Bloomberg Law®

Daily Labor Report®

NUMBER 183 SEPTEMBER 22, 2017

Leading the News

News

 ISSN 0418-2693

Bloomberg Law®

Daily Labor Report

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DAILY LABOR REPORT (ISSN 0418-2693) is published daily, Monday through Friday, except for federal holidays, at the annual subscription rate of $13,211 for a single print copy.

Roundup of Newly Filed EEOC Lawsuits

CORRECTION

Latest Cases

Latest Labor and Employment Cases for September 22, 2017

Leading the News

First Amendment

Teacher Snubbed After Dad's Critique Loses Retaliation Claim

An Alabama school superintendent didn't violate clearly established constitutional law when he allegedly denied a teacher promotion because her father criticized the superintendent, a federal appeals court ruled (*Gaines v. Wardynski*, 2017 BL 334055, 11th Cir., No. 16-15583, 9/21/17).

Lynda Gaines said her First Amendment rights were violated by the alleged retaliation. But the U.S. Court of Appeals for the Eleventh Circuit Sept. 21 said Superintendent E. Casey Wardynski is entitled to dismissal of Gaines' claims against him under the doctrine of qualified immunity.

Qualified immunity shields government officials from liability unless their conduct violates clearly established federal law or a constitutional right.

''The theme of the case is that you can't define a clearly established law to a high level of generality,'' attorney Taylor P. Brooks of Lanier Ford Shaver & Payne in Huntsville, Ala., told Bloomberg BNA today. Brooks is one of the attorneys representing Wardynski. ''There needs to be case law particularized to the facts of the case.''

Gaines failed to offer materially similar cases from the U.S. Supreme Court, the Eleventh Circuit, or the Alabama Supreme Court to support her argument that failing to promote an employee after a parent criticizes the employer violates free speech and freedom of intimate association rights. Absent that case law to support her claims, it wasn't apparent that Wardynski's alleged actions violated the First Amendment, the court said.

Gaines' attorney, Robert C. Lockwood of Wilmer & Lee in Huntsville, didn't immediately respond to Bloomberg BNA's request for comment.

J.R. Brooks of Lanier Ford Shaver & Payne in Huntsville also represented Wardynski.

Judge C. Roger Vinson wrote the opinion, joined by Judges Adalberto Jordan and Julie Carnes.

By Jay-Anne B. Casuga

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The opinion is available at http://bloomberglaw.com/public/document/LYNDA_GAINES_PlaintiffAppellee_versus_E_CASEY_WARDYNSKI_individua?doc_id=XVJ6VEV0000N.

Sexual Harassment

IHOPs in Nevada and New York Face Sexual Harassment Lawsuit

A group of IHOP franchises in Nevada and New York subjected food servers and other crew members to sexual harassment and retaliated against women who complained, the EEOC alleges in a federal lawsuit (*EEOC v. Lucinda Mgmt., LLC*, D. Nev., No. 2:17-cv-02458, *complaint filed* 9/21/17).

The Sept. 21 complaint, filed in the U.S. District Court for the District of Nevada, is the second lawsuit the Equal Employment Opportunity Commission filed against IHOP franchises this week, as the agency continues its crackdown on workplace sexual harassment. The EEOC Sept. 19 sued the owner of two IHOPs in Illinois.

Here, New York-based Lucinda Management LLC, five Nevada IHOP locations, and three New York locations allegedly violated the Title VII of 1964 Civil Rights Act protections of a class of workers. Lucinda manages the human resources and related functions of the eight franchises and has several employees who control the operations of all of the restaurants, the EEOC says. The companies also share common policies, supplies, and equipment, the agency asserts.

That includes a sexual harassment policy requiring employees to report any incident to Lucinda's New York office within 72 hours ''or else waive all rights to recovery,'' the EEOC says. But that policy unlawfully deters workers from filing sexual harassment complaints, the agency says.

No Action Taken, EEOC Says Such a policy ''does not shield defendants from liability where local managers were on notice of the harassment yet took no action,'' the EEOC said in a Sept. 21 statement announcing the lawsuit.

''Employers must ensure that employees have every opportunity to report incidents of sexual harassment and take prompt corrective action when they receive complaints,'' Anna Park, regional attorney for the EEOC's Los Angeles District, which includes Nevada, said in the statement.

''Employers should carefully review their sexual harassment policies to evaluate whether they will be effective in preventing and promptly correcting sexual harassment and deterring retaliation,'' Wendy Martin, director of the agency's Las Vegas office, said in the statement.

''The allegations made against a select group of franchisees in New York and Las Vegas go against IHOP's values,'' Stephanie Peterson, brand spokesperson for IHOP's corporate office, told Bloomberg BNA Sept. 22. ''We are a family-centric brand that strives to treat people with respect. The franchisee groups are investigating the matter.''

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Unwanted Touching Alleged The alleged harassment included unwanted touching of a female server's buttocks, comments about her genitalia, vulgar insults and invitations to engage in sexual intercourse, the EEOC says in the complaint. It also included a co-worker pointing to various vegetables and fruits and asking a male cashier which one best described his genitalia, the agency says.

Lucinda Management declined to comment on the lawsuit Sept. 22.

Restaurant Opportunities Centers United reported in 2014 that sexual harassment is ''endemic to the restaurant industry.'' The ROCU's findings were cited in a June 2016 report on workplace harassment issued by a 16-member EEOC task force. It found workplaces that rely on customer service or client satisfaction are among those most at risk for creating atmospheres in which sexual harassment can occur.

Attorneys in the EEOC's Las Vegas and Los Angeles offices represent the commission. No attorney had filed an appearance yet for the companies.

BY PATRICK DORRIAN

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Text of the complaint is available at http://www.bloomberglaw.com/public/document/US_Equal_Employment_Opportunity_Commission_v_Lucinda_Management_L?doc_id=X1Q6NTC3KH82&imagename=1-1.pdf.

EEOC

Wellness Rule Review to Last Until August 2018, EEOC Says

The EEOC will need until August 2018 to reconsider its regulations on employer wellness programs and expects to issue a new final rule by October 2019, the agency said (*AARP v. EEOC*, D.D.C., No. 1:16-cv-2113, *status report filed* 9/21/17).

The Equal Employment Opportunity Commission reported the status of the rule Sept. 21 to the U.S. District Court for the District of Columbia in response to the court's Aug. 22 ruling that the agency needs to provide additional reasons for adopting portions of the regulations under the Americans with Disabilities Act and the Genetic Nondiscrimination Information Act. These parts of the rule allow companies to provide incentives for employee participation in wellness programs.

The ruling came in a lawsuit filed by AARP challenging whether a wellness program is truly voluntary if workers must choose between receiving a 30 percent decrease in health insurance premiums or providing their family's personal health information to their employer, as EEOC rules currently provide.

The agency will likely need until August 2018 to reconsider the existing rules so it can receive and evaluate input from employers and other stakeholders, vote on any regulatory actions, and obtain authorization from the Office of Management and Budget to promulgate new regulations, the EEOC said in its status report.

Employers Need Time, EEOC Says Any substantive changes to the agency's existing rules on employer wellness programs resulting from the reconsideration and rulemaking likely won't take effect until January 2021, because employers will need time to bring plans into compliance with those changes, the EEOC added. Timing estimates provided in the report may change based on developments during the course of its reconsideration and rulemaking process, the agency said.

The EEOC's plans also may change with the arrival of President Donald Trump's two nominees for seats on the five-member commission, should they be approved.

The status report also asks the court to deny AARP's pending motion to vacate the existing rules effective Jan. 1, 2018. Instead, the court should keep the existing rules in place next year and direct the agency to again report in April 2018 on the status of its review efforts, the EEOC said.

Prior to issuing its current wellness program rules, the EEOC had taken legal action against several employers, including Honeywell International, alleging that their wellness programs violated the ADA and GINA by requiring workers and their spouses to divulge confidential medical information. Workers were also asked to submit to involuntary medical exams or face substantial monetary penalties, the EEOC said.

AARP and the EEOC Sept. 22 both declined to comment on the status report when contacted by Bloomberg BNA.

BY PATRICK DORRIAN

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Text of the status report is available at http://www.bloomberglaw.com/public/document/AARP_v_UNITED_STATES_EQUAL_EMPLOYMENT_OPPORTUNITY_COMMISSION_Dock/6?doc_id=X1Q6NTCCOC82&fmt=pdf.

Employment Discrimination

The Trump-Loving Lawyer Who Won't Stop Suing Fox News

Douglas Wigdor raced out of his law offices near Union Square in Manhattan, jumped on a bike, and, still wearing his navy suit and purple tie, pedaled furiously toward a BBC TV studio downtown. It was a mild evening in mid-September, and once again the news bookers had beckoned him to weigh in on the ongoing drama surrounding Rupert Murdoch's 21st Century Fox Inc. Wigdor was eager to oblige.

As Wigdor settled in on-set, an anchor in London caught viewers up on the latest development. That morning, 21st Century Fox had been dealt a serious setback in its $15.5 billion bid to take over Sky, the European pay-TV giant. Karen Bradley, the U.K.'s culture secretary, had just revealed that she'd be referring the deal to regulators for more scrutiny—in part over concerns raised by Wigdor and others about whether the company would comply with British broadcasting standards.

The BBC anchor turned to Wigdor, who said a new probe would be a step in the right direction. He repre-

sented more than 20 current and former 21st Century Fox employees, he explained, in lawsuits involving claims of sexual harassment, retaliation, and racial discrimination. And there was still more to uncover, he said. Past settlement agreements had prevented many potential witnesses from speaking out. The government ought to lift the gag orders and hear every voice. ''I refer to 21st Century Fox as 19th Century Fox,'' Wigdor said.

A few days later, back in his office, he admits he flubbed the punchline—in past interviews, he'd placed Fox in the 18th century. In his defense, it had been a crazy day. The same morning news broke about the Sky deal, Wigdor had filed a defamation suit in Manhattan federal court on behalf of Charles Oakley, the erstwhile NBA power forward, who'd been forcibly removed from Madison Square Garden during a Knicks game earlier this year. Afterward, James Dolan, the team's owner, suggested on ESPN Radio that Oakley has a drinking problem. In the suit, Oakley claimed he hadn't been intoxicated that night and alleged that Dolan had a history of haphazardly accusing his critics of alcoholism. Dolan's legal team called the lawsuit ''frivolous,'' but the sports mediascape went nuts, discussing Wigdor and Oakley's assertions endlessly.

Wigdor, 49, grew up in Port Jefferson, N.Y., on the North Shore of Long Island. He's a sporty guy—he spent a couple of summer breaks from college in the early 1990s giving tennis lessons in Washington, D.C. Alan Greenspan and Andrea Mitchell were clients: A photograph of the former Fed chairman in snug tennis attire hangs in a revered spot in Wigdor's office.

The Knicks have always been the lawyer's favorite basketball team, but he didn't hold back in crafting Oakley's complaint. Among other jabs, he called them the laughingstock of the NBA. ''I'm a die-hard Knicks fan,'' he says. ''Hopefully, they won't ban me from Madison Square Garden.'' Then he shrugs. The Knicks have been bad for eons.

Anomaly Among N.Y. Plaintiffs' Attorneys Wigdor's fortunes, by contrast, are on the rise. In the summer of 2016, when Roger Ailes, the founder of Fox News, was ousted from his longtime perch atop the network, he left behind what critics characterize as a Superfund site of toxic workplace behavior. Wigdor now spends his days dredging actionable claims from the sedimentary layers of allegation. It's potentially a lucrative business. In a regulatory filing in August, 21st Century Fox revealed that in the previous year it had incurred costs of $50 million settling such claims.

Wigdor isn't yet as well known as, say, the late Johnnie Cochran or the ubiquitous Gloria Allred, but his multifront legal assault on Fox News has quickly elevated him to the top tier of telegenic anti-discrimination lawyers. He's something of an anomaly, though, among New York plaintiffs' attorneys—a white, male, Republican Trump supporter, a species about as common in his habitat as feral elephants in Central Park.

Even so, Wigdor's practice is thriving. In part, this is because of his Allredian knack for generating frenzied press coverage on behalf of clients and for striking aggressively at the jowl-sheltered jugular of white corporate America. ''When we write our complaints, there's an effort on our part to make it as colorful as possible,'' Wigdor says. ''We're writing in a way that puts the company on its heels. Because we know that these companies have multimillion [dollar] marketing resources. Now we're suing this company and trying to change the public perception.''

Not long ago, in the early 2000s, Wigdor was toiling away in the obscurity of Big Law, handling labor and employment cases for Morgan, Lewis & Bockius LLP on behalf of large corporations. He had two young children at home but found himself growing restless as he approached middle age. To the initial dismay of his parents, he decided to strike out on his own. In 2003, along with like-minded colleagues Kenneth Thompson and Scott Gilly, he formed the firm that's now known as Wigdor Law.

The partners picked up one of their first clients on their way out the door at Morgan, Lewis, & Bockius, when Wigdor ran into a secretary named Sharon Simmons-Thomas on the elevator. She was visibly upset. On a recent Christmas shopping trip to Macy's flagship store in Manhattan, plainclothes security guards had accused her of shoplifting. She'd produced receipts for her items, but the guards nevertheless marched her to a holding facility and handcuffed her to a bench. Like her, everyone in the makeshift jail was black, she said.

That May, Wigdor and his partners filed a race-discrimination suit against Macy's Inc. in federal court in Manhattan, alleging that the retailer was unfairly targeting minority shoppers. The company released a statement saying it ''doesn't profile or discriminate against any minority group or individual.'' But the ''shop and frisk'' suit generated a wave of bad publicity for the chain. Macy's eventually settled the case.

Other headline-generating suits followed. That first year, Wigdor also represented Patrick Brady, a young man with cerebral palsy who alleged that he'd been demoted from his job at a Walmart pharmacy in Centereach, N.Y., because of his disability and assigned instead to menial tasks such as retrieving shopping carts from the parking lot. The case went to trial, and in February 2005 a federal jury sided with Brady, ordering Wal-Mart Stores Inc. to pay $7.5 million in damages. Following the verdict, prospective clients poured into Wigdor's office, alleging workplace malfeasance in a cross section of New York industries: banking, advertising, design, retail, and, notably, media.

Before Fox, the New York Post In 2009, Wigdor ran up against a Murdoch-owned news operation for the first time. His client was Sandra Guzman, a former New York Post editor who is of black and Puerto Rican descent. Guzman filed a discrimination suit against the tabloid, alleging she'd been terminated after complaining about an editorial cartoon depicting police officers shooting to death a chimpanzee and uttering a wisecrack that some believed alluded to President Obama. The complaint was jam-packed with unflattering anecdotes, portraying the Post's offices as a kind of racist, drunken zoo. A lawyer for the newspaper at the time called the suit without merit; it was later settled under confidential terms.

''He might be a Cowboys fan. All right. It's not necessarily relevant to my case''

In July 2011, Wigdor and his partners filed another lawsuit against the Post. Their client, Nafissatou Diallo, a maid at the Sofitel hotel in Manhattan, had recently alleged that she'd been sexually assaulted on the job by Dominique Strauss-Kahn, the former head of the Inter-

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national Monetary Fund. Not long after her claims went public, the Post published a series of articles describing Diallo as a prostitute who ''routinely traded sex for money with male guests.'' She sued for libel, saying the paper had concocted false accusations against her ''in an apparent desperate attempt to bolster its rapidly plunging sales.'' A spokesperson said the Post stood by its reporting, but eventually the paper settled that case, too, for an undisclosed amount.

At the time, Kenneth Thompson was the frontman for many of the firm's highest-profile cases. (Gilly, who departed the firm in 2011, didn't respond to a request for an interview.) A liberal Democrat, Thompson had long harbored political ambitions, and in 2013, with Wigdor's support, he ran for Brooklyn District Attorney. He defeated his incumbent opponent, becoming the borough's first black DA. He held the job for nearly three years until he died, at age 50, from cancer.

When his friend won the race, Wigdor was overjoyed, but suddenly he was left to command the spotlight for his clients—alone, without the advantage of a black partner who'd become one of the city's most recognizable civil rights advocates. He went on to prove more than willing to draw attention to himself, sometimes by larding his complaints with racially inflammatory rhetoric. In the past year, his filings and public statements have accused companies of ''conduct reminiscent of the Jim Crow era,'' practicing ''plantation-style management,'' and perpetuating ''a segregationist culture.''

''My clients like that,'' Wigdor says. ''They've used those words and phrases in interviews. They think it's appropriate.''

In July 2016, Gretchen Carlson, a longtime Fox News personality, filed a sexual harassment suit against Ailes. At the time, his lawyers denied the allegations. But then more female employees came forward with stories of harassment. 21st Century Fox parted ways with the embattled news executive, who walked away with a $40 million severance package. (Ailes died earlier this year.)

The Fox Cases Wigdor wasn't representing Carlson, but amid the ensuing litigation, Fox employees started finding their way to him. In December he filed a discrimination suit in federal court in Manhattan on behalf of Lidia Curanaj, a former reporter for WNYW, a local station owned by 21st Century Fox. In the complaint, Curanaj accused 21st Century Fox of fostering a ''misogynistic culture'' and alleged that Fox News had passed her over for a job because she'd rejected Ailes's sexual overtures during a one-on-one job interview and again afterward. A spokesperson for Fox said at the time the claims were without merit. The suit is ongoing.

On March 28, Wigdor filed another suit against 21st Century Fox, this time on behalf of Tichaona Brown and Tabrese Wright, two black women who'd worked in the payroll department at Fox News. The complaint alleged that they'd been racially harassed and discriminated against by their white supervisor, comptroller Judith Slater, and that Fox had done nothing about it for years. A third black employee from the department, Monica Douglas, soon joined the suit.

The complaint alleged that Slater, a 17-year veteran of the network, had called day laborers ''cheap Mexicans,'' argued that the Black Lives Matter movement was racist, mocked African American employees by using stereotypical slang, and suggested that all black men physically abused women. Douglas claimed that on at least two occasions Slater had kicked her in the buttocks as she walked down the hall.

According to the lawsuit, Douglas complained to management in November 2014 after enduring the offensive behavior for years, but the network didn't intervene until the allegations were about to become public. At that point, just before the lawsuit was filed, Fox News fired Slater and issued a statement saying that ''abhorrent behavior'' had no place at the network. Slater's attorneys have filed a motion to dismiss the case, which is still active. ''The cases that include our client are frivolous and without merit,'' Brian Jacobs and Catherine Foti, her lawyers, said in a statement. ''The complaints Wigdor filed rely on false allegations and mischaracterizations and are nothing more than a reprehensible money grab.''

The Lawsuits Pile Up On April 1, the New York Times published a front-page story reporting that the network and its top star, Bill O'Reilly, had paid a total of roughly $13 million to secure agreements from five different women—one of whom, former Fox News host Juliet Huddy, had been represented by Wigdor—to not speak publicly or sue over the sexual harassment and lewd behavior they'd alleged against O'Reilly. Through a spokesperson, O'Reilly denied the claims. But soon protesters were gathering outside Fox's Manhattan headquarters, and dozens of advertisers were pulling spots from his show.

On the night of April 18, Marc Kasowitz, a lawyer for O'Reilly (and also Donald Trump), released a statement suggesting the uproar against his client was a sham, orchestrated by unnamed individuals with ulterior motives. ''Bill O'Reilly has been subjected to a brutal campaign of character assassination that is unprecedented in post-McCarthyist America,'' Kasowitz wrote. ''This law firm has uncovered evidence that the smear campaign is being orchestrated by far-left organizations bent on destroying O'Reilly for political and financial reasons.''

Wigdor read the statement with irritation. A lifelong Republican, he was annoyed by the suggestion he was carrying water for some vast left-wing conspiracy. He quickly devised a memorable retort. The previous year, during the presidential primaries, Wigdor had attended a fundraiser for Trump on Kiawah Island, S.C. Before leaving, he'd had his picture taken standing shoulder-to-shoulder with Trump, who grinned and flashed a thumbs-up at the camera. The day after Kasowitz's haymaker, Wigdor released a statement accompanied by the photo. ''As someone who supported and contributed to the Trump campaign and who routinely watches Fox News, I can categorically deny, and find it offensive, that my Firm is being accused of being controlled by far-left organizations,'' he wrote.

Shortly thereafter, Fox announced it was letting O'Reilly go. Kasowitz didn't respond to a request to be interviewed for this article.

On April 25, Wigdor filed a second racial discrimination suit against 21st Century Fox, this time on behalf of Adasa Blanco, a Hispanic woman who formerly worked in accounts payable under Slater. The complaint included many of the same allegations of insensitive behavior. The next day, Wigdor hosted a press conference at his offices to announce that Kelly Wright, a black anchor at Fox News, was joining the other racial

discrimination lawsuit involving Slater, which was now seeking class-action status. Its list of plaintiffs had grown to double digits. ''We have spreadsheets to keep track,'' Wigdor says.

In front of a gaggle of reporters, Wright accused Fox News of ''systemic and institutional racial bias.'' Shedding tears, he quoted Frederick Douglass: ''Power concedes nothing without a demand.'' (The network soon responded with a statement ''vehemently'' denying the claims made in both ''copycat complaints.'' The suits are ongoing.) Surrounded by his clients, Wigdor was easy to pick out—a white guy in a sea of black and brown faces. People often assume he's Irish Catholic because of his orange-ish hair and pale, freckled complexion. Sometimes he corrects them, letting them know he's Jewish; other times he lets it go.

Death Threats That night, he got the first in a series of death threats. A caller said he was a ''n----- lover'' and threatened to kill his family and bomb his firm. Wigdor contacted the police, which led, about two weeks later, to the arrest of Joseph Amico, a computer repairman, in Las Vegas. He was extradited to Manhattan and charged with multiple counts of making a terroristic threat and aggravated harassment. (He pleaded not guilty.)

Wigdor kept pushing ahead with the Fox suits, seemingly unrattled. ''He just will not be intimidated,'' says Jeffrey Speed, a board member at World Wrestling Entertainment Inc. Years ago, Wigdor represented Speed in a contract dispute with his former employer, Six Flags Entertainment Corp., winning a roughly $24 million ruling in arbitration. ''He went up against one of the top New York law firms. We'd show up for hearings, and there'd be 10 lawyers across the table. He thrives on that.''

This May, Wigdor filed three more suits in Manhattan federal court against 21st Century Fox, bringing the total to six. In one, Jessica Golloher, a correspondent for Fox News Radio, alleged she was being marginalized because of her gender and that the company had retaliated against her after she spoke up. In another, Naima Farrow, a former Fox News employee who is black, alleged she'd been terminated from the accounts payable department because of her pregnancy. And Kathleen Lee, an employee at Fox News Radio, held that she'd been subjected to a ''sexually hostile work environment,'' and that for months the company had done nothing to address her concerns. In the complaint, she claimed that a male colleague frequently referred to Hillary Clinton as Hillary ''Clit-on,'' would time how long it took Lee to use the ladies' room, and engaged in raunchy commentary about the physiques of female TV anchors. Fox News called Golloher's claims ''without merit'' and said that the other suits were ''without legal basis,'' and that the company had ''acted appropriately, and lawfully, in connection with these matters.'' Lee's suit has since been settled for undisclosed terms. Golloher's and Farrow's are ongoing.

In July, according to a report in the New York Times, Wigdor proposed in a mediation proceeding to settle all of the outstanding suits against 21st Century Fox for more than $60 million—a proposal Fox rejected. (Wigdor and Fox declined to comment on the negotiations.) Shortly thereafter, on Aug. 1, Wigdor filed a seventh suit against Fox News. This time his client was Rod Wheeler, a black contributor who said he'd been discriminated against by the network and that his reputation had been marred by his association with the manufacturing of a fake news story about Seth Rich, a young Democratic National Committee staffer who'd been murdered.

The complaint read like a D.C. spy noir, rife with double-dealing and subplots. Among other things, it alleged that Fox News had colluded with members of the White House to gin up a bogus news narrative about Rich's murder, aiming to deflect scrutiny from the Trump campaign's contacts with Russian political operatives during the 2016 election. Wheeler, an ex-homicide detective, claimed that quotes had been fabricated under his name in a FoxNews.com story that sought to bolster the ungrounded theory that it might have been Rich, not the Russians, who provided WikiLeaks with a cache of stolen emails from the DNC. The story has since been retracted.

The White House denied the allegations in the complaint, as did Fox News President Jay Wallace, who called them ''completely erroneous.'' In a motion to dismiss, lawyers for the network have argued that Wheeler was ''neither misquoted nor defamed'' and that, in any case, he was contractually bound to pursue such claims in arbitration, not court. Even so, the wild, confusing allegations spawned countless news stories on both sides of the Atlantic—and, in the end, helped to persuade British authorities to nudge 21st Century Fox's pending acquisition of Sky deeper into the regulatory thicket.

''It's much better to have him on our side than risk sitting across from him''

Courting the Media Behind every successful plaintiffs' attorney is an effective press strategy. Wigdor takes a varied approach. Sometimes he goes on the TV news circuit. Sometimes he stages press conferences. Often he grants in-depth access to a single reporter from a prominent news outlet, on the condition that the story be embargoed until the day a suit is filed, when it can be set off like a firecracker.

But Wigdor says pressuring companies via the press isn't enough. You also have to know how to win should the company choose not to settle. Wigdor says he has yet to lose a trial verdict in a case on which he's been the lead attorney. (He has, mind you, had plenty of cases tossed out before they reached that stage.) ''Doug will attack from the press,'' says Derek Sells, an attorney and managing partner of the Cochran Firm, which was founded by the late Johnnie Cochran. ''But you get him in the courtroom, and he'll attack you there as well.''

Sells met Wigdor about 15 years ago, at a children's birthday party in Queens, N.Y. Before long, he recalls, Wigdor challenged him to a game of H-O-R-S-E on a pee-wee basketball hoop. ''What struck me about Doug back then, and it's true now, is how competitive he is,'' Sells says. ''He wanted to win that game bad.''

The outcome of the shootout is still in dispute, with both lawyers claiming victory, but they became close friends. ''We both were committed to civil rights and to doing justice,'' Sells says. ''I saw in Doug someone who wanted to try and change society, as best he could, through the cases that he handles. That's something that has lasted the test of time.'' In the years since, Sells and Wigdor have occasionally teamed up for lawsuits and family vacations, during which they bicker fre-

DLR ISSN 0418-2693

quently about politics. ''Sometimes the discussions get a little heated,'' Sells says.

''Oh yeah, especially after a couple glasses of wine,'' Wigdor says. ''He's a big Obama supporter.''

''He did support Trump,'' Sells says. ''I don't know if he still does. You should ask him about that one.''

Support for Trump Wigdor says his ardor for the president has slackened somewhat in recent months, for reasons that include Trump's failure to strongly condemn the violent gathering of white supremacists in Charlottesville, Va. ''He's done some good things, but I was a pretty vocal supporter among my friends and colleagues during the campaign,'' Wigdor says. ''I've since tapered that down.''

Wigdor is unsure if his political beliefs—which butt against those of most New Yorkers—have ever cost him a client. ''If I were someone who had been discriminated against or harassed or insulted, and I were looking for a lawyer, I wouldn't be looking for an ideologue or someone who is tweeting about liberal causes that they are supporting in their free time,'' he says. ''I would find someone who is a trial lawyer and knows their way around the courtroom.''

A few years ago, Wigdor and Thompson represented the actor Rob Brown, whose credits include Finding Forrester and Treme, in another shop-and-frisk case against Macy's. The retailer eventually settled the suit. Brown says he was referred to Thompson and Wigdor by a close lawyer friend. At the time, he admired Thompson's politics but knew nothing about Wigdor's. He was surprised to learn, from this reporter, that Wigdor is a Trump fan. ''We never talked about him being a Republican, and it wouldn't have mattered,'' Brown says. ''He might be a Cowboys fan. All right. It's not necessarily relevant to my case.''

Wigdor declines to share any figures about his firm's profitability, other than to say that dysfunctional workplaces are his business and business is good. With virtually all of its clients, Wigdor Law works on contingency, taking a 38 percent to 40 percent cut of whatever a case wins in settlement or at trial. ''As I would say to a prospective client, this way our interests would be completely aligned,'' he says.

These days, the firm's clientele is expanding to the behavioral hazmat zones of Silicon Valley. Although the bulk of the firm's business remains in New York, techbro litigation is simply too potentially lucrative to ignore. Over the past several years, Wigdor has represented a number of clients against tech companies, including a 2015 suit in federal court by a woman who had been raped by an Uber driver in New Delhi, and who argued that the company had been negligent in vetting him. Uber Technologies Inc. contested her claims but eventually settled the case.

Although he prefers to work for plaintiffs, Wigdor has occasionally advised companies on workplace management. For years, he's offered guidance to the clients of Park Strategies LLC, a consulting firm started by Alfonse D'Amato, the former U.S. senator for New York. D'Amato first met Wigdor in the late '80s, when he interned in the Republican's Washington office and starred on its softball team, the ''D'Amato Hot Tomatoes.'' D'Amato says keeping Wigdor on call is a good deal for his clients. ''It's much better to have him on our side than risk sitting across from him.''

It's a strategy not available to companies like 21st Century Fox, already fending off a Wigdorian barrage. Recently, Fox News has made numerous efforts to clean up its workplace, shedding troublesome employees, hiring a new human resources chief, and implementing mandatory sensitivity training. Yet the lawsuits keep coming. On Sept. 18, Wigdor uncorked his eighth: Scottie Nell Hughes, a former political panelist for the network, alleged that she'd been raped by Charles Payne, a Fox Business Network host, and that when she'd reported the abuse the company had retaliated against her. A lawyer for Payne said in a statement that his client ''vehemently denies any wrongdoing'' and described the claims as ''baseless,'' while Fox and Wigdor, once again, served and volleyed in the press. ''The latest publicity stunt of a lawsuit filed by Doug Wigdor has absolutely no merit and is downright shameful,'' Fox News said.

But Wigdor has played this game before. ''Fox cannot,'' he says, ''spin its way out of this crisis.''

By Felix Gillette

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News

Arbitration

Uber Pay Case Idles Pending Supreme Court Decision

Uber Technologies Inc. and about 240,000 California drivers who say the company owes them minimum wage, overtime, and expense reimbursement have to wait longer to find out whether the case belongs before a judge or an arbitrator, following a federal appeals court order (*O'Connor v. Uber Technologies, Inc.*, 9th Cir., No. 14-16078, *order* 9/22/17).

Uber argued to the U.S. Court of Appeals for the Ninth Circuit that the case belongs before an arbitrator because a provision in the company's agreement with drivers requires them to arbitrate claims against the company as individual actions.

But Judge Edward Chen of the U.S. District Court for the Northern District of California allowed the case to proceed after concluding that the arbitration clause wasn't enforceable because drivers have a right under the National Labor Relations Act to engage in concerted activity.

Appeal Withdrawn The Ninth Circuit heard oral argument Sept. 20 in Uber's appeal of Chen's order. It ordered the appeal withdrawn Sept. 22 until the resolution of a trio of cases pending in the U.S. Supreme Court that ask whether an arbitration clause with a class action waiver violates the NLRA.

The Supreme Court is scheduled to hear oral argument in the cases Oct. 2, the first official day of its new term. It is likely to issue one decision that resolves all three cases.

Lichten & Liss-Riordan, P.C. attorneys Shannon Liss-Riordan and Adelaide Pagano in Boston represent the drivers.

Gibson, Dunn & Crutcher LLP attorneys Joshua Lipshutz in Washington; Kevin Ring-Dowell in Irvine, Calif.; and Theodore Boutrous, Jr. and Theane Evangelis in Los Angeles represent Uber.

BY JON STEINGART

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Text of the order is available at http://www.bloomberglaw.com/public/document/Douglas_OConnor_et_al_v_Uber_Technologies_Inc_Docket_No_1615595_9/1?doc_id=X1Q6NTCFHR82.

LGBT Discrimination

UPS Allowed Lesbian Worker to Be Harassed, Lawsuit Says

United Parcel Service Inc. allegedly did nothing to prevent the harassment of a lesbian employee despite her repeated complaints to company officials, according to a federal lawsuit (*Chaunce v. United Parcel Serv., Inc.*, E.D.N.Y., No. 17-05551, *complaint filed* 9/21/17).

Veldina Chaunce, who worked as a pre-loader for UPS in New York, claims a male co-worker, Allen Lashley, subjected her to egregious discriminatory comments and epithets almost daily. For example, Lashley allegedly called Chaunce a ''dyke-nigger,'' and told her, ''I'm going to fuck you up, dyke,'' she says in a complaint filed Sept. 22 in the U.S. District Court for the Eastern District of New York. Lashley also physically threatened and intimidated her, prompting her to contact the police, she says.

Chaunce repeatedly complained about Lashley to supervisors and human resources officials, but was told to ignore or avoid Lashley, who wasn't disciplined, the complaint says. The company also never investigated her complaints, she says. Chaunce ultimately quit, or was constructively discharged, because of the alleged hostile environment, she says.

''The comments directed at Ms. Chaunce were disgusting,'' Alexander G. Cabeceiras, Chaunce's attorney, told Bloomberg BNA Sept. 22. ''What's even more disgusting was the company's complete indifference to the harassment. That's the real issue in the case for us.'' Cabeceiras is with Derek Smith Law Group in New York.

Under federal discrimination law, an employer may be liable for a hostile work environment created by an employee's co-worker if it knew or should have known about the harassment and failed to take action to correct it.

A UPS spokesman Sept. 22 told Bloomberg BNA that the company will ''review the allegations and respond accordingly.''

''UPS embraces diversity and inclusion as one of its core values and does not tolerate harassment or discrimination,'' he said.

Claims Under State, City Law Chaunce is bringing sex and sexual orientation discrimination, hostile work environment, and retaliation claims against UPS under Title VII of the 1964 Civil Rights Act, New York state law, and New York city law.

New York state and city law expressly allow employees to bring sexual orientation discrimination claims.

There's a split, however, among federal appeals courts as to whether Title VII's sex discrimination prohibition encompasses sexual orientation bias. The full U.S. Court of Appeals for the Second Circuit is scheduled Sept. 26 to hear oral argument on the issue.

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There are nuances in Title VII that allow gay, lesbian, bisexual, and transgender employees to bring sex-stereotyping claims, which have been recognized by the U.S. Supreme Court since 1989, Cabeceiras said.

An attorney hasn't yet entered an appearance for UPS.

BY JAY-ANNE B. CASUGA

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Labor Law

Punching In: Full Slate for Congress, Courts

The week ahead will be a busy one in the labor and employment world as Congress takes up a handful of Trump administration nominees and the Supreme Court starts a new term. To learn more, punch in with Ben Penn and Chris Opfer Monday morning for a look at the labor week ahead. You'll find their column here and can contact them on Twitter at @chrisopfer and @benjaminpenn.

The first labor-related order of business for the justices when they start a new term Monday is to decide if they should take another look at whether public sector unions can force nonmembers to pay ''fair share'' fees. Neil Gorsuch is likely to be the key vote in that case, which could offer a glimpse into how the court might view similar questions in the private sector.

The Senate is scheduled to vote Monday on management lawyer William Emanuel's (R) nomination for the National Labor Relations Board. The Health, Education, Labor, and Pensions Committee follows that up with preliminary votes on deputy labor secretary nominee Patrick Pizzella, Janet Dhillon for Equal Employment Opportunity Commission chair, and Daniel Gade for an EEOC commissioner spot.

Ben and Chris will also have some information on the latest battle over sexual orientation discrimination protections.

BY CHRIS OPFER AND BEN PENN

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Hiring

Starbucks Hiring Snafu Brews Up Background Check Lawsuit

Starbucks Corp. failed to give a job applicant an opportunity to correct an inaccurate background check before it decided to revoke a conditional job offer, according to a lawsuit filed in a federal court.

Kevin Wills didn't anticipate any problems because he had no criminal history and previously worked as a Starbucks barista. The company that Starbucks hired to conduct the background check returned information for another person who had a name similar to Wills and lived in a state where he had never lived, he says in the complaint filed in the U.S. District Court for the Northern District of Georgia (*Wills v. Starbucks Corp.*, N.D. Ga., No. 1:17-cv-03654, *complaint filed* 9/20/17).

Based on a report that someone named Kevin Willis was involved in domestic violence, Starbucks revoked Wills' conditional offer of employment without first providing him a copy of the report or giving him a chance to alert the company to the error, in violation of the Fair Credit Reporting Act, he says.

The background check company, Accurate Background Inc., mailed Wills a copy of the report after Starbucks notified him he wouldn't be hired, he says. At that point, he had already been harmed by Starbucks' failure to provide him a copy before it took an adverse action, he says.

Giving Applicants a Chance Starbucks and other large employers in recent years have adopted ''ban the box'' policies that delay criminal record inquiries until after a conditional job offer is made. Advocates say it gives applicants a chance to demonstrate their qualifications rather than face automatic disqualification as a result of checking ''yes'' on a box on the job application that asks about criminal history.

Starbucks and an attorney for Wills didn't respond to Bloomberg BNA's request for comment.

Skaar & Feagle LLP attorneys James Feagle and Cliff Dorsen in Tucker, Ga., and Kris Skaar and Justin Holcombe in Woodstock, Ga. represent Wills.

An attorney hasn't yet entered an appearance for Starbucks.

BY JON STEINGART

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Text of the complaint is available at http://www.bloomberglaw.com/public/document/Wills_v_Starbucks_Corporation_Docket_No_117cv03654_ND_Ga_Sept_20_?doc_id=X1Q6NTC3SEO2&imagename=1-1.pdf.

Media

Vice Media Video Producers Join Union

Vice Media employees who work in video production have officially organized after the media company recognized the bargaining units, the Writers Guild of America East announced Sept. 21.

About 430 workers will be represented by the WGAE and Motion Picture Editors Guild Local 700, the two groups said. The WGAE already represents about 100 journalists for the Brooklyn-based digital media company and established a collective bargaining agreement in 2015.

These 430 workers are involved in creating video content for VICE.com, the VICELAND cable channel, and VICE programming on HBO.

Vice recognized the union after a third-party card check confirmed the votes. A majority of the company's

content creators signed cards to join WGAE, and a majority of the post-production employees signed cards for MPEG, the two unions said. Vice's organizing committee delivered a letter to management in May to ask the company to honor the decision to unionize. The WGAE said the parties began talks shortly after the letter was sent.

WGAE: Creators Need a Say ''The WGAE knows it is essential for people who create content in this dynamic environment to have a seat at the table as the way the work is done--the way the content is made and distributed--continue to change. We have built a constructive relationship with VICE management and applaud the company for continuing to respect the right of its employees to engage in collective bargaining,'' Lowell Peterson, WGAE executive director, said in a statement.

''VICE is made up of thousands of the finest storytellers, filmmakers, producers, writers, and creatives. Working with employees who voted to join WGA-East and Local 700 and those who opted not to, we'll continue to advance a shared mission to make VICE home to the most innovative, entrepreneurial and progressive minds in media,'' a Vice spokesman said in a statement to Bloomberg BNA. ''We hope these efforts will include collectively joining forces to ensure New York State is doing everything in its power to support our content creators and our Brooklyn HQ.''

Vice laid off some 60 editorial and other employees in July, saying it was moving toward more video content. The WGAE was notified July 21 that 14 of its members were in that group.

Vice employs approximately 3,000 workers.

BY JACLYN DIAZ

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Public Employees

Chicago Cops File Labor Charge Over 'Use of Force' Policy

Chicago's new ''use of force'' policy for police violates its collective bargaining agreement with the union representing the city's 12,000 officers, the union says in a charge filed with the Illinois Labor Relations Board.

Fraternal Order of Police Lodge 7 says the Chicago Police Department imposed unilateral changes to the union's contract without bargaining in good faith. The charge, filed Sept. 21, references the CPD's ''Use of Force General Orders,'' which responded to public outcry over a series of high-profile police shootings and a U.S. Justice Department report that concluded city officers had engaged in a pattern of deadly force incidents that eroded community trust and violated the U.S. Constitution.

The union called on the labor board to bar the CPD from further implementation of the policy.

''The employer has a recent history and pattern of making unilateral changes to the parties' collective bargaining agreement without satisfying its statutory obligation of bargaining with the Charging Party over the impact prior to implementing such changes,'' the union says in its petition.

Mayor Rahm Emanuel said the union's challenge wouldn't derail the city's implementation of the use-of-force policy. Emanuel made the comments during an appearance Sept. 22 at the CPD training academy.

A spokesman for the CPD told Bloomberg BNA Sept. 22 that the department had no official response to the union's labor charges.

On-Going Bargaining Lodge 7 is in the early stages of negotiating a successor agreement with the department, following the expiration of its most recent contract on May 31, a spokesman for the union said. Any adjustments to department policy addressing use of force should be hashed out as part of those discussions, the official said.

Kevin Graham, president of Lodge 7, said the union opposes the policy, as well as the manner by which it was rolled out to rank-and-file officers.

''The city is not negotiating in good faith, and, frankly, we are tired of it,'' Graham said in a statement.

The policy, announced May 17, prohibits the ''use of excessive force, discriminatory force, force as punishment or retaliation, and force in response to exercise of 1st Amendment rights.'' The policy also features guidance on the use of deadly force, creates procedures for ''de-escalation'' to minimize use-of-force incidents, and imposes new limitations on the use of firearms. In addition, the policy creates requirements for reporting potential violations of use-of-force protocols.

The union's charge was filed one day after the CPD announced new training requirements under the policy. All police personnel will go through a four-hour training in the coming weeks as an orientation to the new policy. The four-hour course will be followed with an eight-hour ''scenario-based course'' in 2018 on the use-of-force requirements.

''The completion of this training is a significant milestone in our effort to provide additional resources to our officers and to improve our service to every Chicagoan,'' First Deputy Superintendent of Police Kevin Navarro said in a statement.

Intense Scrutiny The CPD, the second-largest police force in the country, has endured intense scrutiny over the past three years, particularly following the shooting death of Laquan McDonald in October 2014. McDonald, an unarmed teenager, was shot 16 times by Chicago police officer Jason Van Dyke, who was later charged with first-degree murder. Van Dyke is currently awaiting trial in Cook County Circuit Court.

The McDonald case and similar incidents of deadly force led to a Justice Department review of the CPD. The Justice Department issued a report Jan. 17, and concluded the CPD has ''engaged in a pattern or practice of unreasonable force—including deadly force—in violation of the Fourth Amendment of the Constitution.''

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DLR ISSN 0418-2693

Immigration

Travel Abroad Could Spell Trouble for Green Card Seekers

There may be a new snag for immigrants in the employment-based green card backlog: an inability to travel outside the U.S. for three or more months at a time.

''We're basically forcing people to be grounded,'' Laura Danielson of Fredrikson & Byron in Minneapolis told Bloomberg BNA.

Green card applicants generally can't leave the U.S. because it's considered a sign that they've abandoned their intent to seek lawful permanent residence. That is, unless they apply for and receive advance parole from U.S. Citizenship and Immigration Services.

For a long time, green card seekers who were on H-1B specialty occupation or L-1 intracompany transferee visas didn't need advance parole to travel internationally. Under a 1999 regulation, they could leave and re-enter the U.S. freely as long as their visas remained valid and they continued to work for the same employer that sponsored them for the visas.

''That practice has stopped,'' said Danielson, who heads her firm's immigration group.

Denials Started in August Around mid-August, H-1B and L-1 visa holders started receiving denials of their advance parole applications if they left the U.S. while those applications were still pending, Rosanna Berardi of Berardi Immigration Law in Buffalo, N.Y., told Bloomberg BNA Sept. 18. ''This is a huge shift,'' she said.

The USCIS is citing the instructions for the advance parole form, said Berardi, who heads the American Immigration Lawyers Association's Customs and Border Protection Liaison Committee.

AILA is aware of the issue and is talking to the USCIS to try to resolve it, according to Betsy Lawrence, the association's director of government relations.

But the agency says nothing is different. H-1B and L-1 visa holders ''are entitled to travel during the pendency'' of their green card applications ''as long as their visa remains valid,'' a USCIS spokeswoman told Bloomberg BNA Sept. 22.

Leaving the country before an advance parole application is decided is considered abandonment of that application, the spokeswoman said. But that doesn't apply to H-1B and L-1 visa holders because they don't need advance parole at all, she said.

''Neither regulation nor policy has changed,'' she said.

Could Be Stuck for 90 Days That's not the experience of at least some immigration attorneys. What's more, it's taking the agency longer to adjudicate advance parole applications than in the past, Danielson said Sept. 14.

Advance parole applications used to be approved the same day they were handed in, but now it's taking upwards of 90 days, she said.

The affected workers are ''often pretty high-level employees'' who may need to travel overseas to conduct business, Danielson said. There are family emergencies that require international travel as well, she said.

''Business people travel a lot,'' and usually on short notice, Berardi said. A wait time of three to four months just isn't reasonable because ''business is so fluid and so fast,'' she said.

Moreover, it could wind up having a chilling effect on businesses' willingness to sponsor workers on temporary visas, Berardi said.

''It's so frustrating that business professionals that are here trying to do the right thing always seem to be the target of rules that punish them,'' she said. The problem with a policy is that it ''can change on a dime'' and can be ''easily ignored if somebody wants it to be,'' she said.

But ''it's always been like that, this isn't unique to the Trump administration,'' Berardi said.

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Collective Bargaining

Michigan Curbs Negotiation Abilities of State Worker Unions

A new measure adopted by a state panel in Michigan has changed how labor unions representing more than 30,000 state workers can bargain.

Unions are calling the move restrictive and politically motivated. The state is saying the changes are meant to save taxpayers a few dimes while also streamlining the management process.

The new rules passed by the Michigan Civil Service Commission Sept. 20 prevent labor organizations from bargaining over provisions on seniority, job transfers, and grievance procedures.

Unions and workers in other states should prepare to see this in the future, Francis Ryan, a labor history professor at the Rutgers School of Management and Labor Relations, told Bloomberg BNA Sept. 22.

''I can definitely say that this is a trend that will continue,'' he said.

Bargaining Changes Coming in 2019 The commission voted 3-1 for the proposals by Janine M. Winters, the state personnel director.

A majority of the changes take hold in January 2019, when most of the existing labor contracts expire, Nick Ciaramitaro, legislative director for AFSCME Council 25, told Bloomberg BNA.

The new stipulations give more power to management and the commission and prevent the unions from bargaining on issues related to seniority, overtime pay, scheduling, and payroll deductions of union dues. Another change reinstates the board's ability to change wages and compensation if the governor declares a budgetary emergency.

All state workers would have to follow the commission's grievance process, not the grievance procedures established in collective bargaining agreements, Ciaramitaro said.

Different unions represent workers in various departments within the state, so at present there are different methods to determine which workers get preference

during layoffs and staff transfers and for overtime. Union contracts have onerous overtime rules requiring significant time and resources to record compliance, Winters' office said. If mistakes are made, those rules can result in expensive penalties.

The new rules give managers more freedom to manage their employees, the Michigan Chamber of Commerce told Bloomberg BNA. The Chamber spoke in favor of the proposals during the hearing on the changes.

Measure Mirrors Wisconsin The measure is similar to Wisconsin Act 10 from 2011. That legislation, proposed by Gov. Scott Walker (R), addressed a $3 billion budget deficit while also undercutting collective bargaining, compensation, retirement, health insurance, and sick leave of public sector employees, Ryan said.

The Michigan proposal is unusual in that it was not prompted by a budgetary emergency, Ryan said.

''This is clearly linked to what happened in Wisconsin,'' he said.

Public sector unions in other states should prepare for similar efforts in their statehouses. Michigan is not an isolated incident but is part of a bigger trend of anti-union politicians seeking ways to weaken labor's grip, Ryan said.

Employee, Manager Relations to Suffer In the long run, these changes will cause more problems than they will solve, Ciaramitaro said.

As of now, the unions involved are not considering a legal challenge to these rule changes. ''This will make it more difficult to problem solve at the bargaining table, which is really the right place to bargain,'' he said.

Unions were not brought in or consulted on these alterations, Ciaramitaro said. As a result, workers' relationship with management and the state will be strained.

''They want to make decisions without even consulting the workforce,'' he said.

The United Auto Workers, which also represents state employees, said the commission bowed to political pressure.

''These rigged rule changes which will go into effect in 2019, will give the governor more power to dictate working conditions by filling vital positions with unskilled political appointments instead of well-trained professionals who have dedicated their careers to serving Michiganders,'' Dennis Williams, the UAW president, said in a statement.

BY JACLYN DIAZ

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Federal Employees

California Job Fairs Draw Interest From Federal Workers

Some federal employees with expertise in climate change and energy are looking west for new opportunities.

A total of 205 people participated in a Sept. 20 ''virtual job fair'' hosted by California's Public Utilities Commission, Air Resources Board, and Energy Commission, CPUC President Michael Picker told Bloomberg BNA Sept. 21. The job fair took the form of a webinar in which participants could ask the agencies' directors questions about career opportunities related to the state's greenhouse gas reduction program.

A second virtual job fair is scheduled for Sept. 26, Picker said. The focus of the job fairs is on recruiting federal employees, but anybody who's interested in working for the three state agencies can participate, the CPUC said in an announcement about the events.

'Wave of Retirements' Hits Sunshine State The job fairs are being held as California confronts ''a wave of retirements,'' Picker said.

This is causing the state to look far and wide for qualified job applicants, including from federal agencies whose employees may not feel comfortable with President Donald Trump's climate change policies, he said.

The CPUC itself has 250 vacancies, out of a total workforce of 1,200 people, Picker said.

''For us, this has become an existential issue,'' Picker said. ''We've had really good retention'' in some cases for employees who've been with the agency for 30 to 35 years, he said. ''We're having to really scramble.''

Trump's fiscal year 2018 budget proposal calls for cutting 3,200 jobs at the EPA and sharply reducing the agency's budget, among other changes. The president in June said the U.S. would pull out of the Paris climate accord, under which participating nations must meet goals for reducing greenhouse gas emissions. The administration more recently has suggested it is amenable to sticking with the agreement if changes are made.

Former Federal Workers Heading West Three federal employees, including from the U.S. Department of Energy, recently accepted jobs with the utilities commission, Picker said. A fourth job offer to another federal worker is pending, he said.

In addition to those working at the DOE, federal employees at the Environmental Protection Agency and Interior Department have expressed interest in working for the state, Picker said.

Picker distributed leaflets in Washington, D.C., about California state job opportunities for two mornings in March, at the DOE's headquarters and at the EPA. He was in Washington for a meeting of the National Association of Regulatory Utility Commissioners.

''Those were the ones I could get to during a snowstorm,'' Picker said, referencing the late winter storm that took place during his visit.

'Win-Win' for California, U.S.? Jeff Ruch, executive director of Public Employees for Environmental Responsibility, a Washington-based nonprofit, told Bloomberg BNA Sept. 22 he's not surprised that California is looking to poach federal employees from agencies with environmental missions.

''Most federal laws postdate what California has already done,'' said Ruch, a former staffer in the California legislature whose group represents federal, state, and local government employees working for environmental agencies.

And many federal employees working at agencies with environmental missions aren't happy with the administration's stated policies on climate change and en-

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ergy, Ruch said. ''There's a long line at the federal get-out-of-Dodge window,'' he said.

Nick Loris, a fellow at the Heritage Foundation who focuses on energy and environmental issues, told Bloomberg BNA that California's efforts could be a ''win-win'' for both the state and federal governments.

''If there are folks who are displeased with the Trump administration's shift of priorities, it makes sense that they would want to work elsewhere,'' he said.

At the same time, the scientists' exits could make it easier for the president to change the federal government's environmental policies and reduce federal expenditures, Loris said. The Heritage Foundation is a Washington-based group that supports limited government.

The Energy Department, Interior Department, and the EPA didn't respond to requests for comment Sept. 22.

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Employer Stock

Wells Fargo Beats ERISA Challenge Over Cross-Selling Scandal

Wells Fargo & Co. defeated claims that it harmed workers' retirement savings by keeping company stock in its 401(k) despite allegedly knowing that the stock value was artificially inflated because of a 10-year ongoing cross-selling scheme (*In re Wells Fargo Erisa 401(K) Litig.*, 2017 BL 334045, D. Minn., No. 0:16-cv-03405-PJS-BRT, 9/21/17).

Participants failed to show that the plan's fiduciaries couldn't have concluded that a disclosure of the unethical sales practices prior to 2016 would have done more harm than good to their investments, Judge Patrick J. Schiltz of the U.S. District Court for the District of Minnesota held Sept. 21.

The opinion wasn't a complete loss for the participants. Schiltz allowed them to amend their claim of breach of the duty of loyalty, but they will have to specify exactly who breached the duty, when, and how.

The lawsuit follows the 2016 announcement that thousands of Wells Fargo employees had engaged in unethical sales practices, including opening more than 1.5 million deposit accounts and issuing over 500,000 credit-card applications for customers without their knowledge. The scheme allegedly started in 2005. The bank was fined $185 million by federal banking regulators, and the price of Wells Fargo stock dropped sharply.

The decision is the latest example of how difficult it is for investors to meet the challenging pleading standard imposed by a 2014 U.S. Supreme Court decision for claims of breach of fiduciary duty of prudence on the basis of inside information under the Employee Retirement Income Security Act. Wells Fargo joins a growing list of companies that have defeated such lawsuits, including Target Corp., Cliffs Natural Resources Inc., Reliance Trust Co., Lehman Brothers Holdings Inc., State Street Bank & Trust Co., RadioShack, Citigroup, Eaton Corp., Whole Foods Corp., JPMorgan Chase & Co., IBM Corp., and BP Plc.

In his ruling, Schiltz described the lawsuit as ''one of many actions in which plaintiffs' attorneys have taken what is essentially a securities-fraud action and pleaded it as an ERISA'' claim to avoid the demanding pleading requirements of securities laws and to take advantage of the strict duties imposed on ERISA fiduciaries.

The participants alleged sufficient facts that there was an alternative action the bank could have taken—early disclosure—that would have been consistent with the securities laws, Schiltz held. However, they fell short on their allegations that a prudent fiduciary in Wells Fargo's position couldn't have concluded that publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price, he concluded.

The factors a fiduciary must consider to determine whether an early disclosure is appropriate aren't exhaustive but are sufficient to make a point that an earlier disclosure isn't always the best option, Schiltz said.

DiCello Levitt & Casey LLC, Elias Gutzler Spicer LLC, Levi & Korsinsky LLP, Douglas J. Nill PLLC, Zimmerman Reed PLLP, Beasley Allen Crow Methvin Portis & Miles PC, Lockridge Grindal Nauen PLLP, Grant & Eisenhofer PA, and Vinson & Elkins LLP represent the participants. Proskauer Rose LLP and Dorsey & Whitney LLP represent Wells Fargo.

BY CARMEN CASTRO-PAGAN

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Text of the opinion is at http://bloomberglaw.com/public/document/In_re_Wells_Fargo_Erisa_401K_Litig_No_16CV3405_PJSBRT_2017_BL_334?doc_id=XUNBNT40000N.

Employee Benefits

N.Y. Concrete Company Ordered to Pay $76M in Alter Ego Case

Navillus Tile Inc., a New York construction company, has to pay $76 million after propping up alter ego companies so it could elude its obligations under collective bargaining agreements, a federal judge ruled following a bench trial (*Moore v. Navillus Tile, Inc.*, S.D.N.Y., No. 1:15-cv-08441, *verdict* 9/20/17).

The verdict against one of the largest concrete construction firms in the Big Apple should send a message to union employers that they can't avoid their obligations by setting up nonunion affiliates, Tom Kennedy, a lawyer with Kennedy Jennik & Murray PC in New York, said yesterday. Kennedy represented trustees of the fringe benefit funds that filed the lawsuit.

Navillus propped up companies with which it shared ownership, management, and customers, Judge Colleen McMahon wrote Sept. 20 for the U.S. District Court for the Southern District of New York. There was no evidence of anti-union animus, McMahon said. However, it was clear that Navillus treated the three other companies its ownership controlled as alter egos, so the other companies were bound by Navillus' obligation to contribute to the fund, she said.

''Since its inception, Navillus Contracting has been a staunch union supporter and employer, as well as one of the largest contributors to union benefit funds in the city,'' Navillus said in a statement emailed to Bloomberg BNA Sept. 22. ''We are currently reviewing all of our options including appealing to a higher court to reverse this erroneous decision.''

BY JON STEINGART

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Text of the opinion is available at http://www.bloomberglaw.com/public/document/Gesualdi_et_al_v_Navillus_Tile_Inc_et_al_Docket_No_115cv08441_SDN?doc_id=X1Q6NTC6GO82&fmt=pdf.

Enforcement

First Bankers Settles DOL Lawsuit for $6.6M

First Bankers Trust Services Inc. reached a $6.6 million settlement with the Labor Department in a lawsuit challenging First Bankers' role in a $70.9 million employee stock ownership plan transaction that caused millions of dollars in losses (*Acosta v. First Bankers Tr. Servs., Inc.*, S.D.N.Y., No. 1:12-cv-08648-GBD, *consent order and judgment* 9/21/17).

The deal, announced in court papers filed Sept. 21, resolves allegations that First Bankers used faulty valuation methods when it orchestrated an ESOP transaction for the employees of Maran Inc., a private label denim manufacturer. In addition to the settlement amount, the DOL said it assessed—and waived—a $1.3 million penalty on First Bankers for its violations of the Employee Retirement Income Security Act.

This deal may offer clues as to how the DOL and First Bankers will resolve another pending lawsuit challenging the company's role as an ESOP trustee. Court papers indicate that this case, which involves a $15.5 million ESOP transaction for metal manufacturer Rembar Co., has been settled in principle, with specific settlement terms due to the court as early as Sept. 29.

Both settlements come within months of a judge holding First Bankers liable for $9.5 million in a DOL enforcement lawsuit involving a stock transaction that overvalued a residential construction company based on data from the height of the housing market. The DOL indicated in July that this case has since been settled, with specific terms forthcoming.

First Bankers and the DOL are also embroiled in litigation over the company's role in an ESOP transaction for Sonnax Industries Inc.

First Bankers is represented in the Maran lawsuit by Fox Rothschild LLP. The deal was approved by Judge George B. Daniels of the U.S. District Court for the Southern District of New York.

BY JACKLYN WILLE

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Text of the consent order is at http://www.bloomberglaw.com/public/document/Perez_v_First_Bankers_Trust_Services_Inc_et_al_Docket_No_112cv086/3?doc_id=X1Q6NTCCOV82&fmt=pdf.

Sexual Harassment

SoFi Condoned 'Rampant Sexual Activity,' Latest Lawsuit Says

A former loan reviewer at Social Finance Inc. claims in a lawsuit she was repeatedly sexually harassed while working there, ratcheting up pressure on the embattled fintech startup.

Yulia Zamora told her superiors about the sexually charged behavior but was ignored, according to her complaint filed Sept. 21 in California state court. Characterizing the company as a ''frathouse,'' Zamora described drinking parties and ''rampant sexual activity'' in bathrooms and parked cars.

Zamora's is one of at least three lawsuits filed in recent months against SoFi, which Sept. 15 replaced cofounder and Chief Executive Officer Mike Cagney amid allegations that he sexually harassed female employees. SoFi, which refinances student loans and offers other personal financial services, is just the latest Silicon Valley startup under fire for loutish behavior. A Sonoma County Superior Court court clerk confirmed by phone that the complaint was filed Sept. 21.

The company landed in the news in August, when a former senior operations manager named Brandon Charles filed a lawsuit claiming he was fired for reporting sexual harassment by managers. Since then a flurry of reports have alleged sexual misconduct by top managers as well as unethical business practices. The board named Executive Chairman Tom Hutton interim CEO, after Cagney told employees in a memo that ''the combination of HR-related litigation and negative press have become a distraction from the company's core mission.''

In the new suit, Zamora alleges that managers encouraged employees to drink from beer kegs and a margarita cart at SoFi's office in Healdsburg, California. Managers ''relentlessly flirted with subordinates'' and had sex whenever and wherever they could, including in parked cars and in bathroom stalls where they broke toilet seats, according to the complaint. Zamora also alleges a director at the company repeatedly propositioned her and other employees for sex.

Top management indulged in the inappropriate behavior, which then trickled down through the ranks, according to the complaint. Cagney dated subordinates at SoFi's San Francisco office—where his wife works as chief technology officer and vice president of engineering—and attended parties with SoFi's Healdsburg staff while intoxicated, Zamora alleges.

SoFi said in a statement that ''while we can't comment on the specific allegations in this lawsuit, harassment of any kind has no place at SoFi. The board and management of SoFi are committed to creating a culture where employees can thrive.''

DLR ISSN 0418-2693

Allegations Against Former CEO Cagney has engaged in at least one inappropriate relationship with a female employee, people familiar with the matter have said.

Having relationships with superiors became a way for women to get promotions, raises and benefits, according to the complaint. Adam Cobb, director of operations, told Zamora and other female coworkers they could only get promotions by attending individual mentorships with him. Zamora agreed to what she believed was a strictly professional relationship.

In the complaint, Zamora describes an office Christmas Party in December 2015, during which Cagney was drunk on the dance floor with Cobb, who followed Zamora to an after-party and propositioned her. Zamora walked away and approached her supervisors, who laughed. Zamora alleges that for months after the incident, the story was spread as a source of entertainment across the company and action was not taken against Cobb.

Cobb's mentorship of Zamora ended and she was never promoted or given any benefits after she rejected Cobb, according to the complaint. Zamora resigned after a year at the company because of stress and lack of opportunity for her as a woman in the company.

Other Allegations Zamora's allegations echo the stories of other women who worked at SoFi's main San Francisco headquarters.

Top management engaged in heated arguments that involved profanity and throwing objects, according to several former employees. Nino Fanlo, who quit as chief financial officer in May, would kick or throw chairs in his office out of anger, said some of the people, who requested anonymity to discuss internal matters. Fanlo also massaged employees' shoulders and made inappropriate comments about women, including commenting on women's breasts in meetings and publicly telling a female employee to lose weight, they said. The overall environment was hostile and women feared retribution if anything was reported to HR, the people said.

In a phone interview, Fanlo acknowledged kicking a garbage can because he was stressed out and said his comments about women's weight have been taken out of context. ''I patted both male and female shoulders,'' he said. ''I did not massage shoulders.''

Cagney, a former Wells Fargo & Co. trader, cofounded SoFi in 2011 by helping graduates from top-tier universities refinance student loans at low interest rates. The company was valued at $4.3 billion in its last financing round in February, raising more than $1 billion from investors including SoftBank Group Corp. and Silver Lake Partners.

—With assistance from Julie Verhage.

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Technology

Hewlett Packard Enterprise Is Said to Plan About 5,000 Job Cuts

Hewlett Packard Enterprise Co. is planning to cut about 10 percent of its staff, or at least 5,000 workers, according to people familiar with the matter, part of a broader effort to pare expenses as competition mounts.

The reductions are expected to start before the end of the year, said the people, who asked not to be identified because the matter is private. The cuts at the company, which has about 50,000 workers, are likely to affect workers in the U.S. and abroad, including managers, the people said. A Hewlett Packard Enterprise representative didn't immediately respond to requests for comment.

Chief Executive Officer Meg Whitman has been jettisoning divisions since 2015, including personal computers, printers, business services and key software units. The moves are all part of an effort to make HPE more responsive to a changing industry that's under pressure from cloud providers such as Amazon.com Inc. and Alphabet Inc.'s Google.

The job cuts ''will not create a near—or long-term—respite to its structural growth issues,'' Bloomberg Intelligence analyst Anand Srinivasan wrote in a note. ''These cuts will likely cause charges that may last for one or two quarters. They also don't address the longer-term sales-growth weakness amid public cloud growth.''

On a call with analysts earlier in September, Whitman said the Palo Alto, California-based company is benefiting from growing demand across key areas of the business. At the same time, she said she's pushing to cut ''layers'' in the organization and become more efficient.

''With fewer lines of business and clear strategic priorities, we have the opportunity to create an internal structure and operating model that is simpler, nimbler and faster,'' she said.

On the same call, Chief Financial Officer Tim Stonesifer said the company is targeting $1.5 billion in savings over a three-year period.

By Brian Womack

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Collective Bargaining

Securitas, Other NJ Employers Pencil In Deal With Guards' Union

Roughly 1,700 workers reached a tentative agreement for a new contract with some of New Jersey's largest security contractors Sept. 21, a union spokeswoman confirmed.

The security officers are represented by the Service Employees International Union and are set to vote on

the agreement Sept. 30, the spokeswoman told Bloomberg BNA.

The proposed contract would increase wages and paid time off. Minimum salaries would rise from $11 an hour to $13.75 an hour, and employees would receive paid leave for Martin Luther King Jr. Day.

If ratified, the contract would expire at the end of September 2021.

Twelve companies are participating in the agreement, including Allied Universal Security Services, Command Security, G4S Secure Solutions, and Securitas Security Services Inc.

''Throughout the United States and across the globe, G4S respects the rights of its employees to choose whether or not to be represented by a union in accordance with applicable law,'' the company's representative said in an email. ''G4S has positive and constructive working relationships with the unions that represent its employees, including the Service Employees International Union in New Jersey.''

On Sept. 20, G4S, Allied Universal, and Securitas ratified a contract with roughly 300 security officers in Ohio, also represented by the SEIU.

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Dumping

International Trade Commission Votes to Tax U.S. Solar Imports

The U.S. International Trade Commission concluded that a flood of cheap, foreign solar panels is hurting U.S. manufacturers, teeing up an opportunity for President Donald Trump to impose tariffs and import quotas.

The panel's decision now threatens to upend the $29 billion U.S. solar industry. More expensive prices for cells and panels would crimp demand for solar projects that have burgeoned in the past decade. Even before the Sept. 22 vote, some developers had halted construction and begun hoarding supplies, anticipating that tariffs could double the price of imported components.

The ITC, a U.S. agency, is next set to deliver its recommendations to address the import surge to the president by Nov. 13, handing Trump an opportunity to score political points on three priorities: He can slap a tariff on China and argue he's protecting U.S. jobs, all while undermining the economics of an industry that competes with coal.

''President Trump can remedy this injury with relief that ensures U.S. energy dominance that includes a healthy U.S. solar ecosystem and prevents China and its proxies from owning the sun,'' according to a statement from Suniva Inc. emailed shortly after the commission's 4-0 decision.

Georgia-based Suniva is driving the suit. The company filed for bankruptcy protection in April and followed up days later with the trade suit. The company is seeking import duties of 40 cents a watt for solar cells, and a floor price of 78 cents a watt for panels, which currently average about 32 cents worldwide.

In the short term, the decision means uncertainty for solar, said Bloomberg New Energy Finance analyst Amy Grace. Trump has until Jan. 12 to rule on the commission's recommendations. Until the size, scope and length of tariffs are clear, it's difficult for companies to plan projects and sign contracts.

''It's another wave of uncertainty that affects the solar industry,'' said Grace, who estimates tariffs will impact $50 billion to $60 billion of projects.

The U.S. unit of SolarWorld AG, a bankrupt German panel manufacturer, joined Suniva to argue they have been hobbled by a global glut of cheap cells, an industry dominated by China. Unlike earlier trade cases, this one would apply on U.S. imports from any nation.

''We welcome this important step toward securing relief from a surge of imports that has idled and shuttered dozens of factories,'' SolarWorld Americas Chief Executive Officer Juergen Stein said in an emailed statement.

Most of the U.S. solar industry, which uses the cheap panels for rooftop or utility-scale projects, opposes the effort, arguing that inexpensive imports have driven a boom in U.S. solar projects and tens of thousands of jobs hang in the balance. Abigail Ross Hopper, president of the Solar Energy Industries Association, called it an ''ill-conceived case'' driven by creditors wanting to recover some of their investments ''in poorly run companies.''

''The ITC's decision is disappointing for nearly 9,000 U.S. solar companies and the 260,000 Americans they employ,'' Hopper said in a statement. ''Foreign-owned companies that brought business failures on themselves are attempting to exploit American trade laws to gain a bailout for their bad investments.''

Matthew McGovern, chief executive officer of solar developer Cypress Creek Renewables LLC, said there are not enough solar panels made in the U.S. to meet demand. Project costs will rise without low-cost imports, he said in an interview.

'Slowing Impact' ''It's hard to imagine that a stiff tariff would not have a deeply slowing impact,'' said McGovern, whose company is based in Santa Monica, California.

The case is unusual -- and not just because Suniva's majority owner, Shunfeng International Clean Energy Ltd., opposes it. It also was pursued under a rarely used provision of a trade law that offers companies a ''global safeguard'' that can result in broad, uniform protection against imports -- not just tariffs on specific countries or companies. Under that 1974 trade measure, Suniva only had to prove that imports have caused it ''serious injury'' — not that foreign competitors did anything unfair or illegal.

Such ''global safeguard'' cases were relatively popular in the 1980s and 1990s, but they fell out of favor after a string of losses. Even when the ITC sided with domestic manufacturers, presidents were often unlikely to impose a penalty.

These cases have had a resurgence under Trump, whose protectionist rhetoric may be leading companies to think he'll support tariffs or import quotas. In addition to Suniva's claim, the ITC has been conducting a separate global safeguard investigation of large residential washers. Still, Trump is also trying to coax the Chinese leadership into cracking down on North Korea, and so imposing tariffs may complicate that effort.

DLR ISSN 0418-2693

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Disability Benefits

DOL to Give Disability Claims Regulation a Second Look

The Labor Department plans to propose changes to an Obama-era regulation requiring full and fair reviews of disability benefit claims.

A proposed rule that would either amend or delay a final rule from last December was received by the Office of Management and Budget for review on Sept. 21. The Obama-era rule adopts certain safeguards for disability benefit claims that are available to claims for group health benefits under the Affordable Care Act.

The Trump administration indicated in July in its first regulatory agenda that it would review the final regulation for ''questions of law and policy.''

Generally, the OMB can take up to 90 days to review a rule, but since the rule applies to disability claims beginning Jan. 1, the turnaround time for this one could be sooner. The OMB has taken similar steps with the fiduciary rule, approving delays in less than 30 days.

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EEOC

Roundup of Newly Filed EEOC Lawsuits

The following list of Equal Employment Opportunity Commission lawsuits was compiled from court documents and the agency's published statements.

LAWSUITS FILED

EEOC v. The Hertz Corp., D. Colo., No. 1:17-cv-02298, *complaint filed* 9/22/17. *Statute:* Americans with Disabilities Act. *Claim:* Rejected applicant whom it actively recruited for sales position in car sales division in Denver based on his online resume after he showed up at interview using cane, which he uses for stroke-related mobility impairment.

EEOC v. Lowe's Cos., N.D. Tex., No. 3:17-cv-02589, *complaint filed* 9/22/17. *Statute:* Americans with Disabilities Act. *Claim:* Withdrew long-time accommodation being provided to manager in Cleburne, Texas, store who has spinal cord impairment that prevents him from operating certain power equipment that requires the use of both hands and demoted him to lower-paying, nonmanagerial customer service associate position.

EEOC v. Driven Fence, Inc., N.D. Ill., No. 1:17-cv-06817, *complaint filed* 9/21/17. *Statute:* Title VII of the 1964 Civil Rights Act. *Claim:* Subjected black employee at Melrose Park, Ill., facility to racially hostile work environment, including the hanging of a noose in the warehouse where he worked and repeated race-based slurs and comments by warehouse manager and co-workers.

EEOC v. Heart's Desire, LLC, E.D. La., No. 2:17-cv-09390, *complaint filed* 9/21/17. *Statute:* Americans with Disabilities Act. *Claim:* Fired direct care worker who disclosed he has HIV because it regarded him as disabled.

EEOC v. Midwest Gaming and Entm't, LLC, N.D. Ill., No. 1:17-cv-06811, *complaint filed* 9/21/17. *Statute:* Americans with Disabilities Act. *Claim:* Failed to reasonably accommodate slot technician who was on leave for cancer treatment by allowing him a few additional weeks of leave for surgery and instead terminated him.

EEOC v. Gulf Logistics Operating Inc., E.D. La., No. 2:17-cv-09362, *complaint filed* 9/20/17. *Statute:* Americans with Disabilities Act. *Claims:* Discharged deckhand with situational depression or adjustment disorder related to marital problems based on biased perceptions of vessel captains that he posed direct threat to himself and others and was ''distraction'' or that he was unable to perform job's essential functions despite being cleared to work by company doctor and personal physician; violated ADA's ban on illegal medical inquiries and exams by requiring worker to obtain medical release before he could return to work because he sought referral to company's employee assistance program for help with condition.

EEOC v. LHC Operating LLC, N.D. Ill., No. 1:17-cv-06803, *complaint filed* 9/20/17. *Statute:* Title VII of the 1964 Civil Rights Act. *Claims:* Subjected class of female employees at Lincoln Park gym's restaurants to sexual harassment; failed to reasonably prevent or remedy harassment; fired one employee in retaliation for complaining to human resources department about harassment.

EEOC v. v. Wood Grp. PSN, Inc., W.D. La., No. 2:17-cv-09339, *complaint filed* 9/20/17. *Statute:* Americans with Disabilities Act. *Claim:* Refused to hire applicant for production operator position on offshore drilling platform at Grand Isle, La., shipyard after becoming staffing contractor for client that operated platform because he has Type I insulin-dependent diabetes, even though he had performed job for prior contractor without incident or accommodation.

EEOC v. Rosebud Rests., Inc., N.D. Ill., No. 1:17-cv-06815, *complaint filed* 9/20/17. *Statute:* Title VII of the 1964 Civil Rights Act. *Claims:* Subjected female server at Centro restaurant in Chicago to hostile work environment based on sex, including unwelcome and offensive comments, propositions, and touching by co-worker; fired her in retaliation for complaining about sexual harassment and harassment of black employees.

NLRA

CORRECTION

A Sept. 15 story, ''Job Corps Contractors Jointly Liable for Labor Law Violations,'' has been corrected to reflect that Michael G. Pedhirney and Sean M. McCrory of Littler Mendelson in San Francisco and Dallas represented Adams and Associates Inc., and that Mickey L. Washington of Washington & Associates in Houston represented McConnell, Jones, Lanier & Murphy LLP.

DLR ISSN 0418-2693

Latest Cases

Litigation

Latest Labor and Employment Cases for September 22, 2017

The following are summaries of the latest court and National Labor Relations Board rulings involving labor law, wage and hour, discrimination, disabilities and individual employment rights, prepared by Bloomberg BNA legal editors.

NLRB

Interference An employer that provides linen and laundry services unlawfully threatened to call and called the police when union representatives refused to leave a public right-of-way in front of its facility where they were distributing handbills to employees. The union representatives had already moved to the shoulder of the highway at the employer's request when the employer called the police, and it was not reasonable for the employer to believe that it had a property interest in the shoulder that privileged it to exclude them (*ImageFIRST Uniform Rental Service, Inc.*, N.L.R.B., 04-CA-166319, 9/22/17).

Refusal to Bargain Two environmental contractors unlawfully refused to recognize and bargain with a Laborers local following its certification as exclusive bargaining representative for a unit of workers they jointly employ. The contractors argued that some or all of the complaint is barred by the NLRA's six-month limitations period, but one contractor admitted that the charge was filed the same month it first failed and refused to bargain with the union, and all representation issues they raise were or should have been litigated in the earlier representation proceeding (*Retro Environmental, Inc. / Green JobWorks, LLC*, N.L.R.B., 05-CA-195809, 9/22/17).

WAGE & HOUR

Preemption A staffing agency nurse working a South Carolina prison can go ahead with her state-law claim seeking pay for vacations, holidays, and sick leave, despite the argument that her federal overtime claim that she was misclassified as an independent contractor preempts her state claim. The federal wage law doesn't have a remedy for paid leave claims such as hers, and the agency's contract with the state prison system says that nurses are agency employees, the court noted (*Turner v. Condustrial, Inc.*, 2017 BL 334595, D.S.C., No. 3:17-00205-MBS, 9/21/17).

Minimum Wage A fired service advisor for a Pennsylvania car dealership can go ahead with his federal and state minimum wage claims after his final paycheck netted him $11.60 due to a ''miscellaneous'' deduction of $415, because the dealership's ''earnings record'' that says he was paid an over $3,000 commission wasn't part of his complaint and his pay stub indicates that he was paid nothing in commissions during his last pay period (*Pleickhardt v. Major Motors of Pa., Inc.*, 2017 BL 334329, M.D. Pa., No. 3:17-CV-0375, 9/21/17).

Damages A Massachusetts social services agency owes a group home worker an additional $142,041 in liquidated damages after a jury found that her firing when she was suddenly hospitalized for mental illness violated the Family and Medical Leave Act, because the agency fired her without asking about her condition and refused to reconsider its decision when she provided a doctor's note saying she could return to work. She doesn't get front pay until her estimated retirement in 10 years, however, because the jury award of the same amount for lost wages and benefits was enough to make up for her job loss, the court found (*Boadi v. Ctr. for Human Dev., Inc.*, 2017 BL 334004, D. Mass., No. 14-cv-30162-KAR, 9/21/17).

Settlement Agreements A nationwide facility management company may pay a total of $4.8 million to settle two federal collective actions claiming that janitors weren't paid overtime for pre-shift work, even though the $3.8 million of this sum for attorneys' fees and expenses equals a 76 percent fee while the janitors get 27 percent of their possible damages. The settlement is fair in view of the complicated dispute involving 6,193 janitors working in 10,000 facilities under 45 different collective-bargaining contracts, and the same formula was used to settle a similar case, the court found (*Binissia v. ABM Indus., Inc.*, 2017 BL 333784, N.D. Ill., No. 15 cv 6729 Consolidated for Purposes of Settlement, 9/21/17).

DISCRIMINATION

Retaliation A male former employee at an Atlanta car dealership can't proceed on his claim that the company fired him because of his internal complaint regarding unfair treatment. He spoke to human resources about some questionable dealing practices because he didn't ''want to get accused of cheating customers'' but didn't make any allegation about the company's treating him differently because of his race, sex or national origin, the court says (*Bolden v. Asbury Auto. Grp.*, 2017 BL 335578, N.D. Ga., 1:17-cv-2369-WSD, 9/21/17).

Retaliation A black former police officer can't proceed on his claim that the New York Police Department fired him because he participated in a class-action lawsuit against the NYPD rather than because he failed a drug test. His complaint alleged only generalized instances of the NYPD retaliating against officers who participated in the suit but nothing specific as to how the NYPD treated him, and he was actually promoted after his involvement in the lawsuit (*Waithe v. City of New York*, 2017 BL 334628, S.D.N.Y., 16-cv-5510 (KBF), 9/21/17).

Hiring A black woman of Nigerian descent who is over 40 years old can't show that a District of Columbia staffing company didn't offer her any job assignments because of her race, age and national origin rather than the fact that there might not have been any job openings for her. Though she believed that the agency was going to refer her for positions, she didn't offer any evidence that there was any specific job vacancy for which she applied and was rejected, let alone because of her race, age or national origin, the court says (*Ogunsula v. Staffing Now, Inc.*, 2017 BL 334353, D.D.C., Civil Action No. 15-cv-0625 (TSC), 9/21/17).

Discharge A Muslim physician of Syrian descent can go to trial on his claims that CMS Medical Care Corporation in Pennsylvania fired him because of his religion and national origin rather than the fact that he wrote a hostile email to another doctor in violation of the company's workplace violence policy. The email didn't contain an explicit threat, and the physician made clear in the body of the email that even though he was appalled at some of the events ongoing at the Hospital, he held ''no ills'' toward the other doctor (*Rifai v. CMS Med. Care Corp.*, 2017 BL 333790, E.D. Pa., CIVIL ACTION NO. 15-1395, 9/21/17).

Discharge A 51-year-old former legal assistant can proceed on her claims that an Illinois law firm treated her differently and gave her poor performance evaluations because of her age and ultimately fired her in retaliation for her EEOC charge regarding those issues. Though she didn't explicitly allege that the firm had at least 20 employees, she attached to her briefing an employee list that names more than 20 people (*Clarke v. Law Office of Terrence Kennedy*, 7th Cir., No. 16-4277, 9/21/17).

INDIVIDUAL EMPLOYMENT RIGHTS

Trade Secrets Bixby Zane Insurance Services is entitled to a temporary restraining order to stop its former sales manager from using its confidential rates and price lists to solicit business from its clients and partners after he quit to start his own business. Bixby has shown that it has a public interest in protecting its confidential information and that the manager is causing serious harm to its relationship with a business partner (*PEO Experts CA, Inc. v. Engstrom*, E.D. Cal., No. 2:17-cv-00318-KJM-CKD, 9/21/17).

First Amendment A tenured professor for the University of Texas Pan-American doesn't have a First Amendment claim that he was fired in retaliation for making inappropriate statements to his students and for refusing to withdraw a criminal complaint filed against a co-worker. The professor's statements were personal in nature, he failed to provide the context in which the statements were made, and he hasn't sufficiently shown that his complaint led to him being fired (*Banik v. Tamez*, S.D. Tex., CIVIL ACTION NO. 7:16-CV-00462, 9/21/17).

Tortious Interference A former director of sales may proceed with her claim against All Systems Satellite Distributors Inc. alleging that it interfered with her employment when its owner threatened to stop doing business with a company if it didn't fire her. All Systems argues that the director was an at-will employee and didn't have an expectation of continued employment, but the company promised her employment for at least six months (*Beaulac v. All Sys. Satellite Distribs., Inc.*, D.N.H., Civil No. 17-cv-162-JD, 9/21/17).

Noncompete Agreements EMS USA Inc. may enforce a noncompete agreement that prevents its former office manager from working for a competing company in the same territory for 12 months after firing him for cause. The manager hasn't shown that the terms of the agreement are unreasonable or overly broad (*Costanzo v. EMS USA, Inc.*, 2017 BL 334649, N.D. W.Va., Civil Action No. 5:16CV168, 9/21/17).

DLR ISSN 0418-2693