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## **Settlements**

The NLRB reached a settlement with five Michigan beer distributors requiring these companies to pay \$41 million in back pay to their employees and to the Teamsters Union. The settlement was arrived at after the Sixth Circuit held that the employers colluded in their separate negotiations with the union in order to attempt to remove the union as the bargaining agent for the employees. In their separate negotiations, each of the distributors bargained in bad faith by bargaining to impasse on the same package of wage and benefit cuts and then imposing their final contract proposals, which were identical. The employees of all of the companies struck.

The Cheesecake Factory paid \$345,000 to settle a sexual harassment lawsuit filed by the EEOC on behalf of six male employees. The employees alleged that they were the victims of repeated sexual assaults by kitchen employees who inappropriately touched them and made sexually explicit comments. The employees complained to managers who did not take effective action to stop the complained of behavior.

## **Union Elections**

Unions won more than 73% of all NLRB conducted elections during the first half of 2009. The Teamsters won over 70% of the 164 NLRB conducted elections they were involved in. The SEIU won 74% of the 44 elections they were involved in.

## **GINA**

The Genetic Information Non Discrimination Act (GINA) went into effect in December 2009. The Act prohibits employers from discriminating on the basis of genetic information in hiring, promotions, compensation, benefits, job training discipline and other terms and conditions of employment. GINA defines “genetic information” as “information about an applicant or employee on the basis of genetic tests or manifestation of a disease or disorder in family members of such individuals.” GINA also prohibits retaliation against employees who assert rights covered by GINA. The new law applies to employers with 15 or more employees. The penalties for violations are the same as provided under Title VII.

## **FMLA**

A Federal District Court in Illinois in Reynolds v Inter Industry Conference of Auto Collision Repair and the Third Circuit in Erdman v National Insurance Co held that once an employee asserts his or her intention to take FMLA in the future, even though they are not then eligible to take FMLA leave, a claim of retaliation may go to a jury. In the Erdman case, the Third Circuit held that it was not necessary for an employee to take an FMLA leave or be eligible to take an FMLA leave. The only requirement to have

retaliation decided by a jury was that the employee was fired after he or her asserted his or her future intent to take an FMLA leave.

## **Supremes**

One of the cases pending before the Court will decide whether decisions of the NLRB decided when only two of the five members were on the NLRB are valid and enforceable. The DC Court of Appeals held that the decisions were not valid. The First, and Seventh Circuit Courts had held that they are valid. Another case pending before the Court is Stolt-Nielson et al v Animal Feeds International Corp. This case will decide whether arbitration of claims by a class is required when the contract clause requiring arbitration makes no mention to the filing of a legal action by a class.

## **FLSA**

In Parth v Pomona Valley Medical Center, the Ninth Circuit held that employers are free to determine hourly pay for any shift of hours so long as employees are paid no less than the statutory minimum wage. In this case, a nurse opted on a voluntary basis to work twelve hour shifts so that she could get more days off during a forty hour work week. The employee sued the employer arguing that the employer violated the FLSA by not paying her more per hour when she worked into the first four hours of the second shift as part of her twelve hour shift. The Court held that the employer did not violate the FLSA because it paid her more than the minimum wage and there is no requirement to pay an employee more per hour for working night hours.

## **Rehabilitation Act**

The Ninth Circuit in Fleming v Yuma Medical Center considered the issue of whether an employer - employee relationship was a necessary prerequisite for suing for discrimination under the Rehabilitation Act. The Sixth and Eighth Circuits had previously held that it was. The Tenth Circuit had held that an independent contractor retained by a company could sue the company for discrimination. The Ninth Circuit in Fleming agreed with the Tenth Circuit on an issue that will likely be finally decided by the Supreme Court. In this case, the medical center retained an anesthesiologist as an independent contractor. The medical center refused to give the doctor a contract allegedly because he suffered from sickle cell anemia and the doctor sued the center citing a provision in the Rehabilitation Act which provides that "no otherwise qualified individual with a disability . . . shall solely because of her or his disability be excluded from the participation in . . . be denied the benefits of or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." The center responded by asserting that the doctor had no standing to sue because he was an independent contractor and not an employee. The Ninth Circuit held that the doctor could sue as an independent contractor because, while the ADA specifies that a person to have standing to sue for discrimination has to be an employee, the Rehabilitation Act has no such provision and instead refers to "qualified individuals."

## **Romance**

In Anderson v Oklahoma State University Board of Regents, the Tenth Circuit upheld a decision by a Federal District Court and held that "preferential treatment on the basis of consensual romantic relationship between a supervisor and an employee is not gender based discrimination. Title VII's reference to sex means a class delineated by gender rather than sexual affiliation." In this case, an employee complained to his employer that his supervisor was having a romantic relationship with a fellow female employee. The employee claimed that after he filed a complaint he was no longer included in managerial meetings and was subsequently a part of a reduction in force in violation of Title VII.

## Defense

The Seventh Circuit held in Roby v CWI, Inc that an employer had a valid defense to a lawsuit filed by an employee who claimed that a hostile work environment resulted in her constructive discharge. The court relied on the U.S. Supreme Court's decision in Farragher/Ellerth, discussed in a prior issue of *Employee Briefs*. In this case, a female employee complained to her employer that she was being sexually harassed as a result of sexually suggestive comments by her supervisor. The employer promptly investigated and immediately changed work schedules of the supervisor and the employee so that they rarely came in contact. When the investigation was complete, the employer issued a multi-page warning to the supervisor and required the supervisor to take anti-harassment training. The female employee took a leave of absence and never returned to work. The female employee then sued the employer charging sexual harassment and constructive discharge. The District Court granted the employer's motion for summary judgment. The Seventh Circuit upheld the dismissal of the lawsuit relying on the Farragher/Ellerth decision, which held that an employer who takes prompt and effective steps to deal with a claim of discrimination has established a valid defense. The court also found that there was no evidence of a constructive discharge in that the employee was not terminated or forced to resign because of intolerable circumstances.

## Privacy

The U.S. Supreme Court will decide the issue of whether an employee has the right of privacy preventing his employer from reading messages he sends on an employer issued electronic device. The case, Onario v Quon, involves a policeman who used a government employer issued texting device to send explicit sexual messages to his girlfriend. The Ninth Circuit decided that the police chief violated the officer's Fourth Amendment rights by reading messages on the government issued device. The decision will impact private employers and the use by their employees of employer issued cell phones, computers and other communication equipment.

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