4th Labor & Employment Seminar

Kamer Zucker & Abbott

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NEW DEVELOPMENTS IN FEDERAL AND STATE LAW

By: Shaun P. Haley, Esq.

I. U.S. SUPREME COURT.

A. Arbitration.

Circuit City Stores, Inc. v. Adams, – U.S. – , 121 S. Ct. 1302 (2001).

Federal Arbitration Act applies to most employment contracts, only exempting from coverage contracts involving transportation workers. The Court enforced an arbitration agreement which was contained in the employment application completed by Adams. Although this case signals a trend toward favoring arbitration of employment-related claims, the Ninth Circuit's 1998 decision in *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998), which determined that mandatory arbitration of Title VII claims was unenforceable, remains good law.

Eastern Associated Coal Corp. v. United Mine Workers of America, 531 U.S. 57, 121 S. Ct. 462 (2000).

Public policy considerations do not require courts to refuse to enforce an arbitration award ordering an employer to reinstate an employee truck driver who twice tested positive for marijuana. The Court made the important point that the question was not whether the employee's drug use itself violates public policy, but whether the agreement to reinstate him does so. The Court could not find in the Omnibus Transportation Employee Testing Act of 1991, the regulations, or any other law or legal precedent any explicit, well-defined, dominant public policy to which the arbitrator's decision ran contrary.

Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79, 121 S. Ct. 513 (2000).

An arbitration agreement could not be invalidated because it does not refer to arbitration costs and fees. While saddling an employee with prohibitive fees and costs could invalidate an agreement because it impedes an individual's attempt to vindicate federal statutory rights, the court believed that parties seeking to invalidate arbitration agreements must bear the burden of showing actual prohibitive expense. Speculation alone is not enough.

Major League Baseball Players Association v. Garvey, – U.S. –, 121 S. Ct. 1724 (2001).

Reversed a Ninth Circuit decision awarding $3 million to former baseball star Steve Garvey. In overturning the decision, the Court held that the Ninth Circuit impermissibly exceeded the bounds for a court's review of an arbitration award by deciding the case's merits on its own. The high court, referencing its earlier precedents regarding the limitations on judicial review of arbitration awards, stated that courts are not authorized to review an arbitrator's decision on the merits of a case despite allegations that the decision rests on factual errors or misinterprets the parties' agreement. The Supreme Court held that when a court weighs the merits of a grievance, it usurps the role of the arbitrator. Even where there is a finding of arbitrator error or misconduct, a reviewing court may not decide the merits of the underlying case in order to preclude additional arbitral proceedings. This case serves as an important reminder to employers who utilize arbitration as a means of resolving employment-related disputes that judicial review of arbitration awards is extremely narrow.

B. Violence Against Women Act.

United States v. Morrison, 529 U.S. 598, 120 S. Ct. 1740 (2000).

The private civil remedy provision of the 1994 Violence Against Women Act is an invalid exercise of Congress's power under the Commerce Clause and Section 5 of the 14th Amendment.

C. ERISA.

Pegram v. Herdich, 530 U.S. 211, 120 S. Ct. 2143 (2000).

Health plan enrollees may not bring federal claims against their plans under the Employee Retirement Income Security Act (ERISA) for denials of coverage that are based in part on medical judgment.

D. Taxation.

United States v. Cleveland Indians Baseball Co., – U.S. –, 121 S. Ct. 1433 (2001).

Back wages are subject to FICA and FUTA tax rates that were in effect for the year in which the wages are in fact paid, not for the year in which they should have been paid. The employer in this case had settled a grievance and paid, in 1994, backpay for wages that were originally due in 1986 and 1987.

E. Front Pay.

Pollard v. E.I. du Pont de Nemours & Co., – U.S. –, 121 S. Ct. 1946 (2001).

Front pay awards in cases under Title VII are not an element of compensatory damages and are therefore not subject to damages caps under that statute.

II. UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

A. Americans With Disabilities Act.

Echazabal v. Chevron USA, 226 F.3d 1063 (9th Cir. 2000).

Any "direct threat" posed by an applicant to his own health or safety does not provide an employer with an affirmative defense to liability under the ADA if the disability does not present a direct threat to other employees in the workplace. The court specifically held that any risk that the plaintiff's liver would be damaged from further exposure to solvents and chemicals present in a refinery did not preclude him from being "otherwise qualified" within the meaning of the ADA.

Harris v. Harris & Hart, Inc., 206 F.3d 838 (9th Cir. 2000).

In this case, an employer required a medical release prior to rehiring an employee who previously requested an accommodation for carpal tunnel syndrome and then left employment because of that condition. The court held that requiring a release was not an illegal pre-offer medical inquiry under the ADA because the employer would have been entitled to request the release if the employee was simply seeking to return after a leave of absence.

Willis v. Pacific Maritime Association, 244 F.3d 675 (9th Cir. 2001).

The Ninth Circuit joined eight other circuits in establishing that the ADA does not require an employer to violate the seniority provisions of a collective bargaining agreement in order to provide a reasonable accommodation to an employee. The court determined that such an accommodation is *per se* unreasonable where the collective bargaining agreement contains bona fide seniority provisions.

Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000).

A cargo handler with back problems could proceed with his claim that the employer violated the ADA by failing to consider reasonable accommodations, including bypassing a company-imposed seniority system to reassign him to another job. The Ninth Circuit held that employers must engage in an interactive process with the disabled employee to identify possible reasonable accommodations, and can be held liable under the ADA for failure to make a good faith effort if a reasonable accommodation would otherwise have been possible. The court further found that a *self-imposed* seniority system is not a *per se* bar to reassignment (as in collectively bargained seniority systems), but is merely a factor in the undue hardship analysis. The United States Supreme Court has since decided to review the Ninth Circuit's decision.

Brown v. Lucky Stores, Inc., 246 F.3d 1182 (9th Cir. 2001).

A California grocery checker who missed work because of court-ordered drug and alcohol rehabilitation is not protected under the ADA "safe harbor" provision for addicts in recovery. The Ninth Circuit held that "mere participation" in a rehabilitation program is not enough to trigger the protections of the Act, and the employee's drug and alcohol use was too recent for her to be protected.

Humphrey v. Memorial Hospitals Association, 239 F.3d 1128 (9th Cir. 2001).

A medical transcriptionist suffering from Obsessive Compulsive Disorder was deemed by the Ninth Circuit to have a covered disability under the ADA. Due to her condition, the employee had to go through several daily rituals, such as washing her hair several times, which caused her to be frequently late to work. The court determined that the employee's disorder seriously affected the major life activity of caring for herself, and was therefore covered by the ADA. In addition, the court found the employer to have violated the Act by failing to consider allowing the employee to work from home, as it did several other employees. The employer maintained a policy that prohibited employees who had been subjected to discipline from working at home. The court stated that it was inconsistent with the purposes of the ADA for an employer to fail to provide an accommodation based solely on discipline resulting from the disability itself.

B. Sex Discrimination.

Frank v. United Airlines, Inc., 216 F.3d 845 (9th Cir. 2000).

From 1980 to 1994, United Airlines required its flight attendants to comply with maximum weight requirements based on sex, height and age. Failure to maintain weight below the applicable maximum subjected a flight attendant to various forms of discipline, including suspension without pay and termination. In overturning a lower court's decision in

favor of United, the Ninth Circuit noted that the weight restrictions inherently treated women in a different manner from men in that the policy required female flight attendants to weigh between 14 and 25 pounds less than male colleagues of the same height and age. As such, the company's weight requirements facially represented disparate treatment of female flight attendants and therefore were unlawful under Title VII.

C. Age Discrimination.

Coleman v. Quaker Oats Co., 232 F.3d 1271 (9th Cir. 2000).

After Quaker Oats engaged in a fifty percent reduction in force, three employees brought suit under the Age Discrimination in Employment Act (ADEA), claiming that the layoff unduly affected employees over the age of forty. Plaintiffs were able to provide statistical evidence demonstrating that persons over forty were terminated at a rate twice that of those under forty; however, the court said the statistical evidence was far less dramatic when matters such as education and job placement were also considered. In addition, the court held that the "disparate impact" theory commonly associated with Title VII actions did not apply to cases brought under the ADEA. The practical impact of this case is that individuals bringing suit under the ADEA must demonstrate actual discriminatory bias -- statistical evidence alone will not suffice.

D. Retaliation.

Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000).

In a decision rejecting the view of the Fifth and Eighth Circuits and specifically adopting the interpretation of the EEOC, the Ninth Circuit held that an adverse employment action covers anything reasonably likely to deter employees from engaging in protected activity and not just ultimate employment actions such as hiring, firing, promoting and demoting. As such, the employer was found to have violated the retaliation provisions of Title VII when it eliminated staff meetings, eliminated a flexible start-time policy, and reduced employee workload and salary.

Fielder v. UAL Corp., 218 F.3d 973 (9th Cir. 2000).

A United Airlines employee brought suit under Title VII, claiming that her co-workers retaliated against her for complaining about the harassing behavior of a fellow employee. The employee specifically complained that following her initial allegations, her co-workers refused to answer her questions and failed to assist her in performing the physical activities of her job. She also found her coat wadded up in a corner with muddy footprints on it. In a case of first impression, the Ninth Circuit determined that "discrimination" under Title VII encompasses more than just ultimate employment decisions, and as such, the statute's protection against retaliation extends to co-worker retaliation that rises to the level of an adverse employment action. This case has further ramifications for employers in that the Ninth Circuit allowed the employee to proceed under a continuing violation theory even though she had not been subject to any retaliatory behavior for 300 days prior to her claim (in fact, the employee was on medical leave for the entire limitations period). However, the Ninth Circuit determined that sufficient conduct had occurred to allow a jury to determine whether United had engaged in an ongoing violation of federal anti-bias laws.

E. Sexual Harassment.

Star v. West, 237 F.3d 1036 (9th Cir. 2001).

In this case, an employee brought suit under Title VII claiming that her employer failed to take adequate measures to end her co-worker's allegedly harassing conduct. After being notified of the potential unlawful behavior, the employee's supervisor notified the alleged harasser that the "charges were serious" and that he was to stay away from the complaining employee. In finding for the employer, the Ninth Circuit held that actual discipline of a harassing co-worker is not necessary to establish that an employer provided an adequate remedy to a harassment complaint.

F. Privilege.

Oleszko v. State Compensation Ins. Fund, 243 F.3d 1154 (9th Cir. 2001).

The pyschotherapist-patient privilege extends to unlicensed counselors in employee assistance programs (EAPs). The court found that Oleszko could not compel discovery of EAP records to prove a pattern of sex and race discrimination at the hands of her employer, California's State Compensation Insurance Fund. With its finding, the Ninth Circuit became the first in the country to expand the privilege for licensed mental health providers created in *Jaffe v. Redmond*, 518 U.S. 1 (1996), to unlicensed mental health counselors providing services as part of an EAP.

G. Arbitration.

Hawaii Teamsters Local 996 v. United Parcel Service, Inc., Case No. CV-99-00313-HG, 2001 WL 670081 (9th Cir. June 14, 2001).

The Ninth Circuit determined that an arbitrator exceeded the boundaries of a collective bargaining agreement in upholding United Parcel's discharge of an employee for swearing at a payroll clerk and a human resources official. In

the court's opinion, the arbitrator failed to consider a contract provision requiring the employer to give a written warning before firing an employee, except in the most serious cases. According to the Ninth Circuit, the swearing incident did not meet the level of severity necessary for immediate discharge without warning.

H. Fair Labor Standards Act.

Rowe v. Laidlaw Transit, Inc., 244 F.3d 1115 (9th Cir. 2001).

Upholding a district court's ruling, the Ninth Circuit determined that a transit company supervisor who was paid on an hourly basis while she worked part-time during her recovery from an ankle injury, but otherwise was paid on a salary basis, was exempt from the overtime requirements of the Fair Labor Standards Act (FLSA). The reduced schedule worked by the supervisor qualified as unpaid leave under the Family and Medical Leave Act (FMLA), and the employer's provision of leave under the FMLA did not alter the employee's FLSA exempt status.

I. WARN Act.

Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152 (9th Cir. 2001).

In a case of first impression, the Ninth Circuit held that tips, holiday and vacation pay are to be included in the "backpay" to which employees are entitled when their employer violates the WARN Act by giving them less than 60 working days' notice of a plant closure or mass layoff.

III. SUPREME COURT OF NEVADA.

A. Arbitration.

Kindred v. Second Judicial District Court, 996 P.2d 903 (Nev. 2000).

Specifically declining to apply the Ninth Circuit's decision of *Duffield v. Robertson Stephens & Co.*, the Nevada Supreme Court held that an employee could be compelled to arbitrate Title VII claims under the Nevada Uniform Arbitration Act. The employee sought relief from a lower court ruling compelling her to arbitrate her Title VII claim under a valid arbitration clause contained in her Application for Securities Industry Registration ("U-4 Form"). In denying her request for relief, the court held that nothing in Title VII precluded the compulsion of arbitration for claims arising under an employment contract. This decision is yet another example of the pressure facing the Ninth Circuit to overturn its decision in *Duffield*.

B. Workers' Compensation.

Banegas v. State Industrial Insurance System, 19 P.3d 245 (Nev. 2001).

In this case, the Nevada Supreme Court clarified NRS 616C.505, and held that an unmarried co-habitant of an injured/deceased employee could not receive benefits under Nevada's workers' compensation laws, even if the person was totally dependent upon the injured/deceased employee.

IV. NATIONAL LABOR RELATIONS BOARD.

A. *Weingarten* Rights.

Epilepsy Foundation of N.E. Ohio, 331 N.L.R.B. No. 92 (2000).

Reversing a twelve-year precedent, a sharply-divided Board ruled that federal labor law protections giving unionized employees the right to have a representative present during a disciplinary interview should similarly extend to employees in nonunion workplaces.

B. Union Organizing.

Allegheny Ludlum Corp., 333 N.L.R.B. No. 109 (2001).

Employers may not videotape employees for use in anti-union campaign videos during union organizing drives unless the employee "volunteers" to be included and no coercion is involved.

Technology Service Solutions, 332 N.L.R.B. No. 100 (2000).

In a significant decision favorable to employers, the National Labor Relations Board ruled that an employer is not required to give a union a list of the names and addresses of its employees to assist the union in the organizing process unless the union proves it has no reasonable alternative means of communication with the employees.

Atlantic Limousine, Inc., 331 N.L.R.B. No. 134 (2000).

In this case, the Board adopted a *per se* rule prohibiting the use of election-day raffles to encourage employees to vote in a certification election.

C. Bargaining Units.

M.B. Sturgis Inc., 331 N.L.R.B. No. 173 (2000).

The Board overruled previous precedent to conclude that both temporary and regular employees could be included in the same bargaining unit without first getting the permission of the employer and the temporary agency, provided that both employers qualify as joint employers.

D. Discipline.

Felix Industries Inc., 331 N.L.R.B. No. 12 (2000).

The Board held that an employer violated the Taft-Hartley Act when it discharged an employee who -- during a phone call in which he was engaged in protected activity by claiming a contractual right to night differential pay -- called his supervisor a "f****** kid" three times. By a 2-to-1 vote, the Board found that the employee's outburst was not of such a serious nature as to cause him to lose the protection of the National Labor Relations Act. Enforcement of the Board's decision was later denied by the D.C. Circuit Court of Appeals.

E. Dues Check-Off.

Hacienda Hotel, Inc. Gaming Corp., 331 N.L.R.B. No. 89 (2000).

Employers did not violate the Taft-Hartley Act when they unilaterally dishonored the dues-checkoff provisions of an expired collective bargaining contract. In a divided decision, the Board held that an employer's obligation to continue a dues-checkoff arrangement expires with the contract that created the obligation.

F. Subcontracting.

Overnite Transportation Company, 330 N.L.R.B. No. 184 (2000).

An employer must bargain over the subcontracting of bargaining unit work even if the subcontracting is intended to accommodate fluctuations in workload and results in no layoffs or economic loss to bargaining unit workers.

G. Withdrawal of Recognition.

Levitz Furniture Company of the Pacific, Inc., 333 N.L.R.B. No. 105 (2000).

Continuing the pattern of overturning precedent to benefit unions, the Board ruled that an employer may no longer withdraw recognition from a union by establishing an objectively based, good-faith reasonable doubt as to the union's majority status. Instead, the employer can only withdraw recognition if it can show that the union has actually lost the support of a majority of the employees.

V. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC).

A. Waivers Under the ADEA.

The EEOC recently promulgated regulations, to be codified at 29 C.F.R. § 1625, covering the validity of waivers under the Age Discrimination in Employment Act and the Older Workers Benefit Protection Act. The regulations essentially codify the principles articulated in *Oubre v. Entergy Operations, Inc.*, in which the U.S. Supreme Court held that an employer cannot force a former employee to "tender back" any payments received when the employee later decides to sue his or her employer. Additionally, the regulations state that an employer may not, on its own, abrogate or avoid the duties to which it agreed, even if the waiver is challenged.

B. ADA and Contingent Workers.

On December 12, 2000, the EEOC issued internal guidelines addressing how the ADA applies to contingent workforce arrangements involving staffing firms. The guidance concludes that a company employing temporary workers through a staffing firm may be held liable under the ADA: (1) for directly discriminating against a disabled worker or (2) for discrimination by the staffing firm, if the employer participated in the illegal conduct or knew or should have known that the staffing firm was engaging in unlawful disability discrimination and failed to take corrective action within its control.

VI. STATE LEGISLATION.

A. Workplace Violence.

Assembly Bill No. 370, enacted into law by Governor Guinn on June 12, 2001, and codified at Chapter 33 of the Nevada Revised Statutes, enables employers to obtain a court-ordered, temporary restraining order (TRO) when the employer reasonably believes that harassment in the workplace has occurred. A TRO cannot be obtained when the alleged harassment is against more than one person. An employer is not subject to civil or criminal liability if it fails to seek a TRO. At the same time, an employer is immune from liability for seeking the TRO as long as it is acting in good faith.

B. Child Labor.

Through the passage of Assembly Bill No. 74 (codified at Chapter 609 of the Nevada Revised Statutes), the Labor Commissioner is authorized to adopt regulations placing limits on the ability to employ children under the age of 16. The final measure allows the Labor Commissioner to regulate the employment of children under 16 in connection with the sale of any product, good or service under conditions which the Commissioner deems "dangerous to the health and welfare of such child." The Commissioner's authority to regulate in this area does not extend to counties with a population under 100,000. The Commissioner cannot regulate minors engaged in the sale of agricultural products at a fixed location, as long as the products are sold directly to consumers and are not for resale. An employer who violates any regulation established by the Labor Commissioner in this area will be subject to a fine of $2,500.00 for each violation.

C. Workers' Compensation.

Under newly modified NRS 616C.050, an employer or insurer must notify each claimant of his right to select an alternate treating physician or chiropractor should the claimant not be satisfied with his original treating physician. The new statutory provision calls for the creation of a standardized form notifying employees of this right.

Legislators also passed provisions clarifying NRS 616C.590, which establishes when an employee is entitled to vocational rehabilitation benefits. Beginning in July 2002, a partially disabled worker will be eligible for vocational rehabilitation benefits if he or she is able to return to restricted duty, but the employer fails to offer restricted employment at a salary constituting 80% of the employee's pre-injury salary.

Beginning on July 2, 2002, a hearing or appeals officer will be able, under certain circumstances, to order an insurer, managed care organization, third-party administrator, or employer which denies coverage for a work-related injury to reimburse an employee for treatment. An employee must first pay for the treatment under protest, and then a hearing or appeals officer must ultimately determine that the treatment requested should have been covered.