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Employment Law News Flash **July 2011**

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WHAT'S NEW IN EMPLOYMENT LAW

Recent Employment Decisions

The Minnesota Court of Appeals Adopts New Legal Standard for Aiding and Abetting Sexual Harassment Under the Minnesota Human Rights Act (MHRA).

***Matthews n/k/a Heller v. Eichorn Motors, Inc.*, (Minn. App. 7/11/11, No. A10-2095)**

- The Minnesota Court of Appeals reversed the employer's summary judgment dismissal and held that the MHRA **does** impose liability on employers for "any person … who intentionally aides, abets, incites, compels or coerces a person to engage in any of the practices forbidden by this chapter or to attempt to do so." Minn. Stat. § 363A.08, subd. 2 and § 363.15 (2010).

- Prior to *Matthews*, Minnesota state and federal cases had not addressed the legal standard for an aiding-and-abetting claim under the MHRA.

- The Minnesota Courts now follow the majority of other states that apply a common law standard, as reflected in the Restatement (Second) of Torts. The appellate court concluded that the Restatement's legal standard is consistent with the original meaning of "aiding and abetting" in a civil context and the remedial purposes of the MHRA.

FACTS:

- The dealership agreed that the manager's conduct of harassing Ms. Matthews violated the MHRA; however, the court agreed with the employer that neither of the owners knew that the conduct had violated the MHRA or substantially assisted or encouraged the violations.

- Plaintiff also argued that knowledge of the sexual harassment should be imputed to the owner simply because the alleged harasser was a high level supervisor. The court disagreed and reiterated that they will require evidence that the owner knew about the sexual harassment, or the "aiding and abetting" claim would fail as a matter of law.

- The court agreed that the record established that Mr. Eichorn knew about the manager's sexual harassment, but there was no evidence that this individual substantially assisted that conduct as this individual no longer had any ownership interest or a position with Eichorn Motors. The court reasoned that subjecting him to an "aiding and abetting" liability claim under the MHRA would be tantamount to imposing a duty on third parties to protect against workplace sexual harassment.

- Plaintiff also asked the court to find that the owner was liable under a responsible-corporate-officer doctrine which permits a corporate officer to be held personally liable for the corporation's violations of strict liability, public welfare statutes, even if the corporate officer was unaware of the actual violations.

- The court declined to do so concluding that no Minnesota case law has applied this doctrine to litigation between two private parties. The court emphasized that it had already rejected the application of this doctrine to the MHRA because the MHRA is not a strict liability statute.

***Wal-Mart v. Dukes*, ___ S.Ct. ___, (June 20, 2011, No. 10-277)**

The U.S. Supreme Court in *Wal-Mart* set aside the class certification of the nation's largest class action suit because:

- Employees failed to show a particular pattern of policy or practice of discrimination that meets the commonality requirement for class actions.

- Employer was entitled to individual proceedings on each back pay claim.

FACTS:

- Wal-Mart is the largest private employer operating in 3,400 locations and employs more than 1 million workers.

- 1.5 million female class members claimed sex discrimination with regard to pay and promotions in violation of Title VII.
- Plaintiffs were 3 current and former employees.

⇒ First plaintiff, a cashier, had performance issues and was "demoted" to "greeter." She claimed two other male greeters were paid more than she was.

⇒ Second plaintiff, alleged a male manager screamed at females more often, told her specifically to "doll up," "wear make-up" and dress better.

⇒ Third plaintiff claimed that she was "rebuffed" whenever she asked for management training to try for a promotion.

- The key for defense was testimony and documentary evidence that showed that pay and promotions were at the discretion of **local** managers.

⇒ In complaint, plaintiffs alleged that **local** managers discriminated against females with pay and promotions, which favored men.

◊ Commentators of this decision have argued that plaintiffs' counsel made a mistake by failing to plead and produce evidence of decisions at corporate level for these two allegations.

- Another strong defense was evidence that local management made subjective decisions.

INSUFFICIENT EVIDENCE BY PLAINTIFFS

- Plaintiffs relied on anecdotal reports of discrimination from about 120 of Wal-Mart's female employees which the court was quick to reject as insufficient for class of 1.5 million.

⇒ The supreme court noted that appropriate class declarations are 1 out of 8 members as in a Teamsters case, where here there were declarations from only 1 out of 12,500 women.

- The court also rejected testimony of expert sociologist, Dr. William Bielby, who conducted a "social framework analysis" of Wal-Mart's personnel practices and "culture."

⇒ The expert was unable to say that the determination made by local managers was affected by the alleged corporate culture of discrimination.

- The supreme court adopted the 9th circuit dissents from other cases noting:

> "Information about disparities as the regional and national ledoes not establish the existence of vel disparities at individual stores, let alone raise the inference that a company wide policy of discrimination is implemented by discretionary decisions at the store and district level."

FUTURE LITIGATION IMPACT

- Fewer class actions in federal court but more filings in state court.

- An increase in regional or local class actions rather than national likely.

- Court was hostile of concept in *Wal*-Mart case of 3 main plaintiffs waiving individualized damages for all other class members; conflict of interest.

- Court warned future plaintiffs that to prevail, they will need to investigate sources of "commonality" early on and establish:

⇒ Common decision makers
⇒ Common policies and practices
⇒ Other common factors resulting in disparate treatment or impact

PRACTICAL POINTERS

- Decentralized management structures in decision making preferred.

- Large employers probably more secure and protected with this decision but mid-sized employers more vulnerable.

ARBITRATION CLAUSES

- Arbitration clauses will prevent the filing of class actions. *See AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (Nov. 9, 2010, No. 09-893) which allowed mandatory arbitration clauses on class action.

- The U.S. Supreme Court held that arbitration is poorly suited to the higher stakes of class litigation. The court concluded that states cannot require a procedure that is consistent with the FAA, even if it is desirable for unrelated reasons.

FACTS

- The Concepcions purchased AT&T service which was advertised to include free phones. They were not charged for the phones but were charged $30.22 in sales tax based on the phone's retail value.

- AT&T moved to compel arbitration under the terms of its contract with the Concepcions. The Concepcions argued that the arbitration agreement was unconscionable and unlawfully exculpatory under California law because it disallowed class wide procedures.

- The district court decided that the arbitration provision was unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions. The Ninth Circuit affirmed.