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***“Employee Briefs”***  
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## **Verbal Complaints**

The Seventh Circuit in Kasten v Saint-Germain Performance Plastics Co affirmed the granting of a motion for summary judgment to the employer by the District Court. The plaintiff in this case alleged that he had been fired because he had verbally complained to his foreman about the location of the time clocks because the location prevented employees from being paid while putting on and taking off safety gear and that he was thinking about filing a complaint under the provisions of the FLSA. The District Court held, and the Seventh Circuit agreed, that verbal complaints do not qualify as “protected activity” under the FLSA and cannot be the basis of retaliation.

In Pitrulo v County of Buncome, NC, the Fourth Circuit held that an employee’s complaint to her father which was transmitted in a conversation between the father and the employer about alleged gender bias which prevented the employee from getting a promotion, was not “protected activity” under Title VII and could not be the basis for a claim of retaliation.

## **Settlements**

A Federal Judge in Washington State approved a \$35 million settlement of a class action lawsuit filed against Wal-Mart by employees who were forced to forgo meals and work breaks and work off the clock for these periods of time.

Benedict College settled an EEOC complaint filed by white employees who alleged they were terminated because of their race for \$165,000.

Nordstrom department stores settled an EEOC complaint for \$292,000. The complaint filed by black and Hispanic employees was that the alterations manager subjected the employees to disparaging comments on the basis of the employees’ race and national origin and, after the employees filed a complaint, the employer did nothing to stop the behavior.

A Texas company, Maverick Tube Company, settled a retaliation claim processed by the EEOC for \$175,000.

A Pittsburgh hospital settled an EEOC complaint alleging that the hospital denied reasonable accommodation to an employee who was being treated for cancer and ultimately discharging her. The hospital paid \$100,000 in settlement.

Casey’s General Stores, Inc. agreed to pay \$11.7 million to settle two class action lawsuits alleging that the company violated the FLSA by failing to pay assistant managers overtime for hours they worked beyond 40 in a week.

## **Arbitrability**

The Sixth Circuit in R.H. Cochran v Sheet Metal Workers, et al vacated an arbitration award in favor of a union. In this case, the collective bargaining agreement between the parties specified that if a grievance was not filed within thirty days of the occurrence on which it was based, the grievance would not be arbitrable. The arbitration panel ignored the language and decided that the grievance was arbitrable. In this case, the employer had consistently strictly enforced the thirty day non-arbitrability contractual position. The court held that when contract language is clearly written, an arbitration panel must comply with the timeliness language if: (1) the employer notifies the union in every step of the grievance procedure that the grievance was not timely filed and that the employer would take the position that it is not arbitrable; (2) if in the past the employer has not consistently enforced the timeliness requirements, the employer must notify the union that in all future cases it would enforce the contractual timeliness requirements and then reinforce its position in every step of the grievance procedure.

The Third Circuit in Steelworkers v Rohm and Haas held that despite a broad arbitration clause in a collective bargaining agreement, it is only when a grievance arises from an article in a collective bargaining agreement that it must be arbitrated. This case involved the denial of disability claims which the union sought to arbitrate. The company refused to arbitrate the issue because the disability plan was not mentioned in the collective bargaining agreement. The Federal District Court decided that the union had the right to arbitrate these grievances. The Third Circuit reversed the District Court and held that while there is a presumption of arbitrability, a grievance has to be based on a specific section of the contract and since the disability plan and/or benefits was not mentioned in the CBA, the denial of the disability benefit was not required to be arbitrated.

## **Union E-Mail**

The D.C. Circuit in Guard Publishing v NLRB reversed the NLRB's position under the Bush administration that permitted employers to prohibit union related e-mail solicitations on company computer systems, while allowing employees to solicit for other personal, non-work related matters. The court reversed a decision by the NLRB that a warning issued by the employer to an employee, who was president of the union, for violating the company policy prohibiting all solicitations using the company computer system for union business was not illegal. The company had not penalized other employees who used company computers to announce and to solicit participation in upcoming parties, community activities and charitable functions. The union president received a written warning after she sent an e-mail concerning union business on company computers. After she received the first warning, the union president sent out two additional union related e-mails to other employees concerning union business after which she received a second written warning. The union filed an unfair labor practice charge. The NLRB decided that the employer had not violated the law by issuing the warning notices. The court reversed the NLRB and held that the company policy was unlawful and held that the union has the right to use the company computers and e-mail system on union business because to prohibit the use for union business while allowing the use of company computers for other nonunion personal business was discriminatory.

## **NLRB Decisions**

The Second Circuit in Shell Island SNF LLC v NLRB agreed with the First and Seventh Circuit courts holding that the 400 or so decisions issued by the NLRB while it had only two members was legal and the decisions enforceable. As we previously reported, the D.C. Circuit held that the 400 NLRB decisions were not enforceable because the NLRB had only two members when the decisions were issued. The NLRB has now filed a petition with the D.C. Circuit asking that the full court have a rehearing on this topic. If the full court does not grant the request, the differences between the circuit courts will no doubt be resolved by a decision of the U.S. Supreme Court.

## Stimulus

Two lawsuits were filed by purported classes of employees of Bank of America. One of the classes consisted of African-American stockbrokers and the other class consisted of female stockbrokers. Both classes contended in their lawsuits that their retention bonuses were discriminatory because the retention bonuses paid to white, male stockbrokers were higher. The retention bonuses were paid to Bank of America stockbrokers when Bank Of America was required by the federal government to acquire Merrill Lynch. Both classes contended that their retention bonuses were lower than their white, male counterparts because BOA had always steered more affluent customers to the white, male stockbrokers. Therefore, the more affluent customers purchased more stock and because the retention bonuses were partially based on the volume of sales by the stockbrokers, the black and/or female employees received lower retention bonuses.

## Union Elections

Unions won 66.8 % of NLRB conducted secret ballot elections conducted in 2008. This is the highest win rate since 1984 and compared to a win rate of 60.4 % in 2007. The NLRB conducted 1,579 secret ballot elections in 2009 compared to 1,519 in 2007. 108,587 employees voted in 2008. The Teamsters union was the most successful union in obtaining new members through elections in 2008. The Teamsters got jurisdiction over 13,815 new members in 2008 through NLRB elections, followed by the SEIU with 10,928.

## Comments

In EEOC v Starlight LLC, a Federal District Court in Washington State held that a restaurant manager's comment to a Muslim female employee when she asked for a promotion that it was not her religion, but her choice of head covering that kept her from getting the promotion. The restaurant subsequently offered the employee the promotion, but she quit and then sued. The court held that the comments were on their face discriminatory and the discrimination was not erased by the subsequent offer of a promotion.

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