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COMMENTARY

Proof of retaliation: Both sides of the 'v.'

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WAGE AND HOUR

Santa Monica 'carwasheros' not getting full pay, suit says

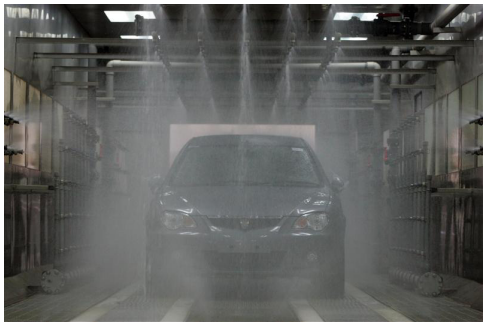
Three Santa Monica-area car washes are not paying Latino workers the full amount for the time they work, the Mexican American Legal Defense and Educational Fund alleges in a California state court lawsuit.

Carmona et al. v. Lincoln Millennium Car Wash Inc. et al., No. BC484951, complaint filed (Cal. Super. Ct., L.A. County May 21, 2012).

The proposed class action, filed by MALDEF in the Los Angeles County Superior Court, alleges that Lincoln Millennium Car Wash Inc., Silver Wash Inc. and Gold Wash Inc. shortchanged the "carwasheros," as they identify themselves.

Each company forced its employees to work off the clock without overtime pay, did not allow them meal and rest breaks, and failed to reimburse work-related expenses, the complaint alleges.

According to the suit, the three named plaintiffs are non-exempt employees who were subjected to violations of the California Labor Code, the Business and Professions Code, and state wage orders on a regular basis. The plaintiffs claim that the defendant car washes were on notice of these violations, but refused to correct the problems.



REUTERS/Bazuki Muhammad

The suit says the defendant car washes forced employees to work off the clock without overtime pay, did not allow them meal and rest breaks, and failed to reimburse work-related expenses.

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8 questions to ask before taking an adverse employment action

By Anna M. Dailey, Esq., and Katherine A. Brings, Esq.
Dinsmore & Shohl

A wrongful-discharge suit can be very costly to your company. These suits involve back pay, reinstatement or front pay until retirement; damages for humiliation and embarrassment; attorney fees; and in some situations, punitive damages. It's not uncommon to hear of jury verdicts far exceeding $1 million for an individual plaintiff.

Attorney fees payable to plaintiff's counsel can often be assessed, which is on top of the verdict and can easily cost $300,000 to $500,000. Such cases not only expose the company to large monetary risk, but can be very disruptive to both production and morale.

Thirty-plus years of defending against such cases has taught us eight things to look for in employment law cases. A seasoned and successful plaintiff's attorney who spoke at an employment law seminar recently was asked about how he selected winning cases. He said it all comes down to one word: fairness. He is absolutely right. No matter how a court instructs a jury, jurors will usually look for a way to do what they think is fair.

But what is fair in some parts of the United States may seem horribly unfair in other parts of the country. Thus, it clearly pays to understand the law and the predilections of juries in the particular state where your company operates and you practice law.

Even though a jury should only decide cases based on whether the employer was legally within its rights to discharge the plaintiff, jurors often see their mission as deciding whether the employer acted fairly toward the plaintiff and to its other employees. The fair employer usually wins the lawsuit; the unfair employer loses.

THE 8 QUESTIONS

An HR professional or employment lawyer should ask eight questions to determine if the discharge action is *fair*.

1. How long has the employee been working for the company, and is this his first disciplinary action?

A jury will view an employee who has been with a company for 20 years differently from it will view an employee who has been with a company for 20 months or 20 days. The longer the employee has worked for the company, the greater the jury's expectations that the employee deserves a warning first and an opportunity to correct his behavior, unless the employee's conduct was so egregious that discharge is obviously the "fair" outcome.

Arbitrators regularly use this same line of thinking, and you can expect jurors to do the same. Arbitrator Dennis R. Nolan put it well:

> Even long seniority counts for only so much. It buys extra consideration, it merits the benefit of any reasonable doubts, and it will oblige an employer to view the employee's record as a whole rather than treating events in isolation.[1]

In fact, many arbitrators have turned discharges into suspensions when they judged a discharge of an employee with a long work record and no prior disciplines. If you, as an HR manager or attorney representing the company, are deciding if discharge is the fair discipline, you will want to know how long the employee has been working for the company and if past discipline issues exist.

2. Have there been any past warnings?

This is a corollary to question 1. As noted, unless an employee's conduct is an egregious misdeed, jurors believe an employee deserves some warning and an opportunity to correct or improve before he is fired. Jurors believe in the principle of progressive discipline, especially for minor infractions, and they will look for an unlawful motive if the employer discharges first instead of giving at least one warning for a minor infraction.

Supervisors may claim to have given prior warnings, but if you are reviewing the case file, make sure you look at the employee's disciplinary history. Look through any and all past warnings (oral and written), and also check to see whether the employee was told, in writing or orally, that one more misdeed could result in discharge. When an oral warning is given, it is a good practice for supervisors and HR professionals to document the warning in a written memo at the time it was issued.

3. Have you reviewed any documentation regarding the incident giving rise to the discharge?

When a supervisor or manager is fed up enough to call for an employee's discharge, emotions may be running high. Before you order up the employee's final paycheck, ask to see any documentation of the incident that led to the discharge. Examine the documentation for improper motives or

The 8 Questions

1. How long has the employee been working for the company, and is this his first disciplinary action?
2. Have there been any past warnings?
3. Have you reviewed any documentation regarding the incident giving rise to the discharge?
4. Has any other employee committed the same infraction, and was that employee treated similarly or differently?
5. Were there any witnesses?
6. Was the discharged employee a member of a protected class?
7. Will co-workers believe the company was fair?
8. What do you plan to tell the employee who will be discharged?

unfairness, and make sure your company is doing the fair thing by approving this discharge.

Documents that contain statements showing an unlawful motive for the discharge are embarrassing and costly. We are not suggesting that the HR manager destroy such documents. Rather, finding such evidence gives the employer an opportunity to prevent an unlawful discharge. It is also an opportunity to train supervisors and managers about their obligations under the law, as well as the company's expectations of its management team.

4. Has any other employee committed the same infraction, and was that employee treated similarly or differently?

The law calls these previous incidents "comparators." These are people who engaged in the same conduct and were treated the same or differently. Courts and juries will pay attention to what the employer did in past similar situations. As an attorney, you should be able to explain to a jury that atypical or mitigating circumstances can be used to distinguish either the conduct at issue or the employer's seemingly inconsistent treatment of these individuals.

While it may be a plaintiff's burden to prove that there is a comparator of sufficient similarity who was treated better, it is best to examine these scenarios yourself and determine if there are comparable.[2] If you find yourself saying "but two wrongs don't make a right," then examine what distinguishes this situation from the last one, such as different supervision, a change in law or the passage of time.[3]

5. Were there any witnesses?

If there are witnesses, the HR manager or attorney should ask them what they saw or heard. You should consider asking them to write out a short statement of what they witnessed. If a company terminates an employee without listening to what witnesses have to say, the jury will second-guess an employer's good-faith belief that there was sufficiently egregious misconduct to support a discharge.

An investigation need not always be exhaustive, but if no one interviews actual witnesses, the jury will wonder if the company's decision was in fact unlawfully motivated.

6. Was the discharged employee a member of a protected class?

What is the former employee's race, gender, age, national origin or disability status? All of these categories can lead to a *prima facie* claim of unlawful discrimination. In addition to protected classes under civil rights laws, do not forget to ask about potential whistle-blower or retaliatory-discharge issues: *Did the employee recently file a workers' compensation claim*? *Did the person recently make safety complaints or engage in union organizing activities?*

> The fair employer usually wins the lawsuit; the unfair employer loses.

If the employee being discharged enjoys a protected class status or was engaged in a legally protected activity, go back to question 4 about "comparators." How have others, whether or not in a protected class, been treated when they engaged in similar conduct?

Ralph Waldo Emerson may have viewed "consistency as the hobgoblin of little minds," but when it comes to fairness, consistency toward similarly situated employees is the best defense to an employment law claim. In fact, it can be such a strong defense it will warrant summary judgment in favor of an employer.[4]

7. Will co-workers believe the company was fair?

In addition to a potential jury, your company's other employees are judging your disciplinary decision-making. Employees, like juries, expect their employer to be fair. If your company is sued by a discharged employee, from a defense standpoint, nothing beats having co-workers willing to testify on behalf of the company because the employer acted fairly. In fact, those employees will likely be the same ones who tell their discharged co-worker to move on with his life.

Nothing is worse, however, than having the majority of the employees telling the discharged employee to sue the company and offering to give sworn statements to the plaintiff's lawyer.

8. What do you plan to tell the employee who will be discharged?

Planning the termination meeting is an important step in preventing future liability. The employer should conduct the termination in person, if possible. The termination meeting should be conducted consistently in accordance with the company's written policies, procedures and practices. During the termination meeting, ensure there is at least one other company person present — the speaker and an observer.

Even if the employment relationship is "at will," the person terminating the employee should explain the reason(s) for the termination. Employees who are not given a reason for their termination are more likely to pursue legal action against their former employers than employees who are told the reason.

Still be cautious when delivering the reasons for termination because juries will expect that the reasons the employer gives now will be the only reasons the employer should be able to use to defend the decision during a trial. You can provide a generalized list of the reasons rather than detailing specifics so long as the reason is given. Statements like "we are moving in a different direction" cause plaintiffs' lawyers to look for unlawful motives.

Consider giving the employee an opportunity to tell his side of the story. The employee may say he understands or offer to resign. If what the employee says raises new issues you were not aware of, you have the option of suspending the employee while you investigate the validity of such claims.

While conducting the termination, avoid being hostile or emotional and avoid making careless or discriminatory statements. Discharge cases for legitimate business reasons have been lost over words like "we need someone with more energy." Rather, you should refer to a specific business reason, such as low sales numbers or poor production for the last couple of years. If the reason for discharge is a violation of policies or procedures, refer to the violation and, if appropriate, point to any past warnings regarding these issues.

As you plan the termination meeting, consider consulting an objective, impartial person for advice. Whether that is a

fellow HR person in your company or an employment law attorney, it is useful to solicit the opinion of someone who is not involved in the decision to terminate. Documenting that conversation may also be useful in establishing that you were trying to be fair in the decision to discharge. WJ

NOTES

[1] *Carolina Tel. & Tel. Co.*, 97 LA 653, 655 (1991) (emphasis added).

[2] *Smith v. Allen Health Sys.*, 302 F.3d 827, 835 (8th Cir. 2002).

[3] *See, e.g., Mitchell v. Toledo Hosp.*, 964 F.2d 577 (6th Cir. 1992); *Gen. Ins. Co. of Am. v. EEOC*, 491 F.2d 133, 136 (9th Cir. 1974) (incident involving alleged comparator from eight years earlier was too remote to be relevant); *Plair v. E.J. Branch & Sons*, 931 F. Supp. 555, 565 (N.D. Ill. 1995) (a plaintiff cannot show that she was similarly situated to another individual when a different decision-maker was involved); *Bassano v. Hellmann Worldwide Logistics*, 310 F. Supp. 2d 1270, 1280 (N.D. Ga. 2003) (new management may see things differently, and choose to enforce policies more strictly, than previous management); *Rogas v. Florida*, 285 F.3d 1339, 1343 (11th Cir. 2002); *Chapman v. AI Transp.*, 229 F.3d 1012, 1031 n. 21 (11th Cir. 2000).

[4] *See Warren v. Solo Cup Co.*, 516 F.3d 627 (7th Cir. 2008) (finding that summary judgment was properly granted to employer on Equal Pay Act claim because alleged comparative employee was not similarly situated given the differences in the employees' education, experience and computer aptitude); *Riggs v. Airtran Airways*, 497 F.3d 1108 (10th Cir. 2007) (holding that grant of summary judgment on former employee's Age Discrimination in Employment claim was proper because other employees were not similarly situated); *Floyd v. Fed. Express Corp.*, 423 Fed. Appx. 924, 930 (11th Cir. 2011) (upholding a grant of summary judgment because the plaintiff failed to establish that his co-worker was similarly situated to himself).

Anna M. Dailey (L) and Katherine A. Brings (R) are colleagues at **Dinsmore & Shohl** in Charleston, W.Va. Dailey has tried more than a dozen jury trials. She and Brings regularly advise employers on disciplinary matters and defend companies facing claims for wrongful discharge. Learn more about each attorney at www.dinsmore.com.

Proof of retaliation: Both sides of the 'v.'

By Tina M. Maiolo, Esq.
Carr Maloney PC

According to statistics released earlier this year, the Equal Employment Opportunity Commission in 2011 received a record 37,334 charges of retaliation. The number of retaliation charges — the most common of all charges filed, at 37.4 percent — was over 1,000 more than the EEOC received in 2010, and almost 15,000 more than only five years ago. The monetary benefits received through the EEOC as a result of the retaliation claims filed in 2011 was $147.3 million. This does not include monetary benefits obtained through litigation.

The message these numbers sends could not be clearer — more and more retaliation claims are being filed, and many of those are resolving in favor of the claimants. So, the question becomes, What type of evidence can an employee use to prove retaliation, and what type of evidence can the employer use to defeat such claims?

Before plunging into what evidence is necessary to prove or disprove a claim of retaliation,[1] it is important to understand the elements of a retaliation claim. Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act and the Equal Pay Act all prohibit retaliation by an employer, employment agency or labor organization because an employee engaged in protected activity.

Protected activity includes:

- Opposing a practice made unlawful by one of the employment discrimination statutes (the "opposition" clause).
- Filing a charge, testifying, assisting or participating in any manner in an investigation, proceeding or hearing under the applicable statute (the "participation" clause).

The party engaging in protected activity need not be the individual claiming to be treated differently because of a protected status, and need not even be a member of the alleged protected class.

An employee can challenge retaliation by an employer even if the alleged retaliation occurred after the employment relationship ended (for example, through negative references given because the former employee filed an EEOC charge against it) and even if the protected activity occurred with a different employer (for example, the employer refuses to hire a person because it was aware the applicant opposed a previous employer's discriminatory practices).

Finally, the person claiming retaliation need not be the person who actually opposed the unlawful discriminatory practices. Title VII, the ADA, the ADEA and the EPA all prohibit retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage that person from pursuing those rights.[2] In such a case, both the individual who engaged in the protected activity and the individual against whom the employer retaliates can assert claims.

PROOF OF RETALIATION: WHAT THE EMPLOYEE MUST SHOW

To assert a claim of retaliation, the employee must prove:

- She engaged in a protected activity.
- She suffered an adverse job action.
- The adverse job action was causally connected to the protected activity.

Proving protected activity

As set forth above, protected activity can be established by proof that the employee opposed the employer's discriminatory practices or that the employee participated in covered proceedings.

The employee can prove protected activity through direct or circumstantial evidence. Direct evidence is evidence that stands on its own to prove a fact, such as any express written or oral admission or testimony from a witness with first-hand knowledge, while circumstantial evidence is indirect evidence that gives rise to a specific factual inference.

Proof that the employee opposed discriminatory practices

An employee can prove that she opposed unlawful discriminatory practices by demonstrating, through direct or circumstantial evidence, that she threatened to file a charge or other formal complaint alleging discrimination. The most common example is when an employee threatens to sue if certain discriminatory behavior does not cease (for example, a woman threatens to sue if she is not paid the same as her male counterpart for equal work).

> More and more retaliation claims are being filed, and many of those are being resolved in favor of the claimants.

Another way an employee can demonstrate opposition to discriminatory practices is by showing that she complained to any manager, union official, co-worker, company equal-employment official, attorney, newspaper reporter, legislator or anyone else about alleged employment discrimination.[3]

Opposition can be nonverbal (such as picketing) and can be on behalf of another or through an employee's representative, as opposed to being on behalf of or through the employee herself. In the latter cases, the employer cannot retaliate against the employee making the complaint or the employee about whom the complaint is made.

It should be noted that not all complaints rise to the level of protected activity. Instead, only complaints that implicitly or explicitly express concern about purported discriminatory practices constitute protected activity. For example, if an individual demonstrates that she sent a letter to human resources complaining about unfair treatment and expressing dissatisfaction that the job she

wanted went to someone less qualified, the individual has not proven protected activity because the letter did not expressly or implicitly allege that any protected status was the reason for the alleged unfairness.[4]

Furthermore, the opposition must be based upon a reasonable and good-faith belief that the opposed behavior was discriminatory, regardless of the ultimate outcome of the investigation. This means that to be protected, the employee must have some valid basis for opposing certain behavior. An employee, for example, a woman who does not meet the minimum qualifications for a position given to a man, cannot in good faith engage in opposition to alleged gender-based discrimination on the ground that she was not given the position for which she was not qualified.

Finally, the manner of opposition must also be reasonable. To determine what is reasonable, courts and the EEOC have balanced individuals' right to oppose discrimination with employers' need for a stable and productive work environment. Examples of unreasonable opposition include searching confidential documents and showing them to co-workers,[5] or other unlawful activities, such as threats of violence to life or property or coercing witnesses to change their testimony.

If the employee's opposition interferes with job performance to the extent that she is ineffective in the job, the retaliation provisions do not protect her from appropriate discipline or discharge.[6]

Employees can also prove that they engaged in a protected activity by demonstrating, again through direct or circumstantial evidence, that they refused to obey an order because of a reasonable belief that the order is discriminatory. For example, a supervisor in a delivery company can prove he engaged in protected activity by refusing a supervisor's instruction not to send any black delivery personnel into affluent, white neighborhoods.

An employee can also prove that she engaged in protected activity by demonstrating that she requested a reasonable accommodation under the ADA or religious accommodation under Title VII. Although a request for reasonable accommodation does not literally mean the employee "opposed" discrimination or "participated" in any administrative or judicial complaint process, courts have held that the employee is protected against retaliation.[7]

Proof that the employee participated in covered proceedings

Covered proceedings include an investigation, proceeding, hearing or litigation under Title VII, the ADEA, the ADA or the EPA — regardless of whether such proceedings are undertaken through a state agency, the EEOC, or a state or federal court. Protection extends not only to the individuals filing those claims, but also to any individual testifying or otherwise participating in the proceedings. Protection also extends regardless of whether the claim is timely or whether the allegations in the original charge were valid or reasonable.

> The person claiming retaliation need not be the person who actually opposed the unlawful discriminatory practices.

Unlike the opposition clause, which applies only to those who protest practices that they reasonably and in good faith thought were discriminatory, the participation clause applies to all individuals who participate in the statutory complaint process. As such, an employee can prove retaliation by demonstrating that she suffered an adverse job action because she filed an EEOC charge, even though the basis of the underlying charge was invalid or unreasonable.

Proving an adverse job action

Many adverse job actions by an employer are easy for the employee to prove. They are the obvious types of adverse job actions: termination, suspension, demotion, or refusal to hire or promote. Other adverse job actions include denial of job benefits to which the employee is entitled, harassment or other adverse treatment.

Some courts have held that only those actions that materially affect the terms, conditions or privileges of employment invoke the anti-retaliation provisions.[8] The EEOC has openly disagreed with these courts' rulings and concluded that the "statutory retaliation clauses prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity."[9]

Proving a causal connection

The most difficult element for an employee to prove is the element of causation. As set forth above, the employee — through direct or circumstantial evidence — must prove that the employer took the adverse job action because the employee engaged in protected activity.

In light of the fact that most employers do not admit to a retaliatory motive, employees usually prove retaliation through circumstantial evidence. The circumstantial evidence most often consists of proof that the employer had knowledge of the employee's protected activity, and the employer with knowledge of the protected activity took the adverse job action shortly after learning of the protected activity.

An inference of causal connection can also be established by evidence of other factors, such as being treated differently from other similarly situated individuals, an inadequate investigation by the employer, or being given a reason for the adverse job action that was false and merely a pretext for retaliation.

PROOF OF NO RETALIATION: WHAT THE EMPLOYER MUST SHOW

Now that we have seen what evidence an employee must provide to meet her burden of establishing a retaliation claim, we must discern what evidence an employer can provide to avoid liability for retaliation.

Assuming the employee has met her burden of proving the essential elements of engaging in a protected activity and suffering an adverse job action, the employer must demonstrate a legitimate, non-retaliatory reason for the adverse job action to avoid liability. The most conventional non-retaliatory reasons offered by employers for challenged adverse job actions include poor attendance, poor work performance, insubordination, or other violations of the employer's policies or procedures.

Employers must demonstrate a legitimate, non-retaliatory reason for the adverse job action through evidence such as witness testimony and proper documentation. Any vagueness in the ground for the adverse job

action can open the door for the employee to argue that the reason offered by the employer is not true and is pretext for retaliation.

Even if the employer produces evidence of a legitimate, non-retaliatory reason for the adverse job action, the employer can still be found liable for retaliation if the reason is actually a pretext for a retaliatory motive. An employee can prove pretext through evidence that the reason was not believable, the employee was subjected to heightened scrutiny after the protected activity or the employee was treated differently from other similarly situated employees who did not engage in protected activity.

CONCLUSION

Each party has its own burdens in asserting or defending a claim of retaliation. The exact evidence that an employee may use to prove a retaliation claim, or that an employer may use to disprove it, depends on the facts and circumstances of the individual case, as well as the laws and interpretations of the specific jurisdiction in which the case is filed.

As such, all employees and employers are advised to seek legal counsel before asserting or defending a claim of retaliation. Employers are also advised to seek legal counsel before taking any adverse job action against an employee who has, or may have, engaged in a protected activity. WJ

NOTES

[1] This article addresses the most common holdings and theories of retaliation. The case law in individual jurisdictions may vary. One should always consult the laws of one's specific jurisdiction before deciding what proof is necessary or sufficient to prove or disprove a retaliation claim.

[2] *See, e.g., Murphy v. Cadillac Rubber & Plastics,* 946 F. Supp. 1108, 1118 (W.D.N.Y. 1996) (a plaintiff asserted a viable claim of retaliation where he was subjected to an adverse job action because of his wife's protected activity).

[3] EEOC Compliance Manual, Section 8-II.2 (1998).

[4] *See, e.g., Barber v. CSX Distrib. Servs.,* 68 F.3d 694 (3d Cir. 1995).

[5] *O'Day v. McDonnell Douglas Helicopter Co.,* 79 F.3d 756 (9th Cir. 1996).

[6] *See, e.g., Coutu v. Martin County Bd. of Comm'rs,* 47 F.3d 1068, 1074 (11th Cir. 1995).

[7] *See, e.g., Garza v. Abbott Labs.,* 940 F. Supp. 1227, 1294 (N.D. Ill. 1996).

[8] *See, e.g., Munday v. Waste Mgmt. of N. Am.,* 126 F.3d 239 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1053 (1998) (an employer's instruction to shirk a plaintiff who engaged in protected activity, spy on her, and report back to management did not rise to the level of an adverse job action because it did not adversely affect the terms, conditions or benefits of employment).

[9] EEOC Compliance Manual, Section 8-II.3 (1998).

Tina M. Maiolo is a member of **Carr Maloney PC** in Washington. She specializes in the areas of employment and labor law, immigration law, civil rights law, business law, and commercial litigation, and she regularly manages legal matters specific to nonprofit and charitable organizations, as well as religious institutions.

MALDEF

CONTINUED FROM PAGE 1

According to a MALDEF report, the CLEAN Carwash Campaign, a coalition formed to investigate labor violations in the car wash industry, had told the car washes about the alleged violations.

Among the allegations in the complaint, the plaintiffs say the car washes not only did not pay minimum wage or overtime, but also required employees to furnish their own materials for work, including tools and uniforms, without reimbursement.

In addition, the car washes failed to pay double minimum wage as required by California law to workers who provide or are required to purchase their own tools, the complaint says.

The employers intentionally provided their employees with inaccurate wage statements to cover up the unlawful practices, the complaint says.

Employees in California are entitled to a 10-minute rest break for every four hours of work. They are also entitled to a meal break after no more than five hours of work, or compensation when the meal break is not provided, MALDEF claims.

Car wash management, however, barred the meal breaks or delayed them past the five-hour cutoff without paying the premium, MALDEF claims.

In addition to asking the court to certify the case as a class action, the plaintiffs are seeking compensatory damages, special damages, an injunction barring the continuation of the alleged unfair wage practices, premium wages, liquidated damages and statutory and civil penalties. WJ

Attorneys:
Plaintiffs: Victor Viramontes and Nicholas Espiritu, Mexican American Legal Defense and Educational Fund, Los Angeles

Related Court Document:
Complaint: 2012 WL 1932707

See Document Section A (P. 19) for the complaint.

Collective bargaining agreement can't require arbitration of wage claims

A Texas-based life insurance provider cannot compel a former saleswoman to arbitrate statutory wage payment claims against it, a California appeals court has determined.

Hoover v. American Income Life Ins. Co., No. E052864, 2012 WL 1739806 (Cal. Ct. App., 4th Dist. May 16, 2012).

The 4th District Court of Appeal agreed with the lower court that American Income Life Insurance Co. had waived its right to demand arbitration by first litigating the case for more than a year.

The panel also found that an arbitration agreement in an agent contract executed by the plaintiff and incorporated into a collective bargaining agreement with the Office and Professional Employees International Union Local 277 was unenforceable.

"As a general rule, state statutory wage-and-hour claims are not subject to arbitration, whether the arbitration clause is contained in the CBA or an individual agreement," the appeals court explained.

The plaintiff, Martha Hoover, worked for about four months as a California-based sales agent for American Income Life before quitting in June 2008, the panel's opinion said.

She sued the company a year later in the San Bernardino County Superior Court, claiming she had been hired as an employee, but that AIL had failed to pay her minimum wage, reimburse her for work-related expenses and promptly pay her earned wages upon termination.

According to the opinion, Hoover's civil complaint is based on various California Labor Code statutes. Section 1194 requires an employer to pay minimum wage, Sections 2802 and 2804 provide an employee cannot waive the right to reimbursement from an employer for necessary employment-related expenses, and Sections 203, 219 and 229 provide employees with the right to timely payment of earned wages upon termination.

The parties engaged in motion practice and discovery before AIL answered the complaint in April 2010, the opinion said.

> "State statutory wage-and-hour claims are not subject to arbitration, whether the arbitration clause is contained in the CBA or an individual agreement," the appeals court said.

The answer contained more than 20 affirmative defenses and asserted that Hoover was an independent contractor who was not entitled to the types of compensation demanded.

After an attempt at mediation failed, AIL made a demand to arbitrate the case, which Hoover rejected in August 2010, the opinion said.

Four months later, the company filed a motion to compel arbitration.

According to AIL, Hoover's agent contract, which was incorporated into the CBA, contains an arbitration provision that requires the parties to arbitrate disputes arising from or relating to the agent contract, the opinion said.

The trial court denied the motion, finding neither the arbitration provision of the agent contract nor the CBA expressly mandated arbitration of statutory wage payment rights. In addition, the court found AIL had waived its right to demand arbitration by participating in the litigation process for more than a year.

AIL appealed to California's 4th District, which also found that AIL had waived its right to demand arbitration.

"AIL did not introduce the question of arbitration for almost a full year and AIL conducted litigation in a style inconsistent with the right to arbitrate," the appeals court said.

Moreover, the panel agreed with the trial court that the underlying agreements do not provide a basis to compel arbitration.

The statutory wage claims raised by Hoover are not subject to arbitration, even if an arbitration clause is contained in a collective bargaining or individual employment agreement, the appeals court said.

"Hoover's lawsuit represents an effort to enforce nonwaivable statutory rights, not an attempt to enforce compliance with the agent contract or the CBA," the appeals court held.

Finally, the appeals court rejected AIL's argument that the CBA and agent contract involve interstate commerce that subjects Hoover's claims to the Federal Arbitration Act, 9 U.S.C. § 1.

"Hoover did not work in other states or engage in ... activity that affected interstate commerce," the panel said. WJ

Attorneys:
Plaintiff: James M. Gilbert, Newport Beach, Calif.; Joseph Antonelli, Chino Hills, Calif.; Darren D. Daniels, Irvine, Calif.

Defendant: Joel D. Siegel, David Simonton and Leanna M. Anderson, SNR Denton US LLP, Los Angeles

Related Court Document:
Opinion: 2012 WL 1739806

See Document Section B (P. 31) for the opinion.

ERISA preempts employee's suit over pay deductions for insurance

A lawsuit alleging an employer illegally deducted health insurance premiums from the pay of a former employee is preempted by the Employee Retirement Income Security Act, a federal judge in Maryland has ruled.

Kresal v. RFID Global Solutions Inc., No. 11-1395, 2012 WL 1701770 (D. Md. May 14, 2012).

In a complaint originally filed in Maryland state court, Fred Kresal said RFID Global Solutions Inc. hired him in February 2005 to be its director of customer support.

RFID never informed him prior to being hired that a portion of his wages would be used to contribute to health and dental insurance, the complaint said. Kresal also alleged the company reduced his salary without his consent and that he was not paid for nearly 900 hours of overtime worked from 2008 through 2010.

He allegedly stopped working for RFID in July 2010.

The complaint included claims for negligence, conversion, breach of contract and violations of the Maryland Wage and Hour Law, Md. Code Ann., Lab. & Empl. § 3-415, and the federal Fair Labor Standards Act, 29 U.S.C. § 201.

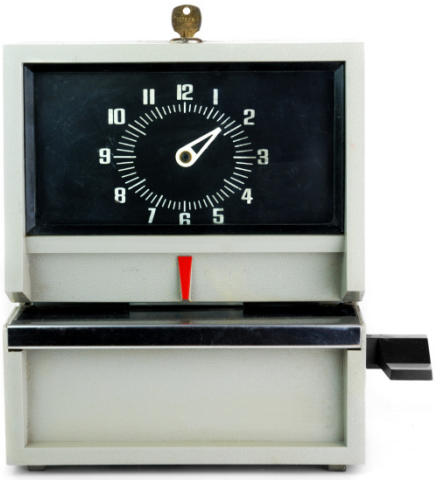
RFID removed the case to the U.S. District Court for the District of Maryland in May 2011.

Kresal subsequently amended the complaint and raised his damages demand from about $134,000 to more than $300,000.

RFID answered the amended complaint and moved in January for judgment on the pleadings.

U.S. District Judge William M. Nickerson granted the motion, finding the claims preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001.

The state law claims relating to the alleged diversion of a portion of Kresal's salary to pay for insurance plans are preempted by ERISA, the judge said.



The federal statute is a comprehensive regulatory system designed to promote the interests of employees in employee benefit plans, the judge noted. ERISA "protects the administrators of employee benefit plans from the threat of conflicting and inconsistent state and local regulation," he said.

Kresal's state law claims are preempted because they aim to recover by alternate means benefits allegedly due under ERISA, Judge Nickerson said.

Kresal argued that he should be allowed to proceed to the discovery phase of litigation to determine if RFID actually used the withheld money to pay for insurance coverage. It is "probable" the funds were not diverted in accordance with ERISA, Kresal said in court papers opposing RFID's motion.

But even assuming Kresal's wages were not properly directed to any employee benefit plan, that fact would necessarily relate to an employee benefit plan covered by ERISA, Judge Nickerson said.

He also dismissed Kresal's claim that the employer illegally reduced his pay in 2008.

Under Maryland law, an employer may reduce pay without the employee's agreement provided it gives the employee proper notice, the judge said.

Kresal did not allege he was not given proper notice of the pay cut, the judge noted.

> The judge ruled that the plaintiff's state law claims related to the alleged diversion of a portion of his salary to pay for insurance plans are preempted by ERISA.

The complaint also failed to state viable claims for unpaid overtime under the Fair Labor Standards Act and Maryland's parallel wage law, the judge ruled.

The overtime laws do not apply in cases where the plaintiff is employed in an executive, administrative or professional capacity, he explained.

Documents attached to the amended complaint showed that Kresal was an employee exempt from overtime, the judge noted. WJ

Attorneys:
Plaintiff: Daniel L. Cox, Frederick, Md.

Defendant: Kirsten M. Eriksson and Darah McCray Okeke, Miles & Stockbridge, Baltimore

Related Court Document:
Opinion: 2012 WL 1701770

CLAIM: RETALIATION

Award amount: $274,000

Arbitrator William H. Lemons has found that an employee who was demoted, disciplined and then fired after taking leave protected under the federal Family and Medical Leave Act is entitled to an award of $81,000 plus 532 days' interest. Lemons also ordered another $81,000 in liquidated damages for salary and benefits and other compensation from the date of the worker's firing through the date of the arbitration hearing. He also said the employee should receive $56,000 in attorney fees and costs, but denied her request for travel expenses. Lemons rejected the employer's contention that the employee, an MBA hired to fill a special position, was "incompetent from the start." The employee's FMLA leave actually played a role in connection with the employment decision made here, and the employer failed to show that it would have made the same decisions with respect to similarly situated employees, the arbitrator said.

In re Arbitration Between [Claimant] and [Respondent] (Home Furniture, Furnishings and Equipment Stores), No. [Redacted], 2012 WL 1655289 (Am. Arbitration Ass'n Apr. 26, 2012).

Related Document:
Award: 2012 WL 1655289

CLAIM: WRONGFUL TERMINATION

Award amount: $0

An employee who left her job for 90 minutes without clocking out or telling her supervisor was properly fired for falsifying her time card, or "gross misconduct" as outlined in the company handbook, arbitrator Bonnie Siber Weinstock has decided. The employee did not explain to any supervisor, either before or after her departure, that her husband had just called her to ask for a divorce and would seek custody of their daughter because the employee was an "unfit mother," Weinstock noted. Although the employee worked through lunch to "make up time," her time card falsely indicated she was taking a 45-minute lunch break, the arbitrator said. Weinstock found the deceptions on the day in question "serious misconduct" and that the employer was not arbitrary, capricious or discriminatory when it decided that the penalty should be termination.

In re Arbitration Between [Claimant] and [Respondent] (Hotels, Rooming Houses, Camps and Other Lodging Places), No. [Redacted], 2012 WL 1574270 (Am. Arbitration Ass'n Apr. 20, 2012).

Related Document:
Award: 2012 WL 1574270

CLAIM: WRONGFUL TERMINATION

Award amount: $0

An American Arbitration Association arbitrator has denied the wrongful-discharge claim of an employee who lost his job for refusing to sign a drug test consent form that released his employer and the testing company from liability for problems arising from the testing procedure. Although there was evidence that the employer told the worker several times he could be fired for failing to comply with the drug testing policy, he appeared for the test but crossed out the release clause in the two consent forms. He was promptly fired. After noting that the worker was an at-will employee, the arbitrator rejected his argument that his case fell under the public policy exception to the at-will employment doctrine. The arbitrator was not convinced the release clause offended a well-established and clear mandate of public policy, and emphasized that the employer had permissibly implemented, interpreted and applied its drug testing policy.

In re Arbitration Between [Claimant] and [Respondent] (Food and Kindred Products), No. [Redacted], 2012 WL 1574243 (Am. Arbitration Ass'n Apr. 26, 2012).

Related Document:
Award: 2012 WL 1574243

CLAIM: DISABILITY DISCRIMINATION

Award amount: $1.6 million

A research analyst found to have been discriminatorily discharged because of her disability and accordingly entitled to reinstatement to a similar position should also receive a total of $1.6 million in lost earnings and bonuses, arbitrator Donald J. Spero has decided. His decision came in a case that started in 2004 and was still unresolved in 2012. The amount reflects evidence that the analyst failed to mitigate her damages in 2008 by rejecting an offer for a job that paid $270,000 annually. But Spero found she did show diligence in seeking employment during some of the following time period. He rejected the employee's argument that her academic credentials and prior experience would have qualified her for a promotion during the time she was with the company, and he did not use that information when calculating future lost earnings. Spero also found that because setting wages and determining raises and bonuses were largely subjective at the company, he could not rely on a precise calculation for the award but instead used the financials of another research analyst as a guide.

In re Arbitration Between [Claimant] and [Respondent] (Holding and Other Investment Offices), No. [Redacted], 2012 WL 1655290 (Am. Arbitration Ass'n Apr. 20, 2012).

Related Document:
Award: 2012 WL 1655290

New York high court rejects compliance officer's wrongful-discharge claim

A 5-2 majority of New York's highest court has declined to adopt an exception for compliance officers to the general rule that an at-will employee cannot sue his employer for wrongful discharge.

Sullivan v. Harnisch et al., No. 82, 2012 WL 1580602 (N.Y. May 8, 2012).

The two-judge dissent, led by Court of Appeals Chief Judge Jonathan Lippman, cautioned that compliance officers should be protected by courts, lest they be prone to turn a blind eye to illegal behavior to keep their jobs.

THE UNDERLYING SUIT

According to the majority's opinion, Joseph Sullivan was the former executive vice president, treasurer, secretary, COO and chief compliance officer for two affiliated hedge funds, Peconic Partners LLC and Peconic Asset Managers LLC.

He was fired after an alleged dispute with the funds' majority owner, chief executive and president William Harnisch, the opinion said.

Sullivan sued the funds and Harnisch in the New York County Supreme Court, claiming that the firing resulted from his vocal objection, in his capacity as compliance officer, to stock sales allegedly made by Harnisch.

The trial court denied a defense motion for summary judgment, finding Sullivan could maintain a wrongful-discharge claim.

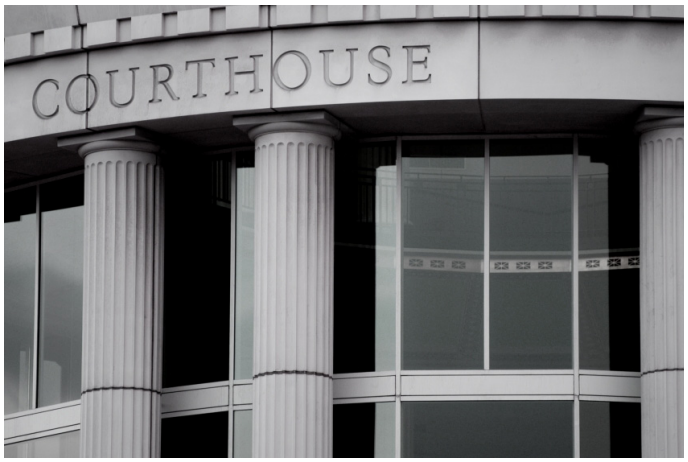
But after an intermediate appellate court reversed that decision, Sullivan turned to the state's highest court.

COURT OF APPEALS RULING

Writing for the majority, Judge Robert S. Smith reaffirmed the high court's decision in *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293 (N.Y. 1983), which held that absent a constitutional provision, statute or contract, New York common law does not recognize a cause of action for the wrongful-discharge of an at-will employee.

Judge Smith rejected Sullivan's invitation to make an exception to that rule for the compliance officer of a hedge fund.

He noted the importance of regulatory compliance officers to hedge funds but said that was no reason "to make state common law governing the employer-employee relationship more intrusive."



The judge added that Sullivan is not subject to whistle-blower protections because he has not claimed to have reported any alleged misconduct to the Securities and Exchange Commission. Rather, he claimed he was fired after an alleged confrontation with Harnisch.

Judge Lippman warned in his dissenting opinion that the majority's denial of protection to compliance officers will send the message that if they want to stay employed, "they should keep their heads down and ignore good-faith suspicions or evidence they may have that their employers have engaged in illegal and unethical behavior."

"In the wake of the devastation caused by fraudulent financial schemes — such as the Madoff Ponzi operation, infamous for many reasons, including the length of time during which it continued undetected — the courts can ill afford to turn a blind eye to the potential for abuses that may be committed by unscrupulous financial services companies in violation of the public trust and the law," Judge Lippman wrote. WJ

Attorneys:
Plaintiff: Daniel M. Felber, Balsam Felber & Goldfield, New York

Defendants: Y. David Scharf, Morrison Cohen LLP, New York

Related Court Document:
Opinion: 2012 WL 1580602

Connecticut judge OKs $307,000 verdict for defamed pilot

A Connecticut judge has upheld a $307,000 jury verdict in favor of an airline pilot whose former employer allegedly defamed him by telling a prospective employer that he had been terminated for poor performance.

Nelson v. Tradewind Aviation LLC, No. 09-5007929, 2012 WL 1759855 (Conn. Super. Ct., Milford County May 1, 2012).

Judge Joseph Doherty of the Superior Court found no support for any of the reasons set forth by Tradewind Aviation for setting aside the verdict in favor of Jeffrey Nelson who was let go in 2007 purportedly for lack of work.

Nelson claimed that when he applied for a job with Republic Airways, Tradewind defamed him by reporting he was let go for performance reasons, not for a lack of work. The jury agreed with Nelson and awarded him $207,000 in economic damages and $100,000 in noneconomic damages.

Tradewind moved to have the verdict set aside, citing five reasons the jury's decision was invalid.

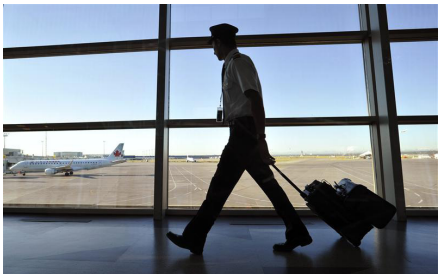
First, although there was contradictory evidence concerning what Nelson told Republic about his reason for leaving Tradewind, there was a sufficient basis for the jury to find that he did not misrepresent his status, Judge Doherty said. The jury properly found that Republic rescinded Nelson's job offer because of Tradewind's statements.

"By the verdict, it is obvious that the jury did find that the defendant's actions not only did the plaintiff harm, but did him substantial harm," the judge said.

Second, the jury had adequate bases for concluding that Nelson did not misrepresent his involvement in an incident involving damage to a plane when he was a student pilot and was not at the controls, the judge said. The jury accepted Nelson's explanation and did not consider it the reason Republic withdrew its job offer, Judge Doherty said.

Third, there was no error in the court's decision to admit favorable statements by other pilots who had critiqued Nelson's work, the judge said. The statements were not inadmissible hearsay as they were made by agents of Tradewind who were authorized to make such statements in the course of their employment, he explained.

Fourth, the jury properly determined that Nelson truthfully testified that he believed



REUTERS/Todd Korol

he was let go because of a lack of work, and that Tradewind subsequently told Republic that it had terminated him for performance reasons, the judge said.

Finally, the jury heard conflicting testimony about whether Nelson told the Connecticut Department of Labor that Tradewind had "discharged" him after a reprimand for failing to keep the interior of his plane clean. Nelson claimed he consistently told the state agency that he was laid off, and there was sufficient evidence for the jury to accept that testimony, Judge Doherty said. WJ

Related Court Document:
Memorandum of decision: 2012 WL 1759855

Nurse injured by stabbing wins revival of failure-to-warn claims

A nursing home employee who was stabbed by a resident is not time-barred from bringing failure-to-warn claims against her employer under Missouri's two-year limitations period for health care and malpractice actions, the state appeals court has ruled.

Spero v. Mason et al., No. WD 74016, 2012 WL 1392599 (Mo. Ct. App., W. Dist. Apr. 24, 2012).

Vincetta Spero can continue to pursue claims that the nursing home concealed the resident's violent history, but not allegations that the facility failed to restrain or safeguard the resident, the Court of Appeals said.

The three-judge panel unanimously found that her allegations related to the resident's health care are subject to the two-year limitations period under Mo. Rev. Stat. § 516.105.

According to the appellate court's opinion, Spero suffered multiple injuries when a resident at Senior Estates stabbed her repeatedly during a 2005 shift as a charge nurse.

Spero filed a petition for damages in the Jackson County Circuit Court nearly five years later against Senior Estates' assistant director of nursing Sylvia Mason, director of nursing Dr. Ramilo Gatapia and administrator Charles Albin.

She claimed that the defendants breached their personal duties to provide ordinary care by failing to warn her of the resident's prior attacks and "dangerous nature," according to the opinion.

The suit alleged the defendants knew it was probable that Spero could be injured or killed while caring for the resident without proper safety precautions, but negligently ordered her to engage in acts that compromised her safety.

Spero also alleged the defendants neglected to place the resident on a secured floor "dedicated to violent and dangerous individuals," the opinion says.

> Vincetta Spero alleged that upper-level nursing home employees failed to warn her of the resident's prior attacks and "dangerous nature," according to the opinion.

Gatapia argued in a motion to dismiss that the negligence claims are time-barred under Section 516.105 because they pertain to his treatment of the resident and information he obtained during treatment.

Judge David M. Byrn of the Jackson County Circuit Court granted Gatapia's motion and later dismissed the claims against Mason and Albin on the same grounds, the opinion says.

Spero challenged the rulings on appeal. According to the opinion, she argued that the two-year limitations period does not apply to her suit because her claims are based on a duty the defendants owed to her as an employee.

Mason, Gatapia and Albin maintained that Spero's claims are related to health care because they stem from allegedly negligent treatment of the resident, the opinion says.

The appeals court said the actions of health care providers that are only "incidentally related" to the delivery of health care do not fall within the scope of Section 516.105.

Spero's allegations that the defendants failed to warn her of the dangers of interacting with the resident or concealed the resident's violent history are not subject to the two-year window for health care claims, Judge Thomas H. Newton wrote in the opinion.

The panel found that the Circuit Court judge properly dismissed Spero's claims that the defendants failed to restrain, isolate or safeguard the resident as time-barred.

The appeals court reversed the ruling on the defendants' motions to dismiss and remanded the case to the Circuit Court. WJ

REUTERS/Michaela Rehle

Attorneys:
Appellant: Timothy Monsees, Monsees Miller Mayer Presley & Amick, Kansas City, Mo.

Respondent (Mason): Mark E. Kelly, Withers Brant Igoe & Mullennix, Liberty, Mo.

Respondent (Gatapia): Marc Erickson, Kansas City, Mo.

Respondent (Albin): Karl Kuckelman, Wallace Saunders Austin Brown & Enochs, Overland Park, Kan.

Related Court Document:
Opinion: 2012 WL 1392599

Workers' comp is sole remedy for nurse's death, court rules

The family of a nursing home worker who died of a heart attack after an altercation with a resident can pursue remedies only under Louisiana workers' compensation law, a divided state appeals court has ruled.

Lloyd et al. v. Shady Lake Nursing Home et al., No. 47,025–CA, 2012 WL 1605410 (La. Ct. App., 2d Cir. May 9, 2012).

Margaret Caldwell's husband and children lost their bid to reverse a trial court's decision to dismiss their wrongful-death lawsuit for lack of subject matter jurisdiction.

The 3-2 ruling by Court of Appeal's 2nd Circuit rejected the family's claim that Shady Lake Nursing Home's failure to protect Caldwell was an "intentional tort" that is not covered by workers' compensation.

Two judges said in a dissenting opinion that Caldwell's estate should be allowed to pursue tort claims because the resident's attack was not an "unforeseen incident."

The state Workers' Compensation Act, La. Rev. Stat. § 23:1032, is generally an employee's exclusive means for redressing workplace injuries, excluding intentional acts.

Heart-related injuries or deaths are not compensable under the WCA absent clear and convincing evidence that "extraordinary and unusual" workplace stress caused the injury.

According to an opinion issued by the appellate court majority, Caldwell suffered a heart attack shortly after a male dementia patient at Shady Lake struck her in the face during an altercation in 2007.

Caldwell, a certified nursing assistant, was morbidly obese and had pre-existing high blood pressure. She died about an hour after the attack, the majority opinion says.

An autopsy showed that hypertensive heart disease and coronary artery disease were the immediate causes of Caldwell's death, and the physical blow to the face was an underlying cause, the majority noted.

Her husband, Edward E. Lloyd, and the couple's children filed a wrongful-death suit against Shady Lake in the Carroll Parish District Court. The suit alleged Shady Lake failed to protect Caldwell from a patient with documented impulse control and psychotic disorders and a closed-head injury.

The nursing home breached its duty to protect employees from mentally incapacitated residents who could foreseeably exert fatal harm, the family claimed.

Both parties moved for summary judgment on the issue of whether Caldwell's death was compensable under the Workers' Compensation Act.

Shady Lake asserted in a declinatory exception that the District Court lacked subject matter jurisdiction because the plaintiffs' exclusive remedy is through workers' compensation.

> Margaret Caldwell suffered a fatal heart attack shortly after a dementia patient at Shady Lake Nursing Home struck her in the face during an altercation in 2007, according to the opinion.

The District Court denied both motions, and the state appeals court affirmed in 2010. *Lloyd et al. v. Shady Lake Nursing Home et al.*, 47 So. 3d 609 (La. Ct. App., 2d Cir. 2010).

A trial is necessary to resolve genuine issues of material fact as to whether Caldwell's injuries constituted a workplace "accident" under the WCA or an intentional tort, the appeals court said.

The District Court held an evidentiary hearing and sustained the nursing home's exception for subject matter jurisdiction.

Workers' compensation is the sole remedy for the plaintiffs' claims because Caldwell's injuries were not the result of an intentional tort, the court ruled in May 2011.

Lloyd and the couple's children argued on appeal that Shady Lake's failure to protect Caldwell from a known aggressor was an intentional act that is not covered under the WCA.

The Court of Appeal said the intentional-tort exclusion does not apply. While Shady Lake knew the resident was aggressive, there was no evidence that he had attacked anyone prior to the incident with Caldwell, the majority found.

The appeals court also rejected the plaintiffs' contention that the trial court erroneously found Caldwell's death would be compensable under the WCA because extraordinary work stress caused her heart attack.

The facts of the case do not fulfill the heightened burden of proof for a compensable heart-related death under the WCA, the plaintiffs claimed.

The majority of the appeals court declined to disturb the trial court's ruling. Testimony from nursing home employees established that Caldwell's attack was more serious than the type of physical injuries that are commonly experienced by nursing assistants, the majority said.

Judge John L. Lolley wrote in a dissenting opinion joined by Judge Felicia T. Williams that the plaintiffs should not be limited to workers' compensation because the attack on Caldwell went "clearly beyond" the scope and course of her employment. WJ

Attorneys:
Plaintiff-appellants: Rosalind D. Jones and Frederick D. Jones, the Jones Law Group, Monroe, La.

Defendant-appellees: Joseph J. Bailey and Jeremy C. Cedars, Provosty Sadler Delaunay Fiorenza & Sobel, Alexandria, La.

Related Court Documents:
Opinion: 2012 WL 1605410

See Document Section C (P. 38) for the opinion.

WORKER REINSTATEMENT ENDS LONG-RUNNING UAW DISPUTE

The National Labor Relations Board has announced a settlement of a four-year labor dispute between an Alabama manufac-turing plant and the United Automobile Aerospace & Agricultural Implement Workers of America, the union representing its workers. Illinois-based NTN Bower Corp., which makes precision roller bearings, agreed to reinstate 60 former strikers at its Alabama site and to distribute $1.85 million in back pay to current and former employees, according to the NLRB's May 16 announcement. The agreement resolves multiple pending cases, where the issues included the company's failure to reinstate a large number of workers after a 2008 strike and to recognize the union. The company also agreed to acknowledge the union, which has represented the workers for decades, the statement said.

LABOR DEPARTMENT GOES AFTER COMPANY THAT FIRED COMPLAINING MINER

The U.S. Department of Labor's Mine Safety and Health Administration has filed a complaint with the Federal Mine Safety and Health Review Commission against a construction company that fired a miner allegedly in retaliation for repeatedly making safety complaints, according to the Labor Department's May 17 report. The MSHA investigation revealed the miner had alerted the company about safety problems, refused to turn on the plant's generator until required safety guards were installed and called MSHA to report the company. An administrative law judge will determine if the company, Ferraiolo Construction Inc., violated federal law by unlawfully discriminating against the miner. The MSHA seeks a cease-and-desist order, removal of adverse references from the miner's personnel file, an offer to reinstate and payment of a $20,000 penalty, the report said.

JUDGE RESTORES FULL-TIME HOURS FOR SUPERMARKET EMPLOYEES

A federal judge in Wisconsin has ordered a Piggly Wiggly supermarket to restore full-time status and health insurance to employees whose hours it reduced without first bargaining with the union, according to a May 21 National Labor Relations Board report. The NLRB said supermarket managers reduced 19 employees' work hours without notice because a non-union competitor was opening nearby. The reduction in hours also meant the loss of health insurance. The judge cited the unilateral reductions, open hostility to the union and efforts to undermine the union's credibility when issuing the injunc-tion, which also restores the union's bargaining position. The temporary injunc-tion bars the company from making any unilateral changes in the future.

Gottschalk v. Piggly Wiggly Midwest, No. 12-0152, 2012 WL 1860159 (E.D. Wis. May 18, 2012).

Related Court Document:
Order: 2012 WL 1860159

COMPANY SETTLES AGE-BIAS SUIT FOR $200,000

A Texas-based distributor of specialty fast-eners has agreed to pay $201,000 to settle an age discrimination lawsuit by the Equal Employment Opportunity Commission, alleging violations of the federal Age Discrimination in Employment Act, the agency announced May 18. According to an EEOC statement, Advance Components Vice President Gary Craven made ageist comments about 64-year-old Dan Miller and fired him after 20 years as a company salesman. Craven allegedly called Miller "old fashioned" and regularly expressed interest in hiring younger staff. Advance filled the position the day after the termination with a man who is in his 30s, the EEOC said. In addition to the monetary payment, Advance agreed to train personnel and to enforce a written policy against age discrimination.

Equal Employment Opportunity Commission v. Advance Components, No. 11-2081, settlement approved (N.D. Tex., Dallas May 18, 2012).

EEOC SUES NURSING HOME FOR DISABILITY BIAS

A Tennessee nursing home violated the federal Americans with Disabilities Act by firing an employee because the employee is HIV-positive, the Equal Employment Opportunity Commission says in a suit filed in the U.S. District Court for the Eastern District of Tennessee. In a May 17 statement, the EEOC said the employee worked as a licensed practical nurse for Christian Care Center of Johnson City Inc. for more than a month and was fired as soon as the HIV status was discovered. The disability discrimination suit seeks back pay, compensatory and punitive damages, and injunctive relief to prevent future discrimination.

Equal Employment Opportunity Commission v. Christian Care Center of Johnson City Inc., No. 12-00207, complaint filed (E.D. Tenn., N.E. Div. May 17, 2012).

Related Court Document:
Complaint: 2012 WL 1932809

TIME WARNER FAILS TO PAY OVERTIME, SUIT SAYS

A proposed federal class action filed in the U.S. District Court for the Southern District of New York claims that entertainment giant Time Warner Cable Inc. systematically failed to pay its hourly call-center representatives overtime for required work above their 40-hour work week. According to the complaint, the CCRs were not paid for such tasks as booting up their computer systems, phone calls that continued past their shifts and time spent working after they had logged out of the time-keeping software at the end of the day. The plaintiffs, a nationwide class of more than 2,000 CCRs, claim that because they are hourly workers, the company's failure to pay overtime violates the Fair Labor Standards Act and state law. The suit seeks unpaid wages, interest and injunctive relief.

Oleniak et al. v. Time Warner Cable Inc. et al., No. 12-3971, complaint filed (S.D.N.Y. May 18, 2012).

Related Court Document:
Complaint: 2012 WL 1760193

RECENTLY FILED COMPLAINTS FROM WESTLAW COURT WIRE*

Westlaw Cite	2012 WL 1653306
Case Title	Bernard v. Starbucks Corp., No. 12-00838 (D. Or. May 11, 2012)
Case Type	Employment
Case Subtype	Retaliation
Allegations	Defendant Starbucks Corp., a Washington business, employed plaintiff Robynn Bernard. Defendant discriminated and retaliated against plaintiff for utilizing Oregon's Family and Medical Leave Act.
Damages Synopsis	$500,000

Westlaw Cite	2012 WL 1653117
Case Title	Pozin v. GI Entertainment, No. 12-005652 (Fla. Cir. Ct., Pinellas County May 8, 2012)
Case Type	Employment
Case Subtype	Wage and hour
Allegations	Plaintiffs were employees of GI Entertainment and worked as servers and bartenders. Defendant failed to pay employees standard minimum wage. Plaintiffs are joining in a class action to recoup lost wages.
Damages Synopsis	$15,000

Westlaw Cite	2012 WL 1750140
Case Title	Ostrowsky v. Department of Education of NYC, No. 12-02439 (E.D.N.Y. May 16, 2012)
Case Type	Employment
Case Subtype	Wrongful termination
Allegations	The New York City School District terminated plaintiff's employment in retaliation for his complaint about his co-worker's harassing acts, causing the plaintiff to suffer damages.
Damages Synopsis	In excess of $4,000 in statutory damages, in excess of $2,000 in damages, declaratory and injunctive relief, and fees.

Westlaw Court Wire is a Thomson Reuters news service that provides notice of new complaints filed in state and federal courts nationwide, sometimes within minutes of the filing.

CASE AND DOCUMENT INDEX