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DISCRIMINATION

Goldman Sachs employee stuck with arbitration clause barring class action

A Goldman Sachs managing director who agreed to submit all employment-related disputes to arbitration cannot pursue a class action against the firm for Title VII gender discrimination, a federal appeals court has held.

Parisi et al. v. Goldman Sachs & Co. et al., No. 11–5229–cv, 2013 WL 1149751 (2d Cir. Mar. 21, 2013).

In granting Goldman Sachs' interlocutory appeal, a three-judge panel of the 2nd U.S. Circuit Court of Appeals reversed the trial court and barred Lisa Parisi's class action against the investment banking giant. The trial court had refused to compel individual arbitration of Parisi's claims of "pattern and practice" discrimination.

In its March 21 opinion, the appeals panel found that Parisi could not circumvent the binding arbitration agreement she signed when she joined the firm in 2003 because arbitration would not prevent her from "vindicating" a statutory right protected by Title VII.

Writing for the panel, Circuit Judge Barrington D. Parker rejected Parisi's argument that arbitration would force her to waive her Title VII right to sue for pattern-or-practice discrimination, which is available only to class plaintiffs. There is no substantive right to sue for pattern-or-practice

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discrimination, which is a method of proof and a burden-shifting tool, "not a freestanding cause of action," the court explained.

As such, the arbitration agreement requiring that Parisi bring her claims as an individual, not through a class action, did not deprive her of any statutory right, Judge Parker said. In fact, both the courts and Congress specifically approved arbitration of Title VII claims, according to the panel opinion.

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The federal enclave doctrine: A potentially powerful defense to state employment laws

By Joshua B. Waxman, Esq., Richard W. Black, Esq., and Steven E. Kaplan, Esq.
Littler Mendelson

The U.S. Constitution provides that the federal government has exclusive legislative rights over certain federal territories (such as military bases, courthouses and other official properties) if a state consents to the purchase of the territory. These territories are known as "federal enclaves." In practical terms, the federal enclave doctrine provides a little known but potentially powerful defense for employers that perform work in federal enclaves because often only federal law will apply in those locations.

The application of *federal* law to work performed in federal enclaves is significant because *state* employment laws may give rise to more plaintiff-friendly remedies and longer statutes of limitations than their federal counterparts. Significantly, the doctrine has been recognized to preclude state law wage-and-hour class actions. In addition, because the doctrine gives rise exclusively to federal law claims, it may form the basis to remove a lawsuit from state to federal court.

WHAT IS A FEDERAL ENCLAVE?

A federal enclave is territory, transferred by a state through cession or consent to the United States, over which the federal government has acquired exclusive jurisdiction. Once the federal government exerts exclusive jurisdiction over a territory, it can choose whether state or federal law will govern. The source of the federal enclave doctrine is Article I, Section 8, clause 17 of the U.S. Constitution, which provides that:

> Congress shall have power … to exercise exclusive Legislation in all cases whatsoever over such district[s] … as may, by cession of particular states … become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.[1]

Federal enclaves thus include some federal courthouses,[2] military bases,[3] federal buildings,[4] and national forests and parks.[5] Not all federal *territories* are federal *enclaves*.

In order for a territory to be considered a federal enclave, the federal government must have purchased the territory "by the consent of the Legislature of the state." If it did not,

The U.S. Constitution provides that the federal government has exclusive legislative rights over certain federal territories such as military bases, courthouses, and other official properties.

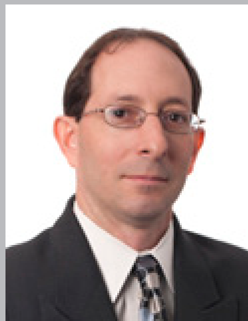
then the United States and, by implication, a private employer working on the federal property, does not obtain the benefits of the federal enclave doctrine. Instead, its possession is one of an "ordinary" proprietor, and state law will apply.[6]

In litigation, determining whether a federal territory is a federal enclave can be a time-intensive and fact-intensive undertaking. Given the sheer volume of federal territories in the United States and the dearth of case law addressing each territory, a party will often need to conduct this unconventional research from scratch. Such research might include digging through old deeds or sifting through old court records to determine whether the federal government in fact procured the property.

Moreover, a party must also locate the state statute consenting to the purchase by the United States. The source of this information can vary and can range from a deed of purchase to an opinion letter from the state's attorney general explaining that the property at issue was ceded to the federal government and consented to by the state's general assembly.[7]

HOW TO DETERMINE WHICH STATE LAWS ARE PREEMPTED

After establishing that a federal territory is a federal enclave, the next question that must be answered is: Which state laws are preempted?



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Which state laws does the federal enclave doctrine preempt?

(1) A state law that was enacted *before* the cession continues to apply unless Congress states otherwise.

(2) A state law that was enacted *after* the creation of the enclave does not apply to the enclave.

The general rule is that: A state law that was enacted *before* the cession continues to apply unless Congress states otherwise,[8] and a state law that was enacted *after* the creation of the enclave does not apply to the enclave.[9]

As described more fully below, there are three notable exceptions to this general rule.[10]

Therefore, it is necessary in this step of the analysis to determine the date upon which the land in question became a federal enclave, as well as the date upon which the state law at issue was enacted. If the alleged claim is borne from the common law, rather than statutory law, the same analysis will still apply.[11]

The date upon which the territory became a federal enclave may be determined from a deed of purchase or other court record, whereas traditional statutory research might provide the date on which the state law was enacted. If the state law was enacted *after* the territory became a federal enclave, the state law will not apply. By contrast, if the state law was already in existence, the general rule, as noted, is that the state law *will* apply.

The U.S. District Court for the Eastern District of New York's decision in *Sundaram v. Brookhaven National Laboratories*[12] provides a good example of this principle. In this case, the issue was whether New York's anti-discrimination statute applied to the laboratory. As a threshold matter, there was no dispute that the land on which Brookhaven National Laboratories sat was a federal enclave because the United States purchased the property from the state of New York July 17, 1933, in a transfer signed by the governor and authorized by the state Legislature. Because neither the New York Human Rights Law nor the New York Civil Rights Law was enacted before July 17, 1933, the *Sundaram* court held that the state's anti-discrimination laws did not apply to the Brookhaven National Laboratories. In addition, the court held that the plaintiff's two common-law claims (breach of contract based upon an employee handbook and a tort for unlawful discharge) also did not apply because those claims were not recognized by New York courts until well after 1933.

WHAT ARE THE EXCEPTIONS?

There are three exceptions to the general rule that a state's law enacted after the creation of a federal enclave is preempted by federal law.

First, state law is not preempted if the state had, at the time of cession, explicitly reserved the right to legislate over the matters at issue.[13] Second, minor regulatory changes to state programs that existed at the time of cession are not preempted "provided the basic state law authorizing such control has been in effect" since the time of cession.[14] Finally, federal enclaves are not shielded from state law if Congress provides "clear and unambiguous" authorization for such state regulation over its federal enclaves.[15]

Exceptions to the general preemption rule:

(1) State law is not preempted if the state had, at the time of cession, expressly reserved the right to legislate over the matters at issue.

(2) Minor regulatory changes to state programs that existed at the time of cession are not preempted "provided the basic state law authorizing such control has been in effect" since the time of cession.

(3) Federal enclaves are not shielded from state law if Congress provides "clear and unambiguous" authorization for such state regulation over its federal enclaves.

With respect to the first exception, neither the United States nor a private employer can rely on the federal enclave doctrine if, at the time of cession or purchase, the state expressly reserved the right to legislate the activity at issue within the territory.

For example, some states have reserved the right to legislate civil and criminal service of process only,[16] whereas other states have reserved jurisdiction to the fullest extent possible under the Constitution.[17]

In *Sundaram*, discussed above, the plaintiff argued that the New York laws in question were not preempted because, at the time of cession, New York reserved the right to legislate in that territory. The deed memorializing the purchase by the U.S. government stated, in part:

> That the State of New York shall retain a concurrent jurisdiction with the United States on and over the property and premises so conveyed, so far as that all civil and criminal process, which may issue under the laws or authority of the state of New York, may be executed thereon in the same way and manner as if such jurisdiction had not been ceded.[18]

The court, however, rejected the plaintiff's argument, noting that the "express terms of the scope of concurrent jurisdiction is extremely limited … to the state's right to serve civil and criminal process on the property."[19] Thus, the deed did not provide the state with jurisdiction to legislate other activities, such as antidiscrimination laws, within the federal enclave.

The second exception relates to state programs that were enacted prior to the date of cession of the property at issue, but which require ongoing regulatory changes after that date.

In *Paul v. United States*, the U.S. Supreme Court addressed state regulatory schemes regarding milk price controls that were in place when the state ceded sovereignty over land used for federal military installations but that were subject to ongoing change by regulators. Relying on the federal enclave doctrine, the United States argued that California should be barred from trying to enforce its current milk pricing regulations, rather than the pricing regulations in effect when the United States acquired the land in question.

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Rejecting that argument, the Supreme Court held that changes in milk pricing regulations would still be applicable to the federal enclave, "provided the basic state law authorizing such control had been in effect since the times of these various acquisitions" of the land constituting the federal military installations.[20] The Supreme Court remanded the case to the lower court to examine the precise evolution of the current regulatory scheme.

> jurisdiction of the state within whose exterior boundaries such place may be.[22]

The court held that this federal statute provides clear authorization for state regulation because it gives a state official charged with enforcing a state's workers' compensation laws "the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession."[23]

The federal enclave doctrine has been recognized to preclude state law wage-and-hour class actions.

The third exception provides that even if the state law at issue was enacted after the creation of the federal enclave, Congress may authorize such state regulation if it provides "clear and unambiguous" assent to the state law.[21] What constitutes "clear and unambiguous" authorization, however, has been the subject of considerable debate in federal district courts.

Some federal statutes have been found to provide clear and unambiguous authorization for state regulation without much controversy on the basis of their plain language. In *Goodyear Atomic Corp. v. Miller*, for example, the U.S. Supreme Court addressed whether Congress had authorized states to enforce their workers' compensation laws in federal enclaves. In particular, the statute at issue provided:

> Whatsoever constituted authority of each of the several states is charged with the enforcement of and requiring compliances with the state workmen's compensation laws of said states and with the enforcement of and requiring compliance with the orders, decisions and awards of said constituted authority of said states shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any state and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any state, in the same way and to the same extent as if said premises were under the exclusive

The Clean Air Act[24] is another example of a federal statute that expressly allows states to regulate its provision on federal properties. The CAA provides that federal facilities:

> Shall be subject to, and comply with, all federal, state, interstate and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever) ... ; to the exercise of any federal, state or local administrative authority; and to any process and sanction, whether enforced in federal, state, or local courts, or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.[25]

Indeed, courts have used the language of the CAA as the prototypical example of how Congress can be "clear and unambiguous" when it authorizes state regulation on federal property. In *Bouthner v. Cleveland Construction Inc.*, for example, the District Court compared the clear and unambiguous language of the CAA (*i.e.*, that state law would apply to those federal facilities) to the Davis-Bacon Act,[26] which does not contain similar language. The court noted that "Congress is entirely capable of providing explicit authorization when it intends to permit a state regulation to apply in a federal enclave. The CAA is one such example."[27]

One issue that has not been as well addressed by the federal district courts is whether Congress has authorized the application of state wage-and-hour law claims in federal enclaves. Courts that have considered this question are split on the issue.

The primary issue with respect to state wage-and-hour laws is whether the Service Contract Act contains clear and unambiguous congressional authorization for state wage-and-hour laws. More specifically, the issue is whether congressional intent can be inferred through the SCA's requirement that federal contractors pay prevailing wages, including minimum wages and "fringe benefits," which are defined to include benefits "not otherwise required by federal, state or local law to be provided by the contractor or subcontractor."[28]

In *Lebron Diaz v. General Security Services Corp.*,[29] individuals employed by the defendant at a federal courthouse brought a lawsuit for unpaid bonuses and sick leave under Puerto Rico law. The employer contended that the courthouse was a federal enclave, which precluded any claims under local law. The plaintiff countered that the language in the SCA constituted clear congressional intent that local regulation of employment benefits within a federal enclave was permissible. The U.S. District Court for the District of Puerto Rico, observing that the "question is admittedly close," explained:

> While it is true that the [SCA] does not explicitly state that local laws will apply, no fair reading of the emphasized phrases makes possible any other construction of the language. A message does not have to be *in haec verba* to be "clear and unambiguous." The only reasonable interference to be drawn from the [SCA] is that local and state laws were to provide the foundation upon which the [SCA] was to be built, to insure that contract employees received certain minimum benefits. The application of local law providing separate and independent employment benefits, such as the law of Puerto Rico here, was unambiguously assumed.[30]

Other courts have been unable to find clear and unambiguous authorization through the SCA. In *Manning v. Gold Belt Falcon*,[31] for example, the U.S. District Court for the

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District of New Jersey held:

> Nothing in the Service Contract Act evinces congressional intent to apply state minimum-wage laws to federal enclaves, nor is the application of state law to federal property even mentioned. Furthermore, Congress clearly enacted the Service Contract Act for a specific purpose: to ensure workers employed by federal employers were paid no less than workers employed by private or state employers in the same area. There is no explicit intent to abrogate the federal enclave doctrine, but rather a desire to ensure protection for service contracts.[32]

The court noted further: "The distinction between the statute in *Goodyear* and the SCA is obvious: one clearly applies state law to federal land, while the other does not."[33]

Relatedly, in *Bouthner*, the U.S. District Court for the District of Maryland, when analyzing similar language under the Davis-Bacon Act, held that Congress did "not explicitly authorize state wage-and-benefit laws to apply to contractors" because "Congress has shown it is capable of including language in statutes expressly stating that states have the power to apply the statute to land ceded to the United States" and therefore "the lack of an explicit authorization will often suggest that a statute is not clear and unambiguous."[34] The court, therefore, agreed "with the reasoning in *Manning*."[35]

Even assuming that Congress, through the SCA, ratified the application of certain state laws to federal enclaves, courts have held that claims for overtime do not constitute "fringe benefits" as the term is used in the SCA or the Davis-Bacon Act. For example, the *Bouthner* court held that "even if this court accepted plaintiffs' interpretation of the Davis-Bacon Act, state and local law would only apply to claims for fringe benefits. Plaintiffs' allegations that they were not paid minimum wage, were misclassified as independent contractors or exempt persons, and were not timely paid their wages, do not directly relate to 'fringe benefits.'"[36] The court continued: "Plaintiffs' allegations that they were not paid overtime also does not amount to a claim for fringe benefits, at least within the meaning of the Davis-Bacon Act."[37]

On the basis of the analysis in *Bouthner*, the *Diaz* decision can be distinguished because those claims related to the defendant's Christmas bonus and sick leave policy and involved "fringe benefits," rather than claims for overtime. As a result, employers can persuasively argue that a plaintiff's reliance on the *Diaz* decision to assert that the SCA provides clear and unambiguous authorization for state overtime laws in federal enclaves is misplaced.

THE FEDERAL ENCLAVE DOCTRINE IS NOT AVAILABLE TO PRIVATE EMPLOYERS PERFORMING WORK IN THE DISTRICT OF COLUMBIA

Although the District of Columbia is itself a federal enclave, the federal enclave doctrine is not available as a shield for private employers performing work in the District.

In 1790 the District of Columbia was carved out of Maryland and Virginia.[38] In 1846, however, the portions Virginia ceded were returned. After nearly 200 years of exclusive federal government control, in one form or another, Congress enacted the District of Columbia Home Rule Act in 1973.[39] The act allows District citizens to elect a mayor and council. The powers and duties of the council are similar to those held by governing boards in other localities, including the authority to enact laws. One significant difference, however, is that Congress reviews all legislation passed by the council before it can become law.

The act also specifically prohibits the council from enacting certain laws, such as those that would:

- Lend public credit for private projects.
- Impose a tax on individuals who work in the District but live elsewhere.
- Make any changes to the Heights of Buildings Act of 1910;
- Change the composition or jurisdiction of the local courts.
- Enact a local budget that is not balanced.
- Gain any additional authority over the National Capital Planning Commission, the Washington Aqueduct or the District of Columbia National Guard.

Unless Congress overturns a District law, Congress has essentially assented to concurrent jurisdiction. Moreover, these District laws have been applied to private employers working in the District.[40]

REMOVAL

In addition to the possible preclusion of certain state law claims, the federal enclave doctrine may also provide grounds to remove a lawsuit from state to federal court because the doctrine, if applicable, gives rise exclusively to federal law claims.[41]

Though it may be difficult to fully develop the factual record necessary to remove an action from state to federal court within 30 days after service of process required for removal under 28 U.S.C. § 1446, a party should be able to remove cases involving the federal enclave doctrine to federal court if, in its notice of removal, the party can plead factual allegations sufficient "to raise a right to relief above the speculative level."[42]

Under the federal removal statute,[43] a defendant need only file a notice of removal, signed pursuant to Rule 11 of the Federal Rules of Civil Procedure, containing "a short and plain statement of the grounds for removal."[44] The 4th Circuit has held that a "district court should not hold a removing party's notice of removal to 'a higher pleading standard than the one imposed on a plaintiff in drafting an initial complaint.'"[45]

In *Jones v. John Crane-Houdaille Inc.*, the U.S. District Court for the District of Maryland addressed whether a defendant properly removed a case to federal court based on the federal enclave doctrine.[46] The plaintiff in *Jones* worked at the Aberdeen Proving Ground which, in substantial part, is a federal enclave. In his motion to remand, the plaintiff argued that the defendant's removal was defective because it did not provide full support for the contention that the portion of the Aberdeen Proving Ground where the plaintiff worked had in fact been ceded to or purchased by the federal government. The plaintiff argued further that even assuming, *arguendo*, that the territory had been procured by the United States, the defendant failed to sufficiently plead the degree of cession. The district court disagreed, stating:

> Measured against the plausibility standard of *Twombly* [*Bell Atlantic Corp. v. Twombly*], the notice of removal is not defective for failing to allege Maryland's consent to exclusive federal legislative jurisdiction. A judge in this district has previously explained, in detail, why the federal government has exclusive legislative jurisdiction over portions, at least, of the Aberdeen Proving Ground.

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> Other judges in this court have also noted that parts of Aberdeen Proving Ground are federal enclaves. In addition [...], opinions in several other cases in the district have referred to the Aberdeen Proving Ground, on which Edgewood Arsenal sits, as a federal enclave.[47]

The court denied the motion to remand, without prejudice, pending further discovery regarding the specific location of the plaintiff's workplace, as well as the date and manner by which the land was procured by the federal government. The court concluded that if the defendant could not support its defense, the court could remand the case to state court for lack of subject matter jurisdiction.

As a result, employers who are sued in state court for an alleged violation of a state wage-and-hour law in a putative class action (subject to that state's version of Federal Rule of Civil Procedure 23) over work performed at a federal enclave have greater flexibility in removing the lawsuit to federal court if the employer can meet the "plausibility" standard under *Twombly*. This flexibility is particularly welcome since it may be difficult for an employer to develop fully the complete the factual record necessary to support the application of the federal enclave doctrine prior to the statutory removal deadline.

CONCLUSION

The federal enclave doctrine is a potentially potent weapon for defendants in employment and other litigation since, if applicable, the doctrine will preclude all state law claims enacted after the creation of the enclave, including class-wide state wage-and-hour claims. As a result, and because it can be difficult to quickly develop the factual record necessary to confidently rely on the doctrine, it is important that any employers working on any federal property, such as a military base, medical facility, courthouse or other federal building or national park, determine sooner rather than later whether the federal enclave doctrine is available to them. WJ

NOTES

1 U.S. Const. art. I, § 8, cl. 17.

2 *See, e.g., United States v. Markiewicz*, 978 F.2d 786, 797 (2d Cir. 1992).

3 *See e.g., Bouthner v. Cleveland Constr.*, 2011 WL 2976868 (D. Md. July 21, 2011) (National Naval Medical Center in Bethesda, Md.); *Manning v. Gold Belt Falcon LLC*, 681 F. Supp. 2d 574 (D.N.J. 2010) (Fort Dix, N.J.); *Hutchison v. Andrulis Corp.*, 2004 WL 691790, at *1 (N.D. Fla. Mar. 19, 2004) (Department of the U.S. Navy, Coastal Systems Station, in Panama City, Fla.); *Kelly v. Lockheed Martin Servs. Group*, 25 F. Supp. 2d. 1 (D.P.R. 1998) (Roosevelt Roads Naval Station in Ceiba, Puerto Rico).

4 *United States v. Windsor*, 765 F.2d 16 (2d Cir. 1985) (Knolls Atomic Power Laboratory in Windsor, Conn.).

5 *Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234 (10th Cir. Aug. 10, 2012).

6 *Paul v. United States*, 371 U.S. 245, 264 (1963).

7 Office of the Attorney Gen. of the State of Md., 61 Op. Atty. Gen. Md. 441 (1976) (addressing whether the National Naval Medical Center in Bethesda, Md., was a federal enclave).

8 *Koren v. Martin Marietta Servs*., 997 F. Supp. 196, 202 (D.P.R. 1998) (state law existing at the time of cession still applies within the enclave until a federal law abrogates the state law).

9 *Cooper v. S. Cal. Edison Co.*, 170 Fed. Appx. 496 (9th Cir. May 10, 2006) (federal enclave doctrine preempts state law claims that do not pre-date the acquisition of the enclave).

10 First, federal law does not preempt state law if the state had, at the time of cession, expressly reserved the right to legislate over the matters at issue. Second, federal law will not preempt state regulatory schemes that were in place prior to the date of cession, but which require ongoing changes by a regulatory body. Finally, state law will apply in federal enclaves if Congress provides "clear and unambiguous" authorization for such state regulation over its federal enclave.

11 *See, e.g., Allison*, 689 F.3d at 1240. ("Judge-made common law is no different than Legislature-made law in application and effect. When a state court adopts a new cause of action through its common-law powers, that cause of action functions no differently than if it had been created by the state legislature.")

12 424 F. Supp. 2d 545 (E.D.N.Y. 2006).

13 *Sundaram v. Brookhaven Nat'l Labs.*, 424 F. Supp. 2d 545 (E.D.N.Y. 2006).

14 *Paul v. United States*, 371 U.S. 245, 269 (1963).

15 Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988).

16 *See, e.g.*, Mont. Code Ann. § 2-1-202.

17 *See, e.g.,* Md. Code. Ann., State Gov't § 14-102 ("With respect to land that the United States or any of its units leases or otherwise holds in the state, the state reserves jurisdiction and authority over the land and over persons, property, and transactions on the land to the *fullest extent that is permitted by the United States Constitution* and that is not inconsistent with the governmental purpose for which the land is held.") (emphasis added).

18 *Brookhaven Nat'l Labs.*, 424 F. Supp. 2d at 570.

19 *Id.*

20 *Paul*, 371 U.S. at 269.

21 *Goodyear Atomic Corp*., 486 U.S. at 180.

22 40 U.S.C. § 290.

23 *Goodyear Atomic Corp.*, 486 U.S. at 182.

24 42 U.S.C. § 7401.

25 42 U.S.C. § 7418(a).

26 40 U.S.C. §§ 3141 et seq.

27 *Bouthner v. Cleveland Constr.*, 2011 WL 2976868, at *3 (D. Md. July 21, 2011).

28 41 U.S.C. § 351(a)(2).

29 *See, e.g., Lebron Diaz v. Gen. Sec. Servs. Corp.,* 93 F. Supp. 2d 129 (D.P.R. 2000).

30 *Id.* at 141-42.

31 *See, e.g., Manning v. Gold Belt Falcon*, 681 F. Supp. 2d 574, 577 (D.N.J. 2010).

32 *Id*.

33 *Id*.

34 *Bouthner*, 2011 WL 2976868, at *5.

35 *Id*.

36 *Id*. at *6.

37 *Id*.

38 Council of the District of Columbia, DC Home Rule.

39 D.C. Code §§ 1-201.01.

40 *Twenty Citizens of the District of Columbia v. Clinton* (D.D.C. June 30, 1998) ("The home rule government [comprised of the council of the District of Columbia, the mayor of the District of Columbia and the various administrative departments] does not constitute a republican form of government, because every action of the home rule government is subject to absolute review and veto by the Congress of the United States itself or by defendant District of Columbia Financial Responsibility and Management Assistance Authority acting as an administrative agent or instrumentality for the Congress of the United States of America and because the home-rule government was created by an act of Congress and not by an autonomous act of the citizens of the District of Columbia and because the Congress of the United States holds the exclusive power to alter or abolish the home-rule government at any time.").

41 *Morgan v. Rankin*, 436 Fed. Appx. 365 (5th Cir. Aug. 10, 2011).

42 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554-56 (2007).

43 28 U.S.C. § 1446(a).

44 *Id*.

45 *Ellenburg v. Spartan Motors Chassis*, 519 F.3d 192, 200 (4th Cir. 2008) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554-56 (2007)).

46 *Jones v. John Crane-Houdaille Inc.*, 2012 WL 1197391 (D. Md. Apr. 6, 2012).

47 *Id*.

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Nonprofit whistle-blower employee nets $1.6 million retaliation award

A former senior case manager at a New Jersey ex-convict rehabilitation facility has been awarded more than $1.6 million in damages plus back pay after she was fired for reporting a manager's unethical and retaliatory conduct.

Pietrowski v. Kintock Group, No. 111003328, verdict returned (Pa. Ct. Com. Pl., Phila. County Mar. 22, 2013).

A jury in the Philadelphia Court of Common Pleas unanimously found that Marla Pietrowski's former employer, The Kintock Group, violated the New Jersey Conscientious Employee Protection Act, N.J. Stat. Ann. § 34:19-1, by creating a hostile work environment and terminating her for reporting conduct that violated company policy.

The state CEPA protects employees from being fired in retaliation for disclosing or objecting to a wrongful business practice or conduct by a fellow employee.

The jury awarded Pietrowski $1.5 million in punitive damages, $100,000 for pain and suffering and just shy of $78,000 in back pay.

"I feel so thankful to the jury for their ability to see that I was a victim of abuse of power and that employees who stand up to their employers and voice concerns about wrongdoing in the workplace should not fear being fired," Pietrowski said, according to a statement from Console Law Offices, which represented her.

Pietrowski, who lives in New Jersey and worked out of a Kintock office there, filed the New Jersey state law claims in Philadelphia court because the company's headquarters are in Pennsylvania and it does business in the city, the Console Law statement said.

Kintock Group filed a motion April 1 seeking to overturn the verdict.

According to her October 2011 complaint, Pietrowski worked for Kintock, a nonprofit organization that helps people recently released from prison to transition back into society, from July 2009 until her termination two years later.

She alleged the company terminated her after she reported comments by interim director Yari Miranda that led her to believe he was involved in illicit drug dealing.

had been telling her that she was being groomed for the director position.

The suit says that due to Miranda's increasing hostility toward Pietrowski, he did not recommend her for the director position in 2010, and she was passed over.

In April 2011 she complained of a hostile work environment created by Miranda and his handpicked successor, Erinn Hendricks, the complaint said.

The New Jersey Conscientious Employee Protection Act protects employees from being fired in retaliation for disclosing or objecting to a wrongful business practice or conduct by a fellow employee.

In October 2009 Pietrowski reported Miranda because involvement with illegal drugs is a violation of company policy, and she was concerned about his ability to work in a facility that deals regularly with individuals who require treatment for drug abuse, the complaint said.

Pietrowski also notified superiors when Miranda violated company regulations by bringing his 8-year-old daughter to work even though several registered sex offenders were enrolled in the Kintock program, the complaint said. She said Miranda's actions endangered his child.

A year after reporting Miranda, Pietrowski applied for the director position to permanently replace him. She said in her lawsuit that beginning shortly after the time she was hired, Miranda and other officials had been telling her that she was being groomed for the director position.

Two months later, Kintock terminated Pietrowski for gross misconduct, purportedly for making false allegations about Miranda and Hendricks.

Pietrowski alleged she was terminated despite receiving only positive performance reviews and evaluations, the complaint said. She also alleged her abrupt firing violated company policy that calls for "progressive discipline," which alerts an employee about objectionable conduct and provides an opportunity to change. WJ

Attorneys:
Plaintiff: Laura C. Mattiacci and Rahul Munshi, Console Law Offices, Philadelphia

Defendant: Caren Litvin, Radnor, Pa.

Related Court Documents:
Verdict sheet: 2013 WL 1390609
Damages verdict sheet: 2013 WL 1390637
Complaint: 2011 WL 10550714

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EBay's 'handshake' deal with Intuit robbed workers of mobility, government says

Online auctioneer eBay Inc.'s no-hiring pact with financial software maker Intuit Inc. served no purpose other than to restrict competition for employees, the Justice Department has told a California federal court.

United States v. eBay Inc., No. CV 12-5869, opposition brief filed (N.D. Cal., San Jose Div. Feb. 26, 2013).

The government is suing eBay in the U.S. District Court for the Northern District of California over the companies' alleged "handshake" agreement not to recruit or hire each other's employees. The Justice Department says the deal effectively lowered salaries and restricted personnel mobility.

Intuit is not a defendant in the case because the government already sued the company over similar practices with different companies in 2010. A final settlement in that suit barred Intuit from entering into or enforcing any agreement to improperly limit competition for employees, according to the Justice Department.

In a motion to dismiss the suit, eBay said the Department of Justice has failed to show how the agreement personally harmed any employees or broader market competition.

> The agreement was not necessary to achieve a lawful procompetitive purpose, the Justice Department said.

But the government says in its Feb. 26 opposition brief that the pact violated the Sherman Act, 15 U.S.C. § 1, because the firms robbed their employees of the chance to earn higher salaries and benefits and curbed their opportunities for career advancement.

"The agreement was not pursuant to a joint venture or other collaborative business relationship between the two firms that might, in some other circumstances, justify specifically tailored agreements necessary to achieve a lawful procompetitive purpose," the Justice Department said. "It was a 'naked' restraint on competition, of the sort most clearly condemned by antitrust law."

According to the suit, then-eBay CEO Meg Whitman and Intuit founder Scott Cook, who served on the board of both companies, were closely involved in forming, monitoring and enforcing the pact from 2006 through 2009.

REUTERS/Robert Galbraith

Moving to dismiss in January, eBay said there is no actionable antitrust cause because the people mentioned by name all had served as officers or directors of the company. Although the complaint purports to allege a conspiracy, eBay says, it focuses solely on conduct among directors and officers of a single company with a shared purpose.

The Justice Department also has not identified any actual harm to competition that goes beyond eBay and Intuit, the motion to dismiss said.

But the government says that some agreements are "so obviously anticompetitive and lacking any redeeming justification that they may be condemned without requiring the full-blown analysis that antitrust law requires in other circumstances."

It also says the agreement "distorted the competitive process in the labor market that matches employees and jobs." WJ

Related Court Documents:
Opposition brief: 2013 WL 950609
Motion to dismiss: 2013 WL 578471
Complaint: 2012 WL 5727488

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ARBITRATION

Arbitrator had ample cause to dismiss discrimination suit, California court says

A former employee's conduct during an arbitration hearing, including trying to bribe a witness, gave the arbitrator reason to dismiss a suit that accused a construction company of age and race discrimination, a California appeals court has ruled.

Brooks v. Bechtel Corp. et al., No. A132926, 2013 WL 1205063 (Cal. Ct. App., 1st Dist., Div. 2 Mar. 26, 2013).

The 1st District Court of Appeal panel affirmed a San Francisco judge's decision to deny Rufus Brooks' requests for a new trial or an order vacating the arbitrator's ruling in favor of Bechtel Corp.

Brooks worked on a telecommunications project for Bechtel, one of the world's largest construction companies, between 2005 and 2007, the panel's opinion said.

In April 2008 Brooks filed a complaint with the Judicial Arbitration and Mediation Services against the San Francisco-based Bechtel and its officers, claiming the company failed to pay him overtime. Three months later, he added age and race discrimination claims because Bechtel fired and refused to rehire him at the end of the project he was working on, according to the appellate opinion.

Bechtel filed a counterclaim with JAMS, stating that it fired and did not rehire Brooks because of his inappropriate conduct, including repeated harassing phone calls and aggressive and threatening emails sent to company executives.

Arbitrator R. Wayne Thorpe granted Bechtel's motion to dismiss all the claims, finding that Brooks had attempted to bribe one witness and intimidate two others, had engaged in uncivilized conduct during depositions and conferences, and had given "evasive and deceptive" testimony.

"I have never before witnessed conduct so fundamentally disrespectful of our legal system," Thorpe said. He ruled that Bechtel had no duty to rehire Brooks and awarded the company $20,000 in attorney fees.

Brooks asked the San Francisco County Superior Court to vacate the arbitrator's ruling, but in June 2011, Judge Peter Busch denied the motion to vacate as well as Brook's motion for a new trial.

In his appeal, Brooks only addressed the arbitrator's first reason for dismissal: his alleged attempted bribery of witness Scott Cuen.

Brooks argued only that the arbitrator was wrong in finding that he had tried to bribe Cuen to change his testimony because Cuen had been improperly allowed to testify over the telephone, the opinion says.

The panel said that even if Brooks were correct that Cuen should not have been permitted to testify over the phone, the trial court was still correct to confirm the arbitrator's decision because of the other reasons cited by Thorpe: Brooks' attempted bribery and intimidation, uncivilized conduct, and evasive testimony.

"Any one of these reasons was an adequate and correct basis for the denial of appellant's petition to vacate the arbitrator's ruling," the panel said. WJ

Attorneys:

Plaintiff/appellant: Rufus Brooks, Orlando, Fla., pro per

Defendant/respondent: Paul W. Cane Jr., Paul Hastings Janofsky & Walker, San Francisco

Related Court Document:
Opinion: 2013 WL 1205063

See Document Section B (P. 31) for the opinion.

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Class arbitration case could be big deal for employers

(Reuters) – A case heard by the U.S. Supreme Court March 25 over class-action arbitrations could have deep repercussions on both employers and employees.

***Oxford Health Plans LLC v. Sutter*, No. 12-135, oral argument held (U.S. Mar. 25, 2013).**

The case concerns a doctor who sued Oxford Health Plans in state court in New Jersey on behalf of a proposed class of physicians who claimed the health insurer underpaid them. Oxford successfully moved the case into arbitration, citing a contract agreed to by its network of physicians.

An arbitrator ruled that a class of doctors could pursue their arbitration against the company, even though the contract's arbitration clause did not specifically call for class arbitration. A trial court affirmed the ruling, as did the 3rd U.S. Circuit Court of Appeals, and Oxford appealed to the high court.

While the case does not specifically encompass employment disputes, companies nonetheless have weighed in on Oxford's side, hoping that class arbitrations are limited in the employment context as well.

"If the court rules that the arbitrator had exceeded his authority by allowing a class procedure, it would be quite logical that the same principle would apply to employment arbitrations," said Richard Alfred, an attorney with Seyfarth Shaw who represents employers.

A win for Oxford would be "a big windfall for employers," said Marcia McCormick, a professor at Saint Louis University School of Law, because plaintiffs tend to be more successful when they litigate as a group than when they pursue claims individually.

The Chamber of Commerce, the Equal Employment Advisory Council and the Voice of the Defense Bar all filed *amicus* groups in favor of Oxford, citing concerns that permissive use of classes could wipe out the benefits of arbitration.

"The financial and other benefits that the parties derive from employment arbitration are likely to disappear altogether if they are forced to submit to complex, class-based arbitration even where the underlying agreement does not provide for class arbitration procedures," the Equal Employment Advisory Council, a group of about 300 large employers, wrote in its brief.

Rae Vann, an attorney at Norris, Tysse, Lampley & Lakis, who wrote the *amicus* brief for the council, said class arbitrations simply defeat the purpose of arbitration.

"The reason why we don't see class arbitration as a matter of course is it doesn't make much sense to require arbitration and then have a situation where we are mirroring court procedures," said Vann.

> "If plaintiffs' lawyers figure out they could pursue a class arbitration, employers could be more liable more often [and] arbitration could be less cheap," Saint Louis University School of Law professor Marcia McCormick said.

AFTER WAL-MART

While class arbitrations are not prevalent, employers may be concerned that such actions could pick up as court-litigated class actions decrease in the wake of *Wal-Mart v. Dukes,* 131 S. Ct. 2541 (2011) and other Supreme Court rulings, McCormick said.

"If plaintiffs' lawyers figure out they could pursue a class arbitration, employers could be more liable more often [and] arbitration could be less cheap," she said. "I think they are worried about plaintiffs figuring out this is an option and taking advantage of it."

The dialogue at the Supreme Court March 25 centered on how much deference courts must give arbitrators to come to their own interpretations of a contract. Justices Antonin Scalia and Stephen Breyer and Chief Justice John Roberts all had a series of rapid-fire questions for Eric Katz, who represented the physician.

An arbitrator can permit a class action, Justice Scalia said, "as long as he says, 'I'm interpreting the agreement, it can be as wildly inconsistent with the agreement as you like and there's nothing the courts can do about it.'"

Katz held steady to his assertion that the courts have given great deference to arbitrators.

"I respectfully submit, as this court repeatedly held, that courts do not have the authority to second-guess the arbitrator and make decisions or come up with a resolution that would have been different with the arbitrator just because they disagree," said Katz.

Alfred, the Seyfarth Shaw lawyer who represents employers and who attended the argument, predicted the Supreme Court will rule 6-3 to reverse the lower courts.

Such a ruling, said Alfred, "very well may relieve employers of the concern about class arbitration and provide an incentive to go forward with arbitration programs." WJ

(Reporting by Carlyn Kolker)

Attorneys:
Respondent (Sutter): Eric Katz, Mazie Slater Katz & Freeman, Roseland, N.J.

Petitioner (Oxford Health): Seth Waxman, Wilmer Cutler Pickering Hale and Dorr, Washington D.C.

Related Court Document:
Oral argument: 2013 WL 232724

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Within a few days, *Comcast* puts its stamp on labor cases

(Reuters) – Just one week after the U.S. Supreme Court issued a decision limiting the criteria by which classes can be certified, repercussions were already percolating through labor and employment cases.

In *Comcast Corp. et al. v. Behrend et al.*, No. 11-864, 2013 WL 1222646 (U.S. Mar. 27, 2013), the court ruled 5-4 on March 27 that 2 million Comcast subscribers could not bring antitrust claims as a class, saying the plaintiffs failed to show that damages could be accurately measured for the group.

On April 1, the Supreme Court cited that decision as it vacated a ruling by the U.S. 7th Circuit Court of Appeals, which had allowed a class action to proceed against RBS Citizens alleging violations of the federal wage-and-hour law. The Supreme Court remanded the case, *RBS Citizens d/b/a Chart One v. Ross et al.*, No. 12-165, 2013 WL 1285303 (U.S. Apr. 1, 2013), to the Chicago-based appeals court for further consideration. While the remand does not necessarily mean the 7th Circuit will reverse its previous ruling, it gives the defense an opportunity to revisit the case armed with new law from the high court.

No sooner had the Supreme Court issued its order in *Ross* than lawyers representing RBS Citizens in a related case seized on it. On April 1, on the eve of a trial in federal court in Pittsburgh, RBS Citizens' counsel at Proskauer Rose asked U.S. District Judge Gary Lancaster to consider decertifying a class of assistant branch managers suing the bank over violations of wage-and-hour laws. The Supreme Court's order in the *Ross v. RBS Citizens* and its decision in the Comcast case make the certification issue "ripe for re-examination," Proskauer lawyers argued. Judge Lancaster did not rule on RBS Citizens' motion, and a jury was selected in the case April 2.

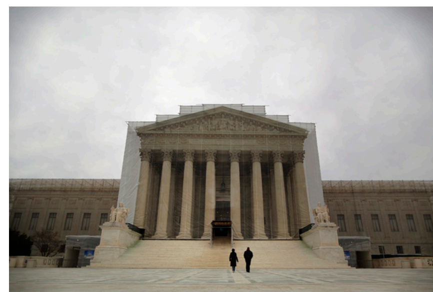
Even before the *Ross* order, at least one other judge had cited *Comcast* in an employment case. On March 29, just two days after the *Comcast* decision, U.S. District Judge Thomas McAvoy ruled that, based on the *Comcast* decision, a group of workers at Applebee's restaurants in New York and Connecticut could not pursue some of their wage-and-hour claims against the restaurant operator as a class action. Judge McAvoy found that, as in the *Comcast* case, plaintiffs did not have a consistent theory of damages that cut across all class members. "In the instant case, plaintiffs have not offered a damages model susceptible of measurement across the entire class, arguing instead that this issue is separate from the question of liability," Judge McAvoy wrote. *Roach et al. v. T.L. Cannon Corp. d/b/a Applebee's et al.*, No. 10-0591, 2013 WL 1316452 (N.D.N.Y. Mar. 29, 2013).

LAWYERS REACT

Gerald Maatman, an attorney at Seyfarth Shaw who represents employers in wage disputes, said the *Comcast* ruling will now likely appear in defense motions at the certification stage of wage-and-hour cases.

"What *Comcast* has done is said class certification is a make-or-break, really important fork-in-the-road decision," he said. "Federal judges really need to sift through the evidence and really do an in-depth analysis: Can plaintiffs' evidence really be applied to everyone? Can damages be decided on a class-wide basis?"

But Justin Swartz, an attorney at Outten & Golden who represents employees in employment litigation, predicted that *Comcast*'s effect on wage-and-hour cases will be muted because the ruling focused narrowly on how damages are construed, typically not a controversial issue in wage-and-hour cases.



REUTERS/Jonathan Ernst

U.S. Supreme Court building

"I expect the management bar will take a shot at knocking out unpaid-wage cases based on *Comcast*, just like they did in *Wal-Mart v. Dukes* and every other inapplicable Supreme Court decision they think might give them some traction," Swartz said. "But in the end, wage-and-hour cases are simple challenges to illegal pay policies and are almost always perfect for class certification."

William Allen, an attorney at Littler Mendelson who represents employers, said plaintiffs and defendants will continue to seek clarity from the courts on how to interpret the decision.

"I think it's going to be very similar to *Dukes* in terms of evolution," Allen said. "The interpretation by the district courts will take some time, and then it will take another six months to two years to work its way through the circuit courts, and then it will work its way on." WJ

(Reporting by Carlyn Kolker)

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Concepcion spells doom for FLSA case

(Reuters) – The 4th U.S. Circuit Court of Appeals ruled that a shuttle-service driver's wage dispute with his employer must be arbitrated, demonstrating the broad reach of the U.S. Supreme Court's 2011 ruling in *AT&T Mobility v. Concepcion*.

Muriithi et al. v. Shuttle Express et al., No. 11-1445, 2013 WL 1287859 (4th Cir. Apr. 1, 2013).

Citing the *Concepcion* decision, the 4th Circuit on April 1 held that Samuel Muriithi, a driver for airport shuttle service Shuttle Express, could not sue for unpaid wages under the Fair Labor Standards Act because an agreement he had signed with the company in 2007 mandated that disputes between workers and the company be arbitrated.

Muriithi had alleged that he and a class of other shuttle drivers were misclassified as independent contractors and should have been deemed employees who were entitled to minimum wage and overtime pay.

The 4th Circuit's ruling vacated U.S. District Judge Alexander Williams' March 2011 ruling that the company's arbitration agreement, which prohibited class-action suits, prevented Muriithi from vindicating his statutory rights and therefore was not enforceable. Arbitration, Judge Williams ruled, would have forced Muriithi to incur prohibitive costs.

Later that year, the Supreme Court issued its ruling in *Concepcion*.

Appeals court Judge Barbara Milano Keenan, who was joined by Judges Andre Davis and John Gibney who sat by designation, ruled that the *Concepcion* decision, which upheld arbitration contracts in a consumer setting, was applicable to the Shuttle Express contract. Moreover, the panel ruled, Muriithi did not meet the "substantial burden" needed to prove that the cost of arbitration was so high as to render it prohibitive.

Christopher Parlo, who represented Shuttle Express, said he was pleased with the court's decision. "I am hopeful that it is a precursor to what the Supreme Court will do in the cases before it having to do with class-action waivers," Parlo said. He was referring to a case before the high court that turns on whether merchants can sue American Express as a group or whether they must individually arbitrate their antitrust claims. *Am. Express Co. et al. v. Italian Colors Restaurant et al*., No. 12-133, *cert granted* (U.S. Nov. 9, 2012).

John Singleton, the lawyer representing Muriithi, did not reply to a message seeking comment.

"I think the message is certainly that, with class-action waivers, the trend is very clear what the Supreme Court intended," said William Allen, a lawyer at Littler Mendelson who represents companies in wage disputes and who was not involved in the case. WJ

(Reporting by Carlyn Kolker)

Attorneys:
Plaintiff: John Singleton, Singleton Law Group, Baltimore

Defendant: Christopher Parlo, Russell Bruch and Melissa Rodriguez, Morgan Lewis & Bockius, New York

Related Court Document:
Opinion: 2013 WL 1287859

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Judge sees no evidence of racketeering in unions' 'corporate campaign'

A federal judge in Los Angeles has ruled that a commercial laundry company failed to show that union organizers tried to extort its right to operate its business independently by attempting to unionize its workers.

Magic Laundry Services Inc. v. Workers United Service Employees International Union et al., No. 12-09654, 2013 WL 1409530 (C.D. Cal. Apr. 8, 2013).

U.S. District Judge Michael W. Fitzgerald of the Central District of California gave Magic Laundry Services one final chance to support its suit against the Workers United Service Employees International Union and its local affiliate, Western States Regional Joint Board, Local 52, but expressed doubt that the company can succeed on its racketeering claims.

The judge said the company could file an amended complaint before the end of April.

"Perhaps there will be a second amended complaint but there will be no third," he said.

According to the judge's order, following an April 1 hearing, Magic Laundry lacked sufficient facts to make a *prima facie* case that the unions had engaged in extortion or mail and wire fraud.

Judge Fitzgerald also dismissed the company's state law claims, including defamation and trespass, finding that state law and the First Amendment protected the unions' conduct.

Magic Laundry, which has more than 300 employees, filed suit alleging the unions aggressively sought to unionize its workers because the unions needed to collect additional member dues to meet their own financial obligations.

According to the suit, the unions initiated a "corporate campaign" strategy combining legal and illegal methods to strong-arm Magic Laundry into entering into a collective bargaining agreement with its employees.

A corporate campaign is a approach used by the labor movement to force an employer to allow union organizing of its workforce. In the strategy, unions use publicity and governmental and regulatory pressures on companies.

Magic Laundry says that after it initially refused to allow its employees to unionize, the defendants waged a public campaign against it, including holding loud and disruptive protests outside company facilities, distributing fliers with false information about the company, and appealing to politicians for support.

Magic Laundry alleged the defendants conspired to extort its rights to operate its business as it chose and committed mail and wire fraud by disseminating false statements about the company in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961.

Magic Laundry sought injunctive relief and exemplary and punitive damages for lost business and damage to its reputation.

In support of their motion to dismiss, the unions argued that Magic Laundry had not shown that they engaged any conduct that would be considered criminal under RICO. The racketeering law "was never intended to outlaw legitimate union organizing, even aggressive union organizing," the defendants said in a reply brief.

The unions also said their "peaceful pamphleteering" was part of a legitimate labor organizing effort and is protected by the First Amendment to the U.S. Constitution.

"In seeking to exert social pressure on [plaintiff], the union's methods may be harassing, upsetting or coercive, but unless we are to depart from settled First Amendment principles, they are constitutionally protected, " the brief said, quoting *Metropolitan Opera Association v. Local 100, HERE*, 239 F.3d 172, 177-78 (2d Cir. 2001).

Magic Laundry argued in opposition that the unions had "abandoned legitimate union bargaining" in an attempt to take away its right to organize and run its business as it wished.

The company maintained that it had the right to decided whether to recognize the union as representatives of its employees.

Judge Fitzgerald granted the unions' motion to strike the suit's state law claims, finding California's "anti-SLAPP" law protected the unions' actions, including allegedly defamatory fliers and demonstrations.

SLAPP stands for strategic lawsuits against public participation. The anti-SLAPP law protects from private suit anyone speaking out on public issues or petitioning the government.

According to the judge's order, a suit designed "primarily to chill the exercise of First Amendment rights" can be dismissed at an early stage in the proceedings.

In dismissing the suit's RICO claim, Judge Fitzgerald said Magic Laundry's complaint failed to show extortion by the unions.

Without showing that the defendants obtained or tried to obtain "a property right" from the company, the unions' actions are only coercion, not extortion under the racketeering law, the judge said.

The defendants only "exerted coercive pressure" to get Magic Laundry to recognize the unions, the order said.

Additionally, the judge found that the company failed to provide specific facts to show that the unions conducted a fraudulent scheme or used mail and wire fraud to further that scheme.

Judge Fitzgerald granted Magic Laundry's counsel's request for an opportunity to amend the complaint a second time; he gave the company 14 days from the date of the order to file a second amended complaint. WJ

Attorneys:
Plaintiff: Talin V. Yacoubian, Yacoubian & Powell, Los Angeles

Defendants: Glenn Rothner, Rothner, Segall & Greenstone, Pasadena, Calif.

Related Court Documents:
Order: 2013 WL 1409530
Reply in support of motion to dismiss: 2013 WL 1415396
Opposition to motion to dismiss: 2013 WL 867259

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Worker stole trade secrets to 'lure away' clients, tobacco company says

A tobacco company claims a former employee stole proprietary information about its clients and business practices during the course of his employment and gave it to a competitor that later hired him.

Republic Tobacco L.P. v. Ferraro et al., No. 1:13-CV-01639, complaint filed (N.D. Ill., E. Div. Mar. 4, 2013).

The company says both the ex-employee and its competitor misappropriated trade secrets and should be required to pay for the damage they caused.

Glenview, Ill.-based Republic Tobacco LP sued Paul Ferraro and Scandinavian Tobacco Group Lane Ltd., or Lane, which is based in Tucker, Ga., in the U.S. District Court for the Northern District of Illinois.

Republic is the "nation's leading distributor" of products such as pipe tobacco, roll-your-own tobacco, cigars and cigarette filters, according to the suit.

"Republic has spent tens of millions of dollars and enormous energy developing customer contacts and relationships, and an extensive understanding of its customers' special needs, issues and plans over a period of approximately 40 years," the complaint says.

Ferraro allegedly stole confidential information and trade secrets, including information about key clients and strategies, while employed by Republic. He then used the information "in trying to lure away Republic's customers on behalf of Lane," the suit says.

"Critical to Republic's success has been its development of confidential information and trade secrets, including but not limited to sales data, pricing and cost information, local market conditions and references, marketing plans and distribution strategies," the complaint says.

Ferraro was a key accounts manager for Republic beginning in September 2010 who was responsible for selling the company's products to more than 70 retail chains in the Northeast, generating nearly $5 million in annual revenue, according to the suit.

Republic says Ferraro "abruptly" resigned Feb. 18 and started performing the same or similar job for Lane. For several weeks in January and February until his resignation, Ferraro allegedly collected confidential information about Republic and passed it onto Lane.

For example, he requested detailed marketing plans that Republic had developed for some of its largest clients, and store lists for two other clients, the suit says.

"The information described above is highly confidential and proprietary, would not normally be available outside Republic or within Republic by people without a need to know, and would be of great use to a competitor of Republic, such as Lane," the suit says.

Republic maintains that Ferraro breached the confidentiality agreement he signed during his employment.

The complaint alleges claims against Ferraro for breach of contract and fiduciary duty, and tortious interference with contract against Lane. The company accuses both defendants of misappropriation of trade secrets.

Republic seeks injunctive relief to stop Ferraro from using the confidential information.

"The harm is irreparable and ongoing because confidential information, once disclosed to a competitor, cannot be erased from the competitor's mind, and customer relationships are inherently delicate and cannot be replaced or repaired with money damages," the suit says.

It also seeks compensatory damages, punitive damages and attorney fees and costs. WJ

Attorney:
Plaintiff: Charles S. Bergen, Grippo & Elden, Chicago

Related Court Document:
Complaint: 2013 WL 787160

See Document Section C (P. 35) for the complaint.

Trade secrets

Republic Tobacco claims that former employee Paul Ferraro possessed the following confidential information and trade secrets about its business when he resigned:

- Marketing strategies, including the companies Republic planned to target, the price structures for such companies and the new customer sales methods it intended to introduce.
- Customer lists, including key personnel to target for sales opportunities, information on the pricing and features of accounts, stores, sales histories and forecasts, profitability, and customers' special needs and planning diagrams for product placement.
- Relationships with brokers and distributors, including crucial competitive information about the amount of compensation paid to these third parties.
- Pricing plans and strategies for securing new business and keeping old business.
- Management methods such as those pertaining to structuring and running its business.
- Key sales employee information, including salary, bonuses and benefits.

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8th Circuit rejects coverage for employee's gunfire injuries

A car dealership's commercial liability insurance excluded coverage for an employee's accidental shooting of a co-worker because the triggering event — monitoring for possible intruders — took place during the course of the victim's employment duties, a federal appeals court has ruled.

Gear Automotive v. Acceptance Indemnity Insurance Co., No. 12-2446, 2013 WL 1092290 (8th Cir. Mar. 18, 2013).

An exclusion for employee injuries provided that the policy did not cover the dealership's liability to employees, the 8th U.S. Circuit Court of Appeals said.

Robert Gear, sole owner of Gear Automotive LLC, sued his own company in Missouri state court over shooting injuries described by the appeals court's opinion as "grievous and substantial."

SHOOTING INCIDENT

In October 2008 Robert Gear hired Joe Posner for one evening to help him and his brother, full-time employee Darrell Gear, watch the car dealership after the police had advised that some unidentified people might attempt to burglarize the dealership premises.

While pursuing an intruder on the property, Posner fired a gunshot that struck Robert Gear in the leg, the opinion said.

Gear Automotive's commercial liability carrier, Wilshire Insurance Co., denied a claim Robert made for his injuries. In the meantime, Robert Gear and Gear Automotive settled a suit that Robert filed against his own company for $350,000. Robert subsequently pursued payment from Wilshire in Missouri state court.

The insurer removed the case to the U.S. District Court for the Western District of Missouri, and the District Court granted summary judgment to Wilshire on the ground that Gear Automotive failed to purchase workers' compensation insurance for the purpose of covering claims such as this.

Gear appealed.

The 8th Circuit said it would not reach the workers' compensation issue because

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the policy's employee exclusion supports judgment in the insurer's favor.

The policy excluded coverage for bodily injury to an employee "arising out of and in the course of … employment."

The appeals court said Robert's role as owner of Gear Automotive did not exclude his position as an employee. He generally engaged in the same daily activities at the dealership as his brother Darrell, who was indisputably an employee, the opinion said.

When Posner shot Robert, he also was engaged in the same activity as Darrell (monitoring the property), the judges noted.

They also found that the shooting incident happened within the course of their employment, so the exclusion applied and the judgment in Wilshire's favor should be affirmed. WJ

Related Court Document:
Opinion: 2013 WL 1092290

Goldman Sachs

CONTINUED FROM PAGE 1

Parisi's suit, which she filed after her firing in 2008, alleged a pattern of discrimination against female Goldman Sachs employees. The company's conduct allegedly violated both Title VII and the New York City Human Rights Law.

The 2nd Circuit said arbitration would not prevent the plaintiff from "vindicating" a statutory right protected by Title VII.

In finding for Goldman Sachs, the panel reversed a decision by U.S. District Judge Leonard B. Sand of the Southern District of New York. He had adopted a magistrate judge's opinion allowing Parisi to proceed with her class action to avoid waiver of a substantive right under Title VII.

But the appellate court found that arbitration would not result in any such waiver and there was no reason to deviate from the federal policy favoring arbitration. Although Parisi can arbitrate only her individual claims, she is free to present evidence to the arbitral body of discriminatory patterns, practices or policies, the panel said. WJ

Related Court Document:
Panel opinion: 2013 WL 1149751

See Document Section A (P. 25) for the opinion.

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2 new cases seek to clarify pregnancy discrimination laws

(Reuters) - Both complaints were brought by pregnant women who said they were denied reasonable accommodations for pregnancy-related disabilities.

Since 1978 the Pregnancy Discrimination Act has prohibited employers from treating pregnant women differently from similarly situated employees.

In 2008 Congress passed the Americans with Disabilities Act Amendments Act, expanding the definition of disability to cover pregnancy-related impairments, and the EEOC issued regulations codifying the act in March 2011.

In a complaint filed March 28, Amy Crosby, a cleaner who makes $9 an hour at Tallahassee Memorial Hospital, said she suffered from carpal tunnel syndrome. Her symptoms intensified in her 23rd week of pregnancy, which she said made it impossible for her to lift heavy bags of laundry and trash.

After Crosby submitted a note from a chiropractic neurologist attesting to pregnancy-related carpal tunnel syndrome, the hospital said the information needed to come from her obstetrician. Crosby's obstetrician said she could not diagnose her and recommended a neurologist for the pains in her arm.

Several supervisors refused her requests for work with limited lifting, and she was involuntarily placed on unpaid leave under the Family and Medical Leave Act.

"They just kept saying, 'It's policy, it's policy,'" Crosby told Reuters.

According to the complaint, which was filed by the National Women's Law Center, other hospital employees who had suffered injuries or were otherwise unable to complete aspects of their jobs had been accommodated.

A spokesman for the hospital said he had not seen the complaint and could not comment on it.

LIGHT DUTIES

A separate complaint filed in January by the American Civil Liberties Union alleges that United Parcel Service Inc. failed to accommodate driver Julie Desantis-Mayer when she was pregnant in the spring of 2012.

In August 2012 the company offered her a light-duty position on the condition that it would not count toward seniority or benefits, an offer she described as "unlike, and worse than UPS' accommodation of other, non-pregnant employees."

A spokeswoman for UPS said the company does not discriminate against pregnant workers and that it adheres to all aspects of the law.

Typically, the EEOC attempts to mediate between the parties, and if that fails, it investigates the claim. If the investigation finds that a law has been violated, the EEOC can settle, sue or, in some cases, refer the case to the U.S. Department of Justice. If no violation is found, the aggrieved party can still sue privately.

A spokesman for the EEOC declined to comment on the two cases.

But in its three-year strategic enforcement plan, released in December 2012, the agency identified accommodating pregnancy-related limitations under ADAAA and the PDA as an "emerging issue."

With little case law on the books since the regulations were issued in March 2011, employers are in uncharted waters, said Stacie Caraway, an employment lawyer at Miller & Martin PLC in Chattanooga, Tenn., who is not involved in either case. For example, she said, it is difficult to tell whether the hospital's request for additional documentation was unreasonable.

"We had 25 years of case law with the ADA to tell us what was reasonable and what was not, but now we're starting from scratch," she said. "That's what makes these cases kind of a crapshoot."

Employers should be "conservative" and lean toward accommodating workers where possible, Caraway said. "If the proof shows that someone has a pregnancy-related disability, then the employer does have a duty to accommodate it as with cancer or any other disability."

EARLIER CASE

The two cases highlight changes in the legal landscape since the Americans with Disabilities Amendments Act was passed. In a 2008 case filed a few months before the law came into effect, the 4th U.S. Circuit Court of Appeals ruled that the Pregnancy Discrimination Act did not require UPS to accommodate pregnant worker Peggy Young by offering her light duty, despite offering it to workers injured on the job. *Young v. United Parcel Service et al.*, No. 11-2078, 707 F.3d 437 (4th Cir. Jan. 9, 2013).

"The ADAAA certainly broadens the definition of disability and means that a number of conditions caused by pregnancy might be treated as disabilities now, where they wouldn't have before," said Samuel Bagenstos, a professor at the University of Michigan Law School and a prominent disability rights advocate.

Bagenstos and other lawyers are preparing a petition on Young's behalf at the U.S. Supreme Court.

Cara Greene, a co-chair of Outten & Golden's Family Responsibilities and Disability Discrimination practice group in New York, said these cases highlight how the PDA and the ADAAA interact to require accommodations that the court denied to Young.

"Employers are missing the fact that just because a disability results from pregnancy, it doesn't mean they don't have to accommodate it," Greene said.

Legislation to codify these obligations has stalled. The Pregnant Workers Fairness Act, introduced last year in Congress, would require employers to make the same types of accommodations for pregnancy, childbirth and related medical conditions as they do for disabilities. It is due to be reintroduced this spring, according to a spokeswoman for the National Women's Law Center.

Galen Sherwin, a staff attorney with the American Civil Liberties Union's Women's Rights Project, said that the two laws, the PDA and the ADAAA, should already be sufficient.

"If employers are now required to treat a broader category of disabled individuals with compassion by providing them the necessary job accommodations, but they are refusing those same type of job accommodations to pregnant women, that really flies in the face of Congress's intent in passing the PDA." WJ

(Reporting by Anna Louie Sussman)

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UTAH'S INTERNET EMPLOYMENT PRIVACY LAW SIGNED

Utah Gov. Gary R. Herbert signed the Internet Employment Privacy Act into law March 26, making Utah the latest state to restrict what information employers can require and access from their employees. Under the law, employers cannot require employees or job applicants to disclose their username and passwords associated with personal, non-work-related Internet accounts. The law does allow employers to require staff to disclose usernames and passwords for an employer-issued device or an account used for business purposes. Employers can also restrict access to certain websites on work computers and networks and can monitor data stored on employer-provided devices and networks. The law limits damages from any legislative action related to the statute to $500. The law passed through the Utah Legislature with unanimous support. It is set to take effect May 14.

N.J. FOOD MANUFACTURER VIOLATED WAGE LAWS, SUIT SAYS

A former mechanic for New Jersey-based J&J Snack Foods says the manufacturer violated federal and state wage laws and fired him because he complained about it, according to a federal court class action. Robert McMaster, who worked for the company between June and November 2012, alleges the company failed to pay him for his entire shifts worked. According to the complaint, the company required McMaster to clock out before he completed his daily tasks and regularly docked him for break time even when he worked through lunch. McMaster alleges he was fired because he complained about being cheated out of his pay. The suit seeks damages for lost pay for a proposed class of all other maintenance mechanics who the company failed to pay for their full shift in the last three years. WJ

McMaster v. J&J Snack Foods Sales Corp. et al., No. 13-1677, complaint filed (D.N.J. Mar. 19, 2013).

Related Court Document:
Complaint: 2013 WL 1345445

DEUTSCHE BANK FACES 2ND SEX DISCRIMINATION SUIT IN 2 YEARS

In a Manhattan federal court suit, a former Deutsche Bank vice president says the bank used a mass layoff in 2012 to "disproportionately" target women. Heather Zhao alleges she endured discriminatory comments from co-workers when she was pregnant, and the company fired her shortly before the end of her maternity leave. In addition, Zhao says, a male supervisor refused to give her a bonus after she complained that he discriminated against her because of her gender. The suit alleges the German bank violates federal and state employment laws, including the Family and Medical Leave Act. This is the second such action filed against the German bank in the last two years. In September 2011 Kelley Voelker alleged her work responsibilities were reduced when she returned from a maternity leave. *Voelker v. Deutsche Bank*, No. 11-6362, 2011 WL 4014350 (S.D.N.Y. Sept. 12, 2011).

Zhao v. Deutsche Bank AG, No. 13-2116, complaint filed (S.D.N.Y. Mar. 29, 2013).

Related Court Document:
Complaint: 2013 WL 1287358

WAFFLE RESTAURANTS TO PAY FIRED WORKER $25,000

East Coast Waffles Inc., which operates more than 100 Waffle House restaurants in the South, has agreed to pay a former employee $25,000 to settle an Equal Employment Opportunity Commission lawsuit charging the company with retaliation. According to a March 28 EEOC statement, the agency sued the Atlanta-based company in Tampa federal court following the firing of an employee who complained about racial harassment by customers. The EEOC suit said the Waffle House violated Title VII of the 1964 Civil Rights Act by firing the worker in retaliation for opposing racial harassment. In addition to the monetary payment, under the consent judgment, the company will give managers special training.

Equal Employment Opportunity Commission v. East Coast Waffles Inc., No. 13-525 (M.D. Fla. 2013).

JURY AWARDS FIRED EPILEPSY VICTIM $109,000 IN ADA SUIT

An Army-Navy surplus store must pay $109,000 to a former employee allegedly fired because he suffers epileptic seizures, according to a March 7 jury award in an Equal Employment Opportunity Commission lawsuit in Denver federal court. The EEOC sued Western Trading Co. in 2010 on behalf of Tyler Riley, alleging the company failed to accommodate his disorder. According to the suit, the company permitted Riley to come back to work after he suffered a seizure on the job, but despite assurances from his doctors, the company fired him after learning he had suffered another seizure off hours. The company also improperly kept Riley's medical records with his other employment documentation, the suit said. The jury awarded Riley $24,000 in back pay, $20,000 for emotional distress and $65,000 in punitive damages, according to an EEOC statement.

Equal Employment Opportunity Commission et al v. Western Trading Co. Inc., No. 10- 2387, 2013 WL 1285653 (D. Colo. Mar. 7, 2013).

Related Court Document:
Verdict Form: 2013 WL 1285653

BLOOMBERG SUED OVER UNPAID OVERTIME

Former Bloomberg LP employee Lee Siegel alleges the media company failed to pay him and other computer help desk workers premium overtime wages in violation of the Fair Labor Standards Act, according to a New York federal court complaint. Siegel, a New Jersey resident, worked as PC support staff at the company's Princeton and New York City offices from September 2010 until July 2012, the suit says. PC support staff generally worked five eight-hour shifts per week, but Siegel and other putative class members usually worked extra hours to complete jobs, the suit says. Bloomberg, however, compensated them for only 40-hour weeks, the suit says. The suit seeks unpaid wages, liquidated damages, and attorney fees and costs.

Siegel et al. v. Bloomberg LP, No. 13-CV-1351, complaint filed (S.D.N.Y. Feb. 26, 2013).

Related Court Document:
Complaint: 2013 WL 830805

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PERB REVIVES CHALLENGE TO COUNTY'S CHANGE TO UNION RELEASE TIME POLICY

Ruling: California Public Employment Relations Board reversed the dismissal of an unfair-practice charge and remanded the case for issuance of a complaint. In the charge, the union alleged that the employer violated Meyers-Milias-Brown Act provisions by unilaterally changing its policy regarding compensation paid to employees on approved union release time. PERB found that the charge was timely pleaded under the equitable tolling doctrine. It decided that the unfair-practice charge sufficiently alleged an established past practice, subject to a unilateral change by the employer without following meet-and-confer procedures. The county denied the union's statutorily guaranteed rights by causing employees to suffer a loss of compensation in compensation or other benefits under MMBA Section 3505.3, PERB said.

What it means: PERB noted that MMBA Section 3505.3 requires public agencies to allow reasonable time for formal negotiations "without loss of compensation or other benefits." It construed "loss" within the meaning of that statutory section "as measured against the amount of pay the employee would have earned if the employee had not been 'formally meeting and conferring with representatives of the public agency on matters within the scope of representation.'"

Service Employees International Union, Local 721 v. County of Riverside, 37 PERC 180, 2013 WL 1274553 (Cal. Pub. Employment Relations Bd. Mar. 1, 2013).

ABSENT EVIDENCE OF ANTI-UNION ANIMUS, CHALLENGE TO LAYOFF OF COLLEGE INSTRUCTORS FAILS

Ruling: The Illinois Educational Labor Relations Board upheld an administrative law judge's recommended dismissal of an unfair-practice charge. The charge alleged that the employer community college district violated IELRA provisions by laying off several instructors in retaliation for their union activities. The IELRB determined that the employer was aware of the union activities of the laid-off instructors. It rejected the unfair-practice complaint, absent evidence that the instructors' actions were motivated by their union activities. The unfair-practice charge had no merit where the complainants failed to make the requisite showing that the employer's actions were motivated by their union activities, the IELRB decided.

What it means: In order to establish a *prima facie* case of a violation of IELRA Section 14(a)(3), the complainants were required to provide evidence indicating, in part, that an adverse action resulted from anti-union animus (in whole or in part) or that union activity was a substantial or motivating factor behind that adverse action.

NEA, IEA, Illinois Eastern Community Colleges Association et al. & Illinois Eastern Community Colleges (Board of Trustees), No. 529, 29 PERI 136, 2013 WL 1235481 (Ill. Educ. Lab. Relations Bd. Jan. 24, 2013).

ARBITRATOR WILL CONSIDER DISPUTE OVER DISCHARGE OF PARK COMMISSION EMPLOYEES

Ruling: In an unpublished decision, the Superior Court of New Jersey Superior Court Appellate Division affirmed a decision by the Chancery Court. The appeals court upheld the Chancery Court's ruling that an arbitrator must consider the arbitrability of two grievances disputing the termination of two non-probationary park employees. The trial judge properly referred the interpretation of the parties' ambiguous negotiations agreement to a Public Employment Relations Commission arbitrator, the appeals court decided.

What it means: Under New Jersey case law, once the Chancery Court determined that the issue required an interpretation of the negotiations agreement to resolve and the CNA's grievance procedures conferred upon the arbitrator authority to interpret the CNA, it was required to defer the case for an arbitrator to decide between the parties' competing interpretations of the CNA.

Somerset County Park Commission v. Teamsters, Local 469, 39 NJPER 110, 2013 WL 1235495 (N.J. Super. Ct. App. Div. Feb. 4, 2013).

EMPLOYER'S REFUSAL TO PAY FOR UNION RELEASE TIME COMPORTS WITH PERA PROVISIONS

Ruling: Michigan Employment Relations Commission adopted an administrative law judge's recommended dismissal of an unfair-practice charge. The ALJ rejected the union's contention that the employer committed an unfair practice by failing to reimburse union members for their expenses in connection with attending an MERC hearing, when it compensated other employees for their attendance at the same hearing. The ALJ found no collective bargaining agreement provision requiring the employer to compensate union members in connection with their appearance at an MERC hearing. The union did not show how the employer's refusal to reimburse union members' travel expenses here constituted unlawful discrimination in violation of Public Employment Relations Act provisions, the ALJ concluded.

What it means: As the ALJ noted, under MERC case law, a public employer lacks any statutory duty to compensate employees for union activity, including time of work for the purpose of testifying at an MERC hearing.

District Health Department No. 2 & Professional Management Association, 26 MPER 42, 2013 WL 1324548 (Mich. Employment Relations Comm'n Feb. 26, 2013).

FORMER SCHOOL SECURITY GUARD'S DFR CLAIM AGAINST UNION LACKS MERIT, MERC RULES

Ruling: Michigan Employment Relations Commission considered the individual charging party's exceptions to an administrative law judge's recommended dismissal of her unfair-practice charge. Charging party unsuccessfully alleged that the union violated its duty of fair representation toward her by failing to prevent the subcontracting of school security work and by failing to prevent the layoff of bargaining unit members. MERC upheld the ALJ's refusal to disqualify himself from hearing the case. It modified the ALJ's decision to indicate that the instant matter was not barred under the doctrines of *res judicata* and collateral estoppel. Nevertheless, MERC concluded that charging

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party's duty of fair representation claim was meritless absent evidence indicating that the union's conduct toward charging party was arbitrary, discriminatory or in bad faith.

What it means: In considering the arguments raised by charging party in her exceptions, MERC noted that the doctrine of collateral estoppel prohibits the litigation of an issue in a new action between the same parties or their privies when the original case resulted in a final judgment and the issue in question was actually litigated and necessarily determined in the earlier matter. MERC explained that *res judicata* prohibits parties from retrying the same claim.

Teamsters, Local 214 and Greer, 26 MPER 43, 2013 WL 1324549 (Mich. Employment Relations Comm'n Feb. 26, 2013).

TOWNSHIP FAILS TO REBUT EVIDENCE PROMOTION DECISION WAS IMPROPERLY MOTIVATED

Ruling: The Pennsylvania Labor Relations Board sustained in part a township employer's exceptions to a hearing examiner's decision reported at 44 PPER 65 (2012). The PLRB made absolute and final as amended and modified, the hearing examiner's conclusion that the township violated Section 6(1)(a) and (c) of the Pennsylvania Labor Relations Act when it discriminated against a union president by failing to promote the president to the rank of lieutenant because of his protected union activity.

What it means: In order to establish a *prima facie* case of discrimination, the complainant must demonstrate not only that he was engaged in protected activity and that the employer was aware of the protected activity, but also that any adverse employment action was motivated by that protected activity. Once that *prima facie* case has been established, the burden of proof shifts to the employer to demonstrate a legitimate business reason for taking the complained-of adverse action.

Police Association of Falls Township v. Falls Township, 44 PPER 93, 2013 WL 1324567 (Pa. Labor Relations Bd. Mar. 19, 2013).

STATE POLICE REPUDIATE CBA WITH UNILATERALLY IMPOSED SERGEANT RESIGNATION REQUIREMENT

Ruling: The state police was ordered to cease and desist from interfering with employees' exercise of guaranteed rights and to cease refusing to bargain regarding the amendment to its operations manual to require Special Emergency Response Team members to resign from SERT upon accepting a promotion to the rank of sergeant.

What it means: The unilateral change in terms and conditions of employment constituted a repudiation of the parties' collective bargaining agreement.

Pennsylvania State Troopers Association v. Pennsylvania State Police, 44 PPER 95, 2013 WL 1324568 (Pa. Labor Relations Bd. H. Ex. Mar. 21, 2013).

QUESTIONABLE DOCTOR'S NOTE ISN'T WILLFUL MISCONDUCT UNDER UNEMPLOYMENT STATUTE

Ruling: The Unemployment Compensation Board of Review properly determined that a municipal tow truck operator was eligible for unemployment compensation benefits. The Pennsylvania Commonwealth Court declined to find that the operator's provision of an undated medical certificate, stamped with the doctor's name, address and telephone member, violated the employer's sick leave policy for purposes of willful misconduct within the meaning of 402(e) of the Unemployment Compensation Law.

What it means: An employer relying on willful misconduct as the basis for discharging an employee bears the burden of demonstrating the existence of the work rule and its violation. Only then does the burden shift to the employee to prove that the deliberate violation of rules or the disregard of standards of behavior was for good cause. Here, the claimant's note substantially complied with the sick leave policy notwithstanding that it was not signed and dated, where the note indicated he was under a doctor's care and the dates coincided with the time he missed work.

Philadelphia Parking Authority v. Unemployment Compensation Board of Review, 44 PPER 96, 2013 WL 1324562 (Pa. Commw. Ct. Mar. 13, 2013).

WESTLAW JOURNAL

GOVERNMENT CONTRACT

This publication focuses on litigation between private contractors and the federal government arising out of contracts for the military and the Department of Defense. It also covers those entered into by various branches of government for construction, communications and computer systems, and transportation. Disputes between contractors and state and local governments are covered, primarily those involving discrimination in public contracting. Rulings and filings in the U.S. Court of Federal Claims, the federal district and circuit courts and the various Boards of Contract Appeals are featured. You'll also find coverage of litigation involving The False Claims Act and its whistleblower provisions

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RECENTLY FILED COMPLAINTS FROM WESTLAW COURT WIRE*

Case Name	Court	Docket #	Filing Date	Allegations	Damages Sought
Slavich v. Twin Rivers Unified School District	Cal. Super. Ct. (Sacramento)	34-2013-80001431	02/07/13	Teacher sought a writ of mandate against the Twin Rivers Unified School District to reinstate him to his former teaching position and back pay and benefits due to his termination based on the district's false accusations against him.	Writ of mandate, general, special and noneconomic damages, back pay, benefits, interest, fees, and costs
Lawson v. Russel Motor Cars Inc. 2013 WL 1345925	Md. Cir. Ct. (Baltimore)	24-C-13-001857	03/29/13	Russel Motor Cars violated the Maryland Wage, Payment and Collection Act by failing to pay an Internet sales manager commissions, bonuses and various employment benefits.	$100,000 on two counts, $500,000 on one count, additional damages in the amount of three times the wages due, plus costs, interest and attorney fees
Sisk v. CSX Transportation Inc. 2013 WL 1313917	Md. Cir. Ct. (Baltimore)	24-C-13-001766	03/29/13	CSX's failure to provide plaintiff with a safe work environment caused plaintiff to develop cumulative trauma disorders in his feet and ankles.	$5 million plus costs
Tabin v. Metro-North Commuter Railroad 2013 WL 1313859	S.D.N.Y	1:13cv2148	04/01/13	Metro-North Commuter Railroad failed to blow horn and warn plaintiff car man of an approaching train, causing plaintiff to sustain rib fractures, head lacerations and traumatic brain injury after being struck by the train.	$10 million, disbursements and costs
Hohorst v. Chesapeake Services System Inc. 2013 WL 1334745	E.D. Va.	2:13cv158	04/1/13	Defendant Chesapeake Service Systems violated the Fair Labor Standards Act by failing to pay plaintiff overtime wages for work performed in excess of 40 hours per week.	Actual and liquidated damages, costs and fees
Sikkila v. Fitness Ridge Malibu LLC 2013 WL 1313907	Cal. Super. Ct. (L.A.)	BC504567	04/2/13	Fitness Ridge Malibu violated the Fair Employment and Housing Act by wrongfully terminating plaintiff's employment in retaliation for complaining to management that her co-worker, male massage therapist and spa manager, would touch guests in a sexually volatile way.	Compensatory, exemplary and punitive damages, penalty, fees and costs

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RECENTLY FILED COMPLAINTS FROM WESTLAW COURT WIRE*

Silverstein v. WordLogic Corp. 2013 WL 1313882	S.D.N.Y	1:13cv2181	04/2/13	WordLogic Corp. demoted, harassed and constructively discharged plaintiff president and CEO after he discovered and refused to conceal the substantial fraud and ongoing fraud being perpetrated against the company by its former president, CEO and largest shareholder.	$5 million, fees and costs
Vinsys Info. Technology Inc. v. Ugrymov 2013 WL 1370670	Va. Cir. Ct. (Fairfax)	CL-2013-0006283	04/2/13	A former employee of Internetwork Consulting Services LLC committed breach of contract, tortious interference, and conspiracy against Vinsys Information Technology Inc. by knowingly violating the terms of an employment acceptance letter to gain access to a project that plaintiff had brought before the defendants, hiring the employee directly and stealing the project from plaintiff.	In excess of $8 million in compensatory damages, $5 million in punitive damages, $5 million in treble damages, plus injunctive relief and costs
Robinson v. City of Riverside 2013 WL 1386934	Cal. Super. Ct. (Riverside)	RIC1304016	04/4/13	Defendant retaliated against whistle-blower plaintiff for complaints of sexual harassment, thefts of police money and drug evidence, and former supervisor's association with the Hessian Motorcycle gang. Defendant demoted, transferred, refused to pay, harassed and harmed plaintiff additionally for making health and safety complaints.	Compensatory and general damages, special damages, injunctive relief, costs, interest
Hayman v. University of Maryland Medical System Corp. 2013 WL 1370690	Md. Cir. Ct. (Baltimore)	24-C-13-001905	04/4/13	University of Maryland Medical System violated the Americans with Disabilities Act when plaintiff's supervisor threatened to fire her if she refused to work 12-hour shifts and thereafter her doctor recommended that she work no more than 8 hours a day because she suffered from arthritis.	$250,000 in compensatory damages and $250,000 for emotional distress and mental anguish, plus costs, interest and attorney fees

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Etzelsberger v. Fisker Automotive Inc. 2013 WL 1397407	C.D. Cal.	8:13cv540	04/5/13	Class Action. Fisker Automotive ordered mass layoffs or plant closings and terminated its employees without cause and without 60 days' advance written notification in violation of the Worker Adjustment and Retraining Notification Act.	Class Action Certification, unpaid wages, disbursements, interest, fees and costs
Gilbert v. FedEx Freight Inc. 2013 WL 1369556	S.D. Ind.	1:13cv568	04/5/13	FedEx Freight wrongfully discriminated against plaintiff based on gender and sexual harassment by creating a hostile work environment and was terminated in retaliation of filing a complaint.	Compensatory, liquidated and punitive damages, fees and interest
Sciddurlo v. Financial Industry Regulatory Authority 2013 WL 1365826	S.D.N.Y	1:13cv2272	04/5/13	The Financial Industry Regulatory Authority downgraded plaintiff's employment status, placed on probation and terminated him after he disclosed the flaw in the FINRA system which allowed large brokerage firms to circumvent Security and Exchange Commission leverage guidelines.	$25 million in punitive damages, interest, fees, disbursements and costs
Bennett v. Pardell 2013 WL 1369538	S.D.N.Y	1:13cv2260	04/5/13	Defendant psychiatrist terminated plaintiff's employment without compensating him for his information technology work at Riverview Psychiatric Medicine, and blatantly disclosed plaintiff's medical records to third parties and Riverview employees with the intent to inflict emotional distress on plaintiff.	Not less than $600,000 in compensatory damages, $10 million in punitive damages, injunctive relief, plus interest

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