Zinsergram a/k/a Legal Update

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EEOC AND NLRB DEVELOPMENTS

The federal courts continue to rule against the EEOC and chide the agency for bringing cases without sufficient evidence. The EEOC's strategy appears to be to bring frivolous actions against Employers, with the strategy that the expense of litigation will cause Companies to cave in and agree to lucrative settlements. Those Companies that are fighting are winning and are being awarded attorney's fees and expenses by the courts.

In terms of NLRB developments, the U.S. Court of Appeals for the D.C. Circuit has denied the motion of the NLRB to rehear the case it lost, finding that its notice posting rule violated the First Amendment. Finally, the Federal Court in the Western District of the State of Washington has dismissed a petition by the NLRB because it was without authority to bring the case. Summaries of these cases follow.

EEOC TAGGED FOR ATTORNEY'S FEES

The EEOC filed multiple claims of sexual harassment against CRST. The EEOC delayed in identifying the number of individuals in the class. Eventually, all but one of the 255 alleged class member claims were dismissed. The one claim was settled. CRST sought fees and costs. These are only awarded if the EEOC's claims were frivolous.

The U.S. District Court stated, "The EEOC cannot avoid liability for attorney's fees simply by artfully crafting a complaint using vague language to hide frivolous allegations." This came after the EEOC argued that by not including class members' names, its claims could not be frivolous.

In dismissing the EEOC's claims of non-frivolity, the court noted, "The court previously determined that the EEOC's claims were unreasonable, and, after reviewing the record and the parties' arguments, the court essentially stands by its determination." The court found, "The EEOC presented only anecdotal evidence in support of its pattern-or-practice claim… and its argument boils down to little more than bald assertions." The court noted that the EEOC had "not investigated any of the claims," had "wholly failed to satisfy its statutory pre-suit obligations," and had "imposed an unnecessary burden upon [CRST] and the court."

In calculating the costs, the court awarded the requested fees after reducing them for the time spent on the settled claim. This was in line with doing rough justice, generally based upon the success of the defendant in having frivolous claims dismissed.

The court deducted 7% from its original award for costs CRST would have incurred in filing usual answers and case management without the frivolous claims. Because the hours were well-documented, the court additionally awarded appellate fees reduced by 10%, which would have been incurred even if the frivolous claims had not been filed.

Additionally, out-of-pocket expenses were awarded for a total of $3,724,065.63 in attorney's fees, $465,230.47 for appeal work, and $413,387.58 in out-of-pocket expenses, for a grand total of $4,602,683.68.

EEOC'S SHOUT OF "*J'ACCUSE!*" DROWNS IN INSUFFICIENT EVIDENCE

The EEOC alleged a pattern and practice of discrimination against pregnant employees and those who have returned from maternity leave, in violation of Title VII. To support this claim, the EEOC offered antidotal evidence. However, the Company, Bloomberg, was able to offer statistical experts to combat the claims.

In weighing the evidence, the U.S. District Court for the Southern District of New York stated, "*J'accuse* is not enough in court. Evidence is required. The evidence presented in this case is insufficient to demonstrate that discrimination was Bloomberg's standard operating procedure, even if there were several isolated instances of individual discrimination."

The court stated, "The EEOC has presented no admissible statistical evidence… even though the EEOC's own compliance manual states statistical evidence is extremely important." The court found, "The quality of the EEOC's evidence is variable at best." It further stated, "A court must be weary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees."

The court found that the claims were about dissatisfactions in raises stating, "There is no such thing as work/life balance. There are work life/choices, and you make them, and they have consequences." The court granted Bloomberg's motion for summary judgment.

NLRB REBUKED ON NOTICE POSTING RULE – AGAIN!

On May 7, 2013, the U.S. Court of Appeals for the D.C. Circuit ruled that a Notice Posting Rule promulgated by the NLRB violated the First Amendment of the Constitution of the United States. The Court ruled that forcing Employers to post such a notice is compelled speech in violation of the First Amendment.

The notice that the NLRB attempted to impose was a virtual road map to teach employees how to unionize. In striking down the rule requiring that a notice be posted, the Court noted, "[The plaintiffs] see the poster as one sided, as favoring unionization, because it fails to notify employees of their rights to decertify a union…"

On September 4, 2013, the U.S. Court of Appeals for the D.C. Circuit denied the Motion of the NLRB, asking that the Court rehear the case.

Editor's note: It will be interesting to see if the NLRB petitions the U.S. Supreme Court.

ACTING GENERAL COUNSEL'S APPOINTMENT IS INVALID

The U.S. District Court for the Western District of Washington has dismissed a petition of NLRB Regional Director Ronald H. Hooks, seeking 10(j) injunctive relief against the Employer. The case was dismissed for two basic reasons.

First, the Court noted the various decisions around the country, holding that President Obama's appointments to the NLRB on January 4, 2012 were unconstitutional recess appointees because the Senate was not in recess. The District Court Judge agreed.

Additionally, the Court ruled that Acting General Counsel Lafe Solomon (who has been "Acting" for over two years) was not validly appointed to that role under the so-called Federal Vacancies Reform Act. The Judge ruled that the Act "only permits the appointment of a person under specific circumstances, and the only circumstances that could apply… is appointing a person who, within the last 365 days, has served as a personal assistant to the departing officer."

The Court stated that it is undisputed that Acting General Counsel Solomon has never served as a first assistant. With that ruling, the Court dismissed the NLRB's petition.