court determines that the plaintiff’s claims are frivolous. The ruling clears away any uncertainty about the standards for determining attorneys’ fee awards to defendant-employers where some of a plaintiff’s claims are frivolous and some are not. In determining when a defendant is eligible for an award of fees, the Court adopted a “but-for” test, holding that the defendant is “to receive only the portion of his fees that he would not have paid but for the frivolous claim.”

The indomitable Inflatable Rat has survived another legal challenge. The 16-foot tall balloon has been used by the labor movement to garner public attention to the targets of its protests, usually secondary employers using non-union contractors to perform work. In this case, the rat was part of a protest by the Sheet Metal Workers Union against a Florida hospital using the services of a non-union building contractor. Litigation over the action ultimately resulted in the Labor Board deciding the rat shall rise again.

Jackson Lewis attorneys are available to discuss lawful responses to union tactics. For the Jackson Lewis analysis of the decision, see NLRB Rules Union “Rat Displays” and “Bannering” at Secondary Employer Lawful at www.jacksonlewis.com.
NLRB Holds Public Meetings on Proposed Rule Changes to Speed Union Elections

On June 22, the National Labor Relations Board proposed amendments to its existing rules and regulations governing Board procedures in union representation cases. According to the Board’s announcement, the proposed amendments are intended to “reduce unnecessary litigation, streamline pre- and post-election procedures, and facilitate the use of electronic communications and document filing.” On July 19, the Labor Board completed two days of hearings during which Jackson Lewis and more than 60 other speakers testified on behalf of management, unions, and employees. Board members closed the hearing with a promise to maintain “open minds” as they hammer out a final rule.

The proposed rules amendments also generated a congressional hearing by the U.S. House of Representatives Education and Workforce Committee titled, “Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers’ Free Choice.” Jackson Lewis partner Michael J. Lotito testified at the July 7 hearing. Among other things, the changes proposed by the Labor Board could:

- Accelerate the initial hearing date following the filing of a representation petition;
- Mandate expansive pre-hearing discovery of issues by employers;
- Defer litigation of most voter eligibility issues until after the election;
- Limit post-hearing briefs by giving the Board discretionary review;
- Bar pre-election requests to the Board to review regional decisions;
- Require lists of eligible voters be filed electronically within only two days after an election is directed; and
- Mandate that employers provide unions with prospective voters’ phone numbers, and e-mail addresses.

For Jackson Lewis’ analysis of the NLRB’s proposed rules, see, Two Newly Proposed Agency Rules Threaten to Hamper Employer Communications before Union Elections.

For the NLRB’s Fact Sheet and Summary, see, Proposed amendments to NLRB election rules and regulations fact sheet | NLRB.

Term of Current NLRB Chair Expires Before Labor Day 2011

The terms of two of the four sitting members of the National Labor Relations Board expire before the end of 2011. Chairman Wilma B. Liebman has served on the Board since 1997, as chair since 2009. Her third term expired on August 27. Member Craig Becker is serving a recess appointment, which expires on December 31. Of the two remaining members, Mark G. Pearce is serving a term that ends on August 27, 2013. The only Republican member, Brian Hayes, is serving a term that ends on December 16, 2012.

Vacancies may be filled either by nomination by the President and confirmation by the Senate, or by recess appointment by the President. According to the Board’s website, there are two nominations currently pending before the Senate, one for Terence F. Flynn to fill a vacant seat, and one to confirm Member Becker. From January 2008 to April 2010, the Board operated with three of its five seats vacant. During that period, the two remaining members issued nearly 600 decisions. In June 2010, a divided Supreme Court ruled that the two-member Board was not authorized to issue those decisions.

For a brief period in 2010, the Board was at full capacity with five members, but from January 2008 to April 2010, the Board operated with three vacancies. During that period, the two remaining members issued nearly 600 decisions. In June 2010, a divided Supreme Court ruled that the two-member Board was not authorized to issue those decisions.

For more information on the effects of the Supreme Court’s decision and the NLRB response, see “After the Quorum Quandry,” Preventive Strategies, 3rd Quarter 2010 at www.jacksonlewis.com.
Other Labor Board News

Employers should exercise care from a labor-relations perspective in handling social media issues. The National Labor Relations Board’s General Counsel has shown a continuing interest in social media as a medium for complaints against employers. In April, the GC instructed the agency’s Regional Directors that they should submit to the GC’s Division on Advice all cases “involving employer rules prohibiting, or discipline of employees for engaging in, protected concerted activity using social media, such as Facebook or Twitter,” among other issues (see, General Counsel Memorandum 11-11, at www.nlrb.gov).

The directive comes in the wake of some well-publicized agency complaints alleging posts on the social media sites Facebook and Twitter constituted protected concerted activity (see, Preventive Strategies, Second Quarter 2011, Friend or Foe? The Influence – Positive or Negative – of Social Media in the Workplace at www.jacksonlewis.com). Those complaints were resolved without definitive statements by the Board or administrative law judge.

One complaint has generated a written Advice Memorandum, which could be instructive. The complaint alleged a newspaper unlawfully discharged a reporter for various Twitter postings about his employer. Based on a review of the facts and law, the NLRB Division of Advice found no violation. The Tweets of the reporter were not concerted protected activity, and even though the newspaper did not have a specific social media policy, its actions against the single individual for his personal Twitter postings were not unlawful, according to the memo. Lee Enterprises, Inc. d/b/a Arizona Daily Star, at www.nlrb.gov.

For more analysis, see, NLRB General Counsel Remains Focused on Social Media, at www.efcablog.com.

Jackson Lewis News

Congratulations to the 54 attorneys listed as “Leaders in their Field”

Jackson Lewis extends hearty congratulations to the 54 attorneys who were listed as “Leaders in their Field” in the 2011 Chambers USA Legal Guide. The Chambers firm-wide rating praised Jackson Lewis: “This responsive and hands-on team’s top concern is always to help the client efficiently work through whatever issues it is facing.” In addition to individual attorneys, the following Jackson Lewis regional offices were ranked in the top two tiers in their respective areas:

Birmingham, Phoenix, Hartford/Stamford, Orlando/Miami/Jacksonville, Baltimore, Omaha, Las Vegas, Portsmouth, Morristown, Greenville, Memphis and Washington, DC Region/ Norfolk/Richmond offices.

For a listing of the individual honorees, see Jackson Lewis LLP Listed in 2011 Chambers Guide.