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### For Auld Lang Syne: A Year in Employment Law Not Soon Forgotten

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2011 presented new directions and challenges to employers. KBR writes to recap this year's employment law highlights, including updates on the EEOC's 2011 Statistics, the double-edged sword of social media, and comments on the U.S. Supreme Court decision in *Wal-Mart v. Dukes*.

- **Record Setting:** The U.S. Equal Employment Opportunity Commission received its highest number of discrimination charges in the Commission's 46 year history, reporting 99,947 discrimination charges for 2011. The EEOC's Performance and Accountability Report notes that this increase is likely due to the additional statutory authority provided to the EEOC through the passage of the Americans with Disabilities Amendments Act of 2008 and the Lilly Ledbetter Fair Pay Act of 2009. Despite the high volume of charges filed, the EEOC had one of its most efficient years to date-finishing the year with a ten percent decrease in its pending charge inventory. In fact, of the 99,947 charges filed, the fiscal year ended with only 78,136 pending charges, which is the first such reduction since 2002. The EEOC credits its newfound efficiency to its ability to strategically manage resources, and increasing pressure on employers to timely respond to discrimination charges. Moreover, 2011 was also noteworthy because the EEOC demonstrated its ability to bring in high damage awards for victims of workplace discrimination, delivering \$346.6

million in monetary benefits-the highest level in the EEOC's history. On the defense side, a banner year for the EEOC is not good news. Employers should be cautioned by the EEOC statistics and focus on developing and maintaining proper employment practices for 2012.

- **Plugged In:** The latest numbers from 2011 indicate that nearly 800 million people use Facebook worldwide, making it one of the most important phenomena of this decade. With this unprecedented popularity comes a set of complex questions for employers and their lawyers alike. On one hand, social media can be a powerful tool for defense counsel in refuting the plaintiff's claims regarding damages. For example, in a recent state appellate case from New York's First Department, *Patterson v. Turner Const. Co.*, 931 N.Y.S.2d 311 (2011), the court held that the personal data contained on the plaintiff's Facebook account was not necessarily shielded from discovery by virtue of her privacy settings, likening it to the kind of information kept in a personal diary, which is traditionally discoverable. Making social networking requests a part of written discovery demands can lead to damage diminishing information. On the other hand, the increased popularity of social media has lead employers into some uncharted territory. The National Labor Relations Act ("NLRA") permits employees to discuss the terms and conditions of their employment with co-workers and others; however, recent cases have held that this means that discussions held on social networking sites may constitute a concerted activity. See, e.g., *Hispanics United of Buffalo, Inc.*, N.L.R.B. A.L.J., No.3-CA-27872; *Karl Knauz Motors, Inc. d/b/a Knauz BMW and Robert Becker*, N.L.R.B. A.L.J., No. 13-CA-46452. Therefore, employers who take action against employees because of comments posted to their social networking sites run the risk of violating the NLRA. Going forward, employers should be wary of adverse employment decisions that involve communications via social networking.
- **Duke it out:** In 2011 the process of class action certification under Federal Rule of Civil Procedure 23 was muddled by the landmark U.S. Supreme Court decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). Much of the fallout from the *Dukes* decision focuses on what future potential class actions plaintiffs must do to demonstrate "common policy" of discrimination under Rule 23(a). The plaintiffs in *Dukes* were unable to demonstrate a common policy because the only corporate policy alleged was one that allowed discretion by local supervisors. In coming to this conclusion, the Supreme Court first criticized the plaintiffs' expert who could not calculate "whether .5 percent or 95 percent of [Wal-Mart's] employment decisions...might be determined by stereotyped thinking." This may lead to harsher standards for experts in class certification hearings akin to that required for experts under *Daubert v. Merrell Dow Pharmaceuticals*. The Supreme Court further criticized the

*Dukes* plaintiffs' statistical evidence about pay and promotion disparities between men and women at the company because it was insufficient on its face to show discrimination on a class-wide basis. Lastly, the Court held that plaintiffs' anecdotal proof (120 affidavits, representing only one of every 12,500 class members) was simply insufficient to show a general policy of discrimination because the sample was not representative of the class as a whole. Thus, we may see class sizes begin to shrink so that the level of anecdotal proof required is not as vast as would have been required in *Dukes*.

The changes in class actions in wake of the *Dukes* decision remain to be seen; however, it appears--at a minimum--that the class certification process is morphing into a merit-based/procedural hybrid framework. In 2012, we may expect trickle down effects of the *Dukes* framework to other types of collective actions including those under Title VII and the Fair Labor Standards Act, making it more difficult to pursue such suits in Federal Court.

KBR's Employment Law Team wishes you all Happy Holidays.  
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