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Settlements

Outback’s restaurant settled a lawsuit filed by the EEOC for \$19 million. The EEOC alleged that the company denied promotional opportunities over a number of years to female employees.

RBG USA, Inc. agreed to pay \$400,000 in back pay to 482 contract engineers and construction and technical personnel to settle a FLSA lawsuit. The company was found by the Department of Labor not to have included incentive pay in the hourly wage rate in computing the amount of time and one half overtime pay paid to employees working more than forty hours in a work week.

A New York Federal jury awarded \$580,000 to a white former employee of a New York mental health facility who claimed a hostile work environment which resulted in her discharge allegedly because she dated an African American co-worker. In this case, the annual evaluations of the employee were good until she started to date the co-worker. The court held that “a prima facie case of racial discrimination can be established based on a person’s affiliation with someone of a different race.” Bergerson v NY State Office of Mental Health

Retaliation

The Seventh Circuit held in Scruggs v Garst Seed Co that the employer did not retaliate against an employee by eliminating the position that the employee held as part of a broad reduction of personnel as part of a restructuring plan. The court also held that the employer did not retaliate when it refused to hire the employee for an open position following her layoff, and was not guilty of gender based hostile work environment. The employer was able to establish that it had planned the layoffs prior to the filing by the employee of a complaint with the EEOC. The employer was also able to establish that the employee that it hired to fill the open position after the layoff was much more qualified in terms of job requirements than the plaintiff. Lastly, the court rejected the complaint of a hostile work environment because the derogatory statement made by a supervisor was directed to all male and female employees based on their job performance and were therefore not gender based.

Reasonable Period

The Sixth Circuit in Town and Country Plumbing and Heating Co v NLRB ruled in favor of the NLRB finding that an employer violated the law by withdrawing recognition from a union that had won a NLRB election to represent the employer’s employees. The court agreed with the NLRB that the employer failed to negotiate an initial contract for a “reasonable period.” The parties had bargained for two years and had been unable to reach a settlement. The employer withdrew recognition following receipt of a signed petition from a majority of employees asserting that the employees no longer wished to be represented by the union. The union filed an unfair labor practice charge. The employer and the union settled the charge and resumed negotiations for six months, at which time the employer again withdrew recognition

of the union. The union again filed an unfair labor practice charge and the NLRB ruled in favor of the union.

Arbitration

As previously reported in an earlier issue of *Employee Briefs*, the U.S. Supreme Court held in 14 PennPlaza LLC v Pyett that a union contract could specify that statutory claims of discrimination must be arbitrated rather than allowing an employee to file charges with a government agency such as the EEOC if the contract specifically mentions the law involved. The DC Circuit recently ruled that a similar clause barring the filing of unfair labor practice charges with the NLRB would be prohibited and the issues must be arbitrated. Some members of the U.S. Congress have proposed a bill changing the law so that clauses in a collective bargaining agreement requiring arbitration of statutory claims would be unenforceable.

Disability

The Seventh Circuit held in Eckstrand v School District of Somerset that in cases of a psychological disability, e.g., depression, in order to trigger an employer's obligation to provide medically necessary accommodations, a disabled employee must make the employer aware of non-obvious medically necessary accommodations by supplying corroborating evidence such as a doctor's note or statement. In this case, the court reversed a decision by the District Court dismissing a case and found that the school failed to engage in the required interactive process to find an accommodation after a teacher provided a doctor's statement that linked the teacher's seasonal affective disorder depression to the lack of windows in her classroom. The Seventh Circuit found that the school was obligated to change the plaintiff's classroom to one with windows unless the request would pose an "undue hardship" for the school. The court concluded that there would be no undue hardship for the school.

Employment Arbitration

President Obama signed into law the Department of Defense Appropriations Act. The law contains an amendment proposed by Senator Franken of Minnesota which prohibits government contractors from entering into or enforcing arbitration clauses with employees, not with unions representing employees, requiring the arbitration of employee allegations about violations of Title VII discrimination claims or torts relating to sexual assault or harassment. The provision applies to government contractors with contracts with the Defense Department of \$1 million or more. First, the contractor must agree not to enter into any agreement with its employees or independent contractors that requires the employee or independent contractors to resolve through arbitration any claim under Title VII of the Civil Rights Act of 1964 or any tort relating to or arising out of sexual assault or harassment including assault and battery, intentional infliction of emotional distress, false imprisonment or negligent hiring, supervision or retention. Second, the contractor must also agree not to attempt to enforce any agreement of this type. Third, contractors are required to certify for contracts awarded more than 180 days after the effective date of the Act that any subcontractor holding a subcontract worth more than \$1 million has agreed to abide by the Act's requirements. Each of these requirements may be waived by the Department of Defense if it concludes that such waiver is necessary to avoid harm to the national security of the United States. The provision arises because of the alleged gang rape of a female employee of a government contractor in Iraq by fellow employees. All employees had agreed to have such claims arbitrated rather than to file lawsuits in court. The Fifth Circuit ultimately ruled that the female employee could have her assault related allegations heard in federal court rather than arbitration because the claims were not related to her employment. Jones v Halliburton

A bill has been introduced in Congress eliminating mandatory employment arbitration of all such claims against private employers, as well as franchise or consumer matters. The number of employees employed by the private employers to be subject to the bill is as yet unclear.

Contract Settlements

The average first year wage increase in union contract settlements ratified in 2009 was 2.3%, down from 3.6% in 2008. The mean first year wage increase in 2009 was 2.6% down from 3.3% in 2008. The weighted average of first year negotiated settlements in 2009 was 2.8%.

Union Organizing

The DOL has announced that it will be changing the requirements of the LMRDA which now requires employers to file annual reports with the DOL identifying every "agreement or arrangement with a labor relations consultant or other independent contractor or organization" retained by the employer to persuade employees not to sign cards or vote for a union in an election and the amount of money the employer paid for such services. The DOL has, in the past, distinguished between direct persuaders who communicate directly with employees on behalf of employers and advisors, who have no direct contact with employees. The direct persuaders are subject to the reporting requirements, and the advisors are not. The direct persuaders have to report their income from such activities. It is expected that the DOL will expand the definition of those individuals and firms that must report as well as the rules imposed on employers and advisors in the same manner the DOL required in the last days of the Clinton administration. Under those rules, employers would have been required to disclose all persuasive scripts, letters, videotapes or other materials that were prepared by attorneys or consultants if one goal of the materials was to persuade employees regarding unionization, even if the attorney or consultant who prepared these materials had no direct contact with employees. All advisors would also have been required to file reports. The Bush administration rescinded these rules.

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