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WHAT'S INSIDE

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COMMENTARY

NLRB's plan: Expand labor's influence

Attorney Donald W. Schroeder of Mintz Levin examines recent National Labor Relations Board decisions and reports and discusses how NLRB trends may affect employers and employees.

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DEFAMATION

Pilot keeps $1.4 million defamation award against Air Wisconsin

A divided *en banc* Colorado Supreme Court has affirmed a jury verdict and $1.4 million award in favor of an Air Wisconsin pilot who sued the airline for telling the Transportation Security Administration that he was "mentally unstable" and may be armed.

Air Wisconsin Airlines Corp. v. Hoeper, No. 09 SC 1050, 2012 WL 907764 (Colo. Mar. 19, 2012).

The trial court should not have submitted to the jury the question of whether Air Wisconsin was immune from suit under the Aviation and Transportation Security Act, but the error was harmless, the majority said in a 4-3 vote.

The ATSA, rather than Colorado state law, applies to determine whether the airline was immune, the majority explained.

After analyzing the federal statute, the majority determined that the airline was not entitled to immunity.

The justices also determined there was clear and convincing evidence to support a finding of actual malice in the statements by the airline. A showing of actual malice is required to support a successful claim of defamation.

The three dissenting justices said the airline was entitled to immunity under the ATSA because the statements it made to the TSA were substantially

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NLRB's plan: Expand labor's influence

By Donald W. Schroeder, Esq.
Mintz Levin

Armed with greater resources as a result of increased funding levels in President Obama's budgets, the National Labor Relations Board's efforts over the past year leave little doubt regarding its anti-business agenda. Indeed, the board has not only departed from long-standing precedent but has also pursued significant changes in its regulations and practices, which have negatively impacted employers.

IS THE NLRB'S NOTICE-POSTING RULE UNCONSTITUTIONAL?

In *National Association of Manufacturers v. National Labor Relations Board*, No. 11-1629, 2012 WL 691535 (D.D.C. Mar. 2, 2012), Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia gave the NLRB the green light to enforce its notice-posting rule, which requires most union and nonunion private employers to display an 11x17-inch poster apprising employees of their rights under the National Labor Relations Act no later than April 30.

The National Association of Manufacturers, the National Right to Work Legal Defense and Education Fund Inc., the Coalition for a Democratic Workplace, the National Federation of Independent Business, and several small businesses argued unsuccessfully that the rule violates federal labor and regulatory law as well as the First Amendment to the Constitution.

The National Labor Relations Act itself does not contain a notice-posting requirement, and the attempt to create one was construed as an improper effort by the NLRB to expand its jurisdictional reach.

Even so, Judge Jackson maintained that the notice-posting requirement was legal because the NLRA provides the board a "broad, express grant of rulemaking authority."

At the same time, Judge Jackson struck down two of the rule's key enforcement provisions:

- The board cannot charge employers with a "new" unfair-labor-practice charge for failing to post the NLRA poster.
- The board cannot toll the statutory six month statute of limitations for the time period an employer is not in compliance with the notice-posting requirements.

The court found that with these two provisions, the NLRB exceeded its statutory authority, but private employers still complain that the entire rule represents an abuse of power. One plaintiff in the case has already announced it would appeal the ruling, and a second challenge to the rule is pending in federal court in South Carolina.

Lastly, Judge Jackson declined to rule on the validity of Obama's January recess board appointments, maintaining the issue was not relevant to the case since the board had an undisputed quorum when the rule was adopted in August.

> The NLRA itself does not contain a requirement that employers post a notice about employee rights, so many believe the NLRB's adopting such a rule means it is trying to expand its jurisdictional reach.

THE BOARD'S QUORUM PROBLEM

The question of the NLRB's quorum has been a hot issue since board member Craig Becker's term expired Jan. 2. With just two remaining members, the board would have been paralyzed and, based on a recent U.S. Supreme Court decision, unable to issue decisions or engage in rulemaking.

Given the NLRB's current posture, which critics have dubbed as aggressively pro-union and anti-business, many were relieved that the board was poised to lose its ability to create any new binding precedent.

However, in a move that Republican congressional leaders have called an unprecedented abuse of power, Obama made three recess appointments to the board Jan. 4 to fill the vacancies. He appointed two Democrats: Sharon Block, deputy assistant secretary for congressional affairs at the U.S. Department of Labor, and Richard Griffin, general counsel for the International Union of Operating Engineers.

> The U.S. Chamber of Commerce said the NLRB has reviewed over 130 cases involving social media.

He also appointed one Republican, Terence F. Flynn, who was chief counsel to NLRB member Brian Hayes.

Because the U.S. Senate is not technically in recess unless it breaks for longer than three days, a number of U.S. senators attempted to invalidate the appointments by holding brief *pro forma* sessions every fourth day.

The Justice Department issued a memo Jan. 6 that partially clarified the issue by stating that the *pro forma* sessions, in which no business was conducted, could not preclude the president from making recess appointments.

Even so, it is likely the issue will wind up in the courts, as defendants in multiple cases have claimed that the board's rulings are invalid because it lacks a legal quorum.

NLRB ISSUES REPORTS ON SOCIAL MEDIA

In what some are calling yet another bid to increase its purview, the NLRB has been closely scrutinizing a growing number of cases involving social media, and it issued two reports profiling its decisions on social media issues. Significantly, some of the cases discussed do not involve unionized businesses.

In response to the NLRB's heightened attention to social media cases, last August

the U.S. Chamber of Commerce issued a survey of social media issues before the NLRB.

The Chamber reported that over the past two years, the NLRB has reviewed over 130 cases involving social media, resulting in seven settlement agreements, 10 Division of Advice memoranda regarding protected activity in the context of social media, seven board complaints, and two decisions issued at the administrative law judge level.

BOARD'S RECENT PRO-EMPLOYEE DECISIONS

Aside from its activist agenda on the regulatory front, the board has also pursued an aggressive, pro-employee stance in its recent decisions. Most notably, in *In re D.R. Horton Inc.*, 357 NLRB No. 184, 2012 WL 36274 (N.L.R.B. Jan. 3, 2012), the board sidestepped two recent Supreme Court pro-arbitration decisions, ruling that an employer cannot force employees to sign arbitration agreement provisions whereby the employees waive any rights to file class or collective actions.

> The U.S. Supreme Court ruled in 2009 that a union could waive labor rights for employees by negotiating arbitration provisions that mandate arbitration of employment claims.

The NLRB's recent decision against the nonprofit Hispanics United of Buffalo Inc. illustrates the board's effort to establish social media sites as the new water cooler and assert its authority over nonunionized workplaces.

In a first-of-its-kind decision, ALJ Arthur Amchan ruled that HUB violated federal labor law by terminating five employees for their Facebook posts.

In an online email exchange, five employees discussed a co-worker's accusation that HUB's employees did not do enough to serve their clients. Later, in what the NLRB's General Counsel Lafe E. Solomon called a textbook example of an illegal firing, the employees were terminated. ALJ Amchan found that the firings violated the NLRA by interfering with employees' right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

The Sept. 2, 2011, decision against HUB, which represented the first time an ALJ ruled on a Facebook case in the context of an NLRB-related proceeding, is in step with the board's push to make Facebook an explicitly protected area for employee grousing.

In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the U.S. Supreme Court ruled the Federal Arbitration Act preempts state laws that prohibit class-action waivers. Likewise, the Supreme Court ruled in 2009 that a union, unlike employees in *D.R. Horton*, could waive Section 7 rights for its employees by negotiating arbitration provisions that mandate arbitration of employment claims.

Despite this backdrop of clear and unequivocal judicial precedent, the board distinguished both decisions, finding that:

- The FAA does not preempt the National Labor Relations Act where an employee's Section 7 rights are implicated.
- While a union may waive Section 7 rights in the collective bargaining process, an employer cannot force an individual to waive those rights through an arbitration agreement. This decision will obviously face harsh judicial scrutiny at the appeals court level.

CONCLUSION

Against this backdrop, there is little doubt that the NLRB will continue its proactive efforts in establishing its influence over matters involving the workplace. While that was always the case in union environments, the NLRB has widened its approach, seeking to educate nonunion employees about their rights.

With employers on the hunt for passwords to employees' Facebook accounts, the NLRB will undoubtedly weigh in on that debate in the near future. WJ

Westlaw subscribers can scan this QR code to see the ruling in* National Association of Manufacturers v. NLRB *on Westlaw.

Westlaw subscribers can scan this QR code to see the NLRB decision in* D.R. Horton *on Westlaw.

Donald W. Schroeder, a member in the employment, labor and benefits section of **Mintz Levin** in Boston, has extensive experience providing counsel to and handling litigation for corporations in union and nonunion settings on a broad range of issues, including terminations, internal investigations, employment policies and reductions-in-force.

High court rejects challenge to disclosure of pilot's HIV-positive status

A pilot who challenged under the Privacy Act the disclosure of his HIV-positive status to several federal agencies is not entitled to damages for mental or emotional distress, a divided U.S. Supreme Court has ruled.

Federal Aviation Administration et al. v. Cooper, No. 10-1024, 2012 WL 1019969 (U.S. Mar. 28, 2012).

The Privacy Act allows for recovery of actual damages for an intentional violation of the law but does not authorize damages for mental or emotional distress, the 5-3 majority held. Therefore, the government defendants — the Federal Aviation Administration, the Social Security Administration and the Department of Transportation — are protected by sovereign immunity from liability for such an injury, the court said.

Justice Elena Kagan did not participate in the decision.

The Privacy Act, 5 U.S.C. § 552a, outlines requirements for the management of confidential records held by the government,

Justice Samuel Alito, writing the majority opinion, concluded Congress left the meaning of "actual damages" sufficiently ambiguous that the term cannot be considered a waiver of immunity for the agencies. He was joined by Justices Antonin Scalia, Anthony Kennedy and Clarence Thomas and Chief Justice John Roberts.

> Congress left the meaning of the phrase "actual damages" ambiguous, so it could not be considered a waiver of immunity for the FAA, the high court said.

According to the opinion, Stanmore Cooper was diagnosed with HIV in 1985. He began taking medication for the condition.

In 1994 Cooper received the medical certificate the FAA requires for operating an aircraft, but did so without revealing his HIV status. He renewed the certificate every two years until 2004, according to the opinion.

Justice Sonia Sotomayor wrote the dissent. REUTERS/Jim Young

In the meantime, Cooper applied for long-term-disability benefits under the Social Security Act, and revealed his HIV status to the Social Security Administration, the opinion said.

In 2002 the Department of Transportation, the FAA's parent agency, launched Operation Safe Pilot to identify pilots who were medically unfit to fly, the opinion said.

When the DOT and the SSA compared information on the 45,000 pilots in Northern California targeted by the probe, FAA flight surgeons determined in 2005 that Cooper should not have received a medical certificate given his HIV status, according to the opinion.

The FAA revoked Cooper's license, and he was indicted on three counts of making false statements to a government agency, the majority opinion said.

Cooper was sentenced to two years' probation and fined $1,000, according to the opinion.

Alleging the FAA, DOT and SSA violated the Privacy Act, Cooper filed suit in the U.S. District Court for the Northern District of California. He said unlawful disclosure of his HIV status had caused him "humiliation, embarrassment, mental anguish, fear of social ostracism and other severe emotional distress."

The District Court granted summary judgment to the government, and the 9th U.S. Circuit Court of Appeals reversed and remanded.

The government sought Supreme Court review.

The majority ruling first emphasized that a waiver of sovereign immunity must be "unequivocally expressed" in the wording of the relevant statute.

This is not the case in the Privacy Act, the justices said. They examined the statute's wording and applied traditional rules of construction to conclude the damages Cooper sought were not authorized.

The court rejected his argument that excluding such damages would lead to absurd results, namely those suffering only minor pecuniary loss could recover $1,000, while others with serious distress would get nothing.

"Contrary to [Cooper's] suggestion, however, there is nothing absurd about a scheme that limits the government's Privacy Act liability to harm that can be substantiated by proof of tangible economic loss," Justice Alito said.

Justice Sonia Sotomayor, joined by Justices Ruth Bader Ginsburg and Stephen Breyer, dissented.

They faulted the majority for overriding what "our precedents and common sense understand to be primary" injury in cases where one's privacy had been violated. Mental or emotional distress may be the primary and sole damage sustained in such cases, Justice Sotomayor said.

"That result is at odds with the text, structure and drafting history of the act, and it cripples the act's core purpose of redressing and deterring violations of privacy interests," she said. WJ

Related Court Document:
Opinion: 2012 WL 1019969

Pilot

CONTINUED FROM PAGE 1

true. They said the decision may threaten to "undermine the federal system for reporting flight risks."

"It may be tempting to dismiss this case as an outlier," the dissent read. "Indeed, the case before us appears to be the first reported case rejecting immunity in the ATSA's 10-year history. But a $1.4 million verdict is not easy to dismiss, nor is the majority's troubling rationale, which [we] fear may threaten to undermine the federal system for reporting flight risks."

According to the court's opinion, William Hoeper was a commercial pilot for Air Wisconsin. He was designated a federal flight deck officer when the TSA deputized him as a federal law enforcement officer to "defend the flight decks of aircraft ... against acts of criminal violence or air piracy." The TSA issued Hoeper a firearm under the relevant statute, 49 U.S.C. § 4492(a).

> Immunity from suit under the Aviation and Transportation Security Act does not apply to any disclosure known to be "false, inaccurate or misleading," or made with reckless disregard for its truth or falsity.
>
> In this case, the court found, the manager who contacted the TSA said:
>
> - He believed the plaintiff was mentally unstable.
> - The plaintiff may have been armed.
> - The plaintiff had been fired the same day.

> The three dissenting justices said the majority decision could threaten to "undermine the federal system for reporting flight risks."

Problems arose when the airline discontinued its use of the aircraft Hoeper piloted for many years.

After undergoing training on another kind of plane, Hoeper four times failed the proficiency test given to determine if he could be certified to fly a different aircraft, according to the opinion.

The test administrators agreed that Hoeper was angry after the fourth unsuccessful attempt to pass the test. One of the managers believed he was so angry his behavior became threatening, the opinion said.

Concerned about Hoeper's "mental stability" and the fact that he may have been armed, a manager involved in Hoeper's testing called the TSA to report him as a possible threat, the opinion said. The manager expressed concern "for my safety and the safety of others at the [testing facility]."

Air Wisconsin fired Hoeper because he could no longer pilot airplanes after failing the test four times.

Hoeper sued Air Wisconsin in the Denver County District Court, alleging defamation under Virginia law. Although Hoeper lived in Denver, the fourth unsuccessful test took place in Virginia, according to the opinion.

Air Wisconsin moved for summary judgment, claiming immunity under the ATSA, 49 U.S.C. § 44941. The statute provides that "an air carrier who voluntarily discloses any suspicious transaction relevant to certain aircraft security statutes 'shall not be civilly liable' to any person,'" the opinion said.

The trial court denied the motion. The court submitted the defamation claim to the jury with the instruction that it could not rule in favor of Hoeper if it concluded Air Wisconsin was immune.

After the jury found in favor of Hoeper, Air Wisconsin appealed to the Colorado Court of Appeals, which affirmed.

The airline sought review by the state Supreme Court, which also affirmed.

First, the trial court should not have allowed the jury to determine if the airline was immune when ruling on the defamation claim, but rather should have ruled on that issue before trial, the high court majority said.

The verdict was supported by a showing of actual malice, because the manager's statements to the TSA were made with an awareness that the information may be false, the majority said. In the case of Hoeper's termination, the manager actually did not assume, but knew the statement was false.

Although the airline had no proof that Hoeper was a threat, it reported him as such and thereby defamed him, the majority said. WJ

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Defendant: Scott McGath, Overturf McGath Hull & Doherty, Denver

Related Court Document:
Opinion: 2012 WL 907764

See Document Section A (P. 17) for the opinion.

'Take-it-or-leave-it' arbitration pacts deemed unconscionable

A California appeals court has rejected as unconscionable arbitration agreements demanded by Ralphs Grocery Co. of employees, finding them too one-sided in favor of Ralphs and that they were improperly presented on a take-it-or-leave-it basis.

Massie at el. v. Ralphs Grocery Co. et al., No. B224196, 2012 WL 1078562 (Cal. Ct. App., 2d Dist. Apr. 2, 2012).

The 2nd District Court of Appeal quoted extensively from its prior opinion in the case and from the decision in *McLeod v. Ralphs Grocery Co.*, No. BC-321704 (Cal. Super. Ct., L.A. County 2004), a related case.

In both the current case and *McLeod*, a group of Ralphs employees sued the company in the Los Angeles County Superior Court under Cal. Lab. Code §§ 203 and 558, alleging nonpayment of overtime wages. Ralphs petitioned the court to compel arbitration under the employment agreements the plaintiffs had signed.

The trial court denied the petitions because the agreements subjected such claims to individual binding arbitration and barred proceedings on a class or representative basis. This was the class-action waiver the plaintiffs protested.

The appeals court affirmed.

The state Supreme Court granted Ralphs' request for review and ultimately remanded both cases. The high court told the Court of Appeal to reconsider its ruling in light of *Gentry v. Superior Court*, 42 Cal. 4th 443 (Cal. 2007).

In *Gentry*, the Supreme Court found that although not all class arbitration waivers in overtime cases are unenforceable, the trial court must consider a number of factors before ruling on the issue, including:

- The modest size of potential individual recovery.
- The potential for retaliation against class members.
- The fact that absent class members may be poorly informed about their rights under overtime laws.
- Other factors that might get in the way of class members' pursuing their rights to receive overtime pay.

On remand from the Court of Appeal, the trial court allowed discovery on the *Gentry* factors and again found the class-waiver provision in the arbitration agreements unenforceable.

"Just as in *Gentry*, the class arbitration waivers found in this case jeopardize the rights of its employees by prohibiting the most practical and most likely only effective means of challenging defendants' overtime practices," the trial court said.

Ralphs again appealed, and the 2nd District Court of Appeal affirmed. The panel noted its ruling applied to both to the current case as well as *McLeod*.

The panel did not reach the question of whether the class-action waiver standing alone is unenforceable. Rather it found the plaintiffs successfully demonstrated that the arbitration agreements at issue are unconscionable "beyond the class-action waiver."

The appeals court noted the plaintiffs alleged they were pressured to sign the arbitration agreements in order to receive bonuses they had already earned. However, Ralphs presented the agreements on a "take-in-or-leave-it" basis, according to the panel. By continuing to work for the company, employees signaled their acceptance of the arbitration agreement; no signature was needed.

"Even an employee who attempted to opt out of the arbitration policy and even lost a bonus as a result would find the policy still applied — an added element of surprise," the panel said.

The 2nd District said the policy was unfair also because it mandated confidentiality as to the "existence, content and outcome" of any proceeding, as well as a number of other one-sided provisions, including:

- Barring arbitration by arbitrators who employ safeguards that conflicted with Ralphs rules.
- Attempting to shorten the limitations period.
- Attempting to impose the costs of arbitration on employees.
- Allowing Ralphs to modify the agreement.

Because of the number of deficiencies in the arbitration agreements, the panel concluded that severing the offending provisions would not cure the problem because they were "permeated with unconscionability" and therefore could not be enforced. WJ

Related Court Document:
Opinion: 2012 WL 1078562

See Document Section B (P. 37) for the opinion.

The California Supreme Coourt has suggested factors for consideration when ruling on the validity of class-action waiver, including "other real-world obstacles to the vindication of class members' rights to overtime through individual arbitration."

Overtime cases against Ralphs include:

2001: *Prachasaisoradej v. Ralphs Grocery Co.*, No. BC254143 (Cal. Super. Ct., L.A. County) (lead case)

2002: *Swanson v. Ralphs Grocery Co.*, No. BC-284875 (Cal. Super. Ct., L.A. County)

2004: *Massie v. Ralphs Grocery Co.*, No. BC-321144 (Cal. Super. Ct., L.A. County)

2004: *McLeod v. Ralphs Grocery Co.*, No. BC-321704 (Cal. Super. Ct., L.A. County)

2 companies settle EEOC religious-bias suits

AutoZone Inc. and Aviation Concepts Inc. have agreed to settle separate lawsuits brought by the Equal Employment Opportunity Commission alleging each company violated federal anti-discrimination laws by refusing to accommodate an employee's religious beliefs.

Equal Employment Opportunity Commission v. AutoZone Inc., No. 10-11648, consent decree approved (D. Mass. Mar. 30, 2012).

Equal Employment Opportunity Commission v. Aviation Concepts Inc., No. 11-00028, consent decree approved (D. Haw. Mar. 30, 2012).

SIKH HARASSED FOR WEARING TURBAN

AutoZone has agreed to pay $75,000 and provide other relief under a consent decree settling a suit alleging the company harassed employee Frank Mahoney Burroughs, a convert to the Sikh religion, and refused to accommodate his request to wear a turban and a religious bracelet called a kara.

According to a March 30 statement, the EEOC claimed that AutoZone managers at its Everett, Mass., store asked Burroughs if he had joined al-Qaeda and whether he was a terrorist. AutoZone also refused to intervene when customers referred to him as "bin Laden" and made terrorist jokes.

The agency also said AutoZone fired Burroughs because of his religion because he asked for an accommodation and complained about discrimination.

The consent decree requires the company to adopt a no-religious-bias policy, train managers and human resource employees on religious discrimination, and report to the EEOC on employee requests for religious accommodation and complaints about religious harassment.

The company must also post a notice about the consent decree in its more than 4,500 stores. According to the EEOC, AutoZone has more than 65,000 employees.

AIRCRAFT RETAILER TO PAY $51,000 TO JEHOVAH'S WITNESS

In another case of alleged religious discrimination, the EEOC said Aviation Concepts Inc., a Guam-based aircraft retailer and service provider, will pay $51,000 to settle claims that it refused to accommodate the religious beliefs of a Jehovah's Witness.

> In one case, the employer refused to intervene when customers referred to the Sikh employee as "bin Laden" and made terrorist jokes, the EEOC said.

The employee, assistant mechanic Armando Perez, told his manager he did not want to raise the United States and Guam flags at the worksite because doing so would violate his religious beliefs. The manager told Perez to go home and then fired him that day for insubordination, according to the EEOC statement.

The agency and Aviation Concepts entered into a two-and-half-year consent decree under which the company agreed to appoint an equal employment opportunity consultant, provide annual anti-discrimination training to all employees, and train managers and supervisors on how to handle complaints and accommodation requests.

The EEOC said it would monitor compliance with the decree. WJ

INSURANCE ISSUES

Alleged pregnancy discrimination not covered by insurance

A tile and stone store's commercial general liability policy does not cover an employment discrimination suit that alleged the owners unlawfully harassed and fired a sales manager because she was pregnant, a California appellate panel has affirmed.

Imperial Tile & Stone v. State Farm General Insurance Co., No. B230937, 2012 WL 676233 (Cal. Ct. App., 2d Dist. Feb. 29, 2012).

The occurrence-based policy that State Farm General Insurance Co. issued to Imperial Tile & Stone only covered bodily injuries if they were caused accidentally, the 2nd District Court of Appeal explained.

"Alleged acts of discrimination do not constitute accidental conduct," Judge Norman L. Epstein emphasized, writing for the panel.

Therefore, the appeals court ruled that State Farm owed no coverage to ITS for former sales manager Carole Benhamou's pregnancy discrimination lawsuit.

THE DISCRIMINATION SUIT

According to the appeals court's opinion, Benhamou sued ITS in the Los Angeles County Superior Court, asserting various discrimination charges against the tile company and its owners under California's Fair Employment and Housing Act, Cal. Gov't Code § 12940.

Benhamou worked at ITS as an independent contractor until her termination, the lawsuit alleged. When she began to suffer from pregnancy-related illnesses, the company allegedly harassed her.

This led to a demotion and ultimately her termination, the suit charged.

When ITS submitted a claim to State Farm regarding Benhamou's lawsuit, the insurer denied coverage. ITS then initiated a declaratory judgment action in the Los Angeles County Superior Court, alleging the insurer breached its contract and acted in bad faith.

The company maintained it never terminated Benhamou, and it denied her other allegations.

In response, State Farm filed a summary judgment motion, asserting:

- Benhamou's alleged injuries were not caused by accident and, therefore, did not fall within its occurrence-based policy.
- Its policy excluded coverage for intentional acts and employment-related business practices.

Ruling on the motion, Superior Court Judge Yvette M. Palazuelos disagreed with the insurer that Benhamou's allegations clearly involved intentional acts and therefore fell outside the scope of its policy.

Rather she found that ITS presented sufficient evidence to create a material issue of fact as to whether the underlying allegations even occurred.

Still, the judge granted the insurer's motion, finding the allegations fell within the policy's exclusions for employment-related business practices.

ITS appealed, arguing the employment exclusions did not apply because Benhamou was an independent contractor.

The 2nd District Court of Appeal, however, affirmed that the policy offered no coverage for Benhamou's suit.

"Benhamou's complaint alleges that ITS intentionally took adverse action against her due to her pregnancy in violation of FEHA," Judge Epstein wrote. "As a matter of law, these alleged acts are intentional."

Although ITS denied Benhamou's charges, it could not overcome the fact that the policy offered no coverage for allegedly intentional acts, the appellate court said, upholding the lower court's judgment. WJ

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Defendant-respondent: Maria L. Cousineau and Douglas J. Collodel, Sedgwick LLP, Los Angeles

Related Court Document:
Opinion: 2012 WL 676233

Westlaw subscribers can scan this QR code to see Imperial's complaint on Westlaw.

Travelers owes no business insurance coverage for road rage incident

Maine's highest court has ruled that business insurer Travelers owes no coverage for injuries arising from a company co-owner's attack on another motorist in a fit of road rage while he was driving a truck used for company business.

Travelers Indemnity Co. v. Bryant et al., No. Cum-11-380, 2012 WL 965091 (Me. Mar. 22, 2012).

Travelers Indemnity Co. owed no coverage because the co-owner's assault was not carried out "with respect to the conduct of [the] business," the unanimous Supreme Judicial Court held, citing the policy language.

In addition, the acts were not undertaken within the scope of the co-owner's employment as an occasional company driver paid by the hour.

The case involves Michael Bryant, a co-owner of Prime Cut Meat Market.

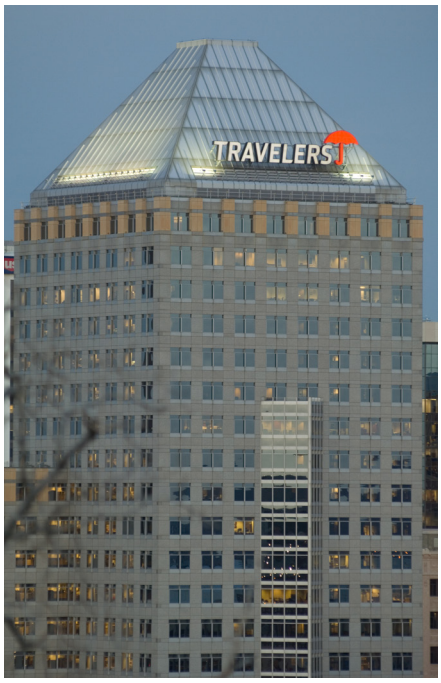
According to the court's opinion, in 2007 Bryant was driving from a campground with his son in his truck, which was emblazoned with Prime Cut decals, when he stopped at a traffic light behind the car of Francis Latanowich.

Bryant got out of his truck, approached the driver's side of Latanowich's vehicle, and struck him repeatedly in the head and chest while preventing him from exiting the car, the opinion says.

Bryant said he took "it upon [himself] to try to set [Latanowich] straight" because Latanowich's driving had purportedly put Bryant and other drivers "at risk," according to the court.

Prime Cut held a business policy with Travelers that covered its owners "with respect to the conduct of [the] business" and employees "for acts within the scope of their employment ... or while performing duties related to the conduct of [the] business," the opinion says.

Latanowich sued Bryant and Prime Cut in Maine state court for assault, battery, false imprisonment, negligence and negligent infliction of emotional distress.



Courtesy of Travelers.com

After the trial court granted Prime Cut summary judgment, Latanowich settled with Bryant. As part of their agreement, Bryant assigned Latanowich his rights to any potential benefits under the company's policy with Travelers.

Travelers then sued Bryant and Latanowich in the Cumberland County Superior Court, seeking a declaration it owed no obligation to indemnify Bryant.

The court granted Travelers summary judgment, finding Bryant was not acting as an insured at the time of the incident because he was not conducting business, acting within the scope of employment or performing employee duties.

Latanowich appealed to the Supreme Judicial Court, arguing Bryant was conducting business at the time of the incident because he was traveling to Prime Cut's store in a truck marked with the business name to check on its freezers.

The high court disagreed. It said Bryant was not acting as a covered owner or employee of Prime Cut when he assaulted Latanowich.

"Whether or not Bryant was en route to Prime Cut, his actions in assaulting Latanowich were not taken 'with respect to the conduct' of the meat market's business," Chief Justice Leigh I. Saufley wrote for the court.

Further, Bryant's assault and his motive were not within the scope of his employment with Prime Cut, the judge said.

"An ordinary person would not think that the policy's language would cover his assault of another motorist, especially where the employee exited his vehicle in the middle of the road to 'set [another driver] straight," Chief Justice Saufley wrote.

> "An ordinary person would not think that the policy's language would cover his [the insured's] assault of another motorist," Chief Justice Leigh I. Saufley wrote.

Consequently, Travelers owed no coverage to Bryant, the court concluded. WJ

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Related Court Document:
Opinion: 2012 WL 965091

California appeals court reduces medical bill recovery for injured worker

An injured home health aide can recover only the amount actually paid to medical providers under workers' compensation law instead of the full amount of her medical bills, a California appeals court has ruled.

Sanchez v. Brooke et al., No. B224835, 2012 WL 745310 (Cal. Ct. App., 2d Dist., Div. 4 Mar. 8, 2012).

A three-judge panel of the 2nd District Court of Appeal said plaintiff Lydia Sanchez, a live-in health care worker injured in a house fire, should not be entitled to recover the amount her medical providers were barred by workers' compensation law from charging her employer.

"Because fees that the provider may not collect from the employer under the workers' compensation law do not represent economic loss for the employee, they are not recoverable in the first instance," Justice Steven C. Suzukawa wrote on behalf of the panel.

The decision is significant because it extends the logic of the California Supreme Court's controversial holding in *Howell v. Hamilton Meats & Provisions*, 52 Cal. 4th 541 (Cal. 2011), to workers' compensation cases.

In *Howell*, the court ruled an auto accident victim could only recover the discounted amount that her insurance carrier actually paid to her medical providers instead of the full amount of her medical bills.

The high court found an exception to the "collateral source" rule, barring the plaintiff from recovering the written-down amount of her medical bills because it did not represent an actual economic loss.

The collateral source rule says an injured person who receives compensation from a third party independent of the tortfeasor should not have that amount deducted from any award against the tortfeasor. California courts apply the rule when determining how much a tort victim may collect in damages from a tortfeasor.

According to the appeals court's opinion, Western Health Resources employee Sanchez was injured attempting to save the life of her patient Dorothea Kavanaugh after Kavanaugh's bedroom caught fire from a cigarette she was smoking.

Sanchez filed a personal injury lawsuit against the trustees of Kavanaugh's estate in the Los Angeles County Superior Court. In response, the trustees asserted the comparative negligence of Sanchez and nonparty Western as an affirmative defense.

> The appeals court said the portion of the employee's award attributable to medical damages should be capped at the amount actually paid to settle her medical bills.

Western, which had paid Sanchez workers' compensation benefits, sought reimbursement by filing a lien against any potential recovery in her suit against the trustees.

At trial, the jury found Sanchez, Kavanaugh and Western were all negligent but that Sanchez's negligence was not a substantial factor in causing her own injuries. It awarded Sanchez $903,000 in total damages, including $575,000 in medical damages.

The trustees appealed, arguing Sanchez's total medical damages award should be reduced from $575,000 to $241,800, the amount her medical providers accepted from Western as payment in full.

The 2nd District agreed that the portion of Sanchez's award attributable to medical damages should be capped at the amount actually paid to settle her medical bills.

Writing for the unanimous panel, Justice Suzukawa acknowledged that *Howell* involved private medical insurance while Sanchez's case was governed by California's workers' compensation laws.

He found the situations were similar, however, and that the California Supreme Court's language in its opinion was sufficiently broad to apply *Howell* to reduce Sanchez's medical damages award.

The judge noted the parties did not have a chance to present all the workers' compensation payment evidence because the trustees' appeal was pending when the state high court issued the *Howell* opinion.

As a result, the panel remanded the case, directing the trial court to consider other evidence that might be relevant to the calculation of Sanchez's permissible medical damages recovery. WJ

Attorneys:
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Defendants/appellants: Christopher M. Sheedy, Calendo, Puckett, Sheedy & Dicorrado, Glendale, Calif.

Related Court Document:
Opinion: 2012 WL 745310

Illinois high court punts on take-home liability issue

The Illinois Supreme Court has sent an asbestos "take-home exposure" suit back to the trial court without deciding if premises owners have a duty to warn about secondhand exposure to the toxin.

Simpkins v. CSX Transportation Inc., No. 110662, 2012 WL 966168 (Ill. Mar. 22, 2012).

In a 4-2 opinion, the state high court said it cannot say the defendant had a duty to warn unless the plaintiff amends the complaint to allege further facts.

Annette Simpkins filed the suit in the Madison County Circuit Court in 2007. She alleged she developed the fatal lung cancer mesothelioma from exposure to asbestos on the body and work clothes of her husband, Ronald.

Following Annette's death, her daughter Cynthia was substituted as plaintiff.

Ronald Simpkins worked for B&O Railroad from 1958 to 1964 and Dow Chemical Co. from 1964 through the end of the Simpkins' marriage in 1965.

> The dissenters said the majority failed to "answer the substantive question of whether a legal duty exists at all for secondhand asbestos exposure."

B&O is the corporate predecessor to defendant CSX Transportation.

CSX successfully moved to dismiss the complaint for failure to state a cause of action because, the company said, it had no duty toward Annette, who was not an employee and never visited CSX's premises.

Circuit Court Judge Daniel J. Stack agreed the defendant had no duty of care toward Annette Simpkins.

The plaintiff appealed to the 5th District Appellate Court. The appeals panel reversed the trial court's judgment.

The panel found companies in Illinois owe a duty of care toward the family members of employees who bring home asbestos fibers on their work clothes.

CSX appealed that ruling to the Illinois Supreme Court.

In the March 22 split decision, the majority offered the plaintiff the opportunity to file an amended complaint.

"We hold that the allegations in plaintiff's complaint are, in part, conclusory and therefore insufficient to establish that defendant owed a duty of care to Annette Simpkins," the majority said.

The proper remedy is to remand and allow the plaintiff to amend the complaint so the trial court can determine, "if all well-pled facts are taken as true, a duty of care ran from defendant to plaintiff in this case."

In a dissent joined by Justice Anne M. Burke, Justice Charles E. Freeman said the majority failed to "answer the substantive question of whether a legal duty exists at all for secondhand asbestos exposure, ostensibly the reason we granted leave to appeal."

The dissenting justices say no duty exists in this case and that the trial court correctly granted the motion to dismiss. WJ

Related Court Document:
Opinion: 2012 WL 966168

RECENTLY FILED COMPLAINTS FROM WESTLAW COURT WIRE*

Westlaw Cite	2012 WL 1031759
Case Title	Tuohy v. City of Atlanta, No. 2012-213260 (Ga. Super. Ct., Fulton County Mar. 28, 2012)
Case Type	Employment
Case Subtype	Retaliation
Allegations	Plaintiff was the treasurer for the city of Atlanta, when he was fired for refusing to make an illegal transfer of funds. Plaintiff had complained about earlier transfers and circumvention of financial protocols.
Damages Synopsis	Damages under the Whistleblowers Provisions of Georgia, Affirmative relief under the Georgia Open Records Act; economic, compensatory and punitive damages

Westlaw Cite	2012 WL 1018242
Case Title	Ozmun v. Lamar University, No. B192-226 (Tex. Dist. Ct., Jefferson County Mar. 26, 2012)
Case Type	Employment
Case Subtype	Religious discrimination
Allegations	Plaintiff was a faculty member in the Department of Theatre & Dance for defendant Lamar University. Because of her religious beliefs, plaintiff failed to attend a performance highlighting homosexuality, and as a result received disciplinary action from defendant Lamar University.
Damages Synopsis	Compensatory, exemplary and punitive damages

Westlaw Cite	2012 WL 994588
Case Title	Estronza v. RJF Security & Investigations, No. 12-01444 (E.D.N.Y. Mar. 23, 2012)
Case Type	Employment
Case Subtype	Age discrimination
Allegations	Removed from the Supreme Court of the State of New York, County of Kings, docketed as 3986/2012. Defendant RJF Security & Investigations terminated plaintiff's employment based on his national original and his age, resulting in damages.
Damages Synopsis	$5 million in monetary damages, $15 million in punitive damages

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

FEDERAL JUDGE ORDERS BUILDING OWNER TO END LOCKOUT

A federal judge has issued a temporary injunction against the owners of a Brooklyn apartment complex to end a long labor lockout, the National Labor Relations Board said in a March 28 statement. U.S. District Judge Brian Cogan of the Eastern District of New York ordered Renaissance Equity Holdings to end its lockout of more than 70 unionized porters and maintenance workers and to immediately resume bargaining with the Service Employees International Union, Local 32BJ. The NLRB's Brooklyn Regional office sought the injunction based on claims of unfair labor practices, including failure to bargain in good faith with the union. According to the NLRB, the order restores all previous terms and conditions of employment, with the exception of a reduction of the workers' wages because of Renaissance's claims of financial hardship.

Paulsen v. Renaissance Equity Holdings, No. 12-00350, 2012 WL 1033339 (E.D.N.Y. Mar. 27, 2012).

Related Court Document:
Decision: 2012 WL 1033339

Westlaw subscribers can scan this QR code to see the full ruling on Westlaw.

COMPANY MUST RESTORE $520,000 TO RETIREMENT PLAN

Defunct California construction company Explore General Inc., must restore $520,000 to its 401(k) profit-sharing plan under a California federal court order, the U.S. Department of Labor said in a statement April 4. Chief U.S. District Judge Anthony Ishii said the company was required to pay its workers an hourly prevailing wage, which included a fringe benefit in the form of contributions to a retirement plan, when it worked on projects financed by government agencies. *Solis v. Explore General Inc.,* No. 10-01157 (E.D. Cal. Jan. 23, 2012). However, rather than sending the fringe benefits to the plan, the company was using it for general operating expenses, the Labor Department said. The agency sued the company for allegedly failing to pay fringe benefits and for breach of fiduciary duty under the Employee Retirement Income Security Act.

MORTGAGE LOAN OFFICER ACCUSES BANK OF DISABILITY BIAS

A Bank of America loan officer has sued the bank for disability discrimination, retaliation and other violations of California and federal law, alleging he was refused doctor-recommended work accommodations after returning from several medical leaves between 2008 and 2010. Plaintiff Omid Behjou said that before he went on leave, the bank was aware of his physical problems but did not pay disability benefits when due. When he returned to work, the bank refused to provide a headset and ergonomic work station to ease his spine problems, and also failed to interview him for any of the 17 job openings posted after his return to work, the complaint says. The bank was aware when it terminated his short-term disability benefits that he had complained to various state and federal agencies about his treatment, and fired him in retaliation, the suit says.

Behjou v. Bank of America Corp., No. 12-1590, complaint filed (N.D. Cal. Mar. 29, 2012).

Related Court Document:
Complaint: 2012 WL 1063422

HEALTH CARE COMPANY SETTLES DISABILITY BIAS SUIT FOR $35,000

The Equal Employment Opportunity Commission and an Ohio-based home health care services provider have agreed to a $35,000 settlement on disability discrimination claims the agency brought against the company in federal court. According to the EEOC, Personal Touch Home Care of Ohio Inc. fired Pamula Calfee based on her renal failure, chronic obstructive pulmonary disease and asthma even though she could perform her job despite her disabilities. Calfee had worked at Personal Touch since 2000, the EEOC said in a statement. In addition to the monetary award, the settlement includes a two-year consent decree requiring the company to provide training about disability discrimination to its supervisors and managers. Disability discrimination violates the federal Americans with Disabilities Act and many state anti-discrimination laws.

Equal Employment Opportunity Commission v. Personal Touch Home Care of Ohio Inc., No. 11-00042, consent decree approved (S.D. Ohio Apr. 2, 2012).

5 WORKERS SUE MEDICAL FIRM FOR RETALIATION

Five former employees of a Florida medical staffing company claim in a state court complaint that they were targeted for retaliation after they protested illegal practices by their supervisors and refused to participate in alleged violations of state law. The plaintiffs say managers at Rose Group Inc. in Jacksonville, Fla., misrepre-sented the staff's medical certifications to hospitals and other medical providers, insisted that unqualified personnel issue medications to patients and falsified staffers' drug records. On one occasion, management allegedly opened mail addressed to another tenant in the office building , looking for football jerseys. The plaintiffs say anyone who objected to the managers' conduct was fired and often denied some pay after termination. The complaint alleges Rose Group violated Florida's Whistle-blower Act, that the defendants were unjustly enriched by not paying the plaintiffs for overtime, and that they negligently hired and supervised company managers.

Jacobs et al. v. Rose Group et al., No. 2012-001850, complaint filed (Fla. Cir. Ct., 4th Jud. Cir. Feb. 22, 2012).

Related Court Document:
Complaint: 2012 WL 686423

OSHA MEMO AFFIRMS PROTECTION FOR REPORTING INJURIES

In a March 12 memo, the Occupational Safety and Health Administration warned its regional administrators and whistle-blower program managers to be aware of potentially discriminating policies that employers may have concerning reports of on-the-job injuries. Among other things, the agency warned that offering incentives not to report injuries, or linking manage-ment and supervisor bonuses to lower accident reporting could be potentially discriminatory, as they discourage report-ing injuries. The memo was featured in a news article by the American Postal Workers Union April 3, and it included information about a U.S. Postal Service safety specialist who claimed he was retaliated against for helping an employee to file a complaint with OSHA.

CASE AND DOCUMENT INDEX