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“Employee Briefs”
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Settlements and Awards

A class of applicants for sales positions at Victoria's Secrets in the company's California stores sued the chain for failure to pay wages for “sales tryouts” which involved unpaid job training and “job previews.” The company settled the suit for \$10 million, \$2.89 million of which were paid by the company to the attorneys for the class.

The EEOC and B&H Foto & Electronics Company settled a discrimination lawsuit filed by the EEOC for \$4.3 million. The EEOC had charged the company with paying Hispanic warehouse workers less than their non-Hispanic counterparts and discriminating against them in benefits and promotions.

The owners of nine Asian restaurants in New York City agreed to pay \$2.3 million to more than 800 workers to make up for years of minimum wage and overtime violations of the FLSA.
Ollies'Brasserie/Mainline.

United Airlines agreed to settle an EEOC lawsuit for \$850,000. The EEOC had charged the company with discrimination against 30 disabled employees by failing to offer them overtime while they were on light duty. The ADA provides that employees must be evaluated individually as to whether they can perform available jobs with or without accommodation. The fact that these employees could not perform their regular jobs did not, in the EEOC's opinion, mean that they could not do other jobs that were available on overtime.

GCIU/IBT

The Fourth Circuit in Media General Operations, Inc approved the decision by the NLRB that a newspaper pressman employed by the Tampa Florida Tribune and represented by the GCIU/IBT lost his protection against discharge when he used profanity against a company executive during protracted and bitter negotiations for a successor contract. The employee called the chief executive of the newspaper a “f----g idiot.” The NLRB administrative law judge found that the pressman was not protected by the law even though he was engaged in concerted activity during the profanity laden conversation with two foremen.

RICO

A New York City Federal court dismissed a law suit filed by Cintas Corporation against two unions, UNITE/HERE and the IBT, alleging that the unions had violated RICO, the federal racketeering law, other federal and state laws and was guilty of extortion. The unions had targeted customers and employees of the company and alleged on their online e-mails that the company was paying poverty wages, was discriminating against employees on the basis of being members of a variety of protected classes and was continually violating safety laws. The court held that the company had no right to be exempt from criticism and because the unions were not using the company logo to sell competing goods to customers,

they were not guilty of extortion. The court declined to consider the claims of violations of state laws leaving those allegations for the state courts to decide.

Workweek

The DOL Wage and Hour Division issued an opinion letter concerning an employer who changed its workweek to having employees work nine hour shifts Monday to Thursday and eight hours every other Friday. One half of the Friday shift that is worked every other Friday is charged to one week and the other half of the Friday shift is charged to the following week. In this manner, one of the two weeks requires employees to work 44 hours. The advisory opinion concludes that this schedule does not require the employer to pay 1 ½ for the four hours worked more than 40 hours in one of the two weeks (Wage and Hour Letter FLSA 2009 1.1 1/16/09).

Possible Union Merger

Representatives of the AFL-CIO, Change to WIN, which includes several unions, such as the Teamsters and the SEIU, who withdrew from the AFL-CIO several years ago, and the National Education Association, an unaffiliated union with more than two million members, is continuing to meet to discuss a possible merger of the three groups into one National Labor Federation. Former Michigan Congressman David Bonior is acting in the role of mediator. If these three union groups merge, the merged group will represent more than sixteen million members in more than 60 unions. No doubt such a merged union will have substantial political clout in a Democratic administration and in state political races.

DOL

The Department of Labor is hiring 150 additional investigators to enforce Federal safety and wage and hour laws. The DOL is also hiring 100 additional investigators in connection with the Federal stimulus program. This increase of 250 investigators increases the DOL's investigative staff by approximately one third.

Supremes

The Court in AT&T v Hulteen reversed the Ninth Circuit's decision. The Supreme Court decided that AT&T did not violate the Pregnancy Discrimination Act of 1978 by calculating the accrual of pension benefits in a way that gives less retirement credit to employees who took pregnancy leave prior to the passage of the law as compared to employees who took medical leave for other disability reasons. Prior to the passage of the Pregnancy Discrimination Act employees were credited with a maximum of 30 days for pregnancy leave, no matter how many days they actually took off following the birth of their child, but were not limited in the amount of days of pension credit they would receive for medical leave for any other reason, no matter how many days the leave lasted. The Pregnancy law mandated that pregnancy had to be treated as a disability in the same manner and with the same rules as any other disability so after the passage of the law, all employees on any kind of leave for disability received the same pension accrual credits for the length of their leave. AT&T did not make this method retroactive for pregnancy leaves prior to the effective date of the law.

The plaintiffs sued claiming that because they received lower pension credits because they only received a maximum of 30 days pension credit prior to the passage of the pregnancy law the employer had violated the Pregnancy law. The Supreme Court disagreed and relied on section 703(h) of Title VII which provides “. . . it shall not be an unlawful employment practice for an employer to apply different standards for compensation . . . pursuant to a bona fide . . . seniority system provided that such differences are not the result of an intention to discriminate because of sex . . .”

Standing to Sue

In Poore v Simpson Paper the Ninth Circuit was faced with the issue whether retired employees could have a trial concerning their claim that their employer had to continue to pay their health benefits after they retired. The employer was party to contracts with the Paper Workers Union. Those contracts and a company health book provided that retirees were eligible for medical benefits until they were covered by Medicare.

The contract also specified that the company could amend their labor contract and change benefits so long as they first bargained with the union. The company decided to close the plant in 1996 and negotiated a closure agreement with the union agreeing to provide retiree health benefits to employees who would have received health benefits, but for the closure. In 2002, the company stopped providing health benefits for these retirees. A number of retirees and dependents sued the company claiming that the unilateral decision to terminate health benefits was in violation of ERISA and LMRA. The District Court granted summary judgment to the employer because it held that the plaintiffs lacked standing to sue as these benefits had not vested. The Ninth Circuit ultimately reversed a unanimous decision and allowed the plaintiffs to go to trial on their claims. The Ninth Circuit relied on a 2008 decision of the U.S. Supreme Court in LaRue v DeWolff, et al which held that while plaintiffs have to be “plan participants” to sue, under ERISA the definition of plan participants should include former employees with a colorable claim for benefits and that a plaintiff only had to show “that had it not been for the trustees breach of their fiduciary duty he would have been entitled to greater benefits than he received” to state a claim under ERISA. The Ninth Circuit also held that the plaintiffs could claim a violation of LMRA because the language in the benefit book and the labor contract was ambiguous. The Court also concluded that the expiration of the labor contract was not an impediment to the plaintiffs’ case because the benefits accrued during the life of the then existing contract.

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