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FAIR LABOR STANDARDS ACT

Wage-and-hour class action certified against BellSouth

A group of BellSouth "field managers" share the same highly regimented job duties and can be conditionally certified as a class to sue the company for overtime under the federal Fair Labor Standards Act, a federal judge in Atlanta has ruled.

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REUTERS/Tami Chappell

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The SEC's new rules for the Dodd-Frank whistle-blower program

R. Scott Oswald and Nicholas Woodfield, attorneys with the Employment Law Group, examine the new rules implementing the whistle-blower provisions of the Dodd-Frank Act.

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The SEC's new rules for the Dodd-Frank whistle-blower program

By R. Scott Oswald, Esq., and Nicholas Woodfield, Esq.
Employment Law Group

On July 21, 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. Law No. 111-203 (codified in scattered sections of 7, 12 and 15 U.S.C.), in response to the financial crises triggered by the improper and illegal activities of large financial institutions.

The Dodd-Frank Act established the new Consumer Financial Protection Bureau, the mission of which is to make markets for consumer financial products and services work for every American and to detect and prevent financial fraud.[1]

In addition to establishing a new watchdog agency, the law also enlists the help of whistle-blowers. Dodd-Frank requires the Securities and Exchange Commission to reward whistle-blowers who disclose original information regarding violations of securities law that result in monetary sanctions exceeding $1 million. The reward can range from between 10 percent and 30 percent of the amount recouped by the SEC. Further, employers are prohibited from retaliating against those whistle-blowers who do come forward.

The SEC had a largely unsuccessful whistle-blower reward program prior to the enactment of the Dodd-Frank Act. The reward ranged from 0 percent to 10 percent, and the program primarily targeted insider trading. However, the new SEC program is modeled after the successful Internal Revenue Service whistle-blower program established in 2006, which has already resulted in the recovery of millions of tax dollars because of tips provided by whistle-blowers.

Another source of inspiration for the new SEC program is the *qui tam* provision of the federal False Claims Act. Originally enacted during Abraham Lincoln's presidency as an answer to the unscrupulous government contractors who were selling to the U.S. Army, *inter alia*, faulty rifles and decrepit horses, the FCA authorizes whistle-blowers to sue contractors on behalf of the federal government to recover ill-gotten funds. Under the FCA, billions of taxpayer dollars have been recovered in the last two decades alone.

SEC PROPOSES NEW WHISTLE-BLOWER RULES

In November 2010, the SEC proposed a set of rules and regulations for implementing the Dodd-Frank whistle-blower program. During this rule-making process, the SEC received hundreds of comments from companies, individuals and law firms.

> The False Claims Act was originally enacted to stop the sale of faulty rifles and decrepit horses to the U.S. army in the mid-19th century.

In particular, corporations argued that employees should be required to report all securities violations to internal compliance programs, noting the requirement for corporations to maintain these costly programs.[2] Whistle-blower advocates countered that broader protections and greater incentives for whistle-blowers are necessary to prevent another financial crisis.

On May 25, 2011, the SEC adopted, by a 3-2 vote, Rule 21F implementing the Section 922 whistle-blower provisions of the Dodd-Frank Act. These rules were effective Aug. 12, 2011. In the end, the SEC declined to require whistle-blowers to first report securities law violations internally.

However, to encourage internal reporting, the SEC included internal reporting as a factor that may increase the size of whistle-blower rewards for those whistle-blowers who first report violations internally.[3] Whistle-blowers who report violations internally and then to the SEC within 120 days are still entitled to a reward, even if the employer later reports the same violations to the SEC.[4]

The finalized rules also delineate the types of disclosures that qualify for a reward and the types of individuals — the bad actors — who are generally prohibited from receiving a reward. Only those whistle-blowers who provide original information to the SEC leading to $1 million or more in sanctions are eligible for a reward. Moreover, attorneys working for the employer are often ineligible except where one of the enumerated special exceptions is applicable.

According to the SEC, the new law is already producing its intended results.

"For an agency with limited resources like the SEC, it is critical to be able to leverage the resources of people who may have first-hand information about violations of the securities laws," SEC chief Mary L. Schapiro said. "While the SEC has a history of receiving a high volume of tips and complaints, the quality of the tips we have received has been better since Dodd-Frank became law. We expect this trend to continue, and these final rules map out simplified and transparent procedures for whistle-blowers to provide us critical information."[5]

ELIGIBILITY OF A DISCLOSURE

For the whistle-blower to be eligible for a reward under the Dodd-Frank program, the disclosure must relate to a violation of one or more securities laws, rules or regulations. Importantly, the Dodd-Frank Act explicitly includes within the purview of the SEC any violations of the Sarbanes-Oxley Act or the Foreign Corrupt Practices Act. SOX requires corporations to abide by certain accounting rules. The FCPA prohibits U.S. corporations from bribing foreign officials.

A whistle-blower must *voluntarily* provide the SEC with *original information* regarding a *securities law violation* that *results in sanctions exceeding $1 million* in order to be eligible for a reward. Disclosures are *voluntary* so long as the whistle-blower discloses the information to the SEC *before* the information is requested by:

- The SEC or in connection with an investigation by:
  - The Public Company Accounting Oversight Board or any self-regulatory organization.
  - Congress.
  - Any other authority of the federal government.
  - A state attorney general or securities regulatory authority.[6]

The $1 million threshold can be achieved by aggregating the monetary sanctions resulting from two or more SEC, administrative or judicial proceedings arising from the same nucleus of operative facts.[7]

"The same-nucleus-of-operative-facts test is a well-established legal standard that is satisfied where two proceedings, although brought separately, share such a close factual basis that the proceedings might logically have been brought together in one proceeding."[8] Monetary sanctions may include any money, penalties, disgorgement or interest resulting from SEC enforcement.[9]

SEC chief Mary Schapiro reports that the quality of tips and complaints the commission has received has improved since Dodd-Frank became law.

The SEC defines *original information* as information that is based upon the whistle-blower's independent knowledge or independent analysis and not already known to the SEC.[10] Independent knowledge pertains to any factual information in the whistle-blower's possession that is not derived exclusively from public sources, such as the news media, judicial proceedings or government reports.[11]

However, a whistle-blower's independent analysis may also be based upon public sources so long as that analysis reveals information that is generally unknown to the public.[12] The new rules provide that a whistle-blower's disclosure through an employer's internal compliance program maintains its original information status so long as the whistle-blower also discloses that information to the SEC within 120 days.[13]

Requests for information made by the SEC to the employer are not automatically directed at every employee. For example, an SEC request made to the accounting department of a company probably would *not* preclude an employee outside the accounting department from receiving a reward in return for providing information to the SEC. In addition, requests for information made by the employer during its own internal investigations would not preclude an employee from later making a voluntary disclosure to the SEC.

Finally, a disclosure must be sufficiently specific, credible and timely such that it causes the SEC to open an investigation, or otherwise contributes significantly to a new or existing investigation.[14]

ELIGIBILITY OF A WHISTLE-BLOWER

The SEC included rules that make certain individuals ineligible for a reward in order to avoid rewarding improper behavior. For instance, a preexisting legal or contractual duty to report information to the SEC precludes a whistle-blower from a reward.[15] However, the duty must be one that is owed to the government. Therefore, an employer could not preclude its employees from eligibility by requiring them to report securities law violations to the SEC.

Moreover, the SEC generally will not grant rewards to:

- Attorneys (including in-house attorneys) and non-attorneys in cases in which the information is subject to attorney–client privilege.
- Public accountants working on SEC engagements in cases in which the information relates to the engagement client.
- Personnel with compliance-related responsibilities.
- Officers, directors, trustees or partners who learn the information in connection with the corporation's internal reporting, compliance or auditing procedures.
- Individuals who obtained the information through the commission of a crime.
- Officials of foreign governments.

In an important victory for whistle-blower advocates, the SEC included exceptions permitting eligibility to officers, public accountants and other personnel with compliance-related responsibilities when:

- The whistle-blower reasonably believes that disclosing the information to the SEC is necessary to prevent the company from substantially harming the financial interests or property of the company or its investors.
- The whistle-blower reasonably believes the company is impeding the investigation of the misconduct.
- At least 120 days have elapsed since the whistle-blower provided the information to internal compliance personnel or his or her supervisor.
- At least 120 days have elapsed since the whistle-blower received the information, if he or she received the information under circumstances indicating that internal compliance personnel were already aware of the information.[16]

The foregoing exceptions permit employees who are the most likely to uncover wrongdoing to blow the whistle to the SEC when their company refuses or otherwise fails to address the misconduct.

THE ANTI-RETALIATION PROVISION

Whistle-blowers who report that what they *reasonably believe* to be a *possible* securities law violation has occurred, is occurring, or is about to occur will qualify for protection under the anti-retaliation provisions of the Dodd-Frank Act. The disclosure must have a facially *plausible* relationship to a securities law violation, but it does not necessarily have to be material. Conversely, a frivolous disclosure would *not* qualify an employee for whistle-blower protection under the new rules.

The rules prohibit employers from interfering with the efforts of whistle-blowers to disclose information to the SEC. The SEC is permitted to enforce the anti-retaliation provisions by investigating and sanctioning employers who practice illegal retaliation.[17] Should the SEC or the courts find an employer liable for retaliation, the prevailing whistle-blower can:

- Be reinstated to his or her former position.
- Recover double the wages owed to him or her in the form of back pay with interest.
- Recover attorney fees and other litigation costs.

> The SEC rules bar those with a pre-existing duty to report information to the commission from receiving a reward.

CONCLUSION

The SEC's rules are consistent with the intent of Congress to create a robust whistle-blower reward and protection law. Under the new SEC rules, protections for whistle-blowers are broadened and the reward program is strengthened. Employees who report violations internally to their employer can receive protection and can receive a reward. As such, the rules reflect the spirit of the act, and the next question will be whether the court will continue to interpret the Dodd-Frank Act and its enabling regulations in a consistent manner. WJ

NOTES

[1] Consumer Financial Protection Bureau, http://www.consumerfinance.gov/the-bureau.

[2] In the wake of several high-profile corporate and accounting scandals, including those of Enron and WorldCom, Congress passed the Sarbanes-Oxley Act of 2002 to prevent future scandals by requiring corporations to implement proper internal compliance programs meant to address accounting irregularities.

[3] Rule 21F-6(a) at 34,330, 34,358.

[4] Rule 21F-4(c)(3) at 34,325.

[5] Press Release, SEC, SEC Adopts Rules to Establish Whistleblower Program (May 25, 2011), *available at* http://www.sec.gov/news/press/2011/2011-116.htm.

[6] Securities Whistleblower Incentives and Protections; Final Rule; Rule 21F-4(a), 76 Fed. Reg. 34,299, 34,306 (June 13, 2011) (to be codified at 17 C.F.R. pt. 240 and 249).

[7] Rule 21F-4(d) at 34,327.

[8] *Id.* at 34,328; *see, e.g., Harper v. AutoAlliance Int'l*, 392 F.3d 195, 209 (6th Cir. 2004).

[9] Rule 21F-4(e) at 34,329.

[10] Rule 21F-4(b) at 34,310.

[11] Rule 21F-4(b)(2) at 34,311.

[12] Rule 21F-4(b)(3) at 34,312.

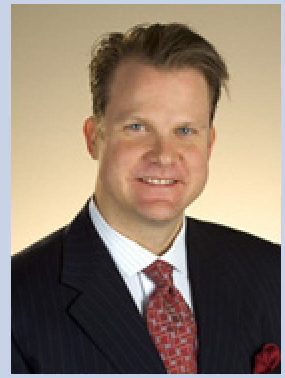
[13] Rule 21F-4(c). at 34,323.

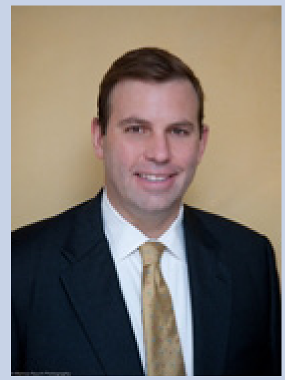
[14] Rule 21F-4(c)(1) at 34,324.

[15] Rule 21F-4(a) at 34,306.

[16] Rule 21F-4(b)(4)(v) at 34,317.

[17] Rule 21F-2(b)(2) at 34,304.





R. Scott Oswald, (top) managing principal of the **Employment Law Group** in Washington, concentrates his practice on representing individual plaintiffs in whistle-blower, *qui tam* and employment rights litigation. He has extensive jury trial experience litigating claims under the Family and Medical Leave Act, the Americans with Disabilities Act, Title VII, and other statutory discrimination claims. **Nicholas Woodfield**, (bottom) a principal in the firm, focuses his practice on non-payment of wages and misclassification claims, Sarbanes-Oxley whistle-blower complaints, False Claims Act (*qui tam*) claims, and discrimination and retaliation cases.

BellSouth

CONTINUED FROM PAGE 1

Lawson et al. v. BellSouth Communications, No. 09-3528, 2011 WL 3608462 (N.D. Ga., Atlanta Div. Aug. 16, 2011).

Chief U.S. District Judge Julie Carnes of the Northern District of Georgia rejected BellSouth's argument that the plaintiffs do not have the same jobs because each field manager performs work outside the checklist of duties they must complete each day.

The judge said that for employees to be similarly situated for certification purposes, they "need only have similar job positions, not identical ones."

The five named and 38 opt-in plaintiffs are current and former field managers for BellSouth.

The plaintiffs say that although their job duties make them essentially low-level clerks, BellSouth has improperly classified them as executive and administrative personnel exempt from the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201.

The field managers have virtually no discretion as to how they do their jobs, cannot hire or fire the technicians with whom they work, and spend most of their workday doing paperwork and entering computer data, the suit says.

The work is "highly regimented, micromanaged and lacks true managerial authority," the plaintiffs say.

According to the suit, the plaintiffs work on the average between 50 and 70 hours per week, including being on call 24 hours a day for seven days. During the on-call time, field managers must respond to calls and email after hours, may not drink alcohol, and cannot leave their territories.

The plaintiffs contend that they are entitled to overtime for this "duty shift" and for other off-the-clock work they perform each day.

> For employees to be "similarly situated" for certification purposes, they "need only have similar job positions, not identical ones," the judge said.

The plaintiffs moved for conditional certification of the case as a collective action to cover all field managers employed by BellSouth since December 2006. Judge Carnes granted the motion.

She found that the plaintiffs met the requirements for conditional certification by showing that:

- Other employees wish to opt in.
- Those employees are similarly situated in their job requirements and pay.

Judge Carnes said the plaintiffs had shown that everyone in the proposed class has the same responsibilities, "no matter what state or business … they work in."

Corporate "unity" is achieved through a management system that dictates a daily regimen that specifies exactly what the field managers "should be doing at all times throughout the day," the judge said.

She rejected BellSouth's contention that collective treatment of the claims is inappropriate because the court would be required to engage in a "highly individualized, fact-intensive inquiry to determine whether each employee is exempt under the FLSA."

The 11th U.S. Circuit Court of Appeals has stated on more than one occasion that a fact-intensive inquiry does not bar a collective action where plaintiffs share common job traits, Judge Carnes said.

Finally, the judge ordered the plaintiffs to remove her name and signature line from the notice of collective action, saying her name "could be perceived as an implicit judicial endorsement of the action's merits." WJ

Related Court Document:
Order: 2011 WL 3608462

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

NLRB issues report on 14 social media cases

The National Labor Relations Board has released a report detailing 14 cases involving charges of unfair labor practices brought when employees were disciplined for posting messages on social media sites.

NLRB regional directors asked the board for advice about how to handle cases where employees' use of social networks and websites such as Facebook, Twitter and YouTube collide with workplace rules, NLRB acting General Counsel Lafe Solomon said in a press release.

In one of the cases, the board found a "textbook example" of concerted activity when one employee initiated a Facebook discussion of working conditions by appealing to her co-workers for assistance in dealing with a supervisor who objected to her work performance.

The NLRB said the employees were protected even though there was "swearing and/or sarcasm" in some of the posts because the postings were, overall, "objectively quite innocuous."

In another case, a sports bar and restaurant fired two employees who participated in a Facebook conversation initiated by a former co-worker who criticized the employer's tax withholding policies.

The NLRB found the terminations and the employer's Internet/blogging policy barring "inappropriate discussions" were unlawful. The employer's threats to sue the employees who participated in the Facebook postings, which were allegedly "defamatory," were also unlawful, the board said.

AIRING OF GRIEVANCES NOT PROTECTED

A newspaper reporter fired for posting "inappropriate and unprofessional" tweets to a work-related Twitter account was not engaged in protected concerted activity, the NLRB said.

The board explained that the reporter's conduct did not relate to the terms and conditions of his employment or "seek to involve other employees in issues related to employment." The employee was simply airing his grievances about the paper's copy editors and his beat, the board found.

The NLRB similarly concluded that a bartender who posted a Facebook message about his employer's tipping policy was not engaged in concerted activity. There had been no employee meetings or attempts to initiate group action about the policy, the board noted.

A union violated the National Labor Relations Act when it videotaped interviews of employees at a non-union jobsite about their immigration status and then posted an edited version of the videotape on YouTube and the local union's Facebook page.

The union coercively interviewed the employees in circumstances that could suggest they were in danger of being deported for immigration violations, the board said. That interfered with the employees' protected right to work for a non-union employer, the report said.

OVERLY BROAD POLICIES

The NLRB found the following social media policies overly broad:

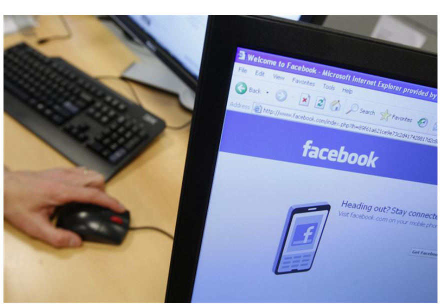
- A prohibition on posting "private or confidential" information without a definition of what the employer considered "private or confidential."
- A ban on postings that would "embarrass, harass or defame" the employer or its employees, officers, board members or representatives. The prohibition could be used to suppress protected criticism of the employer's labor policies or treatment of employees.
- A prohibition on using an employer's logos or photographs of its stores on social media sites because this could restrain employees from engaging in protected activity. As an example, the board cited pictures of employees carrying picket signs with the employer's name.

However, a narrowly drawn restriction on harassing conduct to pressure co-workers to connect on social media was not unlawful, the board said.

Finally, an employer's rule restricting employee contact with media was lawful, the NLRB said. The policy could not reasonably be interpreted to bar employees from speaking on their own behalf to reporters, the board said.

Here, the policy was designed to ensure a "consistent, controlled" company message and limited contact with the media only to the extent necessary to effect that policy, the board said.

Scan this code with your QR reader to see the report:



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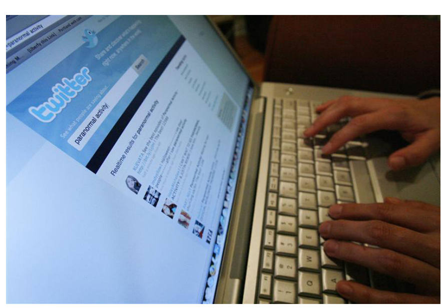

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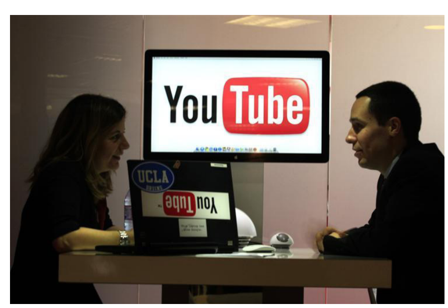

REUTERS Eric Gaillard

The NLRB's investigations were prompted by requests for advice as to how to handle cases where multimedia communications collide with workplace rules about Facebook, Twitter and YouTube postings.

Court, not arbitrator, must rule on delegation clause in arbitration agreement

A California appeals court panel has ruled that a court must decide if an arbitration agreement is unconscionable because it delegates authority to an arbitrator to decide if the pact itself is valid.

***Collins v. Contemporary Services Corp.*, No. B227951, 2011 WL 3630516 (Cal. Ct. App., 2d Dist., Div. 8 Aug. 18, 2011).**

The 2nd District Court of Appeal reversed a trial court order to compel arbitration of only the individual wage-and-hour claims of an employee who had filed a class action against his employer.

The appeals court panel agreed with the argument of plaintiff Yaree Collins that the trial court and not the arbitrator must decide if the arbitration agreement is unconscionable because it does not allow for arbitration of class-wide claims.

The trial court granted the motion to compel with respect to Collins' personal claims, interpreting the arbitration agreement as precluding class actions.

The court also cited the then-recent U.S. Supreme Court ruling in *Rent-a-Center West Inc. v. Jackson*, 130 S. Ct. 2772 (2010). In *Rent-a-Center*, the justices held that a delegation clause in an employment contract arbitration agreement, which gave the arbitrator exclusive authority to decide questions of the agreement's "enforceability," was a valid delegation.

> The lower court should not have validated the delegation clause without meaningful evaluation of whether the clause was unconscionable, the appeals court said.

When a delegation clause is challenged under California's unconscionability law, Cal. Civ. Code § 1670.5, it is up to a court to decide if it is enforceable, the panel concluded.

When Contemporary Services Corp. hired Collins, the company insisted that he sign an arbitration agreement. The agreement did not mention arbitration of class claims, but did provide that "each party shall be entitled to all types of remedies and relief otherwise available in court," the panel noted.

In February 2010 Collins filed a class action wage-and-hour complaint against CSC in the Los Angeles County Superior Court. He alleged violations of state law with respect to meal and rest breaks, overtime pay, and itemized wage statements.

CSC moved to compel arbitration, and Collins opposed. He argued that if the arbitration agreement were interpreted not to provide for arbitration of class-wide claims, it was unconscionable and could not be enforced.

Therefore, Collins' contention that the arbitration agreement was unconscionable must be resolved by the arbitrator, the lower court said.

Collins appealed, arguing that the trial court did not properly apply the *Rent-a-Center* decision to his case.

The appellate panel agreed and reversed, holding that when a delegation clause is challenged under California's unconscionability law, a court must decide if the delegation clause is enforceable.

In Collins' case, the trial court erred when it applied *Rent-a-Center* to validate the delegation clause without meaningful evaluation of whether the clause was unconscionable, the panel said.

Delegation should not occur until the trial court has ruled on the issue of whether the delegation clause itself is unconscionable, the panel said. If the trial court concludes that the delegation clause is not unconscionable, it should again refer the issue of the unconscionability of the entire arbitration agreement to the arbitrator, it added.

If the trial court finds that the delegation clause is unconscionable, however, it must retain the case and rule on the broader issue of the unconscionability of the arbitration agreement as a whole, the panel explained.

The appeals court said it would be premature for the panel itself to rule on whether the delegation clause is unconscionable.

"The decision must initially be made by the trial court upon development of a record showing the respective benefits and hardships to both parties in the event of a delegation or nondelegation," the panel explained. WJ

Related Court Document:
Opinion: 2011 WL 3630516

See Document Section B (P. 28) for the opinion.

Bases for the court's ruling

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011)

Discover Bank v. Superior Court, 36 Cal. 4th 148 (Cal. 2005)

First Options of Chicago v. Kaplan, 514 U.S. 938 (1995)

Gentry v. Superior Court, 42 Cal. 4th 443 (Cal. 2007)

Howsan v. Dean Witter Reynolds Inc., 537 U.S. 79 (2002)

Murphy v. Check 'N Go of California, 156 Cal. App. 4th 138 (Cal. Ct. App., 1st Dist. 2007)

Ontiveros v. DHL Express (USA), 164 Cal. App. 4th 494 (Cal. Ct. App., 1st Dist. 2008)

Rent-a-Center West Inc. v. Jackson, 130 S. Ct. 2772 (2010)

Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 130 S. Ct. 1758 (2010)

CLAIM: WRONGFUL TERMINATION

Award amount: $0

An ice plant operator who failed to rebut the legitimate business reason his employer gave for firing him cannot show that his termination was illegal, an American Arbitration Association arbitrator has ruled. The arbitrator said the claimant could not show that photographs of problems at the ice plant had been altered so that it looked like he was not doing his job, or that his termination counseling form contained defamatory statements. The company decided to fire the claimant after a foreman who covered while the claimant was on leave discovered and photographed dirty equipment and other sanitation issues. The company concluded that the claimant had lied on the paperwork he completed to verify that conditions were sanitary.

In re Arbitration Between [Claimant] and [Respondent] (Engineering, Accounting, Research, Management and Related Services), No. [Redacted], 2011 WL 3460216 (Am. Arbitration Ass'n July 25, 2011).

Related Document:
Award: 2011 WL 3460216

CLAIM: DISABILITY DISCRIMINATION

Award amount: $390,000

An American Arbitration Association arbitrator has awarded a total of $391,000 to a California health care professional with post-polio syndrome who claimed her employer discriminated against her based on her disability, refused to discuss possible accommodations for her physical limitations and retaliated against her when she complained. The award included attorney fees, expert witness fees and "miscellaneous costs." The arbitrator determined that the hourly rates for the attorneys were customary and there was no duplication of services among the firms. In addition, the arbitrator allowed $11,000 in costs for legal research provided by an outside computer service and $815 for food, lodging, mileage and parking costs for the disabled claimant. However, the arbitrator disallowed $57,000 for arbitration transcripts and $3,880 for stationery and fax costs.

In re Arbitration Between [Claimant] and [Respondent] (Health Services), No. [Redacted], 2011 WL 3460204 (Am. Arbitration Ass'n July 25, 2011).

Related Document:
Award: 2011 WL 3460204

CLAIM: RACE DISCRIMINATION

Award amount: $0

A white loss prevention detective for a Connecticut clothing store lost her race discrimination case against her employer because she could not show any instances other than her own where the store hired or promoted a black candidate over a white candidate, an American Arbitration Associated arbitrator has decided. The detective was working part time and applied for a full-time position as a loss prevention manager. The employer demonstrated that the black candidate it promoted instead was more experienced, had more seniority and had shown he could work effectively with store personnel, the arbitrator noted. He rejected the detective's attempt to show race discrimination through a Facebook posting, finding no way to verify the post. The detective voluntarily resigned for medical reasons after her bid for a promotion was denied.

In re Arbitration Between [Claimant] and [Respondent] (Apparel and Accessory Stores), No. [Redacted], 2011 WL 3460205 (Am. Arbitration Ass'n July 18, 2011).

Related Document:
Award: 2011 WL 3460205

CLAIM: DISABILITY DISCRIMINATION:

Award amount: $40,000

An American Arbitration Association arbitrator has awarded $30,000 in damages and $10,000 in legal fees to an employee who claimed her employer refused to accommodate the herniated disk she sustained when a co-worker "assaulted" her at an off-site training session. The arbitrator found no evidence of discrimination, retaliation or intentional infliction of emotional distress stemming from the incident. However, he said it was a "disgrace" that the company ignored the employee's repeated email requests for the stool recommended by her doctor. He also concluded that the company should have given the employee a reduced workday along with the stool. These accommodations were intended to be short-term and would have been easy for the company to arrange, he said.

In re Arbitration Between [Claimant] and [Respondent] (Insurance Carriers), No. [Redacted], 2011 WL 3460217 (Am. Arbitration Ass'n July 14, 2011).

Related Document:
Award: 2011 WL 3460217

REUTERS/Larry Downing

U.S. Secretary of Transportation Ray LaHood urged Congress July 28 to end a partial shutdown of the Federal Aviation Administration and restore full funding to the agency.

FAA FURLOUGH

House bill seeks back pay for furloughed FAA workers

Proposed legislation would ensure back pay for Federal Aviation Administration employees who were furloughed when the agency was partially shut down this summer.

The bipartisan House bill, H.R. 2814, known as the Furloughed FAA Employees Compensation Act, was introduced by U.S. Rep. Frank LoBiondo, R-N.J.

The legislation would give the transportation secretary the authority to pay the salaries and benefits from the Airport and Airway Trust Fund.

About 4,000 FAA employees were furloughed during the partial shutdown between July 22 and Aug. 5 when Congress failed to approve the extension of the agency's authorization.

The lack of an agreement on reauthorization halted the FAA's construction, planning, airport certification and other projects, according to the agency's website.

Transportation and Infrastructure Committee Chairman John L. Mica, R-Fla., praised the legislation in a statement.

"This legislation is the right thing to do to ensure that the thousands of hardworking FAA employees who got temporarily left behind by the unnecessary partial shutdown of the agency will not be financially penalized," Mica said.

"The House and Senate must now work to ensure the end of a four-and-a-half-year delay in passing a long-term FAA bill," he added.

In addition to LoBiondo and Mica, the legislation was sponsored by Peter King, R-N.Y.; Lynn Westmoreland, R-Ga.; Gerry Connolly, D-Va.; and Jon Runyan, R-N.J. WJ

Scan this code with your QR reader to see the bill:

Judge tosses billing-fraud claims; pharmacy still faces retaliation suit

Although a federal judge in Seattle has dismissed a billing manager's claim that the pharmacy company where he worked defrauded the Medicare program by submitting false billings for prescription drugs, he allowed a retaliatory-discharge claim to proceed.

United States ex rel. Grayson v. Genoa Healthcare et al., No. C09-506, 2011 WL 2670079 (W.D. Wash. July 6, 2011).

U.S. District Judge Thomas S. Zilly of the Western District of Washington ruled that plaintiff Sandlin Grayson's various fraud allegations did not state a claim under Federal Rule of Civil Procedure 12(b)(6) or meet the particularity requirements of Rule 9(b).

However, Grayson sufficiently alleged he was unlawfully fired because he took part in protected whistle-blower activity, the judge said.

According to the opinion, Sandlin was a corporate billing manager for Genoa Healthcare from October 2008 until he was fired in April 2009.

Genoa, which operates pharmacies in community health centers, serves large numbers of Medicare beneficiaries.

Grayson alleges Genoa's billing practices violated the False Claims Act, 31 U.S.C. § 3729. He said the billings were fraudulent under three theories:

- Some Genoa pharmacies were routinely waiving copayments.
- Genoa had billed Medicare for at least some drugs that were never dispensed to patients.
- One Genoa branch altered dates of service to ensure acceptance of Medicare claims.

He also asserted he was illegally discharged under Section 3730(h) of the FCA in retaliation for opposing the company's practices.

Genoa filed a motion to dismiss all of Grayson's claims.

Judge Zilly concluded Grayson's first two billing-fraud theories failed to satisfy both Rule 12(b)(6) and Rule 9(b).

> "The complaint does not provide reliable indicia that lead to a strong inference that false claims were actually submitted," the judge said.

Grayson did not state a claim under Rule 12(b)(6) concerning the copayment-waiver theory because the complaint did not cite any authority for the proposition that the waiver of copayments alone could result in a false claim, the judge said.

The judge said the complaint also failed to state a claim as to Grayson's second theory because it did not allege that Genoa knowingly submitted bills for drugs it did not dispense or that the firm intended to deceive Medicare.

Moreover, none of the theories met Rule 9(b)'s requirement that a plaintiff lay out with particularity the "who, what, where, when and how" of the alleged fraudulent activity, Judge Zilly said.

Grayson failed to provide sufficient detail under any of his three theories that false claims for medications were actually submitted to Medicare, the judge said.

He dismissed the billing fraud claims without prejudice, meaning Grayson can file an amended complaint.

However, Judge Zilly refused to dismiss the accusation of unlawful discharge, saying the complaint alleged "sufficient facts to constitute a plausible FCA retaliation claim."

He noted Grayson alleges he sent the Genoa board of directors an email clearly stating his belief that the firm had implemented a plan to defraud Medicare.

This constitutes an adequate allegation that Genoa knew Grayson was engaged in protected whistle-blower activity, a necessary element for stating an FCA retaliation claim, the judge said. WJ

Attorneys:
Plaintiff: Stephen A. Teller, Teller & Associates, Seattle

Defendant: David B. Robbins, Bennett Bigelow & Leedom, Seattle

Related Court Document:
Order: 2011 WL 2670079

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

$5 million excess D&O policy covers Gateway employees

A California federal judge has held that an insurer breached its contract by refusing to reimburse policyholder Gateway Inc.'s defense costs when the computer manufacturer's employees were required to testify in a Securities and Exchange Commission lawsuit.

Gateway Inc. v. Gulf Insurance Co., No. 10-CV-1720-WQH-JMA, 2011 WL 3607335 (S.D. Cal. Aug. 15, 2011).

U.S. District Judge William Q. Hayes of the Southern District of California found that Travelers Indemnity Co.'s excess directors' and officers' insurance policy covered current and former employees if the underlying claim alleged a securities law violation.

According to the judge's order, Gateway had three effective D&O liability policies with different insurers when the SEC began to investigate the company for alleged securities violations in 2000:

- Lloyd's of London issued the primary policy, which offered $10 million in coverage.
- Zurich-American Insurance Co. issued an excess policy, which offered another $10 million in coverage once Gateway exhausted the primary policy.
- Gulf Insurance Co., which later merged into Travelers, issued a second excess policy that offered $15 million in coverage once Gateway exhausted the other two policies.

For the SEC investigation, Gateway retained law firm Morrison & Foerster as its defense counsel.

The parties reached a settlement agreement in 2003. The terms required Gateway to fully cooperate with any ancillary investigations and to allow SEC staff members to interview current and former Gateway employees, the computer company explained in court documents. By that time, Gateway had exhausted its policy with Lloyd's.

Following Gateway's settlement, the SEC sued three former directors and officers. The agency asked for Gateway's cooperation to interview current and former employees regarding the ex-directors' and officers' alleged securities violations, and, as dictated by its own settlement terms, Gateway complied.

Although the primary and excess insurance policies mainly covered the company and its directors and officers, the definition of "directors and officers" included Gateway employees "to the extent any claim is for a securities law violation."

Therefore, it asked for Zurich's approval to again retain Morrison & Foerster as counsel for both the company and the employees facing or potentially facing SEC subpoenas. It noted the firm's familiarity with the issues from its previous representations and Zurich approved the defense fees.

By May 2004, Gateway had exhausted Zurich's policy and, the next month, it asked Travelers to reimburse its legal costs. Travelers waited almost one year, "when it gave Gateway an arbitrary advance of $500,000 'pending a determination of Travelers' actual obligations,'" Gateway said in court documents.

REUTERS/Stringer Malaysia

The judge pointed out that California case law requires courts to interpret ambiguities in the policyholder's favor.

Travelers continued to delay reimbursement, paid in infrequent spurts and finally refused payment altogether Oct. 2, 2007.

Travelers sent Gateway a written notice denying that its policy covered Morrison & Foerster's representation of Gateway's employees. It argued that an endorsement in the policy explicitly limited coverage to employees named as co-defendants.

The insurer also asserted that this endorsement applied even when the underlying claim involved a securities law violation.

In turn, Gateway filed its breach-of-contract lawsuit.

After hearing the arguments, Judge Hayes decided that Travelers and Gateway both offered valid arguments regarding whether the policy offered coverage when the SEC sent subpoenas to employees who were not named as defendants in the lawsuit.

Judge Hayes agreed with Gateway, however, and ruled that the two sections could be read congruently. Additionally, he pointed out, California case law requires courts to interpret ambiguities in the policyholder's favor.

Therefore, he held that Travelers breached its contract by refusing reimbursement. WJ

Attorneys:
Plaintiff: Courtney L. Gregory and Matthew V. Herron, Herronlaw, San Diego

Defendant: David J. Billings, Anderson McPharlin & Connors, Los Angeles

Related Court Document:
Order: 2011 WL 3607335

Initial OK for $2 million Wal-Mart COLI settlement in Florida

A federal judge has tentatively approved the settlement of a Florida class-action suit that alleged Wal-Mart improperly took out company-owned life insurance policies and wrongfully profited from the deaths of rank-and-file employees.

REUTERS/Robert Galbraith

Atkinson v. Wal-Mart Stores Inc., No. 8:08-CV-00691-JSM, order granting preliminary settlement approval entered (M.D. Fla., Tampa Div. Aug. 11, 2011).

The order signed Aug. 11 by U.S. District Judge James S. Moody of the Middle District of Florida potentially closes the case for the 223 families in the proposed settlement class.

According to court documents, businesses historically took out company-owned life insurance, or COLI, policies for executives because they had an invested financial interest in the lives of these individuals.

In the late 1980s, insurance companies began to aggressively market COLI policies for lower-level employees, promising tax incentives for large corporations. With the advice of its financial and legal counsel, Wal-Mart began to insure the lives of its rank-and-file workers nationwide in 1993.

The Florida class action grew from two lawsuits filed by residents Wayne Atkinson and Richard Armatrout, whose wives had worked for Wal-Mart. The men said the retail giant improperly received COLI benefits after their wives died.

Both men sued individually on behalf of their wives' estates and an unidentified class. Eventually, their lawsuits were consolidated into a class action with Atkinson and Armatrout named as lead plaintiffs.

The class-action complaint alleged that Wal-Mart had no insurable financial interest in the lives of its rank-and-file employees. Unlike Wal-Mart's corporate interests in COLI policies for executives, Wal-Mart's policies for its lower-level workers amounted to improper wagering contracts on their lives, the complaint said.

By the time Wal-Mart ended its COLI program in 2000, the company had "received almost $13 million in policy benefits from the deaths of 184 Florida rank-and-file employees," according to the complaint.

Without reaching a decision on the merits, Judge Moody initially dismissed the case because he found that the class members had no direct cause of action against Wal-Mart and, therefore, no standing to sue.

He acknowledged that Florida case law and public policy prevented those without an insurable interest from buying a policy on someone else's life. But he said the third-party plaintiffs had no recourse under Florida law.

Only a few months later, the 5th U.S. Circuit Court of Appeals held in a similar class action in Texas that Wal-Mart lacked an insurable financial interest in its rank-and-file employees. *Richard v. Wal-Mart Stores*, 559 F.3d 341 (5th Cir. 2009).

The Florida class plaintiffs appealed to the 11th. Circuit. They said the state Legislature revised Fla. Stat. Ann. § 627.404 in 2008 to create a statutory cause of action against improper life insurance policies and that the law applied retroactively.

They asked the appeals panel to reverse Judge Moody's holding and to find in their favor on the case's merits.

Wal-Mart maintained that the panel should affirm the District Court's dismissal.

Considering the parties' arguments, the 11th Circuit found that the retroactivity issue was a state law question and certified the question to the Florida Supreme Court.

While the issue was pending, however, the parties reached the preliminary settlement, which Judge Moody found to be fair, adequate and reasonable. He asked the 11th Circuit to remand the case to the District Court.

For purposes of the settlement, the certified class consists of 223 estates of former Wal-Mart rank-and-file employees who worked in Florida between 1993 and 1995, who were insured under Wal-Mart COLI policies and who died before 2000.

According to the settlement's terms:

- Wal-Mart will create a $2 million fund for the class members' benefit.
- Armatrout and Atkinson will each receive compensatory awards of $10,000.
- Using approximate costs, each estate will receive around $5,800, less fees and costs.
- Class members can opt out of the settlement or accept the settlement as a final adjudication of their rights.

A final fairness hearing is scheduled for Oct. 17. WJ

Attorneys:

Defendant: Edward A. Moss, Eileen Tilghman Moss, Humberto H. Ocariz and Daniel B. Rogers, Shook Hardy & Bacon, Miami

Plaintiffs: Michael D. Myers and Robert H. Espey II, McClanahan Myers Espey, Houston

3M SETTLES AGE-BIAS SUIT FOR $3 MILLION

Technology giant 3M Co. has agreed to pay $3 million and implement preventive measures to settle a nationwide age discrimination suit brought by the Equal Employment Opportunity Commission. The agency claimed that 3M laid off hundreds of employees over the age of 45 to make way for younger leaders. The EEOC cited an email describing the company's mission as focusing on 30-year-olds with "manager potential" and tapping into youth as participants in the leadership program. The $3 million will go to about 290 former employees. Under the three-year consent decree, 3M will report to the EEOC on its compliance and provide reduction-in-force information to the agency.

Equal Employment Opportunity Commission v. 3M Co., No. 11-02408, complaint/consent decree filed (D. Minn. Aug. 22, 2011).

NLRB REQUIRES NOTIFICATION OF LABOR RIGHTS TO EMPLOYEES

The National Labor Relations Board has issued a final rule requiring employers to notify workers of their rights under the National Labor Relations Act by Nov. 14. Notification includes posting the information on bulletin boards or wherever employee notices are customarily posted and/or on intranet sites. The notice states that employees have the right to act together to improve wages and working conditions; to form, join and assist a union; to bargain collectively with their employer; and to refrain from any of those activities. The notice also includes examples of unlawful employer and union conduct and tells employees how to contact the NLRB with questions or complaints.

AUTO WORKERS WIN $6 MILLION IN DISABILITY BIAS SUIT

New United Motors & Manufacturing Inc. has agreed to pay $6 million into a settlement fund established in a class action brought by employees who claimed the company denied severance benefits to workers out on medical leave. The Equal Employment Opportunity Commission announced the deal Aug. 22, noting that employees told the agency that they were capable of returning to work during the six-month severance period but were denied reinstatement. NUMMI, California's last auto plant, closed in April 2010, and a group of former employees sued the company in federal court that July. The settlement agreement was filed under seal.

Cookson et al. v. New United Motors & Manufacturing Inc., No. 10-02931, settlement agreement filed (N.D. Cal. Aug. 22, 2011).

PHILLY POLICE OFFICER KEEPS $555K AWARD

The 3rd U.S. Circuit Court of Appeals has affirmed a lower court award of $555,000 to a Philadelphia police officer who sued the city after he was fired in retaliation for complaining about police department discrimination against minority officers. Officer Ray Carnation, who is white, was fired in 1999, and a federal jury awarded him $2 million in compensatory damages, which the trial court reduced to $300,000, the cap imposed by Title VII. After an equity hearing on Carnation's termination, the lower court awarded him $209,000 in back pay and $46,000 in prejudgment interest on the back pay.

McKenna et al. v. City of Philadelphia, Nos. 09-3567 and 10-3430, 2011 WL 3606834 (3d Cir. Aug. 17, 2011).

Related Court Document:
Opinion: 2011 WL 3606834

WAL-MART SETTLES EEOC HARASSMENT SUIT FOR $27,500

The Equal Employment Opportunity Commission announced Aug. 16 that Wal-Mart Stores of Texas will pay $27,500 and agree to follow the provisions of a consent decree for two years to settle a sexual harassment suit brought by the agency. The EEOC sued Wal-Mart on behalf of Paula Barstad, an overnight stocker at a store in Midland who claimed she had been sexually harassed by the store security guard. Barstad said she reported the incidents of oral harassment and unwanted physical contact to store management, both formally and informally, but nothing was done and the harassment continued. The consent decree requires the store to refrain from retaliating against Barstad, post a notice prohibiting sexual harassment, conduct anti-discrimination training for managers and set up a procedure for handling discrimination complaints.

Equal Employment Opportunity Commission v. Wal-Mart Stores of Texas, No. 10-118, consent decree approved (W.D. Tex. Aug. 16, 2011).

LOUISIANA COMPANY COMMITTED 15 UNFAIR LABOR PRACTICES

An administrative law judge for the National Labor Relations Board has determined that a Louisiana salt mining operation engaged in several unfair labor practices when dealing with its union employees. Carey Salt Co. made unlawful threats of termination, refused to bargain in good faith and implemented new working conditions without bargaining, the ALJ found. Carey has unlawfully refused to reinstate 84 employees who engaged in a strike to protest the illegal practices, and the company has still refused to withdraw the unlawful terms and conditions of employment, the ALJ said. She ordered Carey to offer reinstatement with full back pay and to restore the original terms and working conditions for its employees.

Carey Salt Co. and United Steel Workers, No. 15-CA-19704, 2011 WL 3291221 (N.L.R.B. Div. of Judges, Atlanta Aug. 1, 2011).

Related Document:
Decision: 2011 WL 3291221

CASE AND DOCUMENT INDEX