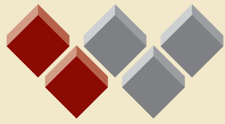

Wimberly Lawson
Seale Wright & Daves, PLLC
Attorneys & Counselors at Law

Briefly

June 2009 Volume 9, Issue 6

UNION CAN WAIVE EMPLOYEES' RIGHT TO SUE IN COURT FOR DISCRIMINATION

The U.S. Supreme Court has decided the issue of whether a provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate claims arising under the discrimination laws is enforceable. The Court finds that such a provision is enforceable, but leaves open the very important question of whether the result might be different if a union decided not to pursue the employees' discrimination claims in arbitration, under circumstances where employees could not continue with the arbitration. *14 Penn Plaza, LLC v. Pyett*, 129 S.Ct. 1456 (April 1, 2009).

Ron Daves

"The key point is whether the agreement to arbitrate statutory anti-discrimination claims is "explicitly stated" in the collective bargaining agreement."

The Court relies on its earlier ruling as to individual agreements to arbitrate in the *Gilmer* case (*Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647 (1991)), and finds that the *Gilmer* ruling's interpretation of the discrimination laws, in this case the age discrimination law, fully applies in the collective bargaining context. The key point is whether the agreement to arbitrate statutory anti-discrimination claims is "explicitly stated" in the collective bargaining agreement. In the 5-4 ruling, the majority finds that individual employees are not waiving a substantive right to proceed in court, but only a procedural right, which may be waived by their collective bargaining representative. The Court states that, "It was Congress' verdict that the benefits of organized labor outweigh the sacrifice of individual liberty" that the system of organized labor "necessarily demands." Earlier cases are distinguished on the basis that the collective bargaining agreement's arbitration provisions did not expressly cover both statutory and contractual discrimination claims. The Court refuses to accept an argument by the dissenting justices that a union may subordinate the interest of an individual employee to the collective interests of all employees in the bargaining unit, since the Court would be relying on a judicial policy concern as the source of authority for introducing a qualification to the law not found in its text. Further, Congress has accounted for this conflict of interest by imposing a duty of fair representation on labor unions, which a union breaches "when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith." Thus, a union is subject to liability if it illegally discriminates against older workers in either the formation or governance of the collective bargaining agreement, such as by deciding not to pursue a grievance on behalf of one of its members for discriminatory reasons. Further, a union itself is subject to liability under the age discrimination law if the union itself discriminates against its members on the basis of age.

Editor's Note – It is going to be interesting to see how everyone reacts to this Supreme Court ruling – employers, unions, and the courts. Courts still have a lot of judicial interpretation to resolve as to whether a collective bargaining agreement provides sufficient "due process" procedures in order to warrant a court's refusal to hear the case, and instead deferring the matter to a grievance arbitration procedure. As part of this analysis, the courts are going to have to consider the issue left unresolved in the Supreme Court ruling as to whether the employee can pursue arbitration of his statutory discrimination claim if the union fails or refuses to take the case to arbitration or otherwise support his position. Employers are going to have to consider whether resolving discrimination claims in the grievance arbitration procedure is best for them. That is, while the grievance arbitration procedure may be much quicker and less expensive in resolving such claims, it may also allow

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Our Firm *Wimberly Lawson Seale Wright & Daves, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.*

EEOC LOOKING AT EMPLOYER USE OF CRIMINAL AND CREDIT HISTORIES

Mary Moffatt Helms

"That test considers 'the nature and gravity of the offense, the time that has passed since the conviction or the completion of the sentence, and the nature of the jobs held or sought.'"

At a recent American Bar Association teleconference, EEOC Acting Chair Stuart Ishimaru stated that the EEOC is continuing to examine the need for more guidance on employers' use of criminal records and credit histories in employment decisions. In a guidance released in 1987, the EEOC stated that employers' use of conviction records has a racially adverse impact, and set out a 3-part test for when employers could use such records consistently with Title VII. That test considers "the nature and gravity of the offense, the time that has passed since the conviction or the completion of the sentence, and the nature of the jobs held or sought." In 2006, the EEOC updated its compliance manual section on race and color to reiterate its 3-part test and to clarify that a "blanket exclusion" from employment of persons with past convictions "without consideration of the circumstances would neither be job-related nor consistent with business necessity."

In one important case, the ruling of the Third Circuit Court of Appeals in the *El* case, the Court ruled in favor of a public transit agency that fired a driver who had been convicted of murder 40 years earlier. (*El v. Southeastern Pennsylvania Trans. Authority (SEPTA)*, 479 F.3d 232 (March 19, 2007)). Not only did the Third Circuit refuse to defer to the EEOC guidelines regarding criminal records, but concluded that the standard of a business necessity defense is that a policy should accurately distinguish between an applicant who poses an unacceptable level of risk and an applicant who does not. It is not necessary that a policy must seek to have no risk but there's a need to distinguish between a minimal level of risk and a higher level of risk.

Several participants in the teleconference pointed out that employers should not rely on arrest records in evaluating applicants, although they might consider the circumstances of pending arrests. If they consider pending arrests, employers should investigate the circumstances, and should not consider convictions that are irrelevant to the job being sought. The length of time since the conviction is also a significant factor, as there developed sort of a "rule of thumb" a few years ago that convictions older than seven years should rarely be considered relevant. It was also suggested that policies without definitive "bright-line" conviction rules are less likely to draw legal attack than set rules. In other words, the analysis should involve review of all relevant circumstances rather than setting forth a certain type of conviction or a certain time period for consideration.

Much less was said at the conference about the use of credit histories. One issue under such policies is the use of statistical examples to show or defeat showing disparate impact against minorities and the like. Assuming such disparate impact is shown by considering credit histories, employers would have to have a strong and logical argument to reject applicants for the reason of poor credit histories alone.

KNOW YOUR ATTORNEY

Suzanne K. Roten

SUZANNE K. ROTEN is a Senior Associate in the Knoxville, Tennessee office of the firm, which she joined in 2001. Her law practice includes an emphasis in employment discrimination and wrongful discharge litigation, as well as FLSA, ADA and FMLA compliance. In addition to Tennessee, Suzanne is licensed to practice law in California, and she regularly advises clients on California employment law compliance. She received her Bachelor of Arts degree in English Literature from the University of California, San Diego, a Master of Library Science from the University of California, Berkeley, and her law degree from the University of California, Los Angeles. While in law school, Suzanne was a member of the UCLA Law Review and served as its Chief Managing Editor. Suzanne was appointed by the Mayor of Knoxville to serve as a member of the Knoxville Civil Service Merit Board from 2004 - 2013. Suzanne is a member of the East Tennessee Lawyers Association for Women, the Los Angeles County Bar Association and the Knoxville Bar Association, where she serves on its Publications Committee.

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DC COURT INVALIDATES NLRB RULINGS FOR ALL OF 2008; ADMINISTRATION APPOINTS TWO UNION ATTORNEYS TO NLRB

Gary Wright

"If the DC Circuit chooses not to reconsider its decision, the NLRB will have to review over 400 cases to decide how they should be handled."

The United States Court of Appeals for the District of Columbia Circuit has determined over 400 decisions made last year by the National Labor Relations Board (NLRB) under the Bush Administration are invalid. During the last year of the Bush Administration, the NLRB had been operating with only two members, because the Democrats were in control in Congress and they objected to nominees submitted to fill the three vacancies on the Board. Thus, the DC Circuit concluded that the Board lacked a 3-member quorum, in spite of an attempted delegation of authority to do so. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB,* No. 08-1214, 5/1/09.

On the same day, however, the Court of Appeals for the Seventh Circuit held that the Labor Act gave the NLRB the authority to continue to conduct business with a quorum of two members when the Board had delegated its authority to do so. *New Process Steel LP v. NLRB*, No. 08-3517, 5/1/09. As a result of the DC Circuit ruling, the NLRB is considering its legal options, including filing a petition for reconsideration within the next 45 days, according to a spokesman for the NLRB. If the DC Circuit chooses not to reconsider its decision, the NLRB will have to review over 400 cases to decide how they should be handled.

In late April, the Obama Administration moved quickly to nominate two union attorneys to the 5-member NLRB, in addition to the one former union attorney already on the Board. If confirmed, the result will leave the NLRB with three union attorneys, and a single Republican member. Traditionally, the administration in power appoints three members of its own party, and two members of the other party, and so it is anticipated that at some point the Administration will nominate another Republican member. One of the new union attorneys appointed, Craig Becker, has been an Associate General Counsel for the Service Employees International Union for 17 years and also holds the same position at the AFL-CIO. The other appointee, Mark Pearce, practices labor and employment law at a firm representing unions.

It is interesting to note that until the Clinton Administration, administrations considered it inappropriate to appoint union attorneys to the NLRB, considering them to be potentially too one-sided in their views. Obviously, the current administration has no such concerns.

ISSUES OVER THE BONUS TURMOIL

Margaret Noland

"Some view bonuses as a good tool to reward employees for good performance, and/or to retain a company's best employees."

In light of the national attention to the turmoil over big bonuses given to executives whose companies made bad business decisions or lost large amounts of money, this article addresses some of the considerations. Some view bonuses as a good tool to reward employees for good performance, and/or to retain a company's best employees. However, in today's job market, the necessity of using bonuses for retention purposes has diminished. Further, where bonuses are paid to executives at a time when employees are being laid off, suffering reduced pay, or otherwise hurting, the company image is tarnished and the situation is de-motivating. On the other hand, if bonuses have been a regular occurrence, employees may look at bonuses as part of their pay, and a cut in that pay may be discouraging, and in some cases, a breach of trust and/or even a breach of contract. Whether bonuses are a regular part of compensation, and subject to normal contractual rules, may depend on how specific and definitive they are, or whether there is a reservation of rights or a reservation of discretion for management to award them or not.

Some employers distinguish between bonuses and incentives. While bonuses are typically awarded for company-wide success, incentives are designed to motivate the individual

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EMPLOYEE LAWFULLY FIRED FOR CONCEALING PRESCRIPTION DRUG USE

Fred Baker

"The employer in question had a drug and alcohol policy that forbade employees from taking a prescription medication that 'has an adverse effect on the employee's ability to work safely.'"

Issues concerning prescription drug use by employees have always been of concern to employers. Some prescription drug use can impair an employee on the job, or indicate more serious problems, but there are strict privacy, HIPAA, and Disability Act restrictions on employment rules or policies applicable to prescription drug use. A recent case illustrates some of these issues, ruling favorably for the employer. *Kosmicki v. Burlington Northern & Santa Fe Railroad Co.*, 2008 WL 4693122 (C.A. 8, 2008).

The employer in question had a drug and alcohol policy that forbade employees from taking a prescription medication that "has an adverse effect on the employee's ability to work safely." Various drugs the plaintiff took had the potential to cause sleepiness and dizziness, and when the plaintiff failed a simulator test as a train conductor, he told his employer that it was due to the effects of the medication. He had not previously provided his employer with information about the drugs he was taking during a medical screening when he filled out a medical history form.

The plaintiff sued contending that his employer fired him because it regarded him as disabled. The employer claimed the plaintiff was terminated for dishonesty. The court found that the plaintiff was unable to raise an inference that a perception of disability was the rationale for his discharge, rather than his failure to disclose his prescriptions.

Editor's Note – This ruling is a controversial one, and employers should seek the advice of counsel concerning adverse actions to be taken relating to employees on lawful prescription drugs. Minor factual changes might have caused the court to rule for the plaintiff. The case does support a long line of cases giving employers a fair amount of leeway in terminating employees who falsify medical information and health questionnaires.

"ISSUES OVER THE BONUS TURMOIL"
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employee to meet or exceed a certain goal. Many experts believe that the more incentive pay involved in total compensation, the better, because it has a greater tendency to improve performance. In other words, "you get what you pay for." Further, the use of incentive pay serves as a sort of natural and acceptable pay cut when goals are not met.

If the bonuses are eliminated, suspended, or cut, thought should be given to providing ways or time frames in which employees have a way to earn back those lost earnings. One method is to convert employees from bonuses to incentives. However, careful attention must be given to make sure the company doesn't break its promises to the employees in the process. Further, sympathy and tact need to be given to communications with employees so that the welfare of the employees is considered as important as the welfare of the business.

"UNION CAN WAIVE EMPLOYEES' RIGHT TO SUE"
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a greater number of employees to more easily assert their discrimination claims, resulting in additional cases for employers to defend. Unions are going to have to decide whether to resist agreeing to use the grievance arbitration procedure to resolve statutory discrimination claims. On the one hand, unions may not want to assume that additional burden and cost of presenting such claims. On the other hand, it could present opportunities for unions to represent employees and defend their rights. Unions may feel that could present a better public image and organizing tool. Unions might be able to suggest to employees and to employers that there is an advantage to having union representation, in that the grievance arbitration procedure takes the place of more expensive court litigation for both parties.

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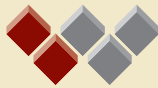

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Dear Clients and Friends:

Our Annual Conference is truly the high point of the year for us -- a time to gather with friends and discuss important, contemporary employment issues. Please plan now to join us.

Our day and a half program covers important legal decisions and societal trends affecting employment. Topics are carefully selected to address the concerns of all employers and to give you an opportunity to select from a wide array of topics dealt with in detail. Some of the twenty-five or more topics are:

- FMLA Amendments and Issues
- Records Retention and Destruction
- Amendments to Americans with Disabilities Act
- COBRA Regulations
- Genetic Information Non-Discrimination Act
- Wage/Hour Compliance under New Administration
- Lilly Ledbetter Fair Pay Act
- Employee Free Choice Act
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- Recession and RIFs – Tips for Dealing with the Downturn
- Workers' Compensation Strategies

Join us in Knoxville on November 5 and 6! We promise you an informative, but light-hearted, thorough and practical journey through today's workplace issues.

Hope to see you there!

Respectfully,

Ronald G. Daves
Managing Member

We are also pleased to announce that our keynote speaker will be author, motivational speaker, trainer, radio talk show host and one of the nations most sought after public speakers,

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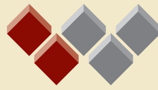

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$295 per person
$275 for each additional person from same company
$230 for eight or more from same company

Registration and payment received AFTER October 1

$335 per person
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REGISTRATION INCLUDES:

Seminar (1½ days), materials, two continental breakfasts, lunch and evening reception on Thursday

CANCELLATION POLICY:

50% cancellation fee will be incurred for cancellations after October 14. Cancellations made after October 28, 2009 will forfeit registration fee (registrants will receive the conference materials post-seminar)

FOUR WAYS TO REGISTER:

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