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WHAT'S INSIDE

EEOC PROCEDURE

Supreme Court hears arguments on proper review of EEOC subpoena decisions

By Tricia Gorman

The U.S. Supreme Court heard arguments Feb. 21 on whether appellate courts should defer to trial court decisions regarding Equal Employment Opportunity Commission subpoena requests or conduct a more factual inquiry.

McLane Co. v. Equal Employment Opportunity Commission, No. 15-1248, oral argument held (U.S. Feb. 21, 2017).

U.S. Supreme Court building REUTERS/Carlos Barria

In a case that could affect the future of EEOC discrimination litigation, attorneys for the agency and food distributor McLane Co. told the justices that an appellate court should consider only if a district court has abused its discretion in its ruling.

Without suggesting how the court may rule, attorney Sage Knauft of Walsworth LLP, who is not involved in the case, noted that the justices asked very pointed questions.

"Justice [Sonia] Sotomayor asked the court-appointed counsel why an abuse-of-discretion standard was not appropriate, given that this is the standard generally used to review a trial court's rulings on relevance," Knauft said.

Attorney Stephen B. Kinnaird of Paul Hastings LLP, who was appointed by the Supreme Court to argue in favor of the 9th U.S. Circuit Court of Appeals' more thorough de novo review standard, responded to

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EXPERT ANALYSIS

Heightened restrictions on use of criminal background history: What employers need to know

Attorneys Brooke Iley and Joel Michel of Blank Rome LLP discuss the proliferation of ban-the-box laws across the country and suggest how employers can comply with the restrictions on applicant criminal history questions.

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Heightened restrictions on use of criminal background history: What employers need to know

By Brooke T. Iley, Esq., and Joel Michel, Esq.
Blank Rome LLP

In a sweeping movement to limit the use of a job applicant's criminal history during the application process, many states and localities have adopted some form of "ban the box" legislation.

Ban-the-box refers to legislation that prohibits, among other things, employment application questions that ask whether an applicant has been arrested or convicted of a crime. The goal of the ban-the-box movement is to ensure that employers consider a job applicant's qualifications without the stigma of a prior criminal history.

Over 90 percent of human resource professionals conduct some sort of background check during the hiring process.[1] Nearly a third of American adults have been arrested by age 23.[2] Studies have shown that applicants who indicate their criminal history on an initial application are less likely to receive a callback.

One study found that 34 percent of white applicants without criminal records and 17 percent of those with criminal records were later contacted for a callback interview.[3] Among black applicants, 14 percent of those without a criminal record and only 5 percent of those with criminal records were later contacted for a callback interview.[4]

By removing all criminal background questions from job applications and delaying background checks until later in the hiring process, proponents of ban-the-box legislation seek to provide applicants with criminal histories a better chance at obtaining employment.

'BAN THE BOX' MOVEMENT

Various forms of the ban-the-box movement have gone viral since November 2015, when President Barack Obama directed the Office of Personnel Management to remove the box asking about an applicant's criminal history from federal job application forms.

> Ban-the-box regulations prohibit inquiries into a job applicant's criminal history on an employment application.

At least 25 states — representing nearly every region of the country — have adopted some form of ban-the-box policy: California (2010, 2013), Colorado (2012), Connecticut (2010), Delaware (2014), Georgia (2015), Hawaii (1998), Illinois (2013, 2014), Kentucky (2017), Louisiana (2016), Maryland (2013), Massachusetts (2010), Minnesota (2009, 2013), Missouri (2016), Nebraska (2014), New Jersey (2014), New Mexico (2010), New York (2015), Ohio (2015), Oklahoma (2016), Oregon (2015), Rhode Island (2013), Tennessee (2016), Vermont (2015, 2016), Virginia (2015) and Wisconsin (2016).

While most ban-the-box regulations apply only to public employers, at least nine states — Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island and Vermont — have prohibited the arrest/conviction history question on job applications for private employers.

In addition to these state ban-the-box laws, over 150 cities and counties have adopted various versions of ban-the-box policies. Some of these regulations apply only to state employees, while others apply to private employees as well.

The restrictions on an employer can be dramatically different from one jurisdiction to the next, even within the same state. This trend of decentralized state and local guidance and enforcement is likely to continue under the Trump administration.

INITIAL CONSIDERATIONS

As noted, ban-the-box regulations prohibit inquiries into a job applicant's criminal history on an employment application.

In addition, many of these policies specify a particular point when employers are allowed to make inquiries into the criminal history of a job applicant.

Generally, employers must refrain from making inquiries into an applicant's criminal history until after a point specified in the applicable ban-the-box law (e.g., after the initial interview or after a conditional offer has been extended).

Complying with ban-the-box regulations can be both time-consuming and challenging for many employers, especially those that operate in multiple jurisdictions. No two versions of ban-the-box laws are identical.

In addition, these laws sometimes conflict or overlap with anti-discrimination laws, the Fair Credit Reporting Act, 15 U.S.C.A. § 1681,

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and other laws relating to background screenings.

Because companies that operate in multiple jurisdictions are subject to the ban-the-box legislation of each state and county in which they operate, they face the difficult task of creating applications and hiring procedures that comply with the ban-the-box policies of each location.

Thus, uniformity in applications and interview processes may not be feasible for employers that operate in multiple jurisdictions.

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Compliance is further complicated by the fact that office location may not be enough to determine jurisdiction. If employees will be traveling to other cities or states to meet with clients, that could present jurisdiction challenges.

Likewise, an employee who regularly moves between office branches could pose unforeseen problems during the application phase. To help minimize exposure, many multistate companies have voluntarily dropped criminal background questions from their applications.

In addition to dictating when inquiries into an applicant's criminal history can be made, ban-the-box policies further dictate how a job applicant's criminal history can be used.

While employers should be careful to consider the specific policies in their jurisdictions, there are a few provisions that are typical of ban-the-box policies.

These include notice requirements, job-related screening tests, limits on the scope or type of criminal record employers can consider, and individualized assessment requirements.

TYPICAL PROVISIONS IN BAN-THE-BOX LAWS

Notice requirements

Several jurisdictions, including Philadelphia, New York City, San Francisco and Oregon, have adopted policies that require employers to notify applicants before and/or after an adverse employment decision is made based in whole or in part on criminal history information.

Some ban-the-box regulations require employers to provide the applicant with a copy of the criminal history report that affected the employer's decision, while providing the applicant a specified period of time to contest the accuracy of the report or to provide an explanation.

Job relatedness

Some ban-the-box laws include language establishing that an employer's policy or practice of rejecting applicants based on the applicant's criminal record must be job related and consistent with business necessity.

Practical approach to compliance

- ☑ Don't search the applicant's criminal history
- ☑ Revise applications
- ☑ Create written procedures
- ☑ Avoid blanket exclusionary policies

The language used in these laws often includes some variation of the Equal Employment Opportunity Commission's "Green factors." The factors came from the case *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977), in which the 8th U.S. Circuit Court of Appeals found that a complete bar on employment based on any criminal activity, other than a traffic violation, is unlawful under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e.

In determining whether a rejection is job related for the position in question and consistent with business necessity, states/counties generally require employers to consider:

- The nature and gravity of the offense or conduct.
- The time that has passed since the offense or conduct and/or completion of the sentence.
- The nature of the job sought.

Types of records that may be considered

Under some ban-the-box policies, certain information within an applicant's criminal history may never be considered by an employer. This general prohibition usually applies to:

- An arrest that did not result in a conviction.
- Participation in a diversion or deferral of judgment program.
- A conviction that has been dismissed, expunged or otherwise invalidated.
- A conviction in the juvenile justice system.
- An offense other than a felony or misdemeanor, such as an infraction.
- A conviction that is older than a specified number of years indicated by the particular ban-the-box law.

Individualized assessment

Generally, employers may not maintain hiring policies that automatically disqualify an applicant based merely on the existence of a criminal record.

> Generally, employers may not maintain hiring policies that automatically disqualify an applicant based merely on the existence of a criminal record.

Some laws require employers to conduct individualized assessments of an applicant before denying him employment based in whole or in part on his criminal history.

In conducting these individualized assessments, employers must consider factors such as the:

- Nature of the offense(s).
- Number of convictions.
- Length of time that has passed following the last conviction.
- Relationship between the crime(s) and nature of the position.
- Age of the applicant at the time of the most recent conviction.

Most ban-the-box policies provide for exceptions in a number of circumstances, including where:

- The employer is required by law to obtain information regarding past convictions.
- The applicant is required to possess or use a firearm in the course of employment.
- An applicant convicted of a crime is prohibited by law from holding the position.
- The position sought involves caring for the young, elderly or sick.
- The position sought is one that involves public safety.

Revise applications

Employers may need to revise hard copy and/or online application forms to remove or appropriately limit questions seeking conviction information for impacted positions. They should also consider creating separate job applications for positions covered under any ban-the-box laws and positions exempted from such laws.

If an employer uses a third party to screen applicants, it should ensure that the third party's screening process complies with any applicable ban-the-box laws.

Employers that operate on a nationwide basis may want to consider the most stringent ban-the-box requirement from the relevant jurisdictions in which they operate to determine if that model is appropriate for their company.

If an employer uses a third party to screen applicants, it should ensure that the third party's screening process complies with any applicable ban-the-box laws.

PRACTICAL APPROACH TO COMPLIANCE

Don't search the applicant's criminal history

One common misunderstanding among employers is that although they may be prohibited from asking job applicants about their criminal history, they may nonetheless research applicants' criminal history themselves via Google, social media or other means.

Ban-the-box laws generally prohibit all inquiries into an applicant's criminal history until the point specified by the regulation — usually after the initial interview or after a conditional offer has been extended.[5]

Thus, employers must train their human resources personnel to refrain from making any inquiry into the applicant's criminal history — including asking the applicant directly or on a job application and researching the applicant's criminal history on the internet — until the specified point in the hiring process.

Create written procedures

Employers should consider consulting an employment lawyer to create written guidelines for hiring managers and other human resources personnel. These guidelines should be implemented whenever inquiries are made into an applicant's criminal history.

Written procedures are especially useful in guiding human resources personnel if an offer is withheld or rescinded due to the applicant's criminal history.

Employers that operate within jurisdictions requiring them to provide specific pre-adverse and adverse decision notification should also consult a lawyer to assist in drafting form notification letters and to train their human resources staff.

Although ban-the-box notice requirements may be similar to those under the Fair Credit Reporting Act, ban-the-box notice requirements should be considered separate from and in addition to the pre-adverse and adverse action requirements under the FCRA. This is because compliance with the FCRA's requirements does not always ensure compliance with ban-the-box regulations.

Avoid blanket exclusionary policies

In addition to violating ban-the-box laws, blanket hiring policies that exclude all applicants with a criminal history may violate Title VII.

There may be Title VII disparate impact liability where the evidence shows that an employer's criminal screening policy or practice disproportionately excludes members of a Title VII-protected class (race, color, religion, sex or national origin) and the employer does not demonstrate that the policy or practice is job related for the position in question and consistent with business necessity.

CONCLUSION

Employers should be diligent in reviewing their applications and policies to ensure compliance with all applicable ban-the-box policies. They should also consult employment lawyers to help train interviewing managers and human resources personnel to ensure the employer has compliant procedures across the entire organization. WJ

NOTES

[1] *See* Society for Human Resources Management, Background Checking: Conducting Criminal Background Checks 3 (2010).

[2] Robert Brame, Michael G. Turner, Raymond Paternoster & Shawn D. Bushway, *Cumulative Prevalence of Arrest From Ages 8 to 23 in a National Sample,* 129 Pediatrics, 21 (2012).

[3] Jeffrey C. Dixon, Royce Singleton & Bruce C. Straits, The Process of Social Research 342 (2015); *see also* Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment,* Nat'l Inst. of Just. J. 42, 43 (2012) (citing Devah Pager, *The Mark of a Criminal Record,* 108(5) Am. J. of Soc. 937, 947–49 (2003)).

[4] C. Dixon et al., supra note 3, at 342.

[5] Some ban-the-box policies contain provisions that allow employers to make inquiries into the criminal history of an applicant if the applicant opens the door by volunteering information about his criminal history.

7th Circuit leaves EEOC concerns about employer wellness program unaddressed

By Tricia Gorman

A recent appellate decision tossing a government challenge to an employee wellness program gives little clarity as to the legality of conditioning health insurance on an employee's completion of a health-risk assessment and testing.

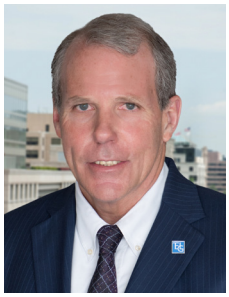
Equal Employment Opportunity Commission v. Flambeau Inc., No. 16-1402, 2017 WL 359664 (7th Cir. Jan. 25, 2017).

In affirming a lower court's decision to dismiss the suit, a 7th U.S. Circuit Court of Appeals panel avoided discussion on the merits of the case, instead declaring it moot because the circumstances of the employer and worker had changed.

The Equal Employment Opportunity Commission sued plastic products manufacturer Flambeau Inc. in 2014, alleging its wellness program participation requirements violated the Americans with Disabilities Act's ban on employer-mandated medical exams, 42 U.S.C.A. § 2112(d)(4)(A).

A Wisconsin federal court granted the company summary judgment, finding that the law's safe-harbor provision protected the requirements because they were tied to the administration of the plan.

Attorney Tom Harrington, principal of The Employment Law Group, who was not involved in the suit, said questions remain after the 7th Circuit's decision.



"*Flambeau* does not clarify the types of wellness programs prohibited under the ADA," Tom Harrington of The Employment Law Group said.

"*Flambeau* does not clarify the types of wellness programs prohibited under the ADA," Harrington said in a statement.

He noted that the EEOC has filed several suits over wellness programs with varying results.

"As a result of the appellate decision, we're left with sparse case law that could break either way," he said. "In *EEOC v. Orion Energy Systems Inc.*, No. 14-cv-1019, 2016 WL 5107019 (E.D. Wis. Sept. 19, 2016), for instance, another case out of Wisconsin with facts similar to *Flambeau*, the District Court drew an opposite conclusion from the lower court in *Flambeau*, holding that a mandatory health program was illegal under the ADA."

MANDATORY ASSESSMENT AND TESTING

The EEOC sued Flambeau on behalf of Dale Arnold, an employee at the company's Baraboo, Wisconsin, manufacturing plant from 1990 to 2014.

In 2012, Flambeau began requiring employees to complete a wellness program in order to participate in the company's self-funded, self-insured health plan, according to the 7th Circuit panel's opinion. That same year, the company discontinued Arnold's insurance after he failed to timely complete a health-risk assessment and biometric testing, the opinion said.

The company eventually reinstated Arnold's coverage after he completed the required assessment paperwork, the opinion said.

The assessment included questions about medical history, diet, mental and social health, and job satisfaction, and the biometric testing requirements included height and weight measurements, a blood pressure reading and a blood test, according to the opinion.

SAFE-HARBOR PROTECTION

In a matter of first impression in the 7th Circuit, U.S. District Judge Barbara B. Crabb of the Western District of Wisconsin ruled that the ADA's safe-harbor provision protected Flambeau's wellness program. *EEOC v. Flambeau Inc.*, 131 F. Supp. 3d 849 (2015).

"The EEOC guidance provides a good roadmap for how to structure a voluntary wellness program," Hinshaw & Culbertson partner Anthony Antognoli said.

The provision offers an exception to the ban on employer-required medical exams for activities tied to the administration of employer insurance plans, such as underwriting or setting premium costs, Judge Crabb said.

APPEAL DEEMED MOOT

The EEOC filed an appeal with the 7th Circuit in February 2016, arguing that the safe-harbor provision does not apply to the ADA's ban on non-job-related health inquiries and exams. Flambeau did not show that it used the health assessments for underwriting, the agency said.

A three-judge appellate panel affirmed Judge Crabb's decision, saying that "the relief the EEOC seeks is either unavailable or moot."

The statutory debate in the appeal was moot, the panel said, because Arnold had resigned six months before the EEOC filed suit and did not incur any damages. Additionally, Flambeau abandoned its wellness program requirements early in 2014 for cost reasons, the appeals court said.

The panel further noted that the EEOC, after suing Flambeau, issued regulations for wellness programs. *Regulations Under the Americans with Disabilities Act*, 81 Fed. Reg. 31126–01 (May 17, 2016).

The regulations, which went into effect last July, allow employers to offer workers incentives worth up to 30 percent of the cost of their individual health insurance plans to participate in wellness programs without violating the ADA.

THE FUTURE OF WELLNESS PROGRAMS

The EEOC's guidance on wellness programs will likely affect how employers design their programs, according to several employment attorneys.

Anthony Antognoli, a partner with Hinshaw & Culbertson in Chicago, said employers should use the guidance to avoid future litigation.

"Employers should think twice before relying on the ADA safe harbor for bona fide plans," said attorney Karen Gelula of Drinker Biddle & Reath.

"The EEOC guidance provides a good roadmap for how to structure a voluntary wellness program," Antognoli said in a statement.

The rising costs of medical plan premiums, however, may tempt an employer to go beyond the regulatory guidance in crafting a wellness program that will benefit the company, Antognoli said.

Harrington, of The Employment Law Group, also suggested employers follow the commission's guidelines "rather than flipping a coin," particularly given the unclear signals coming from recent litigation.

"These guidelines aren't legally controlling, but they offer ground rules for deciding whether a wellness program is involuntary and therefore disallowed under the ADA," Harrington said.

Noting the popularity of wellness programs, attorney Karen Gelula of Drinker Biddle & Reath in Philadelphia said she expects employers will continue to try to implement them but with an eye on the EEOC guidelines.

"Workplace wellness programs constitute an estimated $6 billion industry despite the lack of evidence that the implementation of such programs will actually reduce an employer's health cost," Gelula said, citing a recent report by the Rand Corp.

Gelula expects less litigation as long as employers follow the EEOC's recent regulations, but offered a note of warning related to the recent *Flambeau* decisions.

"Employers should think twice before relying on the ADA safe harbor for bona fide plans, at least until the EEOC indicates a change in its position that only voluntary wellness programs are compliant with the ADA," she said. WJ

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Related Filing:
Appellate opinion: 2017 WL 359664

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

C.H. Robinson's arbitration agreement blocks class-wide wage claims, 9th Circuit says

(Reuters) — A federal appeals court Feb. 3 derailed a proposed wage-and-hour class action against logistics and shipping giant C.H. Robinson Worldwide Inc. by enforcing an arbitration agreement with a class-action waiver.

Poublon v. C.H. Robinson Co. et al., No. 15-55143, 2017 WL 461099 (9th Cir. Feb. 3, 2017).

A unanimous three-judge panel of the 9th U.S. Circuit Court of Appeals reversed a lower court ruling that had denied C.H. Robinson's bid to dismiss the class claims under California's law prohibiting enforcement of "unconscionable" arbitration agreements.

The panel said the entire arbitration agreement was not rendered invalid because parts of it were unenforceable. For instance, the panel said the class-action waiver cannot block the plaintiff's claim brought under California's Private Attorneys General Act, but that part could be severed from the rest of the agreement.

The ruling stems from a lawsuit that Lorrie Poublon, a former account manager for C.H. Robinson in Los Angeles, filed shortly after she left the company in 2012.

Poublon accused Minnesota-based C.H. Robinson of misclassifying her and other employees as exempt from overtime in violation of California labor law. Her class action was originally filed in California state court and removed to the U.S. District Court for the Central District of California.

Poublon filed an amended complaint in 2012 that added a PAGA claim.

C.H. Robinson moved to compel arbitration in 2012, asking the court to enforce the agreement contained in the incentive bonus deal that Poublon signed.

U.S. District Judge Christina Snyder in Los Angeles denied the company's motion in 2015. Judge Snyder held that the arbitration agreement was invalid because it was procedurally and substantively unconscionable under California law. *Poublon v. C.H. Robinson Co. et al.*, No. 12-cv-6654, 2015 WL 588515 (C.D. Cal. Jan. 12, 2015).

C.H. Robinson appealed Judge Snyder's ruling to the 9th Circuit in 2015, arguing that any parts of the arbitration agreement that may be unconscionable should be severed.

The 9th Circuit panel Feb. 3 held that the agreement was neither procedurally nor substantively unconscionable.

In a 37-page opinion authored by Circuit Judge Sandra Ikuta, the panel found that just one of the eight provisions in the agreement, which would allow the company but not an employee to bring some claims in court, was substantially unconscionable.

The panel, which included Circuit Judges Consuelo Callahan and Carlos Bea, also held that the PAGA waiver was invalid under the California Supreme Court's 2014 decision in *Iskanian v. CLS Transportation Los Angeles LLC*, 327 P.3d 129 (Cal. 2014).

But the panel rejected Poublon's contention that the entire arbitration agreement was unconscionable because more than one of its provisions was invalid.

The panel held that it could sever out the offending parts without affecting the remainder of the arbitration agreement.

The arbitration agreement was a "contract of adhesion" because C.H. Robinson had more bargaining power than Poublon and presented it on a take-it-or-leave-it basis, the panel said. But that status gave the agreement a "low degree of procedural unconscionability at most," which was not enough to make it invalid, the panel said.

Attorneys for C.H. Robinson, Jack Sholkoff of Ogletree Deakins Nash Smoak & Stewart, and Kyle Nordrehaug of Blumenthal Nordrehaug & Bhowmik, did not reply to requests for comment. WJ

(Reporting by Robert Iafolla)

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Related Filing:
Opinion: 2017 WL 461099

See Document Section B (P. 33) for the opinion.

California town denies service-charge ordinance violates wage laws

By Tricia Gorman

A Northern California city says a restaurant industry association's attempt to block the city's ordinance governing disbursement of restaurant and hotel service charges should fail because the law does not conflict with state and federal wage laws.

California Restaurant Association v. City of Emeryville, No. 16-cv-6660, memo in support of dismissal filed (N.D. Cal. Jan. 31, 2017).

In its motion to dismiss the California Restaurant Association's lawsuit in the U.S. District Court for the Northern District of California, the city of Emeryville says the ordinance has the same purpose of protecting workers' interests as wage laws.

"Far from conflicting with the [California] Labor Code, the service-charge requirement, in fact, furthers its stated purpose of protecting workers and preventing a fraud on the public by requiring hospitality employers that impose service charges to pay those revenues to service workers," the city says.

The city also disputes the CRA's claims that the ordinance, which requires restaurants, hotels and banquet facilities to pass all "service charges" collected from patrons on to employees, is unconstitutional.

TIPS VS. REVENUE

The CRA sued Emeryville in November, alleging the local ordinance unfairly targets the hospitality industry and blurs the distinction between employee tips and a business's revenue.

The group representing the state's restaurant industry seeks declaratory and injunctive relief barring the city from enforcing the ordinance that was passed in June 2015.

The CRA alleges the ordinance amounts to taking businesses' private property without compensation, in violation of the California Constitution and the Fifth Amendment. The group points to various federal and state laws that have "consistently defined compulsory service charges as revenue and, thus, property of the businesses that charge them."

The group further alleges the law violates the First Amendment by penalizing businesses for using the term "service charge" in pricing description communications to customers and violates the 14th Amendment's Equal Protection Clause by specifically targeting hospitality employers.

The ordinance also conflicts with federal and state wage and tax laws, the CRA alleges.

Federal laws do not subject tips to deduction and withholding by an employer, but the ordinance treats the additional service charges as tips instead of revenue, the complaint says. Similarly, California's tax law imposes sales tax on mandatory service charges, but not on voluntary tips, it says. Finally, the Fair Labor Standards Act, 29 U.S.C.A. § 201, bars employers from classifying service charges as tips in order to meet minimum wage requirements, according to the CRA.

CLAIMS BASED ON 'FAULTY ASSUMPTION,' CITY SAYS

In its memo, the city says it passed the ordinance because worker protections under state laws are not "robust" enough given the city's high cost of living.

The ordinance mandating that employees benefit from the employer's service charges provides "working households in Emeryville with some semblance of economic security," the memo says.

According to the city, municipalities across the country have enacted similar provisions, and courts have consistently upheld such requirements.

The city first disputes the CRA's contention that the ordinance violates the Constitution.

The ordinance regulates revenue and so cannot be labeled a "taking" of employer property under the Fifth Amendment, the city says. Further, it addresses an employer's conduct and commercial speech that is not protected by the First Amendment and does not run afoul of the 14th Amendment by targeting a specific class, according to the city.

"Neither the federal nor state constitution [has] ever been construed to require a legislative body to take an 'all or nothing' approach to regulate all businesses equally," the memo says.

The city further counters the CRA's claims that the ordinance is preempted by federal and state laws.

"At their core, all of CRA's arguments are based on the same faulty assumption — that federal and state law define service charges as an employer's immutable property," the city says.

The FLSA does not address employer property rights or regulate how service charges should be distributed, and state law does not bar employees from receiving money that is not labeled a "tip" or "gratuity," according to the memo. WJ

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Related Filing:
Memo: 2017 WL 525457

Judge: On second thought, airline doesn't owe baggage handlers OT

By Tricia Gorman

A San Francisco federal judge now says US Airways Inc.'s fleet service agents are exempt from state law overtime requirements because they are governed by a collective bargaining agreement, reversing his previous ruling.

Angeles et al. v. US Airways Inc., No. 12-cv-5860, 2017 WL 565006 (N.D. Cal. Jan. 13, 2017).

U.S. District Judge Charles R. Breyer of the Northern District of California granted US Airways' motion for summary judgment Jan. 13, acknowledging that he had previously rejected the airline's same "recycled" arguments in earlier motions during the four-year long litigation.

"In all candor, US Airways' motion for judgment on the pleadings should have been granted," he said.

The judge's ruling centers on two California measures, the state's labor law and the state Industrial Welfare Commission's wage orders, both of which govern workers' wages, hours and working conditions.

The labor law and wage orders are separate but complementary, and a wage order is considered to have the same authority as a statute, according to Judge Breyer's order.

The order stems from a 2012 suit originally filed in California state court by two former fleet service agents whose duties include freight and baggage handling for US Airways.

The plaintiffs alleged the airline violated Section 510 of the labor law, Cal. Lab. Code § 510, by failing to pay the workers overtime for additional hours they worked when they traded shifts with co-workers and for the time they were clocked in before and after their scheduled shifts.

Section 510 mandates overtime pay of one and one-half times the regular rate of pay for hours worked in excess of eight hours in a day and 40 hours in a week.

The class-action lawsuit also included claims for unpaid overtime under Wage Order 9, which regulates wages and working conditions within the transportation industry.

The plaintiffs sought unspecified damages for unpaid wages on behalf of all current and former US Airways fleet service agents who worked for the airline since 2008.

After removing the suit to federal court, US Airways filed a motion to dismiss arguing that the plaintiffs and proposed class are not due overtime pay under exemptions within the labor law and wage order, according to Judge Breyer's order.

Section 514 of the law, Cal. Lab. Code § 514, exempts from the overtime requirements workers who are subject to a collective bargaining agreement that expressly provides for overtime pay and a regular rate of pay that is at least 30 percent more than the state's minimum wage.

The wage order includes an exemption for railway and airline employees who are covered by a CBA in accordance with the federal Railway Labor Act, 45 U.S.C.A. § 181.

In a February 2013 opinion, Judge Breyer dismissed the plaintiffs' wage order claims, agreeing they are exempt for overtime under the RLA exemption.

But he rejected the airline's arguments related to the labor law allegations, finding that the fleet service agents' CBA did not meet the requirements for the Section 514 exemption. *Angeles v. US Airways Inc.*, No. 12-cv-5860, 2013 WL 622032 (N.D. Cal. Feb. 19, 2013).

After the plaintiffs filed their third amended complaint in November 2013, the airline sought a judgment on the pleadings related to the labor law claims.

The airline again argued that the RLA exemption should bar the plaintiffs' claims and added that a separate exemption under Wage Order 9 should also block the claims.

According to the airline's motion, the so-called voluntary modification exemption excludes from overtime compensation additional hours accumulated because of a voluntary shift trade that was not required by the employer.

The plaintiffs were seeking overtime for hours worked when co-workers traded shifts, the airline said.

In a 2014 decision, Judge Breyer again refused to dismiss the claims, saying his previous ruling had addressed the airline's arguments.

In October 2016, US Airways filed a motion for summary judgment on the plaintiffs' overtime and related claims, reiterating its arguments for exemptions under Section 514, the RLA and voluntary modification.

This time Judge Breyer granted the motion noting that "at least one of those recycled arguments was correct ... all along."

The RLA exemption under Wage Order 9 does apply to the plaintiffs' claims under Section 510 of the labor law, the judge said.

Since the CBAs under which the fleet service agents worked fall within the scope of the RLA exemption, the airline need not comply with either overtime provision, Judge Breyer said.

Since the RLA exemption applies, the judge said, he need not address the other exemption arguments.

The RLA provision, which applies only to railway and airlines workers, does not conflict with Section 514, which applies across industries, according to the order.

The court must treat both provisions equally, Judge Breyer said.

The judge referred the case to a magistrate judge Jan. 14 for settlement talks on the suits' remaining claims for minimum wage violations and work expense reimbursement. WJ

Related Filing:
Order: 2017 WL 565006

ABM Industries to pay $110 million to settle California on-call class action

(Reuters) – ABM Industries Inc. announced Feb. 7 that it will pay $110 million to settle a class action accusing the company of failing to give uninterrupted rest breaks to thousands of security guards in California.

Augustus et al. v. ABM Security Services Inc., No. S224853, settlement announced (Cal. Feb. 7, 2017).

The settlement follows ABM's defeat at the California Supreme Court, which ruled in December that state law prohibits employers from keeping workers on-duty or on-call during their rest breaks. *Augustus et al. v. ABM Sec. Servs.*, 385 P.3d 823 (Cal. 2016).

"While we disagree with the decision of the California Supreme Court, we are pleased to have reached a resolution in these longstanding legal matters related to our previously held security business," ABM President and Chief Executive Officer Scott Salmirs said in a statement.

ABM, a multibillion-dollar facilities management company headquartered in New York City, sold its security business for $131 million in 2015.

The security guards' attorney, Drew Pomerance of Roxborough Pomerance Nye & Adreani, said he was glad to close out more than a decade's worth of litigation and revive the guards' big trial court win.

The settlement stems from security guard Jennifer Augustus' 2005 class action filed in California state court. Augustus claimed that ABM's practice of not relieving guards of all duties during rest breaks violated state labor law. Augustus' lawsuit was consolidated with two similar security guard class actions in 2005 and 2006.

ABM acknowledged during discovery that it required guards to keep their radios and pagers on, so they could respond when the need arose.

Superior Court Judge John Wiley in Los Angeles granted the plaintiffs' motion for summary judgment in 2010, reasoning that an on-duty or on-call rest break is indistinguishable from the rest of the work day. *Augustus v. Am. Commercial Sec. Servs.*, No. BC336416, 2010 WL 8906657 (Cal. Super. Ct. Dec. 23, 2010).

In 2012, Judge Wiley awarded the nearly 15,000-member class about $90 million in damages, interest and penalties.

ABM challenged Judge Wiley's findings, arguing that simply the risk of interruption was not enough to invalidate a rest break.

California's 2nd District Court of Appeal reversed Judge Wiley in 2014, holding that state labor law does not require employers to provide off-duty rest breaks and being on-call is not the same as being at work. *Augustus v. ABM Sec. Servs.*, 182 Cal. Rptr. 3d 676 (Cal. Ct. App., 2d Dist. 2014).

The plaintiffs appealed to the California Supreme Court. The case attracted amicus briefs from several groups, including the U.S. Chamber of Commerce and the National Association of Manufacturers in support of ABM, as well as the California Employment Lawyers Association on behalf of the plaintiffs.

The state high court reversed the appeals court in December, holding that state labor law mandates that employers have no control over how workers spend their break time and relieve them of their duties in order for it to count as a rest break.

"A rest period, in short, must be a period of rest," Justice Mariano-Florentino Cuéllar wrote for the court.

In addition to the $110 million settlement, ABM announced Feb. 7 that it will pay $5 million to settle a proposed wage-and-hour class action brought by security guard Vardan Karapetyan in 2015. That lawsuit included rest-break claims, along with seven other state labor law claims. *Karapetyan v. ABM Indus. et al.*, No. 15-cv-8313, *settlement announced* (C.D. Cal. Feb. 7, 2017). WJ

(Reporting by Robert Iafolla)

U.S. court upholds Obama-era retirement advice rule

(Reuters) – A U.S. federal judge Feb. 9 upheld an Obama-era rule designed to avoid conflicts of interests when brokers give retirement advice, in a possible setback for President Donald Trump's efforts to scale back government regulation.

U.S. Chamber of Commerce v. Hugler et al., No. 16-cv-1476, 2017 WL 514424 (N.D. Tex. Feb. 8, 2017).

The stinging 81-page ruling comes just days after Trump ordered the Labor Department to review the "fiduciary" rule — a move widely interpreted as an effort to delay or kill the regulation.

The decision by Chief Judge Barbara Lynn for the U.S. District Court for the Northern District of Texas is a stunning defeat for the business and financial services industry groups that had sought to overturn it.

And while it is not expected to stop the Labor Department from delaying the rule's April 10 compliance deadline while it conducts the review, some legal experts say it could make it more difficult for the Labor Department to find a way to justify scrapping or significantly altering the rule.

This marks the second time now a federal district court has upheld the fiduciary rule. *Nat'l Ass'n of Fixed Annuities v. Perez*, No. 16-cv-1035, 2016 WL 6573480 (D.D.C. Nov. 4, 2016). A third court, meanwhile, rejected an effort to stay the rule's implementation. *Mkt. Synergy Grp. v. U.S. Dep't of Labor*, No. 16-cv-4083, 2016 WL 6948061 (D. Kan. Nov. 28, 2016).

REUTERS/Carlos Barria

The judge's ruling comes just days after President Donald Trump, shown here, ordered the Labor Department to review the Obama-era "fiduciary" rule — a move widely interpreted as an effort to delay or kill the regulation.

"Three courts have now carefully considered the full range of industry attacks on the DOL's best interest fiduciary rule, and they have firmly rejected all of them," said Stephen Hall, the legal director of Better Markets, a nonprofit group that supports the rule.

"The decision issued today is definitive and sends a message that ought to put a stake through the heart of industry's efforts to destroy this common-sense rule."

The Labor Department's "fiduciary" rule requires brokers to put their clients' best interests first when advising them about individual retirement accounts or 401(k) retirement plans.

It is championed by consumer advocates and retirement nonprofit groups, but has been staunchly opposed by the financial services sector, which argues it will make retirement advice too costly and harm lower-income retirees in particular.

The long list of groups that sued the Labor Department in the Dallas federal court include the U.S. Chamber of Commerce, the Financial Services Institute, the Financial Services Roundtable, the Insured Retirement Institute and the Securities Industry and Financial Markets Association.

In a joint statement, those groups said they disagreed with the judge's ruling and vowed to "pursue all of our available options to see that this rule is rescinded."

The decision in the Labor Department's favor came just a few hours after the Justice Department had petitioned the court to stay issuing a ruling because of the Feb. 3 White House request to review the rule to determine if it should be revised or scrapped.

Judge Lynn, who was appointed to the bench by former President Bill Clinton, denied that request shortly after her ruling was filed.

"The Department of Labor is continuing to follow the president's memorandum and is exploring options to delay the applicability date," Labor Department spokeswoman Jillian Rogers said in a statement.

SWEEPING LEGAL ARGUMENTS REJECTED

The ruling represents a setback for Gibson Dunn & Crutcher attorney Eugene Scalia, who represented the business groups and has a strong track record for winning legal challenges to kill off unwanted Wall Street regulations.

The decision addressed a sweeping series of legal arguments that Gibson Dunn's attorneys made against the rule, including claims that the Labor Department had exceeded its legal authority and that it had violated federal rulemaking procedures by failing to conduct an adequate cost-benefit analysis to help justify the regulation.

"The court finds the DOL adequately weighed the monetary and non-monetary costs on the industry of complying with the rules, against the benefits to consumers," Judge Lynn wrote.

"In doing so, the DOL conducted a reasonable cost-benefit analysis."

Judge Lynn also rejected other arguments, including claims that the rule violated free speech rights of brokers and that the rule violated federal laws governing arbitration.

The case could still be appealed to a higher court.

Meanwhile, there are still several other pending legal challenges to the rule. WJ

(Reporting by Sarah N. Lynch; editing by Dan Grebler and Lisa Shumaker)

Related Filing:
Opinion: 2017 WL 514424

The next challenge to public sector union fees

(Reuters) – The Center for Individual Rights filed a lawsuit Feb. 6 challenging public sector unions' ability to collect fees from nonmembers, nearly a year after the death of a U.S. Supreme Court justice stymied its last bid to stop that practice.

Yohn et al. v. California Teachers Association et al., No. 17-cv-202, complaint filed (C.D. Cal. Feb. 6, 2017).

But that conservative advocacy group and its lead lawyer, Michael Carvin of Jones Day, may have to get in line behind the National Right to Work Committee, which already has seven cases on similar grounds percolating in the courts, including one that is a step away from the Supreme Court.

The conservative legal groups have set their crosshairs on compulsory agency fees, which unions charge nonmembers to cover collective bargaining and other nonpolitical expenses. The loss of agency fees would deny public unions a crucial revenue stream, potentially eroding their bargaining power and political clout.

Opponents of agency fees claim that they violate public workers' free speech rights by forcing them to support political positions they may not agree with because collective bargaining with the government is inherently political. But supporters say agency fees, also known as "fair-share fees," prevent nonunion workers from benefiting from collective bargaining without paying for it.

The high court appeared to be on the brink of declaring public sector agency fees unconstitutional last year in an earlier case filed by the Center for Individual Rights, *Friedrichs et al. v. California Teachers Association et al.*, 136 S. Ct. 1083 (2016). But then Justice Antonin Scalia died last February. Instead of overturning its 1977 decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), that allowed agency fees, the court split 4-4 in April and kept its precedent in place.

President Donald Trump's nominee for the Supreme Court, Circuit Judge Neil Gorsuch of the 10th U.S. Circuit Court of Appeals, would likely cast the deciding vote if he is confirmed and the agency-fee issue returns to the court. Judge Gorsuch is a conservative in the mold of Justice Scalia.

The National Right to Work Committee is following the same path to the high court that the Center for Individual Rights used in *Friedrichs* by challenging compulsory agency fees on free speech grounds.

The group is litigating seven cases on behalf of public workers objecting to agency fees. The furthest along is scheduled for oral argument at the 7th U.S. Circuit Court of Appeals in March. *Janus et al. v. AFSCME et al.*, No. 16-3638, *oral arguments scheduled* (7th Cir. Mar. 1, 2017).

Should there be difficulties with that case getting to the Supreme Court, the National Right to Work Committee has similar lawsuits in federal courts in Kentucky, Connecticut, New York, Pennsylvania and California, as well as one in Massachusetts state court.

"We wanted to make this unavoidable," said Patrick Semmens, the right to work group's spokesman.

The group's case in the 7th Circuit arose from a legal fight between Illinois' Republican Gov. Bruce Rauner and public sector unions over his 2015 executive order to stop the state government from deducting agency fees from state workers' pay. Unions challenged the order in state court and Rauner responded with a lawsuit asking for a federal court to declare agency fees unconstitutional and backing his authority to issue the order.

U.S. District Robert Gettleman in Chicago dismissed Rauner's complaint in 2015, ruling that he had no standing to challenge the constitutionality of agency fees.

But Judge Gettleman allowed state workers — represented by the National Right to Work Committee's legal arm and fellow conservative legal group the Liberty Justice Center to intervene and file an amended complaint claiming agency fees violate their free speech rights. The workers challenged fees paid to affiliates of AFSCME and the International Brotherhood of Teamsters.

Judge Gettleman dismissed their complaint in 2016, saying that *Abood* was still binding precedent after the Supreme Court's 4-4 ruling in *Friedrichs*.

The plaintiffs appealed, but asked the 7th Circuit to uphold the dismissal as a way to hurry the case to the Supreme Court.

Teamsters spokesman Galen Munroe said that lawsuit is an attack on public sector unions that would allow nonunion members to freeload on members.

Center for Individual Rights President Terence Pell acknowledged that his group's case is behind the Right to Work Committee's cases, but hopes that it could get to the Supreme Court in time for the justices to simultaneously take cases backed by both groups.

"It's not a zero-sum game," Pell said. WJ

(Reporting by Robert Iafolla)

Attorneys:
Plaintiffs: Michael A. Carvin, Ann T. Rossum, Anthony J. Dick, Edward San Chang, William D. Coglianese and John A. Vogt, Jones Day, Washington, DC

Ex-ADP employees lose federal appeal over noncompete agreement

By Melissa J. Sachs

Two former employees of a human resources software and services company have failed to convince a federal appeals court to overturn a preliminary injunction prohibiting them from soliciting their ex-employer's clients for one year.

ADP LLC v. Lynch et al., No. 16-3617, 2017 WL 496089 (3d Cir. Feb. 7, 2017).

While working for ADP LLC, John Halpin and Jordan Lynch agreed to a 12-month noncompete and nonsolicitation period when they accepted incentive stock awards, the 3rd U.S. Circuit Court of Appeals decision said.

On the website with ADP's stock incentives, both clicked "I accept," indicating they had read the terms and agreed to the company's conditions for one year, the opinion said.

Although Halpin and Lynch argued they never read the terms, the three-judge panel upheld the U.S. District Court for the District of New Jersey's decision to issue a preliminary injunction prohibiting them from soliciting ADP clients for 12 months.

The District Court had allowed Halpin and Lynch to continue working for ADP's direct competitor, the Ultimate Software Group, despite their noncompete, the panel said.

It also reasonably limited the nonsolicitation clause to current clients or prospective clients that Halpin and Lynch learned about while at ADP, the appeals court said. WJ

Related Filing:
Opinion: 2017 WL 496089

Bankrupt former employee escapes company's breach-of-contract claim

By Michael Nordskog

An Illinois woman who allegedly violated a nonsolicitation clause in her employment contract is entitled to discharge any related debt through Chapter 7, a bankruptcy judge in Chicago has ruled.

In re Pagan, No. 16-18940; United Providers Inc. v. Pagan, No. 16-544, 2017 WL 510857 (Bankr. N.D. Ill. Feb. 8, 2017).

The employer failed to plead that the woman acted willfully and maliciously as required under the relevant Bankruptcy Code discharge exception, U.S. Bankruptcy Judge Carol A. Doyle of the Northern District of Illinois said.

Gloria Pagan formerly worked for United Providers Inc. as a medical billing services provider, according to Judge Doyle's opinion.

After Pagan filed for Chapter 7 relief in June 2016, United filed an adversary complaint under Section 523(a)(6) of the Bankruptcy Code, 11 U.S.C.A. § 523(a)(6), which excepts from discharge debts "for willful and malicious injury by the debtor to another entity."

The company alleged that, in October 2015, Pagan violated a non-solicitation provision in her employment contract by conspiring with two other employees to leave United and work instead for one of its clients.

Pagan moved to dismiss the adversary complaint, saying the company had at best asserted an intentional breach of contract, but did not plead a claim for willful and malicious injury.

'WILLFUL AND MALICIOUS' STANDARD

To sustain a claim under Section 523(a)(6), a plaintiff must allege the debtor caused injury, the debtor acted willfully and those actions were malicious, Judge Doyle said, citing *Oakland Ridge Homeowners Association v. Braverman (In re Braverman)*, 463 B.R. 115 (Bankr. N.D. Ill. 2011).

The judge rejected United's argument under *In re Hallahan*, 936 F.2d 1496 (7th Cir. 1991), that Pagan's intentional breach of contract was nondischargeable under Section 523(a)(6).

The Supreme Court and the 7th Circuit have concluded that an intentional breach of contract alone — without an intentional tort — is not enough to meet the "willful and malicious" test under Section 523(a)(6), Judge Doyle said, citing *Kawaauhau v. Geiger*, 523 U.S. 57 (1998); *In re Pickens*, No. 98-1985, 2000 WL 1071464 (7th Cir. Aug. 1, 2000); and *First Weber Group Inc. v. Horsfall*, 738 F.3d 767 (7th Cir. 2013).

However, "not all intentional torts meet the standard under Section 523(a)(6) because conduct can be tortious under state law without proof that the defendant intended the actual injury, not just the action he undertook," she noted, citing *Geiger*.

The judge cited two post-*Geiger* decisions by courts of appeals in other circuits holding that an intentional breach of contract alone does not meet the standard. *Lockerby v. Sierra*, 535 F.3d 1038 (9th Cir. 2008); *In re Best*, 109 Fed. Appx. 1 (6th Cir. 2004).

"To hold otherwise would turn every economic decision to breach a contract into a nondischargeable debt," Judge Doyle said, adding that this would frustrate the debtor's opportunity for a fresh start through bankruptcy.

United also failed to establish nondischargeability through its cursory arguments and conclusory allegations about other claims of Pagan's tortious actions, the judge concluded. WJ

Related Filing:
Opinion: 2017 WL 510857

See Document Section C (P. 45) for the opinion.

Appeals court rejects county worker's civil rights challenge to drug test

(Reuters) – A federal appeals court Feb. 6 rejected a former care worker's constitutional challenge to a random drug test that cost him his job at a county youth detention facility in Kansas.

Washington v. Unified Government of Wyandotte County, Kansas et al., No. 15-3181, 2017 WL 474322 (10th Cir. Feb. 6, 2017).

A unanimous three-judge panel of the 10th U.S. Circuit Court of Appeals ruled that Wyandotte County, which operates a juvenile detention center in Kansas City, Kansas, had an interest in policing employee drug use that outweighed Roberick Washington's privacy concerns.

Washington sued Wyandotte County and several officials in federal court in Kansas in 2014, a year after he was terminated for testing positive for cocaine in a random drug test. Washington, who classified inmates, trained personnel, supervised officers and performed other duties at the time he was fired, had worked at the facility since 1995.

Washington claimed that the drug test was an illegal search in violation of the Fourth Amendment of the U.S. Constitution. He also claimed his due process rights under the 14th Amendment were violated because he was wrongfully terminated and denied a hearing to clear his name.

U.S. District Judge Thomas Marten in Kansas City, Kansas dismissed Washington's lawsuit in 2015. *Washington v. Unified Gov't of Wyandotte Cty., Kan. et al.*, No. 14-cv-2108, 2015 WL 4496276 (D. Kan. July 23, 2015).

Judge Marten held that a Wyandotte sheriff named in the lawsuit did not violate the Fourth Amendment because the drug test he administered was reasonable given Washington's role at the juvenile detention facility. Judge Marten also dismissed that claim against the county, ruling that constitutional claims for damages that fail against an officer also fail against the officer's employer.

Judge Marten tossed the due process claims against other county officials, finding Washington had no property interest in his job or rights to a name-clearing hearing, then dismissed those claims against the county.

Washington challenged the ruling at the 10th Circuit.

In the Feb. 6 decision written by Circuit Judge Timothy Tymkovich, the panel said that a municipality may be liable for a constitutional violation if a plaintiff identifies an unconstitutional policy that caused an injury. But the panel rejected Washington's argument that the drug test violated the Fourth Amendment's probable cause and warrant requirements.

The panel, which also included Circuit Judges Harris Hartz and Nancy Moritz, held that the county established it had a special need for its random drug testing policy as an effective way to prevent employees from being impaired or bringing drugs into the juvenile detention facility.

The county's policy should apply to Washington even though he primarily performed administrative tasks, because he still had access to the juvenile residents, the panel said. The county's safety and welfare interests make the drug testing policy valid despite Washington's privacy interests, the panel said.

"The balance we strike today is specific: the government's interests, while important in this case, might not apply to all employees in a correctional facility," the panel said.

The panel also affirmed Judge Marten's dismissal of Washington's due process claims.

Wyandotte County senior attorney Henry Couchman declined to comment.

Washington's attorney, Michael Gallagher of Gallagher & Kaiser, did not respond to a request for comment. WJ

(Reporting by Robert Iafolla)

Attorneys:
Appellant: Michael J. Gallagher, Gallagher & Kaiser, Kansas City, MO

Appellees: Henry E. Couchman Jr., Legal Department, Unified Government of Wyandotte County/Kansas City, Kansas, Kansas City, KS

Related Filing:
Opinion: 2017 WL 474322

Lack of claim notice dooms employer's suit for coverage, 8th Circuit rules

An insurer does not have to provide coverage to an insured employer that was sued by an injured worker because the employer did not promptly comply with the policy's notice requirement, the 8th U.S. Circuit Court of Appeals has ruled.

American Railcar Industries Inc. v. Hartford Insurance Co. of the Midwest, No. 16-1900, 2017 WL 490414 (8th Cir. Feb. 7, 2017).

A three-judge appellate panel upheld the entry of summary judgment in favor of Hartford Insurance Co. of the Midwest, concluding the notice requirement is a condition precedent to coverage.

INJURED WORKER

George Tedder was working for American Railcar Industries in Arkansas in April 2008 when he suffered a lower back injury while on break. The injury occurred when a co-worker driving a golf cart lost control of the vehicle and struck the table on which Tedder was sitting, according to court records.

ARI had workers' compensation and employers' liability insurance at the time from Hartford. The ELI policy included coverage against bodily injury claims arising "out of and in the course of the injured employee's employment," the 8th Circuit opinion said.

A policy provision required ARI to "promptly give [Hartford] all notices, demands, and legal papers related to the injury, claim, proceeding or suit," according to the opinion.

Tedder filed a workers' compensation claim in early June 2008.

ARI promptly notified Hartford of the injury and Tedder's workers' compensation claim, according to the opinion.

Hartford referred the claim to Georgia Diemer at Specialty Risk Services, a division of Hartford at the time of the injury. Diemer hired an attorney to defend against Tedder's workers' compensation claim, the opinion said.

An administrative law judge ultimately determined that Tedder's claim was not covered by Arkansas' Workers' Compensation Act because he had not been injured while performing an employment service.

Tedder subsequently sued ARI in early September 2009 in federal court in Arkansas.

"ARI did not promptly forward this complaint to Hartford," according to the 8th Circuit opinion.

The attorney representing ARI in Tedder's tort action, however, sent a letter in late September 2009 to Hartford's lawyer in the previous workers' compensation action, asking for copies of any relevant discovery. The letter included as an attachment the answer ARI had filed in the tort action, the opinion said.

A jury awarded Tedder more than $2.2 million in 2012, but the judge later reduced the award to $1.5 million. The 8th Circuit affirmed the judgment on appeal. *Tedder v. Am. Railcar Indus. Inc.*, 739 F.3d 1104 (8th Cir. 2014).

Hartford declined to provide ARI with a defense or indemnification against Tedder's suit.

INSURANCE DISPUTE

ARI sued Hartford in the U.S. District Court for the Eastern District of Missouri, claiming the insurer had breached the policy. ARI is based in St. Charles, Missouri.

The District Court granted summary judgment to Hartford. The court concluded, among other things, that ARI's failure to notify Hartford promptly of the tort action barred coverage. *Am. Railcar Indus. Inc. v. Hartford Ins. Co. of the Midwest*, No. 13-cv-778, 2016 WL 1089256 (E.D. Mo. Mar. 18, 2016).

The 8th Circuit affirmed on appeal by ARI.

"If an insurance policy treats the giving of notice of a lawsuit as a condition precedent to recovery, 'the insured must strictly comply with the notice requirement, or risk forfeiting the right to recover from the insurance company,'" the panel explained, citing *Fireman's Fund Insurance Co. v. Care Management Inc.*, 361 S.W.3d 800, 803 (Ark. 2010).

The 8th Circuit concluded that the notice requirement in Hartford's policy was a condition precedent to recovery and that ARI forfeited the right to recover from Hartford by not strictly complying with the notice requirement.

ARI argued Hartford had notice, citing claims allegedly made by Tedder throughout the workers' compensation proceedings that he would file a civil action, the September 2009 letter to Hartford's workers' compensation attorney, and an alleged discussion between an ARI employee and Diemer about Tedder's tort action.

"It is undisputed, however, that ARI did not forward to Hartford all of the notices, demands or legal papers related to Tedder's tort action," the panel said.

The appeals court, therefore, affirmed the summary judgment ruling in favor of Hartford. WJ

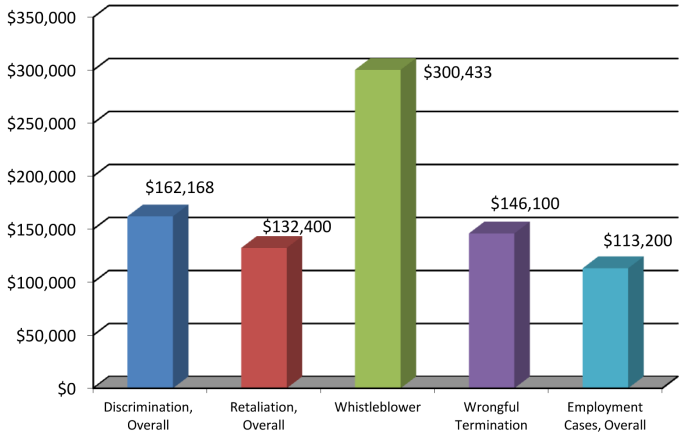
Related Filing:
Opinion: 2017 WL 490414

Statistical study analyzes awards for various employment claims

A recent Jury Verdict Research statistical study analyzes verdicts for various employment claims brought by plaintiffs against their employers from 2009 to 2015. Whistleblower claims continue to garner the highest median award at $300,433.

The graph below shows compensatory median awards for each of the most frequently occurring types of employment claims.

EMPLOYMENT PRACTICE LIABILITY AWARD MEDIANS (2009-2015)



Whistleblower claims can be brought under a variety of federal and state statutes to establish workplace and environmental safety and health standards, and the acts prohibit employers from retaliating against whistleblowers who make complaints regarding potential violations of the acts. In addition, under the First and 14th Amendments to the U.S. Constitution, state and local government officials are prohibited from retaliating against whistleblowers.

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

This statistic is also commonly referred to as the average. Use of the mean in most instances gives a distorted view of the data. Due to the nature of jury verdict data, the mean award can often be skewed by a small number of very high awards.

The range indicates the smallest and largest awards of a given sample. The probability range is defined as the middle 50 percent of all awards arranged in ascending order in a sampling, 25 percent above and below the median award.

Although jury verdicts rarely produce a normal distribution, the probability range and the median award do aid in establishing parameters of where awards tend to cluster.

EMPLOYMENT PRACTICE LIABILITY AWARDS (2009-2015)

The compensatory award median, probability range, award range, and award mean for various employment grounds are analyzed in the table below, based on plaintiff verdicts rendered from 2009 through 2015.

Liability	Award Median	Probability Range			Total Range			Award Mean
Discrimination, Overall	$ 162,168	$ 50,000	-	$ 435,952	$ 1	-	$ 13,500,000	$ 444,882
Retaliation, Overall	132,400	46,220	-	306,970	1	-	7,240,867	363,917
Whistleblower	300,433	135,996	-	673,941	1	-	6,250,000	552,269
Wrongful Termination	146,100	50,153	-	375,310	1,000	-	42,700,000	865,073
Employment Cases, Overall	113,200	25,000	-	350,000	1	-	42,700,000	397,132

The purpose of "Employment Practice Liability: Jury Award Trends and Statistics – 2016 Edition" is to statistically summarize and identify emerging trends in jury verdicts and settlements as a result of employment practice liability claims.

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

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

DISTRIBUTION OF RACE DISCRIMINATION AWARDS (2009-2015)

The following table provides the distribution of compensatory awards and the percentage of the total number of awards within specific dollar ranges for race discrimination.

Award Range			Percentage
To	-	$ 9,999	17%
10,000	-	24,999	7%
25,000	-	49,999	3%
50,000	-	74,999	4%
75,000	-	99,999	3%
100,000	-	249,999	21%
250,000	-	499,999	19%
500,000	-	749,999	7%
750,000	-	999,999	4%
1,000,000	-	1,999,999	11%
2,000,000	+		5%

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

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

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

Labor and employment roundup for Feb. 6 – Feb. 17

Here are some recent highlights in employment-related litigation involving government agencies, safety enforcement actions, state and federal legislation, and regulations and executive actions.

Editors' note: Since this roundup began, it has focused on government agency litigation, enforcement activities, and legislative or regulatory developments. However, the U.S. Labor Department has issued no news releases about the safety enforcement and wage-and-hour developments we generally cover since President Donald Trump was inaugurated. We will cover some notable executive actions and other developments in the meantime.

DISCRIMINATION LAWSUITS, SETTLEMENTS

Feb. 6 — Philly to pay $90,000 to resolve disability discrimination charges. The city of Philadelphia has agreed to pay $90,000 in back pay and damages to a former city sanitation worker the U.S. Justice Department said was fired because of restrictions his doctor recommended after a heart attack. The department said the city violated the American with Disabilities Act, 42 U.S.C.A. § 12101, by firing the worker, who could no longer lift heavy objects, instead of considering his request for a reassignment to another position for which he was qualified. Under a proposed consent decree filed in Philadelphia federal court, the city also must offer to reinstate and reassign the worker, revise its policies to include reassignment as a reasonable accommodation for workers with disabilities, and train employees on ADA provisions. *United States v. City of Philadelphia*, No. 17-cv-514, *consent decree filed* (E.D. Pa. Feb. 6, 2017). 2017 WL 475609

Feb. 10 — EEOC appeals religious-freedom decision in transgender employee's firing. The Equal Employment Opportunity Commission has asked the 6th U.S. Circuit Court of Appeals to overturn a Michigan federal judge's ruling that a Detroit funeral home operator had a right under the Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb, to fire a transgender worker. In one of its first cases on behalf of a transgender person, the commission sued R.G. & G.R. Harris Funeral Homes Inc. in 2014, alleging it violated Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e, by firing a male employee who planned to transition to a female. U.S. District Judge Sean Cox of the Eastern District of Michigan granted summary judgment to the funeral home in August, ruling that it "operates as a ministry" and was exempt from Title VII because complying would force its owner to violate his Christian beliefs. The commission argues on appeal that the funeral home failed to show how employing the embalmer, who intended to dress like a woman, would substantially burden owner Thomas Rost's religious practices. *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes Inc.*, No. 16-2424, *opening brief filed*, 2017 WL 564598 (6th Cir. Feb. 10, 2017).

WAGE-AND-HOUR LAWSUITS, SETTLEMENTS

Feb. 7 — 10th Circuit orders Oklahoma restaurant to pay $2 million for willful FLSA violations. A Tulsa, Oklahoma, restaurant operator must pay $2.1 million in back pay and damages for willfully violating the Fair Labor Standards Act, 29 U.S.C.A. § 201, by improperly withholding wages from its employees, a 10th U.S. Circuit Court of Appeals panel has ruled. The panel affirmed a lower court's decision to disregard as unreasonable a jury's finding that El Tequila LLC's wage law violations were not willful and require the company to pay for an additional year of back pay and damages for willful violations. The U.S. Labor Department alleged El Tequila withheld wages by altering electronic time records, among other things. An Oklahoma federal judge granted the DOL summary judgment on El Tequila's violations of the FLSA's overtime, minimum wage and record-keeping provisions, but allowed the willfulness question to go to a jury. On appeal, in addition to affirming the willfulness ruling, the 10th Circuit said the judge properly deemed as admitted the allegation that El Tequila manually altered time records after the company failed to timely answer the department's complaint. *Perez v. El Tequila LLC et al.*, No. 16-5002, 2017 WL 495541 (10th Cir. Feb. 7, 2017).

SAFETY ENFORCEMENT

Feb. 10 — Goodyear to pay $1.75 million to settle hazard claims following 4 worker deaths. The Goodyear Tire & Rubber Co. has agreed to pay $1.75 million in penalties as part of a comprehensive agreement with the United Steelworkers union and the Virginia Department of Labor and Industry's Virginia Occupational Safety and Health program over four fatal accidents. VOSH performed 11 investigations over the last 18 months at the company's Danville, Virginia, tire plant, issuing more than 120 citations, including 115 for serious violations, and fining Goodyear more than $1 million, according to the agency. The settlement calls for the union and the state to help Goodyear in applying for membership in the state's voluntary protection program to improve the company's safety and health management systems. Goodyear can keep $750,000 of the total penalties assessed to abate hazards at the Danville plant, VOSH said.

LEGISLATION, REGULATIONS AND EXECUTIVE ACTIONS

Feb. 6 — Missouri becomes "right to work" state. Missouri has become the 28th state to enact a "right to work" law barring an employer from requiring employees to join a labor union as a condition of employment or pay fees or charges associated with a union. The state's recently elected governor, Republican Eric Greitens, signed Senate Bill 19 on Feb. 6 after his predecessor, Democrat Jay Nixon, rejected a similar bill last year. The law, which applies to both public- and private-sector employers, with few exceptions, takes effect Aug. 28 but will not apply to existing contracts until they expire or are changed. Violating the law is a misdemeanor subject to up to a $750 fine and 15 days in jail. Employees who claim they are subject to an employer's union pressure can seek injunctive relief and damages under the law.

Feb. 16 — New Hampshire will not become first "right to work" state in Northeast. The Granite State has decided not to join 28 other states in enacting a "right to work" law barring an employer from requiring employees to pay fees or charges associated with a union as a condition of employment. The state's Republican-controlled House

of Representatives rejected the Senate-sponsored measure 200-177, with 32 Republicans voting to nix the bill Republican Gov. Chris Sununu had hoped to sign. The House also voted in favor of a procedural measure to postpone further action on the matter, barring a vote on a similar House-sponsored bill during the current legislative session.

Feb. 16 — Trump picks Alexander Acosta as new labor secretary nominee. President Donald Trump has nominated former National Labor Relations Board member R. Alexander Acosta for secretary of labor. Acosta was appointed to the board in 2002 by former President George W. Bush and served eight months. Acosta, who would be the first Hispanic member of Trump's cabinet, currently serves as dean of the Florida International University College of Law in Miami. His nomination replaces Andrew Puzder, who removed his name from consideration Feb. 15. Puzder, CEO of CKE Restaurants Inc., withdrew after admitting he had employed an undocumented worker as a housekeeper and being sued by various workers, including managers of his fast-food franchisees for alleged California antitrust violations and wage suppression. *Bautista et al. v. Carl Karcher Enterprises LLC et al.*, No. BC649777, *complaint filed*, 2017 WL 525938 (Cal. Super. Ct., L.A. Cty. Feb. 8, 2017).

LABOR AND PUBLIC EMPLOYMENT NEWS

COUNTY COLLEGE'S REFUSAL TO RECOGNIZE EX-EMPLOYEE AS UNION REP EQUALS UNFAIR PRACTICE

Ruling: The New Jersey Public Employment Relations Commission's hearing examiner issued a recommended dismissal of a portion of an unfair-practice charge. The examiner rejected the union's contention that a county college employee's termination violated Employer-Employee Relations Act provisions, despite the employee's protected activity of serving as union president. The examiner decided that the employer terminated the employee as a result of her history of excessive absenteeism. However, the examiner also decided that the employer violated EERA Section 5.4a(1) when it refused to provide drafts of negotiations proposals to the union president and when it deleted the union president's name from proposed signature lines in those drafts.

What it means: The hearing examiner took note of numerous PERC cases holding that a union maintains a right to choose its own negotiations representatives. A contrary holding would allow an employer to control or prevent the use of nonemployee representatives, the examiner explained.

Burlington County College and Burlington County College Support Staff, 43 NJPER 78 (N.J. Pub. Emp't Relations Comm'n, H. Exam'r Dec. 12, 2016).

NEW JERSEY EMPLOYER'S LETTERS TO NEGOTIATIONS UNIT MEMBERS ARE UNFAIR PRACTICE

Ruling: Upon considering a union's unfair-practice charge, the New Jersey Public Employment Relations Commission's hearing examiner decided that a school employer violated Employer-Employee Relations Act provisions when it sent letters containing threats of reprisal directly to union members, in violation of the parties' agreed-upon negotiations ground rules. The employer improperly attempted to negotiate directly with employees and intended to put pressure on union membership by communicating a previously unannounced offer expiration date in its June 2012 letter, the examiner found.

What it means: The hearing examiner explained that EERA provisions permit public employers to express opinions about labor relations so long as such statements are not coercive. An employer maintains the right to advise employees of the status of contract negotiations if the communication does not contain a threat of reprisal or promise of benefits.

Somerset Hills Board of Education and Somerset Hills Education Association, 43 NJPER 80 (N.J. Pub. Emp't Relations Comm'n, H. Exam'r Dec. 29, 2016).

COURT RULES ARBITRATOR MUST CONSIDER UNION'S GRIEVANCE OVER STAFFING LEVELS

Ruling: In an unpublished decision, the Michigan Court of Appeals affirmed a state circuit court's decision to grant a union's motion to compel arbitration of a grievance disputing the municipal employer's staffing decision. The appeals court determined that prior decisions on a different grievance and unfair-practice charge did not bar arbitration of this grievance. It concluded that an arbitrator must decide the merits of the parties' dispute.

What it means: The appeals court observed that, in a lawsuit to compel arbitration, a court's inquiry is limited to the gateway question of arbitrability. Arbitration agreements are generally interpreted in the same manner as ordinary contracts.

AFSCME, Local 1128 v. City of Taylor, 30 MPER 46 (Mich. Ct. App. Jan. 19, 2017).

COUNTY COMMITS UNFAIR PRACTICE BY AMENDING RETIREMENT ORDINANCE DURING FACT-FINDING PROCESS

Ruling: In an unpublished decision, the Michigan Court of Appeals affirmed the Michigan Employment Relations Commission's decision regarding an unfair-practice charge. In that charge, a union contended that the county employer violated its good-faith bargaining duty by amending its retirement ordinance. The appeals court upheld MERC's determination that part of the parties' dispute would be more appropriately resolved through the parties' contractual grievance procedure. It also upheld MERC's conclusion that the employer violated its bargaining duty by moving forward with the retirement ordinance amendments when the parties were engaged in the fact-finding process.

What it means: Under Michigan case law, the appeals court noted, the grievance process set forth in the parties' bargaining agreement will be the process that will guide the parties' disputes over matters of contract interpretation. If the parties have included language in their bargaining agreement that recites their resolution of a particular subject, the parties have satisfied their duty to bargain.

Wayne County v. AFSCME, Michigan Council 25 et al., 30 MPER 47 (Mich. Ct. App. Jan. 24, 2017).

EMPLOYER ERRS IN REFUSING TO PARTICIPATE IN 'MODIFIED AGENCY SHOP' ELECTION

Ruling: The California 4th Appellate Court of Appeal denied a county water district's petition for a writ of extraordinary relief. Through that petition, the district challenged the Public Employment Relations Board's ruling that it committed an unfair practice, in violation of Meyers-Milias-Brown Act Section 3502.5, when it refused to consent to a "modified agency fee shop" election. The appeals court held that Section 3502.5 authorizes the proposed "modified agency shop" and that the union satisfied the procedural requirements for a secret ballot election regarding the establishment of an agency shop.

What it means: The appeals court noted that it will generally defer to PERB's construction of labor law provisions within its jurisdiction. It explained that it would follow PERB's interpretation unless that interpretation was clearly erroneous.

Orange County Water District v. Public Employment Relations Board; Orange County Water District Employees Association, 41 PERC 115 (Cal. Ct. App., 4th Dist. Feb. 1, 2017).

PLRB REMANDS CASE FOR CONSIDERATION OF EFFECTS BARGAINING ISSUE

Ruling: The Pennsylvania Labor Relations Board remanded the instant matter to a PLRB hearing examiner for the limited purposes of addressing the issue of whether the Conneaut School District violated its bargaining obligation when it failed to bargain the severable impact of its decision to implement "cyber snow days" instead of traditional snow days, commencing in the 2014-2015 school year.

What it means: Under Section 702 of the Public Employee Relations Act, a public employer has no duty to bargain matters of inherent managerial policy, including the utilization of technology in furtherance of providing its educational services. Here, the school district acted within its managerial prerogative when it decided to provide instruction during inclement weather through its internet-based learning management system. However, a remand to the hearing examiner was necessary to address the unanswered question of whether the district allegedly refused to bargain the severable impact or effects of the cyber snow days.

Conneaut Education Association v. Conneaut School District, 48 PPER 61 (Pa. Labor Relations Bd. Nov. 15, 2016).

3RD CIRCUIT REJECTS DUE PROCESS, DISCRIMINATION CLAIMS OF FORMER TROOPER

Ruling: The 3rd U.S. Circuit Court of Appeals concluded the Pennsylvania State Police afforded a trooper adequate due process in connection with an internal affairs investigation into claims by a female crisis services worker that the trooper improperly touched her while responding to an involuntary-commitment call. The 3rd Circuit affirmed the lower court's grant of summary judgment in favor of the Pennsylvania State Police on the trooper's due process and gender discrimination claims. The appeals court ruled the federal district court properly determined the proffered justifications for the adverse employment action — the trooper's sexual impropriety and his provision of false information during an investigation — were sufficient to overcome the trooper's claims of deprivation of due process, gender discrimination, or the deprivation of his liberty interest in his reputation.

What it means: The 3rd Circuit explained that the State Police comported with constitutional due process requirements before terminating the trooper's protected property interest in his continued employment. Here, the trooper received notice of the allegations against him, an explanation of the evidence and an opportunity to present his side of the story. Additionally, the appeals court found no record evidence the termination decision was a pretext for gender discrimination or that the contract clause which formed the basis of the discharge decision — serious act of deception — was unnecessarily vague such that the trooper would not know his repeated denial of the improper touching accusation could constitute a "serious act of deception."

Gilson v. Pennsylvania State Police et al., 48 PPER 62 (3d Cir. Jan. 23, 2017).

APPELLATE COURT RULES ARBITRATION AWARD DID NOT RUN AFOUL OF PUBLIC POLICY

Ruling: In an unreported decision, the Pennsylvania Commonwealth Court reversed a trial court's decision to vacate, on public policy grounds, an arbitration award that sustained in part and denied in part the consolidated grievances of a high school teacher/coach charged with violating district policy, including having an improper sexual relationship with a former student. An arbitrator determined the interests of justice warranted the mitigation of the termination to a one-year suspension. However, the appellate court concluded the trial court improperly substituted its own judgment regarding the appropriateness of the arbitration award.

What it means: The appellate court explained that by reweighing the facts relating to the timing of the teacher's improper sexual relationship with the former student, the trial court improperly focused its analysis on whether the conduct of the teacher violated public policy instead of whether the award itself violated public policy.

Cornwall-Lebanon School District v. Cornwall-Lebanon Education Association, 48 PPER 63 (Pa. Commw. Ct. Feb. 3, 2017).

RETALIATORY DEMOTION SPARKS UNFAIR-PRACTICE FINDING AGAINST CAREER CENTER

Ruling: A Pennsylvania Labor Relations Board hearing examiner directed the West Side Career & Technology Center to cease and desist from interfering with and coercing a bargaining unit member in the exercise of guaranteed rights and to rescind the employee's demotion to part-time status.

What it means: The employer was unable to rebut the association's prima facie showing that the employee's protected activity was a motivating factor in its decision to demote the employee to part-time status and reduce her pay and benefits accordingly. The hearing examiner explained that the timing of the complained-of action, four days after the teacher's grievance-filing activity and after she received assurances the art program was not slated for reduction, belied the employer's claim it considered reducing the art program weeks before the employee's protected activity.

West Side Career & Technology Center, 48 PPER 64 (Pa. Labor Relations Bd. Feb. 3, 2017).

Supreme Court

CONTINUED FROM PAGE 1

Justice Sotomayor that the EEOC, and not the district court, has discretion in determining the relevance of information requested in a subpoena.

The appeals court cannot review the district court's ruling based on an abuse of discretion standard under Rule 401 because the court is not the primary decision maker regarding relevance in this situation, Kinnaird said.

McLane Co. is challenging the 9th Circuit's reversal of a lower court ruling and its approval of an EEOC subpoena seeking personal information of company employees in an investigation of a worker's sex discrimination claim.

The company has asked the high court to determine the proper standard of review for a court's ruling in an EEOC administrative action, noting that the 9th Circuit is the only appellate court to conduct a de novo review instead of a narrower or more deferential review for clear legal error only.

De novo review requires the appellate court to determine if the trial judge has misconstrued the law, while a clear-error review determines if the judge made an obvious error in deciding the facts.

RELEVANT AND NECESSARY INFO

The case came before the 9th Circuit after the U.S. District Court for the District of Arizona refused to enforce an EEOC subpoena against McLane seeking information related to the company-mandated employee strength test. *EEOC v. McLane Co.*, No. 12-2469, 2012 WL 5868959 (D. Ariz. Nov. 19, 2012).

Damiana Ochoa filed a sex discrimination claim with the EEOC against McLane in 2008 after she was fired for failing to pass the physical capability test after her maternity leave.

She alleged the company violated Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000e, by discriminating against her based on her gender when it terminated her employment.

In investigating Ochoa's claims, the EEOC asked the company for information about the test and the employees who had taken it.

McLane provided some general information, including gender and test scores, but refused to provide "pedigree information" — names, addresses, Social Security numbers and phone numbers — of the test takers.

It also refused to provide information about when and why it had fired employees who failed the test.

The EEOC filed a subpoena enforcement action against the company in Arizona federal court in 2012.

U.S. District Judge G. Murray Snow required McLane to provide some additional information but said the pedigree information was not necessary for the agency to determine if the company used the strength test in a discriminatory way.

The EEOC appealed, and the 9th Circuit panel reversed in part and vacated in part, finding the requested information relevant to the agency's investigation. *EEOC v. McLane Co.*, 804 F.3d 1051 (9th Cir. 2015).

IRRELEVANT INFO

In its petition for certiorari filed with the Supreme Court in April 2016, McLane argued that by allowing the EEOC broad subpoena powers to collect material, the 9th Circuit essentially nullified limits that Title VII places on the commission's jurisdiction.

Opposing the company's petition, the EEOC said the appeals court properly conducted a de novo review of Judge Snow's subpoena decision because the panel found legal error.

The panel determined that the judge erred in ruling that the EEOC did not need certain information to establish if the company's strength test was discriminatory, the agency said.

The high court granted the petition in September.

In subsequent briefing, the EEOC informed the court that it would not defend the 9th Circuit's position at oral argument, saying the appeals court's de novo review position is wrong.

Although it disagreed with the appeals court's methods, the EEOC maintained that it had properly moved to enforce the subpoena.

Both sides agreed that fact-intensive inquiries required for subpoena enforcement are best done at the district court level.

The high court then appointed Kinnaird as amicus curiae to represent the 9th Circuit's position.

ORAL ARGUMENT

Attorney Allison N. Ho, arguing on McLane's behalf, said that by applying a de novo standard, the 9th Circuit "was stepping into the shoes of the district court and making a determination of relevance."

The relevance of subpoenaed information is not abstract, Ho said, and an appeals court that applies a broader review standard can correct any errors of law while still giving the district court appropriate discretion.

Rachel P. Kovner, assistant to the U.S. solicitor general, presented the argument for the EEOC.

Justice Ruth Bader Ginsburg questioned her about why the agency requested the additional information in the subpoena and how the material deemed irrelevant by the District Court contributed to the EEOC's investigation.

Justice Stephen Breyer expressed some concern about the broad scope of the EEOC's subpoena seeking companywide information and questioned how Judge Snow's determination that the information was burdensome could be an abuse of his discretion.

Kovner said the EEOC sought the information to show disparate treatment and disparate impact on male and female employees. She also noted that the agency requested the additional information only after McLane said it had a nationwide testing policy.

Arguing the 9th Circuit's position, Kinnaird said an appeals court cannot consider a district court's abuse of discretion in such a case because the law gives the EEOC the discretion to determine the relevance of evidence.

"That discretion cannot reside in two places," Kinnaird said. WJ

Attorneys:
Petitioner: Allyson N. Ho, Morgan, Lewis & Bockius, Dallas, TX

Respondent: Assistant to the Solicitor General Rachel P. Kovner, Washington DC

Amicus curiae: Stephen B. Kinnaird, Paul Hastings LLP, Washington, DC

Related Filing:
Oral argument transcript: 2017 WL 680462

RECENTLY FILED COMPLAINTS FROM WESTLAW COURT WIRE*

Case Name	Court	Docket #	Filing Date	Allegations	Relief Sought
Haff Poultry Inc. v. Tyson Foods Inc. 2017 WL 390936	E.D. Okla.	17-cv-33	1/27/17	Class action. Tyson Foods and other chicken processing companies have suppressed compensation for broiler chicken farmers below competitive levels by frequently and contemporaneously sharing highly sensitive and confidential compensation data among themselves, in violation of the Sherman Act and the Packers and Stockyards Act.	Class certification, treble damages, interest, fees and costs
McKinney v. MetLife Inc.	D. Conn.	17-cv-173	2/7/17	Class action. MetLife Inc. "deliberately and uniformly denied overtime compensation" to its claims specialists who handled long-term disability claims, in violation of the federal Fair Labor Standards Act and the Connecticut Minimum Wage Act.	Class certification, more than $50 million in liquidated damages and unpaid wages, injunctive and declaratory relief, interest, fees and costs
Kennicott v. Sandia Corp.	D.N.M.	17-cv-188	2/7/17	Class action. Federal contractor Sandia National Laboratories discriminated against female employees in wages, evaluations and promotions, and retaliated against workers who complained about the gender discrimination by reducing their wages and denying promotions, in violation of Title VII of the Civil Rights Act of 1964, the New Mexico Human Rights Act and the state's Fair Pay for Women Act.	Class certification; compensatory, exemplary and punitive damages, including back pay; declaratory and injunctive relief; reinstatement or front pay; interest; fees and costs
Riley v. United Parcel Service	M.D. Fla.	17-cv-254	2/13/17	Class action. UPS wrongfully performed background checks on prospective and current employees by using consumer reports without giving the workers the required notice or providing them any opportunity to review the information on the reports, in violation of the Fair Credit Reporting Act of 1970.	Class certification, statutory and punitive damages, declaratory relief, expenses, fees and costs
Johnson v. Oracle America Inc. 2017 WL 589270	N.D. Cal.	17-cv-725	2/14/17	Class action. Technology company Oracle America knowingly, intentionally and willfully failed and refused to pay its California-based sales representatives the full and complete amount of commissions they earned, in violation of the California Labor Code and the state's unfair-competition law.	Class certification, more than $150 million in damages, injunctive relief, statutory penalties, restitution, interest, fees and costs

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RECENTLY FILED COMPLAINTS FROM WESTLAW COURT WIRE*

Case Name	Court	Docket #	Filing Date	Allegations	Relief Sought
Campbell v. Magic Leap Inc.	S.D. Fla.	17-cv-60327	2/13/17	Virtual reality startup Magic Leap Inc. subjected its vice president of strategic marketing to a hostile work environment and gender discrimination when she tried to make the company's product more appealing to women and the workplace more diverse, and terminated her in retaliation for opposing illegal gender discrimination, in violation of Title VII of the Civil Rights Act of 1964.	Punitive damages, including back pay, declaratory relief, reinstatement or front pay, interest, fees and costs
Ackerson v. Rector and Visitors of the University of Virginia	W.D. Va.	17-cv-11	2/15/17	The University of Virginia discriminated against an assistant vice provost on the basis of her sex by failing to pay her equal pay for equal work in comparison with her male counterparts and retaliating against her when she complained of pay bias or reported her disability, in violation of the Equal Pay Act of 1963, Title IX of the Education Amendments of 1972, Title VII of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973.	Promotion; liquidated, compensatory and punitive damages including front and back pay; fees and costs

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CASE AND DOCUMENT INDEX