

HIRE Institute
1320 Nineteenth Street, N.W., Suite 300
Washington, DC 20036
Tel: 202-296-4516
Fax: 202-296-8205
hireinst@aol.com

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Supremes

The U. S. Supreme Court will often accept for their consideration issues on which circuit courts have disagreed. There are several such issues in the pipeline:

In Hall Street Associates, the U. S. Supreme Court held that only the grounds set forth in the Federal Arbitration Act could be used by the courts to overturn a decision by an arbitrator. These grounds include corruption and evident partiality exceeding the powers granted to the arbitrator by the language in the agreement between the parties to arbitrate. We covered the decision in this case in a previous issue of **Employee Briefs**. Prior to the Hall decision, some circuit courts had also overturned arbitration decisions on the ground of “manifest disregard of the law,” that is, if the arbitrator did not correctly apply federal law and federal court decisions. The Second Circuit in a post Hall decision continued to use the “manifest disregard of the law” ground to overturn an arbitrator’s decision (Stoldt-Nielson SA v Animal Feeds Intl). The Second Circuit in this case agreed with a post Hall decision by the Seventh Circuit and held that if an arbitrator “. . . knew of the relevant legal principle, appreciated that the legal principle controlled the outcome of the disputed issue, and nonetheless flouted the governing law by refusing to apply it . . . at that point the arbitrator has failed to interpret the contract at all . . . and have exceeded their powers . . . or imperfectly executed their powers so that a . . . final, and defined award upon the subject matter was not made.” In short, the court held that if the arbitrator in his decision incorrectly applied the law, the court could and would overturn the decision of the arbitrator. Other circuit courts have disagreed with this reasoning and have held that this was not a ground which could be used to overturn the decision of an arbitrator.

The Sixth Circuit in McKnight v General Motors Company agreed with the Seventh and Ninth Circuits in holding that a retired former employee lacks standing to sue under the ADA when their pension benefit was reduced when they started to receive social security benefits. The second and Third Circuits have ruled that retired former employees do have standing to sue alleging violations of the ADA. Again, an issue that will likely be resolved by a decision of the U. S. Supreme Court.

In December 2008 the Court agreed to consider an ADEA case. The question is whether a plaintiff in an age discrimination suit must present direct evidence that age played a substantial role in an adverse employment action. Gross v FBL Financial Services. The plaintiff is a vice president of the defendant employer who filed a lawsuit alleging that a change in his responsibilities, which reduced his income, was because of his age (53). The District Court found in favor of the plaintiff and awarded him \$47,000 in compensatory damages. The employer appealed to the Eighth Circuit which reversed the District Court and held that “. . . to justify shifting the burden in the issue of causation to the defendant, a plaintiff must show by direct evidence that an illegitimate factor played a substantial role in the employment decision. The plaintiff then asked the U. S. Supreme Court to consider the case.

FLSA

The Eighth Circuit in Department of Labor v Barbeque Ventures, LLC considered a provision in the Fair Labor Standards Act which provides that employers who violate the FLSA requirement of overtime pay for hours worked over forty will be liable for the amount of overtime pay not paid and may be liable for liquidated damages, unless the employer can show that it acted in "good faith" and with "reasonable grounds for believing" that it was in compliance with the Act. In this case, the employer operated five fast food restaurants in the Omaha, Nebraska area. The payroll for each of the five restaurants was computed and paid by an outside payroll company. Several employees who regularly worked in one of the restaurants applied to work additional hours in another of the commonly owned restaurants and were hired to do so. A supervisor who had responsibilities to oversee all five restaurants knew that the employees were working in two or more of the commonly owned restaurants. The total hours worked by these employees in both restaurants exceeded forty hours per week, but they were not paid overtime for the hours over forty in the same week. The DOL filed a lawsuit against the employer. A District Court granted the DOL's motion for summary judgment and awarded back pay of \$90,000, interest on the judgment, liquidated damages, and injunctive relief. The employer defendant appealed only the portion of the award that assessed liquidated damages and contended that it did not know employees were not being paid time-and-one-half for hours worked over forty in the same week because it had farmed out the computation and payment of wages to an outside company. The Eighth Circuit upheld the decision of the District Court assessing liquidated damages and held that the defendants could not hide behind the computation of the outside payroll company to establish that it had acted in good faith, especially because its primary supervisor knew employees were working in multiple locations.

Settlements

The EEOC settled a sex discrimination lawsuit against L. A. Weight Loss Center, Inc. for \$20 million. The EEOC had alleged that the company was guilty of sex discrimination because it did not hire qualified male applicants for field positions. Because the company is in Chapter 11 bankruptcy, the bankruptcy referee had to approve the settlement which consisted of \$16 million in compensatory damages and \$4 million in punitive damages.

The EEOC reached a settlement with Sara Lee Bakery Company of \$245,000 in a case of alleged racial discrimination. In this case, three African American employees alleged that they were denied promotions because of their race. The employer did not post foreman jobs, but instead selected employees to fill the open foreman jobs. Selected foremen had always been white, and some of the selected employees had less seniority than the African American employees and no better employment record.

The NLRB settled a case for \$16.2 million with Midwest Generation, EME, LLC. A union representing 1,200 employees of the employer struck for two months. Members of the union then voted to return to work unconditionally, but did not agree to the employer's last offer to settle a contract. The employer refused to rehire the employees after their unconditional offer to return to work so long as the union did not accept the employer's last contract offer. Six days later, after first rejecting the employer's offer, the union members voted to accept the employer's proposal. The NLRB decided that the employer did not violate the law. The Seventh Circuit reversed the NLRB and found that the employer failed to carry its burden of showing that it had a substantial business justification for the six day lockout rather than being motivated by antiunion animus.

The EEOC settled a religious discrimination suit with the University of Phoenix for \$1.9 million. The EEOC had charged the university discriminated against non-Mormons in compensation, opportunities for promotion and discipline.

Libel

Staples, Inc. fired a salesman for allegedly padding his expense and travel expenses in violation of company policy. A company executive then sent an e-mail to 1,500 other sales and managerial employees advising them that the named salesman had been fired for violating the company expense policy. The employee sued for libel. The First Circuit in Noonan v Staples, Inc decided that Staples was not guilty of libel because the statement they made to other employees was the truth and because other employees have a common interest in knowing that the company had fired an employee for violating company policy.

WARN

At a time when layoffs in many industries are becoming the rule rather than the exception, a review of the possible impact of the WARN statute on layoffs may be helpful. The WARN statute requires employers who layoff under certain circumstances to give sixty days notice of the layoffs. This is referred to in the statute as a “mass layoff” as distinguished from a total plant closure which also triggers the sixty day notice requirement. A mass layoff occurs if at least fifty employees comprising at least 33% of the workforce are laid off at a “single site of employment” or at least 500 employees are laid off at a single site of employment. Note that the layoff of fifty employees does not trigger WARN unless the fifty or more employees who are laid off also constitutes at least 33% of the work force. The law does not define what a “single site of employment” is. The courts have defined it as including buildings that are “proximate” to each other, e.g., in an industrial park or campus, if the buildings are commonly owned, managed and have intertwined management and work forces. It is important to note that a number of states and some cities have their own layoff laws that are in addition to and in some cases more stringent than the federal WARN statute.

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“Employee Briefs” is written by Malcolm L. Pritzker, Esq., Attorney-at-Law, Washington, DC. Any questions concerning content should be addressed to the HIRE Institute, 1320 Nineteenth Street, N.W., Suite, 300, Washington, DC 20036, tel: 202-296-4516, fax: 202-296-8205, e-mail: hireinst@aol.com.