

WHAT'S INSIDE

LABOR

- 7 NLRB's new rules promise faster unionization votes

SEXUAL HARASSMENT

- 9 Plaintiff claiming limited emotional distress need not submit to mental exam
Davis v. Imperial County Super. Ct. (Cal. Ct. App.)

WRONGFUL TERMINATION

- 10 Cohabitation is valid reason for firing church school director, California court says
Henry v. Red Hill Evangelical Lutheran Church (Cal. Ct. App.)
- 11 Poor job performance defeats challenge to firing
Villalvazo v. Kofax Inc. (Cal. Ct. App.)

EMPLOYMENT ARBITRATION UPDATE

MILITARY LEAVE

- 13 Lowe's settles Iraq War vet's job rights suit for \$45,000
King v. Lowe's (D. Or.)

BANKRUPTCY ISSUES

- 14 ADA claim not discharged in Northwest's bankruptcy case, 8th Circuit rules
Sanchez v. Northwest Airlines (8th Cir.)

NEWS IN BRIEF



Scan the QR code to see this Westlaw Journal issue online, with live links to all documents.

41247235

COMMENTARY

Should employers include class-action waivers in their arbitration agreements?

Annette A. Idalski and William S. Helfand, attorneys with Chamberlain, Hrdlicka, White, Williams & Aughtry, explore the benefits and limitations of including class-action waivers in employment arbitration agreements in light of the U.S. Supreme Court's decision in *AT&T Mobility v. Concepcion*, a consumer arbitration case.

SEE PAGE 3



REUTERS/Robert Sorbo

The NLRB's decision concerns Boeing's production of the 787 Dreamliner airplane. Here, the first Dreamliner sits on the assembly line at the company's plant in Everett, Wash.

LABOR

NLRB withdraws unfair-labor-practice charge against Boeing

The National Labor Relations Board has announced the withdrawal of an unfair-labor-practice charge brought by a union against Boeing Co. to challenge the company's decision to move a second production line of the 787 Dreamliner airplane work from Washington state to a nonunion facility in South Carolina.

CONTINUED ON PAGE 8



Westlaw Journal Employment

Published since May 1986

Publisher: Mary Ellen Fox

Production Coordinator: Tricia Gorman

Managing Editor: Robert W. McSherry

Editor: Linda Hilsee Coady, Esq.
Linda.Coady@thomsonreuters.com

Westlaw Journal Employment
(ISSN 2155-594X) is published biweekly by
Thomson Reuters.

Thomson Reuters

175 Strafford Avenue
Building 4, Suite 140
Wayne, PA 19087
877-595-0449
Fax: 800-220-1640
www.andrewsonline.com
Customer service: 800-328-4880

For more information, or to subscribe,
please call 800-328-9352 or visit
west.thomson.com.

Reproduction Authorization

Authorization to photocopy items for internal or personal use, or the internal or personal use by specific clients, is granted by Thomson Reuters for libraries or other users registered with the Copyright Clearance Center (CCC) for a fee to be paid directly to the Copyright Clearance Center, 222 Rosewood Drive, Danvers, MA 01923; 978-750-8400; www.copyright.com.

How to Find Documents on Westlaw

The Westlaw number of any opinion or trial filing is listed at the bottom of each article available. The numbers are configured like this: 2009 WL 000000. Sign in to Westlaw and on the "Welcome to Westlaw" page, type the Westlaw number into the box at the top left that says "Find this document by citation" and click on "Go."



TABLE OF CONTENTS

Labor	
NLRB withdraws unfair-labor-practice charge against Boeing (N.L.R.B.).....	1
Commentary: By Annette A. Idalski, Esq. and William S. Helfand, Esq., Chamberlain, Hrdlicka, White, Williams & Aughtry	
Should employers include class-action waivers in their arbitration agreements?	3
Labor	
NLRB's new rules promise faster unionization votes.....	7
Sexual Harassment: <i>Davis v. Imperial County Super. Ct.</i>	
Plaintiff claiming limited emotional distress need not submit to mental exam (Cal. Ct. App.)	9
Wrongful Termination: <i>Henry v. Red Hill Evangelical Lutheran Church</i>	
Cohabitation is valid reason for firing church school director, California court says (Cal. Ct. App.)	10
Wrongful Termination: <i>Villalvazo v. Kofax Inc.</i>	
Poor job performance defeats challenge to firing (Cal. Ct. App.)	11
Employment Arbitration Update	12
Military Leave: <i>King v. Lowe's</i>	
Lowe's settles Iraq War vet's job rights suit for \$45,000 (D. Or.).....	13
Bankruptcy Issues: <i>Sanchez v. Northwest Airlines</i>	
ADA claim not discharged in Northwest's bankruptcy case, 8th Circuit rules (8th Cir.).....	14
Recently Filed Complaints from Westlaw Court Wire	15
News in Brief	17
Case and Document Index	18

CORRECTION

The commentary titled "*Florida v. HHS takes health reform to high court*" that appeared in the Dec. 27, 2011, issue incorrectly stated that U.S. Supreme Court Justice Antonin Scalia dissented in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). He joined the majorities in those cases.

Should employers include class-action waivers in their arbitration agreements?

By **Annette A. Idalski, Esq. and William S. Helfand, Esq.**
Chamberlain, Hrdlicka, White, Williams & Aughtry

The specter of defending against employment-related class actions, which are at an all-time high, looms in the minds of employers and, in particular, their in-house counsel. For years, employers have grappled with how to guard against, prevent or minimize such expensive litigation.

Presenting employees with mandated arbitration agreements at the time of hire has become more common among businesses looking to reduce their legal expenses, since arbitrating is often more efficient and cheaper than litigating in court. Wise employers have also added class-action waivers to their arbitration agreements so employees must agree, as a condition of employment, to bring any employment-related claims against the employer on an individual basis.

This defensive strategy has received increased attention since the U.S. Supreme Court decided *AT&T Mobility LLC v. Concepcion* last year.¹

This commentary addresses the benefits and limitations of employment-related class-action waivers in arbitration agreements, and the effect of the *Concepcion* decision and subsequent authority on the enforceability of such agreements.

BENEFITS OF ARBITRATION AGREEMENTS

Employees who agree to submit their employment-related claims to an arbitrator instead of filing a lawsuit in court may be seen as providing their employers a significant advantage, but this arrangement can be advantageous for the employee as well. Depending on the state in which the agreement is made, employees may enter into these agreements in exchange for compensation, initial or continued employment, and the employer's mutual promise to submit the same claims to arbitration, which usually provides a faster and less expensive means of resolving disputes.

Proponents of arbitration cite many advantages — lower overall cost and confidentiality being prominent examples.² Arbitration proceedings have the potential to reduce overall cost because they can lead to a more expeditious decision. Accessing an arbitrator is easier than going to court, and the scheduling is typically on a faster track.

Most often, discovery is more circumscribed, with less time allotted than in court, and parties rarely brief discovery issues for arbitrators, thereby saving additional time and expense.

Presenting employees
with employer-mandated
arbitration agreements at
time of hire is becoming
increasingly common.

Discovery disputes are usually quickly resolved through a telephone conference with the arbitrator, as opposed to waiting weeks or months for a hearing before a judge.

While arbitrators' knowledge and skills may vary, arbitrators are often practicing lawyers with much more legal knowledge and rational problem-solving abilities than most juries possess. Accordingly, arbitration is seen as a means of reducing, if not eliminating, the often-feared "runaway" jury verdict. Further, arbitration decisions are more likely to be final than court decisions, as it is difficult to challenge arbitration decisions. Of course, this can be as much a negative as a positive aspect of arbitration, depending on the decision.

Finally, and importantly, arbitrations offer a more confidential resolution of matters.

Documents are not publicly filed, and the arbitrator's findings are typically sealed with only the outcome being made public.

DISADVANTAGES OF EMPLOYMENT ARBITRATION AGREEMENTS

There are also disadvantages to arbitrating employment agreements. For example, the issue of whether an arbitration agreement is enforceable is often litigated by the employee at the outset of a dispute, particularly in jurisdictions where courts disfavor arbitration or require very specific arbitration agreements. Such an exercise can be time-consuming and often adds an extra layer of costs for the employer.

In addition, some practitioners believe arbitrators are more likely to admit all evidence rather than exclude some based on procedural defenses or the rules of evidence. This may have a negative impact on the employer given the volume of documents the employer maintains compared to that from the employee.

Arbitrators are less likely than judges to decide cases on dispositive motions, such as motions to dismiss or motions for summary judgment and, while there is a high rate of summary dismissal of employment cases in the courts, the majority of arbitration cases proceed to live testimony before the arbitrator. Finally, and perhaps most importantly, it is very difficult to appeal an arbitrator's decision.

CLASS-ACTION WAIVERS AFTER CONCEPCION

One recent and more expanded potential benefit of arbitration agreements is the elimination of employee class- or collective-action claims. Often, class or collective actions are filed as such because they are more efficient for obtaining relief, especially when the individual claims are too small to incentivize plaintiffs' lawyers.

Similarly, a plaintiff might rethink the value of bringing a claim if they can simply join a class-based claim that will proceed forward without much participation or individualized proof from such an employee.

This may especially be so in wage-and-hour litigation, where the individual disputed amounts are often small, but when viewed collectively, may lead attorneys to pursue large judgments and statutory attorney fees, regardless of the merits of any one claim. Employers have repeatedly voiced concerns that individual merits, or the lack thereof, are too often ignored in such cases in the interest of efficiency.

Including class-action waivers in arbitration agreements, preventing employment class-action and collective-action lawsuits altogether, forces employees to prove the merits of their own claims. If the employer takes such a step requiring individual claims to be brought and proven separately, many may never come to fruition, which would result in tremendous savings to employers.

Most practitioners are optimistic that the likelihood of class-action waivers being enforced by the courts has increased in the wake of the Supreme Court's decision last term in *Concepcion*. Recent cases applying generally the Supreme Court decision in *Concepcion* provide a basis for this optimism.

Notably, the class-action waiver agreement considered by the Supreme Court in *Concepcion* arose in the consumer arbitration context. In the case, Vincent and Liza Concepcion signed a wireless service agreement with AT&T that included an arbitration clause prohibiting class actions over disputes between the customer and the carrier. Under the agreement, the Conceptions received free cellular phones, but AT&T charged them sales tax totaling \$30.22.

The Conceptions filed a class-action lawsuit in California, alleging deceptive advertising because their cell phones were not truly "free." Applying state law, both the federal district court and 9th U.S. Circuit Court of Appeals refused to enforce the waiver based on a leading California case, *Discover Bank v. Superior Court*.³ That court found arbitration clauses containing class-action waivers to be unconscionable, particularly when the individual amount at issue was effectively too small to incentivize litigation.

The U.S. Supreme Court reversed the lower courts, noting that the Federal Arbitration Act preempted state laws conditioning the enforceability of arbitration agreements on the availability of class proceedings.

Employers have voiced concern that individual merits, or lack thereof, are too often ignored in class action wage and hour litigation.

"The overarching purpose of the FAA ... is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," the high court said. "Requiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."⁴

Thus, the Supreme Court's decision appears to provide broad preemption of any state law requiring the availability of class-action relief in arbitration, even outside of the consumer arbitration context.



Scan this code with your QR reader to see the *Concepcion* decision on Westlaw.

DO CLASS-ACTION WAIVERS APPLY IN EMPLOYMENT CASES?

Many observers have predicted that the Supreme Court's reasoning in *Concepcion* would, and arguably should, apply equally to class-action waivers in employment arbitration agreements. Based on the results of early cases, the predictions largely appear to be correct.⁵

For example, the 8th Circuit recently said as much:

"Like the phone customers in *Concepcion* who based their challenge to the enforceability of a class-action waiver provision based upon California law, [plaintiff Mack] Green and the other drivers make a Minnesota-state-law-based challenge to the enforceability of the class-action waivers in the [arbitration agreements]. Our reading of *Concepcion* convinces us the state-law-based challenge involved here suffers from the same flaw as the state-law-based challenge in *Concepcion* — it is preempted by the FAA. Consequently, *Concepcion* forecloses Green's claim that the District Court erred in concluding the class-action waivers were enforceable [in this action under the Minnesota Fair Labor Standards Act]."⁶

Likewise, in *Lewis v. UBS Financial Services Inc.*, a federal court in the Northern District of California compelled arbitration of claims under the California Labor Code. That court found that *Concepcion* tacitly overruled California cases that extended the *Discover Bank* case to arbitration agreements in the employment context, noting *Concepcion* could not be read so narrowly as to not apply in the employment context.

Similarly, in *Morse v. ServiceMaster Global Holdings Inc.*, another federal court in the Northern District of California found the

Pros and Cons of Arbitration for Resolving Employment disputes

PROS:

- Reduction of overall cost
- Scheduling and deadlines typically faster
- "Runaway" jury verdict eliminated
- Resolution of disputes more confidential

CONS:

- Enforceability of arbitration agreements often litigated
- Arbitrators may admit all evidence rather than selectively excluding
- Arbitrators less likely to decide cases on dispositive motions
- Difficult to appeal arbitrator's decision

unique facts of that case established that defendants had not waived their arbitration rights despite proceeding in litigation because, prior to *AT&T Mobility LLC v. Concepcion*, they could not have compelled arbitration under California law.

EXCEPTIONS TO ENFORCEABILITY OF ARBITRATION AGREEMENTS WITH CLASS-ACTION WAIVERS

Class- or collective-action waivers will not always prevent multiparty litigation. For instance, class-action waivers likely will not prohibit the Equal Employment Opportunity Commission or Department of Labor from bringing suit on behalf of the government, potentially for the benefit of numerous individuals. Thus, *Concepcion* should have no effect on governmental enforcement actions under the Fair Labor Standards Act because, in those cases, the secretary of labor is the party bringing the action.⁷

The Supreme Court long ago made clear that the EEOC may bring lawsuits to pursue reinstatement, back pay and compensatory

Class-action or collective-action waivers will not always prevent multi-party litigation.

or punitive damages in enforcement actions under Title VII, the Americans with Disabilities Act and the Age Discrimination in Employment Act, even if the employer and employee have a valid agreement to arbitrate employment-related disputes.⁸

In doing so, the Supreme Court held that “it should be remembered that arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief.”⁹

Additionally, one court in the Southern District of New York has also refused to compel arbitration where the plaintiff had signed an arbitration agreement with a class-action waiver, because she was bringing a “pattern and practice” discrimination claim against her employer.¹⁰ In a pattern-and-practice claim, a plaintiff usually argues that discrimination is an employer’s standard operating procedure, and the matter therefore proceeds on a class basis.

In this light, the court said that under the applicable substantive law, the plaintiff could not bring a pattern-and-practice claim individually, so compelling single-party arbitration would deny the plaintiff her substantive rights under Title VII. The court said its decision was consistent with *Concepcion*, which the court said applied to preempting state-law-based concerns but not to the federal statutory concerns present in that case.

Employers should also anticipate that arbitration agreements with class-action waivers might be challenged as violating the National Labor Relations Act by prohibiting collective action. Courts have not yet adopted this position, which the National Labor Relations Board is spearheading under a novel but questionable theory.¹¹

Since *Concepcion*, at least one court in the Southern District of California found the NLRA did not operate to invalidate or otherwise render unenforceable an arbitration agreement containing a class-action waiver.¹²

WHAT CAN EMPLOYERS EXPECT?

Cases interpreting *Concepcion* are still working their way through the courts, and the holdings will likely become more refined as different situations are presented for review. As more cases are decided, the applicability of *Concepcion* to other types of collective actions, including employment cases, will become clearer.

Nonetheless, based on the early cases interpreting this Supreme Court authority, it appears that *Concepcion* is not limited to the consumer context and holds significant promise for employers. The *Concepcion* decision increases the likelihood that courts will compel arbitration in FLSA, NLRA and in similar contexts. Employers should be aware, however, that this area is complex, quickly changing and may vary by jurisdiction.

Arbitration agreements with class-action waivers might not prohibit all collective actions, but they could likely prevent many actions and significantly reduce the risks and costs attendant to large collective actions. Employers should make a careful determination as to whether arbitration agreements with class-action waivers are appropriate for their companies in light of

the benefits and limitations of arbitration agreements, as well as the prospect of stemming collective actions for most claims.

WJ

NOTES

¹ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011).

² See e.g., JOHN W. COOLEY & STEVEN LUBET, *ARBITRATION ADVOCACY* 5 (2d ed. 2003).

³ *Discover Bank v. Super. Ct.*, 36 Cal. 4th 148 (2005).

⁴ *Concepcion*, 131 S. Ct. at 1747.

⁵ Cases have uniformly considered *Concepcion* in the employment context, often compelling arbitration. See e.g., *Green v. Super Shuttle Int'l*, 653 F.3d 766, 769 (8th Cir. 2011) (affirming the District Court’s grant of a motion to compel arbitration and its enforcement of the class-action waivers in a case brought under the Minnesota Fair Labor Standards Act because the waivers were valid and enforceable under *Concepcion*); *Urbino v. Orkin Servs. of Cal.*, 2011 WL 4595249, at *9–12 (C.D. Cal. Oct. 5, 2011) (denying a motion to compel arbitration in a case brought under California’s Labor Code Private Attorney General Act because the arbitration agreement contains an unconscionable PAGA arbitration waiver); *Lewis v. UBS Fin. Servs.*, 2011 WL 4727795, at *3–6 (N.D. Cal. Sept. 30, 2011) (granting a motion to compel arbitration, finding that *Concepcion* also overrules *Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2007); *Plows v. Rockwell Collins Inc.*, 2011 WL 3501872, at *4–6 (C.D. Cal. Aug. 9, 2011) (denying a motion to compel arbitration although the waiver was valid because the court was bound by *Gentry* until it was explicitly overruled); *Morse v. ServiceMaster Global Holdings*, 2011 WL 3203919, at *3–4 (N.D. Cal. July 27, 2011) (granting a motion to compel arbitration because defendants’ actions in litigating the claims prior to *Concepcion* did not amount to waive their right to compel arbitration); *Williams v. Securitas Sec. Servs.*, 2011 WL 2713741, at *3–4 (E.D. Pa. July 13, 2011) (finding *Concepcion* inapplicable to plaintiff’s motion for a protective order in FLSA case seeking to invalidate an arbitration agreement circulated to class members because plaintiff’s motion did not implicate any state law ground to invalidate the arbitration agreement); *Chen-Oster v. Goldman Sachs & Co.*, 2011 WL 2671813, **3–4 (S.D.N.Y. July 7, 2011) (finding *Concepcion* did not require the court to compel arbitration of a “pattern and practice” claim under Title VII); *Quevedo v. Macy’s Inc.*, 2011 WL 3135052, at *17 (C.D. Cal. June 16, 2011) (finding a PAGA claim arbitrable because *Concepcion* preempts California law); *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854, 859–863 (2011) (holding that the FAA does not preempt California law regarding the enforceability of contractual waivers of an employee’s right to bring representative PAGA claims).

⁶ *Green*, 653 F.3d at 769.

⁷ Employees might also try to argue that individuals cannot waive the right to proceed collectively under Section 216(b) of the Fair Labor Standards Act. One court recently observed, though, that “[c]ourts routinely hold that FLSA does not grant employees the unwaivable right to proceed in court collectively under Section 216(b).” See *Copello v. Boehringer Ingelheim Pharms.*, 2011 WL 3325857, at *7 (N.D. Ill. Aug. 2, 2011) (listing cases). See also *Carter v. Countrywide Credit Indus.*, 362 F.3d 294, 298 (5th Cir. 2004); *Norman v. Alliant Group*, 2011 WL 4862945, at *1 (S.D. Tex. Oct. 13, 2011). But see *Saincome v. Truly Nolen of Am.*, 2011 WL 3420604, *11-12 (S.D. Cal. Aug. 3, 2011) (reserving decision for arbitrator).

⁸ *EEOC v. Waffle House Inc.*, 534 U.S. 279, 287 (2002).

⁹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991)

¹⁰ *Chen-Oster*, 2011 WL 2671813, at *3-4.

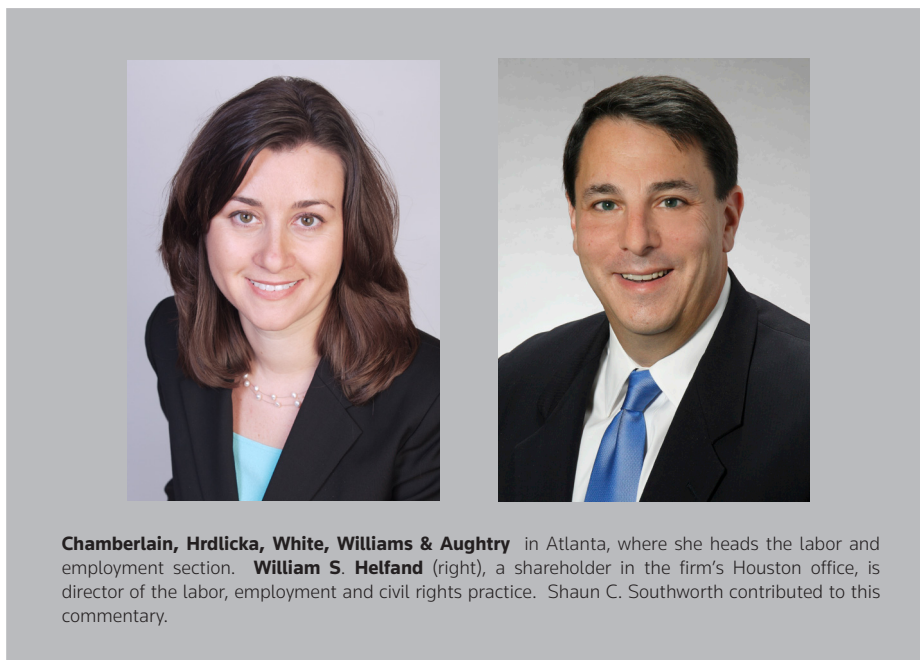
¹¹ See *Braun Elec. Co.*, 324 NLRB 1, 3 (1997) (“It is well-settled that Section 7 of the act protects the right of employees to utilize the board’s processes, including the right to file unfair-labor-practice charges”). See also *Bill’s Elec.*, 350 NLRB 292, 296 (2007); *U-Haul Co. of Cal.*, 347 NLRB 375, 377 (2006); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004); Office of Gen. Counsel, Nat’l Labor Relations Bd., Memorandum GC 10-06, Guideline

Memorandum Concerning Unfair Labor Practice Charges Involving Employee Waivers in the Context of Employers’ Mandatory Arbitration Policies 4 (2010) (“A mandatory arbitration agreement that could reasonably be read by an employee as prohibiting him or her from joining

with other employees to file a class-action lawsuit is unlawful.”).

¹² *Grabowski v. Robinson*, 2011 WL 4353998 at *7-8 (S.D. Cal. Sept. 19, 2011).

Annette A. Idalski (left) is a shareholder with



WESTLAW JOURNAL **INSURANCE BAD FAITH**



This publication brings you detailed, timely and comprehensive coverage of developments in bad faith litigation around the country.

Many legal issues impacting bad faith litigation are covered, including refusal to defend, failure to settle, refusal to pay legitimate claims, bad-faith handling of claims, implied covenant of good faith and fair dealing, proper treatment of “unsophisticated” policyholders, and misrepresentation of coverage.

Call your West representative for more information about our print and online subscription packages, or call 800.328.9352 to subscribe.

NLRB's new rules promise faster unionization votes

The National Labor Relations Board has decided in a 2-1 vote to adopt amendments to union election procedures to allow faster resolution of challenges to the votes.

The focus of rules is the board procedures in the small number of cases where parties cannot agree on issues raised by either employer or employees.

Under current rules, an employer can challenge the legality of including certain workers in the proposed union through a petition and hearing held before a regional board. The regional director rules on the question and then schedules the election. The employer can then appeal to the NLRB.

Under the new rules, employers and unions will not be able to appeal regional board decisions until after the workers vote.

The changes, which will become effective April 30, 2012, still allow employers to raise concerns about the unionization process but require them to hold off on their appeals until after the workers vote.

As the rules now stand, the parties can appeal regional director decisions to the NLRB at a number of points in the process. Under the new rules:

- The hearing officer will be able to limit testimony to relevant issues.
- The hearing officer will decide whether to accept post-hearing briefs.
- All appeals will be limited to the question of whether an election should take place.
- All appeals will be consolidated into a single post-election request for review.

There are also restrictions on unions under the new rules. Currently, unions attempting to block workers who want to call a vote on



reversing unionization can do so through a hearing and can appeal to the NLRB if they lose.

Under the new rules, however, unions can still ask for a hearing but cannot appeal the decision until after the vote.

Proponents of the new rules say they will reduce delays and litigation that ensue when union votes are challenged. According to a Dec. 21 NLRB press release, only 10 percent of union elections have reached the hearing stage. Those elections have taken place on average 101 days following the election petition filed with a regional office, the board said.

Critics of the new rules argue that the NLRB has not followed its own procedures and has denied employers the right to make

their cases against unionization in their workplaces.

"This decision erodes employers' free-speech and due process rights and opens the door to rushed elections that will deny employees access to critical information and time to consider the issues at hand prior to entering the voting booth," Katherine Lugar, executive vice president for public affairs with the Retail Industry Leaders Association, told the New York Times Dec. 22. [WJ](#)

Scan this code with your QR reader to see the amendments.



Boeing Co. and International Association of Machinists and Aerospace Workers, No. 19-CA-32431, case closed (N.L.R.B., Region 19 Dec. 9, 2011).

The charge, which was filed by the International Association of Machinists and Aerospace Workers in March 2010, accused Boeing of planning the move in order to retaliate against and intimidate union employees who participated in past strikes and to chill future strike activity.

Acting on the union’s charges, the NLRB’s regional director in Seattle filed a complaint alleging Boeing violated the National Labor Relations Act, 29 U.S.C. § 15, by:

- Attempting to undermine protected union activity such as strikes.
- Refusing to negotiate with the union over the decision to transfer the work.
- Discriminating against its employees who may choose to belong to a union.

The board’s investigation of the charge supported the union’s claims that Boeing had made no secret of the motivation underlying

its decision to give the second Dreamliner production line to nonunion workers in South Carolina.

assembly line in South Carolina, arguing that even if the accusations were true, they were not evidence of retaliation against the union.

The union accused Boeing of moving the Dreamliner work in retaliation for past strikes and to chill future strike activity.

Boeing officials allegedly told the Seattle news media that it wanted to avoid having to deal with labor issues involved in having a union workforce. For example, an unidentified high-ranking official said Boeing could not “afford to have a work stoppage, you know, every three years,” according to the board’s press release.

As remedies, the board asked the NLRB administrative law judge to require that Boeing:

- Read and/or broadcast to its employees any notice the judge may issue.
- Keep its second Dreamliner production line in Washington state.
- Not discriminate between union and nonunion facilities when deciding where work will be performed.

In its answer to the NLRB’s complaint, Boeing generally denied the board’s claims about its alleged reasons for establishing a second

The company also emphasized that the collective bargaining agreement in effect at the time it decided to move work to South Carolina did not require negotiation with the union about such a decision.

The remedies requested are impermissibly punitive and improper, not just for the state of South Carolina, but also for Boeing employees, the company said.

The NLRB’s decision to drop the claims against Boeing came just two days after the company agreed to a new labor contract with the union, which included an agreement that it create several thousand more jobs in Washington.

The SeattleTimes reported Dec. 1 that Boeing planned to keep the second Dreamliner production line in South Carolina but that Washington workers would build the new U.S. Air Force 737MAX fuel tanker planes.

WJ

WESTLAW JOURNAL **CLASS ACTION**



This reporter covers the proliferation of the class action lawsuit in numerous topic areas at the federal, state, and appeals court levels. Topics covered include consumer fraud, securities fraud, products liability, automotives, asbestos, pharmaceuticals, tobacco, toxic chemicals and hazardous waste, medical devices, aviation, and employment claims. Also covered is legislation, such as the 2005 Class Action Fairness Act and California’s Proposition 64, and any new federal and state legislative developments and the effects these have on class action litigation.

Call your West representative for more information about our print and online subscription packages, or call 800.328.9352 to subscribe.

Plaintiff claiming limited emotional distress need not submit to mental exam

A sexual harassment plaintiff need not submit to an independent mental exam where her current psychological condition is not at issue and she does not plan to introduce expert evidence on her past distress, a California appeals court has ruled.

Davis v. Superior Court of Imperial County, No. D059181, 2011 WL 6101629 (Cal. Ct. App., 4th Dist. Div. 1 Dec. 8, 2011).

The 4th District Court of Appeal emphasized that the crux of the dispute is plaintiff Lisa Davis' constitutional right to privacy. It reversed a trial judge's decision to allow the examination, saying the lower court had abused its discretion.

According to the opinion, Davis was a heavy-equipment operator at Kiewit Pacific Co. In March 2008 she complained to company officials about alleged harassment by a co-worker and the "poor condition" of the portable toilet designated for women.

At the same time, Davis says, she filed a complaint with the state's Department of Industrial Relations Division of Occupational Safety and Health about conditions at the jobsite. Several days later, she was fired, the opinion says.

California allows physical or mental examination of:

- A party to an action
- An agent of a party
- A natural person in the custody or under the legal control of a party

Where the mental or physical condition (including the blood group) of that party or person is in controversy in the action.

Cal. Civ. Proc. Code § 2032.020(a)

received professional treatment for distress, the opinion says. A little over a year later, she refused Kiewit's request to voluntarily submit to an independent mental examination.

Kiewit Pacific fired the plaintiff only days after she filed a complaint with CalOSHA about conditions at the job site, the complaint says.

In October 2008 Davis sued the company in the Imperial County Superior Court for gender discrimination, harassment, retaliation, failure to prevent discrimination and failure to pay wages. She also claimed she suffered and was continuing to suffer a number of emotional problems.

During a deposition in August 2009, Davis said her emotional distress had decreased since leaving her job and that she had not

In response to the company's subsequent motion for leave to conduct the examination, Davis served the company with an amended complaint that did not include reference to ongoing emotional distress, according to the opinion. The trial court granted Kiewit's motion in February 2011.

Davis turned to the Court of Appeal, which stayed the trial court's order to allow the independent mental examination.

The appeals court lifted the stay after ordering the trial court to vacate its order and enter a denial of the motion.

Based on California decisions in similar cases, the panel noted that allegations of current, continuing mental distress place a plaintiff's mental condition in controversy and thus make a mental examination the proper subject of a discovery request.

However, Davis has not alleged continuing emotional distress related to her job and will not introduce expert testimony to prove the existence of prior distress, the opinion says.

Because her current mental state is not in controversy, the panel concluded that Kiewit should not be permitted to conduct a mental examination.

In addition, the company was unable to show that it could not fairly litigate Davis' claim without intruding into her privacy.

"Where, as here, a litigant will not be using expert evidence to support her emotional-distress claim, and she does not contend that her injury was in any manner unusual, Kiewit cannot meet that burden," the panel said. [WJ](#)

Attorneys:

Plaintiff: Jason Dumbeck, Dumbeck & Dumbeck, Oceanside, Calif.

Defendant: Hayley Macon, Seyfarth Shaw LLP, Los Angeles

Related Court Document:

Opinion: 2011 WL 6101629

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

Cohabitation is valid reason for firing church school director, California court says

A church did not violate state or federal antidiscrimination law when it terminated its preschool director for living with her boyfriend and raising their child together without being married, a California appeals court has ruled.

Henry v. Red Hill Evangelical Lutheran Church of Tustin, No. G044556, 2011 WL 6119336 (Cal Ct. App., 4th Dist., Div. 3 Dec. 9, 2011).

At the heart of the case was the ministerial exception that protects religious organizations from claims of discrimination under state or federal law when they make decisions related to clerical salaries, assignments, working conditions and termination of employment.

The exception is rooted in the constitutional guarantee of religious freedom, the 4th District Court of Appeal noted in a written opinion.

The panel also agreed with the argument of Red Hill Evangelical Lutheran Church of Tustin that the state's Fair Employment and Housing Act, Cal. Gov't Code § 12940, expressly exempts religious organizations from its definition of "employer."

In addition, the panel rejected plaintiff Sara Henry's claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, because Henry failed to support her argument that she was fired in violation of a public policy rooted in that law rather than because she had violated the church's position on premarital sex.

"In this case, the evidence at trial supports a finding that Henry's employment was terminated because she was living with her boyfriend in a sexual relationship and was raising their child in that living arrangement, and not because she was a woman or became pregnant or had a baby out of wedlock," the panel said.

According to the opinion, Henry was hired as a preschool teacher by Red Hill in August 2002 and became director of the school in 2003. Each year, Henry had signed a document outlining her duties as a teacher and as a Christian role model and acknowledged that she was an at-will employee.

Although Henry was married when she began her employment with Red Hill, she later divorced, moved in with her boyfriend and had a child. The church fired her in 2009 after the school principal learned from parents that Henry was living with her boyfriend, which evidenced a failure to meet the expectations of the teaching staff.

Henry sued the church in Orange County Superior Court, alleging termination based on marital status in violation of the Fair Employment and Housing Act. Her second claim was violation of public policy as expressed in state and federal law and the California Constitution.

After a bifurcated trial, the trial judge entered a judgment in Red Hill's favor, finding that the church is a religious institution and that Henry was fired because she violated a church precept.

Under Cal. Civ. Proc. Code § 597, trial of a defendant's special defenses are allowed before trial of the underlying issues. If the

court rules in favor of defendant, as it did in this case with the ministerial exception, no trial on the underpinning allegations is permitted, unless the judgment is overturned on appeal.

Henry appealed, and the appeals court panel affirmed the Superior Court.

The panel first determined that Red Hill was expressly excluded from the Fair Employment and Housing Act's definition of "employer" because it is a nonprofit religious organization.

Next, Henry failed to cite any enactment declaring a public policy against marital status discrimination under Title VII, the panel said. The evidence at trial indicated that Red Hill fired Henry based on a matter of religion, and not because of her gender or because she had a baby while not married, it added.

Finally, the panel rejected Henry's argument that she does not fall within the ministerial exception because she was a teacher, not a "minister," at Red Hill. Instead, the court emphasized that Henry's duties at Red Hill included a number of ministerial functions: she led her students in prayer, taught them religion and led chapel services.

The ministerial exception applied here, and Henry was properly terminated, the panel said. **WJ**

Related Court Document:

Opinion: 2011 WL 6119336

See Document Section B (P. 22) for the opinion.



REUTERS/Bazuki Muhammad

Poor job performance defeats challenge to firing

A credit analyst failed to overcome a long list of job performance problems when he tried to prove his employer fired him in retaliation for reporting sexual harassment, a California appeals court has decided.

Villalvazo v. Kofax Inc., No. G044765, 2011 WL 6153099 (Cal. Ct. App., 4th Dist., Div. 3 Dec. 12, 2011).

The 4th District Court of Appeal said that the incidents on which plaintiff John Villalvazo based his harassment allegation were too trivial to support his claim that defendant Kofax Inc. subjected him to a sexually hostile work environment in violation of the state's Fair Employment and Housing Act.

In a unanimous opinion, the panel rejected Villalvazo's state law retaliation claim because he failed to rebut the company's legitimate reason for the firing: his poor job performance. There was also no showing of a causal link between the reports of harassment and his termination, the court explained.

According to the opinion, Villalvazo worked as a credit analyst for data management company Kofax from 2003 until 2009 and reported to Alicia Barcellos.

During that time, Villalvazo received adverse performance evaluations that said he could not complete his assigned work on time, was frequently tardy, refused to do the menial tasks of his job and took long lunches that required Barcellos to cover for him, the opinion says.

After formally reprimanding him, Barcellos and her supervisor decided to fire Villalvazo because of ongoing problems with his performance and because of his tendency to "goof around" whenever Barcellos was not in the office, the opinion says.

Villalvazo sued Kofax in the Orange County Superior Court, alleging sexual harassment and retaliation in violation of California's Fair Employment and Housing Act, Cal. Gov't Code § 12940. He based his harassment claim on several incidents he said had taken place over the six years he worked with Barcellos.

He claimed that Barcellos made repeated sexual advances by talking to him about sex on television reality shows, by commenting that she wanted to watch him change his

The incidents cited by Villalvazo "fell far short" of showing a pattern of "continuous, severe harassment," and he offered no evidence that he reported any of the incidents, the panel said.

The retaliation claim fared no better.

Kofax had set forth a legitimate reason for its decision to fire him, and Villalvazo did not carry his burden of creating a triable issue as to whether the company's reason was a pretext for retaliation, according to the opinion.

The court said that the incidents of sexual harassment cited by the plaintiff were "too trivial" to support his hostile-environment claim.

clothes and by making frequent remarks with sexual connotations, according to the opinion.

Kofax moved for summary judgment. The trial judge granted the motion because it said Villalvazo failed to raise a material issue of fact with respect to the harassment claim and failed to show he was fired because he complained about harassment.

Villalvazo appealed, and the appeals court panel affirmed.

Establishing employer liability for maintaining a sexually hostile work environment requires a showing that a worker was subjected to sexual advances, conduct or comments that were severe enough to alter the conditions of employment and create an abusive work environment, the panel said.

The court noted:

- Villalvazo did not show he was engaged in an activity protected under state or federal law.
- He did not report the alleged harassment to the company.
- There was no evidence of a causal link between his alleged complaints and his termination.

"Without a causal link between the protected activity and the adverse employment action, the retaliation claims fail," the court said. **WJ**

Related Court Document:
Opinion: 2011 WL 6153099

See Document Section C (P. 29) for the opinion.

CLAIM: NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Award: \$25,000

A security guard whose employer forced her to take an unwanted, unpaid Family and Medical Leave Act leave and left her in limbo about when she could return to work is entitled to \$25,000 to compensate her for the emotional distress suffered before she was fired, arbitrator Beverly Hodgson has decided. The security guard alleged that the employer insisted on the leave and a fitness-for-duty examination after she reported a supervisor had sexually assaulted her off-site and complained about how her report was handled. Shortly afterward, unrelated to the alleged assault, the employee told her supervisor she was taking a new sleep medication. Company policy requires workers to report medication changes to supervisors. Although there was no evidence that anyone at the job site had concerns about her performance after that report, the employer put the employee on FMLA status and, for six months, ignored inquiries about what she should do to return to work, Hodgson noted. After a neuropsychological evaluator recommended the employee not return to duty, the company fired her. Although the employee claimed she was fired in retaliation for her sexual harassment complaint, Hodgson ruled for the employer on this issue, finding that the evaluator did not know about the harassment claim. The arbitrator ruled for the employee on the emotional-distress claim, citing “months of mental anguish” that the employer should have foreseen would lead to bodily harm.

In re Arbitration Between [Claimant] and [Respondent] (Justice, Public Order and Safety), No. [Redacted], 2011 WL 6122383 (Am. Arbitration Ass’n Nov. 21, 2011).

Related Document:

Award: 2011 WL 6122383

CLAIM: BREACH OF EMPLOYMENT CONTRACT

Award: \$102,000

An electrician working in Iraq under a contract specifying a base monthly pay rate of \$5,000 should receive an award of \$102,000 on his breach-of-contract claim, arbitrator Stephen Ruffino has determined. The employer

paid the electrician only \$3,750 a month, refused to pay the difference and said the higher rate was a “mutual mistake.” Over a period of seven months, the electrician refused to sign a new contract, demanding the contracted pay rate. Ruffino rejected the employer’s argument that because the electrician continued to work after he had been informed of the compensation error and had been presented with a new contract, the original agreement had been modified to include the lower rate. Because the company could have ended the at-will employment relationship at that point, but did not do so, the original contract remained in effect, Ruffino said. The electrician’s demand for arbitration sought \$120,000 in damages, and the parties stipulated that maximum unpaid compensation would be \$88,000. The arbitrator added 9 percent prejudgment interest to bring the award to \$102,000.

In re Arbitration Between [Claimant] and [Respondent] (Business Services), No. [Redacted], 2011 WL 6122389 (Am. Arbitration Ass’n Nov. 16, 2011).

Related Document:

Award: 2011 WL 6122389

CLAIM: RACE/GENDER DISCRIMINATION

Award: \$0

Arbitrator Elizabeth Scott Wood has denied all of the claims of a black woman who alleged her television station employer engaged in illegal discrimination when it refused to give her a job as the 5 p.m. weekday news anchor because of her gender, race and weight. The employee claimed that men were treated more favorably than women with respect to height and weight requirements for on-air positions and that the company relegated black newsroom employees to weekend positions. In her case, the employee alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, based on her employer’s June 2009 decision to fill the anchor slot with a thin white woman. Wood said, however, that the employee failed to make her case under Title VII because she could not show she was treated less favorably than were plus-size men who applied for the position (none did). In addition, Wood determined the employer stated legitimate nondiscriminatory reasons

for its decision. Those reasons included a careful balancing of the viewer ratings and skills of both candidates and the employee’s reputation for being “difficult,” Wood said. The employee failed to show that these criteria were a pretext for either gender or race discrimination, the arbitrator said.

In re Arbitration Between [Claimant] and [Respondent] (Motion Pictures), No. [Redacted], 2011 WL 6122379 (Am. Arbitration Ass’n Nov. 15, 2011).

Related Document:

Award: 2011 WL 6122379

Scan this code with your QR reader to see the decision on westlaw.



BREACH OF LABOR AGREEMENT

Award: 20 hours’ pay to each affected employee

An arbitrator in Connecticut has found that the New Britain Board of Education breached its labor agreement with health care professionals when it scheduled two hours per month of staff development time, a departure from its past practice of paying those employees 20 extra hours per year for staff development time. The union filed a grievance to protest the change, claiming it violated the existing contract. The matter was submitted to arbitration, and arbitrator Laurie Cain upheld the grievance. She noted that while the contract provided for staff development time up to two hours per month, it did not stipulate a specific number of hours per month or per year to be paid. Cain examined extrinsic evidence of past practices to make her decision and found that because the arrangement prior to the 2009 contract was always 20 hours each school, the school board breached a binding past practice. She sustained the grievance and ordered 20 hours pay for each affected employee.

In re Arbitration Between New Britain Board of Education and AFSCME (School Employees), No. 2010-A-0214, 2011 WL 6005185, 40 LAIS 104 (Sept. 27, 2011).

Related Document:

Award: 2011 WL 6005185

Lowe's settles Iraq War vet's job rights suit for \$45,000

The Lowe's hardware store chain has paid \$45,000 to end a government lawsuit alleging the company illegally fired an Iraq War veteran after he returned to work following military service.

King v. Lowe's, No. 11-CV-1320, settlement approved (D. Or. Nov. 3, 2011).

The Justice Department says Lowe's did not admit to any wrongdoing but agreed to pay back wages and damages to Army National Guard member Matthew King, a former employee.

The settlement resolves the government's allegations that the company terminated King's employment without cause in violation of the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301, according to the Justice Department.

USERRA forbids employers from discriminating against employees because of military obligations and requires companies to offer service members their old jobs or comparable positions upon their return from military duty.

The statute also provides that after rehiring a service member, a company must keep the individual employed for a year unless there is good cause to terminate the employment, according to the United States.

The Justice Department filed its suit in tandem with the settlement in the U.S. District Court for the District of Oregon. U.S. District Judge Marco Hernandez approved the deal Nov. 3.

King began working for Lowe's in Lebanon, Ore., as a "team member" in April 2008, according to the complaint.

He notified Lowe's in July 2008 that he had been called up for active duty and would be leaving for military service that September, the suit says.

King served in Iraq between May 2009 and April 2010.

Following his honorable discharge from the Army May 21, 2010, King sought unemployment benefits from Oregon based on his discharge from military service, the suit says.

The state denied King's request and he returned to work at Lowe's in June 2010, the complaint says.

The Justice Department said Lowe's notified King Aug. 11, 2010, that he was being fired because he had received unemployment benefits while working for the company.

Lowe's allegedly told King that he could return to his job if he provided paperwork showing that the company's accusations were incorrect.



REUTERS/Fred Prouser

The Justice Department said Lowe's illegally fired Matthew King without good cause within one year of his return from military service.

Later that day King obtained documentation from the state government indicating that he never received unemployment benefits, but Lowe's would not let him into the store to give the papers to management, the suit says.

King gave the papers to one of the company's security guards, and Lowe's sent him his final paycheck a week later, the suit says.

The Justice Department said the company illegally fired King without good cause within one year of his return from military service.

The government asked the District Court to order Lowe's to pay King his lost wages plus interest along with unspecified damages.

The Justice Department said that in addition to the \$45,000 payment the settlement provides that Lowe's will provide King with a neutral employment reference.

The company will also change its personnel records to remove any notations saying that King's termination from employment was involuntary, the government said.

"Our service members need to know we will have their backs at home, including the right to have their job restored with their former employer when they return home after serving our country," Thomas E. Perez, assistant attorney general for the Justice Department's Civil Rights Division, said in a statement.

The government filed the case on King's behalf after the Labor Department's Veterans' Employment and Training Service was unable to resolve the matter with Lowe's.



Related Court Document:
Complaint: 2011 WL 5857554



REUTERS/Shannon Stapleton

A Northwest Airlines employee sued the company for discrimination more than a year after the court-approved bar date for the filing of administrative expense claims against the airline's estate.

BANKRUPTCY ISSUES

ADA claim not discharged in Northwest's bankruptcy case, 8th Circuit rules

An employee of Northwest Airlines may continue to prosecute a workplace discrimination lawsuit under the Americans with Disabilities Act, a federal appeals panel has ruled, overturning a lower court's finding that the claim had been discharged as part of the company's bankruptcy case.

Sanchez v. Northwest Airlines Inc., No. 10-2393, 659 F.3d 671 (8th Cir. Oct. 14, 2011).

A three-judge panel of the 8th U.S. Circuit Court of Appeals said the claim is still viable because the airline's announcement of the deadline for filing "administrative" claims in its bankruptcy case expressly excluded liabilities incurred in the company's ordinary course of business.

Tort suits filed during a Chapter 11 bankruptcy case are considered administrative expense claims because they occur when the debtor is receiving the benefit of operating while attempting to reorganize.

According to the panel's written decision, Northwest rescinded a promotion offer to Carlos Sanchez in March 2007 after allegedly deciding he had physical limitations due to a prior work-related knee injury.

Northwest was in Chapter 11 bankruptcy at the time.

The U.S. Bankruptcy Court for the Southern District of New York ultimately confirmed Northwest's reorganization plan in May 2007 and set July 30, 2007, as the bar date for the filing of administrative expense claims against the airline's estate.

Sanchez received notice of the bar date, the opinion said.

More than a year later Sanchez sued Northwest under the Americans with Disabilities Act in the U.S. District Court for the District of Minnesota.

The ADA claim "fits squarely" within the definition of "ordinary court of business," the appeals court said, because "it arises out of the regular employment relationship between the debtor and its employee."

Northwest won summary judgment after the District Court concluded that Sanchez's failure to seek payment before the administrative expenses deadline resulted in the discharge of his claim.

The 8th Circuit disagreed on appeal by Sanchez.

The panel said the notice of the bar date provided by Northwest expressly excluded from the duty to file a payment request several categories of administrative expenses, including liabilities incurred by the airline in the ordinary course of business.

Sanchez's ADA claim "fits squarely" within the definition of "ordinary court of business," the panel said, because "it arises out of the regular employment relationship between the debtor and its employee."

The 8th Circuit therefore reinstated Sanchez's lawsuit because he was not required to file a claim before the bar date.

WJ

Attorneys:

Plaintiff: Dorene R. Sarnoski, Minneapolis

Defendant: Timothy R. Thornton, Briggs & Morgan, Minneapolis

Related Court Document:

Opinion: 659 F.3d 671

See Document Section D (P. 39) for the opinion.

RECENTLY FILED COMPLAINTS FROM WESTLAW COURT WIRE*

Westlaw Cite	2011 WL 5933501
Case Title	Ball v. Midwest Realty Advisors, No. 11-770125 (Ohio Ct. Com. Pl. , Cuyahoga County Nov. 29, 2011)
Case Type	Employment/disability discrimination
Allegations	Midwest Realty Advisors discriminated against plaintiff for the maintenance position based on his bipolar disorder, depriving him of equal employment opportunities.
Damages Synopsis	Compensatory and punitive damages, interest, fees and costs

Westlaw Cite	2011 WL 6099674
Case Title	Gaye v. West Pharmaceutical, No. 11-011464 (Fla. Cir. Ct., Pinellas County Dec. 1, 2011)
Case Type	Employment
Case Subtype	National origin discrimination
Allegations	Plaintiff was fired from West Pharmaceutical of Florida based on his national origin in violation of the state's Civil Rights Act of 1992.
Damages Synopsis	\$15,000 in unpaid wages, bonuses and commissions

Westlaw Cite	2011 WL 6119921
Case Title	Barry v. City of New York, No. 11-09003 (S.D.N.Y. Dec. 9, 2011)
Case Type	Employment
Case Subtype	Fair Labor Standards Act
Allegations	City of New York fails to pay overtime to Police Department detectives in violation of state and federal wage-and-hour laws.
Damages Synopsis	Compensatory damages, cost and fees

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

RECENTLY FILED COMPLAINTS FROM WESTLAW COURT WIRE*

Westlaw Cite	2011 WL 62111439
Case Title	State v. Legends Sports Bar LLC, No. 2011-021591 (Ariz. Cir. Ct., Maricopa County Dec. 9, 2011)
Case Type	Employment
Case Subtype	Sexual harassment
Allegations	Defendant Legends Sports Bar created a sex-based hostile work environment and unlawfully engaged in employee sexual harassment.
Damages Synopsis	Lost wages, injunction and costs

Westlaw Cite	2011 WL 6181843
Case Title	Reynolds v. Hertz Corp., No. 24-C-11-008464 (Md. Cir. Ct., Balt. City Dec. 1, 2011)
Case Type	Employment
Case Subtype	Wage and hour
Allegations	Hertz avoided paying plaintiff overtime by intentionally classifying her as a manager, although she had no management duties.
Damages Synopsis	\$1.2 million

Westlaw Cite	2011 WL 5933503
Case Title	Campana v. Things Remembered Inc., No. 11-770127 (Ohio Ct. Com. Pl., Cuyahoga County Nov. 29, 2011)
Case Type	Employment
Case Subtype	Disability discrimination
Allegations	The defendant, an officer of the Things Remembered Inc., terminated plaintiff based on her disability, when she developed breast cancer, causing her to experience emotional distress.
Damages Synopsis	In excess of \$25,000 in compensatory, liquidated, punitive and consequential damages; lost wages; fees and costs

*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.

UPS UNIT SETTLES DISABILITY BIAS SUIT FOR \$95,000

UPS Supply Chain Solutions has agreed to pay \$95,000 to settle a disability discrimination lawsuit brought by the Equal Employment Opportunity Commission on behalf of an employee who claimed the company refused to consider a reasonable accommodation for his deafness. The parties' three-year consent decree settles allegations that the company refused to provide an American sign language interpreter to help employee Mauricio Centeno understand training sessions, departmental staff meetings and other work-related gatherings. Although a California federal court granted summary judgment to the company in 2008, the 9th U.S. Circuit Court of Appeals reversed, holding that the reasonable-accommodation requirement for employers applies not only to essential functions of a job but also to benefits and privileges such as staff meetings.

Equal Employment Opportunity Commission v. UPS Supply Chain Solutions, No. 06-06210, proposed consent decree filed (C.D. Cal. Dec. 14, 2011).

LABOR DEPARTMENT PROPOSES GOAL FOR DISABLED HIRING

The U.S. Department of Labor has proposed a new rule that would require federal contractors and subcontractors to have a minimum of 7 percent disabled workers in their workforces. The proposed regulation includes specific actions federal employers must take to recruit and train disabled employees, keep proper records and disseminate policies. The rule would strengthen the affirmative action requirements already established in Section 503 of the Rehabilitation Act of 1973 and is similar to the specific guidance provided with respect to workplace equality for women and minorities, the agency said in a Dec. 8 statement. The unemployment rate for people with disabilities is 13 percent, about one-and-a-half times that of the non-disabled, the agency said. Comments on the proposed rule will be accepted until Feb. 7 at <http://www.regulations.gov>. Comments should include identification number (RIN) 1250-AA02.

EEOC SUES DAIRY QUEEN FOR SEXUAL HARASSMENT

A Dairy Queen franchisee in North Carolina violated federal discrimination law by allowing a female employee to be sexually harassed and then firing her for complaining about the misconduct, the Equal Employment Opportunity Commission has alleged. According to the complaint, a male cashier sexually harassed Chastity Hill-Cox by talking explicitly about sex, calling her offensive gender-based names and making sexual gestures. Hill-Cox told the restaurant manager about the harassment, but nothing was done, the EEOC says. When the police responded to Hill-Cox's complaint, the manager fired her for "causing too many problems" for the company, the suit says.

Equal Employment Opportunity Commission v. YS&J Enterprises d/b/a Dairy Queen, No. 11-01103, complaint filed (M.D.N.C. Dec. 14, 2011).

OSHA FINING BEAUTY SALONS, HAIR SMOOTHERS MAKERS

The Occupational Safety and Health Administration is continuing to cite and fine salons, beauty schools and manufacturers for failing to protect workers from exposure to formaldehyde when they use certain hair smoothing products, the agency said in a Dec. 8 statement. Formaldehyde irritates the eyes and nose and is a cancer hazard, OSHA said. The government in 2011 cited about two dozen salon owners and beauty schools for failing to protect workers and imposed fines of up to \$17,500 per infraction, the agency said. Two Florida manufacturers of hair products containing formaldehyde have also received citations for failing to protect their workers, it said.

GOVERNMENT SUES CONTRACTOR FOR SEX DISCRIMINATION

The U.S. Department of Labor has named federal contractor Brunswick Corp. and subsidiary Lund Boat Co. in an administrative complaint accusing them of systematically discriminating against more than 200 women who applied for entry-level jobs at Lund's boat manufacturing plant in Minnesota. Lund representatives said the women were

less likely to be hired because the company preferred workers with manufacturing experience, according to the agency's Dec. 1 statement announcing the complaint. But the complaint says the company was more likely to hire men without such experience than a woman who had it. Under Executive Order 11246, federal contractors are required to provide equal consideration to all qualified candidates for a job, regardless of gender. The complaint requests that Lund and Brunswick pay monetary damages and seeks to bar them from taking part in any government contracts until they remedy the alleged violations.

Office of Federal Contract Compliance Programs v. Lund Boat Co. and Brunswick Corp., No. 2012-OFC-00002, administrative complaint filed (O.F.C.C.P. Dec. 1, 2011).

SARBANES-OXLEY VIOLATION COSTS BANK \$930,000

An investigation of a Bank of America employee's wrongful-termination complaint with the Occupational Safety and Health Administration has revealed that the bank violated the whistle-blower protection provisions of the Sarbanes-Oxley Act. OSHA said in a statement that it has ordered the bank to reinstate the employee and to pay him about \$930,000, including back wages, interest, compensatory damages and attorney fees. OSHA enforces the whistle-blower provisions of the Sarbanes-Oxley Act and 20 other statutes protecting employees who report violations of laws governing various industries in the U.S. In this case, the employee, who worked for Countrywide Financial Corp., which merged with BofA in 2008, led investigations that revealed wire, mail and bank fraud involving Countrywide employees. The employee claimed that his attempt to report the fraud to upper management at the company resulted in his termination. BofA said in a statement that it plans to challenge the order.

CASE AND DOCUMENT INDEX

<i>Boeing Co. and International Association of Machinists and Aerospace Workers</i> , No. 19-CA-32431, case closed (N.L.R.B., Region 19 Dec. 9, 2011)	1
<i>Davis v. Superior Court of Imperial County</i> , No. D059181, 2011 WL 6101629 (Cal. Ct. App., 4th Dist. Div. 1 Dec. 8, 2011)	9
Document Section A	19
<i>Equal Employment Opportunity Commission v. UPS Supply Chain Solutions</i> , No. 06-06210, proposed consent decree filed (C.D. Cal. Dec. 14, 2011)	17
<i>Equal Employment Opportunity Commission v. YS&J Enterprises d/b/a Dairy Queen</i> , No. 11-01103, complaint filed (M.D.N.C. Dec. 14, 2011)	17
<i>Henry v. Red Hill Evangelical Lutheran Church of Tustin</i> , No. G044556, 2011 WL 6119336 (Cal Ct. App., 4th Dist., Div. 3 Dec. 9, 2011)	10
Document Section B	22
<i>In re Arbitration Between New Britain Board of Education and AFSCME (School Employees)</i> , No. 2010-A-0214, 2011 WL 6005185, 40 LAIS 104 (Sept. 27, 2011)	12
<i>In re Arbitration Between [Claimant] and [Respondent] (Business Services)</i> , No. [Redacted], 2011 WL 6122389 (Am. Arbitration Ass'n Nov. 16, 2011)	12
<i>In re Arbitration Between [Claimant] and [Respondent] (Justice, Public Order and Safety)</i> , No. [Redacted], 2011 WL 6122383 (Am. Arbitration Ass'n Nov. 21, 2011)	12
<i>In re Arbitration Between [Claimant] and [Respondent] (Motion Pictures)</i> , No. [Redacted], 2011 WL 6122379 (Am. Arbitration Ass'n Nov. 15, 2011)	12
<i>King v. Lowe's</i> , No. 11-CV-1320, settlement approved (D. Or. Nov. 3, 2011)	13
<i>Office of Federal Contract Compliance Programs v. Lund Boat Co. and Brunswick Corp.</i> , No. 2012-OFC-00002, administrative complaint filed (O.F.C.C.P. Dec. 1, 2011)	17
<i>Sanchez v. Northwest Airlines Inc.</i> , No. 10-2393, 659 F.3d 671 (8th Cir. Oct. 14, 2011)	14
Document Section D	39
<i>Villalvazo v. Kofax Inc.</i> , No. G044765, 2011 WL 6153099 (Cal. Ct. App., 4th Dist., Div. 3 Dec. 12, 2011)	11
Document Section C	29

Reproduction Authorization

Authorization to photocopy items for internal or personal use, or the internal or personal use by specific clients, is granted by Thomson Reuters for libraries or other users registered with the Copyright Clearance Center (CCC) for a fee to be paid directly to the Copyright Clearance Center, 222 Rosewood Drive, Danvers, MA 01923; 978-750-8400; www.copyright.com.