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EMPLOYER LIABILITY

Supreme Court narrowly defines 'supervisor' in discrimination case

An employer is vicariously liable for the harassing and discriminatory actions of an employee only when that person has the power to take "tangible employment actions against the victim," the U.S. Supreme Court has ruled.

Vance v. Ball State University et al., No. 11-556, 2013 WL 3155228 (U.S. June 24, 2013).

In a 5-4 decision, the high court said an individual can be considered a supervisor for the purposes of employer liability only if the person can take actions, such as hiring, firing and reassignment, that can have a direct economic impact on the accuser.

An individual who may have some control over another worker's day-to-day tasks is not a supervisor, and an employer would generally not be liable for that person's actions, the majority said.

The ruling could make it more difficult to sue employers over alleged workplace harassment.

The high court majority — Chief Justice John Roberts and Justices Samuel Alito, Antonin Scalia, Anthony Kennedy and Clarence Thomas — said two 1998 Supreme Court rulings established the factors for determining employer liability and provided the framework for this decision.



REUTERS/Larry Downing

Justice Ruth Bader Ginsburg's dissent said that according to the majority's "truncated conception of supervisory authority, the Faragher-Elterth framework has shifted in a decidedly employer-friendly direction."

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Brinker's legacy, one year in

By Rex S. Heinke, Esq., and Christopher K. Petersen, Esq.
Akin Gump

Over the last decade, meal and rest break class-action litigation has proliferated in California, culminating in the California Supreme Court's April 2012 landmark decision in *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012). The court's decision provided much-needed clarity on several key points, including the nature of an employer's duty to provide meal and rest breaks and the intervals at which an employee has a right to those breaks. *Brinker's* most important legacy, however, is its impact on the issue of class certification.

Leading up to *Brinker*, two lines of decision emerged in the lower courts on meal breaks. One line held that employers needed only to "provide" meal breaks, while the other required employers to "ensure" that employees took meal breaks. Under the "provide" standard, employers merely had to relieve employees of all duties for a 30-minute meal break, but did not need to ensure that they, in fact, took such breaks.

Under the "ensure" standard, employers had an affirmative duty to police employees on meal breaks to be certain that they never performed any work at all. As the court explained in *White*,¹ the "ensure" standard, "would be impossible to implement for significant sectors of the mercantile industry (and other industries) in which large employers may have hundreds or thousands of employees working multiple shifts."

The stark contrast between the "provide" and "ensure" standards had a tremendous impact on class certification. Certification motions were much easier for a plaintiff to win under the "ensure" standard because liability for missed breaks turned only on whether the plaintiff (or putative class members) missed any breaks, without any need to inquire why. Moreover, the evidence needed to prove liability could often be gathered easily (e.g., time punch records indicating whether an employee took a meal break and for how long).

common questions did not predominate — an essential requirement for class certification.

The Supreme Court granted review in *Brinker* to resolve this conflict and, in the process clarified the applicable certification analysis.

WHAT DID THE COURT DECIDE IN BRINKER AND HOW HAS IT BEEN APPLIED SINCE?

Meal break claims

The Supreme Court adopted the "provide" standard for meal break claims. Despite

Brinker's most important legacy is its impact on the issue of class certification.

Under the "provide" standard, however, courts often denied certification because the reason for any missed breaks was crucial to the question of liability. For example, if an employer provided an employee a meal break, but the employee did not want to take a break, then no liability would result. Many employers litigating under the "provide" standard were able to present evidence that putative class members missed breaks for a variety of reasons (e.g., they wanted to work through their break and then leave work early, they wanted to secure a tip from a customer [e.g., waiters]). The variety of reasons for missed breaks meant that

the plaintiff's contention that opinion letters issued by the Division of Labor Standards Enforcement clearly favored the "ensure" standard, the Supreme Court found no such support in the language of the statute or the wage order themselves. The applicable wage order (No. 5) stated only that "[n]o employer shall employ any person for a work period of more than five hours without a meal period of not less than 30 minutes." As the court pointed out, "[t]he wage order employs no verb between 'without' and 'a meal period' ... to specify the nature of the employer's duty."

However, another provision in the wage order provided a useful contrast, from which the court inferred the nature of the employer's duty. As the court explained, "on duty" meal breaks are permitted under the wage order when "the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to." When those circumstances are not present, the court reasoned, "an employer is obligated to provide an 'off duty' meal period," the attributes of which were the "reciprocal" of on duty meal periods. So, where on duty meal breaks are those in which an employee is not "relieved of all duty" for a thirty-minute period, off duty meal breaks are those in which an employee is relieved



Rex Heinke (L) represented Brinker and is co-head of the Supreme Court and appellate practice at **Akin Gump**. **Christopher Petersen** (R) is an associate in the firm's labor and employment group.

of all duty. Thus, the court concluded, an employer must only relieve employees of duty but need not “ensure” that they take breaks and must not impede or discourage employees from taking breaks.

Not only does this standard mean employers are “not obligated to police meal breaks and ensure no work thereafter is performed,”² but it also makes certification of a meal break class far less likely. Indeed, the “provide” standard “requires, ineluctably, individualized fact finding” about why employees do not take breaks.³

For example, in *Gonzalez*, the plaintiffs alleged that their employer’s insistence on putting the customer first and understaffing its stores impeded or prevented employees from taking meal breaks.⁴ They offered time punch records to show when employees did not have breaks, and argued that this supported certification.⁵ However, because

Brinker alleviates a primary source of contention not only in terms of liability, but also in terms of the propriety of class certification.

Brinker merely requires employers to relieve employees of duty, but not to ensure breaks are taken, the employees could only succeed if they could show by common evidence that the employer’s policies “forced [them] to forego’ their meal periods on a classwide basis.”⁶ Time punch records failed as a common method of proof because, as the court explained, the relevant question is whether “[the employer] was responsible” for any given missed break, not simply whether an employee missed a break.⁷ Individualized inquiries were necessary to determine the reason for each missed break, precluding certification.⁸

Most courts deciding certification of meal break classes in the year since *Brinker* have followed this rationale. The exceptions — where certification of meal break claims has been granted — result from class-wide policies (especially written ones) that do not comply with *Brinker*. For example, in *In re Taco Bell Wage and Hour Litigation*,⁹ the employer’s written policy stated: “You are required to take a full 30-minute,

uninterrupted meal period after 5 hours of work.” *Brinker*, however, clarified that, absent waiver (which is permissible in certain circumstances) “a first meal period [must be

The court concluded that an employer must only relieve employees of duty but need not “ensure” that they take breaks.

taken] no later than the end of an employee’s fifth hour of work.”¹⁰ Thus, the plaintiffs’ theory of liability in *Taco Bell* turned on an allegedly facially unlawful policy common to all class members.¹¹

The result likely would have been different if the policy itself was not facially invalid, as the court explained with respect to a different sub-class. The *Taco Bell* plaintiffs also sought to certify an on-duty meal break sub-class, claiming that the company’s on-duty meal period agreements with managerial and graveyard shift employees required all of these employees to take on-duty meal breaks.¹² However, as the court made clear, California law permits on-duty meal breaks, depending on the nature of the work.¹³ The simple fact that all managerial and graveyard shift employees had on-duty agreements did nothing to advance certification because such agreements are not facially invalid in the way that the meal break policy allegedly was.¹⁴ As a result, individual inquiries would be necessary to determine the nature of each employee’s work and whether it required an on-duty meal period.¹⁵ In the absence of the facially invalid meal break policy, a similar, employee-specific inquiry would have had to be made about the reason each employee missed a break, so certification would have been denied.

Rest break claims

Results in rest break class actions echo those in meal break class actions in many respects, although plaintiffs have had marginally more success certifying rest break classes. This appears to be largely the result of the Supreme Court’s decision about the timing of rest breaks in *Brinker*. The wage order states, in ambiguous fashion, that employers must “authorize and permit” employees to take 10 minute rest breaks “per four hours or major fraction thereof.” Wage Order No. 5, subdivision 12. “Major fraction” is undefined. The court decided “major fraction” means “greater than one-half.” Another section of the wage order provides that an employee is

not entitled to a break if his or her shift is less than three and a half hours. Thus, the court concluded that employees are entitled to a 10-minute break for shifts from three and a

half hours to six hours in length, another 10 minutes for shifts of more than six hours up to 10 hours, another for shifts from 10 hours up to 14 hours, etc.¹⁶

Before *Brinker*, employers were left on their own to determine what “major fraction” meant. Some interpreted the reference to three-and a-half-hour shifts to suggest that “major fraction” of four hours meant somewhere between three and a half and four hours. A written policy to this effect could result in class certification.¹⁷

Nonetheless, even where a break policy arguably violates *Brinker*, an employer can still defeat certification.¹⁸ In *Ordonez*, the plaintiff challenged the employer’s written rest break policy, which stated simply “[a]ll employees are required to take one paid 15 minute rest break for every four hours worked in a given shift.”¹⁹ The policy was uniformly applicable to employees and, the court noted, arguably violated *Brinker* (i.e., that it did not provide for breaks for shifts or parts of shifts constituting a “major fraction” of four hours). However, the employer offered ample testimony that employees were, in fact, “granted rest breaks in accordance with California law — or, at a minimum, in accordance with no uniform policy at all.” The court concluded, based on “substantial evidence,” that the employer’s actual practice complied with California law, so “plaintiff’s evidence that defendant may have an illegal, written rest break policy [was] insufficient” to certify a class.

In sum, *Brinker* eliminated any threat that employers need to “police” every employee on break and, perhaps more importantly, created a standard that makes certification of meal and rest break classes much less likely than before, especially if an employer’s policies are not facially invalid.

Off-the-clock claims

Although *Brinker*’s primary impact has been on meal and rest break standards and certification of break claim classes, another aspect of the decision is important.

The Supreme Court upheld the trial court's decision denying certification of the plaintiff's off-the-clock claims.²⁰ The plaintiff argued that employees performed off-the-clock work during meal periods.²¹ However, the only evidence before the trial court was a handful of anecdotes about "individual instances in which employees worked off the clock, with or without knowledge or awareness by Brinker supervisors."²² The only relevant policy at issue forbade off-the-clock work, consistent with California law.²³ The Supreme Court affirmed the ruling, explaining that plaintiff's meager showing of a handful of incidents was not "substantial" enough to support class treatment, especially in the absence of a uniform policy that violated California law.²⁴ Brinker has been followed in denying certification of off-the-clock classes.²⁵

CONCLUSION

Although its legacy will continue to be written by state and federal courts in the coming years, *Brinker* has laid to rest any notion that employers must "ensure" employees take breaks. This alleviates a primary source of

contention not only in terms of liability (*i.e.*, courts must inquire about why employees missed breaks, not just whether they missed them), but also in terms of the propriety of class certification (*i.e.*, whether a plaintiff can establish an unlawful reason for missed breaks by common evidence). *Brinker* has also severely limited rest period and off-the-clock class actions. **WJ**

NOTES

¹ *White v. Starbucks Corp.*, 497 F. Supp. 2d 1080, 1088-89 (N.D. Cal. 2007).

² *Brinker*, 53 Cal. 4th 1004, 1040 (2012).

³ *Gonzalez v. OfficeMax North Am.*, 2012 WL 5473764 at *3-6 (C.D. Cal. Nov. 5, 2012).

⁴ *Id.* at 4-5.

⁵ *Id.*

⁶ *Id.* (citing *White*, 497 F. Supp. 2d 1080).

⁷ *Id.*

⁸ *Id.*

⁹ *In re Taco Bell Wage & Hour Litig.*, 2012 WL 5932833 at *5-9 (E.D. Cal. Nov. 27, 2012) (emphasis added).

¹⁰ *Brinker*, 53 Cal. 4th at 1041.

¹¹ *Taco Bell*, 2012 WL at *5-9.

¹² *Id.* at *10.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Brinker*, 53 Cal. 4th at 1033-34.

¹⁸ See, e.g., *Ordonez v. Radio Shack Inc.*, 2013 WL 210223 (C.D. Cal. Jan. 17, 2013).

¹⁹ *Id.*

²⁰ *Brinker*, 53 Cal. 4th at 1051-52.

²¹ *Id.*

²² *Id.* at 1052.

²³ *Id.* at 1051.

²⁴ *Id.* at 1052.

²⁵ See, e.g., *In re Autozone*, 2012 WL 6679983 (N.D. Cal. Dec. 21, 2012) (citing *Brinker* in denying certification of off-the-clock class, analogizing to the anecdotal evidence and policy forbidding off-the-clock work presented in *Brinker*).



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Fox should have paid 'Black Swan' interns, judge says

Two interns who worked on production of the movie "Black Swan" were employees covered by the Fair Labor Standards Act and New York law and should have been paid, a New York federal judge has ruled.

Glatt et al. v. Fox Searchlight Pictures Inc. et al., No. 11 Civ. 6784 WHP, 2013 WL 2495140 (S.D.N.Y. June 11, 2013).

Plaintiffs Eric Glatt and Alexander Footman did not fall within the narrow "trainee" exception to the FLSA established by *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), U.S. District Judge William H. Pauley III of Southern District of New York said.

Glatt, Footman and another intern, Eden Antalík, filed the class-action suit against Fox Searchlight Pictures and parent Fox Entertainment Group Inc. They alleged the defendants violated the FLSA and the New York Labor Law by wrongly classifying them as unpaid interns rather than employees.

Glatt and Footman worked in New York on "Black Swan," and Antalík was an unpaid intern at Fox Searchlight's New York corporate office, according to the opinion.

Both sides moved for summary judgment on the question of whether Glatt and Footman were employees of Fox Searchlight.

The company, as their employer, should have paid Glatt and Footman according to federal and state minimum-wage laws, Judge Pauley said, citing the Department of Labor's criteria for determining whether an internship at a for-profit business falls within the "trainee" exception and considering the "totality of the circumstances."

Searchlight exercised formal and functional control of "Black Swan" as it set the budget, closely supervised work on the film, and had the power to hire and fire production personnel, the judge said.

The Labor Department criteria provide, in part, that an internship may be unpaid if it is similar to training given in an educational setting, is for the benefit of the intern, does not displace regular employees and provides no immediate advantage to the employer.

The FLSA definition of "employ" is broad, so exclusion from it is "necessarily quite narrow," the judge said, citing the Labor Department criteria.

The interns performed routine tasks such as obtaining documents for personnel files, handling purchase orders, assembling office furniture, arranging travel plans, taking out trash, taking lunch orders, answering phones and making deliveries, Judge Pauley said.

The judge found that Footman and Glatt did not receive an education similar to one they would have gotten in an academic or vocational setting, nor were the benefits of the internship, such as resume listings and job references, anything more than incidental.

The interns' work would otherwise have been done by paid employees, he said.



REUTERS/Danny Moloshok

Director Darren Aronofsky poses next to a poster of his film "Black Swan" at 2010 screening of the film in Hollywood.

The New York Labor Law's definition of "employ" is almost identical to the FLSA's, the judge noted.

Antalík moved for class certification on her New York law claims and for certification of a "collective action" under the FLSA.

Judge Pauley found that Antalík provided evidence of a "common policy to replace paid workers with unpaid interns" at various divisions of Fox Entertainment Group t.

He granted class certification on Antalík's New York Labor Law claims and conditional certification of a FLSA collective action to a group of unpaid interns who worked for certain divisions of Fox from Sept. 28, 2008, to Sept. 1, 2010. **WJ**

Related Court Document:
Opinion: 2013 WL 2495140

See Document Section A (P. 23) for the opinion.

Magazine publisher pays interns 'a dollar an hour,' suit says

Conde Nast Publications benefits from work done by college interns but fails to pay them a minimum wage in violation of federal and state wage laws, two former interns say in a New York federal court class action.

Ballinger et al. v. Advance Magazine Publishers Inc. d/b/a Conde Nast Publications, No. 13-cv-4036, complaint filed (S.D.N.Y. June 13, 2013).

The publisher of W Magazine and The New Yorker pays interns "a dollar an hour, if that," the suit says.

The complaint, filed in the U.S. District Court for the Southern District of New York, alleges Conde Nast, a subsidiary of Advance Magazine Publishers Inc., is violating the Fair Labor Standards Act, 29 U.S.C. § 201, and the state's law on wages, N.Y. Labor Law Art. 19, § 650.

Citing an internship fact sheet published by the U.S. Department of Labor, the suit says interns are covered by the FLSA and must be paid minimum wage because an employer "benefits from the interns' work."

The suit alleges Conde Nast took advantage of interns to lower labor costs and avoid paying a full-time employee.

Former Conde Nast interns Lauren Ballinger and Matthew Leib filed the suit seeking unpaid wages and statutory damages, plus declaratory and injunctive relief on behalf of more than 100 interns who have worked for the company since 2007.

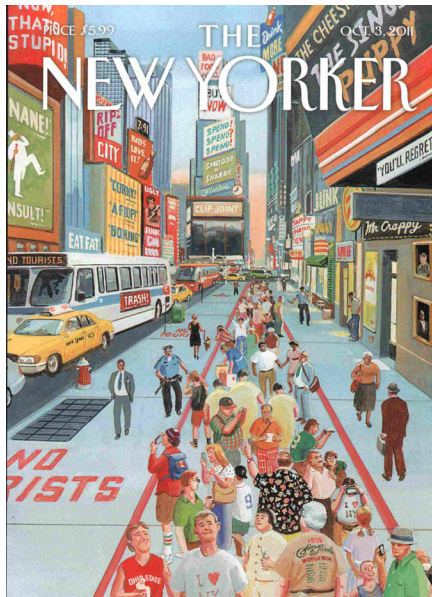
According to the complaint, Ballinger worked at W Magazine from June through October 2009, performing a variety of tasks, including packing, unpacking, sorting and organizing products, and running errands.

Ballinger says she often worked 10 to 12 hour days but was paid \$12 a day no matter how long she worked.

Leib worked at The New Yorker on two separate occasions between June and August 2009 and then again from June to September 2010, the complaint says.

He performed some editing duties and also responded to reader emails, the suit says, and was paid a total of \$300 and \$500 per respective internship.

Ballinger seeks to represent interns as a class based on Conde Nast's alleged violations



Courtesy of donpergut.wordpress.com



Courtesy of justjared.com

Former interns of The New Yorker and W Magazine, both owned by Conde Nast, seek unpaid wages on behalf of more than 100 interns who have worked for the company since 2007.

Department of Labor fact sheet on intern programs

According to the U.S. Department of Labor's Fact Sheet #71 on internship programs, interns at private companies are generally considered employees, covered by the FLSA and due minimum and overtime wages.

The Labor Department has set out six criteria to determine if an intern is a trainee rather than an employee and therefore not covered by the FLSA. If the working circumstances meet all six factors, an "employment relationship" does not exist between the employer and the intern, the fact sheet says.

The six criteria used to determine the trainee vs. employee status of an intern:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment.
2. The internship experience is for the benefit of the intern.
3. The intern does not displace regular employees but works under close supervision of existing staff.
4. The employer that provides the training derives no immediate advantage from the activities of the intern and on occasion its operations may actually be impeded.
5. The intern is not necessarily entitled to a job at the conclusion of the internship.
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

of state labor law, while Leib's claims are a collective action seeking redress for alleged violations of the federal FLSA.

MORE INTERN CLASS ACTIONS

The suit against Conde Nast is one of three similar wage-and-hour class actions filed in June by interns working at media companies.

Three former interns at Gawker Media allege in a federal court suit that the digital publisher and founder Nick Denton did not pay them "a single cent" to write, research

and edit posts to the company's blogs. The suit includes claims that Gawker violated the Fair Labor Standards Act and New York labor law. *Mark et al. v. Gawker Media LLC et al.*, No. 1:13-cv-4347, 2013 WL 3131818, *complaint filed* (S.D.N.Y. June 21, 2013).

In the first intern suit against the music industry, a former intern at Warner Music Group seeks unpaid wages on behalf of more than 100 people whose primary job consisted of administrative tasks such as answering phones and filing papers. The state court

suit alleges the music company failed to pay minimum and overtime wages in violation of New York labor law and does not include claims under the FLSA. *Henry v. Warner Music Group et al.*, No. 0155527/2013, 2013 WL 2958187, *complaint filed* (N.Y. Sup. Ct., N.Y. County June 17, 2013). **WJ**

Attorneys:

Plaintiffs: Adam T. Klein, Rachel Bien and Juno Turner, Outten & Golden, New York

Related Court Document:

Complaint: 2013 WL 2636203

WAGE AND HOUR (INTERNS)

Gordon Ramsay's L.A. restaurant stiffes staff, workers say

Famed TV chef Gordon Ramsay violates California's labor law by failing to pay servers and other staff at his Fat Cow restaurant minimum wage and overtime, a class action filed in state court in Los Angeles claims.

***Becerra et al. v. Fat Cow LLC et al.*, No. BC511953, complaint filed (Cal. Super. Ct., L.A. County June 13, 2013).**

Four women who worked at the restaurant until earlier this year further allege that Ramsay's company forced staff to work through meal and rest breaks without compensation.

Ramsay is famous for his TV cooking contest and restaurant makeover shows such as MasterChef, Hell's Kitchen and Kitchen Nightmares. He also owns restaurants worldwide.

The complaint filed in the Los Angeles County Superior Court names restaurant management companies The Fat Cow LLC, FCLA LP and Gordon Ramsay Los Angeles LP as defendants and alleges the companies' policies constitute unfair business practices.

The restaurant also fails to pay wages within 72 hours of terminating an employee and does not provide itemized wage statements as required by state labor law, the suit says.

According to the suit, California's Labor Code requires employers to provide one half-hour meal break for every five hours worked and a 10-minute rest break for every four hours worked.

If the employer does not allow workers to take these breaks, employees are due one hour of pay for each missed break, the complaint says.

The plaintiffs (two hostesses, a server and a barista) filed suit under the state's Private Attorney General Act of 2004, Cal. Lab. Code § 2698. PAGA allows an employee to sue an employer for civil penalties on behalf of fellow employees.

The suit seeks unpaid wages, economic damages and injunctive relief on behalf of all current and former hourly, nonexempt employees who have worked at The Fat Cow since it opened in August 2012. **WJ**

Attorney:

Plaintiffs: Lauren Mayo-Abrams, Beverly Hills, Calif.

Related Court Document:

Complaint: 2013 WL 3091587



REUTERS/Fred Prouser

Four former employees say a company owned by celebrity chef Gordon Ramsay, shown here, forced staff to work through meal and rest breaks without compensation.

After setbacks for plaintiffs, RBS Citizens overtime cases to settle

(Reuters) – A multi-court assault over pay practices at RBS Citizens Financial is going out with more of a whimper than a bang.

Cuevas et al. v. Citizens Financial Group Inc. et al., No. 10-cv-5582, settlement agreement reached (E.D.N.Y. June 10, 2013).

Six cases in various courts alleging that the bank failed to pay assistant branch managers overtime are on the brink of a global settlement, court records show, after a series of setbacks for the plaintiffs.

The cases, brought by plaintiffs' lawyers Brendan Donelon and Peter Winebrake, allege that the bank misclassified its assistant branch managers as exempt from federal and state wage-and-hour laws and that they were therefore denied overtime and are owed back pay.

The cases were filed in federal courts in Pennsylvania, Massachusetts, Illinois and New York under the Fair Labor Standards Act. While the cases varied slightly – some contain different class members, some invoke relevant state laws, and some name different units of the bank – the allegations were essentially the same throughout.

According to a June 10 entry on the docket in the U.S. District Court for the Eastern District of New York, the parties have reached a "global settlement agreement" that will require all of the cases to be transferred to U.S. District Judge Frederic Block in Brooklyn for his ultimate approval.

"The cases will begin to be transferred once all the terms of the settlement have been worked out," the docket entry said.

The specifics of the settlement have not been filed. The details will eventually be made public because the cases are class actions and are subject to public fairness hearings.

"The parties have reached a resolution that is to everyone's satisfaction," Donelon told Reuters.

Mark Batten, a partner at Proskauer Rose who represents the bank, declined to comment.

SETBACKS

At first, the plaintiffs seemed to gain traction in their multipronged assault on RBS Citizens and subsidiaries, achieving class certification in federal courts in Brooklyn, Pittsburgh, Chicago and Boston.

On May 29 the 2nd U.S. Circuit Court of Appeals delivered the plaintiffs yet another blow, vacating Judge Block's decision granting class certification in the case in Brooklyn. That opinion came just two weeks after oral argument. *Cuevas et al. v. Citizens Fin. Group et al.*, No. 12-2832, 2013 WL 2321426 (2d Cir. May 29, 2013).

Ruling that Judge Block failed to resolve all the competing facts when he said the plaintiffs met the standards for class certification, the appeals court sent the case back to Judge Block for further consideration.

The cases allege the bank misclassified its assistant branch managers as exempt from federal and state wage-and-hour laws and that they are owed back pay.

But then they suffered a series of setbacks. In April, immediately following the U.S. Supreme Court's ruling in *Comcast v. Behrend*, 133 S.Ct. 1426 (2013), which limited the ability of plaintiffs to sue as a class, the Supreme Court vacated a 7th U.S. Circuit Court of Appeals ruling allowing two of the cases against RBS to proceed as a class.

Later that month, the plaintiffs lost a big trial against the bank in federal court in Pittsburgh, when a jury found that the bank hadn't misclassified a group of about 470 assistant branch managers as exempt from the Fair Labor Standards Act. Before the trial, Donelon had told Reuters that he saw the case as a "bellwether."

Shortly thereafter, the parties indicated that a settlement was brewing. On May 31 the plaintiffs and defense filed a joint request to stay proceedings in the 7th Circuit case. A mediation had taken place May 28 and a "preliminary agreement" had been reached, the filing said. **WJ**

(Reporting by Carlyn Kolker)

Attorneys:

Plaintiffs: Peter Winebrake, Winebrake & Santillo, Dresher, Pa.; Brendan Donelon and Daniel Craig, Donelon PC, Kansas City, Mo.

Defendant: Mark Batten, Elise Bloom, Nigel Telman, Brian Gershengorn and Jacqueline Dorn, Proskauer Rose, New York

Supreme Court defers in class arbitration

(Reuters) – After several years of U.S. Supreme Court decisions favorable to defendants, plaintiffs’ lawyers got a glimmer of good news from a decision June 10 in a ruling about class actions in an arbitration context.

***Oxford Health Plans LLC v. Sutter*, No. 12-135, 2013 WL 2459522 (U.S. June 10, 2013).**

In *Oxford Health Plans v. Sutter*, the Supreme Court affirmed an arbitrator’s ruling that allowed class arbitration of doctors’ disputes with an insurer. The case concerned John Sutter, a pediatrician in New Jersey who had claimed that Oxford underpaid him and other doctors.

While the case concerned an insurance dispute, the topic has particular resonance for employment lawyers because many employment agreements specify that disputes must be arbitrated. In a unanimous decision written by Justice Elena Kagan, the court ruled that it would defer to an arbitrator’s decision that allowed classwide arbitration of the dispute, because Oxford itself had agreed to allow the arbitrator to determine whether the contract permitted class arbitration.

“The sole question for us is whether the arbitrator (even arguably) interpreted the parties’ contract, not whether he got its meaning right or wrong,” Justice Kagan wrote.

Defendants had hoped for a broad ruling eviscerating the class-action mechanism in an arbitration context. The justices, during oral argument, seemed sympathetic to Oxford, and thus the decision for the plaintiffs was a surprise.

The Chamber of Commerce, the Equal Employment Advisory Council and the Voice of the Defense Bar all filed *amicus* briefs citing concerns that class arbitrations could wipe out the very benefits of arbitration.

“The financial and other benefits that the parties derive from employment arbitration are likely to disappear altogether if they are forced to submit to complex, class-based arbitration even where the underlying agreement does not provide for class arbitration procedures,” the Equal Employment Advisory Council, a group of about 300 large employers, wrote in its brief.



U.S. Supreme Court building

REUTERS/Molly Riley

NO CLASS ARBITRATION

“(Defendants) were hoping the court would decide the arbitrability of class claims,” said Marcia McCormick, a professor at St. Louis University School of Law.

But the decision, said McCormick, is a “very very narrow ruling” that focused specifically on the contract at issue.

She noted that class arbitrations are not common in a consumer or employment context, as they are difficult to mount.

While acknowledging that the ruling was narrow, Max Folkenflik, a plaintiffs’ lawyer, said, “It has a number of aspects which would likely give defendants great pause.”

He said, “For most defendants, they really dislike the class arbitration in the extreme.”

The *Sutter* decision could spur more employees to accept arbitration in the possibility that they could press a group action, he said.

“This case may suggest, if you get referred to arbitration, the next step may be to allow yourself to arbitrate, and get class procedures or their equivalents,” he said.

Attorneys who represent employers still say they have a powerful weapon to ensure that they avoid class arbitration: fixing any employment agreements to clarify that they do not allow class arbitrations.

“I think that the issue addressed in this decision is one that has a limited shelf life because what we now know is that there are ways to draft arbitration clauses to avoid this issue,” said Robert Whitman, an attorney with Seyfarth Shaw, which represents employers.

“If I had an arbitration clause that was silent on class arbitration, I would remove the silence and replace it with an explicit waiver on class arbitrations,” he said. **WJ**

(Reporting by Carlyn Kolker)

Attorneys:

Defendant: Seth Waxman, Wilmer Cutler Pickering Hale & Dorr, Washington

Plaintiff: Eric Katz, Mazie Slater Katz & Freeman, Roseland, N.J.

Related Court Document:

Opinion: 2013 WL 2459522

See Document Section B (P. 40) for the opinion.

Supreme Court's Amex ruling springs up in employment appeals

(Reuters) – Experts predicted that the U.S. Supreme Court's decision on arbitration at American Express would soon affect employment cases, and they were right.

D.R. Horton Inc. v. National Labor Relations Board, No. 12-60031, letter filed (5th Cir. June 24, 2013); Raniere v. Citigroup Inc., No. 11-5213, invitation to file supplemental briefs issued (2d Cir. June 21, 2013).

Within days of the June 20 decision, it was cited in two closely watched employment matters, one involving Citigroup Inc. and the other involving D.R. Horton Inc.

The *American Express v. Italian Colors Restaurant et al.*, No. 12-133, 2013 WL 3064410 (2013), decision said merchants could not claim that high costs prevented them from using arbitration to resolve a dispute with the credit card company.

Four days later, lawyers representing D.R. Horton cited it at the 5th U.S. Circuit Court of Appeals, which is hearing the homebuilder's challenge to a decision by the National Labor Relations Board.

The board said D.R. Horton's employment contract violated federal labor law because it required employees not only to arbitrate disputes but to do so individually.

The Supreme Court's *American Express* decision "emphatically rejects" the NLRB's arguments and "effectively disposes" of the case, D.R. Horton's lawyers said in a letter to the 5th Circuit on June 24.

In a response, NLRB Deputy Associate General Counsel Linda Dreeben said the Amex decision

does not apply to employment matters.

D.R. Horton's arbitration clause is invalid because it restricts employees' rights under the National Labor Relations Act to pursue work-related claims as a group, Dreeben wrote. "Like all other Supreme Court decisions addressing the contours of the (Federal Arbitration Act), *American Express* does not address that core NLRA right," she wrote.

Ron Chapman, the Dallas-based Ogletree Deakins attorney representing D.R. Horton, said the Supreme Court's rationale in *Amex* applies with "equal force" to employment cases.

"There was nothing to suggest it would be in any way different," Chapman said.

The board's reasoning is in line with its response to an earlier Supreme Court ruling, *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), which blessed class-action waivers in consumer arbitration agreements. In a series of cases, the NLRB has said the National Labor Relations Act prevents the application of *AT&T Mobility* to employment agreements.

In the Citigroup case, it took just one day for the 2nd U.S. Circuit Court of Appeals to invite the parties to submit supplemental briefs on the impact on the case of the *American Express* decision.

In that case, workers said they were owed unpaid overtime. A trial court denied a motion by Citigroup's CitiMortgage unit to compel

arbitration, saying the arbitration agreement was invalid because it prohibited collective action.

David Gottlieb, an attorney for the workers, said the case is entirely different from the Supreme Court's *AT&T Mobility* or *Amex* cases, which are consumer and antitrust cases, because the underlying statute is the Fair Labor Standards Act.

"In the FLSA, you have the concept of a collective action built directly into the context of the law, which you don't have for any of the other laws for which class-action waivers have been discussed," said Gottlieb, an attorney at Thompson Wigdor.

Supplemental briefings are due to the 2nd Circuit in mid-July. **WJ**

(Reporting by Amanda Becker)

Attorneys:

Plaintiff (D.R. Horton): Ronald Chapman, Bernard Jeweler, Christopher Murray, Michael Hsetterly and Mark Stublely, Ogletree Deakins, Dallas

Defendant (NLRB): Linda Dreeben, Ruth Burdick and Kira Dellinger Vol, NLRB, Washington; Beth Brinkmann, Justice Department, Washington

Plaintiff (Raniere): Kenneth Thompson, Douglas Wigdor and David Gottlieb, Thompson Wigdor, New York

Defendant (Citigroup): Samuel Shaulson and William Chang, Morgan, Lewis & Bockius, New York

Black pilot's discrimination claims not barred by federal law, CBA

A former Compass Airlines pilot can proceed with his state law discrimination suit against the carrier because federal law does not preempt his claims and his union's collective bargaining agreement does not require arbitration of them, a Minnesota federal judge has held.

Bradley v. Compass Airlines LLC et al., No. 12-cv-02471, 2013 WL 2443848 (D. Minn. June 5, 2013).

In declining June 5 to dismiss Elsee Bradley III's suit, U.S. District Judge Susan R. Nelson of the District of Minnesota also found that Bradley did not waive his day in court when he commenced arbitration proceedings.

The collective bargaining agreement's arbitration provisions do not cover Bradley's race discrimination and retaliation claims under the Minnesota Human Rights Act, Minn. Stat. §§ 363A.08, 363A.15, and the agreement does not "clearly and unmistakably" provide that claimants forfeit their legal rights by invoking arbitration, Judge Nelson said.

Bradley, who is black, was an Air Line Pilots Association member who spent three years captaining a 76-seat Embraer 175 passenger jet for Compass.

According to the suit, a supervisor evaluating Bradley as he trained on a flight simulator in late 2010 became "agitated and hostile," repeatedly making profane, racially disparaging remarks about "you f---ing people."

Bradley says he tried to defuse the situation by speaking directly with the evaluator, but the man responded by giving him a grade of "not satisfactory" for the flight simulation. Bradley then complained to the evaluator's supervisor, who allegedly threw him out of his office.

After Bradley's own direct supervisor failed to address his concerns, Bradley filed a formal complaint with human resources.

Over the next few months, Bradley says, Compass responded to his complaint by retaliating against him — demoting him, reducing his hours and subjecting him to strenuous testing no white employees had to take.

A supervisor evaluating the plaintiff as he trained on a flight simulator in late 2010 allegedly made profane, racially disparaging remarks about "you f---ing people."

When the airline finally fired Bradley in February 2011, he filed a discrimination grievance under the ALPA's collective bargaining agreement. While arbitration proceedings were pending, Bradley filed a lawsuit in Minnesota's Dakota County District Court, saying Compass has a "poor record" with respect to minority hiring and alleging violations of the state's Human Rights Act.

The airline removed Bradley's suit to federal court and moved to dismiss the case for lack of subject matter jurisdiction, arguing that the federal Railway Labor Act, 45 U.S.C. § 151, preempts his state law claims and



that Bradley waived his right to a judicial forum when he commenced arbitration proceedings.

The RLA requires airlines and the unions representing their workers to establish arbitration procedures for resolving disputes over pay rates, labor rules and working conditions.

But Judge Nelson disagreed with Compass, finding that the collective bargaining agreement between the airline and the ALPA does not require aggrieved pilots to arbitrate statutory race discrimination claims.

Moreover, the RLA does not preempt Bradley's state law claims, according to the opinion.

The federal law's requirement that airline employees resolve all "minor" labor disputes through collective bargaining mechanisms does not deprive those employees of substantive legal rights the states give them by statute, the judge said. **WJ**

Attorneys:

Plaintiff: Ian S. Laurie, Gerald T. Laurie and Leanne R. Fuith, Laurie & Laurie, St. Louis Park, Minn.

Defendant: Hal A. Shillingstad and Jaime N. Cole, Ogletree Deakins Nash Smoak & Stewart, Minneapolis; David J.A. Hayes III, Compass Airlines, St. Louis

Related Court Document:

Opinion: 2013 WL 2443848

Tech workers renew motion for class status in suit over Apple, Google recruiting practices

Former software engineers who accuse seven Silicon Valley tech firms of conspiring to restrain the labor market have amended their class-certification motion to address a federal judge's concerns that their proposed class was too broad.

In re High-Tech Employee Antitrust Litigation, No. 5:11-CV-02509, plaintiffs' supplemental motion filed (N.D. Cal., San Jose Div. May 10, 2013).

The plaintiffs' May 10 supplemental motion responds to an order by U.S. District Judge Lucy H. Koh of the Northern District of California, who held April 5 that the alleged pact by Apple, Adobe Systems, Google, Intel, Intuit Inc., Lucasfilm and Pixar affected workers in too many different ways to support class certification.

In rejecting the proposed plaintiff class of more than 100,000 technical and creative employees — including software engineers, applications developers, digital artists, product developers and others — Judge Koh noted the labor market for each position differed, meaning the alleged conspiracy may have harmed some employees and not others.

But she left the door open for the plaintiffs to file an amended motion to address those issues.

In their supplemental motion, the plaintiffs say further discovery confirms the alleged pact "affected all of defendants' employees."

According to the 2011 complaint, the companies conspired to "fix and suppress" employee compensation and to "restrict employee mobility" between 2005 and 2010.

University, who reviewed the proposed class and determined the purported conspiracy would have affected "all or nearly all" of its members.

The complaint alleges the companies violated the Sherman Act, 15 U.S.C. § 1, and California's related Cartwright Act, Cal. Bus. &

The defendants allegedly conspired to "fix and suppress" employee compensation and to "restrict employee mobility."

The companies entered bilateral "do not cold call" agreements, promising not to poach each other's specialized, salaried employees, the suit says.

These alleged agreements skewed the economics of the labor market and drove down salaries and other labor costs.

The plaintiffs' supplemental motion expands on the effects of the alleged conspiracy by incorporating the conclusions of Kevin F. Hallock, former chair of economics at Cornell

Prof. Code § 16720. It also includes a claim under the state's unfair-competition law, Cal. Bus. & Prof. Code § 17200. [WJ](#)

Related Court Documents:

Order: 2013 WL 1352016
Supplemental motion and brief in support of class certification: 2013 WL 2155822



REUTERS/Robert Galbraith



REUTERS/Mike Blake

The suit alleges that several tech companies, including Apple and Google, entered into "do not cold call" agreements, promising not to poach each other's specialized, salaried employees.

California plaintiffs reach wage settlement with AT&T Mobility

(Reuters) – Some 135 individual wage cases that sprang from a failed collective action against AT&T Mobility have reached a settlement in principle, according to a recent court filing.

Cruz v. AT&T Mobility Services, No. 11-cv-4508, joint motion for settlement filed (N.D. Cal. June 20, 2013).

Both plaintiffs’ and defense lawyers have asked to keep the terms confidential, presenting what experts see as a dilemma for the judge overseeing the case.

The cases have their origins in *Zivali et al. v. AT&T Mobility* a collective action filed in 2008 in federal court in New York. The lawsuit claimed that AT&T Mobility violated the federal Fair Labor Standards Act Fair Labor Standards Act, 29 U.S.C. § 201, by failing to pay workers overtime for work they did after hours such as answering emails and phone calls.

U.S. District Judge Jed Rakoff decertified the case in May 2011 on the grounds that the 4,100 workers participating in the case had a variety of claims, resulting in individual litigation. , *Zivali et al. v. AT&T Mobility*, No. 08-10310, 784 F. Supp. 2d 456 (S.D.N.Y. May 12, 2011).

According to a June 14 motion in the Northern District of California, mediation in March has resolved 135 cases involving California plaintiffs, and the parties are seeking approval from U.S. District Judge Thelton Henderson.

The parties have asked Judge Henderson to allow the settlements to be filed under seal, saying that publicity could derail any settlements with remaining plaintiffs in the litigation.

“The principal reason for the confidentiality obligations associated with the parties’ settlement is to prevent any one case – which presents inherently individualized claims – from creating unrealistic or false expectations on the part of the hundreds of other former *Zivali* plaintiffs whose cases are pending around the country,” the parties wrote in a joint motion June 14.

While class actions must be open to the public because notice of the settlement goes out to class members, individual cases in almost all other areas of the law do not require judicial approval or public notice.

But cases brought under the Fair Labor Standards Act present unique issues to judges. After the FLSA was enacted, judges held that release of FLSA claims, as happens



REUTERS/Rick Wilking

in a settlement, must be approved by a judge or the Department of Labor.

The origins of that doctrine can be traced to the notion that there needed to be safeguards any time a plaintiff released his or her employer from claims for payment involving the minimum wage, said Robert Whitman, an attorney at Seyfarth Shaw who is not involved in the case.

Judges have also concluded that if they are going to approve a settlement, it must be done in open court, he said.

“Many judges say, ‘you are asking me to engage in a judicial act, and any judicial act is presumptively a public act, just like a courtroom is presumptively open,’” said Whitman.

KEEPING SETTLEMENTS PRIVATE

Defendants often want to keep settlement details private, lest they reveal how much

money they are paying out, and they sometimes ask judges to keep the settlement details under wraps, he said.

Wendy Sugg of Crowell & Moring, who represents AT&T Mobility in the case, said the only reason for confidentiality was to avoid affecting the outstanding cases.

“We are not just asking for it to be sealed to keep it out of the public domain, we are asking for it so as not to influence other cases,” Sugg said.

Plaintiffs’ lawyers, too, bristle at the notion that their clients must disclose their payouts.

“If a lower-wage worker wants to agree to settle the case and file confidentially, they shouldn’t be treated any different than an executive who settles a discrimination claim,” said Justin Swartz, an attorney at Outten & Golden who represents plaintiffs and isn’t involved in the AT&T case. “Judges routinely allow those to be confidential.”

Joel Bryant of Green Bryant & French, who represents the California plaintiffs in the AT&T Mobility case, did not return a call seeking comment.

In recent years some judges have rejected parties’ requests to keep settlement terms confidential, including district court judges in New Jersey, Florida and New York.

Writing in a case involving restaurant workers, U.S. District Judge Richard Holwell of New York expressed this view, saying in a 2011 opinion, “this court joins the overwhelming consensus of district courts that have considered the issue to hold that an FLSA settlement cannot be sealed absent some showing that overcomes the presumption of public access.”

A hearing with Judge Henderson on the proposed settlement was scheduled for July 1.

WJ

(Reporting by Carlyn Kolker)

Attorneys:

Plaintiffs: Joel Bryant, Green Bryant & French, San Diego

Defendant: Wendy Sugg and Shahab Sagheb, Crowell & Moring, Los Angeles

Mortgage lender says former employee stole clients

A New York-based mortgage lender alleges in a lawsuit that a former employee breached a noncompetition agreement by setting up a rival loan origination firm and diverting away business from his former employer.

Greystone Funding Corp. v. Kutner et al., No. 651926/2013, complaint filed (N.Y. Sup. Ct., N.Y. County May 30, 2013).

Manhattan-based Greystone Funding Corp., which specializes in multifamily property loans, says Ephraim Kutner is barred by contract from competing against it in the lending business until April 15, 2015.

Greystone says Kutner, with the help of his brother Jonathan has stolen clients, employees and trade secrets for the benefit of Harborview Capital Partners LLC — the mortgage banking firm he started.

Jonathan and Harborview are co-defendants in the suit.

The plaintiff lender is asking the New York County Supreme Court to order the defendants to stop all conduct that is in violation of their duties to Greystone and to pay unspecified damages.

In the, complaint, Greystone says it employed Ephraim as a loan originator at its office in Lawrence, N.Y., where he supervised a group of employees, including Jonathan.

Ephraim signed an agreement stating he would not compete with the company in the lending business while working there or for two years after his employment ended, the suit says.

The plaintiff says that in the agreement, Ephraim also promised to maintain the confidentiality of Greystone's trade secrets and proprietary business information.

Greystone says both brothers left their positions April 15.

Under his contract, Ephraim cannot engage in a competing business until 2015, when his two-year post-employment period ends, Greystone says.

asking some of the company's employees to work with him at his own lending firm. The plaintiff says three of its employees resigned their positions April 17 and began working for Harborview.

The suit alleges that since leaving his employment, Ephraim has breached the contract by engaging in direct competition with Greystone by pursuing lending business for Harborview. He also has contacted Greystone's clients to cancel business meetings without its knowledge, the complaint says.

Ephraim also wrapped up lending deals he previously had pursued for Greystone, the plaintiff claims.

Greystone Funding Corp. says former employee Ephraim Kutner stole its clients, employees and trade secrets.

Despite this agreement, Ephraim and Jonathan set up Harborview, which has an office in Lawrence, at some point in April, the complaint says. The suit also claims that before leaving Greystone, Ephraim began

The suit also claims that Jonathan and Harborview tortiously interfered with the contract between Greystone and Ephraim because Jonathan knew of the non-competition contract but helped Ephraim breach the agreement for the financial benefit of himself and Harborview, the suit says.

In addition to an order preventing the defendants from competing in the lending business, the plaintiff has asked the court to impose a constructive trust on any profits the defendants received from the deals they diverted away from Greystone. [WJ](#)

Attorney:
Plaintiff: Jonathan L. Israel, Foley & Lardner, New York

Related Court Document:
Complaint: 2013 WL 2356262

See Document Section B (P. 40) for the complaint.





WESTLAW JOURNAL
**INSURANCE
COVERAGE**

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NEWS IN BRIEF

CARNIVAL COMPANY UNDERPAYS WORKERS, CLASS ACTION SAYS

E.J. Amusements, parent company of Fiesta Shows, which runs dozens of carnivals in the New England states each year, fails to pay its workers minimum wages and overtime, a Boston state court suit says. The suit, filed on behalf of hundreds of carnival workers, says most of the staff comes from Mexico on temporary, seasonal labor visas. According to the complaint, the New Hampshire company pays workers a flat \$400 per week and they generally work 14-hour days, which works out to about \$4 an hour. The minimum wage in Massachusetts is \$8 an hour. Workers sometimes work as much as 22 hours straight and are not compensated with time-and-a-half overtime pay, the suit says.

Garcia v. E.J. Amusements of N.H. Inc. et al., No. 13-02204 E, complaint filed (Mass. Super. Ct., Suffolk County June 17, 2013).

Related Court Document:
Complaint: 2013 WL 3131765

PA. MCDONALD'S WORKER BALKS AT DEBIT CARD PAY

A McDonald's restaurant cheats workers out of their full wages by paying staff with a payroll card rather than a paper paycheck or direct deposit, a Luzerne County, Pa., class action says. According to the suit, Natalie Gunshannon sued the owners of a Clarks Summit, Pa., restaurant that paid her with a payroll card, like a debit card, with an account where her pay would be deposited. Gunshannon says that as a result of card fees, including for ATM withdrawals and cash advances, she would lose some of the \$7.44 an hour she was being paid. Pennsylvania state law says workers will be paid in either cash or check, according to the complaint. The suit seeks unspecified monetary damages on behalf of an estimated 750 current and former hourly employees of McDonald's restaurants in Pennsylvania who are paid by debit card.

Gunshannon v. Mueller et al., No. 7010-2013, complaint filed (Pa. Ct. Com. Pl., Luzerne County June 13, 2013).

Related Court Document:
Complaint: 2013 WL 3294355

DOL SUES OVER COMPANIES' \$4.9 MILLION PENSION LOSES

The U.S. Department of Labor filed two suits in Kentucky federal court seeking to restore \$4.9 million the agency says was illegally used by two industrial companies' pension plan trustees. According to the complaints, trustees for Fairfield Casting, a foundry in Iowa and for Fourslides Inc., a metal parts manufacturer in Michigan, violated the Employee Retirement Income Security Act by improperly using plan funds. The violations include using funds to purchase company property, improperly transferring assets and paying excessive fees, the DOL said in a June 11 statement announcing the suits. In addition to restoration of plan funds, the DOL also seeks to prevent the offending trustees from serving as plan administrators in the future.

Harris v. Hofmeister et al., No. 13-cv-156, complaint filed (E.D. Ky. May 30, 2013).

Harris v. LaCourciere et al., No. 13-cv-158, complaint filed (E.D. Ky. May 30, 2013).

Related Court Documents:
Hofmeister complaint: 2013 WL 3297465
LaCourciere complaint: 2013 WL 3297464

COMPANIES SETTLE PREGNANCY DISCRIMINATION CLAIMS

The Equal Employment Opportunity Commission announced June 10 that CSI Corp. will pay \$12,000 to settle pregnancy discrimination charges, bringing the total of restitution paid for the claims to \$42,000. Last year Trinity Protection Services agreed to pay \$30,000 for the same claims. The EEOC had originally sued DTM Corp. over claims its policy of suspending pregnant employees without pay and forcing them to submit "fitness for duty" medical releases and undergo medical examinations violated Title VII of the Civil Rights Act, the Pregnancy Discrimination Act and the American with Disabilities Act. When DTM filed for bankruptcy, CSI and Trinity became liable for the claims as successor companies that had purchased DTM assets, according to an EEOC statement announcing the settlement. Trinity and CSI had never actually employed the claimant.

Equal Employment Opportunity Commission v. DTM Corp. et al., No. 11-cv-2433, consent decree entered (D. Md. June 7, 2013).

SCHOOL EMPLOYEE'S COMMENTS ABOUT SAFETY ISSUE CONSTITUTE PROTECTED SPEECH

Ruling: The U.S. District Court for the Eastern District of Pennsylvania allowed a former vocational school employee to proceed on her First Amendment and due process claims against her former employer.

What it means: The employee's speech advocating on behalf of students, staff and members of the public who may have been exposed to asbestos in a public school, fell outside her duties as a technology assistant and addressed a matter of public concern.

Wood v. Bethlehem Area Vocational Technical School et al., No. 12-4624, 2013 WL 2983672 (E.D. Pa. June 17, 2013).

APPEALS COURT NIXES ARBITRATION AWARD DIRECTING ERRANT PROFESSOR'S REINSTATEMENT

Ruling: The Commonwealth Court of Pennsylvania reversed a grievance arbitration award. The arbitrator directed the reinstatement of a university department head who was terminated for making inappropriate sexual remarks to and about female students on an overseas school trip. The appeals court found that the professor's receipt of a verbal complaint about the comments, which he self-reported to the university, satisfied contractual notice requirements.

What it means: Pennsylvania courts use an essence test in reviewing grievance arbitration awards. Under this test an arbitration award will be upheld if the issue is properly defined within the terms of the collective bargaining agreement and the arbitrator's interpretation is rationally derived from the collective bargaining agreement. Here, the award was not rationally derived from the collective bargaining agreement because the CBA did not require a complaint as a mandatory prerequisite for disciplinary action by the university.

Slippery Rock University of Pennsylvania et al. v. Association of Pennsylvania State College et al., No. 855 C.D. 2012, 45 PPER 3, 2013 WL 3054085 (Pa. Commw. Ct. June 17, 2013).

ARBITRATOR PROPERLY DIRECTS COUNTY COLLEGE TO REVOKE REPRIMAND FOR PROFESSOR

Ruling: In an unpublished decision, the Superior Court of New Jersey, Appellate Division, affirmed a state trial court's refusal to overturn an arbitration award. In that award, a grievance arbitrator decided that the employer county college lacked just cause to issue a letter of reprimand to a professor who allegedly failed to follow proper procedures for ordering a book for one of his classes. The appeals court found that the union's grievance disputing the letter of reprimand was both grievable and arbitrable under the terms of the parties' negotiations agreement. It further found no grounds for overturning the award. In conclusion, the appeals court concluded that certain New Jersey statutory provisions did not provide the employer's board of trustees with sole jurisdiction over personnel matters.

What it means: The appeals court noted that the Higher Education Restructuring Act of 1994, N.J. Stat. Ann. § 18A:3B-1, afforded its board of trustees with "exclusive jurisdiction" to decide disputes concerning personnel matters. It explained that the act was intended to free public colleges from government control over their operational decisions. However, no part of the act's legislative history suggested that it was intended to preclude public colleges from complying with other preexisting state laws concerning labor relations, the court reasoned.

Ocean County College Board of Trustees v. Faculty Association of Ocean County College, No. A-5096-11T4, 40 NJPER 1, 2013 WL 3167905 (N.J. Super. Ct. App. Div. May 24, 2013).

TRANSIT AUTHORITY'S THREATS, ISSUANCE OF DISCIPLINE AND OTHER CONDUCT VIOLATE PLRA

Ruling: The Illinois Labor Relations Board, Local Panel ruled that the employer transit authority violated the state's Public Labor Relations Act, 5 Ill. Comp. Stat. 315, provisions by threatening to move the union's bulletin board on its premises, by eliminating the union's designated parking space, and by placing a warning sticker on the vehicle of the union official. It also ruled that the employer

violated PLRA provisions by disciplining a union board member and by locking the union out of its designated office space.

What it means: The LRB noted that a union will be deemed to have waived its right to bargain over mandatory subjects only when it delays making known its desire to negotiate for such a period of time as to reasonably suggest it has acquiesced in the matter. A union's clear objection to employer action is also sufficient to demonstrate the union's desire to bargain an employer's change.

Amalgamated Transit Union, Local 241 and Chicago Transit Authority, No. L-CA-11-052, L-CA-11-056, 30 PERI 9, 2013 WL 3168055 (Ill. Lab. Relations Bd. Local Panel May 24, 2013).

COUNTY MUST DISCLOSE ADDRESSES, PHONE NUMBERS OF NON-UNION BARGAINING UNIT MEMBERS

Ruling: The California Supreme Court ruled that a county employer violated its duty to meet and confer in good faith with the union when it refused to fulfill the union's request for the names and home addresses of non-union bargaining unit members. The county failed to fulfill its burden of proving that the contact information was not relevant or providing adequate reasons why the information could not be supplied, the court decided. The union's legitimate and important interest in obtaining residential contact information for all employees generally outweighed employees' privacy interests, the court concluded.

What it means: The state Supreme Court noted that Public Employment Relations Board decisions have uniformly given unions the right to obtain employee home contact information. Federal administrative decisions, interpreting analogous provisions of the National Labor Relations Act, 29 U.S.C. § 151, also serve as persuasive authority supporting disclosure of the information sought here.

County of Los Angeles v. Los Angeles County Employee Relations Commission et al., No. S191944, 2013 WL 3207733, 38 PERC 1 (Cal. May 30, 2013).

UNION SHOULD'VE EXHAUSTED ADMINISTRATIVE REMEDIES BEFORE CHALLENGING DISTRICT'S PARTNERSHIP AGREEMENT

Ruling: In a nonpublished/noncitable decision, the California Court of Appeal, 4th District, reversed the trial court's denial of a union's petition seeking a writ of a writ. Through that writ, the union sought to compel the rescission of a school district's partnership agreement with a private entity and elimination of afterschool tutoring positions. The appeals court remanded the case, with directions for a stay of the proceedings until the union exhausted its administrative remedies. Because the present controversy clearly implicated an arguable Education Employment Relations Act, Cal. Gov't Code § 3540, violation, the union was required to exhaust administrative remedies before the Public Employment Relations Board, the court concluded.

What it means: The appeals court noted that EERA provisions endow PERB with exclusive jurisdiction to make the initial determination as to whether unfair practice charges are justified and, if so, what remedy is necessary to effectuate the statute's purposes. PERB's exclusive jurisdiction extends to all alleged violations of the EERA, not just those constituting unfair practices.

California School Employees Association v. Santa Ana Unified School District et al., No. G047078, 38 PERC 3, 2013 WL 3207730 (Cal. Ct. App., 4th Dist. May 29, 2013).

SUBCONTRACTING OF INFORMATION TECHNOLOGY WORK VIOLATES MMBA PROVISIONS

Ruling: The California Public Employment Relation Board's administrative law judge issued a proposed decision regarding an unfair practice charge. The ALJ decided that a county employer failed to negotiate in good faith with the union by contracting out information technology work to a third party. The employer's actions violated the Meyers-Miliias-Brown Act Section 3503, and interfered with bargaining unit employees' right to be represented by the union, in violation of MMBA Sections 3506 and 3409(b). The ALJ issued a make whole order.

What it means: Under PERB case law, the removal of bargaining unit work — by transfer of the work to non-unit employees of the same employer or by subcontracting work from existing employees of another employer — is negotiable. However, when a subcontracting decision involves "core restructuring" and alters an employer's basic operations that decision falls within the managerial prerogative and outside the scope of bargaining.

International Federation of Professional and Technical Employees, Local 21 et al. v. County of Contra Costa, No. SF-CE-873-M, 38 PERC 5 (Cal. Pub. Employment Relations Bd., ALJ June 4, 2013).

Supreme Court

CONTINUED FROM PAGE 1

The two decisions created the so-called *Faragher-Ellerth* defense, which says an employer is liable for harassment by a supervisor but not a co-worker unless the plaintiff can show the employer was negligent. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998).

Those rulings also said an employer could avoid liability if it showed it took steps to prevent or correct the alleged behavior and that the accuser failed to take advantage of the preventative measures.

The majority said *Faragher* and *Ellerth* distinguish between a supervisor and a co-worker and suggest that a narrow definition of a supervisor is warranted.

In dissent, Justice Ruth Bader Ginsburg, writing for Justices Stephen Breyer, Sonia Sotomayor and Elena Kagan, said that according to the majority's "truncated conception of supervisory authority, the *Faragher-Ellerth* framework has shifted in a decidedly employer-friendly direction."

Attorneys **Denise M. Visconti** and **Mark T. Phillis** of **Littler Mendelson**, who were not involved in the case, said via email that the ruling "provides much-needed guidance to both employers and employees regarding who qualifies as a supervisor for purposes of Title VII."

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, prohibits an employer from discriminating against someone based on race, sex, religion or national origin.

HOSTILE WORK ENVIRONMENT

The Supreme Court took up the question of what defines a supervisor in the case of Maetta Vance, an employee of Ball State University.

Vance, who is black, sued the Muncie, Ind., school and several employees in 2006, alleging racial discrimination and harassment under Title VII.

Vance, the only black person working in Ball State's catering department at the time, alleged that at least two co-workers used racial epithets toward her, threatened her and engaged in physical altercations with her.

When she complained, the school and her immediate supervisors investigated and gave the individuals oral and written reprimands, but the harassment continued, the suit said.

Ball State moved for summary judgment, contending that it was not liable for the racial harassment by Vance's co-workers.

The U.S. District Court for the Southern District of Indiana granted the motion, and the 7th U.S. Circuit Court of Appeals, citing *Faragher* and *Ellerth*, affirmed the ruling in 2011 because it found Vance had been harassed by co-workers, not supervisors.

A BROAD SUPERVISOR CONCEPT THREATENS EMPLOYERS

Vance argued to the Supreme Court that the appellate panel misread *Faragher* and *Ellerth*, and she asked the justices to settle conflicts among various federal appeals courts over the definition of a supervisor.

Various business advocacy groups filed *amicus* briefs arguing that a generally broad definition of a supervisor posed a threat to businesses because it would subject employers to an unreasonable and unwarranted level of liability.



The ruling “provides much-needed guidance to both employers and employees regarding who qualifies as a supervisor for purposes of Title VII,” attorneys Denise M. Visconti (L) and Mark T. Phillis (R) said.

The Supreme Court noted that the Equal Employment Opportunity Commission, which enforces Title VII, defines a supervisor as one with “‘sufficient’ authority, authority to assign more than a ‘limited number of tasks,’ and authority that is exercised more than ‘occasionally.’”

Writing for the majority, Justice Alito labeled this definition “nebulous” and “a study in ambiguity.”

According to the majority, the courts can concretely determine a person’s supervisory status based on *Faragher* and *Ellerth* instead of having to consider the individual details in each case, as the EEOC would require.

MINORITY: BURDEN SHIFTS TO VICTIMS

Under the court’s ruling, the minority said, victims now must prove employer negligence to succeed on many of their claims.

Under *Faragher* and *Ellerth*, Justice Ginsburg wrote, employers had to put forth an affirmative defense that they took steps to correct the alleged hostile environment. Now, under a stricter definition of a supervisor, a harassed employee will have to prove employer negligence if the harasser is considered a co-worker with no power to take “tangible employment actions.”

According to the minority, by removing the people involved in the day-to-day activities of an employee from the supervisor category, the majority ignores the conditions of the modern workplace, does a disservice to Title VII’s goal of preventing workplace discrimination and goes against EEOC guidance.

“Supervisors, like the workplaces they manage, come in all shapes and sizes,” Justice Ginsburg wrote.

IMPACT

According to Visconti and Phillis, the high court’s ruling does not change the obligations of employers.

Since employers can be held liable for harassment by a co-worker if a plaintiff shows employer negligence, the attorneys said, employers have an “ongoing obligation to provide a workplace that is free from discriminatory and harassing behavior.” **WJ**

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Respondents: Gregory G. Garre, Latham & Watkins, Washington

Related Court Document:

Opinion: 2013 WL 3155228



WESTLAW JOURNAL

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RECENTLY FILED COMPLAINTS FROM WESTLAW COURT WIRE*

Case Name	Court	Docket #	Filing Date	Allegations	Damages Sought
Craciun v. Baycare Health Systems 2013 WL 3212226	Fla. Cir. Ct. (Pinellas)	13006148CI	6/14/13	Plaintiff Craciun, who was fired by Baycare Health Systems, cites retaliatory discharge and violation of the federal Whistleblower's Act.	\$15,000
Finn v. Mohawk Industries Inc. et al. 2013 WL 3063570	Ca. Super. Ct. (Cobb)	13105214	6/17/13	Plaintiff Finn was terminated by Mohawk Industries Inc. after reporting Mohawk's material noncompliance with federal and international tax and securities laws in connection with its \$1.5 billion acquisition of Marazzi Group, an Italian corporation, and for her refusal of defendant Schleper's demand that she commit perjury to assist him in defending himself on various criminal charges.	Actual, compensatory and punitive damages, attorney fees and expenses
Vallier v. Kings County Hospital 2013 WL 3093907	N.Y. Sup. Ct. (Kings)	11184-2013	6/19/13	King County Hospital and its agents wrongfully terminated and harassed plaintiff nurse on account of discrimination as to age, national origin, disability and sex.	\$8 million in compensatory damages, \$4 million in punitive damages, reinstatement, fees and costs
Argabrite v. Dillard's Inc. 2013 WL 3093910	Tex. Dist. Ct. (Dallas)	DC-13-06809	6/19/13	Dillard's Inc. discriminated against plaintiff employee on the basis of her age and disability by demoting her from the supervisory position over the buyers of the shoe department to the dress department after a 22-year successful performance record.	Actual and exemplary damages, back pay, interest, fees, and costs
Cohen v. Compuware Corp. 2013 WL 3063577	S.D.N.Y.	1:13cv04254	6/19/13	Plaintiff, a Jewish man, alleges religious discrimination after he was forced to resign due to his complaining about workplace harassment.	Declaratory judgment, general, compensatory and punitive damages, attorney fees
Brooks et al. v. AT&T Mobility Services LLC 2013 WL 3091649	S.D.N.Y.	1:13cv04303	6/20/13	Class action. Retail account executives of AT&T allege the company fails to pay wages in violation of the Fair Labor Standards Act, New York Labor Law, and New Jersey State wage-and-hour law.	Class certification, liquidated damages, pre and post-judgment interest, order to send notice to all class members, injunction, attorney fees and costs

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RECENTLY FILED COMPLAINTS FROM WESTLAW COURT WIRE*

Dyer v. Wells Fargo Bank N.A. 2013 WL 3094855	N.D. Cal.	3:13cv02858	6/20/13	Class action. Wells Fargo Bank failed to pay commissions and bonuses to branch sales managers and home mortgage consultants transacting residential mortgage loans for it, noncompliance of the incentive compensation plan.	Class certification, compensatory damages, declaratory and injunctive relief, restitution, fees, and costs
White v. Allina Health System 2013 WL 3132273	Minn. Dist. Ct. (Ramsey)	62-cv-13-4745	6/20/13	Allina Health System terminated the employment of plaintiff employee in retaliation for reporting that defendant's trauma program violated the state's criteria for level III trauma hospital designation in violation of the Minnesota Whistleblower Act.	In excess of \$50,000 plus costs and fees
Oyola et al. v. Gabriela Cadena LLC et al. 2013 WL 3247246	S.D.N.Y.	1:13cv04492	6/20/13	Gabriela Cadena Fashions failed to pay former employees their wages.	Reinstatement, \$10 million in compensatory damages, liquidated damages, injunctive relief, interest, fees and costs
Perri v. Greenfield Communications Inc. et al. 2013 WL 3212243	Ala. Cir. Ct. (Jefferson)	cv-2013-902468	6/24/13	Defendant partners in the Greenfield Communications Inc. entities fraudulently failed and refused to provide the plaintiff sales agent with the full amount of monthly commissions by paying inconsistent and inadequate amounts with no correlation to monthly gross revenues.	Compensatory and punitive damages, an accounting, constructive trust, plus fees, interest and costs
Schutz v. Luther Brookdale Honda 2013 WL 3197691	Minn. Dist. Ct. (Hennepin)	27-cv-13-11849	6/25/13	Supervisor of plaintiff employee at defendant Luther Brookdale Honda subjected plaintiff to repeated, ongoing and unwanted sexual harassment, which has substantially interfered with plaintiff's employment in violation of the Minnesota Human Rights Act.	Front pay, back pay, lost benefits, interest, fees, costs and expenses
Doe v. Universal Protection Services, LP et al. 2013 WL 3212242	Cal. Super. Ct. (L.A.)	BC513341	6/26/13	Universal Protection Services wrongfully terminated plaintiff's employment in retaliation for complaining against the company's multiple unsafe work conditions and practices, illegal drug use and discrimination.	General and punitive damages, injunctive relief, penalties, interest, fees, and costs
Aghmane v. Bank of America Corp. et al. 2013 WL 3231562	Cal. Super. Ct. (S.F.)	CGC-13-532473	6/27/13	Bank of America Corp. wrongfully terminated plaintiff's employment on account of her sex, causing plaintiff to be deprived of equal employment opportunities.	General, special, liquidated, punitive and exemplary damages; interest, fees and costs

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