



McKENNA EMPLOYMENT BULLETIN

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WAL-MART MEGA CLASS ACTION IS DISMISSED

On June 20, 2011, the Supreme Court dismissed a massive class-action sex-discrimination lawsuit against Wal-Mart Stores Inc.

The class represented approximately 1.5 million female employees and past employees who claimed that Wal-Mart paid women less than men and also gave women fewer promotions. The district court certified the class, which was affirmed on appeal to the Ninth Circuit. The U.S. Supreme Court reversed.

The Supreme Court determined that the class-action certification violated federal rules for such lawsuits because there was no commonality among the employees. The female employees held different jobs, at approximately 3,400 different stores nationwide, and had different supervisors. The Supreme Court determined that there was not enough in common with the class members so that they could all be lumped together into a single class-action lawsuit.

The Supreme Court did not rule on the merits of the discrimination case, but held that Wal-Mart is entitled to individual determinations. So while this decision ends the mega-class action suit, it leaves open the possibility of smaller class action suits among more similarly situated plaintiffs.

SEXUAL ASSAULT BY YOUR COMPANY OWNER EQUALS SEXUAL HARASSMENT

A Plaintiff was awarded One Million dollars following a bench trial in a sexual harassment case.

In the case of Moncriffe v. Classique Interiors & Design Inc., 2011 WL 2224880 (E.D. N.Y. 2011), the plaintiff worked for an interior design shop. The plaintiff testified that she was subjected to sexual statements and conduct by one of the company owners, which persisted for two years. Within weeks of her employment, the owner began telling the plaintiff sexual jokes while she was working. Several weeks later, the owner began slapping her on the buttocks. The plaintiff verbally protested and the defendant ceased such conduct; however, it resumed a short time later. After it resumed, matters got worse. The owner exposed himself to the plaintiff. He also made lewd comments about plaintiff's sexual practices and genitalia. The owner would also come up behind her and grab her breasts with both hands. The plaintiff resisted these advances; however, the plaintiff's paychecks thereafter began to bounce. Later, the owner locked the plaintiff in the building after the other employees had left for the day and physically tried to force her to have sexual intercourse with him. She successfully fought him off. Several months later, the owner again forcibly touched the plaintiff in a sexual manner. The police were notified and criminal charges were brought against him. The plaintiff testified that she never returned to work because she was afraid the owner would retaliate against her. The owner was later convicted of sexual crimes.

Following the termination of her employment, the Plaintiff was diagnosed with post-traumatic stress syndrome, began receiving weekly group therapy at a hospital clinic for victims of sexual abuse and was on medication related to stress.

The case proceeded to a bench trial.

The District Court judge stated, "It is difficult to imagine a more hostile work environment than the one presented here. Forced criminal sexual conduct is the most severe type of hostile work environment and this is what the plaintiff was subjected to, in addition to the less severe conduct noted above." The judge awarded damages for emotional distress in the amount of \$500,000, punitive damages in the amount of \$500,000 and attorney fees.

WEB-BASED E-MAILS ARE AN EMPLOYER'S PROPERTY ONLY IF THEY ARE ON THE EMPLOYER'S COMPUTER

In Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC, 2010 WL 5222128 (S.D, N.Y. 2010), the employer accessed and found a chain of e-mails sent between former employees on their personal Gmail accounts. The e-mails listed a long list of problems including theft of customer lists and destruction of company property. The majority of the e-mails were obtained when the employer discovered the former employee's user name and password stored on the employer's computers, giving them access to the employee's accounts.

The former employer sued but the Court would not allow the e-mails into evidence because they violated the Stored Communications Act. That Act provides that whoever intentionally accesses without authorization a facility through which an electronic communication service is provided and obtains access to wire or electronic communications shall be punished. See 18 U.S.C. §2701 to 2712.

Thus, employers that willfully access employees' private web-based e-mails from company computers may be vulnerable to privacy claims and the information they obtain may be inadmissible as evidence of wrongdoing. An employer needs to think about state privacy laws and confidential communications between an employee and his or her lawyer when attempting to access employees' e-mail accounts. Before monitoring e-mails that are sent through personal, non-company accounts, an employer could institute a very strong employer privacy policy that spells out what employees can expect. The policy should tell employees that company computer systems take a snapshot of all the places they visit, including the employees' own web e-mail, so that everything the employee writes or reads may be captured on the employer's computer, even if they think they've deleted it. Employers should have employees acknowledge this policy in writing.

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