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The Express Lane

Retailer's Recap

Wal-Mart class victory is a victory for all retailers. The Supreme Court's decision in ***Wal-Mart v. Dukes*** is a win for all employers, but particularly retail employers. In essence, the Court affirmed that members of a putative class must have enough in common with each other that it makes sense to treat them as "one" for purposes of the litigation. The Court also said that individualized claims for relief, including monetary damages and injunctions, must proceed under rules that allow putative class members to "opt out" and that provide procedural safeguards for defendants. The plaintiffs had sued for sex discrimination, but Wal-Mart prevailed by showing that its corporate policy prohibited discrimination and that employment decisions were delegated to individual store managers. Under these circumstances, the Court said, it would not have made sense to treat the case as a nationwide class action.

iPhone app lets employees track hours worked, send information directly to DOL. The U.S. Department of Labor issued this summer **an app for iPods and iPhones** that allows employees to track their hours worked and send the information directly to either the DOL or elsewhere. The app requires the employee to fill in an hourly wage, so assuming the data are accurate, the app will also reflect the gross pay due to the employee. The DOL promises to issue BlackBerry and Droid versions soon, and is now soliciting ideas about other "employment law apps" it can issue.

Supreme Court OKs state crackdowns on employment of undocumented workers. The U.S. Supreme Court's recent decision in ***Chamber of Commerce of the United States v. Whiting***, which upheld an Arizona statute that sanctioned employers for knowingly or intentionally employing unauthorized aliens, means that retailers with multi-state operations will have to conform to a patchwork of laws rather than a single, uniform federal standard. It also means that we can expect many more states to enact such laws. At last count, approximately 30 states have enacted laws mandating the use of E-Verify.

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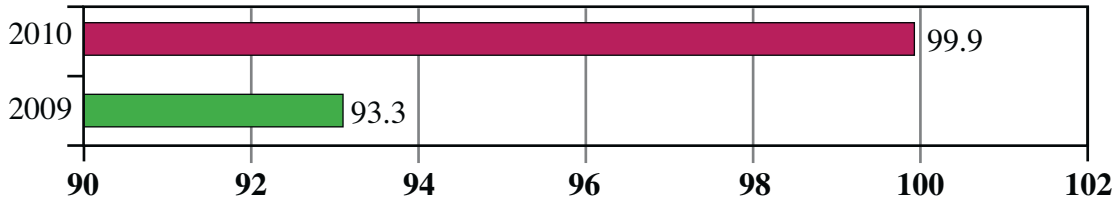
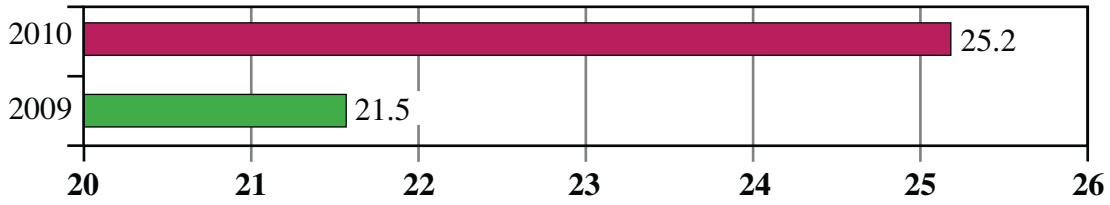
Noteworthy Numbers

Read It and Weep: Charge-Filing Activity, 2009 and 2010

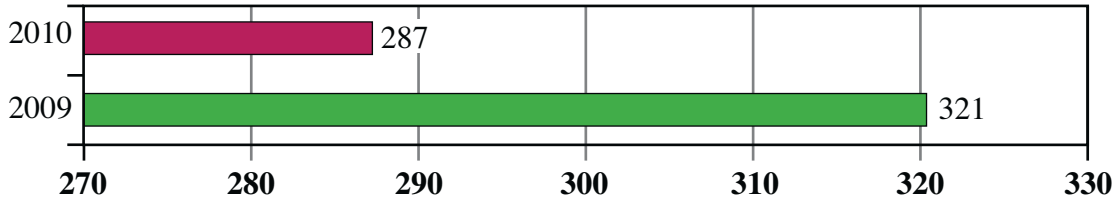
TOTAL NUMBER OF CHARGES FILED (IN THOUSANDS)



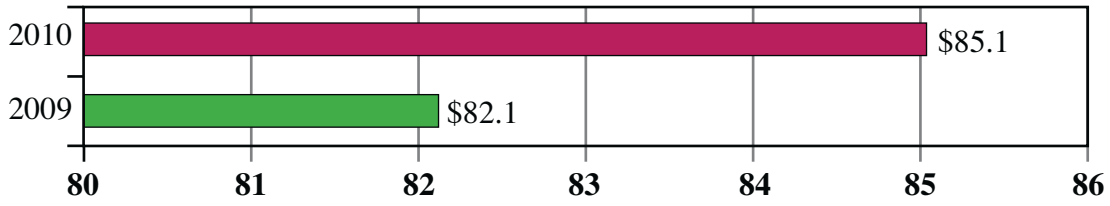
ADA CHARGES (IN THOUSANDS)



NUMBER OF MERIT-BASED LAWSUITS



MONETARY SETTLEMENTS



SOURCE: U.S. Equal Employment Opportunity Commission

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News & Analysis

Ka-*Ching!* EEOC Raking it in on ADA Cases

The Americans with Disabilities Act Amendments Act broadened the scope of what constitutes a disability. As a result, employers are now engaging in the interactive process with employees and facing the question of what is and what is not a reasonable accommodation. The EEOC has indicated in writings and in talks that it intends to focus on disability discrimination, and recent activity by the EEOC confirms its renewed focus on the ADA.

In 2010, the EEOC issued 1,186 Reasonable Cause Findings in ADA charges, up from 962 in 2009, and collected $76.1 million in ADA settlements.

The EEOC's aggressive approach has continued this summer, with the filing of lawsuits alleging disability discrimination and substantial settlements in some cases.

*In a settlement that is reportedly the highest ever collected by the EEOC, Verizon (the telephone company, not the wireless company) agreed to pay $20 million to settle a lawsuit alleging that it and its subsidiaries had enforced its "no-fault" attendance policy where its reasonable accommodation obligations might have required a more flexible approach.

*A Pepsi bottling company has agreed to pay $120,000 and implement preventive measures to settle a disability lawsuit filed by the EEOC in federal court for the Northern District of California. The EEOC alleged that the company had refused an employee's request for a medical leave to accommodate an alleged disability.

*Target has agreed to pay $160,000 to settle an EEOC lawsuit alleging that the discount chain had refused to accommodate a cart attendant with cerebral palsy.

*Denny's has agreed to a $1.3 million settlement in an EEOC lawsuit alleging that the restaurant chain refused to accommodate the leg amputation of a restaurant manager as well as 33 other employees with disabilities.

No doubt spurred on by these settlements, the EEOC is filing lawsuits fast and furious against employers:

* J.A. Thomas & Associates has been sued in federal court in the Eastern District of Michigan. The EEOC complaint alleges that a double amputee was forced to resign when her job moved to Georgia. The EEOC alleged that the employee could not relocate because of her disability but said that she could perform her job at home and asked to be allowed to work from home. The company allegedly refused the request, but after it was unable to fill the job for six months, made it a telecommuting position and hired another person for the job.

*Non-profit Area Four Senior Citizens Planning Council has been sued in federal court in South Dakota after the organization allegedly fired an employee instead of allowing her to return to work after surgery for colon cancer. The EEOC alleges that the employee could have performed the essential functions of her job but was discharged because of symptoms that could have resulted from her chemotherapy.

*JES Personnel Consultants, Inc. d/b/a Genie Temporary Service, was sued in federal court in the Northern District of Illinois for allegedly refusing to allow an employee to return to work because of his epilepsy.

*Johns Hopkins Home Care Group was sued in federal court in Maryland for allegedly firing an employee because of her disability and because she challenged the company's failure to accommodate her need to return to work with limited restrictions after being diagnosed with breast cancer.

As these filings and settlements show, retail employers need to make sure they are up to speed on the ADA and its requirements, particularly non-discrimination, reasonable accommodation, and the interactive process.

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Make Sure Your "Paws" Know the Laws, and Other Lessons From Staub

The Supreme Court's "cat's paw" decision in ***Staub v. Proctor Hospital***, in which the Court held that an employer can be liable for employment decisions that are "tainted" by input from supervisors who have an unlawful motive, reminds retailers of the importance of ensuring that their supervisors and managers are well-trained in anti-discrimination laws, principles of fairness and consistency, and company policies and procedures. Although ideally human resources (or in-house counsel) will approve any adverse actions taken against an employee, that is not necessarily practical or even possible in a retail context. Whoever administers discipline or discharges employees should make sure that there are good reasons for the action taken, and make sure that employees with similar problems have been treated essentially the same way.

It's also a good idea for retailers to have a grievance procedure so that employees can voice concerns that they are being treated unfairly. Even if the corporate human resources or legal department cannot pre-approve every disciplinary or discharge decision, they should always be involved in investigating and resolving complaints of unfair, discriminatory, or retaliatory treatment.

Although the anti-discrimination laws require the employee to show unlawful intent, this can be easily proven circumstantially (for example, by demonstrating that similarly-situated employees outside of the protected class were treated more favorably or proving that there was some sort of connection between an employee's complaints of discrimination and subsequent adverse employment action). In other words, a supervisor's actual intent may not matter if his actions suggest otherwise. Juries expect retailers to do the right thing and want to see that employees are treated fairly. If an employee has performance issues, they want to see that the employer has warned the employee and given him a chance to correct his deficiencies.

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Is Abercrombie Cracking Down on Religious Garb?

This summer, a federal district court in Oklahoma **ruled** in favor of the EEOC in its lawsuit against Abercrombie & Fitch Stores, Inc., for not hiring a Muslim teenager as a sales clerk because she wore a *hijab* – the head covering traditionally worn by Muslim women. The EEOC contended that the *hijab* did not comport with the store's "Look Policy," which aims for a "preppy" image.

The court found that Abercrombie could have reasonably accommodated the teenager without undue hardship, finding that the retailer had in the past allowed female employees to wear head scarves, long skirts, and jewelry for religious reasons, and had allowed male employees to wear yarmulkes and facial hair (as well as baseball caps). Abercrombie is currently defending another EEOC charge for terminating a Muslim woman after she refused to remove her *hijab*, despite receiving permission from a hiring manager to wear it.

Sorry, Only One to a Customer: Good News on Damage Caps Under Title VII

What happens when an employee asserts more than one claim under Title VII of the Civil Rights Act of 1964? Can she recover the maximum for each claim, or is she limited to one recovery regardless of the number of claims?

In ***Black v. Pan American Laboratories***, the U.S. Court of Appeals for the Fifth Circuit (Louisiana, Mississippi, and Texas) determined that the damage cap applies to each party, not to each claim. Title VII has caps on compensatory and punitive damages that vary depending on the size of the employer. In the *Black* case, the cap that applied to the employer was $200,000. After a jury trial on two sex discrimination claims and a retaliation claim under Title VII, the plaintiff was awarded $3,450,000 in back pay and compensatory and punitive damages. The court then reduced the award to $300,000 in back pay and the "capped" maximum for compensatory and punitive damages of $200,000.

Both parties appealed, and the plaintiff argued that she should have been allowed $200,000 per *claim*. She argued that she would not be receiving a double recovery because she had suffered from two types of discrimination: (1) discrimination that did not result in her discharge, and (2) discrimination that did result in her discharge.

The Fifth Circuit had not ruled on this issue before but noted that other circuits had found that the caps apply per party, not per claim, including the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee), the Seventh Circuit (Illinois, Indiana, and Wisconsin), the Tenth Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming), and the District of Columbia Circuit. Following these courts, the Fifth Circuit held that, "[f]or the purposes of Title VII's damages cap, the relevant 'unit of accounting is the litigation, not the legal theory.'"

This holding is good news for retailers because it ensures that the compensatory and punitive damages available to a plaintiff making multiple claims under Title VII is limited to the amount of Title VII's damages cap – just once.

Constangy, Brooks & Smith, LLP has counseled employers on labor and employment law matters, exclusively, since 1946. A "Go To" Law Firm in Corporate Counsel and Fortune Magazine, it represents Fortune 500 corporations and small companies across the country. Its attorneys are consistently rated as top lawyers in their practice areas by sources such as Chambers USA, Martindale-Hubbell, and Top One Hundred Labor Attorneys in the United States, and the firm is top-ranked by the U.S. News & World Report/Best Lawyers Best Law Firms survey. More than 130 lawyers partner with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Alabama, California, Florida, Georgia, Illinois, Massachusetts, Missouri, New Jersey, North Carolina, South Carolina, Tennessee, Texas, Virginia and Wisconsin. For more information, visit www.constangy.com.