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REUTERS/Mario Anzuoni

The judge said differences in how individual Costco employees were affected by a purported companywide "lockdown" policy prevented him from maintaining class certification. A Los Angeles store is shown here.

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RICO pleading standards after *Twombly* and *Iqbal*

By Alec W. Farr, Esq., and Joshua A. James, Esq.
Bryan Cave LLP

It is clear that the U.S. Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), recast pleading standards in federal court and the test for successfully moving to dismiss under Federal Rule of Civil Procedure 12(b)(6).

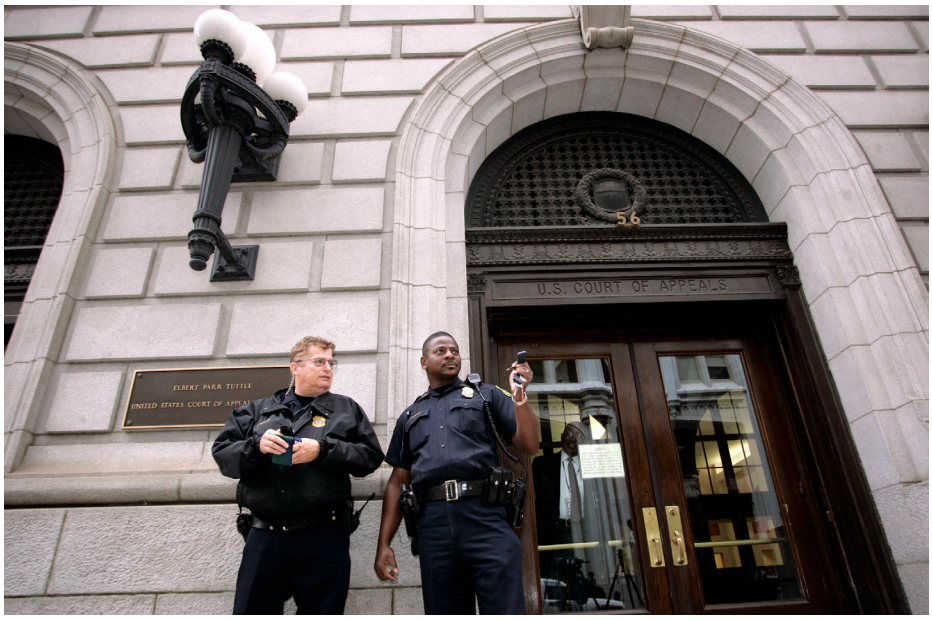
Twombly and *Iqbal* "retired" the *Conley v. Gibson*, 355 U.S. 41 (1957), "no set of facts" standard and substituted the "plausible on its face" test for evaluating whether a plaintiff successfully stated a claim in a complaint.

It is unclear, however, how much difference the two cases have made in motion-to-dismiss jurisprudence.

The 11th U.S. Circuit Court of Appeals' recent decision in *Simpson v. Sanderson Farms Inc.*, 744 F.3d 702 (11th Cir. Mar. 7, 2014), provides an important opportunity to examine the impact of *Twombly* and *Iqbal*. Since *Simpson* bears a striking resemblance to a case decided by the 11th Circuit, *Williams v. Mohawk Industries Inc.,* 465 F.3d 1277 (11th Cir. 2006) ("*Mohawk II*"), before *Twombly* and *Iqbal*, it permits an analysis of the effect of substituting the *Twombly* and *Iqbal* standard for the old *Conley* standard.

This commentary will provide a summary of the facts and pleadings in the *Simpson* and *Mohawk II* cases. It also will explore the *Simpson* decision and how the court's reasoning differs from its reasoning and result in *Mohawk II*.

A review of the effects of *Twombly* and *Iqbal* in this context will provide a better understanding of the *Twombly* and *Iqbal* pleading requirements, including potential pitfalls for plaintiffs and grounds on which defense counsel may seek dismissal.



REUTERS/Reuters Photographer

The 11th U.S. Circuit Court of Appeals' recent decision in* Simpson v. Sanderson Farms Inc. *provides an important opportunity to examine the impact of* Twombly *and* Iqbal. *The court's building is shown here.

SIMPSON V. SANDERSON FARMS

The plaintiffs in *Simpson* were former employees of Sanderson Farms' poultry processing plant in southern Georgia. They filed a class-action lawsuit alleging their former employer committed civil violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, by hiring illegal employees. The plaintiffs said this resulted in depressed wages for the legal workers at the plant.

The first complaint identified three substantive RICO violations:

- Knowingly hiring unauthorized aliens who had been illegally brought into the United States (a violation of 8 U.S.C § 1324).
- Knowingly transferring, possessing or using another person's means of identification in to engage in unlawful activity (a violation of 18 U.S.C. § 1028).
- Fraud and misuse of visas, permits and other documents (a violation of 18 U.S.C. § 1546).[1]

The District Court dismissed this complaint without prejudice, holding that the plaintiffs

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failed adequately to plead the first two alleged violations.

However, the court ruled the plaintiffs had sufficiently pleaded the third alleged violation and sufficiently alleged injury. The only problem with the third alleged violation was a failure adequately to plead that the misuse of the visas proximately caused the plaintiffs' injury.

The plaintiffs filed an amended complaint, this time alleging only fraud and misuse of visas as substantive RICO violations.

The plaintiffs' theory of the case in the amended complaint was straightforward: Sanderson Farms committed violations of Section 1546 by accepting and certifying obviously fake identification documents. This practice allowed it to hire more than 300 unskilled, illegal employees at their southern Georgia plant, which allowed it to depress wages paid to all unskilled, legal employees.

Although the plaintiffs frequently asserted legal workers received depressed wages because Sanderson Farms hired cheaper illegal workers, their only supporting evidence was their own wages (which rose while employed at Sanderson Farms) and a market model that attempted to use basic economic theory to demonstrate that Sanderson Farms' expansion of the labor pool by hiring illegal workers allowed the company to pay lower wages.

The plaintiffs never estimated the number of legal or illegal workers in the market and did not specify a geographic area for the market.

Sanderson Farms moved to dismiss the amended complaint for failure to state a claim, arguing in part that the plaintiffs had neither shown an injury nor introduced enough data to show wages were depressed.

The 11th Circuit, as will be discussed below, agreed with Sanderson Farms on appeal and affirmed the District Court's dismissal with prejudice.

MOHAWK II

In *Mohawk II* the plaintiffs were former and current employees of Mohawk Industries' carpet plants in northern Georgia. They filed a class-action lawsuit, alleging Mohawk committed civil RICO violations by hiring illegal employees. The plaintiffs alleged this resulted in depressed wages for the legal workers at the Mohawk carpet factory.

Mohawk, the complaint alleged, committed four substantive RICO violations:

- Knowingly hiring unauthorized aliens who had been illegally brought into the United States (a violation of 8 U.S.C § 1324).
- Concealing aliens who have entered the United States illegally (also a violation of 8 U.S.C. § 1324).
- Encouraging aliens to enter the United States illegally (also a violation of 8 U.S.C. § 1324).
- Fraud and misuse of visas, permits and other documents (a violation of 18 U.S.C. § 1546).

The District Court denied in part and granted in part Mohawk's motion to dismiss, deeming the plaintiffs' federal and state RICO claims sufficient to survive the motion to dismiss.

The 11th Circuit agreed with the District Court and held that the federal and state RICO counts stated a claim for relief.[2]

COMPARISON OF *SIMPSON* AND *MOHAWK II*

The decisions in *Simpson* and *Mohawk II* were separated by less than eight years, but the intervening *Iqbal* and *Twombly* decisions made a huge difference in the decisions' reasonings and results.

The *Simpson* court dismissed its plaintiffs' complaint for two primary reasons.

First, it determined the plaintiffs had not alleged enough facts, even at the motion-to-dismiss stage, to establish injury.[3]

Second, the court said the plaintiffs had not provided sufficient factual allegations to support a plausible claim of proximate causation.[4]

Still using the *Conley* "no set of facts" test, the *Mohawk II* court, on the other hand, found that the plaintiffs had sufficiently alleged injury and proximate causation, allowing almost identical claims to go forward.

Injury

The *Simpson* court held that the plaintiff had failed to present enough facts at the pleadings stage for the court to "plausibly" infer injury.[5] Although the plaintiffs had alleged they received depressed wages, they offered no data on wages beyond their own wage history at the plant. The court found that, without this additional wage data, "the plaintiffs pled injury at only the highest order of abstraction and with only conclusory assertions."[6]

The *Simpson* plaintiffs pleaded a basic market model they said demonstrated that dipping into the illegal labor pool necessarily depressed wages.

The decisions in *Simpson* and *Mohawk II* were separated in time by less than eight years, but the intervening *Iqbal* and *Twombly* decisions made a huge difference in the decisions' reasonings and results.

In three paragraphs of their amended complaint, the *Simpson* plaintiffs alleged:

- Sanderson Farms employed "over 1,500 hourly workers" making "it one of the largest employers in all of Colquitt County, Ga."
- "The supply of unskilled workers includes people who are illegally in the country ... as well as workers who are legally authorized for employment."
- The market supply of unskilled legal labor is relatively inelastic, *e.g.*, even at high wages relatively few additional unskilled legal workers are available.
- The mixed status labor pool (both legal and illegal employees) is relatively elastic, *e.g.*, more workers will accept employment at low wages.[7]

The *Simpson* court dismissed this model, saying that while the plaintiffs "insist there are enough illegal workers in the mixed-status labor pool to logically infer the depression of wages paid to legal workers ... the conclusion is not self-evident in all markets" and that the plaintiffs failed to allege facts to render their theory plausible.[8]

The court focused heavily on the lack of concrete data to support the plaintiffs' position. The plaintiffs had "provided no parameters and no data to ground [their]

abstract market theory,"[9] and did not offer any "market data that might permit [the court] plausibly to infer a gap between the wages they *actually* received at Sanderson and the wages they *would have* received but for the alleged Section 1546 misconduct."[10]

The court pointed out that the plaintiffs could have offered or estimated "the wages paid by *any* comparable poultry processing plant employers in the relevant market, in the state or even the region" and then compared the wages of those processors that hired illegal workers with those that hired only legal workers.[11]

The court went on to suggest that it would have been willing to accept the plaintiffs' theory if the complaint had supplied facts to describe the relevant labor market in such quantifiable terms as an estimation of the number of legal and illegal unskilled workers in the market and a description of the relevant geographic market.

Without such data, the court found it "difficult, if not impossible, to plausibly conclude that the legal labor supply actually is limited." This failing invited the court impermissibly to speculate on too many factors for the claim to "raise a right to relief above the speculative level" as required by *Twombly*.[12]

A similar fate did not befall the *Mohawk II* plaintiffs even though they had arguably pleaded fewer facts than the *Simpson* plaintiffs.

In *Mohawk II* the plaintiffs alleged "Mohawk's employment and harboring of illegal workers has enabled Mohawk to depress wages and thereby to pay all of its hourly employees ... wages that are lower than they would be if Mohawk did not engage in this illegal conduct."

"Mohawk's widespread employment and harboring of illegal workers," they said, "has substantially and unlawfully increased the supply of workers from which Mohawk makes up its hourly workforce. This unlawful expansion of the labor pool has permitted Mohawk to depress the wages that it pays all its hourly employees."[13]

The market data the *Mohawk II* plaintiffs presented consisted of just three sentences: "Mohawk is the second largest carpet manufacturer in the United States and one of the largest employers in North Georgia," "Mohawk employs tens of thousands of hourly workers in North Georgia," and "Mohawk's knowing employment, harboring, concealing and shielding of illegal workers and its acceptance and use of documents that are not lawfully issued for the use of the possessor or are false is so pervasive that illegal workers now constitute a majority of the work force in many of Mohawk's facilities in North Georgia."[14]

At no point did the *Mohawk II* plaintiffs allege any of the market or geographic data that the court in *Simpson* found so important.

Despite this lack of market data, the *Mohawk II* court found the plaintiffs had presented enough evidence of injury to survive a motion to dismiss. In fact, the court appeared to accept the *Mohawk II* plaintiffs' naked assertions that the inclusion of illegal workers in the labor pool necessarily lowered wages for legal workers.

"Simply put, wholesale illegal hiring depresses wages for the legal workers in North Georgia where Mohawk is located," the court said. "According to plaintiffs, Mohawk's illegal conduct had a substantial and direct effect on wages that Mohawk pays to legal workers."[15]

The *Simpson* court found these assertions lacking. It stated that identifying Section 1546 violations as an "essential step" in a process only identified the violations as "but for" causes.[18]

In order to rise to the level of proximate causes, the court suggested, the plaintiffs needed to plead the same market data necessary to establish that they had been injured.

With that predicate data, the court reasoned, the plaintiffs might be able to show that the Section 1546 violations allowed Sanderson Farms to expand its labor pool and depress wages.

In *Mohawk II* the court was willing to allow the plaintiffs the chance to prove proximate cause at a later stage in the proceedings.

"Although the plaintiffs' evidence in this case may not ultimately prove the proximate-cause requirement," the court wrote, "we conclude that the plaintiffs' complaint states a sufficiently direct relation between their alleged injury and Mohawk's alleged unlawful predicate acts."[19]

The *Simpson* court held that the plaintiff had failed to present enough facts at the pleading stage for the court to "plausibly" infer injury.

The *Simpson* court, in contrast, set a much higher bar, requiring specific allegations of the data underlying the plaintiffs' claim of injury that would permit the court to conclude a claim was stated without resort to speculation.

PROXIMATE CAUSE

The *Simpson* court's second reason for dismissal was a failure to show that Sanderson Farms' violations of Section 1546 were a proximate cause of the plaintiffs' alleged injury.[16]

The plaintiffs had alleged that "[i]n order to avail itself of the mixed-status labor supply, the defendants must violate Section 1546. The illegal workers must make false attestations and the defendants must also make their own false attestations (and accept their fake/false IDs) in order to employ them," and "the violations of Section 1546 are a direct and substantial cause of the depressed wage rates that the plaintiffs ... complain [of]."[17]

Indeed, the *Mohawk II* court was willing to put off answering many of the questions the *Simpson* court thought needed to be answered to survive the motion to dismiss.[20]

The *Mohawk II* plaintiffs undoubtedly would have been dismissed under the standard used in *Simpson*. They pleaded only proximate causation at the most conclusory level, stating a handful of times that Mohawk's RICO violations were the proximate cause of their injury without alleging facts to show how their depressed wages were the necessary consequences of the RICO violations.

The differences are striking. The *Mohawk II* plaintiffs avoided dismissal with facts not substantially different from the *Simpson* plaintiffs, but in only eight years the pleading standard had shifted so much that the *Simpson* court called its decision "not a close case."[21]

CONCLUSION

Comparing the 11th Circuit's decisions in *Simpson* and *Mohawk II* provides a powerful

example of the potentially outcome-determinative effect of the revised pleading standards announced in *Twombly* and *Iqbal*.

While it remains unclear precisely how much specific data a plaintiff must allege to adequately plead injury, it is clear that conclusory allegations of injury and proximate cause that would have been sufficient in the past are no longer valid under *Twombly* and *Iqbal*. WJ

NOTES

[1] The plaintiffs also alleged state RICO violations, but because Georgia RICO provisions are "essentially identical to the federal RICO statutes" these allegation did not complicate the court's analysis. *Simpson*, 744 F.3d 702, at * 4.

[2] The case made a journey through the 11th Circuit and then to the U.S. Supreme Court following the initial decision. The Supreme Court heard oral argument in the case, decided *certiorari* had been a mistake and remanded the case to the 11th Circuit.

[3] *Simpson*, 744 F.3d at 12.

[4] *Id.* at 20.

[5] *Id.* at 3.

[6] *Id.* at 13.

[7] Amended class-action complaint, *Simpson v. Sanderson Farms Inc.*, No. 7:12-CV-28, 2012 WL 10691324, at *7, ¶¶ 62-64 (M.D. Ga. Oct. 5, 2012).

[8] *Simpson,* 744 F.3d at 15.

[9] *Id.*

[10] *Id.* at 13.

[11] *Id.*

[12] *Id.* at 17 and 19.

[13] Complaint, *Williams v. Mohawk Indus.*, No. 04-CV-03, 2004 WL 5505237, at ** 5-6, ¶¶ 33, 35 (N.D. Ga. Jan. 6, 2004).

[14] *Id.* at *6, 11, ¶¶ 34, 75.

[15] *Mohawk II,* 465 F.3d 1277, 1289.

[16] *Simpson,* 744 F.3d at 21.

[17] *Simpson* complaint at *7, ¶¶ 65, 69.

[18] *Simpson,* 744 F.3d at 21.

[19] *Mohawk II,* 465 F.3d at 1291.

[20] Compare *Mohawk II*, at 1291 (citing *Trollinger*) with *Simpson*, at 23.

[21] *Simpson,* 744 F.3d at 12.

NEWS IN BRIEF

TRUCKING FIRM TO PAY $4.4 MILLION OVER BACKGROUND CHECKS

Swift Transportation Company of Arizona will pay $4.4 million to settle claims that it violated the Fair Credit Reporting Act by failing to tell driver applicants they may question information in background checks used in the hiring process. Several Swift job applicants filed the class action filed in federal court in Richmond, Va., seeking damages on behalf of applicants in five states who were not notified of the background check as a condition of employment. The company disqualified applicants based on background checks but never told the applicants that they could question the reports, the suit said. According to the settlement agreement filed April 21, Swift has denied the allegations but has agreed to pay $4.4 million in damages and attorney fees. It is also updating its procedures in relation to the FCRA, the agreement said.

Ellis v. Swift Transportation Company of Arizona, No. 3:13-cv-00473, settlement agreement filed (E.D. Va., Richmond Div. Apr. 21, 2014).

LIMO SERVICE TO PAY $3.5 MILLION IN WAGE SUIT

Drivers for Sunny's Limousine Service have asked a federal judge in Manhattan to approve a $3.5 million settlement of their claims that the company violated federal and state wage laws. Six drivers for Sunny's, which has locations across the country, alleged the company failed to pay minimum and overtimes wages. The company underreported the amount of fares and tips the drivers brought it and failed to pay overtime wages even though the drivers worked up to 84 hours a week, the suit alleged. The settlement resolves the claims of more than 800 drivers in New York. The $3.5 million includes undetermined attorney fees and about $80,000 total for the named plaintiffs.

Munir et al. v. Sunny's Limousine Service Inc. et al., No. 13-1581, memorandum in support of preliminary approval of settlement filed (S.D.N.Y. Apr. 18, 2014).

JUDGE OKS SETTLEMENT OF PRISON COOK'S HARASSMENT SUIT

The California Department of Corrections & Rehabilitation will pay an employee who was allegedly sexually harassed $50,000 in damages and will restore leave time he took because of the harassment, the U.S. Department of Justice announced April 16. A California federal judge approved the settlement, which also calls for the state agency to maintain proper anti-harassment policies and to train personnel. The Justice Department filed the suit on behalf of prison cook Joe Cummings, who said he faced a hostile work environment at the Herman Stark Youth Correctional Facility in Chino. According to the suit, a female co-worker made sexual advances and other unwelcome comments toward Cummings, including striking his head and putting her hand down his pants. The Justice Department said the Department of Corrections violated Title VII of the Civil Rights Act of 1964 by not responding to Cummings' harassment complaints.

United States v. California Department of Corrections & Rehabilitation, No. 5:13-cv-01241, settlement approved (C.D. Cal. Apr. 21, 2014).

NURSE SAYS SHE WAS FIRED FOR REPORTING MEDICAID FRAUD

A nurse and former case manager at Caresource, a managed care company, has accused her former employer of firing her in retaliation for reporting Medicaid fraud. According to the complaint filed in the U.S. District Court for the Northern District of Ohio, Caresource hired Brenda Diggs in 2012 and assigned her to review the files of 51 Medicaid recipients. Diggs says she was fired when she reported to her supervisors that Caresource was improperly receiving Medicaid reimbursement for many of the recipients. The suit alleges violation of the False Claims Act and wrongful discharge. Diggs seeks back pay and reinstatement, plus compensatory damages exceeding $25,000.

Diggs v. Caresource, No. 14-0743, complaint filed (N.D. Ohio, E. Div. Apr. 4, 2014).

A look at changes to New York City's Earned Sick Time Act

By Terri Solomon, Esq., Jean Schmidt, Esq., Huan Xiong, Esq., Christine Hogan, Esq., and Jill Lowell, Esq.
Littler Mendelson PC

On March 20 New York Mayor Bill de Blasio signed into law two bills that significantly expanded the provisions of the New York City Earned Sick Time Act. The act, which took effect April 1, requires most private employers to provide up to 40 hours of paid or unpaid sick leave per year to employees working in New York City.

The amendments to the act expanded the law's paid sick leave requirements to cover employers with between five and 15 employees, expanded the definition of "family member," increased employers' notice and record-keeping requirements, broadened the enforcement power of competent authorities, and increased the time an employee has to file a complaint for alleged violations.

BACKGROUND

The original Earned Sick Time Act was adopted into law June 26, 2013, after the New York City Council overrode then-Mayor Michael Bloomberg's veto. The effective date of the law was specified as April 1 this year.

Following the inauguration of de Blasio on Jan. 1, City Council overwhelmingly passed two new bills in February designed to expand the provisions of the original act, which by its terms had not yet taken effect. The amended version of the act became effective April 1.

SUMMARY OF PROVISIONS AND CHANGES MADE TO THE ORIGINAL ACT

Coverage

The amended act applies to private employers, including manufacturing employers (defined below), with five or more employees, and those with one or more domestic workers. Employers with employees who are not entitled to paid sick leave under the act still must provide unpaid sick leave. The amended act does not apply to public employers, including employees of the United States, New York state or New York City governments.

Manufacturing employers and employers with between five and 19 employees have a six-month grace period before facing civil penalties for any violation of the amended act. However, to discourage repetitive violations during the grace period, the amended act further provides that any second or subsequent violation that occurs before Oct. 1 will serve as a predicate for imposing penalties for subsequent violations that occur on or after that date.

Where the number of employees fluctuates above and below five persons per week over the course of a year, business size will be determined for the current calendar year based on the average number of persons who worked for compensation per week during the preceding calendar year. All persons performing work for compensation, whether on a full-time, part-time or temporary basis, are counted when determining coverage.

> The amended act applies to private employers, including manufacturing employers, with five or more employees.

Changes from the original Earned Sick Time Act

The original act would have initially applied to private employers with 20 or more employees, and then would have expanded Oct. 1, 2015, to include employers with 15 or more employees and employers of one or more domestic workers. The amended act now immediately applies to private employers with five or more employees and employers with one or more domestic workers.

The original act did not have a grace period for employers to come into compliance. The amended act added the grace period for manufacturing employers (defined below) and employers with between five and 19 employees to respond to concerns raised by small business in connection with the expansion of the act.

The original act did not apply to certain employers classified in sections 31, 32 or 33 of the North American Industry Classification System (manufacturing employers). The amended act applies to manufacturing employers.

Eligibility

Subject to the exceptions noted below, any person employed for hire within New York City for more than 80 hours in a calendar year who performs work on a full-time or part-time basis, including a commissioned salesperson, is entitled to sick leave benefits under the amended act.

Participants in certain work study programs, employees compensated by or through qualified scholarships, independent contractors who do not meet the definition of employee under the New York Labor Law, and certain hourly professional employees who are licensed by the New York State Department of Education who call in for work assignments at will and are paid at a premium rate (defined by the amended act as at least four times the minimum federal wage) are not covered by the amended act.

Changes from the original Earned Sick Time Act

There are no changes from the original act in this section.

Amount and type of leave required

Subject to the exceptions noted below, effective April 1, employers of five or more employees are required to provide employees with one hour of paid sick leave for every 30 hours worked, with a maximum requirement of 40 hours of paid sick leave per calendar year. Employers who do not employ at least five employees, and thus are not required to provide paid sick leave, must still provide employees with up to 40 hours of unpaid sick leave per calendar year.

The act defines calendar year as "a regular and consecutive 12-month period, as determined by an employer." Thus, it need not be an actual calendar year.

Employees who do not use all accrued sick leave (paid or unpaid) in a calendar year are entitled to carry over unused sick leave, up to a limit of 40 hours. However, even when an employee carries over sick leave, employers may limit the use of paid sick leave to a total of 40 hours per calendar year.

An employer does not have to allow carry-over of unused paid sick leave from one calendar year to the next provided that the employer pays the employee for any unused sick leave at the end of the calendar year and provides the employee with an amount of paid sick leave that meets or exceeds the requirements of the amended act on the first day of the following calendar year.

The employer may not circumvent its sick-leave obligations by providing an employee with payment of unused sick leave that is less than the amount to which the employee is entitled under the amended act. Upon the employee's termination, resignation, retirement or other separation from employment, an employer is not required to pay an employee for accrued but unused sick leave.

Employees also may take sick leave for themselves and eligible family members who:

- Need a medical diagnosis.
- Require care or treatment of a mental or physical illness.
- Have an injury or health condition.
- Need preventive medical care.

- Need a medical diagnosis.
- Require care or treatment of a mental or physical illness.
- Have an injury or health condition.
- Need preventive medical care.

A "family member" is defined to include an employee's spouse or registered domestic partner; parent, parent-in-law or parent of a domestic partner; child or child of a domestic partner — including a biological, adopted or foster child, stepchild, legal ward or a child of an employee standing *in loco parentis*; siblings, including half-siblings, step-siblings and siblings related through adoption; grandchildren and grandparents.

Sick leave may also be used when an employee's place of business is closed by order of a public official due to a public health emergency or when the employee must care for a child whose school or childcare provider has been closed by order of a public official due to a public health emergency.

Employees who use sick leave under the amended act for purposes not permitted by the amended act may be disciplined by their employer, and discipline may include termination of employment.

Although sick leave begins accruing at the time of hire or the effective date of the act, whichever is later, employees are not entitled to use sick leave until after 120 days (four months) following their date of hire or April 1, whichever is later.

While employees determine how much sick leave they need to use, employers may set a reasonable minimum increment for use of sick leave as long as the minimum is not greater than four hours per day.

With some exceptions, any person employed for hire within New York City for more than 80 hours in a calendar year who performs work on a full-time or part-time basis, including a commissioned salesperson, is entitled to sick leave benefits under the amended act.

Changes from the Original Earned Sick Time Act

The original act did not contain a limit on the amount of unused sick time an employee could carry over each year. The amended act explicitly limits the amount to 40 hours.

Use of leave

The amended act allows employees to take sick leave for "the employee's mental or physical illness, injury or health condition." Despite a lengthy definition section, the amended act provides little guidance regarding what these terms mean. Read broadly, the amended act might, theoretically, include an employee's request for a "mental health day."

Employees also may take sick leave for themselves and their eligible family members who:

Changes from the original Earned Sick Time Act

The amended act has expanded the definition of "family member" to include siblings (including half-siblings, step-siblings and siblings related through adoption) grandchildren and grandparents.

Employee notice and medical documentation requirements

Employers may require employees to provide reasonable notice of the need for leave, including up to seven days' notice where the need for leave is foreseeable. Where the need for leave is not foreseeable, an employer may require an employee to provide notice as soon as practicable.

Where an employee is absent for more than three consecutive work days, an employer may require reasonable documentation from a licensed health care provider establishing the need for and duration of any sick leave. However, the employer cannot require disclosure of the nature of the employee's or his or her family member's injury, illness or condition. In addition, any health information about an employee or an employee's family member must be treated as confidential.

Changes from the original Earned Sick Time Act

There are no changes from the original act in this section.

Exemptions and exceptions

- Small Businesses: The amended act exempts small businesses, defined

as those employing fewer than five employees, from providing paid sick leave.

- Employers with a separate leave policy: Employers who already have or who implement a paid leave policy — including paid time off, paid sick leave, paid vacation and/or paid personal days — that provides for paid leave in an amount sufficient to meet the requirements of the amended act (*i.e.*, one hour of paid sick leave for every 30 hours worked) and allows the leave to be used for the purposes and under the same conditions as required by the amended act, are not required to provide additional paid sick leave.

  Thus, for example, an employer who already provides at least five days of paid time off or paid vacation and permits employees to use that time for the purposes specified in the act, has complied with the act. This is true whether or not the employee uses such leave for the employee's own illness or that of family members.

  Similarly, employers are not required to provide unpaid sick leave if they already provide paid or unpaid time off/sick/vacation/personal days sufficient to meet the requirements of the amended act and allow employees to use that leave for the purposes specified in the amended act.

- Employees covered by a collective bargaining agreement: Where employees are covered by a valid collective bargaining agreement on April 1, the amended act will not apply until termination of the collective bargaining agreement. However, the provisions of the amended act may be expressly waived by the parties to a bona fide collective bargaining agreement, provided that the agreement provides for comparable benefits in the form of paid time off, which may include vacation time, personal time, sick time and/or holiday pay. Holiday and Sunday time paid at premium rates can also satisfy the requirements of the amended act. Construction and grocery industry employees covered by a bona fide collective bargaining agreement may, through their union, expressly waive the amended act, even if the collective bargaining agreement does not provide benefits comparable to those provided by the act.

- Domestic workers. In 2010 New York State passed the Domestic Workers' Bill of Rights which, among other things, entitles domestic workers to three paid days off from work after one full year of service. Notably, that law represents the first occasion that New York required any private-sector employer to provide an employee with paid time off. Effective April 1, the amended act supplements this Bill of Rights and requires employers to provide domestic workers with two days of paid sick leave per calendar year (in addition to the other three paid days off required by the Domestic Workers' Bill of Rights) provided that the domestic worker is employed for one full year of service.

Changes from the original Earned Sick Time Act

As stated above, the original act exempted manufacturing employers from coverage. The amended act does not. In addition, the original act defined "small businesses" as those with fewer than 15 employees. The amended act lowered that number to five employees.

Employer obligations

As of May 1 employers must provide all employees with notice of entitlement to leave and describe the amount and terms of sick leave, including any right to unpaid leave. The notice must also inform employees that the amended act expressly prohibits retaliation for requesting or using sick leave, and that they have a right to file a complaint with the city's Department of Consumer Affairs. Similar to New York's Wage Theft Prevention Act, the employer must have provided notice of the sick-leave benefits in English and the employee's primary language (if the employee's primary language is Chinese, Korean, Russian, French-Creole, Italian or Spanish). A form notice in English and all of the languages mentioned above is available on the department's website.

When new workers are hired, employers also have to provide the notice described above.

Employers may also, but are not required to, post a notice in a conspicuous place, accessible to all employees in each location where such workers are employed, advising them of their rights under the act.

In addition to notice requirements, the act also requires employers to retain records documenting compliance with the act for a period of three years.

Changes from the original Earned Sick Time Act

The original act did not require notice to current employees, only to new hires. The amended act requires that notice have been given to current employees by May 1 and to new hires.

New York City's Department of Consumer Affairs processes violation complaints.

- If the department determines that a violation occurred, it will issue a notice of violation and commence an adjudicatory hearing before an administrative tribunal.
- If the administrative tribunal finds a violation of the act, the department must issue a civil penalty payable to New York City not to exceed $500 for the first violation.
- If a second violation occurs within two years of a first violation, a civil penalty not to exceed $750 may be imposed, with subsequent violations subject to penalties up to $1,000 per occurrence.
- For willful violations of the notice requirements, employers will be subject to a civil fine in an amount not to exceed $50 for each employee who was not given appropriate notice.
- In addition to civil penalties, where an employee's rights under the amended act were violated, the department has the power to order appropriate damages be paid to the employee.

In addition, the amended act now requires employers to retain records of sick leave for a period of three years, up from two years in the original act.

Enforcement

The department has the power to commence an investigation of an employer on its own initiative, including conducting audits of an employer's compliance with the amended act and its record-keeping. Additionally, a person claiming to be aggrieved by a violation of the amended act can file a complaint with the department (or designated agency) within two years of the date the person knew or should have known of the alleged violation. Employees have no independent private right of action in federal or state court.

When the department receives a complaint, it will attempt to resolve it through mediation. In addition, it will send written notification of the complaint to the employer, which will then have 30 days to provide a written response and any other such information the department may request.

If mediation is unsuccessful and the department determines that a violation occurred, it will issue a notice of violation and commence an adjudicatory hearing before an administrative tribunal. If the administrative tribunal finds a violation of the act, the department must issue a civil penalty payable to New York City not to exceed $500 for the first violation. If a second violation occurs within two years of a first violation, a civil penalty not to exceed $750 may be imposed, with subsequent violations subject to penalties up to $1,000 per occurrence.

For willful violations of the notice requirements, employers will be subject to a civil fine in an amount not to exceed $50 for each employee who was not given appropriate notice.

In addition to civil penalties, where an employee's rights under the amended act were violated, the department has the power to order appropriate damages be paid to the employee, including:

- For each instance of sick leave taken by an employee but not compensated by the employer: three times the wages that should have been paid under the act or $250, whichever is greater.
- $500 for each instance of sick leave requested by an employee but unlawfully denied by the employer and not taken by the employee
- For each instance of retaliation not including discharge from employment: full compensation including, but not limited to, wages and benefits lost; $500, and equitable relief as appropriate.
- For each instance of discharge from employment in violation of the act: full compensation including, but not limited to, wages and benefits lost, $2,500, and equitable relief as appropriate, including reinstatement.

In addition, the mayor has the authority to designate an agency other than the department to enforce the act. The designated agency will have all of the powers given to the department, including the authority to initiate an investigation of an employer, hold public and private hearings, administer oaths, take testimony, serve subpoenas, receive evidence, render decisions and orders, and to receive, administer, pay over and distribute monies collected in and as a result of actions brought for violations of the act. The designated agency can also impose civil penalties, order equitable relief and provide monetary damages.

Changes from the original Earned Sick Time Act

The original act had a limitations period of 270 days, not two years, as provided for under the amended act. Employers did not have the right under the original act to provide a written response to a complaint. According to the amended act, employers must respond to a complaint within 30 days.

In addition, the original act did not empower the department to commence investigations of employers on its own initiative. The amended act gives the department this power. Finally, the amended act gives the mayor the authority to designate an agency other than the department to enforce the act. This was not the case in the original act.

The department also prepared and posted on its website frequently asked questions, which will be updated frequently, to provide guidance to employers and employees with their responsibilities and rights under the act.

OTHER STATE AND CITY LAWS THAT MANDATE PAID OR UNPAID SICK LEAVE

Federal law does not require employers to provide employees paid sick leave. Increasingly, however, states and cities across the United States are enacting legislation requiring employers to provide paid or unpaid sick leave. Connecticut and the District of Columbia require employers to provide paid sick leave. The cities of Newark and Jersey City, N.J.; San Francisco; Seattle; and Portland, Ore., also require employers to allow employees to accrue and use paid sick leave. Other states and cities currently are contemplating similar legislation. WJ





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Judge recertifies class in wage suit against Chinese newspaper

A California federal judge has certified a class of employees in a wage-and-hour suit against Chinese Daily News for the second time, following two reviews by the 9th Circuit and a petition to the U.S. Supreme Court.

Wang et al. v. Chinese Daily News Inc., No. 04-1498, 2014 WL 1712180 (C.D. Cal. Apr. 15, 2014).

U.S. District Judge Consuelo Marshall of the Central District of California approved the same statewide class of 200 employees that she had certified nine years ago in the suit over the newspaper's overtime and break policies.

The renewed certification comes after the 9th U.S. Circuit Court of Appeals overturned the judge's original decision following a Supreme Court order to review the class in light of its landmark ruling in *Wal-Mart Stores v. Dukes,* 131 S. Ct. 2541 (2011).

In *Dukes* the Supreme Court decertified a nationwide class of more than 1 million female Wal-Mart employees who had charged the retailer with discrimination, finding that the employees failed to show questions of law or fact common to the class. The case involved millions of employment decisions made at the discretion of individual managers, the high court said.

The 9th Circuit had also ordered Judge Marshall to reconsider the original class certification following the California Supreme Court's ruling in *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (Cal. 2012).

In *Brinker* the state Supreme Court overturned a certification denial in a suit over overtime pay and breaks. The high court said an employer must have a policy providing rest and meal breaks but does not have to force employees to take the breaks.

A DECADE OF LITIGATION

Three Chinese Daily News employees sued the Los Angeles-based news organization in 2004, alleging it violated the federal Fair Labor Standards Act, 29 U.S.C. § 201, and state labor laws by failing to pay overtime and to provide rest and meal breaks.

The plaintiffs sought restitution of unpaid wages on behalf of all hourly workers at the company's Monterey, Calif., facility.

Judge Marshall certified the class in January 2005. *Wang et al. v. Chinese Daily News*, No. 04-1498, 231 F.R.D. 602 (C.D. Cal. Jan. 20, 2005). Following a 16-day jury trial to determine liability and a three-day bench trial to assess damages in 2007, the plaintiffs were awarded $5.1 million.

> The renewed certification comes after the 9th Circuit overturned the judge's original decision and the U.S. Supreme Court ordered a review in light of its landmark ruling in *Wal-Mart Stores v. Dukes*.

Chinese Daily News appealed, and the 9th Circuit affirmed the ruling in September 2010. *Wang et al. v. Chinese Daily News*, 623 F.3d 743 (9th Cir. Sept. 27, 2010).

However, the following year, the company filed a *certiorari* petition and the U.S. Supreme Court vacated the appellate decision for reconsideration in light of the *Dukes* ruling a few months before. *Chinese Daily News v. Wang*, 132 S. Ct. 74 (Oct. 3, 2011).

In March 2013 the same three-judge appellate panel that affirmed the class in 2010 vacated the certification and remanded the case for reconsideration by Judge Marshall. *Wang v. Chinese Daily News*, 709 F.3d 829 (9th Cir. Mar. 4, 2013).

According to the 9th Circuit, *Dukes* raised the standard for plaintiffs to show that common issues can be resolved on a classwide basis.

The panel also said the case should be reviewed in light of the *Brinker* ruling on rest and meal break policies.

THE CLASS ENDURES

Judge Marshall again certified the class, finding that the plaintiffs had presented evidence that Chinese Daily News had a common practice of not paying overtime or providing accurate wage statements.

The plaintiffs met the *Dukes* standard to show that the claims could be resolved for the class because the evidence showed the company's treatment of the class members was consistent and not influenced by individual discretion, the judge said.

Common issues predominate, the judge said, since all the class members worked at the same location with the same management and pay policies.

Additionally, Judge Marshall said the plaintiffs' break claims survived *Brinker*.

The *Brinker* ruling says an employer must provide uninterrupted break time, Judge Marshall said, but here, the plaintiffs showed that Chinese Daily News had no break policy, did not provide break time and never told employees of their rights to a break. WJ

Related Court Document:
Order: 2014 WL 1712180

See Document Section A (P. 29) for the order.

Exclusive: Apple, Google agree to pay over $300 million to settle conspiracy lawsuit

(Reuters) – Four major tech companies including Apple and Google have agreed to pay a total of $324 million to settle a lawsuit accusing them of conspiring to hold down salaries in Silicon Valley, sources familiar with the deal said, just weeks before a high profile trial had been scheduled to begin.

In re High-Tech Employee Antitrust Litigation, No. 11-CV-02509-LHK, settlement reached (N.D. Cal., San Jose Div. Apr. 24, 2014).

The settlement was disclosed in a court filing April 24, which did not spell out terms.

Tech workers filed a class action lawsuit against Apple Inc., Google Inc., Intel Inc. and Adobe Systems Inc in 2011, alleging they conspired to refrain from soliciting one another's employees in order to avert a salary war.

Trial had been scheduled to begin at the end of May on behalf of roughly 64,000 workers. Had the case gone to trial, plaintiffs would have asked a jury to award roughly $3 billion in damages, according to court filings. Under antitrust law, that could have then been tripled to $9 billion.

Schmidt told Jobs that the recruiter would be fired, court documents show. Jobs then forwarded Schmidt's note to a top Apple human resources executive with a smiley face.

Another exchange shows Google's human resources director asking Schmidt about sharing its no-cold-call agreements with competitors. Schmidt, now the company's executive chairman, advised discretion.

"Schmidt responded that he preferred it be shared 'verbally, since I don't want to create a paper trail over which we can be sued later?'" he said, according to a court filing. The HR director agreed.

The companies had acknowledged entering into some no-hire agreements but disputed the allegation that they had conspired to drive down wages.

The companies had acknowledged entering into some no-hire agreements but disputed the allegation that they had conspired to drive down wages.

The case has been closely watched due to the potentially high damages award and a steady disclosure of emails in which Apple's late co-founder Steve Jobs, former Google CEO Eric Schmidt and some of their Silicon Valley rivals hatched plans to avoid poaching each other's prized engineers.

In one email exchange after a Google recruiter solicited an Apple employee, the allegation that they had conspired to drive down wages.

Spokespeople for Apple, Google and Intel declined to comment on the settlement, and an Adobe representative was not immediately available for comment. An attorney for the plaintiffs, Kelly Dermody of Lieff Cabraser Heimann & Bernstein, in a statement called the deal "an excellent resolution."

Corporate defendants in antitrust cases often agree among themselves what portion each will contribute toward a settlement, said Daniel Crane, a professor at the University of Michigan Law School. One likely formula would be to divide the damages based on how many employees each company has in the class, he said.

Apple, Google, Adobe and Intel in 2010 settled a U.S. Department of Justice probe by agreeing not to enter into such no-hire deals in the future. The four companies had since been fighting the civil antitrust class action.

Walt Disney Co.'s Pixar and Lucasfilm units and Intuit Inc. had already agreed to a settlement, with Disney paying about $9 million and Intuit paying $11 million. *In re High-Tech Employee Antitrust Litig.*, No. 5:11-cv-02509, *motion for preliminary approval filed* (N.D. Cal., San Jose Div. Sept. 21, 2013).

Any settlement must be approved by U.S. District Judge Lucy Koh in San Jose, Calif. A hearing on final approval of the Intuit and Disney deals is scheduled for June 19.

The plaintiffs and the companies will disclose principal terms of the settlement by May 27, according to the April 24 court filing, though it is unclear whether that will spell out what each company will pay.

Some Silicon Valley companies refused to enter into no-hire agreements. Facebook Chief Operating Officer Sheryl Sandberg, for instance, rebuffed an entreaty from Google in 2008 that they refrain from poaching each other's employees.

Additionally, Apple's Jobs threatened Palm with a patent lawsuit if Palm didn't agree to stop soliciting Apple employees. However, then-Palm Chief Executive Edward Colligan told Jobs that the plan was "likely illegal," and that Palm was not "intimidated" by the threat. WJ

(*Reporting by Dan Levine; editing by Peter Henderson*)

Workers win key ruling in Dewey & LeBoeuf WARN Act case

By Michael Nordskog, Senior Content Writer, Westlaw Daily Briefing

Dewey & LeBoeuf LLP failed to provide a required written explanation to employees regarding their sudden termination when the firm collapsed in 2012, a Manhattan bankruptcy judge has ruled in a class-action employment law claim under his jurisdiction.

Conn v. Dewey & LeBoeuf LLP (In re Dewey & LeBoeuf LLP et al.), No. 12-1672, 2014 WL 1389021 (Bankr. S.D.N.Y. Apr. 10, 2014).

The firm's failure to provide the explanation means it cannot assert two affirmative defenses to allegations it violated federal employee notification requirements, U.S. Bankruptcy Judge Martin Glenn of the Southern District of New York said in granting summary judgment to the plaintiff on the issue.

Dewey went through a much publicized collapse that ended with a May 28, 2012, Chapter 11 bankruptcy filing, just after it had laid off more than 550 lawyers and nonlawyers, according to the opinion.

The day after Dewey filed its Chapter 11 petition, plaintiff Vittoria Conn filed her class-action suit in the Bankruptcy Court alleging violations of the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101, and similar New York and California employment provisions.

The suit says the firm failed to provide employees with the 60 or 90 days' notice of termination as the various laws require.

Judge Glenn in February 2013 denied Dewey's motion to dismiss the adversary complaint, ruling that the employees had an actionable claim and could seek "equitable restitutionary relief" including back pay.

Dewey then asserted affirmative defenses under the WARN Act. In the two at issue here, the firm said it was not liable as a "faltering company" that was still actively fighting its demise, and because it experienced "unforeseen business circumstances" in the form of media reports on a criminal investigation of the firm's chairman that made its failure inevitable.

Conn moved for partial summary judgment on these two affirmative defenses, saying Dewey failed to satisfy the statutory predicate to those defenses: a written communication to employees announcing the shortened notification period that includes a brief statement explaining the reason why reduced notice is appropriate under the circumstances.

REDUCED NOTICE AND WARN ACT LIABILITY

According to the opinion, Dewey sent letters to its employees May 4, 2012, warning that the firm's precarious financial condition could lead to permanent terminations and identifying the letter as "conditional advance notice" under the WARN Act and similar laws.

On May 10 the firm provided an update, saying the situation was rapidly deteriorating and informing employees that their employment would end May 15, the opinion said.

Judge Glenn noted that Dewey conceded during oral argument its failure to provide an explanatory statement. The firm argued that it met the requirement by supplementing the notice announcement with meetings, electronic calendar announcements and emails telling employees why their termination was imminent.

The judge said the firm's "practicality" argument — that technological methods of communication provided better delivery of information to employees — could not trump statutory and regulatory language requiring written notice.

Judge Glenn pointed out that not all employees were able to attend the meetings, the content of those discussions is subject to dispute and follow-up emails did not provide the necessary explanations.

"Dewey's position raises the type of post-hoc, litigation-oriented argument that the WARN Act's bright lines are intended to avoid," the judge concluded in granting the plaintiff's motion for summary judgment and striking the affirmative defenses. WJ

Related Court Document:
Opinion: 2014 WL 1389021

See Document Section B (P. 35) for the opinion.

New arbitration pact doesn't affect pending suit, appeals court says

Citigroup must go to court to defend against a wage-and-hour class action that was already pending when the plaintiff signed an employee contract that mandates arbitration of all disputes, a federal appeals court has ruled.

Russell v. Citigroup Inc. et al., No. 13-5994, 2014 WL 1327868 (6th Cir. Apr. 4, 2014).

Citing present-tense language in the contract, a three-judge panel of the 6th U.S. Circuit Court of Appeals held April 4 that the plaintiff "certainly" and Citigroup "likely" understood the arbitration agreement to govern only future lawsuits, not pending claims.

The unanimous ruling affirms a Kentucky federal court's decision denying Citigroup's motion to compel arbitration of the class action.

Attorney **Nicholas Woodfield** of **The Employment Law Group PC**, who was not involved in the case, called the decision "an overt exercise of common sense in application."

What makes the ruling significant is not the specific holding in the case, Woodfield said, but the appeals court's reasoning concerning ethical issues that could arise from retroactive application of arbitration agreements.

"The 6th Circuit implicitly opens the door to arbitration agreements being applicable to already-filed cases but suggests that anyone who does this is playing with [his or her] license to practice law," Woodfield said. "As such, it looks like we probably won't see any new arbitration agreements being made applicable to already-filed cases."

The 6th Circuit ruling arose from claims that Keith Russell, a former Citigroup call center employee, filed in January 2012 over the company's pay practices. Citigroup fails to pay workers for the time they spend logging in and out of their computers each day, the suit said.

Russell, who worked for Citigroup from 2004 through 2009, signed a contract that mandated arbitration to resolve disputes but did not mention class actions, according to the appeals court's opinion.

The suit, alleging violations of Kentucky's wage laws, sought undisclosed damages for 300 current and former hourly employees who worked at Citigroup's two Kentucky call centers beginning in 2007.

Less than a year after filing the class action, Russell applied for a job at the same call center and was hired in January 2013. As part of the hiring process, he had to sign a new dispute-resolution agreement that mandated arbitration of all disputes, including class actions, according to the opinion.

In February 2013, Citigroup moved to compel arbitration of the pending suit, which was at the discovery stage.

U.S. District Judge David L. Bunning of the Eastern District of Kentucky denied the motion, finding that the new arbitration agreement did not apply to the earlier suit.

In affirming Judge Bunning's ruling on appeal, the 6th Circuit closely examined the language of the 2013 contract and focused on its use of the present tense.

Comments on the *Russell* decision by Nicholas Woodfield, principal, The Employment Law Group PC

In *Russell v. Citigroup*, the 6th Circuit issued a common sense solution to a thorny but unforeseen problem. As the court noted, it iterated that the intent of the parties governed the scope of the contract, and "[i]n the final analysis, that leaves a situation in which one party (Russell) certainly and the other party (Citicorp) likely expected the contract to govern only lawsuits still to come. This common understanding fixes the meaning of the contract." Hence the arbitration agreement was not applicable to already-filed cases.

The best argument that Citigroup put forward was the presumption in favor of arbitration, but the *Russell* court countered this potentially inequitable application of the presumption where the end result might lead to unintended consequences by noting:

> All in all, "arbitration is a matter of consent, not coercion." *Stolt-Nielsen* S.*A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010). A court deciding whether to order arbitration must determine whether the parties agreed to arbitrate the case at hand. Context shows that they did not in this instance. Using the presumption of arbitrability to extend the contract to this class action, even though neither Russell nor Citicorp expected the contract to stretch that far, means "los[ing] sight of the purpose of the exercise: to give effect to the intent of the parties." *Id.* at 684.

The significance of this decision is not actually in this particular fact scenario, though, as this is a fairly commonsense holding in an unambiguous factual scenario that doesn't expressly shift any paradigms. However, the significance is in what the *Russell* court says between the lines —the not-so-subtle warning that an employer's proffer of an arbitration agreement that required suits already filed in court to be subject to arbitration might result in ethical violations for communicating directly with represented parties. In light of the ethical issues raised, it is unclear whether such terms might be void as a matter of public policy. However, it is clearer that the drafters and proponents of such an arbitration agreement would be putting their law licenses in jeopardy.

According to the opinion, the employee contract mandated arbitration in all employment-related disputes that "arise between you and Citi, its predecessors ... subsidiaries, and affiliates."

The language clearly indicates that the agreement covers disputes "that begin — that arise — in the present or future," the panel found.

> Attorney Nicholas Woodfield of The Employment Law Group PC called the decision "an overt exercise of common sense in application."

Moreover, neither Russell nor Citigroup consulted their attorneys in the ongoing litigation before executing the new agreement, the court also noted, which suggests that neither expected it to affect the suit.

The appellate panel rejected the company's argument that the contract applied to past suits by virtue of the word "all" or through its reference to Citigroup's "predecessors."

Citigroup's best argument, court said, related to the Federal Arbitration Act presumption in favor of arbitration, but again the panel rejected the company's reasoning.

While the FAA requires courts to resolve "any doubts concerning the scope of arbitrable issues ... in favor of arbitration," the panel said, the presumption does not apply when there is no doubt about the scope of an arbitration agreement. WJ

Attorneys:
Appellants: Samuel S. Shaulson, Morgan, Lewis & Bockius, New York

Appellee: Richard M. Paul III, Paul McInnes LLP, Kansas City, Mo.

Related Court Document:
Opinion: 2014 WL 1327868

See Document Section C (P. 43) for the opinion.

PREGNANCY DISCRIMINATION

Pier 1 forces pregnant workers to take unpaid leave, suit says

A pregnant sales associate at Pier 1 Imports has alleged the retailer has a policy of forcing pregnant employees into involuntary, unpaid leave when they could continue working with reasonable accommodations.

Caselman et al. v. Pier 1 Imports Inc. et al., No. 114-CV-263883, complaint filed (Cal. Super. Ct., Santa Clara County Apr. 16, 2014)

Kimberly Erin Caselman, who has worked as a sales associate for Pier 1 since 2011, says she was placed on unpaid pregnancy leave following eight weeks of "light duty," even though her doctor said she could continue to perform her job with some restrictions.

Caselman filed the proposed class action in California's Santa Clara County Superior Court, seeking to represent all past, present and future Pier 1 employees in the state subject to the involuntary leave policy.

Caselman says he expected due date is July 7. On Nov. 21, 2013, she provided the company with a physician's letter certifying that she could not lift more than 15 pounds or climb ladders during her pregnancy, according to the complaint.

Based on the doctor's letter, Pier 1 placed Caselman on an eight-week "light duty," assignment for "associates with temporary mild work restrictions," the suit says. The assignment expired Jan. 16.

Caselman says she repeatedly told the company that she wanted to continue to work with the lifting and ladder restrictions her doctor had advised. She says she provided Pier 1 with an updated physician's statement Jan. 16, with the same pregnancy-related restrictions.

Despite this, Pier 1 placed Caselman on concurrent unpaid company medical leave and the four months of leave she is entitled to under the California Pregnancy Disability Leave Law on Jan. 17, pursuant to its light-duty policy, the suit alleges.

The complaint says Pier 1 policy requires Caselman to return to work or provide a physician's statement by May 20, the last day of the four months of leave.

Caselman says that if Pier 1 does not grant her reasonable accommodation May 20, the

REUTERS/Rick Wilking

retailer will either keep her on involuntary unpaid company medical leave that does not guarantee return to the same or a comparable position after the leave, as the state law does, or will fire her.

The suit alleges Pier 1 violates California's Fair Employment and Housing Act, Cal. Gov't Code § 12945(a)(3)(A), and unfair-competition law, Cal. Bus. & Prof. Code § 17200, by failing to reasonably accommodate for pregnancy-related conditions and placing pregnant employees on involuntary leave.

FEHA provides up to four months of disability leave for an employee disabled by pregnancy or childbirth. It provides post-leave job protection and reasonable accommodation, if requested, with the advice of the employee's health care provider.

Pier 1's policies deny workers the right to preserve their four-month leave until they really need it when the child is born, as well as their post-leave job protection under state law, the complaint says.

The suit seeks declaratory and injunctive relief, plus unspecified compensatory and punitive damages for wages, benefits, and pain and suffering. WJ

Attorneys:
Plaintiff: Elizabeth Kristen, Sharon Terman and Giselle Olmedo, The Legal Aid Society – Employment Law Center, San Francisco

Related Court Document:
Complaint: 2014 WL 1608623

'Fitness for duty' evaluation didn't violate peace officer's FMLA rights

A Los Angeles County requirement that an investigator for the district attorney's office submit to a re-evaluation following leave for emotional distress did not violate the employee's rights under the Family and Medical Leave Act, a California appeals court has ruled.

White v. County of Los Angeles et al., No. B243471, 2014 WL 1478701 (Cal. App. Ct., 2d Dist. Apr. 15, 2014).

The decision by a unanimous three-judge panel of the 2nd District Court of Appeal reversed a lower court ruling in the employee's favor.

According to the appeals court, its decision is consistent with 2008 amendments to the Family and Medical Leave Act, 29 U.S.C. § 2601, that said an employer can require a job-related medical evaluation by its own doctor after an employee returns to work.

While the ruling applies to all employees, the appeals court said, it is particularly important in this case that involves a peace officer who must be "free from any physical, emotional or medical condition" under Cal. Gov't Code § 1031.

A legal alert posted on the Ballard Spahr LLP website addressed the ruling.

"The *White* decision may give employers a basis for seeking a medical opinion regarding an employee's fitness for duty," the post said. "But the court made clear … an employer seeking to request an examination should be prepared to demonstrate that the employee's condition 'impacted or posed a risk to the employee's work.'"

FMLA LEAVE FOR DEPRESSION

Susan White filed suit in the Los Angeles County Superior Court in 2012 after her supervisor in the district attorney's office requested she submit to a re-evaluation to determine if she was fit to perform her job as an investigator following a leave for treatment of severe depression.

As an investigator in the DA's office, White carried a gun because her responsibilities included serving warrants and making arrests, according to the appellate opinion.

She began experiencing emotional issues and acting erratically in 2009, the opinion said.

In April 2011 she informed her supervisors that she would be taking leave under the FMLA for treatment of depression and emotional problems. According to the opinion, White's doctor approved her to return to work in November 2011. The district attorney then placed her on administrative leave related to an internal investigation of a case she had worked on prior to taking FMLA leave.

Four months later, the opinion said, the district attorney's office requested a re-evaluation by the county doctor, citing White's behavior prior to her leave.

According to the opinion, she refused a re-evaluation multiple times, indicating her belief that the request violated her rights under the FMLA, which prohibits an employer from requiring approval by the employer's doctor before an employee can return to work following leave.

REUTERS/Mario Anzuoni

The plaintiff is an employee of the Los Angeles County district attorney's office. Here, former DA Steve Cooley, a defendant in the case, speaks during a press conference.

White sought injunctive relief in the Superior Court so she would not have to submit to the evaluation.

The trial court ruled in her favor, finding that the district attorney's office must rely on the evaluation from White's doctor for her return to work. The county can only seek a further evaluation based on her conduct since — but not before — her leave, the trial court said.

EVALUATION MUST BE 'JOB-RELATED'

On the county's appeal, the appellate panel determined that 2008 amendments to the FMLA allow an employer to seek a re-evaluation under certain circumstances once an employee has returned to work.

According to the appeals court, White officially returned to work in November 2011 before the county requested further evaluation.

Amendments to the FMLA say the Americans with Disabilities Act, 42 U.S.C. § 12101, permits an employer to request an evaluation after an employee has returned to work as long as it is "job-related and consistent with business necessity," the appeals court said. WJ

Attorneys:
Respondents-appellants: County Counsel John F. Krattli, Assistant County Counsel Joyce Aiello and Deputy County Counsel Julie A. Dixon, Los Angeles; Jeffrey M. Hausman and Larry D. Stratton, Hausman & Sosa, Tarzana, Calif.

Petitioner-respondent: Audra C. Call, Green & Shinee, Encino, Calif.

Related Court Document:
Opinion: 2014 WL 1478701

GENDER DISCRIMINATION

Female teachers say Pennsylvania school district pays men more

Three female employees of the Baldwin-Whitehall School District in Pittsburgh have filed a lawsuit accusing the district of paying female teachers less than their male counterparts.

Niemi et al. v. Baldwin-Whitehall School District, No. 2:14-cv-00469, complaint filed (W.D. Pa. Apr. 11, 2014).

English teachers Holly Niemi and Katherine Musselman and math teacher Donna Vecchio, who all have worked for the district since the 2004-05 school year, filed the pay discrimination suit in the U.S. District Court for the Western District of Pennsylvania on April 11.

Male teachers without prior teaching experience have joined the district at a higher pay rate than experienced female teachers, the plaintiffs allege.

The women say the district recognizes the prior teaching experience of male teachers more than that of female teachers in setting salaries, which are based on a combination of education and years of teaching experience. They point to the district's discounting of their own years of teaching experience.

According to the complaint, when Niemi was hired, she was credited for only three years of teaching experience even though she had been teaching for six — one year as a long-term substitute for the district and five years outside Pennsylvania. She was put on "step 4" of the union pay scale.

Musselman received no credit for her two years of public school teaching experience outside Pennsylvania, the suit says, and was put on step 1 of the pay scale.

The district did not credit Vecchio for 15 years of teaching experience outside the state and in private schools, according to the complaint. She was put on step 3 of the pay scale.

Male teachers without prior teaching experience have joined the district at a higher pay rate than experienced female teachers, the plaintiffs allege.

The district's pay practices violate the Equal Pay Act, 29 U.S.C. § 206(d), as male and female teachers perform equal work that requires equal skill, effort and responsibility under the same working conditions, the suit says.

The suit seeks an order putting the female teachers at pay, benefit and seniority levels equivalent to the district's male teachers, as well as back pay and prejudgment interest. WJ

Attorneys:
Plaintiffs: Colleen R. Johnston and Nikki V. Lykos, Rothman Gordon PC, Pittsburgh

Related Court Document:
Complaint: 2014 WL 1608629

Negligent employers can be liable for third-party harassment, 4th Circuit says

(Reuters) – An employer is liable for a third party that creates a hostile work environment if the employer knew or should have known about it and failed to take action, the 4th U.S. Circuit Court of Appeals ruled April 29.

Freeman v. Dal-Tile Corp., No. 13-1481, 2014 WL 1678422 (4th Cir. Apr. 29, 2014).

It was the first time the appellate panel adopted in a published opinion a "negligent standard" for third-party harassment under Title VII of the Civil Rights Act of 1964.

Employers cannot avoid Title VII liability for third-party harassment by adopting a "see no evil, hear no evil" approach, the 4th Circuit said.

The underlying case involves Lori Freeman, hired in 2006 as a temporary worker at the Marble Point Inc. stone yard in Raleigh, N.C. Marble Point was acquired by Dal-Tile Corp., a manufacturer and distributor of ceramic tile and stonework, in June 2008. At that point, Freeman was a permanent employee.

In October 2009 she filed a charge with the U.S. Equal Employment Opportunity Commission, alleging that Dal-Tile had subjected her to a hostile working environment and harassment based on her gender and race.

After getting a right-to-sue letter from the EEOC, Freeman sued Dal-Tile, along with VoStone Inc., a Raleigh-based kitchen and remodeling center with which Dal-Tile did business. She alleged that, as a customer service representative, she was subjected to near daily harassment from VoStone employee Timothy Koester.

Koester would regularly use racial epithets and inappropriate terms for the female gender, Freeman's case alleged.

PASSED GAS ON PHONE

Koester would also describe his sexual activities, show Freeman pictures of naked women on his cellphone and at one point passed gas on her phone, Freeman said.

Freeman complained to her supervisor, who called Koester a "pig" but did nothing about the situation. A human resources manager at Dal-Tile eventually told Freeman that Koester would bypass Freeman and conduct his business with her manager.

In September 2009 Freeman took medical leave to be treated for depression and anxiety related to interacting with Koester. After returning to work briefly, Freeman told Dal-Tile in December 2009 she would be resigning, court documents said.

Employers cannot avoid Title VII liability for third-party harassment by adopting a "see no evil, hear no evil" approach, the 4th Circuit said.

Freeman and other co-workers testified about Koester's racial and sexual remarks. Koester testified he probably made comments about bringing "beautiful black women home" and that it was "maybe racially inappropriate."

The U.S. District Court for the Eastern District of North Carolina at Raleigh granted Dal-Tile's request for summary judgment, saying Freeman did not present sufficient evidence that the harassment was objectively severe or pervasive.

Even if Freeman had provided enough evidence, the federal trial court said, she had not shown that the liability for Koester's behavior should be imputed to Dal-Tile.

"No reasonable fact finder could conclude that [Freeman's] statements to [her manager] constituted a complaint, either formal or informal," the District Court said.

COMMENTS FREQUENT, MANAGER SAYS

The 4th Circuit disagreed.

Freeman's manager "herself testified that she knew Koester used the word "b----" in the office frequently, that he made sexual comments in the office, that he showed pictures of naked women on his phone in the office and that he 'always made comments about women,'" the 4th Circuit wrote.

Freeman's manager knew or should have known that this behavior bothered Freeman given her frequent verbal complaints.

"We believe a reasonable fact finder could find there was an objectively hostile work environment based on both race and sex and that Dal-Tile knew or should have known of the harassment and failed to adequately respond," the panel wrote.

The 4th Circuit reversed the District Court's decision to grant Dal-Tile summary judgment on Freeman's racial and sexual hostile work environment claims. Her case will be remanded to the District Court for further proceedings.

Dal-Tile's counsel declined to comment on the 4th Circuit's decision. Freeman's counsel could not be reached for comment. WJ

(*Reporting by Amanda Becker*)

Attorneys:
Plaintiff: Anne Warren-King and Brian Wolfman, Georgetown University Law Center, Washington

Defendant: William McMahon and Kristine Sims, Constangy, Brooks & Smith, Winston-Salem, N.C.

Related Court Document:
Opinion: 2014 WL 1678422

Driver, employer denied coverage in fatal auto accident case

A truck owned by an employee and consistently used by his employer is a "borrowed" vehicle barred from coverage afforded by a non-owned auto provision in State Farm's contractor insurance policy issued to defendant ARC Manufacturing, a Minnesota federal judge has ruled.

State Farm Fire & Casualty Co. v. ARC Manufacturing Inc. et al., No. 12-CV-690, 2014 WL 1281595 (D. Minn. Mar. 31, 2014).

U.S. District Judge John R. Tunheim of the District of Minnesota made the ruling March 31 in a case that examined a non-owned auto exception to State Farm Fire & Casualty Co.'s auto exclusion in a comprehensive business liability policy.

The policy was purchased by Ronald W. Lammert, vice president of ARC Manufacturing, which performs plumbing, heating, air conditioning and ventilation work, the ruling says.

According to the opinion, Lammert was involved in an accident that killed another driver Oct. 7, 2010. Lammert had been driving home from a job site in Aberdeen, S.D., when the accident occurred.

Co-trustees acting on behalf of the heirs of the deceased motorist brought a wrongful-death action in December 2012 in Swift County, Minn., against Lammert, ARC and Great West, another contractor at the job site, the opinion says. In March 2012 State Farm sough a declaratory judgment that its policy issued to ARC did not provide coverage for the accident.

State Farm's policy contained two pertinent provisions. An auto exclusion barred coverage for bodily injury "arising out of the ownership, maintenance, use or entrustment to others" of any auto "owned or operated by or rented or loaned to any insured," the opinion says.

All parties agreed that ARC and Lammert were insureds and that this provision, taken alone, barred coverage, the opinion says. However, the policy contained an exception to the auto exclusion that applied to bodily injury arising from the use of a non-owned auto. The policy defined "non-owned" auto as any auto that ARC did not "own, lease, hire or borrow" used in connection with ARC's business.

State Farm asserted that ARC hired or borrowed the truck from Lammert. The policy did not define the terms "hire" or "borrow," and the opinion noted the body of case law provided for use of their ordinary definitions in that circumstance.

Finding that the evidence did not support the "hire" theory because ARC did not compensate Lammert for the use of the truck, the opinion focused on whether ARC had "borrowed" the vehicle.

The opinion relied heavily on a similar case, *Metzger v. County Mutual Insurance Co.*, 986 N.E. 2d 756 (Ill. App. Ct. 2013), in which the Illinois Appellate Court determined that a truck owned and operated by the vice president of a masonry company was a vehicle that had been "borrowed" by the company at the time it collided with a car.

Here, Judge Tunheim found that although Lammert was the registered owner of the truck, ARC consistently benefitted from its use. The understanding in this arrangement was that when the use ended, the truck returned to Lammert's personal possession.

The judge cited ARC's lack of any payment to Lammert beyond his regular employment compensation as further support that this was a borrowing arrangement. WJ

Attorneys:
Plaintiff: Matthew R. Smith, Tomsche, Sonnesyn & Tomsche, Minneapolis

Defendant: Tonya T. Hinkemeyer, Rinke Noonan, St. Cloud, Minn.

Related Court Document:
Opinion: 2014 WL 1281595

Clickwrap stock-option agreement valid, Delaware Chancery Court says

An employer may enforce non-solicitation and confidentiality provisions against a former employee who agreed to the terms by clicking "I accept" to an online "clickwrap" contract offering her restricted stock units, a Delaware Chancery Court judge has ruled.

Newell Rubbermaid Inc. v. Storm, No. 9398, 2014 WL 1266827 (Del. Ch. Mar. 27, 2014).

In his March 27 opinion granting Newell Rubbermaid a temporary restraining order against former employee Sandy Storm, Vice Chancellor John W. Noble said he "sympathized" with Storm, who allegedly did not know about her post-employment restrictions.

But "well-settled principles" of online contract formation required a ruling in the company's favor, Vice Chancellor Noble found.

"Storm finds herself in this position because of her willingness to accept an agreement without reviewing its terms when there should have been no doubt that she was assenting to a valid, enforceable contract," he wrote, ordering her not to disclose confidential information or solicit Target Corp., her main client at Newell.

According to the Chancery Court opinion, Storm, who resigned Jan. 7, worked for more than 13 years on a sales and marketing team for a Newell subsidiary that manufactures and sells infant and juvenile products under the Graco brand, mainly to retail giant Target.

Storm was promoted to director of Target-related sales in 2011, and, as part of her promotion, she became eligible to receive restricted stock units, or RSUs, as bonuses.

Before accepting her RSUs online, Storm had to click "accept" at the bottom of a lengthy scrolling message that allegedly discussed the RSU awards and related terms. She went through the same process in 2012 and 2013 when she accepted additional RSUs.

According to Vice Chancellor Noble's opinion, the 2013 terms and conditions included the post-employment confidentiality and non-solicitation provisions. The scroll box included a hyperlink to a copy of the agreement that also contained the provisions, the judge said.

When Storm resigned in January to work for another company, Newell Rubbermaid sued her to enforce the confidentiality and non-solicitation provisions. Her former employer wanted to ensure she did not use her insider knowledge about Target to solicit the retailer, according to the opinion.

Storm argued in response that the provisions were invalid because she did not consent to them.

The judge disagreed, finding that she had a fair chance to review the terms and conditions before accepting them.

"Newell's method of seeking Storm's agreement to the post-employment restrictive covenants, although certainly not the model of transparency and openness with its employees, was not an improper form of contract formation," Vice Chancellor Noble wrote, upholding the clickwrap agreement. WJ

> The company's method of seeking the employee's assent to its post-employment restrictive covenants was not a model of transparency, but it was not improper, the judge said.

Attorneys:
Plaintiff: James W. Semple and Jason C. Jowers, Morris James LLP, Wilmington, Del.; Joel R. Hlavaty and William P. Dunn, Frantz Ward LLP, Cleveland

Defendant: John D. Demmy, Stevens & Lee, Wilmington; Gary D. Melchionni and Theresa Z. Zechman, Stevens & Lee, Lancaster, Pa.

Related Court Document:
Opinion: 2014 WL 1266827

TRANSIT AUTHORITY SHOULD HAVE RESUMED NEGOTIATIONS AFTER UNION MEMBERS REJECTED TENTATIVE CONTRACT

Ruling: In an unpublished decision the Florida 2nd District Court of Appeal reversed the state's Public Employees Relations Commission's dismissal of an unfair-labor-practice charge. PERC determined in part that a transit employer committed no unfair practice by refusing to return to the bargaining table after union members rejected a tentative agreement. The appeals court determined that PERC's resolution of this case was at odds with its prior decision in *ATU, Local 1701 v. Sarasota County Board of County Commissioners*, 36 FPER 453 (P.E.R.C. Nov. 10, 2010), *affirmed per curiam,* 38 FPER 335 (Fla. 2d Dist. Ct. App. Apr. 18, 2012). Contrary to the result reached by PERC, the appeals court held that, pursuant to Fla. Stat. § 447.309(4), the parties in this case were required to resume negotiations after the tentative agreement was rejected by the union membership instead of proceeding to a legislative body hearing. The court remanded the case with instructions for PERC to approve the hearing officer's recommended order.

What it means: The appeals court explained that a legislative body hearing that occurs when the parties are no longer at impasse is void from the outset under the terms of the impasse statute.

Amalgamated Transit Union, Local 1593 v. Hillsborough Area Regional Transit, 40 FPER 332 (Fla. 2d Dist Ct. App. Apr. 4, 2014).

COUNTY FULFILLED STATUTORY, CONTRACTUAL DUTIES BEFORE REDUCING CORRECTIONS OFFICERS' WORK HOURS

Ruling: The California Court of Appeal, 6th District, ruled that a county employer did not violate the Meyers–Milias–Brown Act or a contract regarding meeting and conferring in good faith before reducing the work schedules of certain correctional peace officers. Neither the MMBA nor the parties' memorandum of understanding required the employer to meet and confer about the need to reduce the Corrections Department budget or about the policy decision to avoid layoffs by reducing employee work hours, the court decided. Where the employer acted within the authority reserved by an MOU provision, it did not fail to bargain in good faith, the court concluded.

What it means: A three-part inquiry applies to the question of whether a topic is bargainable under the MMBA and is subject to a meet and confer requirement. In balancing the interests to determine whether parties must meet and confer over a certain matter, a court may also consider whether the transactional cost of the bargaining process outweighs its value.

Santa Clara County Correctional Peace Officers' Association Inc. v. County of Santa Clara, 38 PERC 134 (Cal. Ct. App., 6th Dist. Mar. 17, 2014).

TOWNSHIP PROPERLY EXERCISES MANAGERIAL PREROGATIVE BY ISSUING DIRECTIVE TO OFFICERS

Ruling: Despite a union's contention that a New Jersey municipal employer violated Employer-Employee Relations Act provisions by prohibiting police officers from reporting early for duty immediately following their completion of an off-duty assignment, the New Jersey Public Employment Relations Commission's hearing examiner granted the employer's summary judgment motion and dismissed the unfair practice charge. The examiner found that the employer properly asserted its managerial prerogative to determine staffing needs when it discontinued a prior practice concerning overtime payments.

What it means: The examiner explained that public employers maintain the inherent power to determine staffing levels for a police department as a whole and for each position to be filled or each duty to be performed. These staffing determinations in turn may interrelate to dictate the amount of overtime that will be worked, the examiner explained.

Township of Hanover and Hanover Township PBA Local 128, 40 NJPER 148 (N.J. Pub. Employment Relations Comm'n, H. Exam'r Feb. 25, 2014).

PUBLIC LIBRARY REPUDIATES CONTRACT TERMS BY REFUSING TO ARBITRATE GRIEVANCE

Ruling: The Michigan Employment Relations Commission determined that a public library employer repudiated bargaining agreement terms by refusing to arbitrate a grievance. It rejected the employer's contention that the parties' bargaining agreement was terminated after the union sought to negotiate concerning modifications to that agreement. MERC accepted an administrative law judge's conclusion that the parties' bargaining agreement was automatically extended by one year because neither the union nor the employer provided explicit written notice to terminate the contract at least 60 days prior to the agreement's expiration.

What it means: MERC agreed with the ALJ's reliance on the holding in *36th District Court v. AFSCME Council 25, Local 917*, 25 MPER 67 (Mich. Ct. App. Feb. 28, 2012). Under that binding case law, a notice to terminate a collective bargaining agreement pursuant to the agreement's duration clause must be clear and explicit.

Maud Preston Palenske Memorial Library and American Federation of State, County and Municipal Employees, Locals 2757.09 and 2757.10, 27 MPER 53 (Mich. Employment Relations Comm'n Apr. 10, 2014).

CLARIFYING LANGUAGE IN EMPLOYEE HANDBOOK FALLS SHORT OF RESTRICTING SECTION 7 ACTIVITY

Ruling:]The National Labor Relations Board Division of Advice recommended the dismissal of an unfair-labor-practice charge alleging that employer Lionbridge Technologies violated Section 8(a)(1) of the National Labor Relations Act by maintaining in its employee handbook an employment-at-will policy. In the absence of evidence that the policy explicitly restricted NLRA Section 7 activity, to form or join a labor union, the Division of Advice declined to find that employees would reasonably construe the policy as restricting or prohibiting them from engaging in Section 7 activity.

What it means: The maintenance of a work rule or policy that would "reasonably tend to chill employees in the exercise of their Section 7 rights," even in the absence of enforcement, constitutes a violation of

Section 8(a)(1) of the act. To determine whether a work rule would have a chilling effect on Section 7 activity, the NLRB looks to see whether the rule explicitly restricts Section 7 activity, whether the rule was a response to union activity or whether the rule has been applied to restrict the exercise of Section 7 rights. Here, the at-issue language merely described employees' current at-will status and clarified that the handbook did not create an enforceable employment contract.

Lionbridge Technologies, 41 NLRB AMR 38 (N.L.R.B., Div. of Advice Mar. 31, 2014).

WAL-MART LAWFULLY ENFORCES NO-SOLICITATION POLICY AGAINST OFFSITE, NONEMPLOYEES

Ruling: The National Labor Relations Board Division of Advice concluded that Wal-Mart did not violate Section 8(a)(1) of the National Labor Relations Act when store officials told offsite employees, who were speaking to on-duty employees about OUR Wal-Mart, to leave the store. OUR Wal-Mart is a nonunion association of company employees organized to ensure Wal-Mart treats it workers with "respect," according to its website. Although the union contended the employer freely allowed off-duty and offsite employees access to the sales floor to talk to on-duty employees, the Division of Advice found no record evidence to support that assertion or that the employer knew about or approved of the alleged access.

What it means: Offsite employees have a non-derivative right to access the facilities of their employer to engage in Section 7 organizing activities. Under NLRB law, an employer may lawfully bar access to the interior of its facility and other working areas if the access rule satisfies three conditions. The rule must specifically limit access to the interior of the employer's facility and other working areas, be disseminated to all employees, and be applied to all off-duty employees seeking access to the plant for any purpose, not just to employees engaged in union activity. Additionally, a retail store employer may lawfully prohibit its employees, whether on duty or off duty, from soliciting other employees at all times on the selling floor.

Wal-Mart Stores Inc., 41 NLRB AMR 39 (N.L.R.B., Div. of Advice Mar. 31, 2014).

CAR MANUFACTURER'S APPLICANT SELECTION CRITERIA ARE NONDISCRIMINATORY, NLRB RULES

Ruling: The National Labor Relations Board Division of Advice found insufficient evidence to sustain the United Auto Workers' claim that Kia Motors unlawfully refused to consider and/or hire UAW applicants or otherwise directed its staffing agency not to refer UAW applicants for employment as temporary hourly employees at its West Point, Ga., facility. The Division of Advice recommended dismissal of the charge, concluding it would be unable to establish union animus, within the period set by Section 10(b) of the National Labor Relations Act, as a substantial or motivating factor in the employer's hiring and banding criteria of applicants, or the discriminatory application of those criteria to the detriment of UAW applicants.

What it means: A successful refusal-to-hire claim requires demonstration of three elements: that the employer is in fact hiring or has concrete plans to hire, that the affected applicants possess the required qualifications or training, and that the employer has failed to adhere uniformly to those job requirements or the job requirements themselves are a pretext for discrimination. Here, dismissal of the charge was appropriate because the union was unable to establish that the hiring and banding criteria, which the employer used to sort applicants into bands based on facially neutral elements such as education, work experience, employment history and geographic proximity, directly or indirectly referenced union affiliation.

Kia Motors Manufacturing Georgia Inc., 41 NLRB AMR 37 (N.L.R.B., Div. of Advice Mar. 14, 2014).

EMPLOYER MUST BARGAIN IMPACT OF DISCIPLINE STEMMING FROM GPS TRACKING

Ruling: The Pennsylvania Labor Relations Board dismissed a state employer's exceptions and made absolute and final a hearing examiner's Jan. 6 decision reported at 45 PPER 79. The hearing examiner determined that the employer unlawfully violated Sections 1201(a)(1) and (5) of the Public Employee Relations Act by refusing to bargain the impact of the disciplinary process related to the implementation of a GPS tracking system on the take-home vehicles of the employer's liquor enforcement officers. Although the employer contended the hearing examiner erred in failing to make findings regarding "just cause" requirements for discipline as set forth in the parties' collective bargaining agreement, the PLRB affirmed the hearing examiner's determination that the employer had an impact bargaining obligation with respect to discipline for "erratic driving."

What it means: Although the installation of Automatic Vehicle Locator devices does not outweigh the legitimate managerial interest of the state employer in fulfilling its statutory mission of enforcing liquor-related laws and regulations, matters of employee discipline and disciplinary procedures are mandatory subjects of bargaining. Here, the discipline for "erratic driving" represented a change in employees' working conditions that was severable from the employer's managerial prerogative to install new technology to monitor employee behavior for purposes of discipline under existing rules.

Pennsylvania Liquor Enforcement Association v. Pennsylvania State Police Bureau of Liquor Control Enforcement, 45 PPER 99 (Pa. Labor Relations Bd. Apr. 15, 2014).

APPELLATE COURT REVERSES SUMMARY JUDGMENT ON PLANNING PERIOD, STIPEND CHANGES

Ruling: Based on evidence that Section 21.4 of the parties' collective bargaining agreement was ambiguous and that the lower court ignored parol evidence regarding the parties' interpretation of the clause, the Ohio Court of Appeals reversed a trial court's grant of summary judgment in favor of a school district. The lower court found that the language of Section 21.4 of the CBA entitled the district to stop payment of the eighth-period stipend to its teachers by providing them with a planning period in the morning prior to the start of classes. However, the appellate court found the language in the CBA regarding the eighth-period stipend was susceptible to two or more reasonable interpretations with respect to when the district must provide a planning period to avoid having to pay the stipend.

What it means: The ambiguity in the phrase "teachers who are assigned to classroom instructional duties in lieu of a planning period" is subject to the alternative interpretation that a teacher is entitled to the stipend if the teacher has classroom duties during all instructional periods,

without a planning period at some time during those eight periods. Therefore, the trial court should have considered the association's parol evidence regarding the assertion that Section 21.4 evinced the intention to memorialize the parties' past practice of paying the stipend to teachers if they taught during all eight instructional periods without a planning period during those periods.

Career & Technical Association v. Auburn Vocational School District Board of Education, 31 OPER 193 (Ohio Ct. App. Apr. 14, 2014).

APPELLATE COURT UPHOLDS WRIT OF *MANDAMUS* COMPELLING UNION TO SIGN CBA

Ruling: The Ohio Court of Appeals overruled a fire union's assignment of error and affirmed a trial court's decision to issue a writ of *mandamus* compelling the union to sign a collective bargaining agreement containing a retroactive 1 percent wage increase and the increase in annual hours from 2,600 to 2,756. The union contended the trial court lacked jurisdiction to grant the writ and that collateral estoppel barred the township employer from retroactively applying the increase in hours worked. However, the appellate court rejected both assertions, noting that the union failed to show that the issue of retroactivity was previously decided or that there were extraordinary circumstances that would permit the lower court to disregard a previous appellate court decision, 30 OPER 165 (Apr. 22, 2013), which considered and rejected each of those arguments.

What it means: Where the appellate court previously found that the trial court had subject matter jurisdiction to determine whether the township employer was entitled to the writ of *mandamus*, the law-of-the-case doctrine barred the union from raising any arguments related to the lower court's determination of subject matter jurisdiction over the issue. Additionally, in the absence of evidence that the union raised the issue of retroactivity before the trial court, the union waived that argument on appeal. Moreover, the union was unable to demonstrate that the township possessed an adequate remedy at law where the instant *mandamus* action sought a specific action, compelling the union to sign the agreement, whereas an unfair-practice charge before SERB sought a declaration that the union's refusal to sign the agreement constituted an unfair labor practice.

State ex rel. Union Township, Clermont County, Ohio v. Union Township Professional Firefighters, IAFF Local 3412, 31 OPER 194 (Ohio Ct. App. Apr. 14, 2014).

RECENTLY FILED COMPLAINTS FROM WESTLAW COURT WIRE*

Case Name	Court	Docket #	Filing Date	Allegations	Damages Sought
Construction and General Laborers' Local Union 330 v. Town of Grand Chute 2014 WL 1760469	E.D. Wis.	1:14-cv-455	4/18/14	The town of Grand Chute, Wis., threatened labor protesters with the Construction and General Laborers' Local Union No. 330 with citations and fines if they picketed on public land with a giant inflatable rat.	Declaratory judgment, injunctive relief, fees and costs
Rodriguez v. Wells Fargo Bank N.A. 2014 WL 1647613	Cal. Super. Ct. (Los Angeles)	BC543364	4/22/14	Class action. Wells Fargo violates labor law by failing to pay overtime or provide meal and rest periods.	Class certification; special, general and other damages; earned wages; restitution; interest; fees and costs
Canales v. City of Cockrell Hill 2014 WL 1676901	Tex. Dist. Ct. (Dallas)	DC-14-04421	4/24/14	A Dallas suburb fired an employee in retaliation for her reporting illegal activity by the police chief involving as many as 10 impounded cars a day.	Actual and compensatory damages, reinstatement, interest, fees and costs
Freeman v. Coast to Coast Manpower 2014 WL 1689695	Cal. Super. Ct. (Los Angeles)	BC543709	4/25/14	Class action. Coast to Coast Manpower stiffs workers for minimum wage and violates other labor laws.	Class certification, liquidated damages, injunctive relief, interest, fees and costs
Whitlock v. G2 Diesel Products Inc.	Pa. Ct. Com. Pl. (Chester)	14-03827	4/28/14	G2 Diesel Products Inc. breached the employment contract with plaintiff and fraudulently induced plaintiff to leave his former employer by failing to provide commitments made, failing to disclose the financial condition of the company and discharging plaintiff after less than six months of employment.	In excess of $50,000 plus interest, fees and costs
Childers v. Trustees of the University of Pennsylvania 2014 WL 1677363	E.D. Pa.	2:14-cv-2439	4/29/14	The University of Pennsylvania denied tenure to a former history professor because she took time off to have and care for her children.	Injunctive relief; compensatory, punitive and exemplary damages; reinstatement; expenses; fees and costs
Houston Federation of Teachers Local 2415 v. Houston Independent School District 2014 WL 1724308	S.D. Tex.	4:14-cv-1189	4/30/14	The Houston Independent School District violated teachers' due process rights when it took contract action against teachers who had insufficient student academic growth, as reflected by value-added scores, without providing teachers information to verify or challenge the scores.	Declaratory and injunctive relief, fees and costs

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RECENTLY FILED COMPLAINTS FROM WESTLAW COURT WIRE*

Case Name	Court	Docket #	Filing Date	Allegations	Damages Sought
Dickey v. Baker Boats Inc.	Tex. Dist. Ct. (Harris)	201424479	4/30/14	Baker Boats Inc. terminated plaintiff in retaliation for his participation in an unemployment benefits matter before the Texas Workforce Commission, where he testified unfavorably about the defendant.	Monetary damages, fees and costs
Appleby v. Morgan Stanley Smith Barney LLC	Cal. Super. Ct. (San Francisco)	CGC-14-539080	5/2/14	Morgan Stanley Smith Barney LLC wrongfully interfered with plaintiff's medical leave and discriminated against him because of his disability.	General, compensatory, punitive and statutory damages; front and back pay; injunctive relief; interest; fees and costs
Fernandez v. New York City Department of Education	N.Y. Sup. Ct. (Kings)	0503947/2014	5/2/14	The New York City Department of Education subjected plaintiff to a hostile work environment and harassment, resulting in her constructive dismissal.	$1 million in compensatory damages, punitive damages, disbursements, fees and costs
Cerda v. DVA Rental Healthcare Inc.	Cal. Super. Ct. (Los Angeles)	BC544575	5/5/14	DVA Rental Healthcare Inc. discriminated against and wrongfully terminated plaintiff because of her age.	In excess of $25,000 in general and compensatory damages, front and back pay, punitive and exemplary damages, interest, fees and costs
Sohi v. Specialty Restaurants Corp.	Cal. Super. Ct. (Los Angeles)	BC544614	5/5/14	Defendant wrongfully terminated employee in retaliation for complaining about race and national origin discrimination and harassment.	In excess of $25,000 in compensatory and actual damages, interest, fees and costs

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Costco

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Stiller et al. v. Costco Wholesale Corp. et al., No. 09-2473, 2014 WL 1455440 (S.D. Cal. Apr. 15, 2014).

U.S. District Judge Gonzalo P. Curiel of the Southern District of California said that despite evidence that a companywide "lockdown" policy forced employees to stay inside while managers closed the stores, there are differences in how individual employees were affected.

"[U]ndertaking individualized inquiries as to approximately 30,000 individuals ... would result in the commons questions here being overcome by individualized inquiries," he said.

The ruling reverses certification of a statewide class and conditional certification of a nationwide class by U.S. District Judge Marilyn L. Huff in 2010. The case was transferred to Judge Curiel in October 2012.

and directives to show a de facto policy to keep employees onsite during the store-closing process, the opinion said.

Judge Huff ruled that the evidence showed Costco's manuals set forth a policy that applies to all employees and certified the two classes.

Costco moved to decertify the classes in 2012, arguing that the policy was not uniform and affected employees differently depending on their managers' actions.

According to the opinion, the company presented deposition testimony from employees to demonstrate that some managers allowed workers to leave on time, while others told workers not to clock out until after the closing process.

Some testimony, including Stiller's own deposition, also showed that some employees were able to resolve the pay issues with their managers, the opinion said.

Judge Curiel concluded the plaintiffs presented "substantial" evidence that Costco had a *de facto* policy of retaining employees without pay, but said the company also had "convincing" evidence that not all the employees were left unpaid.

Since managers implemented the policy differently, liability cannot be determined class-wide, he said. WJ

> The plaintiffs had presented "substantial" evidence that Costco had a de facto policy of retaining employees without pay, but the company also had "convincing" evidence that not all the employees were left unpaid, the judge said.

Costco employees Eric Stiller and Joseph Moro sued the wholesale warehouse company, alleging it violated state and federal wage laws by not paying hourly employees for time spent in the stores after they clock out.

The suit alleged that, as part of the company's "lockdown" policy, workers could not leave the store while managers conducted the store-closing process, including moving jewelry displays and emptying cash registers.

Stiller and Moro asked the court to certify two classes: a statewide class of 30,000 workers for state law claims and a nationwide class under the Fair Labor Standards Act, 29 U.S.C. § 201. The suit sought more than $50 million in unpaid compensation and liquidated damages for thousands of hourly Costco employees.

The plaintiffs did not allege that Costco had an express "lockdown" policy, but presented evidence from numerous employee manuals

Attorneys:
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