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WHAT'S INSIDE

GENDER DISCRIMINATION

Transgender applicant appeals dismissal of gender bias suit

By Tricia Gorman

A transgender woman who had a job offer rescinded by Phillips 66 Co. is asking a federal appeals court to revive her lawsuit accusing the energy giant of illegal sex discrimination under Title VII of the Civil Rights Act of 1964.

Wittmer v. Phillips 66 Co., No. 17-cv-2188, notice of appeal filed (S.D. Tex. Apr. 19, 2018).

REUTERS/Rick Wilking

Nicole Wittmer filed a notice of appeal April 19 with the 5th U.S. Circuit Court of Appeals, seeking review of a ruling by Chief U.S. District Judge Lee H. Rosenthal of the Southern District of Texas.

Judge Rosenthal granted summary judgment for the company April 4, saying Wittmer had failed to show Phillips knew she was transgender when it decided to take back the job offer or that the company's reasons for withdrawing the offer were not legitimate. *Wittmer v. Phillips 66 Co.*, No. 17-cv-2188, 2018 WL 1626366 (S.D. Tex. Apr. 4, 2018).

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Don't mean to harsh your mellow, but ... contractors and the Drug-Free Workplace Act

Brad Wine and Steve Cave of Morrison & Foerster discuss the responsibility of government contractors to follow federal laws prohibiting drug use when operating in states that allow recreational drug use.

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Avoid misclassification quagmires by understanding differences between contractors and employees

By Isabel Crosby, Esq.
DLA Piper LLP

When engaging a worker to perform paid work services, a first and critical step in the hiring process is the determination of the worker's status as an employee or independent contractor.

Classification missteps can translate to significant legal and economic risk, including the potential assessment of back pay damages, punitive damages, and attorneys' fees under the Fair Labor Standards Act ("FLSA"), penalties under the Affordable Care Act ("ACA"), tax assessments and penalties, and other potential damages and tax liabilities under both federal and state laws.

Workers who are not properly classified also face negative consequences, as they are not afforded overtime and/or minimum wage protections pursuant to the FLSA, workers' compensation benefits, entitlement to health insurance or other fringe benefits, payment of unemployment insurance, or protections under various employment laws including Title VII of the Civil Rights Act ("Title VII"), the Americans with Disabilities Act ("ADA"), and the Family and Medical Leave Act ("FMLA").

UNDERSTANDING THE DIFFERENCES BETWEEN CONTRACTORS AND EMPLOYEES

Companies engaging workers must consider the jurisdictions and laws applicable to their workers in order to identify the appropriate test to apply in assessing classification, and they may find that workers can be properly classified as an independent contractor in certain states and in compliance with certain laws, while other states and other laws require classification of that same worker as an employee.

As a result, companies are advised to consult with legal counsel before engaging a worker as an independent contractor to assist with a classification analysis, and companies are also well advised to conduct regular workforce audits of their independent contractor relationships to assess whether the relationship, the applicable law, or the jurisdictional requirements have changed since the original assessment was completed.

IRS guidelines for worker classification

The Internal Revenue Service ("IRS") has distilled its analysis of independent contractor classifications into an examination of the following three categories: (1) behavioral control, (2) financial control, and (3) the relationship of the parties.[1]

Any analysis under the IRS test should consider all factors examined together in order to determine the appropriate classification for federal tax purposes.

To assess behavioral control, companies should focus their analysis on whether the business has the right, even if not exercised, to direct and control the work performed by the worker.

> To determine the appropriate classification for federal tax purposes, the IRS considers the following three categories: (1) behavioral control, (2) financial control, and (3) the relationship of the parties.

Factors to consider in analyzing behavioral control include an examination of the nature of the instructions provided to the worker, including where work should be performed, what tools should be used, and where supplies and services should be purchased.[2]

An analysis of financial control must necessarily consider whether the business has the right to direct or control the financial and business aspects of the worker's job.

Factors to consider in analyzing financial control include whether the worker has made significant investment in the equipment that the worker uses in performing services, whether the worker is responsible for the expenses he incurs in performing work services, whether the worker makes his or her services available to the larger marketplace, and the method in which the worker is compensated for services.

In analyzing compensation structures, businesses should consider that employees are typically guaranteed a regular wage amount for hourly, weekly, or other time periods worked while independent contractors are typically paid on a flat fee basis or per job worked.[3]

The IRS guidelines also consider the type of relationship between the parties, and how the parties perceive that relationship.

Factors to consider in analyzing this third category are the written contracts governing the relationship between the parties and

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how those documents describe and characterize the relationship, whether employee benefits are provided, the permanency of the relationship between the parties, and whether the services provided are key to the business.[4]

Important to note is the fact that the mere existence of a written agreement, which simply states that the worker is an independent contractor, is not sufficient on its own to establish an independent contractor relationship between the parties. This is true under virtually all tests.

Assessing the worker relationship under the FLSA

Because the FLSA only applies where an employer-employee relationship exists between the parties, individuals who are properly classified as independent contractors (rather than employees) are not covered by the FLSA. Therefore, they are not protected by overtime and minimum wage requirements. The definition of "employ" is, however, very broadly defined by the FLSA as "to suffer or permit to work."[5]

> The Labor Department has recently made investigation of independent contractor misclassification an enforcement priority estimating that misclassification affects 10 percent to 30 percent of all employers.

In the past several years, a wave of misclassification lawsuits, most of which were filed as putative class or collective actions, have been filed by individuals who performed services as independent contractors and who later sought wages for all hours worked as well as any overtime alleged to be due.

In addition, the Department of Labor, the federal agency charged with enforcing the FLSA, has, in the recent past, made investigation of independent contractor misclassification an enforcement priority estimating that independent contractor misclassification affects 10 percent to 30 percent of all employers, impacting "high risk industries" such as construction, janitorial, home healthcare, childcare, transportation and warehousing, meat and poultry processing, and other "professional and personnel industries."[6]

Courts utilize a balancing test commonly known as the "economic realities" test to evaluate whether "as a matter of economic reality, [the worker] is economically dependent upon the business to which they render services" in order to determine whether a worker is an employee or independent contractor under the FLSA.[7]

In applying this test, courts evaluate a number of factors including: "(1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and the alleged employer; (3) the degree to which the worker's opportunity for profit or loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship."[8]

The Department of Labor has also adopted and affirmed the use of the multi-factor economic realities test for determining whether a worker is an employee or independent contractor.[9]

And in the summer of 2015, the Department of Labor published Administrator's Interpretation Memorandum No. 2015-1, suggesting that the economic realities test should be expansively applied and further taking the position that most independent contractors are actually employees.[10]

However, after the change in administrations, the Department of Labor later withdrew the July 2015 memorandum, but it did not change course in advocating the application of the economic realities test.

Various states apply disparate tests to analyze worker classification

In addition to the various tests under federal law, different states apply varying tests in determining worker status for purposes of determining various state law protections or benefits, *e.g.* unemployment insurance.

Many states follow what is commonly referred to as the "ABC" test under which paid work services are considered employment if:

> (a) The worker is free from the company's direction or control in the performance of work services both under the applicable contract and in actual practice;
>
> (b) The work services are performed either outside of the usual course of business for which they are performed or are performed outside of all places of business of the enterprise for which the services are performed; and
>
> (c) The worker is customarily engaged in an independent trade, occupation, profession, or business.[11]

Other states follow a variation of the "ABC" test applying, for example, only portions (a) and (c), and still others supplement the "ABC" test with additional factors for a more rigid analysis.[12]

Other states apply a 20-factor analysis, weighing 20 different factors, which fall within the IRS's three categories for consideration of behavioral control, financial control, and the relationship of the parties.[13]

This is not, however, a comprehensive summary of all the different state law tests, but rather, a summary of the more common approaches. As such, employers with operations and workers in multiple states should consult legal counsel to ensure compliance with the various applicable state law requirements to avoid misclassification claims in a single jurisdiction.

BEST PRACTICES FOR CLASSIFICATION

The various applicable laws can leave even the most savvy companies with questions regarding proper worker classification. There are, however, several ways to avoid missteps.

1. Conduct regular internal audits in connection with legal counsel

Companies are well advised to conduct an audit of independent contractor relationships in connection with legal counsel and to refresh such audits on a regular basis.

To begin the audit, the company should take the following initial steps:

- Designate an audit team, which may include a human resources representative and a member of the legal department and/or outside counsel.
- Collect all independent contractor agreements and any other applicable documentation related to terms of work and pay for independent contractors.
- Identify the work location of each individual who is currently designated as a contractor in order to identify the state laws that may be implicated by the audit.

The audit should include not only an assessment of the independent contractor agreement (if one exists) but also an analysis of the terms and conditions of the individual's work.

Companies may find, for example, that an individual who was originally engaged as an independent contractor to assist with setting up computer systems in a new office location two years ago has remained engaged to provide regular help desk support without a change in classification status.

Different states apply varying tests in determining worker status for purposes of determining various state law protections or benefits, such as unemployment insurance.

Companies should also avoid reliance on industry practice or past practice in conducting the audit, as a classification analysis should be individualized.

The audit team should prepare both a plan for reclassification or renewal of independent contractor agreements where necessary but also a plan for how to address mistakes.

Legal counsel can help assess both applicable laws and legal risks, and in some cases, the involvement of legal counsel can help shield audit results and analyses from disclosure pursuant to the attorney work product doctrine or attorney client privilege protections.

2. Review and revise independent contractor agreements

Under the various legal standards, simply labeling a worker as an independent contractor, advisor, or consultant is not, on its own, sufficient to establish a contractor relationship. This is the case even where a written agreement exists between the parties to establish the designation or where the worker has requested such a designation.

Independent contractor agreements should include language to establish the appropriateness of the classification, and companies are well advised to approach each independent contractor arrangement with a renewed analysis of the applicable agreement, rather than using a one-size fits all form for all independent contractors.

Companies should consider inclusion of the following (or similar) language in the independent contractor agreement, which may help bolster its position that the individual worker is an independent contractor rather than an employee:

(1) The worker will not receive instructions from the company as to how to accomplish the services for which he/she was retained.

(2) The worker will not receive training from the company.

(3) The contractor may hire others to assist him/her in the performance of the services, and the contractor retains the right to control the work activities of those assistants.

(4) The worker shall have control over his/her hours of work.

(5) The worker acknowledges, and the company agrees, that the contractor shall have the opportunity to pursue other work when and for whom he/she chooses.

(6) The worker has the right to choose where the work will be performed.

(7) The worker may select the order and sequence of the work to be performed.

(8) The worker shall be responsible for completing the final project, and no interim reports shall be required.

(9) The worker shall be compensated per job and not compensated based on the hours required to complete the job.

(10) The worker shall be responsible for his/her business expenses.

(11) The worker shall supply his own tools and equipment to perform the job.

(12) The worker may be terminated for failure to comply with the terms of the contract (rather than on an at-will basis).

(13) The worker is responsible for the satisfactory completion of the job, and shall be liable for failing to complete the job in accordance with the contract.

Where possible the company should make clear that the relationship between the contractor and the company is not continuing but shall terminate at the conclusion of the project. This may require that the contract be renewed multiple times for various work assignments or simply supplemented by new exhibits to the master agreement, which outline supplementary projects as requested.

Agreements which state that the relationship is, essentially, indefinite may later be viewed as characteristic of an employment relationship. Similarly, agreements which contemplate near full-time work are more likely to be characterized as employment relationships if scrutinized by a government agency or court at a later date.

PARTING THOUGHTS

The lack of consistency among state and federal laws can leave companies scratching their heads over how to classify various workers.

However, by conducting regular internal audits, consulting with legal counsel, and ensuring that independent contractor agreements are well crafted and tailored for each individual relationship, companies can avoid the headaches and legal risks that come along with misclassification. WJ

NOTES

[1] *See* IRS, FS-2017-09 (July 20, 2017).

[2] *See id.*

[3] *See id.*

[4] *See id.*

[5] *See* 29 U.S.C.A. § 203(g).

[6] *See* U.S. Dep't of Labor, Strategic Plan FY 2011-2016 (Sept. 30, 2010).

[7] *See Bartels v. Birmingham,* 332 U.S. 126, 130 (1947); *Tony and Susan Alamo Found. v. Sec'y of Labor,* 471 U.S. 290, 301 (1985); *Hopkins v. Cornerstone Am.,* 545 F.3d 338, 343 (5th Cir. 2008); *Brock v. Superior Care Inc.,* 840 F.2d 1054, 1058–59 (2d Cir. 1988); *Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen,* 835 F.2d 1529, 1534–35 (7th Cir. 1987).

[8] *See Hopkins,* 545 F.3d at 343; *see also Brock,* 840 F.2d 1054, 1058–59 (2d Cir. 1988); *Lauritzen,* 835 F.2d 1529, 1534–35 (applying a six-factor test).

[9] *See* U.S. Dep't of Labor, Administrator's Interpretation Memorandum No. 2015-1 (July 15, 2015); *see also* Wage and Hour Division Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (Revised July 2008).

[10] *See* U.S. Dep't of Labor, Administrator's Interpretation Memorandum No. 2015-1 (July 15, 2015).

[11] *See* U.S. Dep't of Labor, Comparison of State Unemployment Insurance Laws (Updated as of March 26, 2018) at p. 1-4 (https://bit.ly/2KDo3RR).

[12] *See id.* at pp. 1-5 & 1-7.

[13] *See id.* at p. 1-5.

Don't mean to harsh your mellow, but ... contractors and the Drug-Free Workplace Act

By Brad Wine, Esq., and Steve Cave, Esq.
Morrison & Foerster

Nine states[1] and the District of Columbia now have laws that permit recreational possession and use of marijuana. Government contractors with offices, employees and/or agents in these jurisdictions are well aware of the ongoing conflict between those laws and federal laws and regulations that prohibit contractors and their employees from, among other things, possessing, distributing or using drugs.

At the federal level, cannabis remains a Schedule I drug under the Controlled Substances Act, 21 U.S.C.A. § 812(c), which governs the manufacture and distribution of drugs and criminalizes the possession and distribution of scheduled drugs.

In addition to the CSA, federal contractors are subject to laws and regulations that require them and their employees to refrain from possessing, distributing or using drugs, or committing any drug-related crimes.

Employers must continue to make employees aware of the discrepancies between state and federal law because certain activities remain prohibited even within the geographical bounds of the states and cities that permit recreational drug use and possession.

For example, it is illegal to possess or use marijuana on federal property in states that have decriminalized marijuana use. In the District of Columbia, roughly one-quarter of the city is impacted by this prohibition.

REUTERS/Lucy Nicholson

A woman holds marijuana for sale at a dispensary in California on Jan. 2, the first day of legal recreational possession and use of the drug in the state.

DRUG-FREE WORKPLACE ACT

The Drug-Free Workplace Act of 1988, 41 U.S.C.A. § 8102(a), requires federal contractors to abstain from, and prohibits employees from engaging in, the "unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance" in a contractor workplace. "Workplace" includes any location that is "for the performance of work done in connection with a specific contract or grant." 41 U.S.C.A. § 8101(a)(5).

Even though some states have enacted laws that permit marijuana use and possession, any company that receives a federal contract or grant must institute and maintain a drug-free awareness program. The program must inform employees about the prohibitions and penalize them for DFWA violations.

As discussed more thoroughly below, designated penalties should include termination from employment or the contractor may require the employee's satisfactory participation in a drug-abuse assistance or rehabilitation program. 41 U.S.C.A. § 8104.. Federal Acquisition Regulation subpart 23.5 implements the prohibitions of the DFWA, and the subpart's implementing clauses are incorporated into government contracts. FAR 23.505; 52.223-6.

PENALTIES FOR DFWA VIOLATIONS

The DFWA does not impose specific penalties against employees who violate the act. Rather, the act penalizes contractors in an effort to incentivize employees to make a good-faith effort to continue to maintain a drug-free workplace. 41 U.S.C.A. § 8102(a)(1)(G).

The contractor is responsible for ensuring that its employees comply with the DFWA's requirements, and agencies are tasked with determining whether "the contractor has failed to make a good-faith effort to provide a drug free workplace." 41 U.S.C.A. § 8102(b)(1)(B).

Penalties imposed against employees must be harsh enough to deter behavior that could frustrate compliance with the act because corporate violations of the DFWA can result in delayed contractual payments, contract terminations and administrative penalties including suspension or debarment from participation in federal contracting. 41 U.S.C.A. §§ 8102(b), 8103(b); FAR 9.406-2(b)(1)(ii).

Additionally, repeated criminal offenses by a contractor's employees can serve as a basis to find that the contractor lacks

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present responsibility to contract with the government.

A state's decision to legalize the recreational use and possession of marijuana does not supersede federal criminal drug statutes or DFWA requirements. It remains a federal crime to, among other things, use or possess cannabis.

A "conviction" under the DFWA is "a finding of guilt (including a plea of nolo contendere), an imposition of a sentence, or both, by a judicial body charged with the responsibility to determine violations of federal or state criminal drug statutes." 41 U.S.C.A. § 8101(a)(3).

Convictions for misdemeanors and minor offenses are treated the same as convictions for drug-related felonies, and all convictions are considered when agencies assess whether the contractor has met its burden to make a good-faith effort to provide a drug-free workplace.

Contractors and grant recipients must notify contracting agencies within 10 days of receiving notice of violations of the DFWA. 41 U.S.C.A. §§ 8102(a)(1)(E), 8103(a)(1)(E). The failure to report violations can serve as a basis for suspension or debarment. 41 U.S.C.A. §§ 8102(b)(1)(A), 8103(b)(1)(A).

Federal contractors are subject to laws and regulations that require them and their respective employees to refrain from possessing, distributing or using drugs, or committing any drug-related crimes.

SECURITY CLEARANCES

Recreational drug use can also serve as the government's basis to deny or revoke a security clearance. Access to classified information should be granted to individuals only if doing so is clearly consistent with the national interest. *See* 50 U.S.C.A. § 3341 et seq.[2]

Individuals who are granted access to classified information after undergoing the requisite background checks are required to continue to behave in a manner befitting an individual who is entrusted with access to classified information.

The statutory scheme imposes "limitations" on the government's ability to grant security clearances and prohibits the grant of a clearance to "an unlawful user of a controlled substance or an addict." 50 U.S.C.A. § 3343. "Controlled substance" is defined to include drugs listed in Schedule I of the CSA.

The government also publishes 13 adjudicative guidelines that apply to all people being considered for initial and continued access to classified information.[3] The guidelines help the government and its investigators determine whether an individual should obtain access to, or continue to have access to, classified information.

Decision makers consider national security interests and undertake a common sense review of the person's overall trustworthiness, based on behavior as revealed by various sources or disclosed in application forms.

The government often cites Guideline H — Drug Involvement — to justify the revocation of an individual's security clearance. This guideline states that, among other things, drug abuse, illegal drug use, dependence, possession, cultivation or manufacture are conditions that raise security concerns and justify the denial of a security clearance.

According to the guidelines, drug use or misuse raises questions about a person's reliability and trustworthiness because it may impair judgment.

The Defense Office of Hearings and Appeals is the administrative tribunal charged with resolving appeals from individuals who have had their clearance revoked. In 2016 alone, it considered at least 93 appeals in cases involving security clearances that were either revoked or denied due to drug involvement.

Accordingly, even if it is permissible under state law, using or possessing marijuana may jeopardize an individual's ability to access classified information, and such access is a requirement for certain federal contracting positions.

PRACTICAL MITIGATION TIPS

Information is perhaps the single most important component of an effective drug-free workplace compliance program. The liberalization of drug laws in various jurisdictions that serve as hubs for government contracting activities only heightens the importance of education for a contractor's workforce.

Recreational drug use can serve as the government's basis to deny or revoke a security clearance.

Contractors with offices in states that permit recreational drug use and possession need to adopt, implement and routinely review their drug-free workplace policies and training materials. Most violations occur because employees are unaware of federal criminal laws and the nuances that could give rise to a drug-related conviction.

Compliance may also require contractors to oversee their relationships with independent contractors and subcontractors. Informing subcontractors about the DFWA and other drug-related requirements by including the applicable regulatory clauses (i.e., FAR 52.223-6) in all agreements is the first step toward ensuring subcontractor compliance.

A close working relationship and continued oversight will allow contractors to identify problems with the subcontractor or its employees early and avoid violations of laws like the DFWA — and any resultant performance problems. WJ

NOTES

[1] The states that permit recreational marijuana use are Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, Washington and Vermont.

[2] Numerous presidents have signed executive orders establishing and revamping parts of the program(s) governing the designation, handling and disposal of classified information.

[3] *Security Executive Agent Directive 4 – National Security Adjudicative Guidelines,* U.S. Dep't of State (June 8, 2017), http://bit.ly/2lPcnR5.

Target removes disability bias suit to Los Angeles federal court

By Tricia Gorman

Target Corp. has removed to Los Angeles federal court a lawsuit alleging it violated California law by cutting a maintenance worker's hours, refusing to accommodate her lifting restriction caused by a work-related injury and ultimately firing her.

Molina v. Target Corp. et al., No. 18-cv-3181, notice of removal filed, 2018 WL 1904163 (C.D. Cal. Apr. 16, 2018).

In an April 16 notice of removal filed in the U.S. District Court for the Central District of California, the retailer says the court has jurisdiction over the state law case because the parties' citizenship is diverse and the amount in controversy exceeds $75,000.

The plaintiff, Norma Molina, is a citizen of California, while the company is a citizen of Minnesota, the notice says.

Target removed the case four days after filing an answer in the Los Angeles County Superior Court that asserted a general denial of her claims and its liability for her alleged injuries.

ALLEGED VIOLATIONS OF CALIFORNIA FEHA

Molina sued Target in March, alleging the company violated California's Fair Employment and Housing Act, Cal. Gov't Code § 12940, by discriminating against her based on her disability and retaliating against her because she requested a reasonable accommodation and medical leave and complained that the company was discriminating against her.

According to the complaint, Molina started at Target in May 2013, putting in about 40 hours per week as a maintenance worker.

In March 2015 Molina injured her back while mopping the floor, the suit says. A company doctor cleared her to return to work with a lifting restriction of 20 pounds or less, according to the suit.

She continued to suffer back pain for more than a year until a second doctor diagnosed a misaligned disk and lowered her lifting restriction to 15 pounds, according to the complaint.

Molina alleges that Target disregarded the doctor's recommendation and moved her to a position that required her to violate the lifting restriction, a problem she reported to her supervisors multiple times.

The situation worsened in October 2016, when Molina's supervisor scheduled her for only three hours in one week, the suit says.

On Nov. 15, 2016, soon after Molina complained about the "drastic change" to her hours and took a day off due to back pain, her supervisor fired her, according to the suit.

Molina alleges the company's stated reason for her termination — taking too many days off — was pretext and that she was really fired over her disability and in retaliation for requesting an accommodation and complaining about the medical restriction violations.

The suit asserts FEHA claims against Target for disability discrimination; retaliation; failure to prevent discrimination and retaliation, to provide a reasonable accommodation or to engage in an interactive accommodation process; and wrongful termination in violation of public policy.

Molina seeks unspecified damages for lost wages and benefits, emotional distress and punitive damages.

AFFIRMATIVE DEFENSES AND REMOVAL

In addition to denying liability in its answer, Target puts forth more than 40 affirmative defenses arguing that Molina has no viable claims against it.

The company contends that any injury Molina may have suffered was due to her own negligence and not attributable to any of Target's actions or omissions.

WESTLAW JOURNAL/Thomas Wertman

Molina also failed to exhaust administrative remedies or take advantage of the corrective procedures available under the company's anti-discrimination and retaliation policy, Target says. She did not engage in an interactive process or request the company's participation in the process, according to the answer.

In its removal notice, Target says that there is complete diversity of citizenship between the parties. Although Molina names up to 20 fictitious and unknown Doe defendants in her suit, Target says under the federal judicial code, 28 U.S.C.A. § 1441, their residence should be disregarded when determining removal jurisdiction.

The amount in controversy exceeds $75,000, the company says, noting that Molina's alleged damages include lost wages and benefits, future wages, statutory, civil and punitive damages as well as attorney fees. WJ

Attorneys:
Plaintiff: Ramin R. Younessi, Los Angeles, CA

Defendant: Samantha C. Grant and Whitney N. Perry, Sheppard, Mullin, Richter & Hampton, Los Angeles, CA

Related Filings:
Notice of removal: 2018 WL 1904163
Answer: 2018 WL 1904161
Complaint: 2018 WL 1224420

Debtor who 'made a mockery' of bankruptcy court can't collect award

By Thomas Parry

An Alabama woman who recently discharged debts through Chapter 7 bankruptcy cannot collect a $116,700 arbitration award over workplace discrimination because she concealed both the discrimination suit and the award during her bankruptcy proceedings, a Birmingham federal judge has ruled.

Wholesalecars.com v. Hutcherson, No. 16-cv-155, 2018 WL 1509509 (N.D. Ala. Mar. 27, 2018).

U.S. District Judge Karon Owen Bowdre of the Northern District of Alabama applied judicial estoppel to prevent Cory Hutcherson from enforcing the award against her former employer Wholesalecars.com, finding Hutcherson had "intended to make a mockery of the judicial system."

However, the trustee in her Chapter 7 proceedings can collect the award on behalf of Hutcherson's bankruptcy estate, Judge Bowdre said.

PROCEEDINGS UNKNOWN TO EACH OTHER

Hutcherson sued Wholesalecars.com in July 2014 in the District Court, alleging that the company had illegally terminated her employment because she was pregnant, Judge Bowdre explained in her opinion.

The case proceeded to arbitration, and on Nov. 24, 2015, an arbitrator awarded Hutcherson $116,677, the opinion said.

Meanwhile, two months before receiving the award, while arbitration was ongoing, Hutcherson filed a Chapter 7 bankruptcy petition in the U.S. Bankruptcy Court for the Northern District of Alabama.

Hutcherson failed to mention her lawsuit against Wholesalecars.com in her original bankruptcy filings, and when asked by her bankruptcy trustee at the Nov. 6, 2015, creditors meeting meeting whether she was "suing anyone for any reason," Hutcherson responded under oath, "no sir," the opinion said.

Subsequently, when she filed amended bankruptcy schedules after having won the award in arbitration, Hutcherson omitted the arbitration award.

The bankruptcy court discharged Hutcherson's debts Jan. 7, 2016.

Soon after, Wholesalecars.com sued Hutcherson in the District Court, alleging that she had obtained the arbitration award through fraud.

Hutcherson did not tell the arbitrator she was going through bankruptcy proceedings and therefore falsely represented to the arbitrator that she was entitled to pursue a claim that actually belonged to her bankruptcy estate, Wholesalecars.com argued.

Hutcherson's former employer asked the court to vacate the award under the Federal Arbitration Act, 9 U.S.C.A. § 10 as having been obtained by fraud or, failing that, estop Hutcherson from collecting the award.

'MOCKERY'

Judge Bowdre refused to vacate the award, finding that Hutcherson's failure to tell the arbitrator that she was going through bankruptcy was not sufficiently related to an issue in the arbitration.

"The arbitrator's decision, the merits of the case, and Wholesalecars.com's ability to present its defense would not have changed had Ms. Hutcherson revealed her lack of standing and the trustee was appropriately substituted in to the arbitration," the judge said.

However, the judge concluded that Hutcherson was judicially estopped from enforcing the award.

Hutcherson's repeated omissions of the suit and the award evinced an intent to "make a mockery of the judicial system," the judge said, citing *Slater v. U.S. Steel Corp.*, 871 F.3d 1174 (11th Cir. 2017).

Most "egregiously," Hutcherson did not answer truthfully about her participation in any lawsuits when asked directly by the bankruptcy trustee at her creditor meeting, the judge said.

"The question was not a trick question," the judge wrote, granting the former employer's motion to the extent it requested the court to bar Hutcherson from enforcing the award.

However, because Hutcherson's bankruptcy trustee never took inconsistent positions under oath, the trustee can enforce the award in the interests of the bankruptcy estate, Judge Bowdre concluded. WJ

Related Filings:
Opinion: 2018 WL 1509509

See Document Section A (P. 27) for the opinion.

NLRB general counsel weighs in on union election rules

(Reuters) – National Labor Relations Board General Counsel Peter Robb has weighed in on the board's union election rules, proposing the elimination of a policy that allows parties to delay elections by alleging conduct that interferes with employees' ability to vote freely.

Robb suggested April 18 that the NLRB abandon its "blocking charge" policy, which pauses elections until unfair-labor-practice charges are resolved, and instead allow elections to proceed and impound the ballots pending resolution of the charges.

Robb's proposal came in response to the board's December request for public input on whether it should change or eliminate the so-called quickie-election rules, which took effect in 2015. The NLRB received nearly 7,000 responses by the close of the comment period April 18.

Enacted by a board controlled by Democratic-appointed members, the rules were designed to streamline the election process. According to NLRB statistics, the median amount of time between the filing of a petition and an election has dropped nearly 40 percent to 23 days since the rules were adopted.

Union signs hang in the windows of a home in Dubuque, Iowa. REUTERS/Tim Reid

Two NLRB members have already signaled they may be receptive to Robb's proposal to drop the blocking charge policy.

NLRB member Marvin Kaplan said in an unpublished decision in December that he was open to revisiting the policy, while member William Emanuel said it should be changed. Those two Republican-appointed members reiterated their views in an unpublished decision in January.

Robb also suggested extending the time for hearings on a union election petitions from eight to 12 days after the petition is filed and empowering NLRB regional directors to delay hearings for up to three days.

In their comments to the NLRB, industry groups and Republican lawmakers criticized the rules for unfairly limiting employers' ability to prepare for elections.

Unions, worker advocates and Democratic lawmakers urged the board to keep the current rules saying they eliminate unnecessary delays and that there is no data to justify changing them. WJ

(*Reporting by Robert Iafolla)*

California court says workers can't sue company after settling with staffing firm

(Reuters) – A California state appeals court has ruled that a telecommunications equipment company cannot be sued for alleged wage-and-hour violations by workers who took part in a settlement of identical claims against the staffing agency that hired them.

Castillo et al. v. Glenair Inc., No. B278239, 231 Cal. Rptr. 3d 397 (Cal. Ct. App., 2d Dist. Apr. 16, 2018).

A unanimous three-judge panel of the California 2nd District Court of Appeal on April 16 said that Glendale, California-based Glenair Inc. was immune from the claims because it acted as an "agent" of staffing firm GCA Production Services Inc. by keeping track of the hours its employees worked. Glenair is represented by Gibson Dunn & Crutcher.

The decision affirmed a ruling by a state judge who said the lawsuit could not proceed once a separate case against GCA had settled. Glenair was accused of violating state laws requiring minimum wage and overtime pay and depriving workers of breaks.

Gibson Dunn partner Jesse Cripps, who represents Glenair, said he was pleased with the decision.

"The court saw this case for what it was — an attempt by the plaintiffs to seek double recovery for the same exact claims that had already been settled," Cripps said.

The plaintiffs' lawyers at Matern Law Group did not respond to a request for comment.

A group of GCA employees who performed maintenance work at a Glenair plant in California sued the staffing firm in 2012, alleging various violations of state wage-and-hour laws.

The plaintiffs did not name Glenair in the lawsuit, but in 2013 two different GCA employees separately sued Glenair over the same alleged conduct, claiming the company was their joint employer because it controlled their working conditions.

The plaintiffs in each case had different lawyers.

The lawsuit against Ohio-based GCA settled in 2014 on undisclosed terms. Workers who opted into the settlement, including the plaintiffs in the lawsuit against Glenair, signed a release that barred them from bringing any similar claims against GCA or its "agents."

Glenair in 2015 moved for summary judgment in the second lawsuit, claiming it was covered by the settlement agreement with GCA. The company said that by alleging that it was a joint employer, the plaintiffs had conceded that it was an agent of GCA.

A state judge in San Bernardino County in 2016 agreed and granted Glenair's motion for summary judgment.

On appeal, the plaintiffs said their claims were not barred because Glenair was not named in the GCA lawsuit or in the settlement agreement. They also said that a company can be a joint employer without being the "agent" of another business.

The 2nd District panel April 16 disagreed, saying Glenair was an agent of GCA because it kept records of hours that employees worked so they could be paid properly.

"If the [plaintiffs] were permitted to pursue their causes of action here, they would undermine the finality of the court-approved settlement, waste judicial resources, and potentially obtain a double recovery on their already-settled claims," Justice Elwood Lui wrote.

The panel also included Justices Victoria Chavez and Brian Hoffstadt. WJ

(*Reporting by Daniel Wiessner*)

Attorneys:
Plaintiffs-appellants: Matthew J. Matern, Tagore Subramaniam and Andrew Sokolowski, Matern Law Group, Manhattan Beach, CA

Defendant-respondent: Jesse A. Cripps, Gibson, Dunn & Crutcher, Los Angeles, CA

Related Filings:
Opinion: 2018 WL 1790683

California college settles class action over missed breaks for $300,000

By Tricia Gorman

A San Diego federal judge has given final approval to a $300,000 settlement resolving class-action claims that a local college failed to provide its hourly employees with work-free rest and meal breaks, or to compensate them for the missed time.

Espinosa v. California College of San Diego Inc. et al., No. 17-cv-744, 2018 WL 1705955 (S.D. Cal. Apr. 9, 2018).

The settlement covers a statewide class of more than 200 current and former hourly, nonexempt employees who worked for the California College of San Diego Inc. since February 2013 and were denied breaks required by state law.

U.S. District Judge Michael M. Anello of the Southern District of California granted final approval of the settlement April 9, saying it was the "fair, reasonable and adequate" result of arm's-length negotiations.

The court had preliminarily approved the pact in December, and Judge Anello noted when granting final approval that no class members had objected to the agreement since then.

Plaintiff Charish Espinosa originally sued the college in state court in February 2017 alleging violations of various wage and break provisions of the California Labor Code.

Espinosa, who worked as an hourly employee in the school's financial aid office between September 2011 and February 2014, claimed she was often denied 10-minute rest breaks and 30-minute meal breaks free of work responsibilities, as the code mandates.

She said she was unable to complete her daily duties, which consisted primarily of interviewing financial aid applicants and related paper work, unless she worked through her breaks.

As a result, Espinosa often performed uncompensated off-the-clock work that she had no way to record officially, she claimed. State law requires full compensation for any meal breaks that employees miss or have to work through, the suit noted.

The class action included claims for unpaid overtime and minimum wages, unpaid meal and rest break premiums, and violations of California's unfair-competition law, Cal. Bus. & Prof. Code § 17200.

The settlement amount includes about $136,000 for class members who file claims, a $2,500 incentive payment for Espinosa, and about $96,000 in attorney fees and costs. Judge Anello rejected about $750 in proposed reimbursement for attorney travel costs related to a rescheduled hearing.

The class members will receive payment based on the number of weeks they worked between February 2013 and the settlement's preliminary approval in December, with the payouts averaging $619 and topping out at $1,246, according to the opinion. WJ

Related Filings:
Opinion: 2018 WL 1705955

Chevron asks judge to reconsider FLSA ruling in light of U.S. high court decision

(Reuters) – Chevron Corp. asked a federal judge in California on April 17 for permission to reargue that two former well-site managers suing the company should be exempt from the overtime requirements in federal labor law based on their compensation, citing a recent U.S. Supreme Court decision expanding how such exemptions should be interpreted.

McQueen et al. v. Chevron Corp., No. 16-cv-2089, motion for leave to file motion for reconsideration filed (C.D. Cal. Apr. 17, 2018).

The motion appears to be the first instance of a defendant invoking the Supreme Court's decision from early April in *Encino Motorcars v. Navarro*, 138 S. Ct. 1134 (2018), to argue workers are exempt from the Fair Labor Standards Act's overtime requirement.

A day after the high court's decision, U.S. District Judge Jeffrey White in Oakland rejected Chevron's motion arguing the two managers were covered by the FLSA exemption for workers receiving at least $455 per week on a salary basis because they were paid more than $1,000 per day. *McQueen v. Chevron Corp.*, No. 16-cv-2089, 2018 WL 1989937 (N.D. Cal. Apr. 3, 2018).

Judge White said Chevron did not show they were guaranteed a weekly pay rate above the minimum.

In its April 17 motion, Chevron said Judge White should vacate his order because the word "guaranteed" does not appear in the FLSA's definition for payment on a salary basis.

Judge White's ruling is at odds with the *Encino Motorcars* decision, which said judges should no longer construe FLSA exemptions narrowly, Chevron said.

REUTERS/Mike Blake

In an opinion by Justice Clarence Thomas, the court said the FLSA exemption for sales workers and mechanics at car dealerships applies to workers known as service advisers because they are a vital part of car dealerships' service teams.

Justice Thomas rejected the principle that exemptions should be read narrowly, as that was based on a "flawed premise" about the FLSA being focused on remedying wage-and-hour violations above anything else.

In dissent, Justice Ruth Bader Ginsburg said the majority's decision unsettled more than 50 years of precedent.

Chevron's lawyer, Michele Maryott of Gibson Dunn & Crutcher, and the plaintiffs' attorney, Matthew Helland of Nichols Kaster, did not respond to requests for comment.

Christopher McQueen and James O'Neal, who managed well sites for Chevron in Texas, New Mexico and Oklahoma, sued the company in the U.S. District Court for the Northern District of California in 2016.

They claimed California-based Chevron violated the FLSA by failing to pay well-site managers nationwide, some of whom were misclassified as independent contractors, overtime wages for hours worked over 40 per week.

Chevron filed a partial motion for summary judgment in December arguing that McQueen and O'Neal were paid on a salary basis with a daily rate of more than $1,000, which exempted them from the FLSA's overtime requirement.

Judge White ruled those plaintiffs were not overtime exempt because they were not paid on a salary basis. He cited U.S. Labor Department regulations saying workers paid on a "salary basis" receive a predetermined amount that is not subject to reduction, as well as the Supreme Court's instruction from its decision in *Auer v. Robbins*, 519 U.S. 452 (1997), to construe FLSA regulations narrowly against employers.

Despite evidence that Chevron paid the plaintiffs above the weekly minimum for the exemption, Judge White said, that is not the same as proof that the company paid them a guaranteed weekly amount above the minimum. WJ

(Reporting by Robert Iafolla)

Contractor failed to pay investigators OT wages, $379 million class action says

A federal contractor has illegally refused to pay overtime wages to investigators who conduct security-clearance background checks for the government, a Tennessee man claims in a $379 million proposed class-action lawsuit.

Champion v. CACI International Inc. et al., No. 18-cv-43, complaint filed, 2018 WL 1527544 (E.D. Tenn. Mar. 23, 2018).

In a complaint filed in the U.S. District Court for the Eastern District of Tennessee, Randy Champion says CACI International Inc. and its affiliated entities violated the Fair Labor Standards Act by failing to pay him and about 3,000 other investigators for the overtime hours they worked under some of the company's government contracts.

The suit also names three company managers and a vice president as defendants.

The FLSA, 29 U.S.C.A. § 201, requires employers to pay overtime for work performed in excess of 40 hours per week.

Champion, of Carter County, Tennessee, also says he was placed on indefinite, unpaid suspension from his job in retaliation for complaints he made about CACI's alleged refusal to pay overtime.

OVERTIME DENIED

Champion says he started working for CACI in October 2013 as a field investigator, conducting background checks on government employees who applied for security clearances.

CACI and its investigators performed the background checks for the government's Office of Personnel Management under federal contracts, according to the suit.

From the start of his employment in October 2014, Champion routinely worked more than 40 hours a week and often worked between 63 and 106 hours a week, the suit says.

CACI did not pay him for any time worked over 40 hours, including a stint in 2015 when he worked for 41 consecutive days, according to the complaint.

CONCERNS VOICED

A CACI supervisor told Champion in December 2017 to indicate on his employee timecard that he did not work over 40 hours, even though he did so consistently, according to the suit.

Champion says he told the supervisor later that month that he was concerned about the company's failure to properly compensate him as well as the instruction to falsify his timecard.

> From the start of his employment, the plaintiff routinely worked more than 40 hours a week and often worked between 63 and 106 hours a week, the suit says.

When the supervisor did not address these concerns, the plaintiff contacted another field investigator who discussed the matter with a different supervisor Jan. 5, the suit alleges.

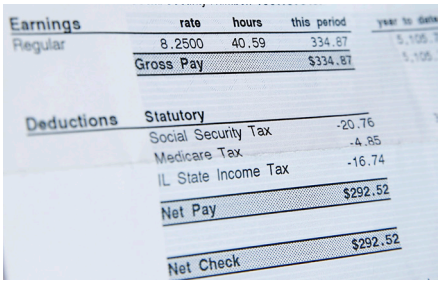
Five days later, the second supervisor told Champion he was suspended immediately but did not provide a reason for the suspension, the complaint says.

DISCIPLINARY LEAVE

Champion says he learned through CACI's online employee portal that he had been put on disciplinary leave and lost his employee health insurance as of Jan. 11.

The employee portal also indicated Champion's suspension was estimated to last through March 12, but that date "has come and gone," the complaint alleges.

An Office of Personnel Management representative notified Champion on Jan. 24 that she had been told to put his security clearance review on hold, and by the end of the month CACI had posted a job opening for his position, the suit says.



REUTERS/Jim Young

The defendants allegedly told Champion he was suspended because the OPM had revoked his security clearance. But the plaintiff says this statement is false and that CACI used it as a pretext to indefinitely suspend him without pay because he objected to the company's compensation practices.

FLSA VIOLATIONS

Champion says that by suspending him in retaliation, CACI violated the FLSA, which protects employees who voice complaints about overtime wages, the complaint says.

The suit also alleges the defendants have a companywide policy of denying field investigators overtime pay in violation of the FLSA. Champion says about 3,000 investigators nationwide have not received overtime compensation because CACI improperly classifies them as being exempt from overtime.

The U.S. Labor Department takes the position that security-clearance field investigators are not exempt from receiving overtime pay, the plaintiff says.

THE PLAINTIFF CLASS

Champion is seeking to represent a class of current and former U.S.-based field investigators who have worked more than 40 hours a week within the past three

years while being wrongly classified by CACI as exempt from overtime pay.

The plaintiff says CACI's failure to pay overtime compensation has caused him and the proposed class members to suffer lost wages, benefits and interest while experiencing embarrassment, humiliation and inconvenience. The suit seeks at least $379 million in damages, attorney fees and costs.

Champion is also requesting reinstatement to his field investigator position or compensation for his lost earnings in the alternative. WJ

Attorneys:
Plaintiff: James W. Friauf, Knoxville, TN

Related Filings:
Complaint: 2018 WL 1527544

See Document Section B (P. 32) for the complaint.

CONSTRUCTIVE DISCHARGE

7th Circuit upholds forced resignation of university researcher

By Jodine Mayberry

The 7th U.S. Circuit Court of Appeals has affirmed a trial court's decision to grant summary judgment against a former cancer researcher who claimed he was forced to resign from the University of Illinois College of Medicine at Peoria because of his ethnic background.

Rao v. Rusch et al., No. 17-2584, 715 Fed. Appx. 551 (7th Cir. Mar. 19, 2018).

The three-judge panel found Jasti Rao forfeited any review of the summary judgment order because he had provided no facts to support his proposition that he was treated less favorably than others outside of a protected class because he was Indian.

LOSS OF TENURE

Rao directed the cancer research center at the university until March 2013, when he resigned following an investigation into misconduct claims, the appellate opinion said.

Sara Rusch, the regional dean for the Peoria campus, formed a committee in September 2012 to investigate claims that Rao had demanded a kickback from a fellow research center member in exchange for retaining his job and immigration status, the ruling said. In addition, the committee investigated claims that Rao had destroyed research results, the panel said.

The committee hired the corporate-investigations group at Kaye Scholer, now Arnold & Porter Kaye Scholer, to perform an internal inquiry, according to the opinion.

Kaye Scholer found the kickback charge and at least some of the research misconduct charges were credible, the panel said. The firm told Rao that he had the option to resign or undergo the public process of revoking his tenure, according to the opinion.

Rao decided to resign, but later filed a complaint against Rusch and other members of the university administration in the U.S. District Court for the Northern District of Illinois, alleging violations of federal employment discrimination laws.

U.S. District Judge Virginia M. Kendall granted summary judgment to the defendants on all issues except Rao's claim that they had violated his rights under the Due Process Clause of the 14th Amendment by constructively discharging him without a hearing.

That issue went to a jury, which returned a verdict in favor of the defendants.

ARGUMENTS LACKING

On appeal, Rao argued that he had raised sufficient evidence in response to the defendants' summary judgment motions to show that he was treated less favorably because he was Indian.

Rao also asked the appeals court to review two decisions by Judge Kendall at trial that curtailed his ability to explore the "state of mind" of an investigative committee member, and his ability to impeach Rusch about what she had said to committee members about why she had formed the committee.

The panel said Judge Kendall allowed Rao's lawyer to put a good deal of evidence before the jury about the merits of the charges against him, how the investigation was conducted and what other members of the faculty believed.

"But the trial was not about those subjects," the opinion said. "The judge was not obliged to let counsel turn a trial about constructive or coerced discharge into an inquest about who within the university believed which particular allegations, and when."

Rao had also argued that a jury instruction regarding willful blindness had been improperly worded.

He claimed the instruction was defective because it limited willful blindness only to the defendants' knowledge of a person's property interest — in this case, his tenure.

The appeals court disagreed, finding the instruction applied to the entire "series of events" that the committee members knew or reasonably should have known would cause Rao to be deprived of his right to due process. WJ

Related Filings:
Opinion: 2018 WL 1381319

9th Circuit clarifies 'amount in controversy' standard for federal jurisdiction

(Reuters) – A federal appeals court April 20 ruled it had jurisdiction over a former JPMorgan Chase & Co. mortgage banker's bid to revive her wrongful-termination and discrimination lawsuit against the bank.

Chavez v. JPMorgan Chase & Co. et al., No. 16-55957, 2018 WL 1882908 (9th Cir. Apr. 20, 2018).

A unanimous three-judge panel of the 9th U.S. Circuit Court of Appeals unanimously rejected Elsa Chavez's claim that the case was improperly removed from California state court because she had lost less in wages than the $75,000 threshold for federal jurisdiction on diversity grounds at the time of the removal.

The panel said the amount of money in controversy includes all relief plaintiffs seek at the time of removal, which for Chavez easily exceeded $75,000.

In a separate unpublished opinion, the same panel affirmed most of a Los Angeles federal judge's decision throwing out her claims against the Manhattan-based bank. *Chavez v. JPMorgan Chase & Co.*, No. 16-55957, 2018 WL 1898174 (9th Cir. Apr. 20, 2018).

Chavez's attorney, Kelly Horwitz of Benedon & Serlin, said Chavez and her lawyers look forward to litigating the claims that were revived.

JPMorgan's lawyer, Theresa Marchlewski of Jackson Lewis, did not respond to requests for comment.

The rulings stem from Chavez's 2015 lawsuit filed in California state court. She accused JPMorgan of wrongful termination and failure to produce employment records in violation of state law.

Chavez also alleged unlawful discrimination, harassment and retaliation based on her age, disability and taking protected leave under the California Family Rights Act, Cal. Lab. Code § 226.

Chavez said she experienced anxiety, stress, headaches and numbness in her arm. She said the bank did not determine the extent of her disabilities or how they could be accommodated.

REUTERS/Stefan Wermuth

Chavez, who claimed she suffered additional ailments after her 2014 termination, sought back pay, compensation for her lost earning capacity, medical expenses, punitive damages and a $750 fine for not getting access to her employment records.

JPMorgan in 2015 removed the case to Los Angeles federal court based on diversity jurisdiction, which requires parties to be from different states and have at least $75,000 at stake. Chavez agreed to the removal.

The bank moved for summary judgment in 2016, saying it fired Chavez for her poor performance.

U.S. District Judge Dean Pregerson in Los Angeles tossed the lawsuit later that year, saying Chavez's claims lacked merit. *Chavez v. JPMorgan Chase Bank*, No. 15-cv-2328, 2016 WL 3556591 (C.D. Cal. June 29, 2016).

Chavez then appealed Judge Pregerson's ruling. She also challenged his jurisdiction over the case, arguing that JPMorgan did not show there was enough money in controversy to have it removed.

In the April 20 ruling, U.S. Circuit Judge Jay Bybee wrote that Chavez's agreement to diversity jurisdiction in 2015 was "strong evidence" that the amount in controversy exceeded $75,000.

Regardless, Chavez's claim for future wages pushed the amount at stake over the threshold for federal jurisdiction, the panel said, since she was earning $39,000 per year and said she had planned to work nine more years.

In its unpublished opinion, the panel agreed that summary judgment was appropriate on most of Chavez's claims.

But the panel said Chavez appeared to make a CFRA interference claim and then revived it. While JPMorgan argued she did not give notice about needing leave under that law, the panel said she raised a triable issue about whether she did.

U.S. Circuit Judge Marsha Berzon and U.S. District Judge John Woodcock of the District of Maine sitting by designation were also on the panel. WJ

(*Reporting by Robert Iafolla)*

Attorneys:
Plaintiff-appellant: Kelly R. Horwitz and Douglas G. Benedon, Benedon & Serlin, Woodland Hills, CA

Defendants-appellees: Sherry Swieca and Theresa M. Marchlewski, Jackson Lewis PC, Los Angeles, CA

Related Filings:
Opinion: 2018 WL 1882908
Unpublished memorandum: 2018 WL 1898174

See Document Section C (P. 43) for the memo and Document Section D (P. 45) for the opinion.

Scotts' $450 million Sunlight asset deal bars employee poaching, competition

By Jeremy Abrams

Lawn and garden products maker Scotts Miracle-Gro Co. has inked a $450 million asset-purchase agreement with garden supply company Sunlight Supply Inc. that prohibits Sunlight and its affiliates from poaching employees or competing with Scotts for five years.

Scotts Miracle-Gro Co. Form 8-K, 2018 WL 01803202 (Apr. 17, 2018).

Scotts will pay $425 million in cash and $25 million in equity to Sunlight at closing, according to a Form 8-K filed with the Securities Exchange Commission on April 17. The well-known fertilizer company said the acquisition will benefit its subsidiary, The Hawthorne Gardening Co., a hydroponic equipment supplier that reportedly does business with the cannabis industry.

Marysville, Ohio-based Scotts is the world's largest marketer of branded consumer lawn and garden products, with over $2.6 billion in revenue in 2017, according to the company's website.

Ontario, California-based Sunlight sells a variety of growing equipment, including light fixtures, humidifiers and irrigation supplies, according to its website.

DEAL TERMS

As part of the merger, Sunlight and its affiliates, including Sunlight Garden Supply Inc. and IP Holdings LLC, agreed not to compete with Scotts for five years after the deal closes, according to the Form 8-K. The noncompete provision also applies to Sunlight founder and CEO Craig Hargreaves and Vice President Kim Hargreaves, the filing said.

Sunlight also agreed not to solicit former employees or customers during the noncompete period, the filing said.

The acquisition also is subject to customary closing conditions, including the receipt of required governmental approvals, according to the filing.

Either company may terminate the deal if it does not close by the end of the year, subject to a three-month extension to obtain required antitrust approvals, the filing said. WJ

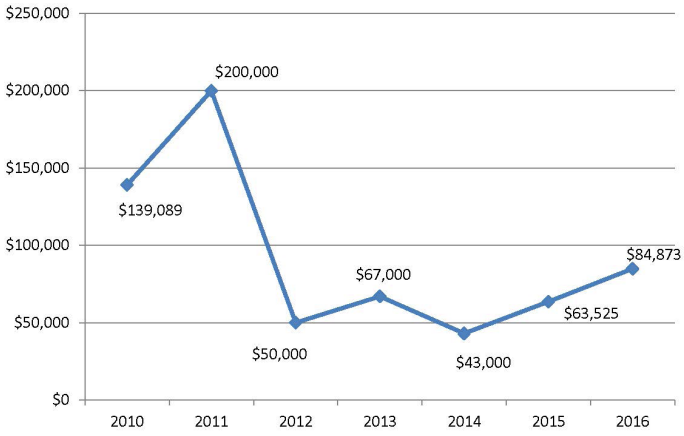
Related Filings:
Form 8-K: 2018 WL 01803202

Federal court claims statistically analyzed

Our most recent report now focuses on plaintiff verdicts rendered in U.S. District Court trials.

For federal jury awards from 2010 to 2016, the analysis shows that the median award in 2015 was $63,525 compared to a median of $84,873 in 2016. The graph below shows median awards for each year included in the sample where a compensatory jury verdict was reached in federal court.

AWARD MEDIANS BY YEAR, FEDERAL COURT



The statistics show that federal court employment verdicts tend to have a lower median award than the overall median for state and federal awards combined. The overall median registers at $106,800 compared to $70,000 for federal court claims that were analyzed separately.

In federal court cases where plaintiffs received compensation, 8 percent contained contentions of sexual harassment with a median award of $137,500 while 26 percent contained contentions of hostile work environment as an adverse action with a median award of $135,000.

AWARD TRENDS IN FEDERAL COURT

Year	Award Median	Probability Range			Total Range			Award Mean
2010	$ 139,089	$ 50,000	-	$ 386,255	$ 1	-	$ 4,100,722	$ 531,874
2011	200,000	54,310	-	528,957	1	-	7,240,867	454,330
2012	50,000	8,870	-	205,947	53	-	42,700,000	485,577
2013	67,000	3,489	-	187,893	1	-	3,700,000	188,366
2014	43,000	7,076	-	199,822	1	-	6,000,000	273,345
2015	63,525	13,624	-	223,500	1	-	2,612,821	193,615
2016	84,873	20,000	-	251,078	1	-	4,117,488	274,908
Overall	70,000	14,000	-	250,000	1	-	42,700,000	312,255

The mean is obtained by determining the sum of all the awards and dividing by the total number of awards in the sample. Use of the mean, in most instances, can give a distorted view of the data. The award median is the middle verdict value among awards listed in ascending order. This value provides the most accurate gauge of the norm for a specific sampling of jury award data.

DISTRIBUTION OF AWARDS, FEDERAL COURT (2010 - 2016)

Award Range			Percentage
To	-	$ 4,999	15%
5,000	-	9,999	6%
10,000	-	24,999	11%
25,000	-	49,999	11%
50,000	-	74,999	8%
75,000	-	99,999	5%
100,000	-	199,999	14%
200,000	-	299,999	8%
300,000	-	399,999	5%
400,000	-	499,999	3%
500,000	-	749,999	5%
750,000	-	999,999	3%
1,000,000	-	1,999,999	4%
2,000,000	+		2%

Figures do not add up to 100% due to rounding.

"Employment Practice Liability: Jury Award Trends and Statistics — 2017 Edition" statistically summarizes and identifies emerging trends in jury verdicts and settlements as a result of employment practice liability claims.

This report includes a breakdown of verdicts and settlements by various types of employment practice liability, such as discrimination and retaliation. This study also tracks the history of plaintiff recovery probabilities for the last several years.

Although Thomson Reuters does not receive 100 percent of the employment practice liability verdicts rendered nationwide, Thomson Reuters does believe that it receives a sufficient sample of data to produce descriptive statistics for specific areas of litigation.

The data are reported, tabulated and analyzed to determine values, trends and deviations in employment practice liability and personal injury verdicts for various publications, which include "Personal Injury Valuation Handbooks and Personal Injury Verdict Reviews."

For more information or to order a copy of Thomson Reuters' latest employment study, visit our website at legalsolutions.thomsonreuters.com.

If you have a recent verdict or settlement that you would like to submit for publication, please visit legalsolutions.thomsonreuters.com/law-products/westlawnext/litigator/jury-verdicts/submit-verdict. WJ

Here are some reports from the Thomson Reuters Public Employee Reporter and Labor Arbitration Information System series on recent significant cases involving public sector collective bargaining statutes from several states, and recent private- and public-sector arbitration decisions.

HEARING EXAMINER NIXES CHALLENGE TO NONRENEWAL OF SECRETARY'S EMPLOYMENT CONTRACT

Ruling: Despite a union's contention that a school employer violated the New Jersey Employer-Employee Relations Act provisions by refusing to renew a secretary's employment contract, a state Public Employment Relations Commission's hearing examiner issued a recommended dismissal of the unfair labor practice charge. The H.E. acknowledged circumstantial evidence of the employer's hostility toward the secretary's union activity. Nevertheless, the H.E. decided that the employer lawfully exercised its managerial prerogative not to renew the secretary's employment contract, given evidence that the secretary mishandled several work issues.

What it means: In the absence of a contractual tenure claim on behalf of a non-professional school board employee, the H.E. noted, public employers maintain a managerial prerogative to determine whether to reappoint an employee after an individual employment contract has expired.

Clark Township Board of Education and Clark Education Association, 2018 WL 1871514, 44 NJPER 100 (N.J. Pub. Emp't Relations Comm'n H. Exam'r Apr. 10, 2018).

CHARTER SCHOOL COMMITS ULPS THROUGH SURFACE BARGAINING, FAILURE TO PROVIDE INFO

Ruling: The California Public Employment Relation Board affirmed consolidated decisions by administrative law judges concerning two unfair labor practice charges brought by a union against a charter school employer. PERB decided that the employer violated its bargaining duty by refusing to meet with the union as certified exclusive representative of its certificated employees, by refusing to provide certain requested financial information, and by engaging in surface bargaining. Upon issuing several unfair practice remedies, PERB directed the employer, upon request, to commence good faith negotiations with the union.

What it means: PERB held that an employee organization that is recognized or certified as an exclusive representative enjoys a conclusive presumption of majority support for a one-year period following recognition or certification, and that an employer may not refuse to bargain with the exclusive representative during that period.

Inglewood Teachers Association v. Children of Promise Preparatory Academy, 2018 WL 1919628, 42 PERC 124 (Cal. Pub. Emp't Relations Bd. Mar. 27, 2018).

ADMINISTRATIVE LAW JUDGE NIXES TEACHERS' CHALLENGES TO DISTRICT'S ALLEGEDLY RETALIATORY ACTIONS

Ruling: Despite four teachers' allegations that a school district retaliated against their protected activity, in part, through heightened evaluation procedures, the California Public Employment Relations Board's administrative law judge issued a proposed dismissal of the unfair practice charge. The ALJ found that three teachers did not suffer any adverse employment actions. The ALJ acknowledged the adverse employment action suffered by a fourth teacher, i.e., a requirement for her to undergo a formal evaluation even though she had received a positive performance evaluation in the prior year. However, the ALJ concluded that no Educational Employment Relations Act violation took place, where the employer provided documented, credible evidence of its concerns over that teacher's classroom management and use of instructional time.

What it means: The ALJ explained that, once a charging party has established a prima facie case of retaliation by a preponderance of the evidence, the burden shifts to the respondent to prove: (1) that it had an alternative nondiscriminatory reason for the challenged action; and (2) that it acted because of this alternative non-discriminatory reason and not because of the employee's protected activity.

Edwards et al. v. Lake Elsinore Unified School District, 2018 WL 1919635, 42 PERC 128 (Cal. Pub. Emp't Relations Bd. A.L.J. Mar. 30, 2018).

EMPLOYER COMMITS NO UNFAIR LABOR PRACTICE BY REVOKING UNION'S USE OF VACANT OFFICE SPACE

Ruling: The Illinois Labor Relations Board, Local Panel considered exceptions to an administrative law judge's recommended decision regarding an unfair labor practice charge. It adopted the ALJ's conclusion that the employer violated Illinois Public Labor Relations Act provisions by threatening a bus operator with discipline for his speech at the "rap session" and by limiting union postings to the union bulletin board. However, contrary to the ALJ's conclusion, the board determined that the employer did not commit an unfair practice by eliminating the union's use of office space on a temporary basis.

What it means: The board observed that, in cases where the removal or relocation of union offices was found to be an unfair practice, the union maintained a proprietary interest in a designated office. It noted that those circumstances were not present here.

Slater and Chicago Transit Authority, 2018 WL 1960001, 34 PERI 160 (Ill. Labor Relations Bd., Local Panel Apr. 17, 2018).

LAST CHANCE AGREEMENT BARS POLICE OFFICER'S CHALLENGE TO 'RESIGNATION'

Ruling: The Florida Public Employees Relations Commission dismissed an unfair labor practice charge in which a police officer contended that the municipal employer violated Section 447.501(1)(a) and (f), Florida Statutes, by refusing to arbitrate his grievance. In the grievance, the officer disputed the municipal employer's acceptance of his letter of resignation under a last chance agreement, or LCA. PERC found that the LCA language here clearly and unambiguously relinquished the officer's right to challenge the employer's acceptance of his resignation. It decided that the employer was entitled to reasonable attorney's fees and litigation costs.

What it means: PERC took note of its holdings that an employee may waive his or her collective bargaining rights pursuant to an LCA. PERC's standard for examining the validity of a waiver is whether the waiver is "clear and unmistakable."

Tal v. City of Lauderhill, 2018 WL 1535750, 44 FPER 251 (Fla. Pub. Emp. Relations Comm'n Feb. 27, 2018).

UNTIMELINESS STYMIES UNION'S EFFORTS TO AMEND UNFAIR PRACTICE CHARGE

Ruling: The Pennsylvania Labor Relations Board dismissed a union's exceptions and made absolute and final the decision of the board secretary not to issue a complaint on the union's claim that the school employer violated Section 1201(a)(1), (2), (3) or (9) of the state's Public Employee Relations Act when it transferred the bargaining unit work of scheduling and coordinating special education matters to a non-bargaining unit employee. allegation was untimely.

What it means: The PLRB explained that the union's exceptions did not challenge the board secretary's sufficiency finding and instead sought to amend the charge to include a Section 1201(a)(5) allegation. However, since the proposed amendment added a new cause of action that was outside the four-month statute of limitations the PLRB determined the amended allegation was untimely.

Wellsboro Area Education Support Professionals, PSEA/NEA v. Wellsboro Area School District, 2018 WL 2002163, 49 PPER 73 (Pa. Labor Relations Bd. Apr. 17, 2018).

STATE EMPLOYER MUST BARGAIN BACKGROUND CHECK POLICY FOR CERTAIN FACULTY MEMBERS

Ruling: The Pennsylvania Commonwealth Court affirmed the decision of the Pennsylvania Labor Relations Board insofar as the board found the State System of Higher Education had no duty to bargain over the background check requirement for unit members who are required to submit to such checks under the Child Protective Services Law. However, the appellate court reversed that portion of the PLRB's final order reported at 49 PPER 7, 2017 WL 3129198 (PLRB June 20, 2017), which found the SSHE was required to bargain the background check and reporting requirements for exempt faculty members — those employees of an institution of higher education whose direct contact with children is limited to prospective visiting students or matriculated students who are enrolled with the institution.

What it means: The appellate court explained that the background checks and reporting requirements directly related to the terms and condition of faculty members' employment. Because the results of such checks could affect faculty members' teaching ability, the appellate court found that bargaining over the Policy as applied to exempt employees would not infringe on the employer's asserted managerial responsibility to protect students and minors on university premises. In contrast, the employer's implementation of background clearances and reporting of criminal arrests or findings of child abuse for nonexempt or mandated reporters under the Child Protective Services Law, involved a managerial prerogative under the State College balancing test.

Association of Pennsylvania State College and University Faculties v. Pennsylvania Labor Relations Board, 2018 WL 2002164, 49 PPER 74 (Pa. Commw. Ct. Apr. 19, 2018).

OHIO APPELLATE COURT UPHOLDS ARBITRATION AWARD IN FAVOR OF TARDY EMPLOYEE

Ruling: In an unreported decision, a majority of the Ohio Court of Appeals affirmed a trial court's determination to uphold an arbitration award that sustained a union's challenge to the termination of a county employee for violating the terms of a last chance agreement. Because there was no previous issue with the employee documenting her time, the appellate court concluded the trial court did not err in finding the arbitrator acted within his authority when he considered extrinsic evidence in determining the employee's correction of her time sheet a day later, did not violate the ambiguous language of a last chance agreement which prohibited the "false or erroneous" documentation of time.

What it means: Although the terms of the last chance agreement provided that the employee could be immediately terminated for violations of the agreement, a court majority concluded the arbitrator properly considered the office practice of employees correcting time sheets up to a week after the fact, in finding that mistakes on time sheets were not uncommon and that the word "erroneous should be read in light of the leeway given to employees to correct their times."

Portage County Board of Developmental Disabilities v. Portage County Educators Association for Developmental Disabilities, 2018 WL 1919774, 35 OPER 96 (Ohio Ct. App. Mar. 26, 2018).

OHIO BOARD RULES MUNICIPAL POLICE LIEUTENANTS ARE PUBLIC EMPLOYEES UNDER THE LAW

Ruling: The Ohio State Employment Relations Board adopted the general counsel's Report and Recommendation and ruled the petitioned-for police lieutenant classification was not exempt from the definition of a public employee. The municipal employer objected to the union's petition to represent the police lieutenants, arguing the classification was a supervisor under the state's Labor Relations Act, Ohio Rev. Code § 4117.01(F)(2), or in the alternative qualified as a management level employee under Ohio Rev. Code § 4117.01(K) and (L). However, the SERB dismissed the employer's objections and remanded the matter for further proceedings.

What it means: Under the Ohio Rev. Code § 4117.01(F)(2) of the Act, the definition of the supervisory exemption for police departments is limited to the "chief of the department or those individuals who, in the absence of the chief, are authorized to exercise the authority and perform the duties of the chief of the department." Here, there was no record evidence the police lieutenant acted in the place of the chief. Additionally, in the absence of evidence the police lieutenant was reasonably required to assist in collective bargaining or the administration of bargaining agreements, SERB declined to find that the lieutenant classification qualified as a management level employee under Ohio Rev. Code § 4117.01(K) and (L) of the state labor relations act.

In the Matter of Ohio Patrolmen's Benevolent Association and City of Groveport, 2018 WL 1919773, 35 OPER 97 (Ohio State Emp't Relations Bd. Apr. 12, 2018).

ARBITRATOR: COP'S DISHONESTY INCOMPATIBLE WITH EMPLOYMENT

Ruling: The town of Avon, Connecticut, had just cause to discharge the grievant for dishonesty, an arbitrator has ruled. A sergeant with 10 years' discipline-free service was discharged for providing dishonest answers to questions about her performance and attitude posed during an investigation into subordinates' complaints about her conduct. The union argued that the town failed to conduct a thorough or unbiased investigation. Moreover, a "social connection and communications pathway between and among" the town's witnesses "caused their testimony to have influenced each other," the union asserted, adding that, "importantly, since most all of these individuals were involved in the grievant's original complaint of a hostile work environment ... ultimately grievant was fired in retaliation for making that complaint against them."

What it means: While not drawing a negative inference from the grievant's decision to not testify, the arbitrator held that, as a result, he could only rely on her statements during the employer's investigation, adding that he "cannot find a sufficient, credible or cohesive rebuttal of the town's claims." Concluding that the employer's investigation was "full and fair" and that the grievant was "fully aware that honesty was a *sine qua non* condition of being a police officer, a rule essential to police work," the arbitrator ruled that her dishonest responses during the investigation into alleged misconduct justified her discharge.

Town of Avon (CT) and International Brotherhood of Police Officers, Local 541, 2017 WL 3262559, 46 LAIS 40 (June 14, 2017).

FATAL CRASH COSTS COP

Ruling: An arbitrator has ruled that the grievant's violation of a last-chance agreement justified his termination. A long-term police officer working under the terms of a last-chance agreement — issued for inappropriate behavior towards the public — was discharged for violating the pursuit policy, which resulted in a suspect's death. According to the city, the grievant was aware of the policy and that pursuits, being inherently dangerous, were to be engaged in without unnecessary endangerment to life and property. Furthermore, the grievant admitted that the only information he had was a potential property crime and was not thinking about the pursuit policy when chasing the suspects' vehicle, the city said. The union argued that termination was unjustified because the last-chance agreement was violated only if the grievant engaged in inappropriate behavior toward the public not if he breached work policies or procedures.

What it means: Video evidence, coupled with the grievant's admission, established his breach of the pursuit policy. In ruling that the grievant's misconduct violated the last-chance agreement, the arbitrator stated that, "one would have to strain the meaning of 'inappropriate' beyond recognition to determine that it does not apply to the behavior of an officer who has violated the pursuit policy," adding that, "the grievant's Facebook posting/admission that he held a predisposition to use extraordinary measures to counteract property crime adds additional weight to the conclusion that his actions were, in fact, inappropriate."

City of Meriden (CT) and Meriden Police Union, American Federation of State, County and Municipal Employees, Council 4, Local 1016, 2017 WL 3262544, 46 LAIS 44 (June 28, 2017).

Labor and employment roundup for April 23 – May 4, 2018

Here are some recent highlights in private and government agency litigation, enforcement actions, and federal and state legislation and regulations.

DISCRIMINATION LAWSUITS AND SETTLEMENTS

April 24 — BNSF Railway fights to derail EEOC's move to OK more than 50 disability bias suits. BNSF Railway Co. has filed a lawsuit against the Equal Employment Opportunity Commission under the Administrative Procedure Act seeking to invalidate certain right-to-sue letters issued in March. The letters authorized 54 BNSF employees and job applicants to sue the railroad company for disability discrimination. BNSF's suit, filed in the U.S. District Court for the Northern District of Texas, says the right-to-sue letters stem from an improper "commissioner's charge" — issued in 2012 by former EEOC Commissioner Stuart Ishimaru — alleging BNSF refused to hire applicants based on perceived disabilities. Ishimaru did not follow the proper procedure for issuing such a charge, which lacked detailed allegations such as workers' and applicants' names and was filed after he resigned from the EEOC, BNSF says. The suit also alleges the EEOC's March right-to-sue letters violated the Americans with Disabilities Act by publicly disclosing pending charges of disability discrimination to workers who had not filed complaints with the commission. Read more: 4/25/18 REUTERS LEGAL 18:15:34

April 25 — Brooklyn jury awards $5.1 million to workers in EEOC religious bias case. After a three-week jury trial, the Equal Employment Opportunity Commission has won $5.1 million in compensatory and punitive damages for 10 workers who alleged a discount medical plan company and its parent forced them to engage in religious practices at work. The commission sued United Health Programs of America Inc. and Cost Containment Group Inc. in June 2014 in the U.S. District Court for the Eastern District of New York, alleging they violated Title VII of the Civil Rights Act of 1964 by requiring the workers to participate in prayer and other religious practices. The companies adopted and implemented a belief system called "Onionhead" or "Harnessing Happiness," created by the aunt of CCG's CEO, and would retaliate against employees who opposed such practices, the EEOC said. The parties will submit additional briefing on damages before a judgment is entered. Read more: 2018 WL 1960353 and 4/27/18 REUTERS 18:12:28

May 2 — Nonprofit resolves EEOC suit alleging bias against male applicant for maternity home program. A Tampa, Florida-based nonprofit child care organization will pay $18,000 to a male ex-employee to settle an Equal Employment Opportunity Commission lawsuit alleging it refused to consider his application to work for the group's maternity home program based on his sex. According to the commission's Florida federal court suit, The Children's Home Inc., also known as the Children's Home Network, laid off Luis Vasquez instead of considering his application for two supervisor positions in a new maternity program. The commission also said the nonprofit told Vasquez that young women in the program might be uncomfortable with men around because of their hormones and instead hired two women, one with less experience than Vasquez, in violation of Title VII of the Civil Rights Act of 1964. Read more: 2018 WL 2041078 and 2018 WL 2036443

May 3 — Seasons 52 to fork over $2.9 million to resolve EEOC age bias suit. The operator of national restaurant chain Seasons 52 has agreed to pay $2.85 million to settle a 2015 Equal Employment Opportunity Commission lawsuit alleging it unlawfully refused to hire job applicants older than 39. The commission filed suit in Miami federal court against GMRI Inc., a Darden Restaurants Inc. subsidiary with subsidiaries that do business under the Seasons 52 name, alleging it rejected applicants age 40 and older for various front- and back-of-the-house positions at 35 restaurants nationwide. Hiring officials allegedly made biased statements to older failed applicants such as "We are looking for 'fresh' employees" and "We are not looking for old white guys." In a consent decree settling the Age Discrimination in Employment Act lawsuit, the parties agreed to establish a claims process operated by an administrator of the EEOC's choice to identify and pay applicants over age 39 who were rejected based on their age. Read more: 2018 WL 2059345, 5/3/18 REUTERS LEGAL 20:05:00 and 2018 WL 2057184

WAGE-AND-HOUR LAWSUITS AND SETTLEMENTS

April 25 — Arizona paint company will pay $243,000 in back pay, damages to resolve OT violations. A Flagstaff, Arizona-based painting contractor has agreed to pay 70 employees a total of $242,618 in back pay and liquidated damages to resolve U.S. Labor Department claims that it violated the Fair Labor Standards Act's overtime and record-keeping provisions. Major League Painting Inc. paid employees straight time for their overtime hours instead of the required time and a half and falsely recorded the payment as a bonus in its payroll records, the department said. Read more: 2018 WL 1941335

April 26 — Pennsylvania restaurant chain forks over $750,000 for FLSA violations. The owners of a chain of bar and grill restaurants in Pennsylvania have paid $750,006 in back wages and liquidated damages to 1,039 employees to resolve U.S. Labor Department allegations that the chain violated the Fair Labor Standards Act. The department said for 30 months, six locations of Arooga's Grille House and Sports Bar misclassified assistant kitchen managers as exempt from minimum wage and overtime provisions. It also alleged the chain had failed to pay minimum wage to tipped employees or overtime compensation to employees who worked more than 40 hours per workweek. Read more: 2018 WL 1960352

April 27 — DOL initiative nets $2 million in back pay, damages for 87 New Jersey gas station attendants. The U.S. Labor Department has recovered $2,079,596 in back wages and liquidated damages for 87 attendants working at 25 full-service gas stations in New Jersey, the only state that does not let customers pump their own gas. Starting in January 2017, the department conducted a series of investigations under an education and enforcement initiative and found that the gas station owners violated the Fair Labor Standards Act. The investigations revealed the owners failed to pay attendants minimum wage and overtime compensation and did not maintain proper time and payroll records. One owner of six stations was also assessed a civil penalty of nearly $9,000 for willful violations, the department said. Read more: 2018 WL 1981429 and 2018 WL 2002186

May 1 — California IT employer on hook for $173,000 for H-1B specialty worker visa violations. A Newark, California-based company that provides data services to companies such as American Express and Apple will pay $173,044 to 12 employees for violations of the H-1B foreign labor certification program, the U.S. Labor Department said. Investigators found Cloudwick Technologies Inc. promised high salaries of up to $8,300 per month to some workers it brought from India, but it then paid employees much less than required under the H-1B visa program and illegally deducted funds from their salaries, the department said. Read more: 2018 WL 2041075 and 2018 WL 2057185

SAFETY ENFORCEMENT

April 20 — OSHA orders maker of e-cigarette liquids to reinstate whistleblower, pay $110,000. A former manager at a Chino, California-based company that makes flavored liquids for e-cigarettes will get his job back and $110,000 in compensation after the Occupational Safety and Health Administration found he had been unlawfully fired for reporting environmental concerns about the production process. OSHA said Mr. Good Vape LLC violated the Toxic Substances Control Act and the Solid Waste Disposal Act by retaliating against the unnamed whistleblower in 2015 after he contacted the California Department of Environmental Protection about issues at his workplace. Read more: 2018 WL 1891255 and 2018 WL 1904803

April 23 — Farm supply company faces almost $259,000 in penalties for poor forklift maintenance. The Occupational Safety and Health Administration has proposed $258,672 in penalties for a national farm supply company the agency says endangered workers at a Xenia, Ohio, facility by failing to properly maintain its forklifts. Mattoon, Illinois-based Rural King Supply Inc. allowed employees to operate a damaged forklift and did not take the vehicle out of service or perform needed repairs, even though employees had reported its brakes were faulty, OSHA said. Read more: 2018 WL 1907215 and 2018 WL 1904805

May 1 — New Jersey roofer faces $221,00 in penalties for hazards at demo site. The Occupational Safety and Health Administration has proposed $221,343 in penalties against a New Jersey roofing contractor that the agency says exposed workers to fall hazards and asbestos at a residential demolition site in Passaic County. An October 2017 inspection found that Hewitt, New Jersey-based John Prevete Framing LLC provided unsafe ladders without required fall protection and exposed employees to asbestos without safety training, OSHA said. The agency said it had previously cited the contractor in 2013, 2016 and 2017. Read more: 2018 WL 2041071 and 2018 WL 2016006

LEGISLATION

April 24 — New Jersey equal pay law expands to cover other protected classes. New Jersey Democratic Gov. Phil Murphy has signed a bill that expands the scope of the state's Law Against Discrimination, which prohibits sex-based pay discrimination, to cover pay bias based on race, nationality, marital status, sexual orientation, gender identity, age and disability. The Diane B. Allen Equal Pay Act, named after a retired state legislator, amends the law to bar unequal pay for "substantially similar work, when viewed as a composite of skill, effort and responsibility" for all classes protected by the LAD. Under the new law, which takes effect July 1, employers can justify wage disparities based on seniority and merit systems or other "bona fide factors," such as experience and training. Unlike the federal Equal Pay Act, which provides only compensatory damages, the New Jersey law also allows recovery of up to six years of back pay and treble damages. Read more: 4/25/18 REUTERS LEGAL 00:24:22 and 2018 WL 1940375

April 30 — Philly ban on salary inquiry lifted but reliance on information barred. Employers in Philadelphia will be allowed to ask job applicants about their salary history but cannot rely on such data to set wages after a federal judge partially blocked enforcement of a pay equity ordinance pending the outcome of a court challenge. The Philadelphia Wage Equity Bill was scheduled to go into effect in May 2017, but the city delayed its implementation after the Chamber of Commerce for Greater Philadelphia filed a lawsuit alleging the law violates the First Amendment by prohibiting employers' speech based on its content and the identity of the speaker. U.S. District Judge Mitchell Goldberg agreed that the law's provision prohibiting employers from inquiring about salary history violates employers' free speech rights and said the city failed to offer evidence that the law would help eliminate pay disparities between men and women. However, the judge did not enjoin another provision making it unlawful for employers to rely on voluntarily provided wage history information to determine salaries they offer. Read more: 2018 WL 2015999 and 5/2/18 REUTERS 19:51:58

RECENTLY FILED COMPLAINTS

Case Name	Court	Docket #	Filing Date	Allegations	Relief Sought
Smallwood v. Forsyth County	N.D. Ga.	18-cv-48	4/10/18	Forsyth County, Georgia, violated the Americans with Disabilities Act and Rehabilitation Act by wrongfully terminating a firefighter because of his post-traumatic stress disorder and in retaliation for his request for a reasonable accommodation to seek medical treatment.	Compensatory damages, declaratory relief, reinstatement, back pay, benefits, lost future benefits of medical insurance and pension, expenses, interest, fees and costs
Fried v. Wynn Las Vegas LLC	D. Nev.	18-cv-689	4/16/18	Wynn Las Vegas resort discriminated against a male manicurist based on his gender, created a sexually hostile work environment and retaliated against him, in violation of Title VII of the Civil Rights Act of 1964.	Back pay and front pay, compensatory and punitive damages, interest, fees and costs
Couch v. Union Pacific Railroad Co.	S.D. Tex.	18-cv-1229	4/19/18	Union Pacific Railroad wrongfully disciplined and terminated an employee for allegedly abusing his Family and Medical Leave Act benefits by taking time off to treat his wife's disability and violated the Americans with Disabilities Act by discriminating against him for associating with his wife.	Reinstatement and expungement of discipline relating to his FMLA leave, more than $75,000 for emotional distress, $300,000 in punitive damages, plus compensatory and liquidated damages, fees and costs
Eisenbach v. Ernst & Young US LLP	E.D. Pa.	18-cv-1679	4/20/18	Accounting firm Ernst & Young terminated a senior manager based on his gender, in violation of Title VII of the Civil Rights Act of 1964 and state and Philadelphia law, and for his use of protected parental leave in violation of the Family and Medical Leave Act.	Compensatory, liquidated and punitive damages; declaratory and injunctive relief, front and back pay, interest, fees and costs
Allen v. Weis Markets Inc.	M.D. Pa.	18-cv-888	4/25/18	Class action. Weis Markets discriminated against black employees and applicants based on their race by subjecting them to a racially hostile work environment and refusing to hire or promote them, in violation of Title VII of the Civil Rights Act of 1964 and discriminated against the named plaintiff by passing over him for promotion in favor of equally or less qualified Caucasians in violation of 42 U.S.C.A. § 1981.	Class certification; actual, compensatory, and punitive damages; injunctive relief; front and back pay; expenses, interest, fees and costs

Gender bias

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INTERVIEW DISCREPANCIES

Wittmer interviewed for an engineering position at Phillips' Borger, Texas, facility Aug. 3, 2015, according to Judge Rosenfeld's opinion.

She told Phillips officials that she was seeking a new job because her employer, agricultural products supplier Agrium, wanted her to spend more time in Canada, the ruling said.

Phillips offered Wittmer the job, pending a background check, according to the opinion.

The background check processor, HireRight, notified Phillips of a discrepancy in Wittmer's work history: She had suggested during the interview that she was still employed by Agrium and told HireRight her employment ended Aug. 1, but Agrium said her employment ended Aug. 2, the ruling said.

When Phillips asked Wittmer about the discrepancies, she provided a July 28 termination letter from Agrium effective immediately but saying Wittmer was to be paid through Aug. 2, the opinion said.

Phillips said it decided to rescind the job offer based on those discrepancies, the ruling said. But before the company informed Wittmer of the decision, she began sending unsolicited emails accusing Phillips officials of "trying to rescind my employment offer because I am a transsexual woman," according to the opinion, which quoted one of her emails.

> "Nothing in the record shows that her sex or appearance played any role in the decision to rescind the offer," the judge said.

Phillips officially withdrew the job offer two days later, and Wittmer filed suit.

COURT: TRANSGENDER STATUS DIDN'T INFLUENCE DECISION

In Judge Rosenthal's April 4 summary judgment decision, she said she agreed with three recent appellate rulings that have found transgender and gay employees to comprise a protected class under Title VII.

She cited the landmark decisions in *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017); *Zarda v. Altitude Express Inc.*, 883 F.3d 100 (2d Cir. 2018); and *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes Inc.*, 884 F.3d 560 (6th Cir. 2018).

But Wittmer's claims failed anyway, Judge Rosenthal said, because the suit did not provide any evidence that her transgender status motivated Phillips' decision to rescind the job offer. In addition, Wittmer failed to provide evidence that the company was even aware she was transgender until after it made the decision, the judge found.

"Nothing in the record shows that her sex or appearance played any role in the decision to rescind the offer," the opinion said. WJ

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Related Filings:
Opinion: 2018 WL 1626366

CASE AND DOCUMENT INDEX