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“Employee Briefs”
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Supremes

Two of the most important employment related cases will be heard by the U. S. Supreme Court, Crawford v Metropolitan Government of Nashville and 14 Penn Plaza LLC v Pyett.

In Crawford, the question is whether Title VII's protection against retaliation makes it illegal for an employer to fire an employee because during the employer's internal investigation of the complaint of sexual harassment by a fellow employee, the employee advised that she too was sexually harassed by the same man. The discharged employee sued alleging that she was fired because her statement during the employer's investigation of the first allegation of sexual harassment was in violation of the prohibition against retaliation under Title VII. The District Court dismissed the suit on the grounds that answering questions during an employer's investigation of another employee's complaint was not "overt opposition" to an employer's violation of a work place discrimination law or participation in an EEOC investigation as defined under Title VII as retaliation. The Sixth Circuit affirmed the decision of the District Court. Some other circuit courts have reached different conclusions. The U.S. Solicitor General submitted a brief to the U. S. Supreme Court in support of Crawford's suit.

In 14 Penn Plaza, the question is whether unionized employees can be prevented by a negotiated contract provision from filing a discrimination claim in court rather than, as provided by the contract provision, arbitrating their claim. An increasing number of nonunion employers, especially larger employers, have increasingly over the past twenty years required employees to arbitrate allegations of discrimination in lieu of filing a court suit. Courts have upheld the validity of these employment arbitration programs. Courts, in upholding employment arbitration procedures have required that there be a "clear" statement that the employee is consciously giving up his or her right to sue. The District Court in 14 Penn Plaza ruled in favor of the employees and held that the contract provision in the union contract could not prohibit the employees from filing suit. The Circuit Court affirmed the District Court's decision and held that even the clearest possible contractual language could not prevent employees from filing suit alleging discrimination. A related question is whether, if the Supreme Court agrees with the Circuit Court, the decision will make mandatory arbitration of discrimination claims as now required by many nonunion employers unenforceable.

Settlement

A District court in Chicago entered a consent decree requiring Ralph's Grocery Store, a subsidiary of Kroeger, to pay \$70,000 to an employee claiming disability and national origin discrimination and required the employer to change its mandatory arbitration policy so that employees can file charges with the EEOC. EEOC v Ralph's Grocery Store. If this decision finds its way to the U. S. Supreme Court in that it is in conflict with decisions by other Federal courts, it will effectively gut mandatory arbitration programs now required by many nonunion employers.

Tagging

In Pilcher v Unite, the Third Circuit affirmed a District Court's finding against a union and the award of \$25,000 in compensatory damages and remanded the case to the District Court to determine whether punitive damages should also be assessed against the union. In this case, during an organizing campaign, the union used the numbers on the license plates of cars in the employee parking lot to discover the names and home addresses of employees. The union then visited the homes of these employees in order to try to talk the visited employees into signing authorization cards for the union. The court found that this was a violation of the Federal Drivers Protection Act.

Politics

The General Counsel of the NLRB issued a memorandum describing the analysis his office will engage in when a charge is filed concerning the discipline of employees who engage in political activities. If employees merely advocate the election of a candidate, it is unlikely that discipline will result in an unfair labor practice (ULP) charge if advocacy violates company rules or retards production. However, if employees advocate the passage or opposition to pending legislation concerning employment issues, even if mixed with advocacy of a candidate that supports the employees point of view, this may well result in the issuance of a ULP charge. For example, legislation concerning the employment of illegal aliens may have sufficient nexus with employment to justify the issuance of a ULP charge. Some states have laws which limit an employer's ability to take adverse action against employees who engage in political activity at the work place. There are three types of state laws which address this issue. In California and Louisiana, laws protect employees from suffering adverse employment actions for engaging in political activities. Connecticut and South Carolina have broad free speech protection laws. Several states, including California, Colorado, New York and South Dakota, protect employees from adverse actions for off-duty political activities.

FMLA

There is a split between federal courts on the issue of whether in a settlement and release of an FMLA claim an employee can agree to retrospectively waive any FMLA claims. The Fourth Circuit held in Taylor v Progress Energy that while an employee can waive prospective FMLA claims, he can not waive FMLA claims retrospectively without the approval of a court or the Department of Labor. The Fifth Circuit as well as the DOL has opined that retrospective FMLA claims can be waived without court or DOL approval. The Seventh Circuit in Butler v Merrill Lynch agreed with the Fifth Circuit and the DOL. It is possible that this issue will wind up being heard by the U. S. Supreme Court.

Confidentiality

In Northeastern Land Services, Ltd, the NLRB decided that a temporary employment agency violated federal labor laws by including in employment contracts a confidentiality agreement that prohibited employees from disclosing the terms of their employment, including specifically their compensation and benefits, to "other parties." The employment agreement specified that violation of this provision was grounds for termination. An employee had questions about his compensation and went to his temporary agency employer who did not rectify the problem. The employee then went to the manager of the employer for whom the temporary agency was supplying temps and discussed his question. The employee was then fired by his temporary agency employer for violating the confidentiality portion of his employment agreement. The employee filed a charge with the NLRB. The NLRB ruled that Section 7 of the NLRA protects the

right of unionized and nonunion employees to discuss their wages and terms of employment with each other, labor unions and others, including other employers. The Board held that the confidentiality agreement was “overly broad” and was therefore a violation of Section 7 of the NLRA.

Retaliation

In Hawkins v Annheuser-Busch, Inc, the Sixth Circuit found an employer guilty of illegal retaliation because the conduct of a supervisor of the complaining employee was so severe as to dissuade a reasonable employee from making or supporting a claim of discrimination. The court also found that members of management had actual or constructive knowledge of the retaliatory behavior and responded to the employee’s complaints so inadequately that the response manifested indifference or unreasonableness under the circumstances.

The Sixth Circuit held in Thompson v North American Stainless, LP held that a Title VII retaliation claim can be brought by an employee who is a family member or associated with another employee who is engaged in protected activity. In this case the employer terminated both the employee who was engaged in protected activity and his fiancé. The fiancé sued based on retaliation.

The Seventh Circuit held in Hall v Forrest River, Inc that an employee who alleged retaliation because she had twice the experience of a junior employee who was promoted could not justify a claim of retaliation just because the complaining employee had previously filed an internal complaint of sexual harassment. The court held that years of experience are not necessarily determinative of qualifications for promotions and that federal anti-discrimination laws were not intended to legislate seniority rights when none existed in the contract of employment. The burden was the employee’s to show that seniority equates to superior qualifications.

SEASONS GREETINGS AND HAPPY HOLIDAYS!

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