An Official Publication of the New Hampshire Bar Association

NEW HAMPSHIRE BAR NEWS

As seen in the BAR NEWS - September 16, 2011

The Supreme Court Speaks: Too Big To Sue and Too Personal for the First Amendment

By: Nancy Richards-Stower and Debra Weiss Ford

Editor's note: This is the ninth Bar News "debate" between employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss Ford (employer advocate), both Fellows of the College of Labor and Employment Lawyers. Here they focus on two cases decided on June 20, 2011: Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011), denying class action status to a nationwide class of women employees, and* Borough of Duryea, Pennsylvania v. Guarnieri*, 131 S. Ct. 2488, a First Amendment petition case brought by a police chief.*

Nancy: *Which Five wore vests of Wal-Mart Greeters?*

Those Supreme Court Justices who backed the cheaters Of Equal Rights for Women fighting For Equal Rights, which still need Righting!

First it was "Too Big to Fail;"
Now it is "Too Big To Sue!"
Neil Young should stomp and strum a song
About this Court – for me and you.
Not "Southern Man" but "Southern Malls"
Where Wal-Mart gobbles life and all;
The Court gave it a special right
To throw its weight and all its might
Against equality; ah women's plight!

Deb: Now, Nance, you didn't really think that the Court would give the Wal-Mart plaintiffs the right to proceed en masse, did you?

Nancy: Well, it would satisfy the numerosity requirement of class actions...and it wasn't the largest class ever...

Deb: Yes, but that other pesky prong, "commonality," was the deal-breaker, as was the related issue: when 1.5 million plaintiffs seek individualized relief, is class certification appropriate? On that issue, the court was unanimous.

Let's review the facts. Past and present female Wal-Mart employees claimed that Wal-Mart's policy of delegating decisions on promotions and pay to local managers resulted in favoritism towards male employees, nationwide, and that Wal-Mart knew it and let it continue.

The plaintiffs sought class certification for 1.5 million class members, seeking injunctive and declaratory relief, punitive damages and back pay.

Nancy: The district court had certified the case as a class action, and Wal-Mart appealed. The Ninth Circuit, en banc and split, basically upheld the district court, and up to the Supremes they went. The "Gang of Five" ruled that plaintiffs had not shown even one common question of law or fact under Rule 23(a) In twisted wordspeak, the "common contention" requirement has to be "capable of classwide resolution," and plaintiffs failed, they said, by not offering enough evidence that the results we see all over the country meant that Wal-Mart had a general policy of discrimination, since it had, after all, nice shiny brochures carrying its very own anti-discrimination policy.

Deb: Plus the Plaintiffs' expert's statistical and sociological testimony, as well as testimony from 40 employees, was very weak when trying to quantify how many Wal-Mart decisions were based on stereotyping, and Wal-Mart challenged the expert's testimony as inadmissible under Daubert. While the Supreme Court did not rule on the Daubert test, it did conclude that even if the testimony "came in," it wasn't enough. The Court concluded that this evidence was "world's away" from meeting the significant proof test.

Nancy: Well, the Court dumped the statistical evidence and anecdotal evidence. I wish they could see a "Day in the Life" video of a typical Wal-Mart store! They are all alike and their gender numbers are all similar. Argh! The emperor has no clothes!

Deb: Well, on the second issue, the entire court agreed that a class can't seek individualized damages which are more than "incidental" to the injunctive and declaratory relief sought. But the point is, with such a large class, individual rights to remedies would be lost.

Nancy: But without a large class, few can challenge the conglomerates swelling in "The Global Economy," and fewer will benefit from civil remedies. Further, when you have cookie-cutter stores dotting the entire globe, all spewing out the same statistical realities, even

if you "fight the fight" and win in some, the rest will bulge like a hernia gone wild.

Deb: Let's agree to disagree and switch from "Too Big To Sue" to "Too Small to Matter."

Nancy: Now, that's just cruel! Following Garcetti (Garcetti v. Ceballos 547 US 410 (2006)), which smashed government employees' First Amendment Speech protections if what they were talking about were issues encompassed in their job duties, it was no big surprise, but it was horrifying to have the Petition Clause similarly vaporized.

Deb: In Bureau of Duryea, Pennsylvania v. Guarnieri, a police chief fired by his town filed a grievance, won reinstatement, and the towncouncil which fired him issued 11 directives controlling his actions. Since Guarnieri felt these were retaliatory, he filed another grievance and won that. Then he filed suit under 42 USC Sec. 1983, claiming his first union grievance was a protected petition under the First Amendment and the directives, retaliation for protected activity. Question: should a small personal employment issue get constitutional protections, or is it too small a matter to matter under the First Amendment?

Nancy: I knew the chief hit the "Wall" as I read the first paragraph: "Petitions are a form of expression, and employees who invoke the Petition Clause in most cases could invoke as well the Speech Clause of the First Amendment."

I pictured Gil Garcetti (LA District Attorney) thumbing his nose at attorney Cellabos (who was fired for telling his boss that the use of a search warrant based on lies was illegal). It is so infuriating. The Supreme Court has eviscerated constitutional protections for government employees, and that will only fertilize the general animosity of the federal courts to employee rights...

Deb: Guarnieri's story is simple; don't you think?

Nancy: Well, let's review it. After Guarnieri filed his "Freedom of Petition" suit, the town denied an overtime claim which he added to the suit under Section 1983 as retaliation. He won his jury trial, was awarded a pile of money, won the appeal filed by the town, and even though the appeals court ruled that the Petition he filed (grievance) was purely personal, he could proceed under the First Amendment.

Deb: And the Supreme Court reversed.

Nancy: Nine-zip on the main argument.

Deb: Yes, and with unmistakable logic: "The question presented by this case is whether the history and purpose of the Petition Clause justify the imposition of broader liability when an employee invokes its protection instead of the protection afforded by the Speech Clause...the right to speak and the right to petition are 'cognate rights'... It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances..."

Nancy: And my favorite: "application of the Petition Clause in the context of government employment would subject a wide range of government operations to invasive judicial superintendence..." after which the Court said that by invoking the First Amendment Petition Clause an employee was circumventing the employees' statutory protections.

Deb: So the court applied the public concern test for First Amendment speech claims to the Petition Clause, noting that if it did otherwise, it would invite public employees to describe their speech complaints as petition complaints, which would "add to the complexity and expense of compliance with the Constitution."

Nancy: And, before it ended its murder of the Petition Clause's once-promised protections for government employees, the court invoked the British Declaration of Right of 1689, the Magna Carta and the Declaration of Independence...You know, I saw one of the original penned copies of the Magna Cara in England, and I read it in an ancient hallway. For all its glory, it is painfully anti-Semitic.

Deb: Your point?

Nancy: Just that sometimes it's important to go back and read the original document. The Constitution promises freedom from retaliation for petitioning the government. This case says it's OK to restrict that freedom. This court expands Free Speech for corporations, but leaves unprotected employees complaining about corruption.

Deb: So next "debate" maybe we'll have the chance to discuss an employee victory. The Supreme Court has taken a Fourth Circuit case holding that the 11th Amendment bars FMLA protections for state employees in Coleman v. Maryland Court of Appeals.

Nancy: Let's make a wager. I'll give you at least 5-4 odds.

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