

Seyfarth Shaw's Annual Workplace Class Action Litigation Report: The State-of-the-Art Word on Employment-Related Class Actions

By Bob Bregman, CPCU, MLIS, RPLU

This is the third year in which we provide a brief overview of (what is now in its ninth edition) Seyfarth Shaw's *Annual Workplace Class Action Litigation Report*. (The previous two overviews can be found at www.irmi.com/online/eplic/ch000010/2012sprg/3spr12-employment-related-class-actions.aspx and www.irmi.com/online/eplic/ch000010/2011sprg/spring11-4-annual-workplace-litigation-report.aspx.)

The *Report* stands alone as the singular, definitive source of information, research, and in-depth analysis on employment-related class action litigation. Practitioners and corporate counsel should not be without it on their desk, since the *Report* is the sole compendium of its kind in the United States.

Gerald L. Maatman Jr., a partner with Seyfarth Shaw LLP, compiles and edits the *Report*. Mr. Maatman's practice focuses on defending employers involved in employment-related class actions and in Equal Employment Opportunity Commission pattern or practice cases. He is co-chair of the firm's class action defense group and authors the firm's class action blog at www.workplaceclassaction.com. Mr. Maatman pioneered the process of conducting employment practices audits to assist employers in structuring effective and practical personnel policies and protocols. His work in this area has been profiled in the *Wall Street Journal*, the *Economist*, and *Time* magazine.

A Thumbnail Sketch of What's Inside

The extensive, 870-page *Annual Workplace Class Action Litigation Report* insightfully examines and analyzes a total of 1,059 class action case decisions. And, because it is available on CD-ROM, the *Report* is fully searchable, making its comprehensive, authoritative content readily accessible. The CD-ROM format allows the

reader to quickly and easily tab through to the desired section(s) of interest. In addition, all of the federal cases examined in the *Report* are indexed by federal circuit, yet another invaluable feature that further enhances its utility.

The following is a synopsis of what's inside:

- ◆ **Overview of the Year in Workplace Class Action Litigation.** This section summarizes the key legal and procedural trends that emerged in 2012, addresses key developments in workplace class action litigation in 2012, and assesses the implications these developments will have on litigation in 2013.
- ◆ **Significant Class Action Settlements in 2012.** This section lists the top 10 settlements in (a) private plaintiff employment discrimination lawsuits, (b) private plaintiff wage and hour class actions, (c) government-initiated enforcement actions and pattern or practice suits, (d) private plaintiff Employee Retirement Income Security Act (ERISA) of 1974 actions, and (e) the top 10 injunctive relief rulings issued by various courts that were a part of certain class action settlements. Items (a), (b), (c), and (d) are reproduced later in this article.
- ◆ **Significant Federal Employment Discrimination Class Action and Equal Employment Opportunity Commission (EEOC) Pattern and/or Practice Rulings.** This section of the *Report* analyzes discrimination class action cases brought under (a) Title VII of the Civil Rights Act of 1964 and (b) "pattern or practice" enforcement actions brought by the EEOC.
- ◆ **Significant Collective Action Rulings under (a) the Age Discrimination in Employment Act (ADEA), (b) the Fair**

Labor Standards Act (FLSA), and (c) ERISA. Cases brought under these federal statutes constitute a substantial portion of all employment-related class action litigation. Therefore, court interpretations of these statutes are important for future cases.

- ◆ **Significant State Law Class Action Rulings.** These rulings are significant because during the past several years, plaintiffs' attorneys have been increasingly resorting to state courts as a forum for pursuing employment-related class action litigation.
- ◆ **Rulings on the Class Action Fairness Act (CAFA).** This law facilitates removal of class actions from state court to federal court. In addition, CAFA regulates the selection of class counsel, tightens control of attorneys' fees awarded to class counsel, toughens pleading standards, reduces the ability of class counsel to dictate the choice of forum, facilitates interlocutory appeals of class certification rulings, and regulates settlements of class actions. Given these profound effects on underlying case strategy and the structuring of class actions, the *Annual Workplace Class Action Litigation Report* analyzes CAFA-related cases.

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gmaatman@seyfarth.com

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- ◆ **Other Significant Federal Rulings Affecting the Defense of Workplace Class Action Litigation.** Throughout 2012, federal courts issued key rulings in class action lawsuits on Rule 23 issues,

which significantly impact the defense of workplace actions. As the plaintiffs' class action bar has pressed new theories and the nature of claim allegations continues to morph, these rulings are important in formulating effective defense strategies for workplace class actions.

The following sections offer a glimpse of the *Report's* contents.

Five Key Trends in Workplace Class Actions during 2012

The report notes five important developments in class actions during 2012. They are:

1. **The U.S. Supreme Court's opinions in *Dukes* and *Concepcion* had a profound impact in shaping class action rulings in 2012.** *Dukes* caused both federal and state courts to conduct a wholesale review of the propriety of previous class certification orders in pending cases, while *Concepcion* fueled significant litigation over the effect of workplace arbitration agreements and impediments such as agreements may impose on employment discrimination class actions. As many class action issues are in a state of flux post-*Wal-Mart* and post-*Concepcion*, these evolving precedents are expected to continue developing in the coming year.
2. **U.S. government enforcement litigation reached "white-hot" levels in 2012, especially by the Equal Employment Opportunity Commission (EEOC).** Not only were a near-record number of charges filed with the EEOC, but the Obama administration's emphasis on administrative enforcement also spawned more government-initiated litigation over workplace issues. As the inevitable by-product of the country's continuing high unemployment rates, more discrimination charges were filed with the EEOC in 2012 than in all but 2 previous years since the founding of the Commission in 1964—a total of 99,412 discrimination charges against private sector employers. The

EEOC’s systemic investigation program—in which the Commission emphasizes the identification, investigation, and litigation of discrimination claims affecting large groups of “alleged victims”—grew to its largest level ever, witnessing a four-fold increase over 2011.

3. **Continued economic dislocations during 2012 spurred more class action and collective litigation.** In particular, FLSA class action activity rose significantly. Even more workplace litigation is expected in 2013, as businesses retool their operations, the dust continues to settle from the economic fallout of the last several years, and the Obama administration begins its second term, with a renewed emphasis on enforcement of workplace laws.
4. **Wage and hour litigation continues to outpace all other types of workplace actions.** FLSA collective actions outnumbered all other types of private class actions in employment-related cases. Specifically, 7,672 FLSA class action lawsuits were filed in 2012, up significantly as compared with 6,779 in 2011.
5. **The plaintiffs’ class action bar is a tight-knit community and developments in Rule 23 and Section 216(b) caselaw in 2012 saw rapid strategic changes based on evolving decisions and developments.** With the Supreme Court’s rulings in *Wal-Mart* and *Concepcion*, the plaintiff’s class action bar began the process of “rebooting” classwide theories of certification, as well as establishing liability and damages on a classwide basis. As a result, new certification approaches and cutting-edge strategies are spreading throughout the substantive areas encompassed by workplace class action law. More than any other trend, the ongoing changes to strategy considerations in crafting class claims and litigating Rule 23 certification motions in the wake of *Wal-Mart*, drove caselaw developments in 2012. Accordingly, workplace class action law is in flux and more change is inevitable in 2013.

A much more thorough discussion of these trends appears within the *Report*.

Top 10 Settlements in Private Plaintiff Employment Discrimination Class Action Lawsuits

The monetary value of the top 10 private plaintiff lawsuits entered into or paid in 2012 totaled \$48.65 million, which represented a significant decrease from the prior year. By comparison, the top 10 settlements in 2011 totaled \$123.2 million.

#	Amount	Defendant	Type of Discrimination
1.	\$22 million	Dolgenercorp, Inc.	Gender
2.	\$6 million	Toyota Motor Corp.	Disability
3.	\$5.8 million	New Jersey Transit	Race
4.	\$4.6 million	University of Medicine & Dentistry	Gender
5.	\$2.5 million	Cook’s Pest Control	Race
6.	\$2 million	Allen Memorial Hospital	Race
7.	\$2 million	National Railroad Passenger Corporation Nassau County	Gender
8.	\$1.45 million	Gristede’s Operating Corp.	Gender
9.	\$1.3 million	Howard Industries, Inc.	Race
10.	\$1 million	Menard, Inc.	Race

Top 10 Settlements in Private Plaintiff Wage and Hour Class Action Lawsuits

The monetary value of the top 10 private plaintiff wage and hour class action settlements entered into or paid in 2012 was \$292 million, a significant increase from the top 10 settlements in 2011, which totaled \$221.1 million.

#	Amount	Defendant
1.	\$99 million	Novartis
2.	\$40 million	Merrill Lynch & Co., Inc.
3.	\$35 million	H&R Block Enterprises, LLC
4.	\$21 million	Rite Aid Corporation
5.	\$20 million	City of New York
6.	\$19 million	Robert Half International Inc.
7.	\$15.6 million	HSBC Bank USA, N.A.
8.	\$15.5 million	ConocoPhillips Co.
9.	\$14 million	Family Dollar Stores, Inc.
10.	\$12.9 million	Spearmint Rhino Companies Worldwide, Inc.

Top 10 Settlements of Government-Initiated Enforcement Actions and Pattern or Practice Lawsuits

The Equal Employment Opportunity Commission (EEOC) and the Department of Labor (DOL) aggressively litigated government enforcement actions in 2012. Based on preliminary figures for the U.S. government's 2012 fiscal year, the EEOC filed 122 new lawsuits, resolved 254 pending lawsuits, and secured \$365.4 million in settlements for allegedly injured victims of job bias, an increase of \$700,000 over the prior year and the largest ever in the Commission's history.

The EEOC also had the second highest number of discrimination charges filed in 2012—a total of 99,412. In addition, the EEOC's docket of systematic pattern or practice cases grew to over 20 percent of the Commission's caseload.

For all types of government-initiated enforcement actions, the monetary value of the top 10 settlements entered into or paid in 2012 totaled \$262.78 million. This was a significant increase over 2011, as the top settlements in that year totaled \$56.078 million.

#	Amount	Defendant
1.	\$220 million	Beacon Associates Management Corp.
2.	\$11 million	Yellow Transportation, Inc., and YRC, Inc.

3.	\$10.7 million	Mattingly
4.	\$5.4 million	BP Amoco Chemical Co.
5.	\$4.8 million	Interstate Distributor Company
6.	\$3.13 million	Pepsi Bottling Group
7.	\$2.75 million	WRS Infrastructure and Environment, Inc.
8.	\$2 million	Baldor Electric Co.
9.	\$2 million	Dillard's Inc.
10.	\$1 million	Missoula Mac, Inc.

Top 10 Settlements in Private Plaintiff ERISA Class Actions

For Employee Retirement Income Security Act (ERISA) class actions, the monetary value of the top 10 private settlements entered into or paid in 2012 totaled \$237 million. This amount is significantly lower than in 2011, when the total monetary value of the top 10 private settlements was \$898.95 million.

The largest ERISA class action settlements involved disputes over the breach of fiduciary duty, reducing retiree benefits, and/or investing pension or 401(k) assets into company stock.

#	Amount	Defendant
1.	\$120 million	Aetna, Inc.
2.	\$24 million	Honeywell Retirement Earnings Plan
3.	\$23.8 million	Continental Automotive Systems U.S., Inc.
4.	\$15.8 million	AK Steel Corp.
5.	\$12.5 million	In Re Schering-Plough Corp.
6.	\$10.4 million	In Re Merck & Co. Inc.
7.	\$10 million	U.S. Bank Pension Plan
8.	\$10 million	In Re Bear Stearns Cos., Inc.
9.	\$6 million	First Horizon National Corp.
10.	\$4.5 million	Gilbert G. Lundstrom

And this Is Just the Tip of the Iceberg

This article has provided only a brief sample of the depth and breadth of the information this authoritative document contains. No practitioner

who deals with employment claims, whether as an underwriter, broker, risk manager, or attorney, should be without it. Even better, the Seyfarth Shaw *Annual Workplace Class Action*

Litigation Report, 2013 edition, is free! For information on how to obtain a complete copy of the *Report*, see the accompanying text box or send an e-mail to gmaatman@seyfarth.com. *EPLiC*

EEOC Fiscal Year 2012 Discrimination Claim Data Reveal Slight Drop versus 2011: But It's No Cause for Optimism

By Bob Bregman, CPCU, MLIS, RPLU

In January 2013, the U.S. Equal Employment Opportunity Commission (EEOC) announced that it received 99,412 private sector workplace discrimination charges during fiscal year 2012 (which runs from October 1 to September 30). This figure was down slightly from the 99,947 charges it received in fiscal 2011 and also short of the 99,922 charges filed in 2010. This article analyzes other key data from the 2012 EEOC report and explains why the apparent leveling off of claim activity is still no cause for enthusiasm.

The Role of the EEOC

The EEOC has the authority to investigate charges of discrimination against employers who are covered by the law. Investigations begin by evaluating the allegations contained within a charge of discrimination that is brought by an employee. If the EEOC finds that discrimination has occurred, it attempts to settle the charge through its administrative process. If a settlement cannot be reached with the employer, the EEOC has the legal authority to file a lawsuit on the employee's behalf. The EEOC does not, however, file a lawsuit in every case in which it finds discrimination and in which a settlement cannot be reached.

Key Fiscal 2012 Highlights

The following represent highlights of EEOC activity during fiscal 2012.

- ◆ The EEOC obtained \$365.4 million on behalf of employees through its administrative

process. That figure is its largest-ever monetary recovery total. (It is important to recognize that such recoveries were not obtained through litigation.)

- ◆ The EEOC also filed a total of 122 lawsuits, including 86 individual suits, 26 multiple-victim suits (i.e., those with fewer than 20 victims), and 10 systemic suits (i.e., those with 20 or more victims).
- ◆ The EEOC's legal staff resolved 254 ongoing lawsuits (most filed prior to fiscal 2012), for a total monetary recovery of \$44.2 million.
- ◆ The EEOC continued its emphasis on investigating allegations of systemic patterns of discrimination in the workplace. In fiscal year 2012, the EEOC completed 240 systemic investigations that, in part, resulted in 46 settlements. These settlements (achieved without litigation) secured \$36.2 million for employees who suffered unlawful discrimination.
- ◆ Retaliation (37,836), race (33,512), and sex discrimination (30,356) (which includes allegations of sexual harassment and pregnancy discrimination), were, respectively, the most frequently filed charges.

Systemic Investigations: EEOC's *Real*/Focus

Although, as noted earlier, total discrimination charges filed by employees in 2012 (99,412) were lower than the total in 2011 (99,947) and 2010 (99,922), as the title of this