ZASHIN&RICH CO.,L.P.A.
cleveland | columbus

EMPLOYMENT LAW QUARTERLY

Volume XIII, Issue iii
Fall 2011

In this issue:

Public Employee's Discharge Without Pre-Termination Hearing Violates Due Process

*by Ami J. Patel**

The United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") recently held that a public employee was not entitled to leave under the Family Medical Leave Act ("FMLA") based on a request made prior to reinstatement. *Walls v. Central Contra Costa Transit Authority*, 2010 U.S. Dist. LEXIS 40596 (N.D. Cal., Apr. 26, 2010). Instead, the Court held the employee possessed a protected property interest in his continued employment. In doing so, the Ninth Circuit reversed in part the trial court's summary judgment ruling.

Kerry Walls ("Walls") worked as a bus driver for the Central Contra Costa Transit Authority ("CCCTA") until his termination on January 26, 2006. Walls filed a grievance based on his termination with his union. Following the grievance process, CCCTA reinstated Walls subject to a Last Chance Agreement. When Walls violated the attendance requirement of his Last Chance Agreement, CCCTA terminated his employment again on March 6, 2006. Walls subsequently claimed his discharge violated the FMLA and his due process right to a pre-termination hearing under the U.S. and California Constitutions. The trial court initially granted summary judgment to CCCTA on all of Walls' claims; however, the Ninth Circuit reversed the trial court's ruling on Walls' due process claim.

In line with the trial court, the Ninth Circuit held that Walls' discharge on March 6th did not violate the FMLA. Walls argued that his discharge, which was based on his absence on March 3rd, interfered with his FMLA rights because he made a verbal request for leave during a meeting on March 1st. The parties agreed that Walls had not been reinstated to his position until March 2nd – when he signed and executed the Last Chance Agreement. Therefore, CCCTA had not reinstated him when he made his request for leave on March 1st. The trial court held (and the Ninth Circuit agreed) that because Walls was not an "employee" under the FMLA when he made his request for leave he was not protected by the FMLA.

The Ninth Circuit reversed the trial court's decision regarding Walls' due process rights. As a public employee, under California law, CCCTA could dismiss Walls for cause only because he possessed a property interest in his continued employment. As a preliminary matter, the Ninth Circuit first had to determine whether Walls' Last Chance Agreement modified or somehow altered this property interest. The Ninth Circuit, however, determined that the language contained within the Last Chance Agreement was not strong enough to demonstrate Walls had knowingly or voluntarily waived his due process rights.

The Ninth Circuit then examined whether Walls received both pre- and post-employment safeguards. The court found that CCCTA denied Walls due process because he did not have an opportunity to respond prior to his termination. Further, even though the Last Chance Agreement stated that Walls

(continues on page 7)

Zashin & Rich Co., L.P.A. represents individuals in all facets of domestic relations law and employers in all aspects of employment, labor and worker's compensation law.

Job Applicants Are Not Protected Under the Fair Labor Standards Act's Anti-Retaliation Provision *by Michele L. Jakubs**

The United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") held that the Fair Labor Standard Act's ("FLSA") anti-retaliation provision does not protect prospective employees. *Dellinger v. Sci. Applications Int'l Corp.*, No. 10-1499, 2011 U.S. App. LEXIS 16635 (4th Cir. Aug. 12, 2011). In this case, Natalie Dellinger ("Dellinger"), a job applicant, brought suit against Science Applications when it decided not to hire her shortly after learning she recently filed an FLSA action against her previous employer. The Fourth Circuit, agreeing with the district court, concluded that Dellinger was not an "employee" of Science Applications as defined by the FLSA and that the FLSA's anti-retaliation provision did not cover prospective employees or job applicants.

Dellinger sued her former employer, CACI, Inc., in July 2009 for alleged violations of the FLSA's minimum wage and overtime provisions. Around this same time period, Dellinger applied for a position with Science Applications. Science Applications offered Dellinger a job in late August 2009. The job offer was contingent upon Dellinger passing a drug test, completing specified forms, and verifying and transferring her security clearance. Dellinger accepted the offer and began satisfying the provisions of her offer.

On her security clearance form, Dellinger was required to list any pending noncriminal court actions to which she was a party. Dellinger listed her FLSA lawsuit against CACI, Inc. Several days after Dellinger submitted her security clearance form, Science Applications withdrew its offer of employment. Dellinger then brought an FLSA action against Science Applications claiming that Science Applications violated the FLSA's anti-retaliation provision by refusing to hire her after it learned she had sued her former employer.

Science Applications filed a motion to dismiss Dellinger's complaint, contending that Dellinger did not state a claim for which relief could be granted because the FLSA's anti-retaliation provision protects only employees, not prospective employees or applicants. The district court granted Science Applications' motion to dismiss, and Dellinger appealed to the Fourth Circuit.

The Fourth Circuit upheld the district court's ruling. In doing so, the Fourth Circuit took a plain-meaning approach in examining the text of the FLSA. The FLSA prohibits retaliation "against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter." 29 U.S.C. § 215 (a)(3).

The Fourth Circuit first answered the threshold question of whether an applicant for employment is an "employee" authorized to sue and obtain relief for retaliation under the FLSA as Dellinger had not sued her employer, but rather her *prospective employer*. While Section 215(a)(3) prohibits retaliation "against any employee" the FLSA defines employee as "any individual employed by an employer" under the FLSA. The Fourth Circuit determined that Congress was referring to the employer-employee relationship in providing protection to those in an employment relationship with their *employer*. The Fourth Circuit also reasoned that because Dellinger was an applicant for employment with Science Applications and her application had been approved only on a contingent basis, she never began work. The FLSA defines "employ" as to "suffer or permit to work." The Fourth Circuit, therefore, concluded that an applicant who never began or performed any work could not, by the language of the FLSA, be an "employee."

The Fourth Circuit also distinguished the FLSA from other statutes, including the National Labor Relations Act and the Occupational Safety and Health Act, noting the definition of "employee" under those statutes and enabling regulations is broader than its definition under the FLSA. As a result, the Fourth Circuit held that the FLSA allows private civil actions *only* by employees against employers and that 29 U.S.C. § 215(a)(3) does not authorize prospective employers to bring retaliation claims against prospective employers.

The Fourth Circuit's decision significantly curbs the ability of job applicants to bring any type of FLSA action against prospective employers. Employers should rest a little easier knowing that the FLSA – on its face – provides no protection to individuals who have never actually *worked* for the employer.

Michele L. Jakubs, an OSBA Certified Specialist in Labor and Employment law, practices in all areas of employment litigation and has extensive experience counseling employers on the FLSA. For more information on this decision or any other FLSA compliance question, please contact Michele at mlj@zrlaw.com or 216.696.4441.

An Employee's Failure to Comply with a Condition of Employment Is a Just Cause Discharge for Unemployment Compensation Purposes

*by Stefanie L. Baker**

The Ohio Supreme Court recently held that a discharged employee was ineligible to receive unemployment benefits when her employer discharged her for failing to obtain a professional license required as a condition of continued employment. *Williams v. Ohio Dep't of Job & Family Services*, Slip. Op. 2011-Ohio-2897 (June 22, 2011).

Bridgeway, Inc. ("Bridgeway") is a community mental health center that provides a variety of services to the mentally ill, including housing services, employment services, and counseling. Bridgeway hired Mary Williams ("Williams") as a full-time residential social worker. After working for Bridgeway for three months, Bridgeway offered Williams a promotion to residential services program manager. Bridgeway conditioned the promotion on Williams obtaining certification as a Licensed Independent Social Worker ("LISW") within 15 months. When Williams accepted the promotion, she signed a letter which included a statement that her failure to complete the LISW certification by May 2008 "w[ould] make [her] ineligible to keep this position."

Williams scheduled her LISW certification test for April 2008. However, due to health concerns, she rescheduled her test receiving Bridgeway's consent to extend the 15-month deadline. When Williams finally took the exam, she failed. After a failed exam, the exam cannot be retaken for 90 days. As such, Bridgeway terminated Williams employment for failing to obtain her LISW certification within the allotted time.

Williams then applied for unemployment compensation with the Ohio Department of Job & Family Services. The agency denied Williams benefits after it determined she had been discharged for just cause. Several appeals followed and the Unemployment Review Commission ("URC") conducted a hearing. During the hearing before the URC, Williams argued that two other residential program managers did not have the LISW certification. However, the URC affirmed that Bridgeway discharged Williams for just cause. The URC noted that the other residential program managers had been with Bridgeway for a much longer period and that it was not uncommon for an employer to increase the educational pre-requisites for a position.

Williams appealed to Ohio's Eighth District Court of Appeals. The Eighth District Court of Appeals reversed the URC holding. Relying on *Shaffer v. Am. Sickle Cell Anemia Ass'n.*, No. 50127, 1986 Ohio App. LEXIS 7116 (Cuyahoga Ct. App. June 12, 1986), the Eighth District Court of Appeals held that Bridgeway did not fairly apply its LISW certification requirement.

The Ohio Supreme Court accepted Bridgeway's appeal to decide "whether an employee who fails to obtain a license or certification that was a condition of employment, as verified by the letter of appointment signed by the employee at the time of hire, is discharged in connection with work within the meaning of Ohio Revised Code § 4141.29(D)(2)(a)." The Ohio Supreme Court unanimously reversed the Eighth District Court of Appeals. In doing so, the Court emphasized that Williams accepted the promotion knowing that the LISW certification was required. Moreover, Williams also controlled the timing of her certification exam and chose to wait until nearly the end of her 15-month period before taking it. As for the other two program managers who were not LISW-certified, the Court found that they were considerably more experienced and hired several years before Williams; thus, Williams was not "similarly situated" to them.

Ohio employers should take notice that an employee's failure to comply with a condition of employment will likely render him or her ineligible for unemployment compensation benefits.

**Stefanie L. Baker has experience representing employers in all aspects of unemployment compensation hearings and appeals. For more information about this decision or unemployment compensation benefits, please contact Stefanie at slb@zrlaw.com or 216.696.4441.*

Court Awards Liquidated Damages Under the Family & Medical Leave Act Despite Prior Arbitration Award *by Patrick M. Watts**

The U.S. District Court for the Southern District of Ohio recently held that a former employee may be entitled to liquidated damages and attorneys' fees under the Family & Medical Leave Act ("FMLA") despite already receiving reinstatement and back pay damages through his union arbitration process. *Poling v. Core Molding Technologies*, No. 10-cv-963 (S.D. Ohio June 22, 2011).

Terry Poling ("Poling") began working for Core Molding Technologies ("Core") in 2006. While working at Core, Poling was a member of the International Association of Machinists and Aerospace Workers, AFL-CIO District Lodge 34, Local Lodge 1471 (the "Union"). As a member of the Union, Poling was subject to a collective bargaining agreement ("CBA"). The CBA included an employee attendance provision which provided a set amount of unpaid days off for unexcused absences and tardiness. If the employee exhausts this set amount of unpaid days off, additional absences result in termination.

Poling had a history of Reflex Sympathetic Dystrophy Syndrome ("RSDS") that required regular treatment. He asked that some of his absences be covered under the FMLA. Core approved and certified Poling's FMLA request.

In September, 2008, Poling missed a period of mandatory overtime. Having exhausted his unpaid days off, as provided under the CBA, Poling submitted evidence that his absence was due to his RSDS. However, after reviewing the evidence, Core determined that his absence was not covered by the FMLA because the evidence did not address why he was unable to work that particular day. Given Core's determination that Poling's absence was not covered by the FMLA and that he had exhausted his unpaid days off, Core terminated Poling's employment.

Poling filed a grievance with the Union based on his discharge. In his grievance, Poling argued that Core did not have "just cause" for terminating his employment. The arbitrator agreed with Poling and ordered reinstatement and a monetary award which covered back pay, benefits, and lost opportunities for overtime. Poling returned to his position until April, 2010 when Core moved his position to Mexico.

After his termination, Poling filed suit against Core alleging that Core violated his rights under the FMLA. If an employer violates the FMLA, an employee is entitled to "any wages, salary, employment benefits, or other compensation denied or lost" as a result of the violation, in addition to liquidated damages. Core filed a motion for summary judgment arguing that Poling's claims for compensatory damages (lost wages, benefits, etc.) equitable relief, liquidated damages, and court costs were void and foreclosed by that fact that Poling recovered all lost wages and benefits in his earlier arbitration process. The Court granted in part and denied in part Core's motion for summary judgment.

The Court granted Core's motion for summary judgment with respect to compensatory damages. Poling conceded that Core had paid all back wages owed to him. The Court determined Poling failed to raise a genuine issue of material fact concerning his back pay. As a result, the Court granted Core's motion for summary judgment regarding compensatory damages.

The Court, however, denied Core's motion for summary judgment on the liquidated damages issue. Poling claimed he was entitled to liquidated damages. Under the FMLA, a plaintiff is entitled to liquidated damages in an amount equal to his or her lost compensation award plus interest (unless the employer can show it acted in good faith). In denying Core's motion for summary judgment on the liquidated damages issue, the Court relied on the United States Court of Appeals for the Tenth Circuit's decision in *Jordan v. U.S. Postal Service*, 379 F.3d 1196 (10th Cir. 2004).

The *Jordan* court found that compensation that is "unlawfully denied but restored before trial, but after a significant delay" could be considered "denied or lost wages under the FMLA" for the purposes of calculating damages. *Id.* at 1201 (internal quotation marks omitted). The *Jordan* court was also motivated by the fact that an unlawful deprivation of wages for a significant amount of time can result in "damages too obscure and difficult of proof [sic] for estimate other than by liquidated damages." *Id.* Poling argued that Core unlawfully kept him from working and receiving compensation for fourteen months. The Court agreed determining that Poling was not foreclosed from seeking liquidated damages. The Court also based its decision on the strong presumption in favor of awarding liquidated damages to affected employees in FMLA and Fair Labor Standards Act cases.

(continues on page 7)

How Much Will the Dukes v. Wal-Mart Decision Impact Wage and Hour Litigation? *by Stephen S. Zashin**

The United States Supreme Court recently rejected an attempt by Wal-Mart employees to pursue a nationwide class action on behalf of all female employees. The lawsuit was based on generic accusations that Wal-Mart maintained a company-wide policy of sex discrimination. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ___ (2011).

To bring any type of class action, a plaintiff must prove "commonality" – that there is some common issue of law or fact in common among all of the members of the proposed class. In the *Dukes* decision, the Supreme Court held that for the female plaintiffs to pursue a class action on behalf of employees based upon a supposedly discriminatory company policy, they must establish something in common more than merely "their sex and this lawsuit." Instead, they must offer "significant proof" of a "specific" employment practice that affected everyone in the proposed class and led to sex-based discrimination. In other words, there must be "some glue holding the alleged reasons for all those [nationwide employment] decisions together."

Dukes makes it clear that employees who wish to join together and pursue a class action cannot rely only on extrapolations from statistics, collections of anecdotal evidence, or expert testimony about corporate "culture" to meet Federal Rule of Civil Procedure 23's ("Rule 23") "commonality" requirement. Instead, they most point to a concrete, specific, and identifiable employment policy or practice that truly affected every employee and that gave rise to the discrimination in question. Plaintiffs must prove that they have something else in common apart from their protected status and their desire to sue a common employer.

Not only does the *Dukes* decision impact sex discrimination cases, it also impacts wage and hour litigation. The standards to bring a class, or collective action under the Fair Labor Standards Act ("FLSA"), are related but different to class action requirements under Rule 23. Under a Rule 23 class action, class members must meet a "commonality" requirement. Under a FLSA collective action, class members must be "similarly situated" to receive conditional certification. Since the FLSA's inception, courts have struggled to define "similarly situated," because the phrase is not defined within the FLSA. However, many courts have looked to interpretations of Rule 23's "commonality" requirement for guidance, which makes the *Dukes*' discussion of "commonality" extremely important to wage and hour litigation.

The *Dukes* decision is barely three months old, but several courts around the country have already found themselves grappling with the decision's impact on wage and hour actions. A sampling of cases dealing with issues presented by *Dukes* includes the following:

(Please see chart on page 6)

In light of the number of cases that have already relied upon *Dukes*, it is clear that the decision has and will continue to have major ramifications on wage and hour litigation. *Dukes* requires courts to pay attention to the disparities that exist in collective action cases (e.g., differences in supervisors, departments, facilities, divisions and regions). The "dissimilarities," not the common questions raised, have the most potential to determine whether class-wide resolution of a matter is permissible. *Dukes* should lead courts to narrowly interpret the "similarly situated" requirement under the FLSA.

The extent to which *Dukes* will impact collective actions is unclear. Some predict *Dukes* will have more of an impact in other nationwide discrimination class actions including pending cases against Toshiba Corp., Goldman Sachs Group, Inc., Cigna Corp. and Bayer. *Dukes* also played a major role in the Ninth Circuit's recent ruling in a Costco disparate impact case (see chart on page 6). Nevertheless, it is clear that *Dukes* alters the landscape of class or collective actions in dramatic ways.

While *Dukes* is an employer-friendly decision, the best defense to class discrimination claims and collective wage and hour claims are strong company policies prohibiting discrimination and wage and hour violations and vigilant compliance efforts.

**Stephen S. Zashin, an OSBA Certified Specialist in Labor & Employment law, has extensive experience defending class and collective actions. Stephen represents employers in all aspects of labor & employment. For more information on class or collective litigation, please contact Stephen at ssz@zrlaw.com or 216.696.4441.*

Case Name	Argument Made Based On *Dukes*	Outcome
Bouaphakeo, et al. v. Tyson Foods, Inc., No. 5:07-cv-04009-JAJ, 2011 U.S. Dist. LEXIS 95814 (N.D. Iowa Aug. 25, 2011).	Defendant argued for decertification of the plaintiffs' Rule 23 class action because a single purported common question of law was not enough to bind class together (court had previously certified class on a single common question of law).	Motion for decertification of class denied
Spellman, et al. v. American Eagle Express, Inc., 2011 U.S. Dist. LEXIS 53521 (E.D. Pa. May 18, 2011), *motion for reconsideration denied by Order dated* July 21, 2011.	Defendant argued conditional certification of an FLSA collective action was inappropriate in light of *Dukes*.	Motion for Reconsideration denied (However, court noted that during the second step of the collective action process, *Dukes*' analysis of what constitutes a common question would be persuasive to whether the FLSA action should be certified)
MacGregor, et al. v. Farmers International Exchange, No. 2:10-cv-03088, 2011 U.S. Dist. LEXIS 80361 (D.S.C. July 22, 2011).	Court found that plaintiffs' allegations were not rooted in a common policy that itself was unlawful, but rather in the enforcement decisions of individual supervisors, which, if true, contradicted company policy.	Court denied conditional certification of FLSA collective action
Cruz v. Dollar Tree Stores, No. 3:07-04012-SC, 2011 U.S. Dist. LEXIS 73938 (N.D. Cal. July 8, 2011).	Court originally certified class of former store managers who claimed they were misclassified under the FLSA in 2009. Based upon *Dukes*, Court decertified finding that letting the case proceed would entail "unmanageable difficulties" in determining whether particular employees spent the majority of their time performing managerial duties; court stated that plaintiffs failed to provide common proof to serve as "glue" that would allow a class-wide determination.	Court decertified class of former store managers because the necessary individual inquiry into each class member's claims could result in a series of "mini trials" that undermine the efficiency class and collective treatment is meant to provide.
Ramos, et al., v. SimplexGrinnell et al., No. 1:07-cv-00981-SMG, 2011 U.S. Dist. LEXIS 65593 (E.D.N.Y. June 21, 2011).	Relying on *Dukes*, judge upheld class certification for about 600 workers who alleged that the Tyco fire and safety equipment unit violated New York labor law and that they were underpaid.	Granted plaintiff's motion for class certification
Creely v. HCR ManorCare, Inc. et al., No. 3:09-cv-02879-JZ, 2011 U.S. Dist. LEXIS 77170 (N.D. Ohio July 1, 2011).	Defendants filed a motion to file supplemental briefing based upon *Dukes*. Judge Zouhary wrote in his order: "This Court concludes the concerns expressed in *Dukes* simply do not exist here."	Upheld class certification
Jasper v. C.R. England et al., No. 2:08-cv-05266-GW-CW, 2009 U.S. Dist. LEXIS 34802 (C.D. Cal. Mar. 30, 2009), *motion to vacate Order denied* (C.D. Cal. June 30, 2011).	Defendants filed an application to vacate the order on the motion to certify class action and to order re-briefing in light of *Dukes*.	The court denied defendant's motion to decertify a class of up to 1,000 truck drivers
Ellis v. Costco Wholesale Corp., No. 07-15838, 2011 U.S. App. LEXIS 19060 (9th Cir. Sept. 16, 2011).	In 2007, the district court certified a class of current and former female employees who claimed Costco denied them promotion based upon their sex. Costco filed a motion to vacate the class certification. The 9th circuit remanded the case for the district court to consider whether the claims for various forms of monetary relief will require individual determinations and are therefore only appropriate for a Rule 23(b)(3) class. The 9th circuit also held the district court failed to conduct a vigorous analysis of "commonality" and "typicality" requirements under Rule 23. Thus, the court vacated the district court's certification of the class under Rule 23(b)(2).	Affirmed in part, vacated in part and remanded to district court

Public Employee's Discharge Without Pre-Termination Hearing Violates Due Process

(continued from page 1)

could not participate in the post-termination procedures of arbitration or file a grievance, it did not include a waiver of Walls' right to pre-termination procedures. Because Walls did not receive a pre-termination hearing, the Court held that CCCTA denied him due process under both the California and Federal Constitutions. The Court sent the case back to the trial court to determine the appropriate remedy for the denial of due process.

This decision reinforces the need for public employers to closely follow pre- and post-employment procedures. Failure to do so could result in costly litigation as it did here.

**Ami J. Patel practices in all areas of labor and employment law, with a focus on private and public sector labor law. For more information on this case or any other labor or employment issue, contact Ami at 216.696.4441 or ajp@zrlaw.com.*

Court Awards Liquidated Damages Under the Family & Medical Leave Act Despite Prior Arbitration Award

(continued from page 4)

As this case demonstrates, it is important for all employers to conduct thorough analyses when employees seek FMLA protection so as to limit their potential exposure to FMLA litigation and damages.

**Patrick M. Watts, an OSBA Certified Specialist in Labor and Employment law, has extensive FMLA compliance and litigation experience. For more information about the FMLA, liquidated damages, or this court's decision please contact Patrick at pmw@zrlaw.com or 216.696.4441.*

ZASHIN&RICH CO.,L.P.A.
cleveland office:
55 public square, 4th floor
cleveland, ohio 44113
p: 216.696.4441
f: 216.696.1618

columbus office:
17 south high street, suite 750
columbus, ohio 43215
p: 614.224.4411
f: 614.224.4433

www.zrlaw.com
www.twitter.com/@zrworkplacelaw/

Z&R Shorts

UPCOMING SEMINARS

48th Annual Midwest Labor and Employment Law Seminar

October 13-14, 2011
Hilton, Easton Town Center, Columbus, Ohio

Stephen Zashin will co-present "Emerging FMLA Case Law: Effective Employee Notice and Avoiding Employer Interference" and George Crisci will present "SERB and Public Sector Issues." To register go to www.ohiobar.org.

Temple Emanu El non-partisan State Issues Program

October 27, 2011 | 8 PM
4545 Brainard Road (at Emery)
Orange Village, Ohio 44022

Jon Dileno will explain and present opposing views regarding Issue 2 (Senate Bill 5), as well as other current Ohio voter issues.

Bucking the Trends and Curving the Costs, How to Stay on Top in Today's Health Care Market

November 1, 2011 | 8:30 AM
The Bertram Inn, Aurora, Ohio

Patrick Hoban will present an update on PPACA developments. To register contact Shawna Altman (shawna@stellarinsurance.com) at 440.893.9882 x6.

Congratulations to George Crisci!

George S. Crisci has been appointed to a three-year term as the Management Co-Chair of the American Bar Association's Labor & Employment Law Section Committee on State and Local Government Bargaining and Employment Law. George was also named one of the "Best Lawyers in America" for 2012.

EEOC Claims on the Rise

After dropping slightly in 2009, claims filed with the Equal Employment Opportunity Commission ("EEOC") hit record highs in 2010. The EEOC received 99,922 complaints in 2010, up over 6,000 from the previous year. The most common complaints were for retaliation and race discrimination. All indications point to the EEOC receiving more than 100,000 complaints in 2011. As the economy continues to struggle and complaints continue to rise, employers must remain vigilant in understanding and complying with employment laws.