Westlaw Journal
EMPLOYMENT

Litigation News and Analysis • Legislation • Regulation • Expert Commentary

VOLUME 26, ISSUE 24 / JUNE 26, 2012

WHAT'S INSIDE

COMMENTARY

Avoiding the pitfalls of retaliation: An employment lawyer's perspective

Myrna L. Maysonet, a shareholder with Greenspoon Marder, discusses retaliation claims under Title VII and what steps employers should take to prevent and defend themselves against such claims.

SEE PAGE 3

WAGE AND HOUR

Pharma sales reps don't get overtime, Supreme Court decides

Sales representatives of pharmaceutical giant GlaxoSmithKline are not entitled to overtime under the Fair Labor Standards Act because they work in outside sales and are specifically exempt from the statute's provisions, a bare majority of the U.S. Supreme Court ruled June 18.

Christopher et al. v. SmithKline Beecham, No. 11-204, 2012 WL 2196779 (U.S. June 18, 2012).

The 5-4 majority acknowledged that the sales representatives did not sell anything themselves.

Their job was to secure "nonbinding commitments" from doctors to use Glaxo's products in appropriate cases, and this activity fit within the labor regulation defining "sales" as including "exchanges, consignments or other disposition," the majority said.

Writing for the majority, Justice Samuel Alito said those "nonbinding commitments" fell under "other disposition." The sales reps qualify as outside salespeople "under the most reasonable interpretation" of the Department of Labor's regulations, he said.

The majority also discounted the Labor Department's argument, in an *amicus* brief, that for a sale to occur, the employee must actually transfer title to the property being sold.

REUTERS/Toby Melville

The Supreme Court held that GlaxoSmithKline sales reps qualify as outside salespeople "under the most reasonable interpretation" of the Department of Labor's regulations and are not entitled to overtime.

That interpretation of the agency's regulations was relatively new and did not appear to be the result of thorough consideration, the majority said.

Justice Alito was joined by Chief Justice John Roberts and Justices Antonin Scalia, Anthony Kennedy and Clarence Thomas.

CONTINUED ON PAGE 7

41247259

Westlaw Journal Employment

Published since May 1986

Publisher: Mary Ellen Fox

Executive Editor: Donna M. Higgins

Production Coordinator: Tricia Gorman

Managing Editor: Robert W. McSherry

Editor: Linda Hilsee Coady, Esq.
Linda.Coady@thomsonreuters.com

Managing Desk Editor: Robert W. McSherry

Senior Desk Editor: Jennifer McCreary

Desk Editor: Sydney Pendleton

Westlaw Journal Employment
(ISSN 2155-594X) is published biweekly by Thomson Reuters.

Thomson Reuters
175 Strafford Avenue
Building 4, Suite 140
Wayne, PA 19087
877-595-0449
Fax: 800-220-1640
www.westlaw.com
Customer service: 800-328-4880

For more information, or to subscribe, please call 800-328-9352 or visit west.thomson.com.

How to Find Documents on Westlaw
The Westlaw number of any opinion or trial filing is listed at the bottom of each article available. The numbers are configured like this: 2009 WL 000000. Sign in to Westlaw and on the "Welcome to Westlaw" page, type the Westlaw number into the box at the top left that says "Find this document by citation" and click on "Go."

Westlaw

TABLE OF CONTENTS

Avoiding the pitfalls of retaliation: An employment lawyer's perspective

By Myrna L. Maysonet, Esq.
Greenspoon Marder

In life, love and business, timing is everything. Retaliation under Title VII should be added to that old adage. The elements of a claim for retaliation under Title VII[1] are easily established: a protected activity by an employee, an adverse action by an employer and a causal connection between the two.[2]

Successfully defending against a retaliation claim, however, is a more difficult task. Many employers defeat an employee's sexual harassment claim at trial only to succumb to the employee's retaliation claim. The exposure for the losing employer on a retaliation claim is high, typically including damages to the plaintiff and potentially hundreds of thousands of dollars for the plaintiff's attorney fees.

Most successful retaliation claims are due to unchecked emotions. Once an employee files a claim of discrimination, the employment relationship becomes emotionally charged. The employer often feels betrayed, and the employee feels persecuted. Without some kind of neutralizer, these situations often result in a successful retaliation claim. By taking steps to force employers to make decisions in a neutral and objective manner, the most common causes of retaliation claims can be eliminated.

With more than 15 years of experience, **Myrna L. Maysonet** is a shareholder with **Greenspoon Marder's** labor and employment and class-action defense groups in Orlando, Fla. She has experience with matters brought under Title VII, FLSA, ADA, ADEA and equivalent civil rights state statutes. She has practiced in multiple jurisdictions in Florida, Nevada, Utah, Tennessee and South Carolina. For more information, please contact Myrna at myrna.maysonet@gmlaw.com.

To prevent and successfully defend against these scenarios, employers must inform employees of relevant policies and practices. Simply stated, tell them about the ground rules for their continued employment with the company. These rules are typically referred to as "standards of conduct" or "employee conduct policies." These rules alert employees of the disciplinary measures available to the employer to rectify instances of employee misconduct.

By taking steps to force employers to make decisions in a neutral and objective manner, the most common causes of retaliation claims can be eliminated.

EMPLOYEE CONDUCT POLICIES

The crux of any retaliation claim is that an employee was subjected to an illegal adverse action because he or she made an allegation of discrimination.[3] The cases in which an employee successfully pursues a retaliation claim share a number of common causes. The first one is a lack of clear disciplinary rules or the lack of uniform enforcement of company rules. These omissions encourage the arbitrary enforcement of discipline, which creates an environment for retaliation claims. This scenario is commonly found in less structured environments such as "mom-and-pop shops," where everyone is treated like "family."

Typically, there is a problematic employee who is routinely late or not performing his or her job duties. The supervisor attempts to correct the problems through verbal warnings, but none of these performance deficiencies are properly documented, because there are no written rules or established progressive disciplinary policies in place. The performance or behavioral problems continue to escalate, and the employer decides to discharge the problematic employee. The employee sees the writing on the wall and immediately complains that he or she was discriminated against by the supervisor. Any subsequent disciplinary action is then viewed as retaliatory, irrespective of its validity.

All crucial policies should be provided to employees in writing. Equally important, an employer must inform employees in writing about the consequences of violating the company's rules and procedures. This step should occur at the time of hire or during training meetings, and it should always be documented to avoid future challenges.

However, the implementation of rules alone is insufficient to prevent retaliation claims. Rules are worthless if they are not enforced. The employer *must* uniformly and consistently apply the promulgated rules. Deviation from set policy will be challenged as pre-textual in nature, thereby eliminating one of the employer's most effective weapons against retaliation claims.

For example, if a company has established an attendance policy, then it must strictly enforce that policy across the board at all times. An employer cannot win a retaliation claim if an employee can show that others who violated the same policies were not subjected to the same discipline. Similarly situated employees should be treated equally, or a jury will view an employer's reason for the employee's discharge as pre-textual or as the result of his or her exercise in a protected activity.

ANTI-DISCRIMINATION POLICIES AND REPORTING PROCEDURES

The second line of preventing retaliation claims is to implement and enforce an anti-discrimination policy and reporting procedures. Anti-discrimination and reporting policies *must* instruct the employee in writing that the employer does not make employment decisions based on an employee's membership in a protected category. The policy must also establish guidelines for employees to internally report complaints of discrimination to specific individuals. A potential harasser can be an employee's direct supervisor, so disclosure alternatives must be provided for that scenario.

As with the rules of conduct, having a written anti-discrimination policy is worthless if employees cannot use it or if the employer is not responsive to complaints. It is crucial for an employer to show the anti-discrimination policy is effective. This does not mean every complaint of discrimination will be found to be valid or that an employee's requested action is always taken, because personality conflicts are sometimes disguised as discrimination complaints. With an effective policy, every complaint is thoroughly and objectively investigated, and appropriate action is taken if found to be necessary. An effective policy stops inappropriate conduct, even if it does not rise to illegal discrimination,[4] and provides measures to avoid further discrimination, including illegal retaliation.

The most common scenario creating liability for the employer is when managers have not been properly trained on how to deal with discrimination complaints. Most employees will first alert a direct supervisor or manager. If supervisors or managers are unaware of their duties under the company's anti-discrimination policy, or if they ignore their duties, the employer is in a position to lose any retaliation lawsuit.

For example, an employee reports to the supervisor that he is being harassed by a co-worker. The supervisor is unaware of the company's anti-discrimination policy and fails to report the complaint to the company's human resources department or to conduct an investigation pursuant to the company's policy. Instead, the supervisor decides the complaint is unwarranted and, shortly thereafter, disciplines the employee who made the complaint.

In this scenario, it is likely the employee can assert a successful retaliation claim. The company is now subjected to liability because of the decision of a single supervisor. The same outcome will occur when supervisors purposely disregard a selectively enforced policy.

The key to avoiding these unfortunate and all-too-common scenarios is to train supervisors and managers to understand the importance of the anti-discrimination policy and reporting procedures and their roles in immediately informing the appropriate persons concerning the complaint. Most supervisors and managers are not experts in human resources; however, they should be held responsible for ensuring discrimination complaints are immediately communicated to the people designated by the anti-discrimination policy and reporting procedures. The designated people should have the skill sets to investigate the complaints and make neutral and objective decisions.

An effective policy stops inappropriate conduct, even if it does not rise to illegal discrimination, and provides measures to avoid further discrimination, including illegal retaliation.

All employees should be informed at the time of hire of the company's anti-discrimination policy and reporting requirements. Companies should provide annual anti-discrimination training for all employees. When training supervisors, emphasis should be placed on the perils of retaliation and their responsibility to ensure every disciplinary action is supported by facts that can withstand future scrutiny. This is usually the biggest hurdle for an employer when dealing with a retaliation claim.

NEUTRAL PARTY

In a retaliation claim, the ultimate question for the court or jury to determine is whether the employer's decision was pre-textual in nature.

"The heart of the pretext inquiry is not whether the employee agrees with the reasons that the employer gives for the [adverse action], but whether the employer really was motivated by those reasons."[5]

Consequently, an employer's stated motives or reasons for making an adverse employment decision will *always* be challenged in a retaliation claim. Who made the adverse decision, what that person knew and when that person knew it are crucial questions in determining the merits of a retaliation claim. The employer has control over the answers to these questions and should ensure the adverse decision is not tainted by any discriminatory animus. An employer can defeat a retaliation claim if the employer can show a legitimate reason for taking the adverse action.[6]

The typical workforce is not trained in handling or investigating discrimination complaints. To most, a charge of discrimination is a personal attack, particularly if they are identified as the alleged harasser or wrongdoer. Emotions are bound to usurp objectivity and neutrality. While it should go without saying that supervisors accused of harassment should not make critical employment decisions regarding the complaining employee, this happens often, with disastrous results for the employer. This is the very essence of a retaliation claim.

The solution requires the implementation of separate procedures for handling employment decisions involving employees who have engaged in protected activity, whether it involves discrimination complaints filed internally or with the Equal Employment Opportunity Commission, or relates to other statutes, such as the Family Medical Leave Act.

The key is to remove the perceived conflict of interest by introducing a neutral and objective person who can independently corroborate that any proposed adverse action is not motivated by discriminatory animus, but by verifiable and objective evidence. This is where a human resource representative, or someone similarly trained, becomes the employer's best asset to defeat retaliation claims.

The purpose of an HR representative is not to make operational decisions. Those decisions ultimately belong to management. The representative is there to guide and advise the employer with respect to employment decisions involving persons who have engaged in a protected category. They can

challenge and verify the accuracy or propriety of a disciplinary decision proposed by management and spot potential problems.

Because HR representatives are typically involved in employment decisions for all employees, they are in the best position to know whether the company has promulgated applicable procedures. An HR representative is also privy to whether a particular policy is enforced or not, is knowledgeable concerning operations, and can assess whether a supervisor's reason for taking a disciplinary action is suspect. The main advantage of having a HR representative is that it inserts an objective and neutral party into the decision-making process.

I have found that when employers implement these steps to uniformly and objectively address disciplinary issues and discrimination complaints, they are more likely to successfully defeat retaliation claims. Successful employers promulgate policies that are uniformly enforced; they strictly adhere to written progressive discipline policies, and most importantly, they have a separate process of vetting employment decisions involving employees who engage in protected activity that remove emotions and conflict of interests from the decision making process. WJ

NOTES

[1] 42 U.S.C. § 2000e3(a).

[2] *Alvarez v. Royal Atl. Dev.*, ---F.3d----, 2010 WL 2631839, *11 (11th Cir. July 2, 2010).

[3] A retaliatory adverse action is any action that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 68 (2006). Typical adverse actions include, but are not limited to, demotions, discharges, change of schedules, or retaliatory actions against relatives of the person complaining.

[4] Title VII is not a civility code and not every slight or offensive comment will be an actionable claim for discrimination or retaliation under Title VII. *Oncale v. Sundowner Offshore Servs.,* 523 U.S. 75 (1998). The sole intent of Title VII is to combat illegal discrimination in the workplace and not personal animosity. *See Pullman-Standard v. Swint,* 456 U.S. 273 (1982); *Henson v. City of Dundee,* 682 F.2d 897 (11th Cir.1982).

[5] *Standard v. A.B.E.L. Servs.,* 161 F.3d 1318, 1333 (11th Cir.1998).

[6] *Tex. Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 254–55 (1981).

Ex-exec keeps $1.35 million award on wrongful-termination claim

A California appeals court has rejected a challenge to a jury's $1.35 million award in favor of a former company legal officer who claimed he was wrongfully terminated.

Faigin v. Signature Group Holdings Inc., No. B224598, 2012 WL 2053556 (Cal. Ct. App., 2d Dist. June 7, 2012).

The employer failed to show any legal error or prejudicial abuse of discretion by the trial court, the 2nd District Court of Appeal concluded.

According to the panel's opinion, Alan Faigin started working for Fremont General Corp. when he was still in law school. In 1983 the company hired him as general counsel, and he worked his way up to chief legal officer in 2004. The company later changed its name to Signature Group Holdings.

Faigin and the company entered into a three-year written employment contract in April 2007. It outlined Faigin's job duties as senior vice president, general counsel and chief legal officer of the company and fixed his salary at $425,000, plus bonus and other executive benefits.

> The plaintiff cited a provision in his employment contract when he told management that the change in his job duties was an involuntary termination.

The contract also said that if Faigin were "involuntary terminated" — that is, without cause or a through "significant change in job duties" — he would be eligible for certain benefits, including three years of his base salary in a lump sum.

When the board of directors hired a new management group, Faigin told the company his job duties changed enough to be considered an involuntary termination, and he demanded the company pay him the lump sum specified in his contract. Fremont refused and instead relieved him his duties in December 2007 and formally terminated him for cause in March 2008.

He sued Fremont in the Los Angeles County Superior Court in January 2009, alleging wrongful termination and breach of contract.

The jury found that Fremont had breached the employment contract and that Faigin was entitled to $1.35 million in damages for that breach.

The trial judge denied Fremont's post-judgment motions for a new trial and judgment notwithstanding the verdict, and Fremont appealed. The company argued that the award constituted an illegal golden-parachute payment and that no evidence supported the damages award.

The appeals court panel affirmed.

The panel agreed with Faigin that he and the company had an implied-in-fact agreement to terminate only for good cause.

The panel explained that an implied-in-fact agreement to terminate only for good cause cannot arise if a contrary written agreement exists, such as an acknowledgement that employment is at will. The presumption that employment is at will arise only if the term of employment is unspecified, the panel said.

Faigin's written contract with Fremont was for a fixed term of three years and did not state that his employment was at will, the panel said. WJ

Related Court Document:
Opinion: 2012 WL 2053556

See Document Section A (P. 19) for the opinion.

Workplace social media policies too restrictive, NLRB says

Most employers are not crafting sufficiently lawful social media policies for their workers because they restrict employee activities too broadly, a National Labor Relations Board attorney has found after analyzing seven cases that have come before the board in recent years.

NLRB acting General Counsel Lafe Solomon's report on social media focuses on cases the agency has addressed and, in particular, the policies applied to use of social media by employees.

In his report, Solomon reviewed seven cases and concluded in six of them that at least some of the provisions in the employer's policies and rules were overbroad and, therefore, violated the National Labor Relations Act. Provisions are unlawful when they interfere with the rights of employees to discuss such workplace issues as wages and working conditions.

In the seventh case, Solomon concluded that the entire policy is lawful under the NLRA.

Employment law attorney **Marcia Goodman** of **Mayer Brown** in Chicago said the NLRB's restrictions have a way to go until they are fully developed, but the report will be helpful to employers because it outlines reasonable courses of action for dealing with social media issues in the workplace.

"When formulating social media policies, the most important thing to keep in mind is determining how to protect the company's confidential information and trade secrets within the boundaries the report establishes," she said. "Be creative," she added.

INFORMATION SECURITY AT ISSUE

In one of the cases examined in the report, an nationwide retailer created a policy barring employees from releasing "confidential guest, team member or company information." Solomon said the provision was unlawful because it could reasonably be interpreted to prohibit employees from discussing their own working conditions or the working conditions of other employees.

Another section of the retailer's policy threatened discipline for discussion of confidential information in the break room, at home, or in open areas and public places. That provision is also too broad, Solomon found.

Another employer, a motor vehicle manufacturer, required employees who had doubts about whether to post nonpublic company information to check with its communications department first. Solomon said this was unlawful because securing permission before discussing working conditions violates the NLRA.

In addition, a policy that prohibited employees from posting photos, music, videos and the personal information of others without their employer's permission is unlawful, in spite of the employer's concern about use of its trademark or logo. Employees' non-commercial use of such logos or trademarks while engaging in labor-related activities would not infringe on the employer's proprietary interest in its trademarks, Solomon said.

ONLINE TONE

An international health care services company that manages billing for health care institutions cannot prohibit employees from commenting online about legal matters and "picking fights" when online, Solomon said. Discussion about wages or working conditions or unionism have the potential to become heated, but are protected by federal labor law.

Similarly, an employer's policy encouraging employees to resolve work concerns through internal procedures rather than online could have the effect of precluding a search for solutions through other means, including collective bargaining, Solomon noted.

He said the "savings clause" at the end of that employer's policy statement could not cure the otherwise unlawful provisions of the social media policy because employees would not understand from the wording that protected activities are permitted. The clause stated that the policy will not be construed as barring activities allowed under the NLRA.

Another company policy that prohibited "harassment, bullying, discrimination or retaliation" online, even if it is done after work hours and from home computers, was lawful. However, a provision warning employees not to harm the "image and integrity of the company" was unlawfully overbroad because it could be understood to prohibit criticism of the employer's labor policies or treatment of employees, Solomon said.

REUTERS/Vivek Prakash

Creating a social media policy

Attorney Marcia Goodman of Mayer Brown suggests doing the following when using the NLRB's report to create a social media policy:

- Focus on what the company *can do* as much as possible.
- Be creative while lining up with principles in report.
- Be compliant while protecting business interests.
- Give concrete examples of what is not protected.
- Reach out to the NLRB if it decides to investigate.
- Emphasize balancing employee rights with protecting business.

UNAUTHORIZED POSTINGS

A nonprofit organization that provides HIV risk reduction and support services has a policy that restricts, without written permission, Internet postings that could be attributed to the employer, and this is lawful, Solomon said. The restriction could not reasonably be construed as restricting employees' right to communicate about working conditions among themselves or third parties, he explained.

A policy that prohibits the making of "disparaging or defamatory" comments is unlawful as is a prohibition on participating in such activities on company time, Solomon said. Workers have the right to engage in NLRA-protected activities on the employer's premises during non-work time and in non-work areas, he said.

ENTIRE REVISED SOCIAL MEDIA POLICY LAWFUL

Finally, Solomon found one employer's entire revised social media policy was lawful for the following reasons:

- The policy is not ambiguous and includes sufficient examples of prohibited conduct.
- Its "be respectful online" requirement contains sufficient examples of plainly egregious conduct to guide employees.
- The policy provides sufficient examples of prohibited disclosures of private and confidential information to help the company maintain trade secrets.

The full report is available at http://www.nlrb.gov/news/acting-general-counsel-releases-report-employer-social-media-policies. WJ

Pharma

CONTINUED FROM PAGE 1

The federal Fair Labor Standards Act, 29 U.S.C. § 201, exempts from its overtime pay requirement "any employee employed in a bona fide executive, administrative or professional capacity or in the capacity of outside salesman."

The justices rejected the plaintiff sales representatives' argument that they do not "sell" but rather "promote" Glaxo's products. Glaxo maintained that its sales reps are trained in sales techniques in order to obtain a commitment from the doctors they visit to prescribe the company's drugs.

A 'DEFINITE MAYBE'?

Justice Stephen Breyer, who wrote the dissent and was joined by justices Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan, said a "nonbinding commitment" is not the same as a "sale."

"Like a 'definite maybe,' an 'impossible solution,' or a 'theoretical experience,' a nonbinding commitment seems to claim more than it can deliver," Justice Breyer said.

The primary duty of the pharmaceutical sales reps is to provide doctors with information about drugs, Justice Breyer said. He reasoned that a doctor will prescribe a drug that is best for a patient, "irrespective of any nonbinding commitment" he or she made to the sales rep.

He went on to say that the sales reps are more "detailers" than sellers of a product.

"The detailer's work, in my view, is more naturally characterized as involving promotional activities designed to stimulate sales that are ultimately made by someone else," Justice Breyer wrote.

FORMER SALESMEN SOUGHT OVERTIME

The case was brought by two former Glaxo salesmen who sought overtime on behalf of themselves and other representatives employed nationwide by the company.

Michael Christopher and Frank Buchanan sued Glaxo in 2008 in the U.S. District Court for the District of Arizona, alleging that the company misclassified them as "outside salesmen" to avoid having to pay them overtime under the FLSA.

They argued that they call on physicians and make presentations — they do not sell samples, take orders or negotiate drug prices with doctors or patients.

They also claimed they worked on average between 10 and 20 hours beyond the traditional 40-hour work week.

The District Court ruled against them, finding their primary duty is selling, not simply promoting.

The plaintiffs appealed to the 9th U.S. Circuit Court of Appeals, which also found that the sales reps' activities have all the hallmarks of selling.

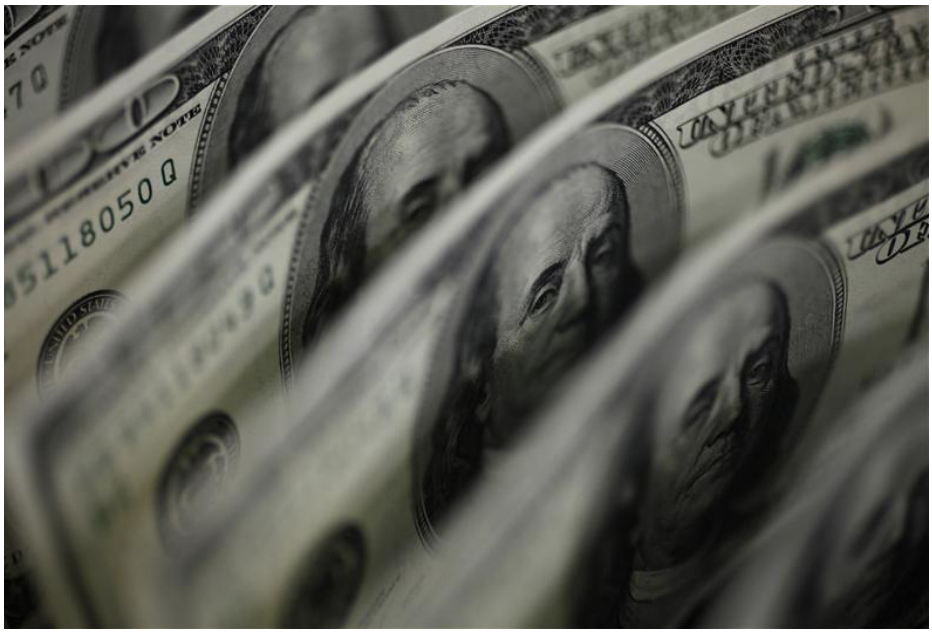
JUSTICES NOT SWAYED BY LABOR DEPARTMENT POSITION

The Labor Department's view that the sales reps should receive overtime was not entitled to deference, the majority said.

Justice Alito said the department had not enforced the overtime provision for pharma sales reps over the years and that its recent decision to back the plaintiffs here did not give the pharmaceutical industry fair warning of its "potentially massive liability."

"Where, as here, an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute," Justice Alito wrote. WJ

Related Court Document:
Opinion: 2012 WL 2196779



REUTERS/Yuriko Nakao

DISABILITY DISCRIMINATION

3 employers settle EEOC disability-bias suits

The Equal Employment Opportunity Commission has settled three disability discrimination suits it filed in federal court, with employers agreeing to pay a total of $164,500 to the affected workers.

Equal Employment Opportunity Commission v. Garney Construction Co. et al., No. 11-03336, consent decree approved (N.D. Ga. June 1, 2012).

Equal Employment Opportunity Commission v. Homestead Gardens, No. 10-02709, consent decree approved (D. Md. June 4, 2012).

Equal Employment Opportunity Commission v. Vitas Health Care of Florida, No. 11-24481, consent decree approved (S.D. Fla. June 6, 2012).

CONSTRUCTION FIRM, POWER COMPANY TO PAY $49,500

Garney Construction Co. and Georgia Power Co. will pay $49,500 to settle charges that Garney withdrew a job offer to a man with epilepsy that had been controlled with medication for over eight years. Bryan Mimmovich had applied for a job operating a front-end loader with Garney, but could not pass the company-required Department of Transportation physical examination because of his epilepsy. Mimmovich had worked for Garney in the same job twice before, according to the EEOC's June 1 press release.

The agency said Garney's subcontractor construction contract with Georgia Power required job applicants to pass a DOT examination or another equivalent medical examination. Federal law does not require heavy-equipment operators to pass a DOT physical examination, the EEOC said.

In its complaint, the agency said Garney engaged in disability discrimination. The EEOC also alleged that Georgia Power interfered with Mimmovich's employment relationship with Garney by requiring Garney to reject him as an employee. The EEOC said employers must individually assess a disabled applicant's ability to do a job.

HEMOPHILIAC GETS $50,000 SETTLEMENT

A Maryland garden center that fired a stocker after finding out he had hemophilia will settle an EEOC suit alleging violation of the Americans with Disabilities Act. Homestead Gardens told Richard Starkey not to return to work after his mother said in casual conversation with Homestead employees that her son had the blood disease, the agency said in a June 6 press release. Under the ADA, it is unlawful to discriminate on the basis of an actual or perceived disability.

> The EEOC said it is seeing an increased number of disability discrimination complaints, including those from employees with epilepsy, hemophilia and high blood pressure.

Homestead Gardens will pay Starkey $50,000 and create a system for employees and independent contractors to report discrimination and retaliation. It also will train supervisors and managers on anti-discrimination laws and provide an expert to evaluate requests for reasonable accommodations.

HOSPICE CARE PROVIDER AGREES TO $65,000 SETTLEMENT

A Miami hospice care provider will pay $65,000 and amend its reasonable-accommodation policy to settle an EEOC suit, the agency announced June 6. The EEOC alleged that Vitas Health Care of Florida violated the Americans with Disabilities Act by not reassigning Eveline Chery, a registered nurse, to a vacant position for which she was qualified after she became unable to perform her usual job duties due to high blood pressure. Vitas instead required her to compete for a job vacancy, but did not rehire her.

Under the ADA, an employer must work with a disabled employee to reach a reasonable accommodation, that is, one that does not impose an undue hardship on the employer, the EEOC said. WJ

9th Circuit reinstates claim for long-term disability payments

A woman unable to go back to work after she suffered a spinal cord injury is entitled to an award of disability benefits under her company's Employee Retirement Income Security Act plan, a divided 9th U.S. Circuit Court of Appeals panel has ruled.

Jackson v. Wilson, Sonsini, Goodrich & Rosati Long Term Disability Plan et al., No. 10-17112, 2012 WL 2060667 (9th Cir. June 8, 2012).

In a 2-1 vote, the panel reversed summary judgment in favor of the Wilson, Sonsini, Goodrich & Rosati Long Term Disability Plan on Pamela Jackson's claim she was disabled and unable to work.

A majority of the panel said the U.S. District Court for the Northern District of California erroneously found that Jackson was not disabled.

"There was no evidence of malingering on the part of this long-term employee," the panel said.

Jackson lost not only her livelihood, but also her home, the majority said.

"Enduring those consequences when she could no longer endure her pain provides additional persuasive proof of her entitlement to benefits," it concluded.

The dissenting judge agreed that summary judgment for the employer was not proper here, but faulted the majority for granting summary judgment in favor of Jackson.

The judge said the evidence suggested several issues of fact needed to be resolved, including the question of whether Jackson could do her job.

In light of the employer's statement that Jackson could "move around as needed" while she worked, the dissent said summary judgment for Jackson should not have been automatic.

According to the panel's opinion, Jackson was injured when a needle touched her spinal cord during treatment for continuing back pain. When her feet became numb, she underwent spinal surgery, but still suffered pain, the opinion said.

Jackson returned to work as a help desk analyst at law firm Wilson, Sonsini, Goodrich & Rosati, but she was unable to handle her job duties because she was required to spend long periods of time seated, the opinion says.

When Jackson sought disability benefits through the firm's benefits plan, the firm insisted that Jackson verify her claim with "objective clinical evidence." However, because Jackson's doctor had inserted Harrington Rods into her back, she could not provide clinical evidence of persistent pain, the opinion said.

A Harrington Rod is a stainless steel surgical device implanted along the spine usually to treat scoliosis, or curvature of the spine.

Jackson sued the law firm and Prudential Insurance Co., the plan administrator, in the U.S. District Court for the Northern District of California, alleging that her employer should have granted her claim for benefits under its long-term disability benefits plan.

> "There was no evidence of malingering on the part of this long-term employee," the federal appeals court said, ruling in favor of disability benefits for the employee.

The District Court granted summary judgment to the defendants, finding the record "clear that the medical information in plaintiff's file does not support the severity of her complaints or indicate that she is unable to perform the material and substantial duties of her occupation."

Jackson appealed to the 9th Circuit, which reversed. In its order, the panel granted summary judgment to Jackson and ordered payment of all benefits denied from May 1, 1999, onward.

The majority also faulted Prudential for arbitrarily refusing to credit evidence from the treating physicians from whom Jackson sought opinions. Prudential was not required to give special deference to treating physicians, but it should not have simply dismissed their evidence, the panel noted.

The appeals court panel rejected the employer's contention that Jackson's job allowed her to sit and stand whenever she needed to do so. WJ

Attorneys:
Plaintiff: Richard Johnston, Santa Rosa, Calif.
Defendant: Anna Forugh Ghassab-Shiran, Gordon & Rees, San Francisco

Related Court Document:
Opinion: 2012 WL 2060667

WESTLAW JOURNAL

CLASS ACTION

This reporter covers the proliferation of the class action lawsuit in numerous topic areas at the federal, state, and appeals court levels. Topics covered include consumer fraud, securities fraud, products liability, automotives, asbestos, pharmaceuticals, tobacco, toxic chemicals and hazardous waste, medical devices, aviation, and employment claims. Also covered is legislation, such as the 2005 Class Action Fairness Act and California's Proposition 64, and any new federal and state legislative developments and the effects these have on class action litigation.

WAGE AND HOUR

Police officer sues California city for wages, overtime

A California police officer claims in a federal court lawsuit that the Long Beach Police Department failed to pay him for a variety of job duties he was required to perform before, during and after his regular shift.

Dapello v. City of Long Beach, No. 12-05065, complaint filed (C.D. Cal., W. Div. June 12, 2012).

Sgt. Michael Dapello works in the city's forensic science/crime lab. In his complaint, filed in the U.S. District Court for the Central District of California, he alleges he was not paid for work such as:

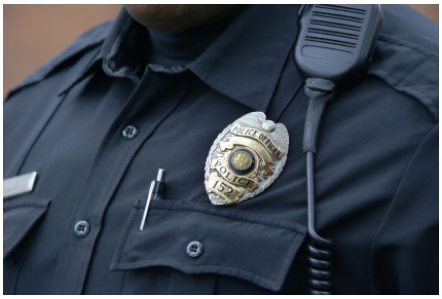
- Pre- and post-shift briefings.
- Preparation for roll call.
- Inspections.
- Preparation of reports.
- Preparation for and traveling to court appearances.
- Administrative hearings.
- Maintaining required equipment.

In addition, he worked during meal and rest breaks, and the city discouraged him from putting in for all the overtime hours he worked, Dapello says.

> The plaintiff says Long Beach violated federal wage-and-hour law because it failed to pay him for "all time spent on activities that are an integral and indispensable part" of his principal duties.

Prior to Dapello's lawsuit, a group of Long Beach police officers brought a collective action under the Fair Labor Standards Act, 29 U.S.C. § 201, for unpaid wages against the city. *Edwards et al. v. City of Long Beach*, No. 05-08990 (C.D. Cal.)

The *Edwards* suit resulted in a memorandum of understanding and a tentative agreement



with the organization that represents police officers there.

According to Dapello's complaint, the internal grievance procedure outlined in the memorandum of understanding that resulted from labor negotiations does not apply to him. He says he is subject to a separate hiring agreement that does not require an internal grievance.

In addition, Dapello says, he opted out of the FLSA collective action that led to the memorandum of understanding.

By not paying him all the wages to which he is entitled, the city has violated the federal FLSA, which requires compensation for "all time spent on activities that are an integral and indispensable part" of his principal duties.

The second claim on the complaint is for breach of contract, which Dapello says he is not required to submit to the Police Department's internal grievance procedures.

Dapello is asking the court to issue an injunction and to award unpaid wages and punitive damages. WJ

Attorney:
Plaintiff: Omel Nieves, Hunt Ortmann Palffy Nieves Lubka Darling & Mah, Pasadena, Calif.

Related Court Document:
Complaint: 2102 WL 2131583

See Document Section B (P. 30) for the complaint.

Ohio Supreme Court upholds workplace smoking ban

The Ohio Supreme Court has upheld a statewide ban on smoking in places of employment, ruling that the law is constitutional and falls within the state's police power.

Wymsylo v. Bartec Inc. d/b/a Zeno's Victorian Village et al., No. 2011-0019, 2012 WL 1888365 (Ohio May 23, 2012).

In a unanimous opinion, the justices rejected a bar owner's claim that penalties for violating the Smoke Free Workplace Act, Ohio Rev. Code Chapter 3794, are excessive and improper.

Ohio voters passed a ballot initiative to enact the ban in 2006. The law bars public places of employment from allowing smoking in their businesses.

Zeno's Victorian Village, a bar in Columbus, was cited for violating the ban on 10 occasions, according to the court's opinion.

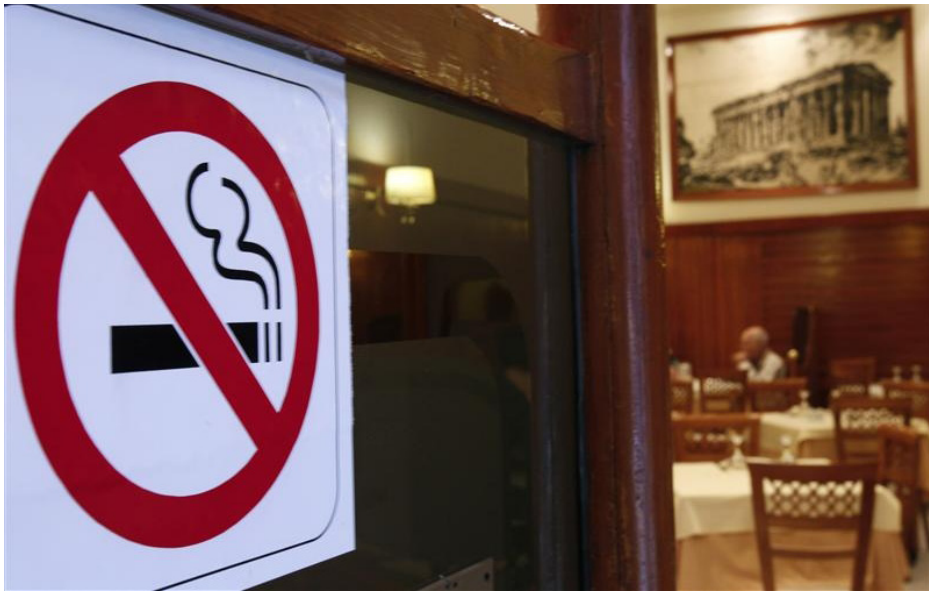
The state's Department of Health sued Zeno's and its owner, seeking a court order forcing the business to comply with the act and to pay all outstanding fines.

Zeno's counterclaimed, arguing that the act violated its constitutional rights.

The Franklin County Court of Common Pleas denied the state's request for injunctive relief and vacated Zeno's 10 violations. The court found that the Department of Health exceeded its authority when it issued fines for violation of the anti-smoking act regardless of whether Zeno's was "permitting" smoking to occur in its building.

The court said Zeno's has "no control over whether someone rips out a cigarette and lights up" and that the agency's interpretation of the law "makes property owners liable for the actions of third parties upon which the property owner has little to no control."

Both parties appealed. Zeno's had argued that is was entitled to declaratory and injunctive relief barring the state from enforcing the smoking ban in an unlawful manner.



REUTERS/John Kolesidis

The Court of Appeals reversed and remanded, finding that the act required business owners to take some responsibility for conduct that takes place in their establishments.

The appeals court also held that Zeno's failure to pursue an administrative hearing on its 10 violations means it waived any error by the Department of Health. Because the violation orders were now final, the trial court erred in vacating them, the court said.

The appeals panel also upheld the law as constitutional.

The Ohio Supreme Court granted review and ultimately affirmed the appellate court ruling.

The high court held that:

- Zeno's was required to exhaust its administrative remedies to preserve a challenge to the act.
- There was substantial evidence showing that Zeno's "implicitly" allowed smoking in violation of the act.
- The state had the authority to require that business owners prevent smoking in public places of employment.
- The state's enforcement of the law was not a regulatory taking without compensation.

"It is not unreasonable or arbitrary to hold responsible the proprietors of public places and places of employment for their failure to comply with the Smoke Free Act," the Supreme Court said.

The court also rejected Zeno's argument that the act improperly takes away the bar's control over the air inside its establishment. The court said the law aims to protect the health of employees and citizens in the state, and "does so by regulating proprietors of public places and places of employment in a minimally invasive way." WJ

Related Court Document:
Opinion: 2012 WL 1888365

See Document Section C (P. 34) for the opinion.

REUTERS/Rick Wilking

WORKERS' COMPENSATION

Gay man's emotional-distress claim barred by workers' compensation

A gay grocery store worker who sued his employer for intentional infliction of emotional distress as part of a workplace discrimination suit must resolve the claim through California's workers' compensation system, a state appeals court has ruled.

Tuckness v. Whole Foods Market California Inc., No. A131448, 2012 WL 2127512 (Cal. Ct. App., 1st Dist. Div. 5 June 13, 2012).

The 1st District Court of Appeal rejected Zachary Tuckness' challenge to the trial court's grant of summary judgment to Whole Foods Market California Inc., which employed him as a member of the specialty department team.

The panel said Whole Foods responded appropriately to Tuckness' complaints of sexual orientation discrimination and harassment, and the company was not obligated to take any action beyond the investigation.

The panel also found no triable issue with respect to the emotional-distress claim because Tuckness' only recourse for the allegedly "outrageous" conduct he experienced at work was a workers' compensation claim.

The panel agreed with the trial court's conclusion that the alleged wrongful conduct happened at work, in the normal course of the employer-employee relationship.

According to the opinion, Tuckness joined Whole Foods in summer 2007. In November that year, he presented management with the first of several lists of complaints about the workplace, the opinion said.

The alleged problems ranged from his supervisor's schedule to holiday glitter that an assistant team leader allegedly had put into the store's olive bar, to alleged comments about Tuckness' sexual orientation, according to the opinion.

Tuckness complained in detailed letters to Whole Foods regional offices, in telephone calls to the employee hotline and directly to store personnel. Whole Foods investigated on several occasions but found the complaints "either lacked merit or did not amount to violations of company policy," according to the opinion. This was the case even when the company hired a third party to conduct the investigation.

In the meantime, Whole Foods documented a number of "corrective counselings" with Tuckness for problems with lateness and absences in April and May 2008, the opinion said. He resigned around that time after the store's director of team member services suggested he transfer to another store, the opinion said.

Tuckness sued Whole Foods in the Alameda County Superior Court, alleging violations of the Fair Employment and Housing Act, Cal. Gov't Code § 12900, and for intentional infliction of emotional distress.

The trial judge granted summary judgment to Whole Foods. Tuckness appealed, and the 1st District affirmed.

The panel found no triable issues of fact with regard to any of Tuckness' statutory claims, and it affirmed dismissal of his claim for intentional infliction of emotional distress.

Workplace injuries must be pursued through a workers' compensation claim, but misconduct that exceeds the normal risk of the employment relationship is an exception, the panel explained.

Tuckness maintained that Whole Foods' conduct fell within that exception, but he failed to support that argument, the panel said.

Discipline or criticism is a normal part of the employment relationship and, even if intentional, unfair or outrageous, it is covered by the workers' compensation exclusivity provisions, the panel said. WJ

Related Court Document:
Opinion: 2012 WL 2127512

Appeals court's citations on workers' compensation:

Miklosy v. Regents of University of California, 44 Cal. 4th 876 (Cal. 2008)

Although employer criticism and discipline may be characterized as intentional, unfair or outrageous, they are covered by workers' compensation exclusivity provisions.

Cole v. Fair Oaks Fire Protection District, 43 Cal. 3d 148 (Cal. 1987)

Employee cannot avoid exclusive remedy provisions of the Labor Code by labeling normal employer decisions on demotions, promotions and criticism of work practices as outrageous or intended to cause emotional disturbance.

Insurer must defend workers' comp trust administrator in mismanagement suits

The administrator of a defunct workers' compensation trust is owed a defense from its professional liability carrier against several lawsuits filed by trust members alleging it was mismanaged into insolvency, a federal appeals panel has ruled.

Westport Insurance Corp. v. Hamilton Wharton Group Inc., Nos. 11–1153–cv LEAD and 11–1493–cv XAP, 2012 WL 1739759 (2d Cir. May 17, 2012).

The 2nd U.S. Circuit Court of Appeals panel ruled the insurer was obligated to defend Hamilton Wharton Group Inc. because the underlying lawsuits could potentially involve "professional services" covered by its policy.

The dispute concerns Hamilton's administration of the New York Healthcare Facilities Workers' Compensation Trust that existed from 1997 until it terminated operations in August 2006. The trust was composed of nursing homes, health care agencies and hospitals that were required under state law to maintain employee workers' compensation insurance.

The trust members sued Hamilton in New York state court, alleging it failed to exercise due diligence in its management of the trust leading to a deficit of more than $30 million.

According to the panel's summary order, Westport insured Hamilton for damages and losses arising from its professional services, defined as "the insured's activities for others as a managing general insurance agent, general insurance agent, insurance agent or insurance broker."

Several plan members filed complaints against Hamilton and owner Walter B. Taylor, stating claims for breach of fiduciary duty, breach of contract and fraud.

The suits alleged Hamilton and Taylor negligently failed to:

- Exercise prudent oversight over the day-to-day operations of the trust.
- Engage actuaries or accountants, and submit audited financial statements.
- Initiate or complete critical business, marketing, underwriting and safety plans necessary for long-term success of the trust.
- Take sufficient or timely corrective actions to address the trust's mounting deficit.
- Engage in any and all transactions as required for the administration of the trust.

Westport initially agreed to defend Hamilton against the suits but reserved its right to challenge whether it actually had an obligation to defend the administrator later.

In December 2010 Westport sued Hamilton in the U.S. District Court for the Southern District of New York, seeking a declaratory judgment that it had no duty to defend or indemnify the administrator in the underlying suits.

> "The 'professional services' contemplated by the policy encompass *at least some* of the activities alleged in the [underlying] actions," the panel said.

Prior to discovery, the District Court granted Hamilton summary judgment, finding that Westport had a duty to defend it because, the court said, it was reasonably possible the underlying suits had implicated covered professional service activities. In addition, the court dismissed as premature Westport's claim that it had no duty to indemnify.

The 2nd Circuit affirmed.

The panel explained that an insurer's duty to defend is broader than the duty to indemnify. Insurers are obligated to defend "so long as the claims asserted against the insured may rationally be said to fall within policy coverage, whatever may later prove to be the limits of the insurer's responsibility to pay," the panel's summary order says.

The panel noted several allegations against Hamilton involved negligent handling of trust funds by failing to hire accountants or conduct payroll and safety audits. Also, it allegedly offered unwarranted discounts to trust members.

"The 'professional services' contemplated by the policy encompass *at least some* of [these] activities," the panel said.

As a result, Westport must defend Hamilton against the suits, the panel concluded. WJ

Attorneys:
Plaintiff: Joyce F. Noyes, Walker Wilcox Matousek LLP, Chicago

Defendant: Kevin L. Smith, Stroock & Stroock & Lavan, New York

Related Court Document:
Summary order: 2012 WL 1739759

RECENTLY FILED COMPLAINTS FROM WESTLAW COURT WIRE*

Westlaw Cite	2012 WL 2149749
Case Title	Litzman v NYPD, No. 12-04681 (S.D.N.Y. June 14, 2012)
Case Type	Employment
Case Subtype	Religious Discrimination
Allegations	Plaintiff NYPD Probationary Police Officer who is an Orthodox Jew was told that he has to trim his beard as a condition for graduation from NYPD Police Academy which violates Plaintiff's religious convictions.
Damages Synopsis	Permanent injunctive relief directing Defendants to accommodate Plaintiff's religious accommodations, compensatory damages, lost wages, interest, cost and fees.

Westlaw Cite	2012 WL 2091932
Case Title	Acquisto v. Sacramento City Unified School District, No. 2012-80001173 (Cal. Super. Ct. Orange County, June 8, 2012)
Case Type	Employment
Case Subtype	Contract
Allegations	Class action. Respondent Sacramento City Unified School District's governing board decided to lay-off plaintiff teacher and putative class while retaining other employees who were not permanent, probationary or who had less seniority, resulting in petitioners' request for a writ of mandate.
Damages Synopsis	Declaratory and injunctive relief, reinstatement, interest, fees, expenses, and costs.

Westlaw Cite	2012 WL 2089505
Case Title	Hardwick v. Auriemma, No. 0153557-2012 (N.Y. Sup. Ct. Manhattan, June 8, 2012)
Case Type	Employment
Case Subtype	Sexual Harassment
Allegations	Defendants The National Basketball Association and USA Basketball (USAB) discriminated against plaintiff Kelley D.F. Hardwick in the terms and conditions of employment on account of her gender, and subjected her to a sexually hostile work environment when co-defendant Coach Geno Auriemma stalked, assaulted and battered her by following her to her room, grabbing her about the arm and attempting to forcibly kiss her on the mouth during their trip to Russia with the USAB Women's Senior National Team.
Damages Synopsis	Compensatory and punitive damages, injunctive relief, fees, disbursements, and costs.

Westlaw Court Wire is a Thomson Reuters news service that provides notice of new complaints filed in state and federal courts nationwide, sometimes within minutes of the filing.

SUPERMARKET CASHIER TO BE REINSTATED

An Albertson's grocery store cashier who was fired allegedly for talking with union organizers and recommending unionization to co-workers should be reinstated, a federal judge in New Mexico has decided. The longtime cashier was suspended and then terminated for her union activity, according to a June 8 National Labor Relations Board announcement. The cashier and the union filed unfair-labor-practice charges with the NLRB, and an administrative law judge found the suspension, firing and other actions by store managers unlawful. The board sought a temporary injunction in federal court in New Mexico to bar store managers from threatening employees or putting them under surveillance for union activity. The judge granted the injunction and ordered the fired employee reinstated.

Overstreet v. Albertson's, No. 12-240, 2012 WL 1970781 (D.N.M. May 31, 2012).

Related Court Document:
Opinion: 2012 WL 1970781

WHIRLPOOL SETTLES RACE, SEX HARASSMENT CASE

Whirlpool Corp. has agreed to pay more than $1 million and drop an appeal of a race and sexual harassment judgment in favor of the Equal Employment Opportunity Commission, the agency said in a statement June 13. The settlement ends almost six years of litigation by the EEOC on behalf of a black female employee at a Tennessee Whirlpool facility who said she was sexually harassed by a white male co-worker, the agency said. The four-day trial in the U.S. District Court for the Middle District of Tennessee included testimony about offensive verbal comments and gestures and a violent assault that left the woman with injuries so serious she is unable to return to work, according to the EEOC. The complaint alleged that Whirlpool knew about the harassment but took no corrective action. The company appealed the judgment to the 6th U.S. Circuit Court of Appeals but agreed June 11 to settle the case.

Equal Employment Opportunity Commission v. Whirlpool Corp., No. 11-5508, voluntary dismissal granted (6th Cir. June 12, 2012).

DOL GETS INJUNCTION TO PROTECT RETIREMENT FUNDS

The U.S. Department of Labor has won an initial round in its suit against a retirement plan fiduciary who allegedly used more than $3.2 million in workers' retirement plan savings from multiple employers for his own personal benefit. The Labor Department obtained a preliminary injunction in the U.S. District Court for the District of Idaho against Matthew Hutcheson and his firm Hutcheson Walker Advisors, the agency said June 14. The Labor Department said the alleged misconduct left the affected retirement plans without sufficient funds to pay all the benefits owed to plan participants. Other defendants in the action include Green Valley Holdings and the Retirement Security Plan & Trust.

Solis v. Hutcheson et al., No. 12-00236, preliminary injunction signed (D. Idaho June 13, 2012).

JEHOVAH'S WITNESS TO GET $35,000 FOR ALLEGED BIAS FIRING

A Michigan long-term-care facility has settled an EEOC lawsuit that alleged the company fired a Jehovah's Witness who told her supervisor she could not work on Wednesdays or Sundays because of her religious beliefs. Whitehall Healthcare Center in Ann Arbor will pay $35,000 to resolve the Equal Employment Opportunity Commission's claims that Whitehall violated Title VII, the federal statute that bars employment discrimination, the agency said in a statement June 8. The employee, a certified nursing assistant, claimed the company refused to consider her request that she not be scheduled to work on days when she planned to attend religious services or participate in fieldwork. Whitehall will also train employees in handling requests for religious accommodation and report to the EEOC on its compliance with the decree, the agency said.

Equal Employment Opportunity Commission v. Whitehall Healthcare of Ann Arbor, No. 11-15407, consent decree approved (E.D. Mich. June 8, 2012).

OSHA ORDERS RAILROAD TO PAY $800,000 AFTER TERMINATIONS

Norfolk Southern Railway violated the whistle-blower-protection provisions of the Federal Railroad Safety Act and must pay more than $800,000 to three employees, the Occupational Safety and Health Administration said in a statement June 18. According to the agency, the railroad charged three employees with improper performance of duties and then fired them after they reported their on-the-job injuries. Over the past year, OSHA has issued several other orders against the railroad after investigations revealed the company has continued to retaliate against employees for reporting workplace injuries, creating a "chilling effect in the railroad industry," OSHA's statement said. The damages award includes $525,000 in punitive damages and attorney fees.

FOOD COMPANY CITED FOR EMPLOYEE DEATH

Tribe Mediterranean Foods, which manufactures Tribe-brand hummus products, has received a citation from the Occupational Safety and Health Administration following the death of a worker at its Taunton, Mass., plant. The June 18 report said a contract employee was cleaning a machine at the plant when he was pulled into it and crushed to death. OSHA found that Tribe had not trained that worker and six others who cleaned plant machinery on how to shut down machines and lock out their power sources before servicing or maintaining them. The agency said Tribe's "continuous disregard for a deadly hazard" was so egregious that it deserved seven willful violations, one for each employee exposed to the hazard, the report said. Other serious violations of OSHA regulations at Tribe included electrical, slipping, and additional machine-guarding hazards, the agency said.

EMPLOYER LAWFULLY CONVERTS TEMPS TO PERMANENT STATUS TO REPLACE STRIKERS

Ruling: Where an operator of shipping vessels had a legitimate business justification for converting its temporary replacements to permanent replacements, the National Labor Relations Board's Division of Advice declined to find that the employer's actions were improperly motivated by an independent unlawful purpose" within the meaning of the board's ruling in *Hot Shoppes*.

What it means: In the absence of evidence that an employer has an independent unlawful purpose in permanently replacing economic strikers, an employer is not required to prove business necessity or show a nexus between the hiring decision and its ability to continue operations during the strike. Here, the NLRB general counsel would not be able to satisfy its burden of proof because there was no evidence of anti-union discrimination under National Labor Relations Act Section 8(a)(3) in the employer's use of permanent replacements.

American Steamship Co., 39 AMR 69 (N.L.R.B. 2012).

TEACHER'S LUMP-SUM PAYMENT RENDERS HER INELIGIBLE FOR UNEMPLOYMENT

Ruling: The Pennsylvania Unemployment Compensation Board of Review affirmed a referee's decision denying unemployment compensation benefits to a teacher who was paid over a 12-month period, but received a lump sum after 10 months when her employment was ended.

What it means: Because the claimant received a lump-sum payment for the summer, she was not considered unemployed until the end of the summer.

George v. Unemployment Compensation Board of Review, 43 PPER 136 (Pa. Commw. Ct. May 21, 2012).

MALE ENGINEER'S EQUAL-PAY CLAIM FALLS SHORT

Ruling: The Ohio Court of Appeals affirmed a trial court's grant of summary judgment in favor of a municipal power and water utility on the discrimination claim of a male engineer-in-training). The plaintiff contended that he was being paid a lower wage than a female co-worker in violation of Ohio Rev. Code § 4111.17(A), the state equal-pay act. However, the appellate court rejected that assertion, noting that no genuine issue of material fact existed because the two employees did not perform equal work under similar working conditions.

What it means: Discrimination claims under Ohio Rev. Code § 4111.17 are evaluated under the same equal-pay standard — equal skill, effort and responsibility — applied to claims brought under the federal Equal Pay Act. Here, the plaintiff failed to establish a *prima facie* case of discrimination under Section 4111.17(A) because his job and that of his female co-worker did not require equal skills, effort and responsibility.

Lang v. City of Columbus Division of Water & Power, 29 OPER 168 (Ohio Ct. App. May 8, 2012).

TERMINATION OF SCHOOL SECURITY PERSONNEL DOESN'T EQUAL CONTRACT REPUDIATION

Ruling: The Michigan Employment Relations Commission adopted an administrative law judge's recommended dismissal of an unfair-practice charge. The ALJ rejected the charging party's contention that the public school employer failed to bargain in good faith by refusing to acknowledge a bid for services based on cost savings it demanded during contract negotiations. The charging party brought the charge after the employer contracted with a third party to provide security services and terminated public safety officers/security officers at its schools. The ALJ found that, under MERC case law, the charging party's February 2010 contract proposal did not constitute a "bid" within the meaning of Public Employment Relations Act Section 15(3)(f). The ALJ also determined that no contract repudiation took place, despite the employer's failure to follow contract provisions when it terminated bargaining unit members. The ALJ concluded that allegations of discrimination and retaliation against unit members were meritless.

What it means: MERC has held that repudiation of a bargaining agreement constitutes a violation of an employer's bargaining duty under PERA Section 10(1)(e). Repudiation exists when there is no bona fide dispute over interpretation of the pertinent contract, and the contract breach is substantial and significantly impacts bargaining unit members.

Detroit Public Schools, 25 MPER 84 (Mich. Emp. Relations Comm'n May 22, 2012).

COURT UPHOLDS DISMISSAL OF COMPLAINT AGAINST UNION

Ruling: In a nonpublished, noncitable opinion, the California 2nd District Court of Appeal affirmed a state superior court's decision regarding a lawsuit brought by the appellant, a former school district employee, against a union. The appellant contended that the union violated public policy and its duty of fair representation toward him because it failed to aid him after he took early retirement in lieu of a layoff. The appeals court agreed with the lower court's conclusion that the Public Employment Relations Board maintained exclusive jurisdiction over the matters raised by the appellant.

What it means: The appeals court noted that PERB's exclusive jurisdiction is not limited to cases in which it is clear that a violation of the Educational Employment Relations Act is involved. Rather, in applying EERA Section 3541.5 to situations dealing with employment disputes, courts have permitted PERB to resolve disputes that arguably could give rise to an unfair-practice claim.

Richman v. California School Employees Association, 36 PERC 170 (Cal. Ct. App., 2d Dist. May 9, 2012).

PERB MAJORITY DIRECTS DISTRICT TO RESCIND 'ZERO TOLERANCE' POLICY FOR DRUG TESTING

Ruling: A majority of the California Public Employment Relations Board reversed a hearing officer's proposed dismissal of an unfair-practice charge, in which the charging party challenged the termination of a school bus driver for failing to submit to a random drug test. The PERB majority decided that the employer unilaterally changed its contractual employee discipline policy by establishing and enforcing a "zero tolerance" policy with respect to an employee's alleged refusal to submit to a random controlled substance and/or alcohol test, without meeting and negotiating with the union over that change. The employer's unilateral change violated EERA Sections 3543.5(a), (b) and (c), it decided.

What it means: To prove a unilateral change, a charging party must establish that: (1) the employer took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; (4) the action had a generalized effect or continuing impact on terms and conditions of employment.

Mutual Organization of Supervisors v. Fairfield-Suisun Unified School District, 36 PERC 176 (Cal. Pub. Employment Relations Bd. May 9, 2012).

COURT VACATES ARBITRATION AWARD OVER TOWNSHIP'S FILLING OF PATROL OFFICER VACANCIES

Ruling: In an unpublished decision, the New Jersey Superior Court, Appellate Division, vacated a Chancery Division order and vacated an arbitration order. The arbitrator ruled in the union's favor on a grievance challenging the municipal employer's assignment of supervisory officers to patrol officers when vacancies arose in the patrol division.

The appeals court explained that the arbitrator disregarded both parties' arguments and issued a decision on a contract provision that neither the union nor the employer cited. The arbitrator's action constituted the type of procedural misbehavior that was prejudicial to a party's rights and was sufficient to warrant vacating the award under N.J. Stat. Ann. § 2A:24-8(c), the court determined. It remanded the matter to the arbitrator for further proceedings.

What it means: While judicial review of an arbitrator's award is very deferential, the appeals court explained, an arbitrator must base his decision on the four corners of the contract. The court noted that it will vacate an arbitration award if the arbitrator adds new terms to an agreement or ignores its clear language.

Township of Montclair v. Montclair PBA Local No. 53, 2012 WL 1836090, 38 NJPER 125 (N.J. Super. Ct. App. Div. May 22, 2012).

CASE AND DOCUMENT INDEX