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WHAT'S INSIDE

COMMENTARY

Taking confidential documents riskier for whistleblowers following New Jersey ruling

Darren Nadel and Michael Roaldi of Littler Mendelson PC discuss a recent New Jersey appeals court ruling and its importance for employees who take or divulge confidential information in actions against their employers.

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CLASS-ACTION WAIVERS

Supreme Court orders California appeals court to reconsider arbitration ruling

The U.S. Supreme Court says a California appeals court must reconsider its decision to overturn a ruling that upheld individual arbitration in a wage suit against CarMax, based on a recent high court decision supporting contract class-action waivers.

CarMax Auto Superstores et al. v. Fowler et al., No. 13-439, cert. granted (U.S. Feb. 24, 2014).

In a one-sentence opinion granting CarMax Auto Superstore's *certiorari* petition, the high court ordered California's 2nd District Court of Appeal to review its March 2013 ruling in light of the Supreme Court's later decision in *American Express Co. et al. v. Italian Colors Restaurant et al.*, 133 S. Ct. 2304 (June 20, 2013).

In *Italian Colors*, an antitrust case, the high court ruled 5-3 that federal arbitration law does not invalidate a contract's class-action waiver based simply on the cost of individual arbitration.

Attorney **Hyland Hunt**, an associate in the Supreme Court practice at **Akin Gump Strauss Hauer & Feld** who was not involved in the case, said the *Italian Colors* decision may "fatally" undermine the reasoning behind the California Supreme Court's waiver-unconscionability standards as set in *Gentry v. Superior Court*, 42 Cal. 4th 443 (Cal. 2007).

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REUTERS/Brendan McDermid

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Taking confidential documents riskier for whistleblowers following New Jersey ruling

By Darren Nadel, Esq., and Michael Roaldi, Esq.
Littler Mendelson PC

Employees involved in civil claims or other whistleblower activities often take sensitive documents from their employer to support their position. As a result, courts across the country are faced with balancing employees' right to support their claims and employers' right to protect their confidential information.

Courts have rejected the notion that there is a blanket privilege protecting the taking of documents and, instead, have developed a balancing test to determine whether the taking is improper.

In particular, the decision in *State v. Saavedra*[1] represents a landmark in this developing area that could create additional risks for employees tempted to take sensitive documents.

SAAVEDRA'S PROCEDURAL HISTORY

In November 2009 former North Bergen Board of Education employee Ivonne Saavedra filed a civil complaint against the board for employment discrimination, hostile work environment and retaliatory discharge in violation of the New Jersey Law Against Discrimination.[2]

During discovery in the civil action, Saavedra produced 367 documents that she had taken from the board. The board then informed the county prosecutor.

In May 2012 a grand jury indicted her for the crimes of theft and official misconduct. She moved to dismiss the indictment, arguing that New Jersey Supreme Court precedent "says it's legal to take confidential documents," referring to a 2010 decision, *Quinlan v. Curtiss Wright Corp.*, that acknowledged the existence of qualified privilege under a prescribed balancing test.[3]

The trial court disagreed but, out of an abundance of caution, still performed the qualified-privilege analysis the New Jersey Supreme Court had outlined.

> Courts have rejected the notion that there is a blanket privilege protecting the taking of documents and, instead, have developed a balancing test to determine whether the taking is improper.

The trial court found that, even under that rubric, the motion to dismiss failed.

The New Jersey Superior Court, Appellate Division, affirmed the trial court's ruling, finding that the analysis for whether an activity is protected should not be applied to protect a criminal defendant from a grand jury indictment for "official misconduct" and "theft" for having taken documents to support a retaliatory-discharge claim.[4]

EXISTING LAW IN CIVIL ACTIONS FOR RETALIATORY TERMINATION

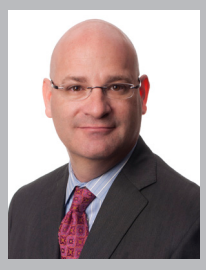
Several courts have ruled in cases involving an employee's taking of confidential employer documents. A basic understanding of the state of the law on the issue is helpful in understanding the implications of the *Saavedra* decision.

The cases in question can be placed into two categories: when an employee takes confidential documents to support the employee's civil claim, or when an employee divulges confidential information to a government agency charged with investigating alleged improper employer behavior.

Courts have largely concluded that procuring an employer's confidential information to aid a civil claim is not protected if the taking and disclosure were unreasonable.[5] In other words, an employee's unreasonable taking of confidential information is a separate and distinct act from claiming she has been the subject of discrimination.[6] Terminating the employee's employment for violating an employer's confidentiality policy is not an act of retaliation against the employee filing suit.[7]

Courts have adopted various versions of what is essentially the same test to determine the reasonableness of the disclosure. The factors typically considered are:

- How the documents were obtained.
- What the employee did with the documents or to whom the documents were produced.



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- The nature and content of the documents, both in terms of the need to keep the information confidential and its relevance to the employee's claim of unlawful conduct.
- The employee's interest in procuring the documents.
- Whether there was a clear violation of a company confidentiality policy.
- The ability of the employee to preserve the evidence in a manner that does not violate the employer's privacy policy.[8]

All the balancing tests are designed to weigh the employer's need for confidentiality but still protect the employee's right to support his or her claim.[9]

The second category of cases arises from instances where there is an allegation that the Sarbanes-Oxley Act was violated. Section 806 of the 2002 law, which requires top management to individually certify the accuracy of financial information, protects employees from retaliation for SOX-protected activity.

We are not aware of a federal court addressing the issue, but an administrative law judge in a claim at the Department of Labor recently ruled that procuring confidential information in violation of company policy is protected behavior, and termination for that behavior can be retaliatory.[10] The balancing tests seen in a discrimination context were not used. Instead, the specific language of Sarbanes-Oxley was discussed.[11]

Finally, jurisdictional issues can arise where civil counterclaims are based on state law. For example, the U.S. District Court for the Southern District of New York recently addressed a jurisdictional issue relating to a counterclaim for theft of confidential documents in a Fair Labor Standards Act case.[12]

In that case, a restaurant employee allegedly took a ledger showing the hours each employee worked. The court ruled that the theft did not arise from the same transaction or occurrence as the underlying action and so was a permissive counterclaim (as opposed to a compulsory counterclaim). However, the court ruled that the employment relationship and the ledger were within a "common nucleus of operative fact" with the underlying claim, so it had jurisdiction over the counterclaims.

THE *SAAVEDRA* ANALYSIS

When the Appellate Division in *Saavedra* affirmed the trial court's analysis, it ruled that the qualified privilege did not insulate the defendant from criminal prosecution for taking confidential documents. It also affirmed the finding that the state made a *prima facie* showing of theft and official misconduct.

Among the 367 documents Saavedra took were a bank statement a parent had provided to the board, an appointment schedule of a psychiatrist who treated students with special needs, a consent for release of information to access Medicaid reimbursement, a signed letter from a parent whose child received confidential services for special needs and an original letter about a child's emotional problem.

The board's general counsel testified that employees were trained on the highly confidential nature of these documents and told they should not take the materials.

The court began its analysis by examining the theft charge.

> Courts have largely concluded that procuring an employer's confidential information to aid a civil claim is not protected if the taking and disclosure were unreasonable.

In New Jersey, "[a] person is guilty of theft if he unlawfully takes, or exercises unlawful control over movable property of another with purpose to deprive him thereof."[13] The court found that, since taking the documents violated the board's internal policies, Saavedra likely took the documents for the purpose of depriving the board of the documents and information.

The court then addressed Saavedra's protected-action argument.

To meet its burden of producing sufficient evidence for a *prima facie* case of theft, the state was required to show that the taking was unlawful. The defendant, on the other hand, claimed that the New Jersey Supreme Court's *Quinlan* decision rendered the taking lawful.

Deciding the reasonableness of the confidential disclosure

Courts typically consider these factors:

- How the documents were obtained.
- What the employee did with the documents.
- The nature and content of the documents.
- The employee's interest in procuring the documents.
- Whether there was a clear violation of a company confidentiality policy.
- The ability of the employee to preserve the evidence in a manner that does not violate the employer's privacy policy.

The Appellate Division disagreed.

In *Quinlan* the plaintiff claimed she was discriminated against when her employer promoted a man to the position of supervisor. Her employer soon learned that she had taken confidential documents.

The New Jersey Supreme Court sought to strike a balance between "individual plaintiffs seeking to vindicate their rights and employers legitimately expecting that they will not be required to tolerate acts amounting to self-help or thievery."[14] The court designed a seven-step test to strike this balance in civil cases.

The court in *Saavedra* rejected the argument that the qualified privilege prevents the state from introducing evidence before the grand jury that the defendant unlawfully took documents, for several reasons.

First, the court reiterated that *Quinlan* created a qualified privilege, requiring a seven-step analysis. Therefore, an employee runs a significant risk that taking confidential documents will not fall within its protection even in a civil context.

Second, the court emphasized that such an analysis is not necessary because the state Supreme Court did not intend the holding to "act as a means of mounting a facial challenge to the indictment in this criminal case."

Third, the state's failure to present evidence that the documents were taken for use in

the civil case was not a failure to present exculpatory evidence. The court determined, "Even if *Quinlan* were directly on point, which it is not, 'what the employee did with the document' is only one factor to consider.'" Such evidence would not be "clearly exculpatory."

The appellate court then ruled the state provided sufficient evidence to support a *prima facie* case for the second charge against the defendant, "official misconduct."

A public employee commits official misconduct in New Jersey when "[h]e commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such act in an unauthorized manner."[15] The charge also requires that the act be done for the purpose of obtaining the benefit for the malefactor or another.

Critically, the court decided that the state showed that Saavedra was trained and informed that the documents she took were highly confidential and should not be taken or disclosed. This was sufficient to meet the element of an "unauthorized exercise of [her] official function."

Further, the appeals court found there was sufficient evidence that Saavedra's purpose was to obtain a benefit for herself. The court ruled that the "official misconduct" statute requires only an affirmative act, not malicious intent. The advantage that taking the documents provided in Saavedra's civil suit was enough to constitute a "benefit" to her.

The appellate court also addressed Saavedra's claim that a decision would have a chilling effect on discrimination claims.

The court said it does not make policy choices about what constitutes criminal conduct but instead makes that determination by looking at language in laws the legislature has passed.

In addition, there was no evidence that the documents in this case would have become unobtainable by using ordinary discovery to obtain them. There are safeguards in place for employees who fear that evidence will be destroyed, such as sanctions or the tort of fraudulent concealment, the court said.

In short, there was no evidence of a need for self-help.

The dissent argued that it would be unfair to prosecute an employee who legitimately believed she had a right to take the documents in question. The majority countered that to dismiss the indictment on those grounds would amount to the judiciary establishing a public policy that employees must be "categorically insulated from criminal prosecution under the theft and official misconduct statutes if they take confidential documents" to support discrimination claims.

WHAT THIS MEANS FOR EMPLOYERS

The law in this area continues to evolve, and courts continue to grapple with the breadth of the privilege for whistleblowing employees.

> Citing Sarbanes-Oxley, a Labor Department administrative law judge ruled that procuring confidential information in violation of company policy is protected behavior, and termination for that behavior can be retaliatory.

The decision in *Saavedra* is a landmark in this development. It expands the potential for criminal prosecution of employees who use "self-help" to obtain evidence, particularly confidential documents, to support a civil claim.

Before *Saavedra*, employees could face discharge for violation of company policy. After discharge, employees could possibly maintain a claim for retaliation, if the taking of documents fell within the qualified privilege.

The court's determination that the qualified privilege is not applicable to a criminal indictment creates a far greater risk to employees who take employer documents. Under *Saavedra*, the qualified privilege cannot be used to defend against a charge of theft. Taking employers' confidential material can be unlawful, even if it is for the purpose of supporting a civil claim.

Saavedra also establishes that formal training about confidential information will help to establish that the taking is unlawful.

The court's decision with respect to the charge of official misconduct has additional implications for public employers. In *Saavedra* the defendant's intent in taking the document was to support a civil action. This was deemed a significant enough personal benefit to meet a *prima facie* showing of the "benefit" requirement for official misconduct. Therefore, in addition to theft, public employers may have "official misconduct" as an additional charge in seeking to punish their employees.

Employers must weigh this potential for a newly created protection against the existing risk. In some instances, courts have found that bringing criminal charges can constitute an independent act of retaliation.[16] To avoid such a finding, it is important that the charge have a firm factual basis. If the employer fails to show that a taking was inappropriate, it may face additional retaliation liability. WJ

NOTES

[1] 81 A.3d 693 (N.J. Super. Ct. App. Div. Dec. 24, 2013).

[2] N.J. Stat. Ann. § 10:5-1-49.

[3] *Quinlan v. Curtiss Wright Corp.*, 8 A.3d 209 (N.J. 2010).

[4] 81 A.3d 693 (N.J. Super. Ct. App. Div. 2013).

[5] *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 722 (6th Cir. 2008); *Armstrong v. Whirlpool Corp.*, 363 Fed. Appx. 317, 331 (6th Cir. 2010); *Harris v. Richland Cmty. Health Care Ass'n*, 2009 WL 2983010 (D.S.C. Sept. 14, 2009); *Quinlan*, 8 A.3d 209; *Argyropoulos v. City of Alton*, 539 F.3d 724, 734 (7th Cir. 2008); *Johnson v. Portfolio Recovery Assocs.*, 682 F. Supp. 2d 560, 582 (E.D. Va. 2009); *Vaughn v. Epworth Villa*, 537 F.3d 1147, 1152 (10th Cir. 2008)

[6] *Harris*, 2009 WL 2983010.

[7] *Id.*

[8] *Niswander*, 529 F.3d at 722; *Quinlan*, 8 A.3d at 226-28.

[9] *Id.*

[10] *Vannoy v. Celanese Corp.*, ARB Case No. 09-118 (Sept. 28, 2011)

[11] *Id.* at 12.

[12] *Nicholsen v. Feeding Tree Style Inc.*, 2014 WL 476355 (S.D.N.Y. Feb. 6, 2014).

[13] N.J. Stat. Ann. § 2C:20-3a.

[14] *Quinlan*, 8 A.3d at 213.

[15] N.J. Stat. Ann. § 2C:30-2a.

[16] Littler Mendelson PC, Whistleblowing & Retaliation § 8.3.4 (5th ed. 2013).

Parties argue *Comcast* impact on wage class action against Applebee's

An Applebee's restaurant owner and former employees who allege wage law violations have filed briefs in federal appeals court taking opposite sides on the question of whether a 2013 U.S. Supreme Court ruling in an antitrust class action prevents class certification in the wage suit.

Roach et al. v. T.L. Cannon Corp. et al., No. 13-3070, appellants' reply brief filed (2d Cir. Feb. 28, 2014).

In briefs before the 2nd U.S. Circuit Court of Appeals, the employees say a New York federal trial judge misinterpreted the Supreme Court's ruling when he denied the workers class certification, while restaurant owner T.L. Cannon Corp. argues the decision was correct.

In *Comcast Corp. et al. v. Behrend et al.*, 133 S. Ct. 1426 (2013), the Supreme Court ruled 5-4 that 2 million Comcast cable subscribers could not bring antitrust claims as a class because the plaintiffs failed to show that the proposed damages could be determined for the entire class.

According to the Applebee's employees, their class should be certified because common issues predominate despite the need to determine damages individually.

Judge Thomas McAvoy denied the plaintiffs class certification two days after the *Comcast* decision, finding damages in the proposed class are highly individualized.

T.L. Cannon, which owns more than 50 Applebee's locations in New York, countered that the *Comcast* decision "undercut" the workers' contention that individually determined damages do not defeat class certification.

Four former Applebee's employees sued Cannon in 2010 alleging the company underpaid workers in violation of New York labor law.

The plaintiffs, who sued on behalf of hourly Applebee's employees who worked at Cannon-owned restaurants in New York, alleged managers failed to log when workers were due spread-of-hour payments and altered time records to reflect breaks the workers did not take.

Spread-of-hour pay is a requirement unique to New York. State law requires employers in some industries, including restaurants and bars, to pay workers for an extra hour when the time between the beginning and end of their workday, including meal breaks, exceeds 10 hours.

On March 29, 2013, two days after the high court's *Comcast* decision, U.S. District Judge Thomas McAvoy of the Northern District of New York denied the plaintiffs class certification.

He cited *Comcast* and said the plaintiffs failed to show how damages could be determined for all class members.

"Plaintiffs' proof that some employees, on various occasions, were denied their 10-hour spread payments indicates that damages in this putative class are in fact highly individualized," he said.

The plaintiffs appealed the ruling to the 2nd Circuit, arguing that Judge McAvoy misinterpreted *Comcast* and its impact on class certification here.

According to the workers, four federal appeals courts have rejected the judge's finding that a court cannot certify a class unless damages can be measured for the entire class. In their Feb. 28 reply brief, the plaintiffs noted the 5th Circuit's recent ruling in *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. Jan. 10, 2014), that a classwide determination of damages is not a prerequisite to certification.

According to the brief, the 5th Circuit said, "*Comcast* 'has no impact on cases ... in which predominance [is] based not on common issues of damages but on the numerous common issues of liability.'"

In response, T.L. Cannon argued that the employees failed to support their claims with evidence of a company policy or practice that violated labor laws. The evidence and declarations offered by the plaintiffs showed only isolated incidents of managers' improperly changing records and accounting for worker time, the company's brief said.

According to the company, Judge McAvoy correctly denied certification and his decision was consistent with the high court's *Comcast* ruling.

Judge McAvoy did not deny certification just because of the question of classwide damages, Cannon said, it was just part of his considerations.

Comcast requires courts to consider "all arguments" that have a bearing on meeting federal requirements for class certification, the company's brief said. WJ

Attorneys:
Plaintiffs-appellants: J. Nelson Thomas, Michael J. Lingle and Annette Gifford, Thomas & Solomon, Rochester, N.Y.; Scott Michelman and Michael T. Kirkpatrick, Public Citizen Litigation Group, Washington; Frank S. Gattuso and Dennis G. O'Hara, O'Hara, O'Connell & Ciotoli, Fayetteville, N.Y.

Defendants-appellees: Craig R. Benson, Andrew P. Marks, Elena Paraskevas-Thadani and Erin W. Smith, Littler Mendelson PC, New York

Related Court Documents:
Appellants' reply brief: 2014 WL 834110
Appellees' brief: 2014 WL 670967
District Court opinion: 2013 WL 1316452

See Document Section A (P. 25) for the appellants' brief and Document Section B (P. 32) for the appellees' brief.

Nurses' class-action suit still stands in wake of *Comcast*

(Reuters) – A federal judge in Detroit rejected a hospital's bid to dismantle a group of nurses' wage-fixing class-action lawsuit based on the U.S. Supreme Court's 2013 decision in *Comcast Corp. v. Behrend*, which raised the bar for pursuing class cases.

Cason-Merenda et al. v. VHS of Michigan Inc. et al., No. 06-15601, 2014 WL 905828 (E.D. Mich., S. Div. Mar. 7, 2014).

U.S. District Judge Gerald Rosen's decision to allow the nurses to proceed as a class against Detroit Medical Center comes as lower-court judges grapple with how to apply the high court's *Comcast,* 133 S.Ct. 1426 (2013), decision in a broad spectrum of cases.

In the *Comcast* decision, the high court ruled that plaintiffs had to show common damage calculations to be certified as a class.

But Judge Rosen, in a ruling March 7, said the facts of the nurses' case — and specifically, the damages model embraced by the plaintiffs' damages expert — was sufficiently different from the situation in the Comcast case.

The damages have been estimated to be as high as $1.7 billion, court records show.

"Upon consideration of the overall nature of plaintiffs' two theories of recovery, however, the court is persuaded that plaintiffs' claim of mutually exclusive theories of liability is correct and that *Comcast* therefore does not apply here," Judge Rosen wrote.

The case against the Detroit-area hospital system has a long history. In 2006 a group of nurses accused eight Detroit-area hospitals, including the Detroit Medical Center, of acting together to depress their wages. Throughout the eight years of litigation, Judge Rosen has dismissed some of the nurses' claims, seven of the defendants have settled, and now Detroit Medical Center remains as the last defendant standing in the case.

> "The court is persuaded that ... *Comcast* therefore does not apply here," the judge said.

In September Judge Rosen certified the class suing Detroit Medical Center. *Cason-Merenda et al. v. VHS of Mich. et al.*, 2013 WL 5106520 (E.D. Mich. 2013).

The hospital system appealed, and in January in a brief order, the 6th U.S. Circuit Court of Appeals vacated the decision, saying Judge Rosen must reconsider his decision in light of *Comcast*.

Both sides submitted new briefs to Judge Rosen on the application of *Comcast*, but Judge Rosen sided with the nurses.

Nevertheless, he noted, a judge or jury could still side with the medical system and reject the plaintiffs' theory of damages at trial.

Rodger Young of Young & Associates, who represents Detroit Medical Center, did not respond to a message seeking comment. WJ

(*Reporting by Carlyn Kolker*)

Attorneys:
Plaintiffs: Mark Griffin, Lynn Sarko, Raymond Farrow and Tana Lin, Keller Rohrback LLP, Seattle

Defendant (Detroit Medical Center): Rodger Young and Sara MacWilliams, Young & Associates, Farmington Hills, Mich.; Thomas Dupree, Theane Evangelis and Jeremy Smith, Gibson, Dunn & Crutcher, Washington

Related Court Document:
Opinion: 2014 WL 905828

Whole Foods performed background checks without authorization, class action alleges

A class-action lawsuit has been filed against Whole Foods Markets California Inc., accusing the natural foods supermarket of obtaining employment applicants' consumer reports without first obtaining valid authorizations.

Gezahegne v. Whole Foods Market California Inc. et al., No. 14-cv-00592, complaint filed (N.D. Cal. Feb. 7, 2014).

California resident Esayas Gezahegne made the accusation in his suit filed Feb. 7 in the U.S. District Court for the Northern District of California.

Gezahegne says the company asked thousands of job applicants to execute invalid online authorizations permitting the company to obtain criminal background checks, credit checks and other reports since 2009.

The credit report authorizations were facially invalid, he says, because they included a liability waiver and other certifications in violation of the Fair Credit Reporting Act.

The FCRA requires consumer report authorizations to be "pristine," he says, containing nothing other than the act's required disclosures and authorizations.

REUTERS/Mike Blake

The online authorizations in the Whole Foods employment applications not only granted the company the right to thoroughly investigate references, work records, education and other matters related to suitability for employment, they released the company and all other persons and businesses from all claims arising from such disclosure or investigation, Gezahegne says.

The authorizations contained a certification that the applicant had not knowingly withheld any information that might adversely affect his chances for employment, as well as notice to the applicant that he is entitled to copies of public records if a public record search is conducted and a waiver of receipt of those copies, he says.

Gezahegne says he executed the company's document titled "consent" when he completed his online employment application for Whole Foods in April 2011.

He electronically initialed and dated the bottom of the authorization page on April 7, 2011, and was hired by Whole Foods three weeks later. He started work May 12, 2011, according to the complaint.

Gezahegne says a Whole Foods internal document indicated his Lexis Nexis background check was completed May 4, 2011, without the company having a valid authorization on file, in violation of the FCRA, 15 U.S.C. §§ 1681b and 1681n.

His first day on the job, he was given a form to sign that he says did comply with the FCRA. The form gave Whole Foods authorization to procure a consumer report from Lexis Nexis, and he signed it, he says.

That valid authorization could not, however, cure the invalid online form he signed electronically in April because his credit report was obtained before he signed the valid disclosure, he says.

Gezahegne seeks certification of the class of all individuals who executed the invalid online authorization forms permitting Whole Foods to obtain their consumer reports as part of an employment application for a class period of Feb. 7, 2009, to the present.

The complaint seeks a judgment that Whole Foods willfully violated the FCRA, $1,000 in statutory damages per violation for each class member and punitive damages. WJ

Attorney:
Plaintiff: Craig J. Ackermann, Ackermann &Tilajef, Los Angeles

Related Court Document:
Complaint: 2014 WL 757934

Supreme Court to take up Amazon workers' security check case

(Reuters) – The U.S. Supreme Court agreed March 3 to hear a case that could determine whether companies such as Amazon.com Inc. must pay workers for the time they spend waiting to clear security checks at the end of their work shifts.

Integrity Staffing Solutions Inc. v. Busk et al., No. 13-433, cert. granted (U.S. Mar. 3, 2014).

The case revolves around workers at Amazon warehouses in Nevada, who had to pass through security checks as part of an anti-theft procedure.

The workers, former temporary employees at Amazon contractor Integrity Staffing Solutions, said they spent nearly 30 minutes some days waiting for the checks. In a 2010 lawsuit, which sought class-action status, they argued they must be compensated for that time under the federal Fair Labor Standards Act, 29 U.S.C. § 201.

The 9th U.S. Circuit Court of Appeals ruled last April that the workers' suit could go forward, prompting several similar lawsuits against Amazon, the world's largest online retailer, and its third-party warehouse contractors, in federal courts around the country. *Busk et al. v. Integrity Staffing Solutions Inc.*, No. 11-16892, 713 F.3d 525 (9th Cir. Apr. 12, 2013).

Those cases, which all seek class- or collective-action status, were consolidated into a multidistrict litigation in the U.S. District Court for the Western District of Kentucky. *In re Amazon.com Fulfillment Center Fair Labor Standards Act and Wage and Hour Litig.*, MDL No. 2504, 2014 WL 690289 (J.P.M.L. Feb. 19, 2014).

Integrity, which is represented in the high court by former U.S. Solicitor General Paul Clement, argued that the 9th Circuit's ruling conflicted with other court decisions that said workers do not need to be paid for similar post-work duties that are not a part of their regular work tasks.

"Security screenings are indistinguishable from many other tasks that have been found non-compensable under the FLSA, such as waiting to punch in and out on the time clock, walking from the parking lot to the workplace, waiting to pick up a paycheck, or waiting to pick up protective gear before donning it for a work shift," Integrity wrote in a brief to the court.

REUTERS/Rick Wilking

"Security screenings are indistinguishable from many other tasks that have been found non-compensable under the FLSA," Integrity Staffing said in its high court brief.

'PRINCIPAL ACTIVITY' AT ISSUE

The Supreme Court case is likely to turn on the extent to which the security checkpoints are considered a "principal activity" of the warehouse workers' shifts.

Integrity argues that walking through security checkpoints does not constitute the "principal activity" of work, the standard for compensability of pre- and post-shift activities that is set out in a 1947 amendment to the FLSA.

The Supreme Court has further clarified this standard to say that the activity must be considered "integral and indispensable," and security checks do not meet this bar, Integrity argued in its high court brief.

The workers, on the other hand, say that because the checkpoint is required by Amazon to ensure that no theft has occurred, it should be considered essential.

"Such searches are also directly related to the work of warehouse employees in filling orders, because if merchandise were improperly removed by workers, warehouse employees would subsequently be unable to fill some orders because (unbeknownst to Integrity and Amazon) there would not be sufficient inventory," the workers wrote in their brief.

A message left on Integrity's general messaging service in Wilmington, Del., was not returned, and Clement did not return a message seeking comment.

Mark Thierman, who represents the workers, said the Supreme Court should adopt the 9th Circuit's view.

"What I can gain is a nationwide policy confirming the 9th Circuit's rule," Thierman said. WJ

(*Reporting by Carlyn Kolker*)

Attorneys:
Petitioner (Integrity): Paul Clement and Jeffrey Harris, Bancroft PLLC, Washington; Neil Alexander, Rick Roskelley, Roger Grandgenet and Cory Glen Walker, Littler Mendelson, Phoenix

Respondents: Mark Thierman and Joshua Buck, Thierman Law Firm, Reno, Nev.; Eric Schnapper, University of Washington School of Law, Seattle

CVS impedes former employees' right to sue, EEOC says

A CVS Pharmacy severance pay agreement that says workers will not sue the company or cooperate with federal investigations violates worker rights, the Equal Employment Opportunity Commission says in a federal civil rights lawsuit.

Equal Employment Opportunity Commission v. CVS Pharmacy Inc., No. 14-863, complaint filed (N.D. Ill., E. Div. Feb. 7, 2014).

The agreement prevents workers from filing discrimination and other employment claims with the EEOC in violation of the Civil Rights Act of 1964, the agency says in its suit filed in the U.S. District Court for the Northern District of Illinois.

"Charges and communication with employees play a critical role in the EEOC's enforcement process because they inform the agency of employer practices that might violate the law," EEOC regional attorney John C. Hendrickson said in a statement announcing the suit. "When an employer attempts to limit that communication, the employer effectively is attempting to buy employee silence."

> CVS' severance agreement prevents workers from filing discrimination and other employment claims with the EEOC in violation of the Civil Rights Act, the agency says.

According to the complaint, the company's severance agreement says former employees must notify the company if they receive a subpoena or interview request related to a lawsuit or governmental investigation.

REUTERS/Mike Segar

The former workers agree not make any disparaging remarks about CVS and not to disclose confidential information related to personnel, wage or benefits under the agreement, which says the workers "forever discharge CVS" from any claims or lawsuits, the complaint says.

According to the EEOC, the "released claims include ... any claim of unlawful discrimination of any kind."

The agreement, in use since August 2011, is five pages of small print that is "overly broad," "misleading" and unenforceable," the agency says.

According to the complaint, more than 650 workers signed the agreement in 2012.

The EEOC seeks injunctive relief, including an order for CVS to change the agreement and its policies to protect workers' ability to exercise their rights. In addition, the agency says former employees who have signed the agreement should have 300 days to file discrimination claims. WJ

Related Court Document:
Complaint: 2014 WL 540344

Kansas high court says employer isn't liable for doctor's alleged misconduct

A Kansas law that immunizes health care providers from liability for injuries caused by other providers bars a patient from suing her former obstetrician's employer for his alleged inappropriate comments and touching, the state Supreme Court has ruled.

Cady v. Schroll et al., No. 103,499, 2014 WL 265551 (Kan. Jan. 24, 2014).

Two justices on the state's highest court held that the Health Care Provider Insurance Availability Act, Kan. Stat. Ann. § 40-3403(h), absolves a provider of vicarious and independent liability for another provider's actions and bars claims for negligent supervision.

The HCPIAA says a health care provider who qualifies for coverage under the state's Health Care Stabilization Fund "shall have no vicarious liability or responsibility for any injury ... arising out of the rendering of or the failure to render professional services ... by any other health care provider who is also qualified for coverage under the fund."

HCPIAA requires hospitals and health care providers to purchase professional liability insurance and pay a surcharge on their premiums that goes toward additional coverage under the Health Care Stabilization Fund.

The state Supreme Court affirmed decisions by a trial court and the Kansas Court of Appeals to enter summary judgment for the Women's Care medical practice in Angela Cady's medical malpractice lawsuit.

According to the high court opinion, Cady alleged that Women's Care employee Dr. John Schroll made sexually charged comments and touched her inappropriately during prenatal care in 2004.

She said Women's Care knew that a state medical board had previously disciplined Schroll for inappropriate behavior with other patients but failed to warn her and ensure that a nurse was present during all of his examinations.

Cady's complaint named Schroll, Women's Care and seven other physicians at the practice as defendants and asserted claims for medical negligence, negligent supervision and emotional distress.

The plaintiff alleged Women's Care knew that a state board had previously disciplined employee Dr. John Schroll for inappropriate behavior with other patients, but failed to warn her and ensure that a nurse was present during all of his examinations.

She settled her claims against Schroll, and the Johnson County District Court dismissed the claims against the other physicians.

Women's Care said Section 40-3403(h) of HCPIAA barred Cady's claims against it and successfully moved for summary judgment.

Cady argued on appeal that Women's Care could still be independently liable, if not vicariously liable, under the statute for failing to properly supervise Schroll.

The Kansas Court of Appeals disagreed, ruling in 2011 that the statute barred Women's Care from being liable for any damages "arising out of" Schroll's conduct. *Cady v. Schroll et al.*, 2011 WL 2535004 (Kan. Ct. App. 2011).

Cady argued before the Kansas Supreme Court that the word "vicarious" modifies both "liability" and "responsibility" in the statute, thereby leaving open the possibility of independent liability.

The high court said her reading would render the word "responsibility" meaningless, since it has essentially the same meaning as "liability."

The legislative history of the HCPIAA shows that it was intended to reduce high malpractice insurance costs by eliminating vicarious liability and responsibility for damages caused by another health care provider covered by the fund, the high court said.

The court also rejected Cady's argument that its prior rulings absolving hospitals of independent responsibility under the HCPIAA do not apply to a medical practice like Women's Care.

The statutory language does not premise immunity on the type of health care providers involved, the nature of the relationship between the two providers or the nature of the theory of liability, the high court said. WJ

Attorneys:
Plaintiff: Roger P. Wright, Theodore M. Green and Lance V. Baughman, Wright Green & Baughman, Lee's Summit, Mo.

Defendant: BK Christopher, Jessica J. Shaw and John B. McEntee Jr., Horn Aylward & Bandy, Kansas City, Mo.

Related Court Document:
Opinion: 2014 WL 265551

GOP senators seek to revive suit challenging Obamacare exchanges

By Michael Scott Leonard, Senior Legal Writer

Six Republican members of the U.S. Senate and two GOP congressmen have filed a friend-of-the-court brief urging a federal appeals panel to revive a lawsuit challenging an Internal Revenue Service rule that implements Obamacare subsidies and enforces the law's related "employer mandate."

Halbig et al. v. Sebelius et al., No. 14-5018, amici briefs filed (D.C. Cir. Feb. 6, 2014).

Indiana et al. v. Internal Revenue Service et al., No. 1:13-cv-01612, motion to dismiss filed (S.D. Ind. Jan. 31, 2014).

The GOP group, which includes 2016 presidential hopefuls Marco Rubio of Florida and Ted Cruz of Texas, filed its *amici curiae* brief Feb. 6 in the District of Columbia U.S. Circuit Court of Appeals, arguing that a Washington federal judge violated separation-of-powers principles when he "effectively amend[ed] the Affordable Care Act in an attempt to make it coherent."

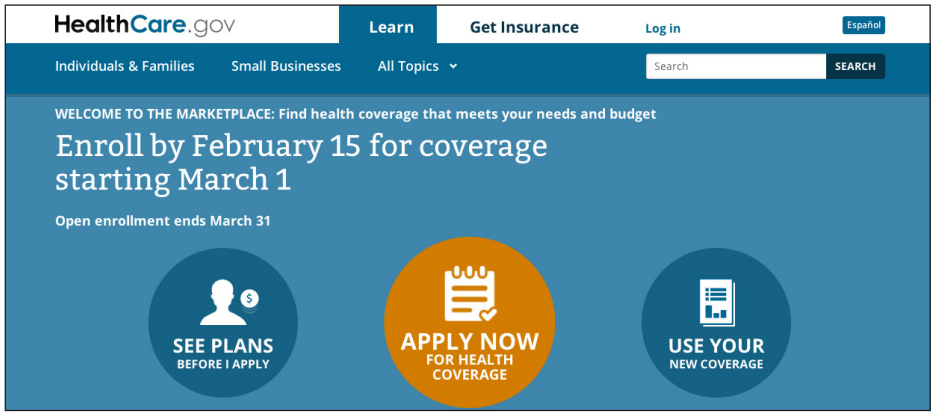
U.S. District Judge Paul L. Friedman of the District of Columbia, who dismissed the suit Jan. 15, defied the law's "unusual legislative history" and usurped Congress' constitutional power to negotiate delicate compromises when he smoothed over Obamacare's internal contradictions by replacing its plain meaning with one that makes more sense, the Republican *amici* claim.

A judge's job is not to fix bad laws but to rule on them, according to the brief. If the Affordable Care Act is unconstitutional as written, the court should strike down the offending provisions, and if it is unworkable, that is for Congress alone to fix, Republican legislators say.

"The District Court's decision is especially troubling because it effectively rewrites the plain text of a provision that was the specific subject of extensive negotiations in the Senate — negotiations that culminated in a compromise that made the ACA's enactment possible," the brief says. "More fundamentally, the District Court erred in assuming that every provision of the sweeping, complex, 2,700-page ACA must fit together in a seamless, unified whole."

In addition to Rubio and Cruz, who led the 2013 government shutdown in an attempt to defund Obamacare, the *amici* include Sen. Minority Whip John Cornyn of Texas, Sen. Orrin Hatch of Utah, Sen. Rob Portman of Ohio, Rep. Darrell Issa of California, and Rep. Dave Camp of Mississippi.

Four other groups, including the libertarian Cato Institute, the National Federation of Independent Business, and the states of Kansas, Michigan and Nebraska, filed *amici* briefs the same day, urging the D.C. Circuit to overturn Judge Friedman's ruling.



Courtesy of www.healthcare.gov

The GOP groups take issue with an IRS rule that implements the health care exchanges that the Affordable Care Act directed the states to establish. A screen shot of the Healthcare.gov website, where consumers can sign up for coverage under the act, is shown here.

The federal government has not yet filed a response brief with the D.C. Circuit, but the Obama administration moved Jan. 31 to dismiss a related suit that the state of Indiana filed last year.

'AN EXCHANGE ESTABLISHED BY THE STATE'

The suits involve an IRS rule that implements the health care exchanges that the Affordable Care Act directed the states to establish so their citizens would benefit from economies of scale when purchasing non-employer-based health insurance. The federal government is operating similar exchanges in the 34 states that declined to set up their own.

The central dispute concerns an Obamacare provision, 26 U.S.C. § 36B(c), that makes tax credits available to any qualifying patient who obtains health coverage through "an exchange established by the state."

The challenged IRS regulation applies those subsidies across the board to people in all 50 states who get insurance through one of the new exchanges.

But according to the suits, the provision actually subsidizes only coverage purchased through a state-run exchange. Under a fair reading of the law's plain text, people who get insurance through the federal exchange do not qualify for the partial refund, the plaintiffs claim.

The distinction matters, the suits say, because the subsidies come with a string attached: The controversial employer mandate, which requires most employers of more than 50 workers to offer them "minimum essential health coverage" or pay a tax penalty, applies only in states that receive the subsidies.

According to the lawsuits, the mandate applies only alongside the subsidies because it actually exists mainly to help pay for them.

Under the law, an employer is not actually subject to the employer mandate until one of its employees obtains insurance via an exchange.

By withholding subsidies from states with federally run exchanges, Congress hoped to pressure them into establishing their own exchanges, the suits argue.

But 34 states resisted that pressure and opted for federal exchanges anyway, according to the plaintiffs, deliberately choosing higher health care premiums without the employer mandate over cheaper coverage with the mandate.

Instead of respecting those choices, the IRS has chosen to apply the subsidies — and therefore trigger the mandate — in all 50 states, according to the plaintiffs.

Implementing the law with so little fidelity to its express provisions violates the Administrative Procedure Act, 5 U.S.C. § 706, the suits say.

'STANDS IN THE SHOES OF THE STATE'

The Obama administration has attacked that reasoning, arguing in court filings that the plaintiffs' narrative makes little sense in light of the Affordable Care Act's overall purpose and structure. The suits have conjured ambiguity out of thin air, cherry-picking examples out of the law's 2,700-plus pages, the government says.

It is clear from context that what the plaintiffs see as an elaborate and intentional incentive structure is in fact one of the many instances of imperfect drafting that inevitably arise over the course of nearly 3,000 pages, according to the administration.

"[I]n enacting the ACA, Congress made clear that an exchange operated by the federal government stands in the shoes of the exchange that a state chooses not to establish," the administration wrote in its Jan. 31 motion to dismiss the Indiana case. "The Treasury Department, accordingly, has reasonably interpreted the act to provide for eligibility for the premium tax credits for individuals in every state."

Judge Friedman agreed in his Jan. 15 opinion.

"[T]he plain text of the statute, the statutory structure and the statutory purpose make clear that Congress intended to make premium tax credits available on both state-run and federally facilitated exchanges," he wrote, dismissing the suit. "What little relevant legislative history exists further supports this conclusion." *Halbig et al. v. Sebelius et al.*, No. 1:13-cv-00623, 2014 WL 129023 (D.D.C. Jan. 15, 2014).

> "The District Court erred in assuming that every provision of the sweeping, complex, 2,700-page ACA must fit together in a seamless, unified whole," the GOP-backed *amici* brief says.

'COMPLEX, ILL-FITTING AND INCONSISTENT'

But in their brief to the appellate court, the Republican congressional *amici* attack Judge Friedman's reliance on traditional canons of construction such as legislative history and structural coherence.

Because of the unusual political circumstances surrounding the Affordable Care Act's passage, different rules apply to interpreting Obamacare, they say.

There is a legitimate reason why the law's provisions do not always mesh well with one another, the *amici* claim: The bill suddenly became a nonstarter halfway through the legislative process, when Republican Scott Brown of Massachusetts won Ted Kennedy's former seat after the longtime Democratic senator died in 2009.

According to the brief, congressional Democrats, who had hoped to continue revising and amending the law, lost their 60-seat supermajority, and they decided instead to send the "as is" bill — which had already passed the chamber in its draft form — to the House of Representatives, where they still had the votes to pass it.

Senate Democrats made what few changes they could through "budget reconciliation," which is not subject to filibuster, but the result of the selective revision process was a hodgepodge law whose internal inconsistencies reflect its unique legislative history, the GOP legislators claim.

"Despite many months of contentious public debate over health care legislation, members of Congress had very little occasion even to carefully read the act's 2,700-page text, let alone carefully to study and to harmonize its many complex, ill-fitting and even inconsistent provisions through the normal bicameral legislative process," the *amici* brief says.

The distinction between how the insurance subsidies apply in states with their own health exchanges and how they work in states with federally run exchanges is one of those inconsistencies, according to the brief.

In allowing the IRS to paper over that distinction, Judge Friedman effectively acted as a legislator, overstepping his constitutional authority to save congressional Democrats from the bad law they passed instead of letting the political process punish them for enacting a law that makes no sense, the *amici* argue. WJ

Attorneys:
Plaintiffs (Halbig): Michael A. Carvin, Walter D. Kelly Jr., Yaakov M. Roth and Jonathan Berry, Jones Day LLP, Washington

Plaintiffs (Indiana): Attorney General Gregory F. Zoeller, Solicitor General Thomas M. Fisher, Special Deputy Attorney General Kenneth A. Klukowski, Ashley T. Harwel and Heather H. McVeigh, attorney general's office, Indianapolis; Andrew M. McNeil, W. James Hamilton and John Z. Huang, Bose McKinney & Evans, Indianapolis

Defendants (U.S.): Assistant Attorney General Stuart F. Delery, Deputy Assistant Attorney General Ian H. Gershengorn, U.S. Attorney Susan S. Brandon, U.S. Attorney Ronald C. Machen Jr., acting U.S. Attorney Dana J. Boente, Civil Division Director Jennifer D. Ricketts, Civil Division Deputy Director Sheila M. Lieber, Joel McElvain, Jonathan H. Hambrick and Elizabeth C. Wu, Justice Department, Washington

Related Court Documents:
Halbig opinion: 2014 WL 129023
Halbig appellants' brief: 2014 WL 343059
U.S. senators' *Halbig amicus* brief: 2014 WL 491284
Halbig amicus brief of Kansas, Michigan and Nebraska: 2014 WL 491282
Indiana amended complaint: 2013 WL 6796098
Indiana dismissal motion: 2014 WL 527210

Former light bulb plant owner seeks dismissal of worker's cancer injury claims

The former owner of a light bulb manufacturing plant has asked a Kentucky federal judge to dismiss class-action allegations that it caused workers to develop serious diseases by negligently exposing them to lead and other toxic chemicals.

Cox v. Royal Philips Electronics NV Koninklijke et al., No. 5:13-cv-00406, motion to dismiss filed (E.D. Ky., Cent. Div. Feb. 7, 2014).

Philips Electronics North America argues in its Feb. 7 dismissal motion in the U.S. District Court for the Eastern District of Kentucky that former employee Elbert Cox Jr.'s fraud suit is impermissible under the Kentucky Worker's Compensation Act, Ky. Rev. Stat. § 342, which is the exclusive remedy in the state for workplace injuries.

> The "abhorrent" conditions at the plant included thick clouds of hazardous substances in the air and lead dust on the floor, the complaint says.

Even if the worker's comp law does not bar the suit, Philips says, Cox has failed to satisfy the heightened pleading standard that Federal Rule of Civil Procedure 9(b) requires for fraud claims.

Unlike the more liberal Rule 8(a), which governs most cases, Rule 9(b) requires fraud allegations that lead to a plausible inference of *scienter*, or intent to deceive.

Cox's proposed class action, which accuses Philips of falsely assuring workers at its Danville, Ky., plant that the lead, mercury, arsenic, beryllium, chromium and trichloroethylene they were exposed to at work was harmless, does not plausibly allege fraud, Philips says.

According to the complaint, the plant suffered from "abhorrent" conditions, including thick clouds of hazardous substances in the air and lead dust on the floor.

Cox, who worked at the plant the entire time Philips operated it, from 1983 to 2011, claims the company did not require workers to use protective devices such as respirators or coveralls.

Philips regularly tested the blood of employees who worked in the facility's "mix house" melting the raw materials for glass, but it allegedly did little more than remove them from the site temporarily if they had certain levels of lead contamination.

REUTERS/Lisi Niesner

The long-term chemical exposure caused Cox to develop advanced colon cancer, he says, and other employees developed conditions such as multiple sclerosis, kidney failure, cognitive deficits and various cancers.

The suit, which alleges gross negligence, fraud, fraudulent concealment and deliberate intention to injure, seeks medical monitoring of everyone who worked at the Philips plant.

In its dismissal motion, Philips argues that the workers' compensation law requires Cox to file an administrative claim over workplace injuries such as those he alleges. Cox's common-law claims are invalid because he did not opt out of workers' comp before his injury, the company says.

Cox can state a valid claim only by showing that Philips deliberately intended to harm him, according to the dismissal motion.

But Cox, who alleges negligence at best, cannot establish that intent, the motion says. WJ

Attorneys:
Plaintiff: Richard A. Getty and Jessica Winters, Getty Law Group, Lexington, Ky.

Defendant (Philips): Brian M. Johnson, Matthew A. Stinnett and Adam C. Reeves, Bingham Greenebaum Doll, Lexington

Related Court Documents:
Motion to dismiss: 2014 WL 515687
Complaint: 2013 WL 6576046

Businesses, insurers urge Washington state to limit asbestos tort actions

The Washington Supreme Court should reject an effort by the widow of a Boeing Co. employee who allegedly had an asbestos-related disease to modify the state workers' compensation law to allow a claim for alleged occupational asbestos exposure to be brought as an action in tort, a coalition of business groups says in an *amicus* brief.

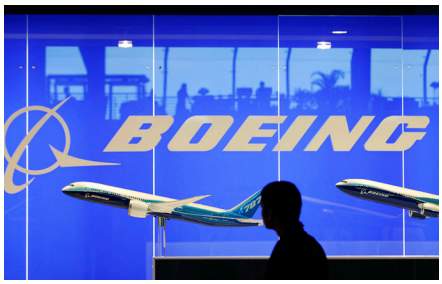
Walston v. Boeing Co., No. 88511-7, amicus brief filed (Wash. Jan. 10, 2014).

It would be inconsistent with the Legislature's intent to find that "any employer who is engaged in hazardous materials operations has deliberately intended to injure its work force," the U.S. Chamber of Commerce and other pro-business and insurance coalitions say in the Jan. 10 brief.

The groups are urging the state high court to uphold a ruling that a former Boeing Co. employee who said he developed the lung cancer mesothelioma from on-the-job exposure to asbestos had no claim in tort against the company because Washington law only allows a remedy through workers' compensation insurance.In 2013 the Washington Court of Appeals, Division 2, said although the law allows an exception to the workers' compensation exclusivity provision when employers' intentional acts harm employees, that was not the case here, as the evidence did not show Boeing knew asbestos exposure would harm its employee.

The *amici*

- American Chemistry Council
- American Insurance Association
- American Tort Reform Association
- Litigation Justice Inc.
- National Association of Mutual Insurance Companies
- NFIB Small Business Legal Center
- Property Casualty Insurers Association of America
- U.S. Chamber of Commerce



REUTERS/Vivek Prakash

The amici want the state high court to affirm that a former Boeing Co. employee who said he developed lung cancer from on-the-job exposure to asbestos had no tort claim against because Washington only allows a remedy through workers' compensation.

The *amici* say the "deliberate intention" standard is "a narrow exception [that] was never intended to swallow" the workers' compensation remedy rule.

Walston et al. v. Boeing Co. et al., No. 42543-2-II, 2013 WL 326309 (Wash. Ct. App., Div. 2 Jan. 29, 2013).

Gary and Donna Walston sued Boeing in the Pierce County Superior Court, alleging he worked in the company's hammer shop from 1956 to 1992 and developed mesothelioma in 2010, according to the appeals court opinion. The plaintiffs said Gary worked with and around asbestos in several products and inhaled asbestos fibers.

Boeing said it was immune from the tort suit under the exclusivity provision in the state's Industrial Insurance Act, Wash. Rev. Code Ann. § 51.24.020.

The law rules out tort claims against employers for on-the-job injuries, except where an employer deliberately harms an employee.

But the plaintiffs said Boeing knew it was exposing employees to asbestos fibers since at least 1972, when the company issued a bulletin about the "dangerously toxic" nature of asbestos, according to the appeals court opinion. Also, they claimed Boeing in 1985 re-covered pipes in the hammer shop because the asbestos-containing insulation was flaking off, the opinion said.

When the trial court denied Boeing's motion for summary judgment, the company brought an interlocutory appeal.

The appeals court found Boeing's argument in favor of summary judgment had merit.

The panel said Walston and other Boeing workers were not immediately or obviously injured by their asbestos exposure, and Walston was not diagnosed with mesothelioma until 25 years after the hammer shop re-insulation project.

Thus the plaintiffs failed to show Boeing had "actual knowledge of certain injury" to its employee, as required by the Industrial Insurance Act, the court said.

APPEAL TO THE STATE SUPREME COURT

The Walstons filed this appeal with the Washington Supreme Court.

They argued Boeing's intentions were clear because the company knew the dangers of asbestos exposure.

The couple asked the court to find that the "deliberate intent" exception holds when an employer knows asbestos exposure is certain to cause injury eventually.

Gary Walston died after filing the appeal, and his wife is pursuing the case individually and as representative of his estate.

The *amici* say the deliberate-intention standard is "a narrow exception [that] was never intended to swallow" the workers' compensation remedy rule.

"Plaintiffs-petitioners seek to erode, if not eviscerate, the IIA's exclusive remedy construct in asbestos and other toxic tort cases. Their approach would give employees a full-blown tort cause of action against their employers for injuries from any number of hazardous, occupational exposures," the *amicus* brief says.

The business groups say many employees work around hazardous materials and there is an inherent risk that someone may get sick, but "risk of disease does not equal malice."

They ask the court to reject the petitioners' attempt to "impose new and expansive tort liability on Washington employers." WJ

Attorney:
Amici: D. Bartley Eppenauer, Shook, Hardy & Bacon, Seattle

Related Court Document:
Amicus brief: 2014 WL 254291

Supreme Court

CONTINUED FROM PAGE 1

In *Gentry,* the state high court held that not all class-action waivers in employment contracts are unconscionable.

According to Hunt, *Gentry* "holds that an agreement requiring individual arbitration is invalid when a class proceeding is likely to be significantly more effective to vindicate statutory rights. In *Italian Colors*, the Supreme Court rejected precisely the same kind of argument by antitrust plaintiffs.

"Whether the statutory rights at issue derive from employment statutes, antitrust statutes or elsewhere, the Supreme Court's reasoning would suggest that so long as the party to an arbitration agreement has the right to pursue those claims, even if it would be practically difficult to do so in an individual arbitration, the arbitration agreement must be enforced," she said.

CARMAX EMPLOYEE WAGE DISPUTE

In 2008 two sales consultants for a CarMax affiliate in California filed separate class actions on behalf of nonexempt workers, alleging the used-car retailer violated wage laws by failing to pay overtime or provide rest and meal breaks.

The suits, seeking compensatory damages, were combined in the Los Angeles County Superior Court.

CarMax moved to compel arbitration in 2011, based on a dispute resolution agreement the employees signed that said an arbitrator would resolve all employment disputes on an individual basis.

The company argued the employment contract was enforceable because the U.S. Supreme Court in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), preempted the state's guidelines for determining the validity of class-action waivers.

> The Supreme Court's *Italian Colors* decision may "fatally" undermine California's contract-waiver-unconscionability standards, attorney Hyland Hunt of Akin Gump Strauss Hauer & Feld said.

In *Concepcion*, the high court ruled 5-4 that a mandatory arbitration clause with a class-action waiver requiring consumers to resolve disputes individually is enforceable because the Federal Arbitration Act, 9 U.S.C. § 2, preempts state laws banning such waivers.

According to CarMax, *Concepcion* pre-empted the state's waiver-unconscionability standards set in *Gentry*.

In *Gentry,* the state high court said a court must determine unconscionability by considering such factors as potential individual recoveries and possible retaliation against class members in deciding whether the waiver hinders employee rights.

The plaintiffs opposed the company's motion to compel, contending that the employment contract was unconscionable under *Gentry* standards, despite *Concepcion*.

In November 2011 the trial court granted the company's motion "based primarily on the holding and reasoning of [*Concepcion*]," according to the appellate opinion.

On appeal, a three-judge 2nd District panel found the contract was not unconscionable but reversed the trial court and remanded for the lower court to consider Gentry guidelines to determine whether the class action could proceed.

The appellate panel said, *Gentry* "is still good law." The *Concepcion* ruling, which involved waivers in consumer contracts, did not affect *Gentry*, which specifically addressed employment contracts, the appeals court said.

The panel said the trial court must consider if a class action was the most effective way to vindicate employees' rights.

IS *GENTRY* STILL 'GOOD LAW'?

In October 2013 CarMax filed a *certiorari* petition asking the U.S. Supreme Court to answer the question of whether federal arbitration law preempts *Gentry* and therefore allows class-action waivers in contracts.

The company argued that *Concepcion* and *Italian Colors* "leave no doubt that the FAA preempts the *Gentry* rule." WJ

Related Court Documents:
Supreme Court order: 2014 WL 684014
CarMax *certiorari* petition: 2013 WL 5553442
Appeals court opinion: 2013 WL 1208111

RECENTLY FILED COMPLAINTS FROM WESTLAW COURT WIRE*

Case Name	Court	Docket #	Filing Date	Allegations	Damages Sought
Johnson v. Home Depot Inc.	Mass. Super. Ct. (Middlesex)	MI-CV-2014-00821	2/27/14	A former merchandising assistant store manager at a Massachusetts Home Depot was discriminated against because of his race and was ultimately terminated.	In excess of $405,000, pre- and post-judgment interest, costs and fees, punitive damages, reinstatement, restitution
Mansfield v. Sharp Memorial Hospital	Cal. Super. Ct. (San Diego)	37-2014-00004821-CU-WT-CTL	2/27/14	Sharp Memorial Hospital failed to prevent workplace sexual orientation discrimination against plaintiff.	Compensatory, exemplary and punitive damages; injunctive and declaratory relief; statutory penalties; interest, fees and costs
McDonald v. Trend Micro Inc.	Cal. Super. Ct. (Orange)	30-2014-00708484-CU-WT-CJC	3/3/14	Trend Micro Inc. wrongfully terminated plaintiff because of her age and because she was highly compensated.	Compensatory damages, including lost wages and benefits; general damages for emotional distress and mental suffering; exemplary and punitive damages; interest; fees and costs
Lacross v. Knight Transportation Inc.	Cal. Super. Ct. (San Bernardino)	CIV-DS1402566	3/3/14	Class action. Knight Transportation Inc. failed to pay employees' earned wages and provide them with accurate itemized wage statements.	Class action, compensatory, liquidated, punitive and exemplary damages; injunctive and declaratory relief; restitution; penalties; interest; fees and costs
Miller v. Lowe's HIW Inc.	Cal. Super. Ct. (San Bernardino)	CIV-DS1402620	3/4/14	Lowe's HIW Inc. terminated plaintiff in retaliation for the plaintiff's complaint for sexual harassment.	In excess of $75,000 in general, special, compensatory, punitive and exemplary damages; benefits; interest, fees and costs
Weeks v. Iowa Pacific	Ill. Cir. Ct. (Cook)	2014-L-002264	3/4/14	Iowa Pacific terminated plaintiff in retaliation for his support of the unionization of the company's workforce.	In excess of $75,000, punitive damages, fees and costs
Povitch v. Escot Bus Lines Inc.	Fla. 13th Jud. Cir. Ct. (Hillsborough)	14-CA-002293	3/4/14	Escot Bus Lines Inc. failed to pay plaintiff overtime for more than 40 hours of work in a week.	$15,000, interest and costs
Doctor-Aaron v. Brookdale Senior Living Inc.	Fla. 4th Jud. Cir. Ct. (Duval)	2014-CA-001617	03/4/14	Brookdale Senior Living Inc. discriminated against plaintiff because of her race and wrongfully terminated her when she complained about the discrimination.	Compensatory and punitive damages, benefits, injunctive relief, interest, fees and costs

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

RECENTLY FILED COMPLAINTS FROM WESTLAW COURT WIRE*

Case Name	Court	Docket #	Filing Date	Allegations	Damages Sought
Csanyi v. Tam	Cal. Super. Ct. (Alameda)	RG14716211	3/5/14	Defendant wrongfully terminated plaintiff in retaliation for her inquiry about and expression of dissatisfaction with defendant's unlawful retention of tips.	In excess of $50,000 in compensatory damages, $1,000 in penalties for each violation, declaratory relief, punitive damages, interest, fees and costs
Sarkis v. Garfield Beach CVS LLC	Cal. Super. Ct. (Los Angeles)	BC538456	3/5/14	Garfield Beach CVS discriminated against plaintiff because of her age, disability and need for accommodations.	General, special, punitive and exemplary damages; disgorgement of profit; injunctive relief; interest; fees and costs
Caamal v. Yamato Kura LLC	Cal. Super. Ct. (Los Angeles)	BC538482	3/05/14	Yamato Kura LLC discriminated against and wrongfully terminated plaintiff after he requested reasonable accommodation for his medical condition.	In excess of $25,000 in general, special, compensatory and consequential damages; interest; fees and costs
Baljian v. RWB Consulting Services & Sales Inc.	Cal. Super. Ct. (Los Angeles)	BC538441	3/5/14	RWB Consulting Services & Sales failed to pay overtime and provide accurate wage statements to plaintiff.	Actual damages, declaratory and injunctive relief, disgorgement of profits, interest, fees and costs
Traiger v. Admirals Bank	Mass. Super. Ct. (Suffolk)	SUCV2014-00727	3/5/14	Admirals Bank discriminated against and wrongfully terminated plaintiff, a former staff accountant, because he is Jewish.	In excess of $100,000, plus punitive damages, interest, fees and costs
Battle v. Charming Charlie	Cal. Super. Ct. (San Diego)	37-2014-00005608-CU-OE-CTL	3/6/14	Class action. Charming Charlie failed to pay employees overtime and proper wages.	Class certification, injunctive relief, disgorgement, actual damages, earned wages, interest, fees and costs
Alonso v. Taqueria Apatzingan Restaurant Inc.	Cal. Super. Ct. (Santa Clara)	1-14-CV-261717	3/6/14	Taqueria Apatzingan Restaurant failed to provide meal and rest breaks and overtime compensation, and sexually harassed plaintiff employee.	In excess of $25,000 in general, compensatory and punitive damages; declaratory and injunctive relief; restitution; penalties; disgorgement; interest; fees and costs
McCue v. Donovan's of Bayside LLC	N.Y. Sup. Ct. (Queens)	0701525/2014	3/6/14	Donovan's of Bayside LLC wrongfully terminated plaintiff because of gender and disability.	Compensatory and punitive damages, injunctive relief, reinstatement, fees and costs

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

UNPROTECTED NATURE OF SCORE-FIXING ALLEGATIONS RENDERS JUDGES' DISCHARGES LAWFUL

Ruling: Even assuming cheerleading competition judges satisfy the statutory definition of an employee under the National Labor Relations Act, the National Labor Relations Board Division of Advice declined to find that the employer, Varsity Brands Inc., violated Section 8(a)(1) of the act when it discharged two judges for publishing to third parties a judges' survey that was critical of the employer. The Division of Advice found that the judges' accusations of score-fixing were unprotected by Section 7.

What it means: Employees' communications to third parties must have a sufficient nexus to a labor dispute for protection under Section 7 of the act. Here, the survey's score-fixing comment was unprotected because it did not meet the board's threshold requirement of relating to the judges' terms and conditions of employment.

Varsity Brands Inc., 41 NLRB AMR 30 (N.L.R.B., Div. of Advice Dec. 23, 2013).

NLRB DIVISION OF ADVICE REJECTS RETALIATORY MOTIVE IN HIRING OF PERMANENT REPLACEMENTS

Ruling: The National Labor Relations Board Division of Advice recommended the dismissal of a union's unfair-practice charge regarding the permanent replacement of striking employees by a nonprofit transportation company. The union alleged the employer had an independent, unlawful purpose for hiring the permanent replacements because it conditioned working during the strike on resigning from the union. However, the Division of Advice determined that the general counsel would be unable to meet his burden of proving there was a prohibited motive for the employer's actions because there was no evidence of an independent, unlawful basis for hiring permanent replacement within the meaning of that outlined in *Hot Shoppes Inc*., 146 NLRB 802 (1964). The region was also advised that the strike did not convert to an unfair-practice strike, notwithstanding that the employer's conditioning of an employee's resignation from the union reasonably tends to prolong a strike.

What it means: Evidence of a substantial business justification is sufficient to rebut a retaliatory motive. Here, the employer undercut the union's claim of a retaliatory motive by negotiating a recall procedure shortly after the strike ended and by offering at least part-time reinstatement to almost all the strikers within a month.

Paratransit Services, Lake County, 41 NLRB AMR 31 (N.L.R.B., Div. of Advice Feb. 3, 2014).

WORK RULE VIOLATIONS, EVIDENCE OF TRESPASS STYMIE ANIMUS, SURVEILLANCE CLAIMS

Ruling: Even assuming the protected activity of two Wal-Mart employees was a motivating factor in the employer's decision to discipline and subsequently discharge them, the National Labor Relations Board Division of Advice recommended the dismissal of the instant charge alleging the employer's adverse action was improperly motivated or that the employer engaged in unlawful surveillance when it photographed OUR Wal-Mart demonstrators. The Division of Advice determined that the employer met its burden under *Wright Line*, 251 NLRB 1083 (1980), of demonstrating that it would have taken the adverse action even in the absence of the employee's protected activity. Record evidence established that the employer disciplined and discharged the employees for violating work rules regarding break times and job safety.

What it means: To determine whether an employee's discipline or discharge is motivated by protected activity, the NLRB looks to whether the employee engaged in protected activity, whether the employer was aware of the protected activity and whether the employer took adverse action against the employee because of that protected activity. Here, although the employees satisfied the first two elements, the employees were unable to establish a nexus between their protected activity and the adverse action because the employer demonstrated that its actions were motivated by the employees' violation of certain work rules and not their protected activity.

Wal-Mart Stores Inc., 41 NLRB AMR 33 (N.L.R.B., Div. of Advice Feb. 7, 2014).

PLRB REJECTS CONTINUING-VIOLATION THEORY, DISMISSES CHARGE AS UNTIMELY

Ruling: The Pennsylvania Labor Relations Board dismissed a charging party's exceptions and made absolute and final the board secretary's decision declining to issue a complaint on allegations that a local community college violated its duty to bargain, meet and discuss when it failed to assign the charging party overtime. The PLRB concluded the secretary did not err in determining that the charge was untimely and failed to state a violation of Sections 1201(a)(5) and 1201(a)(9) of the Public Employee Relations Act.

What it means: Unfair-practice charges filed more than four months after the alleged violation are untimely. Here, evidence showed that the employer's failure to assign the complainant overtime occurred as early as 2008. Although the complainant did not believe the employer's proffered reasons for its decision, the charge was not filed until more than five years later and thus clearly outside the four-month limitations period.

Harr v. Westmoreland County Community College, 45 PPER 85 (Pa. Labor Relations Bd. Jan. 21, 2014).

PLRB DENIES EXCEPTIONS, AFFIRMS DISMISSAL OF UNIT-CLARIFICATION PETITION

Ruling: The Pennsylvania Labor Relations Board dismissed a school district's exceptions to the board secretary's decision not to direct a hearing on the district's petition for unit clarification to exclude the position of instructor of incarcerated youth from an existing bargaining unit of professional employees. The district argued that the position was not included in the bargaining unit. However, the board secretary concluded a unit clarification proceeding was not necessary because the district was not seeking a change in the current certified bargaining unit.

What it means: Although the board possesses authority to determine the appropriateness of a bargaining unit, including the certification of that unit, an arbitrator also has jurisdiction to determine whether an employee is a member of the bargaining unit as defined by the board. Moreover, both the PLRB and the courts recognize the grievance arbitration procedure as an appropriate forum to address disputes regarding whether a bargaining unit encompasses a certain position.

In re Employees of Franklin Area School District, 45 PPER 86 (Pa. Labor Relations Bd. Feb. 18, 2014).

CITY'S REFUSAL TO PAY ARBITRATION CANCELLATION FEES DOESN'T EQUAL UNFAIR PRACTICE

Ruling: Upon considering exceptions to an administrative law judge's recommended decision, the Illinois Labor Relations Board, Local Panel, decided that arbitration cancellation fees are part of the "costs of arbitration," which must be borne equally by the employer and the employee organization under the state's Public Labor Relations Act Section 8. Nevertheless, the LRB also determined that the employer did not violate any PLRA provision by failing to pay a share of the cancellation fees. The employer committed no unfair practice through its dilatory processing of grievances outside of the time frames set forth in the parties' bargaining agreements, the LRB concluded.

What it means: Following the reasoning of the Pennsylvania Labor Relations Board in *McAdoo Police Association v. McAdoo Borough*, 37 PPER 107 (Pa. Labor Relations Bd. 2006), the LRB reasoned that allowing one party to pay the other party's arbitration fee obligation necessarily damaged the arbitrator's appearance of neutrality. It viewed the cancellation fee obligation as a contractual situation between the arbitrator and each of the parties, typically governed by the terms of the agreement to arbitrate or the arbitration award.

Service Employees International Union, Local 73 and City of Chicago, 30 PERI 194 (Ill. Labor Relations Bd., Local Panel Jan. 31, 2014).

LRB, LP MAJORITY RULES: UNION MUST REFUND FAIR-SHARE FEES TO ALL BARGAINING UNIT MEMBERS

Ruling: A majority of the Illinois Labor Relations Board, Local Panel, affirmed an administrative law judge's determination that a union violated the state's Public Labor Relations Act Section 10(b)(1) by failing to provide charging party with information regarding the manner of the fee computation and the procedure for objecting to that computation. The LRB majority directed a refund of all fair-share fees, collected after a certain date, to all fair-share fee payers in the bargaining unit represented by the union.

What it means: In directing the union to refund all fair-share fees collected and/or received after a certain date to all bargaining unit fair-share fee payers, the LRB majority noted that the union was found, on three occasions, to violate PLRA provisions by failing to provide requested information on fair-share fee computations and objection procedures. The LRB majority also relied on PLRA and National Labor Relations Act case law with respect to both the refund of fair-share fees as well as its broad remedial authority.

Hallinan and Fraternal Order of Police, Lodge 7, 30 PERI 196 (Ill. Labor Relations Bd., Local Panel Jan. 31, 2014).

APPEALS COURT NIXES CONSTITUTIONAL CHALLENGES TO STATE LAWS GOVERNING EMPLOYEE BENEFITS

Ruling: The New Jersey Superior Court, Appellate Division, affirmed the dismissal of public sector unions' challenge to the constitutionality of three New Jersey statutes. Those statutes altered state-administered retirement systems, changed eligibility requirements for state-administered health benefits, and altered other public employee benefits. The appeal court decided that the disputed legislation furthered legitimate state interests and did not violate either the New Jersey or U.S. constitutions.

What it means: Citing New Jersey case law, the appeals court explained that a statute will not be declared void unless it is clearly repugnant to the Constitution. A party seeking to rebut the strong presumption of constitutionality that attaches to a statute must show that the statute's repugnancy to the Constitution is clear beyond a reasonable doubt.

Teamsters Local 97 et al. v. State et al., 40 NJPER 118 (N.J. Super. Ct. App. Div. Jan. 31, 2014).

LABOR AND PUBLIC EMPLOYMENT NEWS

DISMISSING UNFAIR-PRACTICE CHARGE, PERC CLARIFIES APPLICABLE LEGAL STANDARD

Ruling: The Florida Public Employment Relations Commission accepted a hearing officer's recommended dismissal of an unfair-labor-practice charge. It found no merit in the contention of the individual charging party, a college professor, that his primary employer exhibited antiunion animus through comments allegedly made comments to his secondary employer. Here, charging party failed to prove that his primary employer took an adverse action against him as a result of his protected activity, PERC found. It declined to award attorney fees to the primary employer as the prevailing party.

What it means: PERC ratified the hearing officer's application of the test enumerated in *Pasco County School Board v. Florida Public Employment Relations Commission*, 353 So. 2d 109 (Fla. 1st Dist. Ct. App. 1977). PERC clarified this area, explaining that the *Pasco County* test was appropriately applied to unfair-practice charges involving asserted violations of protected activity that have been found sufficient to proceed to hearing.

Bernard v. Seminole State College Board of Trustees, 40 FPER 270 (Fla. Pub. Employment Relations Comm'n Jan. 28, 2014).

COUNTY'S UNILATERAL REDUCTION OF EMPLOYEES' WORKWEEK VIOLATES PERA

Ruling: In an unpublished decision, the Michigan Court of Appeals affirmed the Michigan Employment Relations Commission's decision regarding an unfair-practice charge. It agreed with MERC's conclusion that the employer's practice of laying off employees for one day per month violated the Public Employment Relations Act Section 10(1)(e) as well as the contractual five-day workweek provision. The court also determined that MERC maintained jurisdiction to consider the union's charge regardless of whether it also implicated contractual rights.

What it means: In interpreting the definition of the term "layoff" in the parties' contract, the appeals court noted that bargaining agreements are contracts that govern the terms and conditions of employment. Here, by agreeing to the terms of that contract, the parties created a set of enforceable rules, the court explained.

Wayne County American Federation of State, County and Municipal Employees Council 25, 27 MPER 43 (Mich. Ct. App. Feb. 13, 2014).

NEWS IN BRIEF

VERMONT LEGISLATURE WORKING ON SICK LEAVE BILLS

Two bills pending before the Vermont House of Representatives and Senate address the issue of paid sick leave and workers' use of the time. On Feb. 12, a state House committee advanced H208, which requires employers to provide one hour of paid sick leave for every 30-hour workweek. The bill, which now goes to the full House, would require employers to offer up to seven days of paid sick leave per year. The state Senate passed S213 on Feb. 18 to prevent employers from penalizing workers who take sick time. Senate Majority Leader Philip Baruth, D, introduced the legislation after employees for a company that provides food services at several state universities complained that they received infraction points when they took sick time. If employees accumulate seven points in a year, they face possible termination, according to a Feb. 15 report in the Boston Globe.

HOTEL CHAIN TO PAY $75,800 IN PAY DISCRIMINATION SUIT

Extended Stay Hotels has agreed to pay four former employees a total of $75,800 to settle Equal Employment Opportunity Commission charges that the company paid female employees less that male workers in the same positions. The EEOC sued the hotel chain in 2013 after Latoya Weaver, a guest services representative, complained of discriminatory pay policies. The EEOC said Extended Stay violated the federal Equal Pay Act and Civil Rights Act. Weaver will receive $44,840 in the settlement and the amounts for three other female employees range from $10,760 to $3,480, according to a consent decree filed in the case. The company has also agreed to provide yearly antidiscrimination training for its workers.

Equal Employment Opportunity Commission v. HVM LLC d/b/a Extended Stay Hotels, No. 13-1980, setlement announced (D. Md., Greenbelt Div. Feb. 19, 2014).

WAREHOUSE STAFFING AGENCIES SETTLE WAGE CLASS ACTION FOR $1.7 MILLION

Workers at various warehouses in California have asked a Los Angeles federal judge to approve a $1.7 million settlement with three staffing companies they say failed to pay them proper wages. The workers filed a class action against Premier Warehousing Ventures, Rogers-Premier Unloading Services and Impact Logistics Inc. The suit, filed in 2011 on behalf of nearly 2,000 California workers, also names Schneider Logistics Inc., which operates the warehouses. Schneider is not party to the settlement agreement. The suit alleged the defendants violated the Fair Labor Standards Act by failing to pay minimum wage and overtime and failing to provide rest and meal breaks. The plaintiffs were seeking more than $10 million in damages, according to their original complaint.

Carrillo v. Schneider Logistics Transloading & Distribution Inc. et al., No. 11-8557, proposed settlement agreement filed (N.D. Cal. Feb. 14, 2014).

CASE AND DOCUMENT INDEX