Westlaw Journal
EMPLOYMENT

Litigation News and Analysis • Legislation • Regulation • Expert Commentary

VOLUME 27, ISSUE 20 / MAY 1, 2013

WHAT'S INSIDE

COMMENTARY

Attack of the NLRB: Social media policies and beyond

Mintz Levin attorneys Mitch Danzig and Brandon T. Willenberg discuss the National Labor Relations Board's recent decisions about workplace social media policies and what they mean for employers.

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GENDER DISCRIMINATION

California women make case for smaller bias class against Wal-Mart

Women whose bid to represent more than 1 million Wal-Mart employees in a nationwide gender discrimination suit was stopped by the U.S. Supreme Court in 2011 say they have narrowed the proposed class to their home state of California and provided evidence to support certification.

Dukes v. Wal-Mart Stores Inc., No. 01-2252, motion in support of class certification filed (N.D. Cal. Apr. 15, 2013).

Attorney Joseph Sellers, who has represented the plaintiffs since the suit began, told Reuters that the limited statewide classes satisfy standards set by the Supreme Court's June 2011 decision.

"Our clients are hoping to finally get their day in court in pursuing more narrowly drawn cases," Sellers said.

"By identifying specific policies, explaining the common mode of exercising discretion and providing statistics at the store — district and regional level — the plaintiffs have met the burdens created by the Supreme Court," according to the motion in support of certification filed in California federal court.

In June 2011 the Supreme Court unanimously decertified the largest employment discrimination class in history, finding that the employees who charged Wal-Mart with discrimination failed to show "there are questions of law or fact common to the class." *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011).

REUTERS/Jonathan Alcorn

Wal-Mart workers on strike walk a picket line during a protest outside a store in Pico Rivera, Calif., on Oct. 4, 2012. An amended lawsuit seeks to represent about 180,000 women who worked in three "California Wal-Mart regions" between 1998 and 2002 and were subject to an allegedly biased compensation plan.

Last fall U.S. District Judge Charles Breyer of the Northern District of California denied Wal-Mart's motion to dismiss the fourth amended complaint

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Westlaw Journal Employment

Published since May 1986

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

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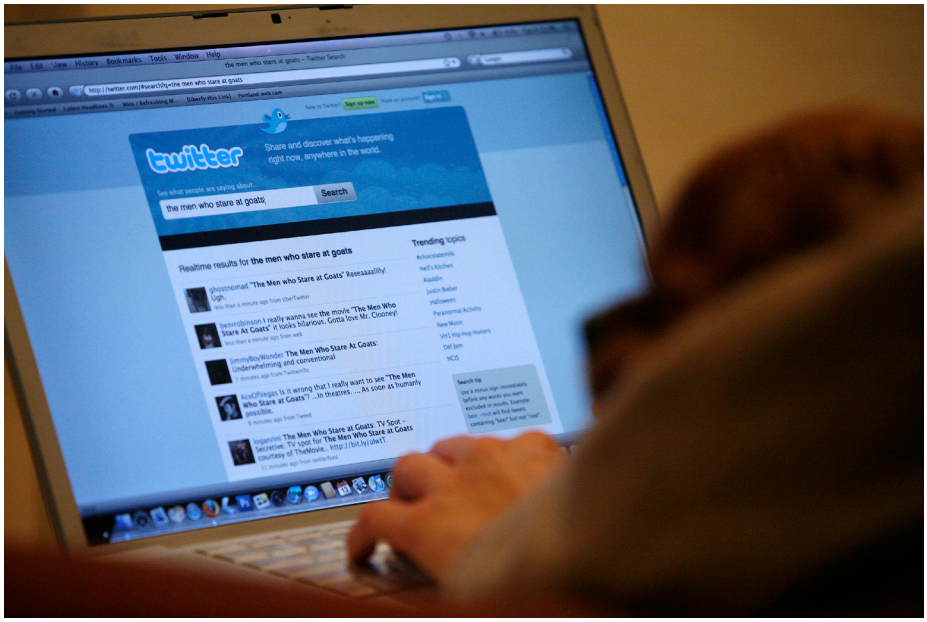
Attack of the NLRB: Social media policies and beyond

By Mitch Danzig, Esq., and Brandon T. Willenberg, Esq.
Mintz Levin

Social media is a powerful vehicle for the communication of information. Relatively "overnight," it has become an integral part of the business world. Companies regularly use Facebook, Twitter, blogs and the like to market and build businesses. Employees are Facebooking, tweeting and blogging throughout the day. Companies are also facing the difficult task of balancing the use and promotion of social media by their employees with protecting their confidential business information, image and reputation. Unfortunately, the National Labor Relations Board has not been making this already difficult task any easier.

Social media policies are now (or should be) the norm for companies. These policies provide guidelines to company employees as to what they can and cannot say and do when using social media to discuss their job or the company. For the past 18 months or so, the NLRB has been weighing in on whether these social media policies (and other employment-related policies) infringe on the rights of employees under the National Labor Relations Act, particularly under Section 7 of the law, which provides to all employees — unionized and nonunionized — the right to engage in "protected concerted activities." These activities include, for example, the right to protest an employer's treatment of its employees or other working conditions such as wages, hours and safety. The NLRB construes employee rights under Section 7 very broadly.



REUTERS/Arko Datta

> Social media policies are now (or should be) the norm for companies.

Starting in August 2011, the general counsel's office of the NLRB issued the first of three reports detailing the outcomes of its investigation into several cases about the use of social media and employers' social and general media policies, with the Acting General Counsel Lafe Solomon stating, "I hope that this report will be of assistance to practitioners and human resource professionals."[1] The other reports followed in January and May 2012.

According to the NLRB, one of the main points of the reports is that "employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees."[2] Although these reports addressed certain social media policies that did (or did not) violate the NLRA, the NLRB did not provide any specific guidance as to what should (or should not be) in a company social media policy in order to comply with the NLRA.

In addition, it's not just social media policies that employers have to worry about. The NLRB's recent decisions have expanded the reach of the NLRA well beyond social media policies into other types of employment policies.

More interesting though, is that in January the D.C. Circuit ruled in *Noel Canning v. NLRB*[3] that President Obama's January 2012 appointment of three new members to the NLRB was improper and therefore the board did not have a proper quorum to issue rulings in 2012. The court invalidated the NLRB decision at issue in that case, but more significantly, it calls into question the validity of all of the NLRB's rulings since January

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2012. Even though these NLRB rulings now appear to be in flux, employers must still be vigilant and take a very close look at their employment policies and handbooks to determine whether they may violate employees' rights under the NLRA.

RECENT NLRB DECISIONS

The NLRB has been very busy for the past 18 months or so. It has issued several decisions attacking not just social media policies but other employment-related policies as well. The cases below highlight the key issues employers need to consider and address. If you're an employer and haven't been paying attention to the NLRB's decisions, then it's time to do so.

In July 2012 the NLRB issued a decision in *Banner Health System*.[4] The company had a blanket policy requesting participants in an internal company investigation to refrain from discussing the investigation. Finding the policy violated the NLRA, the NLRB stated that an employer's desire to protect the integrity of its investigations was not a legitimate business justification sufficient to overcome the employees' NLRA Section 7 rights to engage in concerted activity (*e.g.*, discuss issues related to compensation, benefits or working conditions).

Citing to a prior decision, the NLRB stated that an employer cannot require employees to keep an ongoing investigation confidential unless the employer "first determine[s] whether ... witnesses need protection, evidence [was] in danger of being destroyed, testimony [was] in danger of being fabricated, or there [was] a need to prevent a cover up."

Essentially, it appears the NLRB is requiring employers to make a preliminary determination regarding confidentiality before it conducts any investigation. Unfortunately, the NLRB's ruling may actually discourage employees from complaining if they fear a lack of confidentiality.

The ruling also appears to conflict with the Equal Employment Opportunity Commission's enforcement guidance regarding supervisor harassment, which states in part that an employer should inform its employees that it will protect the confidentiality of harassment allegations to the extent possible. It is unclear whether the NLRB's rule will apply to these types of investigations. Nonetheless, the NLRB decision makes it clear that employers need to look beyond their social media policies to determine whether their other employment policies may violate employee rights under the NLRA.

In September 2012 the NLRB issued its first social media decision in *Costco Wholesale Corp*.[5] Costco maintained an "electronic posting" rule in its employee handbook that prohibited employees from making statements that "damage the company, defame any individual or damage any person's reputation." With little analysis, the NLRB found Costco's policy overly broad, concluding that "the rule would reasonably tend to chill employees in the exercise of their [NLRA] Section 7 rights," since employees would "reasonably construe the language to prohibit Section 7 activity."

> According to the NLRB, "employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees."

The NLRB also stated that Costco's policy "does not present accompanying language that would tend to restrict its application," and that "there is nothing in the rule that even arguably suggests that protected communications are excluded from the broad parameters of the rule."

The ruling at least suggests that if Costco had provided specific examples of prohibited conduct in the policy, or included language specifically exempting protected concerted activities under the NLRA (*i.e.*, a "savings" clause), the NLRB may have found that the policy did not violate the NLRA.

A general "savings" clause (such as "nothing in this policy affects your rights under the NLRA to engage in concerted activities"), however, will not likely be sufficient. In a May 2012 report, the NLRB examined a policy that prohibited, in part, employees from posting information about company performance, customer plans, employer shutdowns and work stoppages, and from speaking publicly about the workplace, work satisfaction or dissatisfaction, wages, hours or work conditions. The policy also had a general savings clause referencing the protection of employee rights under the NLRA.

However, the NLRB said that an employee reading the policy would reasonably conclude that the policy prohibited protected activities notwithstanding the savings clause because the policy still prohibited the employee from publicly discussing the workplace, work satisfaction or dissatisfaction, and working conditions.

The lesson here is that an employer cannot have a policy that prohibits NLRA-protected activity and then expect a broad or general savings clause to rescue it. Employers should focus on the types of electronic postings they really want to prohibit, such as defamatory or harassing language or disclosure of trade secrets and proprietary information. Broad, sweeping restrictions are not going to work. A savings clause should also be included, but it cannot be vague or too general. It also should specifically list the "concerted activities" that are exempted from the applicable policy.

In its September 2012 ruling in *Karl Knauz Motors*,[6] the NLRB found the company's "courtesy" policy to be overbroad. That policy stated:"Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the [company]."

The NLRB focused on the second sentence of the policy, noting that employees would reasonably construe that section as a restriction on objecting to working conditions and seeking the support of others in proving them. The NLRB also noted that there "is nothing in the rule, or anywhere else in the employee handbook, that would reasonably suggest to employees that employee communications protected by Section 7 ... are excluded from the rule's broad reach."

Again, as in *Costco Wholesale*, broad language and the lack of a narrowly tailored and specific savings clause led the NLRB to find that the company's courtesy policy violated the NLRA.

In December, the NLRB weighed in on the termination of employees for making

comments on Facebook. In *Hispanics United of Buffalo Inc.*,[7] an employee posted on her Facebook page: "Lydia Cruz, a coworker feels that we don't help our clients enough at [HUB]. I about had it! My fellow coworkers how do u feel?"

In response, four off-duty co-workers posted Facebook comments objecting to Cruz's job-performance criticisms. Cruz complained about the posts and comments, claiming she had been slandered and defamed. After reviewing the Facebook comments, HUB fired the employees who made all of the Facebook comments on the basis that their conduct violated the company's "zero-tolerance" policy for "bullying and harassment."

The NLRB found the Facebook post and comments were "without question" concerted activity for the purpose of mutual aid and protection under Section 7. It rejected HUB's argument that the Facebook postings constituted unprotected harassment and bullying, noting first that the comments could not be reasonably construed as harassment or bullying within the meaning of HUB's policy. The NLRB held that even if HUB's policy did cover the Facebook post and comments, the policy could not be applied without reference to the NLRA, under which employees' Section 7 rights take precedence over another employee's wholly subjective reaction to their protected comments.

The *HUB* ruling teaches that employers need to be cautious about using social media or electronic postings as a basis for termination, since employee rights under Section 7 of the NLRA may be affected. In addition, and even though it was not addressed in the *HUB* decision, employers need to consider employee privacy rights when making employment decisions that are based on employee use of social media.

In January the NLRB issued its decision in *DirecTV*,[8] finding several of DirecTV's policies (including one intended to protect confidential business information) ambiguous, overbroad and unlawful. Those policies included the company's media policy; law enforcement policy; the job, company business and work projects confidentiality policy; and the "information on public websites" policy.

The NLRB found that the media policy was unlawful because it would lead employees to believe they could not speak to the media about a labor dispute and because it improperly required employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee's free time and in non-work areas.

DirecTV's law enforcement policy required employees to coordinate with the company's security department before interviewing with or providing information to law enforcement regarding an employee. The NLRB found that employees would reasonably understand NLRB agents to be "law enforcement" regarding the current labor investigation and would lead employees to conclude that they would be required to contact the company's security department before cooperating with an NLRB investigation.

> Employers should focus on the types of electronic postings they really want to prohibit, such as harassing language or disclosure of trade secrets. Broad, sweeping restrictions are not going to work.

It also found that the policy was unlawfully broad to the extent that it affected employee contacts with other law enforcement officials about wages, hours and working conditions. Although the NLRB acknowledged that the company had a legitimate interest in knowing about law enforcement interviewing its employees, it stated that DirecTV's policy was ambiguous and unlawful.

DirecTV also maintained a handbook provision that provided, in part, "never discuss details about your job, company business or work projects with anyone outside the company" and "[n]ever give out information about customers or DirecTV employees." The NLRB found that references to "job" and fellow "DirecTV employees" would lead employees to believe they could not discuss their wages and other employment terms.

The board also noted that "because the rule does not exempt protected communications with third parties such as union representatives, board agents, or other governmental agencies concerned with workplace matters, employees would reasonably interpret the rule as prohibiting such communications, making the rule unlawful for that reason as well." According to the NLRB, the fact that this was a "confidentiality" policy that also covered customer information and company business did not save it from being unlawful.

Last, DirecTV also had a policy that stated employees "may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record." The NLRB found that "company information" necessarily included "employment records" (as defined in the handbook and could be construed as including information about employees' wages, discipline and ratings) and was "[a]t the very least ... ambiguous" in light of the handbook definition of "company information." Noting a prior NLRB decision, the board stated, "Employees should not have to decide at their own peril what information is not lawfully subject to such prohibition."

This *DirecTV* ruling is significant, since it demonstrates that all employment policies are subject to scrutiny under the NLRA and that although employers may have legitimate interests in protecting confidential business information or the administration of investigations, those interests and related policies will not trump the protection of employee rights under the NLRA.

NOEL CANNING AND THE FUTURE

But will these NLRB decisions hold up in the near future? Maybe not.

On Jan. 25 the D.C. Circuit issued its decision in *Noel Canning*[9] (a routine unfair-labor-practice case) that has now called into question all NLRB rulings issued since January 2012.

On Jan. 4, 2012, President Obama made three recess appointments to the NLRB. At the time, there were only two confirmed members on the five-seat NLRB — meaning a lack of a quorum to issue decisions. Obama made these appointments using his recess appointment power under the Recess Appointments Clause in Article II, Section 2 of the U.S. Constitution.

The D.C. Circuit agreed with Noel Canning's argument that at the time the NLRB issued the decision in the underlying case, the NLRB only had two validly appointed members, so it lacked a quorum to issue decisions, making the adverse decision in the case invalid. The

court rejected the arguments of the NLRB and the Obama administration that the Senate was in recess Jan. 4, 2012, when the president made the appointments, and it found that the NLRB vacancies did not arise during a Senate recess — requirements for the Recess Appointments Clause.

Although the NLRB was quick to point out its disagreement with the D.C. Circuit's decision and that it believed the decision only applied to this one case, the implications could be far greater, since the decision calls into question every decision the NLRB has made in the past 15 months. The Wall Street Journal reported March 8: "[A]t least 87 companies and three unions have cited the [*Noel Canning*] decision in cases at varying stages within the [NLRB], including cases the board has yet to decide. ... Dozens more companies are citing the [NLRB] recess appointments in appeals they've filed against the agency in federal appellate courts."[10]

The *Noel Canning* battle, however, is headed to the nation's highest court. The NLRB announced March 12 that it will file a petition with the U.S. Supreme Court challenging the D.C. Circuit's ruling in the *Noel Canning* case. Although the Supreme Court could refuse to hear the case, given the importance of the issue and the case's impact on several other cases, it appears likely that it will grant review and hear the case.

WHAT DO EMPLOYERS DO NOW?

For now, and until the Supreme Court weighs in on the *Noel Canning* decision, all the NLRB's recent rulings regarding social media and other employment policies are still valid. So, employers need to be mindful of these decisions and their impact on current policies, and they need to make sure to revise their policies accordingly. And with the recent *DirecTV* decision, it appears the NLRB is extending the reach of the NLRA into nearly every other type of employment policy that governs employee conduct.

As DirecTV recently learned, broad sweeping language in handbooks and policies that restrict what employees can say to the media, law enforcement and co-workers and on blogs and public websites, without specifically exempting employee rights under the NLRA, particularly those regarding the discussion or expression of employment terms, conditions and wages, is likely to be construed as an unfair labor practice.

It's time to dust off those employee handbooks, start reviewing them and seek counsel with your trusted employment lawyers to determine whether and how those handbooks should be revised. WJ

NOTES

[1] Press Release, NLRB, Acting General Counsel releases report on social media cases (Aug. 18, 2011), *available at* http://www.nlrb.gov/news-outreach/news-releases/acting-general-counsel-releases-report-social-media-cases.

[2] Press Release, NLRB, Acting General Counsel issues second social media report (Jan. 25, 2012), *available at* http://www.nlrb.gov/news-outreach/news-releases/acting-general-counsel-issues-second-social-media-report.

[3] *Noel Canning v. NLRB*, 2013 WL 276024 (D.C. Cir. 2013).

[4] *Banner Health System and Navarro*, 35 NLRB No. 93, slip op. (2012).

[5] *Costco Wholesale Corp. and United Food and Commercial Workers Union,* Local 371, 358 NLRB No. 106, slip op. (2012).

[6] *Karl Knauz Motors Inc. and Becker*, 358 NLRB No. 164, slip op. (2012).

[7] Hispanics United of Buffalo Inc. and Ortiz, 359 NLRB No. 37, slip op. (2012).

[8] *DirecTV U.S. DirecTV Holdings LLC and Int'l Assn of Machinists & Aerospace Workers, Dist. Lodge 947, AFL-CIO, 359 NLRB* No. 54, slip op. (2013).

[9] *Noel Canning*, 2013 WL 276024.

[10] Melanie Trottman & Kris Maher, *Companies Challenge Labor Rulings*, WALL. ST. J., Mar. 8, 2013.

U.S. Supreme Court rules against nurse in wage-and-hour case

(Reuters) – A nurse who sued her employer for unpaid wages could not seek to press her case on behalf of similarly treated but yet-to-be-identified workers once the care facility where she worked offered to settle her claim, rendering it moot, the U.S. Supreme Court ruled April 16.

Genesis Healthcare Corp. et al. v. Symczyk, No. 11-1059, 133 S. Ct. 1523 (Apr. 16, 2013).

The 5-4 decision, split along the court's ideological fault lines, will likely have limited practical applicability but could spark further debate about whether the justices treat collective actions brought under the 1938 Fair Labor Standards Act differently from traditional class actions.

The justices found that the case against the nursing and rehabilitation provider should be dismissed because its offer to Laura Symczyk of the unpaid wages to which she alleged she was entitled effectively ended her stake in the case.

"We conclude that respondent has no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness," Justice Clarence Thomas wrote for the majority.

The lawsuit began when Symczyk, then a registered nurse at Philadelphia's Pennypack Center, sued parent company Genesis Healthcare Corp., alleging that 30 minutes of break time were subtracted per worked shift even though employees performed tasks during that time.

Genesis offered Symczyk a "Rule 68" settlement of $7,500 to cover the sought unpaid wages, plus reasonable attorney fees and costs. After Symczyk did not respond to the offer, Genesis filed a motion to dismiss because, it argued, it had offered to settle her individual claim, making her stake in the lawsuit moot, and no other employees had signed on as plaintiffs.

Rule 68 of the Federal Rules of Civil Procedure is designed to encourage settlements.

In wage-and-hour claims brought under FLSA, similarly situated workers must proactively opt in to be covered by a collective action. In traditional class actions, the inclusion of similarly treated members of a class is presumed.

Symczyk's attorneys said that Genesis was trying to "pick off" the lead plaintiff in what could become a larger collective action lawsuit over unpaid wages once other workers were identified.

'A BOILING DISPUTE'

A district court sided with Genesis and dismissed the case. The 3rd U.S. Circuit Court of Appeals reversed. Though the three-judge panel found that Symczyk's individual claim had been satisfied, it said Rule 68 was not meant for strategic use in picking off lead plaintiffs.

The Supreme Court disagreed with the 3rd Circuit panel, finding that though Symczyk had the authority under FLSA to pursue collective relief on behalf of similarly affected employees, her role in the case became moot once her claim was satisfied.

Justice Elena Kagan, in a dissenting opinion for the minority, assailed the majority for failing to consider the underlying question of whether Symczyk's lack of response to the settlement offer rendered her claim moot.

"So, a friendly suggestion to the 3rd Circuit: Rethink your mootness-by-unaccepted-offer theory. And a note to all other courts of appeals: Don't try this at home," Justice Kagan wrote.

J. Timothy McDonald, a Thompson Hine partner who was not involved in the case, said the April 16 decision would likely "add fuel to a boiling dispute" over to what extent class-action principles can be applied to FLSA collective action cases.

The Supreme Court two years ago in *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011), in a boon for employers, limited the type of classes that can be certified for the purposes of bringing a class action to those who had truly similar experiences.

"In today's decision, the majority — which is constituted by justices in the majority in *Dukes* — notes that there are 'significant differences' between the two, but stops far short of saying that (class action) cases like *Dukes* have no applicability to FLSA collective actions," McDonald said. WJ

The decision could spark further debate about whether the justices treat collective actions brought under the 1938 Fair Labor Standards Act differently from traditional class actions.

(Reporting by Amanda Becker)

Attorneys:
Respondent: Gary Lynch, Carlson Lynch Ltd., Newcastle, Pa.; Gerald D. Wells III, Faruqi & Faruqi, Jenkintown, Pa.; Adina Rosenbaum, Public Citizen Litigation Group, Washington

Petitioner: Ronald Mann, Columbia University, New York; Christina Michael, Mitts Law LLC, Philadelphia; James Boudreau, Greenberg Traurig LLP, Philadelphia; Michele Malloy, Littler Mendelson, Philadelphia; Stephen Miller, Cozen O'Connor, Philadelphia

Related Court Document:
Opinion: 2013 WL 1567370

FAIR LABOR STANDARDS ACT

Labor Department sues Utah companies for FLSA violations

Four Utah-based companies and their executives willfully violate record-keeping, minimum-wage and overtime-pay provisions of the Fair Labor Standards Act and owe their employees back pay, the Department of Labor has alleged.

Harris v. Universal Contracting LLC et al., No. 2:13-cv-00253, complaint filed (D. Utah Apr. 8, 2013).

The federal enforcement suit, filed April 8 in the U.S. District Court for the District of Utah, says Universal Contracting LLC, CSG Workforce Partners LLC, Decorative Enterprises LLC and Mountain Builders Inc. knowingly violate the FLSA provisions to obtain a competitive advantage in the construction industry.

Complying with the FLSA can be expensive, and the defendants gain an edge over their competitors by passing the savings of noncompliance on to their clients, the complaint says.

The FLSA, 29 U.S.C. § 201, sets a minimum wage and requires that most employees earn time-and-a-half pay for hours worked in excess of 40 per week.

CGS has tried to evade the FLSA requirements by using a "limited liability corporation" business model to classify its workforce as co-owners rather than "employees" eligible for the law's protections, the complaint says.

But the suit says the workers are employees and that the defendants meet the FLSA definition of an employer. Under the law, an employer is a person or company with authority to direct, supervise and control workers and to act directly and indirectly on their behalf.

Complying with the FLSA can be expensive, and the defendants gain an edge over their competitors by passing the savings of noncompliance on to their clients, the complaint says.

The Labor Department says it told CSG in September 2009 that FLSA minimum-wage, overtime and record-keeping provisions apply to the company's workers. But CGS violated the provisions anyway, and Universal Contracting has gone on violating them since becoming CGS' parent company in January 2012, according to the complaint.

The companies' defective record-keeping makes it impossible to know the full extent of the violations, the Labor Department says.

The state suspended Universal's contractor's license for one year in March because it allegedly failed to release requested financial records.

Universal and CSG supply contract laborers to Decorative Enterprises and Mountain Builders, two area construction companies. The construction companies are "joint employers" of the workers, since they perform the functions of an employer as defined by the FLSA, the suit argues.

The lawsuit seeks overtime compensation and damages for more than 800 laborers currently and formerly employed by the defendants, as well as an injunction ordering the defendants to stop violating the FLSA. WJ

Attorneys:
Plaintiff: U.S. Attorney David B. Barlow and Assistant U.S. Attorney Amy J. Oliver, Salt Lake City

Related Court Document:
Complaint: 2013 WL 1562295

Successful underlying claim defeats employer's malicious-prosecution suit

A favorable wage-and-hour ruling for a Los Angeles film school's former admissions representative prevents the school from showing that it would likely prevail in a malicious-prosecution suit against the employee, a California appeals court has ruled.

Millar et al. v. Fogh et al., No. B238022, 2013 WL 1411770 (Cal. Ct. App., 2d Dist., Div. 2 Apr. 9, 2013).

The 2nd District Court of Appeal reversed a Los Angeles County Superior Court decision, ordering the lower court to grant Cody Fogh's motion to strike the school's malicious-prosecution claim under the anti-SLAPP law, Cal. Civ. Proc. Code § 425.16.

SLAPP stands for "strategic lawsuits against public participation." The anti-SLAPP law protects people speaking out on public issues or exercising First Amendment rights from burdensome lawsuits meant to silence or intimidate them.

Writing for a unanimous three-judge appellate panel, Justice Judith Ashmann-Gerst said Fogh's motion met the two requirements of the anti-SLAPP law: It showed that the school's action challenged his right to file a lawsuit and that the school could not show a probability of prevailing on its claim.

The panel found that an earlier trial court ruling in Fogh's favor in the underlying wage-and-hour claims prevents the school from offering evidence that its malicious-prosecution claim could succeed.

Fogh, who was fired from the Los Angeles Film School's admission office in April 2009, sued the school and its administrators for wage-and-hour violations, including nearly $14,000 in unpaid overtime, wrongful termination, defamation and false light.

When the school filed a demurrer, Fogh dropped the defamation, false-light and wrongful-termination claims in June 2010.

Following a trial on his six wage-and-hour claims, the Superior Court found in Fogh's favor, awarding him about $18,400 plus $100,000 in attorney fees.

The school appealed, and the 2nd District affirmed the ruling in December.

The school then sued Fogh and his attorneys for malicious prosecution based on the defamation and false-light claims, saying Fogh failed to give specifics or evidence of alleged defamatory statements made against him.

Fogh and his attorneys, citing the anti-SLAPP law, filed motions to strike the school's malicious-prosecution claim.

The trial court's ruling in the employee's favor in the underlying wage-and-hour claims prevents the school from offering evidence that its malicious-prosecution claim could succeed, the appeals court found.

In support of the motions, Fogh presented evidence that school administrators Darren Millar and Rita Sawyer told other staff members Fogh was fired because he violated the school's Internet use policy and provided proprietary information to competing schools.

These statements were false and damaged his reputation and future employment prospects, Fogh said.

The school denied making defamatory statements, and the trial court found in its favor, denying the motions to strike.

In its opinion deciding Fogh's appeal, the 2nd District panel said a motion filed under the anti-SLAPP law must satisfy two components.

First, as a threshold matter, the party challenging a suit must show that the claim implicates free speech. The other party must then "demonstrate a probability of prevailing on the claim."

The school conceded the first part of the test when it admitted that its suit challenged Fogh's right to file his lawsuit, the panel found.

But the school could not satisfy the second component, the appeals court said, because the trial court ruled against it in the underlying suit.

The appellate panel rejected the school's contention that Fogh's successful wage-and-hour claims should have no bearing on its suit over the defamation claims because the different sets of claims involve different underlying fact allegations.

According to the appellate panel, the state Supreme Court rejected a similar argument in *Crowley v. Katleman*, 8 Cal. 4th 666 (Cal. 1994).

The appeals court ordered the Superior Court to grant Fogh's motions to strike and said his attorneys are due fees and costs. WJ

Attorneys:
Plaintiffs/respondents: Jonathan B. Cole, Nemecek & Cole, Sherman Oaks, Calif.

Defendant/appellant: Dayton B. Parcells III, Parcells Law Firm, Los Angeles

Related Court Document:
Opinion: 2013 WL 1411770

See Document Section A (P. 25) for the opinion.

Wal-Mart says temp workers' class action should go to individual arbitration

Claims by temporary workers that Wal-Mart failed to pay minimum wages and overtime and to provide breaks should be resolved through individual arbitration under the workers' staffing agency contract, the retailer says in Chicago federal court.

Burks et al. v. Wal-Mart Stores Inc. et al., No. 1:12-cv-08457, memorandum in support of motion to compel arbitration filed (N.D. Ill., E. Div. Apr. 1, 2013).

Wal-Mart's motion, filed in the U.S. District Court for the Northern District of Illinois, says that although it was not a party to the contract, disputes with the retailer should still go through arbitration because the claims against it are identical to the claims against the staffing agency.

The retailer also says it is a third-party beneficiary of the contract because it contracted for workers with the staffing agency Labor Ready Midwest.

Nineteen Wal-Mart temporary employees filed the suit against Wal-Mart and staffing agency Labor Ready Midwest, which contracted with the retailer to supply temp workers in the Chicago area.

The companies violated multiple provisions of the federal Fair Labor Standards Act and two Illinois labor laws, according to the complaint.

The plaintiffs say they were repeatedly forced to work without compensation.

According to the complaint, Wal-Mart required the plaintiffs to show up for work 10 to 15 minutes before their scheduled shifts, work through lunch breaks, attend training sessions and stay late, all without compensation.

Because of these corporate practices, the plaintiffs worked more than 40 hours per week, which entitled them to overtime pay they never received, the suit says.

On numerous occasions, according to the suit, the plaintiffs had their hours canceled at the last minute, which made it impossible for them to find other work during that time. They also say the defendants did not pay them for a minimum four hours on such days, as required by Illinois labor law.

REUTERS/Jim Young

A Wal-Mart employee stocks shelves in a Chicago. Nineteen Wal-Mart temporary employees in the Chicago area are suing the company and a staffing agency for allegedly forcing them to work without compensation.

The plaintiffs are seeking class certification of their claims and have requested compensatory and statutory damages, as well as declaratory and injunctive relief.

Wal-Mart filed a motion April 1 asking the court to compel arbitration and either to dismiss the suit or to grant a stay pending arbitration. Labor Ready filed a similar motion in March.

According to the motions, the plaintiffs' claims are governed by their employment application contracts they signed with Labor Ready. The contracts require that disputes be resolved through arbitration and ban class actions, Wal-Mart's motion says.

While the contracts are between the employee and Labor Ready, the retailer argues, Wal-Mart has a stake in enforcing the arbitration provision under the doctrine of equitable estoppel because the claims against both defendants are identical or intertwined.

The retailer's motion says it is not appropriate for claims against Labor Ready to proceed to arbitration while identical claims against Wal-Mart go to trial.

Wal-Mart also says that under Illinois law, it can enforce the arbitration agreement as a third-party beneficiary and client of Labor Ready because the plaintiffs actually perform their tasks for Wal-Mart, rather than for the staffing agency. WJ

Attorneys:
Plaintiffs: Christopher J. Williams, Workers' Law Office, Chicago

Defendant (Wal-Mart): Alan S. King, Mark E. Furlane and Noreen H. Cull, Drinker Biddle & Reath, Chicago

Related Court Document:
Memorandum: 2013 WL 1292633

See Document Section B (P. 30) for the memorandum.

Judge nixes class certification in Apple, Google employee-poaching case

A federal judge has denied class certification in an antitrust suit alleging six Silicon Valley high-tech firms conspired to artificially restrain the labor market by secretly agreeing not to recruit or hire each other's employees.

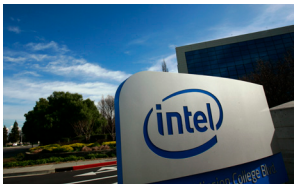
In re High-Tech Employee Antitrust Litigation, No. 11-CV-02509-LHK, 2013 WL 1352016 (N.D. Cal., San Jose Div. Apr. 5, 2013).

Fiver former software engineers sought to represent nearly 100,000 workers who may have been harmed by the pact allegedly formed by Apple Inc., Adobe Systems, Google, Intel Corp., Intuit Inc., Lucasfilms and Pixar.

U.S. District Judge Lucy H. Koh of the Northern District of California ruled that the case, at least for now, cannot proceed as a class action because the pact affected workers in too many different ways.

REUTERS/Andrew Kelly


REUTERS/Mike Segar



REUTERS/Robert Galbraith

The plaintiffs allege that Google, Apple and Intel Corp, as well as Adobe Systems, Intuit Inc., LucasFilms and Pixar agreed not recruit each others' employees in a bid to restrain salaries' in the labor market for software engineers.

companies over their alleged anticompetitive recruitment practices.

Although the companies did not admit any wrongdoing, they agreed not to enter into any future deals to stop each other from poaching workers.

> The judge said the case, at least for now, cannot proceed as a class action because the pact affected workers in too many different ways.

She did leave the door open, however, for the plaintiffs to file an amended complaint to address her concerns that the proposed class is framed too broadly, according to the ruling"The court is keenly aware that the defendants did not produce significant amounts of discovery or make key witnesses available for depositions until after the hearing on the plaintiffs' motion for class certification," Judge Koh wrote.

The defendants' opposition to class certification relied heavily on declarations from current employees, "some of whom were not timely disclosed and whose documents were not produced to plaintiffs," the ruling stated.

The plaintiffs filed the 2011 class-action complaint months after the Department of Justice settled a civil action against the six

According to the complaint, the companies conspired "to fix and suppress employee compensation and to restrict employee mobility" between Jan. 1, 2005, and Jan. 1, 2010.

They entered into six bilateral "do not cold call" agreements, promising not to poach each other's specialized, salaried employees, the complaint said. These agreements skewed the economics of the labor market and drove down salaries and other labor costs, the complaint asserted.

Plus, the suit said, the defendants' senior executives sat on one another's boards and "actively participated in negotiating, executing, monitoring compliance with and policing violations of the bilateral agreements."

In denying the plaintiffs' motion, Judge Koh said there was not yet enough evidence to turn the workers' civil suit into a class action.

"The court is most concerned about whether the evidence will be able to show that the defendants maintained such rigid compensation structures that a suppression of wages to some employees would have affected all or nearly all class members," she said.

The proposed class also may be defined so broadly "as to include large numbers of people who were not necessarily harmed by the defendants' allegedly unlawful conduct," she said.

The complaint charges the companies with violating the Sherman Act, 15 U.S.C. § 1, and California's related Cartwright Act, Cal. Bus. & Prof. Code § 16720. It also included a claim under California's unfair-competition law, Cal. Bus. & Prof. Code § 17200. WJ

Related Court Document:
Opinion: 2013 WL 1352016

Labor groups say Wal-Mart trespass lawsuit is unfair practice

(Reuters) – Labor groups are pushing back after Wal-Mart Stores Inc. brought a trespassing lawsuit against protesters who are demanding better conditions at its stores in Florida.

In a complaint to the National Labor Relations Board, the labor groups said that the trespassing lawsuit, brought by Wal-Mart in late March, is in and of itself a coercive tactic intended to silence critics.

A Wal-Mart spokesman defended the lawsuit, saying it was necessary to "stop the union's ongoing and coordinated effort" to disrupt business at the company's stores.

Wal-Mart's use of Florida trespass law, and the union's response, are an unusual escalation in the long-running back-and-forth between the retailer and labor groups.

"I think what we're seeing is both sides engaging in legal warfare and this is a new front," said Dorian Warren, a professor of international and public affairs at Columbia University.

Although Wal-Mart employees are not represented by unions, the United Food and Commercial Workers International Union and a group known as OUR Walmart have led a longtime campaign to improve working conditions at its stores, resulting in a flurry of complaints before the labor board. The groups in January agreed to stop picketing the chain after Wal-Mart told the board that the protests had disrupted its business in the busy months of the holiday season.

But on March 22, Wal-Mart filed a lawsuit in Orange County, Fla., that accused the UFCW, OUR Walmart, Central Florida Jobs with Justice Corp. and several individuals of "coordinated, statewide acts of trespass" at its stores. *Wal-Mart Stores Inc. v. United Food & Commercial Workers Int'l Union*, No. 2013-CA-004293, *complaint filed* (Fla. Cir. Ct., Orange County Mar. 22, 2013).

One of the protests described in the lawsuit occurred at an Orlando store in February, where a group of OUR Walmart members passed out handbills.

REUTERS/Jonathan Alcorn

Wal-Mart has filed a lawsuit accusing the United Food and Commercial Workers International Union and a group known as OUR Walmart of "coordinated, statewide acts of trespass" at its stores.

"Defendants have left Walmart no other choice but to pursue injunctive relief through the courts," the lawsuit stated.

In their latest complaint to the NLRB, which the labor groups made available to Reuters, UFCW and OUR Walmart said the lawsuit is an unfair labor practice because its purpose is not to prevent trespassing but to silence speech, a protected activity.

"This lawsuit is another attempt by Wal-Mart to try to silence our concerns rather than addressing them," said Vanessa Ferreira, an OUR Walmart member who works at a Walmart store in St. Cloud, Fla.

Wal-Mart spokesman Dan Fogleman said the retailer is confident the latest complaint would fail. "We've seen the union file many charges over the last several months," Fogleman said. "Time and again we've seen them dismissed or withdrawn."

Ronald Meisburg, a former NLRB general counsel and board member and current partner at Proskauer Rose, said "reasonably based lawsuits" against unions are not unlawful under the National Labor Relations Act.

"The board will be looking at whether or not there's a reasonable basis in the law, and then I think it's possible this board would look at whether it was nevertheless — even if it was brought for a reasonable basis — brought for a retaliatory motive," Meisburg said. WJ

(Reporting by Amanda Becker)

Judge allows some workers' claims over chemical exposure, dismisses others

A group of 16 workers who allegedly became sick from exposure to a degreasing solvent at a Kentucky plant can pursue product liability claims against the chemical manufacturers but not conspiracy or concert-of-action claims, a federal judge in Kentucky has ruled.

Smith et al. v. Univar USA Inc. et al., No. 12-134, 2013 WL 1136624 (E.D. Ky. Mar. 18, 2013).

U.S. District Judge Amul R. Thapar of the Eastern District of Kentucky said the plaintiffs provided enough factual information to support their claims that the manufacturers failed to warn them that the chemicals could cause Parkinson's disease, cancer and other serious health conditions.

Defendants Univar USA, PPG Industries, Dow Chemical Co. and Occidental Chemical Corp., however, are entitled to dismissal on the plaintiffs' conspiracy and concert-of-action claims because the complaint does not sufficiently allege an intentional tort, the judge held.

The plaintiffs, led by Robert E. Smith, filed suit in the District Court last April over their alleged exposure to trichloroethylene and trichloroethane while working at the Dresser Industries Plant in Berea, Ky.

The complaint says the defendants supplied the plant with TCE and TCA for use as an industrial solvent and degreasing agent from the 1960s through the 1990s but failed to warn Dresser that the chemicals became dangerous and could cause neurological damage when heated.

The plaintiffs asserted that they touched the chemicals and inhaled their vapors while on the job. Dresser took few safety precautions for workers because it was unaware of the dangers that TCE and TCA posed, the suit says.

The defendants conspired to conceal the risks of exposure and substantially assisted each other by funding inaccurate "research" that would purportedly justify their inadequate warnings, according to the complaint.

Univar, PPG, Dow and Occidental each moved to dismiss the suit for failure to state a claim for relief under Federal Rule of Civil Procedure 12(b)(6).

Dow Chemical Co. is a defendant in the suit.

The pleading does not specify which defendants manufactured and sold the TCE- or TCA-containing products that allegedly caused the plaintiffs' injuries, Dow said in its motion.

Judge Thapar said the claims based on the defendants' individual actions could proceed but not those based on an alleged agreement to deceive.

The plaintiffs need not specify which products allegedly caused their injuries because they asserted that all the defendants provided TCE and TCA to the plant during their entire period of employment, he said.

The judge found the strict liability claims could proceed because the plaintiffs asserted the products were unreasonably dangerous and the defendants knew their warnings were inadequate.

The defendants are entitled to dismissal of the civil conspiracy and concert-of-action claims, he said, because the plaintiffs failed to allege an intentional tort or an unlawful agreement.

The complaint pleads conclusory allegations of unlawful agreement at some unidentified point, which is insufficient to survive a motion to dismiss, Judge Thapar concluded. WJ

Attorneys:
Plaintiffs: Cary L. Bauer and Sidney W. Gilreath, Gilreath & Associates, Knoxville, Tenn.; George Chada, Natrona Heights, Pa.; John W. Morgan, Denney Morgan Rather & Gilbert, Lexington, Ky.

Defendant (Univar): Susan J. Pope, Frost Brown Todd LLC, Lexington

Defendant (PPG): Andrea B. Daloia and Timothy J. Coughlin, Thomson Hine, Cleveland; Charles H. Stopher and Edward H. Stopher, Boehl Stopher & Graves, Louisville, Ky.

Defendant (Dow): Kara M. Kapke, Robert D. MacGill and William E. Padgett, Barnes & Thornburg, Indianapolis

Defendant (Occidental): Andrea L. Russow Nichols, Bingham Greenebaum Doll, Lexington

Related Court Documents:
Memorandum opinion and order: 2013 WL 1136624
Dow's motion to dismiss: 2012 WL 7807597
Complaint: 2012 WL 1619231

See Document Section C (P. 36) for the opinion.

Receipt of workers' comp benefits bars tort claim

A man who worked at a Missouri aluminum smelting plant cannot pursue tort claims related to his development of chronic beryllium disease because he already received $70,000 in workers' compensation benefits, a federal judge in St. Louis has ruled.

Francis v. Noranda Aluminum Inc., No. 1:12-CV-0104, 2013 WL 1090300 (E.D. Mo. Mar. 15, 2013).

U.S. District Judge John A. Ross of the Eastern District of Missouri said Donald Francis' common-law tort claims are barred by the "election of remedies" doctrine, which provides that an aggrieved party may choose only one remedy to enforce rights arising from an injury.

Judge Ross granted Noranda Aluminum's motion for summary judgment and dismissed the suit March 15.

According to the judge's memorandum order, Francis worked as a maintenance millwright and foreman at Noranda's smelting plant in New Madrid, Mo., from 1982 until 2002. In 2006 he was diagnosed with chronic beryllium disease, a progressive respiratory disorder caused by exposure to beryllium dust or fumes.

According to the memorandum and order, Francis filed a claim with the Missouri Division of Workers Compensation in 2008 and has since received more than $70,000 in benefits from Noranda for expenses related to his CBD. The claim is still active.

He and his wife brought common-law negligence and loss-of-consortium claims against Noranda in federal court in April 2012.

The suit alleged Noranda failed to provide Francis with ample respiratory protection, ventilation and hygiene facilities to shield him from exposure to beryllium and other dangerous chemicals.

Francis claimed that CBD has made breathing extremely difficult and that he has an increased risk of lung cancer and a shortened life expectancy because of the disease.

> Donald Francis alleged he has an increased risk of lung cancer due to his former employer's failure to protect him from beryllium exposure.

Noranda filed a motion for summary judgment in the suit, asserting that the state workers' compensation law is the exclusive remedy for Francis' alleged injury.

The company said the election-of-remedies doctrine bars Francis' claims because he already selected workers' compensation as his statutory remedy for CBD.

Francis countered that his workers' compensation claim is still active and there can be no election of remedies or double recovery until a final judgment or full compensation is issued, according to the order.

Judge Ross determined the doctrine precludes Francis' suit.

While the workers' compensation law is the exclusive remedy for accidental personal injuries and not occupational diseases, Noranda properly argued that Francis characterized his disease as an accidental injury in his claim for workers' compensation benefits, the judge said.

He noted that the 8th U.S. Circuit Court of Appeals recently ruled that the receipt of workers' compensation benefits, not the presence of a final award or judgment, triggers application of the election-of-remedies doctrine. *Donner v. Alcoa Inc.*, No. 12–1415, 2013 WL 811606 (8th Cir. Mar. 6, 2013).

Francis received and might continue to collect workers' compensation benefits for his CBD, the judge said in dismissing the case. WJ

Attorneys:
Plaintiffs: Nicole B. Knepper and John D. Anderson, Anderson & Associates, St. Louis

Defendant: Brian A. Troyer and William J. Hubbard, Thompson & Hine, Cleveland; Jason G. Crowell and Michael D. Murphy, Osburn & Hine, Cape Girardeau, Mo.

Related Court Documents:
Memorandum and order: 2013 WL 1090300
Noranda's memo in support of summary judgment: 2012 WL 7810786
Complaint: 2012 WL 4850728

Leveraging motions *in limine* to win your trial and appeal

By Lynn Kappelman, Esq., and Dawn Solowey, Esq.
Seyfarth Shaw LLP

Motions *in limine*, when used effectively, can help deliver a jury win. Trial lawyers file motions *in limine* at or before the start of a trial and ask the judge to rule that certain evidence cannot be introduced during the trial. As a result, these motions present a unique opportunity for each side to shape the trial before it even begins.

Motions *in limine* can help determine which exhibits the jurors see, what testimony is admitted and which witnesses will appear at trial. Motions *in limine* are also an opportunity to educate the judge on your case themes, explain what evidence is relevant to the legal issues at hand and show what prejudicial evidence your opponent would like to insert into the trial.

Not all trial lawyers use motions *in limine* effectively. Some see motions *in limine* as one more task to check off the list when preparing for trial, without realizing their tremendous power to determine the story jurors will hear.

Here is how to make the most of motions *in limine* to increase your chance of a winning verdict, and to create a strong record for appeal.

FILE EARLY

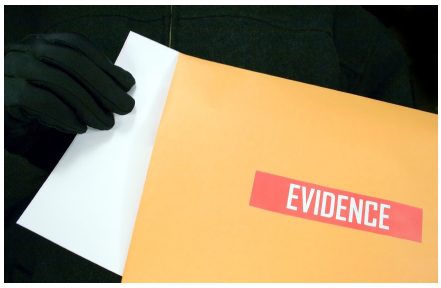
You may have a scheduling order that lists a deadline for motions *in limine* only weeks or days before your trial date. Just because you can file motions in limine on the eve of trial, however, does not mean you should. In fact, filing your motions *in limine* early can pay big dividends. Most crucially, if you can get a ruling on the motions early, you can structure your trial presentation, including witness preparation and opening statement, around the rulings.

> Motions *in limine* present a unique opportunity for each side to shape the trial before it even begins.

In addition, your motions will be better if prepared in advance rather than in the rush of the week before trial. Opposing counsel may not have started trial preparation in earnest and may not be as equipped to counter your arguments. The judge is more likely to read the motions with adequate time to do so. The judge may also be more likely to issue an actual ruling, rather than deferring a ruling to think about it further and see how the evidence comes in.

BE CREATIVE

Many lawyers approach motions *in limine* by reviewing the opposing party's exhibits and filing a motion or two to preclude the most objectionable exhibits. This is a fine piece of the strategy, but it should not be the whole strategy.



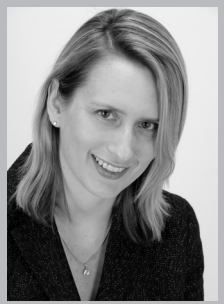
Reread the witnesses' deposition testimony and flag objectionable portions. Review the opposing party's theory of the case as stated in a summary judgment motion or pretrial briefing and flag evidence or arguments of concern. Scan opposing counsel's trial witness list for people whose testimony is not relevant, will be overly prejudicial or were not revealed properly in discovery. In the process of litigating the motion *in limine*, you may gain valuable insight into what opposing counsel expects the witness to say. Do not be shy about filing multiple motions if warranted in your case.

KEEP IT SIMPLE

Keep your motions *in limine* short and to the point. Identify the rule (or rules) of evidence you are relying on, cite a few cases if they are directly on point and explain what you want excluded and why. Unless you are dealing with a particularly esoteric or technical point of law, a few pages should do it. You are more likely to get and hold the court's attention and to get a ruling if the motion is accessible and understandable.

KEEP IT REAL

Many motions *in limine* cite well-worn rules of evidence to argue, for example, that a particular piece of evidence is more prejudicial than probative or will confuse the jury. A conclusory assertion that an exhibit is "prejudicial" or "confusing" is unlikely to persuade a judge, though. Explain why the exhibit is prejudicial or will confuse the jury. Identify precisely



Lynn Kappelman (L) is a partner in **Seyfarth Shaw**'s Boston office, practicing in the area of labor and employment litigation, including issues arising under ADEA, Title VII, ERISA, ADA, and all other state and governmental laws affecting employers. **Dawn Solowey** (R), senior counsel in the labor and employment department in Seyfarth's Boston office, represents management clients in labor and employment litigation in federal and state courts, in arbitration and at the Equal Employment Opportunity Commission and equivalent state agencies.

what you are afraid the jury will conclude and why. Not only will you be more likely to win your motion, but a more precise argument is preferable for your record on appeal.

REQUEST A HEARING

Many judges do not routinely schedule hearings on motions *in limine* but rely only on the written pleadings and issue rulings as late as the morning of jury selection. Request a hearing, preferably well in advance of trial. This will allow you the opportunity to fully air your concerns about bad evidence, talk to the judge in practical terms about the potential for prejudice and generally frame the case for the judge. Ask that the hearing be on the record, rather than in chambers. Get a transcript, which becomes part of your appellate record.

> In the process of litigating the motion *in limine*, you may gain valuable insight into what opposing counsel expects the witness to say.

GET CLEAR AND SPECIFIC RULINGS

Frame your motion *in limine* so as to achieve a clear ruling you can count on at trial. A simple rule applies here: Ask for exactly the ruling you want. If you want the opposing party to be precluded not only from testifying about a particular subject but also from mentioning it in opening statement, ask for that precise ruling. If you want the order to bar exhibits 6 and 7, say that as well. Assume that opposing counsel will go right up to the line of what is permissible, and work hard to have the line drawn where you want it.

PUT YOUR GOOD RULINGS TO WORK

If you do obtain a favorable ruling on a motion *in limine*, leverage that ruling at trial. As soon as you sense opposing counsel is venturing close to the line, say on the record, "Objection; motion *in limine*," to signal to the judge that opposing counsel is entering prohibited territory, and then elaborate at sidebar on the record as necessary.

> Assume that opposing counsel will go right up to the line of what is permissible, and work hard to have the line drawn where you want it.

KEEP WORKING TOWARD A FAVORABLE RULING

Sometimes you simply cannot persuade a judge to rule on a motion *in limine* prior to trial. Many judges prefer to see how the evidence develops before taking a position on the motion. If that happens, keep working toward a favorable ruling as trial proceeds. When the witness, testimony or exhibit at issue arises, ask to be heard at sidebar and re-raise your motion *in limine*. Explain why and how the prejudice you warned about before trial is now about to happen. For the cleanest appellate record, tie your objection back to the motion *in limine* (by docket number if possible) on the record.

OBJECT TO BAD RULINGS

If your motion *in limine* is denied, you can still use that motion as a tool to build an effective appellate record. If the motion is denied in open court, put your objection to the ruling on the record then and there. If the motion is denied prior to trial, ask to be heard briefly the morning of trial, before the jury is seated, to restate your objections to those rulings for the trial transcript. Make a clean record, citing the motion and the ruling by name and docket number.

DO NOT LET YOUR OBJECTION WITHER AWAY

If your motion *in limine* is denied, do not assume the filing of that motion by itself has adequately preserved your objection. The best practice is to continue to object at trial to the introduction of the evidence that was the subject of the motion.

A successful motion *in limine* can dramatically change the trajectory of a trial. For example, you may be able to use a motion *in limine* to preclude the testimony of a witness who has something against your client but who, in fact, has no relevant, firsthand knowledge of the specific facts at issue in the case. If the plaintiff's counsel has listed senior executives or in-house counsel of your corporate client as a harassment tactic, a motion *in limine* can prevent the plaintiff from calling that witness, or possibly, even issuing a subpoena.

> A successful motion *in limine* can dramatically change the trajectory of a trial.

A motion *in limine* may be effective in precluding irrelevant evidence offered only to tarnish a party or witness's reputation with the jury, or of irrelevant lawsuits that have been brought against your client. Defense counsel may be able to use a motion *in limine* to preclude irrelevant and prejudicial exhibits or testimony solely intended to garner the jury's sympathy for the plaintiff. A motion *in limine* can also be helpful in ensuring evidence regarding claims that have been dismissed earlier in the case, such as on summary judgment, do not reappear before the jury.

The best practice is to gather your trial team as soon as you have a trial date to brainstorm potential targets for motions *in limine*. Part of the challenge is anticipating what the other side will do at trial. Investing time in strategic thinking about how to use this important trial tool is a first step toward a winning verdict and appeal. WJ

$14 MILLION SETTLEMENT REACHED IN N.Y. NURSES' WAGE SUIT

More than 3,000 registered nurses in the Albany, N.Y., area have each received checks for about $1,700 as part of a settlement over allegations that five hospitals conspired to suppress nurses' wages. A New York federal judge approved the settlement agreement in late February, and checks were mailed to the nurses March 29, according to a website about the litigation. The nurses filed the wage-and-hour class action in June 2006, alleging the hospitals — Albany Medical Center, Ellis Hospital, Northeast Health, Seton Health System and St. Peter's Health Care — underpaid RNs and violated antitrust laws by exchanging compensation data to suppress wages. The $14.1 million settlement fund includes nearly $20,000 in attorney fees.

Fleischman et al. v. Albany Medical Center et al., No. 06-765, settlement approved (N.D.N.Y. Feb. 26, 2013).

WORKER FIRED FOR COMPLAINTS ABOUT YELLING BOSS, SUIT SAYS

The U.S. Department of Labor says a Florida marine construction company wrongly fired an employee who reported workplace violence when the business's owner yelled and made threatening comments and gestures. According to the federal court suit in Fort Lauderdale, Nori St. Paul complained that Duane Thomas, of Duane Thomas Marine Construction, created a hostile work environment by making inappropriate sexual comments, screaming and making threatening gestures. When Thomas learned of a complaint St. Paul filed with the Occupational Safety and Health Administration, the suit says, Thomas locked the company's computer system and fired her in March 2011. The suit seeks back wages in addition to compensatory and punitive damages.

Harris v. Duane Thomas Marine Construction LLC et al., No. 13-76, complaint filed (M.D. Fla. Feb. 5, 2013).

Related Court Document:
Complaint: 2013 WL 1562310

ALABAMA TOWN SETTLES SEXUAL HARASSMENT CHARGES

The city of Millbrook, Ala., has agreed to pay former police officer Kristen Spraggins unspecified damages to settle a U.S. Department of Justice discrimination and retaliation suit against it. According to an April 9 statement by the agency, the city did nothing to stop unwanted sexual advances toward Spraggins by one of her co-workers and then allegedly fired her for complaining. The Millbrook Police Department subjected Spraggins to disciplinary actions after she complained to her supervisors and filed a discrimination claim with the Equal Employment Opportunity Commission, the Justice Department said. According to the statement, Spraggins was the Police Department's only female officer in January 2008 when she was allegedly harassed. Under a consent decree, the city also agreed to change its policies on discrimination and to provide training to officers and staff, the Justice Department said.

United States v. City of Millbrook, Ala., No. 13-219, consent decree filed (M.D. Ala. Apr. 8, 2013).

EX-HEALTH CENTER EMPLOYEES ALLEGE RETALIATION

A doctor, secretary and therapist at a Florida mental health center allege they were fired for refusing to obey the owners' allegedly illegal orders. Dr. Edda Casanova, a physician at Coastal Mental Health Center, says she was fired when she refused to change a patient's diagnosis so Medicaid could reimburse Coastal or to prescribe drugs for five children whom she never examined. Secretary Sarai Hernandez and therapist Marilourdes Perez claim they were fired when they refused to write prescriptions for patients and for complaining about improper billing procedures. The complaint, filed in the Volusia County Circuit Court, alleges retaliation under Florida's Private Whistleblower Act and the federal False Claims Act. The plaintiffs seek lost wages and benefits, compensatory and punitive damages, and attorney fees and costs.

Casanova et al. v. Coastal Mental Health Center, No. 2013 30408, complaint filed (Fla. Cir. Ct., Volusia County Apr. 5, 2013).

COURT MAJORITY UPHOLDS GRIEVANCE ARBITRATION AWARD REGARDING HEALTH INSURANCE COPAYS

Ruling: A majority of the New Jersey Supreme Court upheld an arbitrator's award concerning a grievance. The grievance disputed the employer's requirement for negotiations unit employees to pay an additional $5 copayment for doctor's office visits. The court majority deferred to the arbitrator's conclusion that the parties maintained a past practice of a $5 copayment amount. The arbitration award, which required the employer to reimburse negotiations unit employees for the incremental increase in copayments through the end of the contract period, did not violate any statute or public policy, the court majority concluded.

What it means: The state Supreme Court majority observed that, when a court reviews an arbitration award, the arbitrator's interpretation of the contract is controlling. Under the "reasonably debatable" standard, a court reviewing a public sector interest arbitration award may not substitute its own judgment for that of the arbitrator, regardless of the court's view of the correctness of the arbitrator's position.

Borough of East Rutherford v. East Rutherford Policemen' s Benevolent Association Local 275, No. A-24-11, 39 NJPER 121 (N.J. Mar. 19, 2013).

COLLEGE DISTRICT SHOULD'VE ENGAGED IN EFFECTS BARGAINING OVER SURVEILLANCE CAMERAS

Ruling: The California Public Employment Relations Board considered a community college district's exceptions to an administrative law judge's decisions. It upheld the ALJ's conclusion that the district violated Educational Employment Relations Act provisions by refusing to engage in effects bargaining concerning its decision to install surveillance cameras in its new learning resource center. PERB found that the type of evidence an employer relies upon for imposing discipline — including video surveillance footage of employees — constituted matters within the scope of representation. PERB also held that a *prima facie* case of a refusal to engage in effects bargaining does not requiring a showing of "actual impact" upon a matter within the scope of representation. It ordered the employer to cease and desist from its EERA violations.

What it means: PERB held that a union's demand for effects bargaining is sufficient if it clearly identifies negotiable areas of impact, *i.e.*, subject matter within the scope of representation, and clearly indicates a desire to bargain over the effects of the decision as opposed to the decision itself. If an employer refuses to bargain without seeking clarification of the union's negotiability rationale, it fails to meet and negotiate in good faith. Here, PERB decided that a charging party may state a *prima facie* case of refusal to negotiate over the effects on discipline and evaluation procedures of a firm decision to install surveillance cameras, without alleging either that the employer created new grounds for discipline or new evaluation procedures.

California School Employees Association Chapter 477 v. Rio Hondo Community College District, No. LA-CE-5389-E, 37 PERC 197 (Cal. Pub. Employment Relations Bd. Mar. 21, 2013).

TENTATIVE BARGAINING AGREEMENT DOESN'T PRECLUDE DIRECTION OF REPRESENTATION ELECTION

Ruling: The Michigan Employment Relations Commission considered an incumbent union's objections to a representation petition, through which the petitioner-union sought to represent a bargaining unit of paraeducators. MERC determined that a tentative agreement between the incumbent union and the employer did not bar the election, where that agreement was never ratified by the union membership. MERC found that the employer's obligation to remain neutral in this representation dispute barred it from returning to the bargaining table after it was notified of the representation petition. It directed a secret ballot election among the petitioned for paraeducators.

What it means: MERC rejected the incumbent union's assertion that, because a tentative agreement had been reached when the representation petition was filed, the employer maintained an obligation to continue negotiations with the incumbent union for at least 30 days after the agreement date. The "30-day rule" purportedly balances employees' right to seek a new bargaining agent with the need to prevent dissident unit minorities from upsetting an established bargaining relationship, MERC explained. It concluded that the 30-day rule does not extend to negotiating a more acceptable agreement.

Rochester Community Schools and Michigan Education Association, No. 12-001938-MERC, 26 MPER 45 (Mich. Employment Relations Comm'n Mar. 15, 2013).

OHIO APPELLATE COURT VACATES LOST PAY AND BENEFITS PORTION OF ARBITRATION AWARD

Ruling: The Ohio Court of Appeals overruled a police union's assignments of error and affirmed a trial court's decision to vacate an arbitration award that granted a terminated police officer lost pay and benefits up to the date of the award. To the extent the lost pay and benefits portion of the award was based on the city's misuse of its subpoena powers to secure evidence of the officer's suspected violations of the department's sick leave policy, the lower court properly determined that the arbitrator exceeded his authority by premising the award on the city's collection of evidence through subpoenas that were improperly issued.

What it means: An arbitration award must have a rational nexus with the parties' collective bargaining agreement. Awards that depart from the essence of the CBA either because they conflict with the express terms of the agreement or because they lack rational support from the agreement will be vacated or modified by a reviewing court because the arbitrator has exceeded his or her authority.

City of Reynoldsburg v. Fraternal Order of Police Capital City Lodge No. 9, Nos. 12AP-451 and 12AP-452, 30 OPER 136 (Ohio Ct. App. Mar. 21, 2013).

COURT RULES CITY MUST BARGAIN UNILATERALLY IMPOSED LAYOFF AND RECALL CIVIL SERVICE RULES

Ruling: The Ohio Court of Appeals affirmed a trial court's decision to uphold the State Employment Relations Board's determination that a city employer violated Ohio Rev. Code § 4117.11(A)(5) by engaging in surface bargaining when it unilaterally submitted proposed changes to the layoff and recall procedures under the municipal civil service rules. Although the adoption of civil service rules did not constitute a per se refusal to bargain, the totality of circumstances supported the lower court's finding that the city's submission of proposed rule changes, during negotiations for a successor agreement, was indicative of the city's steadfast refusal to negotiate layoffs in the context of a labor agreement.

What it means: A public employer's authority to adopt civil service rules that relate to mandatory subjects of bargaining does not insulate the employer from its statutory duty to bargain in good faith with respect to those mandatory subjects of bargaining.

City of Akron v. State Employment Relations Board, No. 26227, 30 OPER 137 (Ohio Ct. App. Mar. 29, 2013).

PENNSYLVANIA COURT UPHOLDS POLICE CHIEF'S DEMOTION TO PATROLMAN

Ruling: A Pennsylvania trial court properly affirmed the decision of a township board of supervisors to remove a police chief from his position and to demote him to patrolman. The Pennsylvania Commonwealth Court concluded the former chief's frequent derogatory comments about members of the board of supervisors, and specific threats of physical harm to one supervisor, established clear and convincing evidence that the chief engaged in a continuing pattern of improper and disrespectful treatment of township employees and supervisors. Therefore, the appellate court rejected the former chief's claim that his removal violated the Police Tenure Act and his due process rights.

What it means: The township's failure to provide the police chief with a written statement of charges within five days of his removal, or to give him a hearing within 10 days of his request, did not mandate his reinstatement to the police chief position. Rather, the lack of charges merely meant that his removal was ineffective until the charges were filed.

Romanick v. Rush Township (Board of Supervisors), No. 1852 C.D. 2013, 44 PPER 99 (Pa. Commw. Ct. Apr. 4, 2013).

PENNSYLVANIA COUNTY'S REFUSAL TO BARGAIN PENSION CHANGES SPARKS UNFAIR-PRACTICE FINDING

Ruling: A Pennsylvania county employer violated Sections 1201(a)(1) and (5) of the Public Employee Relations Act when it unilaterally changed the terms of the pension plan covering employees of a county nursing facility. A Pennsylvania Labor Relations Board hearing examiner concluded the employer's elimination of a defined benefit pension plan for all existing employees who did not meet age and service requirements, and the substitution of a 401(k) defined contribution plan, violated the employer's duty to bargain.

What it means: Under Pennsylvania law a change in a pension plan is a mandatory subject of bargaining that cannot be altered unilaterally.

American Federation of State County and Municipal Employees District Council 85 v. Pleasant Ridge Manor (Erie County), No. PERA-C-11-443-W, 44 PPER 100 (Pa. Labor Relations Bd., H. Ex. Apr. 5, 2013).

Walmart

CONTINUED FROM PAGE 1

filed in the 12-year-old suit. *Dukes v. Wal-Mart Stores*, No. 01-2252, 2012 WL 4329009 (N.D. Cal. Sept. 21, 2012).

The judge said the Supreme Court did not reject the plaintiffs' legal theories, only their lack of proof to show that a common policy affected a nationwide class of Wal-Mart employees. The court should afford the plaintiffs an opportunity to present proof they say they have to show commonality among a smaller proposed class, he said.

> The limited and smaller class and added statistical evidence of store managers' discriminatory policies in the amended suit makes it "markedly different" from the class rejected by the Supreme Court, the plaintiffs say.

This amended suit seeks to represent about 180,000 women who worked in three "California Wal-Mart regions" between December 1998 and December 2002 and were subject to an allegedly biased compensation plan.

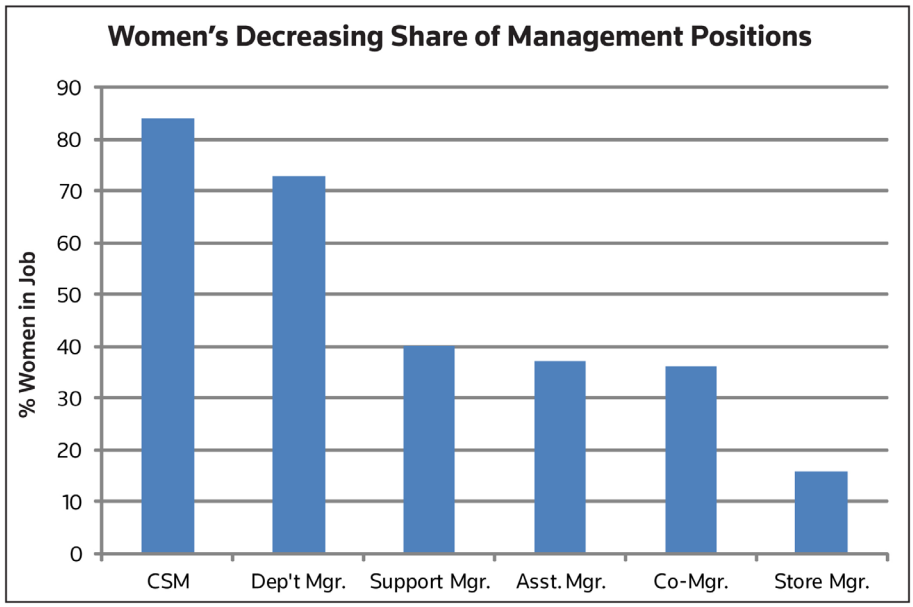
The women have proposed three classes, one for each region in the state, according to the plaintiffs' motion in support of class certification.

The limited and smaller class and added statistical evidence of store managers' discriminatory policies in the amended suit makes it "markedly different" from the class rejected by the high court, the motion says.

The discrimination suit, first filed in 2001, alleges Wal-Mart engaged in a pattern or practice of gender discrimination. The plaintiffs say the company delegates decisions about pay and promotions to managers, in the company's regions, districts and individual stores, who deny female employees opportunities because of their sex.

In addition, the suit alleges Wal-Mart retaliates against women who complain about the lack of promotional opportunities, sexual harassment and unfair treatment.

The plaintiffs say statistics show that managers in California Wal-Marts give women smaller merit raises than men and women are promoted to higher-level positions at a smaller percentage than their male counterparts (see graph).



Source: Plaintiffs' motion and memorandum in support of class certification

The women maintain that the proposed classes meet the certification requirements under Federal Rule of Civil Procedure 23 — numerosity, commonality, typicality and adequacy — and that common issues predominate over individual ones.

A hearing on certification is scheduled for July, according to the plaintiffs' motion. WJ

Attorneys:
Plaintiffs: Joseph Sellers, Cohen Milstein Sellers & Toll, Washington

Defendant: Theodore J. Boutrous Jr., Gibson, Dunn & Crutcher, Los Angeles

Related Court Document:
Motion: 2013 WL 161330

RECENTLY FILED COMPLAINTS FROM WESTLAW COURT WIRE*

Case Name	Court	Docket #	Filing Date	Allegations	Damages Sought
Toups et al. v. American Managed Care LLC 2013 WL 1365955	M.D. Fla.	8:13cv00807	3/28/13	Class action. American Managed Care violated the Worker Adjustment and Retraining Notification Act by terminating more than 500 people at the end of March without cause or proper notice.	Class certification, unpaid wages, interest, disbursements, fees and costs
Professional Engineers in California Government et al. v. Brown et al. 2013 WL 1366030	Cal. Super. Ct. (Alameda)	RG13673444	3/29/13	Professional Engineers in California Government claims Gov. Jerry Brown violated an agreement that state engineers would not be furloughed one day a month.	Writ of mandate, declaratory judgment, expense, fees and costs
Chisolm v. Best Buy Stores 2013 WL 1365899	S.D.N.Y.	7:13cv02080	3/29/13	Class action. Best Buy Stores failed to pay hourly employees required wages and overtime compensation.	Unpaid overtime compensation, liquidated damages, civil penalties, interest, fees and costs
Gamache v. Florida Department of Transportation 2013 WL 1625366	Fla. Cir. Ct. (Pinellas)	13003778CI	4/4/13	An employee of the Florida Department of Transportation cites discrimination relating to his medical condition (diabetes) as the reason he was fired.	$15,000
Dunn v. McQueen et al. 2013 WL 1456014	N.Y. Sup. Ct. (Kings)	0006149-2013	4/4/13	Defendants Alexander McQueen and Gucci Group N.V. failed to take corrective action against its co-defendant manager for his sexual harassment directed at former employee. Defendants ratified the manager's actions by terminating plaintiff's employment in retaliation for his complaints of sexual harassment and discrimination based on sex, resulting in damages.	Compensatory and punitive damages, interest, fees and costs
Moore v. Zintl Inc. 2013 WL 1401351	Minn. Dist. Ct. (Hennepin)	27-CV-13-5867	4/4/13	Defendant Zintl discriminated against employee based on his race, including offensive comments and jokes and termination of plaintiff's employment in violation of the Minnesota Human Rights Act.	In excess of $50,000 including front pay, monetary value of lost benefits, fees, costs and disbursements
Edmonds v. Donley 2013 WL 1438158	N.D. Fla.	5:13cv00105	4/8/13	Secretary of the Department of the Air Force discriminated against and terminated plaintiff's employment as a house helper based on her disability and refused to provide reasonable accommodation for plaintiff's disability.	Compensatory damages, injunctive relief, reinstatement, employee benefits, interest, fees and costs
Humes v. Norfolk Southern Railway Co. 2013 WL 1419288	Md. Cir. Ct. (Baltimore)	24-C-13-002002	4/8/13	Norfolk Southern Railway's failure to provide plaintiff with a safe workplace caused him to develop cumulative trauma disorders.	$25 million

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RECENTLY FILED COMPLAINTS FROM WESTLAW COURT WIRE*

Case Name	Court	Docket #	Filing Date	Allegations	Damages Sought
Burton v. Rust-Oleum Corp. 2013 WL 1455914	Md. Cir. Ct. (Baltimore)	24-C-13-002032	4/9/13	Rust-Oleum's failure to provide plaintiff, a temporary employee, with proper safety training and safety gear caused him to be badly burned during a flash fire.	$2 million in compensatory damages
Blohm v. New England Financial 2013 WL 1455921	Minn. Dist. Ct. (Hennepin)	27-CV-13-6247	4/9/13	New England Financial, through its managers and officials acting on behalf of defendant, discriminated against employee based on her gender, including creating a hostile workplace, depriving her of equal employment opportunities and terminating her employment in violation of the Minnesota Human Rights Act.	For an amount to be determined including back pay, front pay, value of lost benefits, fees, costs and disbursements
Barretta v. City of Riverside 2013 WL 1495368	Cal. Super. Ct. (Riverside)	RIC1304243	4/10/13	Riverside Police Department harassed and discriminated against plaintiff eight-year police officer because he is required to wear an eye patch occasionally to strengthen his eyes per his doctor's orders. Defendant stripped plaintiff of his training officer status, depriving him of promotional opportunities, and allowed colleagues to ridicule him and call him "pirate."	General, compensatory, and special damages; injunctive relief; fees and costs; interest
Berg v. 1328 Uptown et al. 2013 WL 1465614	Minn. Dist. Ct. (Hennepin)	27-CV-13-6304	4/11/13	Defendant 1328 Uptown terminated employee based on his real or perceived disability of having recently been diagnosed with HIV, resulting in violation of the Minnesota Human Rights Act.	In excess of $50,000 including back pay, front pay, monetary value of any lost benefits, costs, fees, interest and disbursements
D. Reynolds Co., LLC v. Martinez et al. 2013 WL 1465608	Tex. Dist. Ct. (Harris)	201321409	4/11/13	Former employees of plaintiff D. Reynolds Co. wrongfully terminated their employment and accepted positions in a new branch of Electrical Distributors, a direct competitor, located in Houston. The plaintiff claims certain contracts and business opportunities that would have benefited Reynolds have been improperly directed to Electrical Distributors.	Injunction, actual damages, interest, fees, expenses and costs
Zielinski v. New York Community Bank Corp. Inc. 2013 WL 1562300	E.D.N.Y.	2:13cv02228	4/11/13	New York Community Bank, its affiliate and co-defendants terminated employee so they could replace her with younger employee in violation of the Civil Rights Act of 1991.	$5 million in compensatory damages, $10 million in punitive damages, economic damages, fees and costs

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Case Name	Court	Docket #	Filing Date	Allegations	Damages Sought
Kaleel v. Shinseki 2013 WL 1495367	M.D. Fla.	8:13cv00943	4/12/13	Secretary of the U.S. Department of Veterans Affairs subjected plaintiff to a hostile environment and harassment based upon national origin and reprisal, in violation of the Title VII of the Civil Rights Act of 1964.	Damages, injunctive relief, fees and costs
Dumps v. National Railroad Passenger Corp. 2013 WL 1623831	Md. Cir. Ct. (Baltimore)	24-C-13-002173	4/15/13	National Railroad Passenger Corp. failed to provide plaintiff with a safe workplace, causing him to develop cumulative stress trauma from repeatedly performing his job in defendant's maintenance department.	$25 million, plus costs
Sanderson v. Brooks et al. 2013 WL 1562573	Cal. Super. Ct. (Los Angeles)	BC505548	4/15/13	Country music legend Garth Brooks and Red Strokes Entertainment failed to pay employee her entitled wages, producing fees and bonuses prior to the termination of her employment, causing her to sustain damages.	No less than $425,000 in general damages, special and punitive damages, interest, and costs
Texas Apartment Insurance Solutions LLC v. National Shield Insurance Services LLC 2013 WL 1562582	Tex. Dist. Ct. (Travis)	D-1-GN-13-001233	4/15/13	National Shield Insurance Services and co-defendant violated their fiduciary duties and an employment agreement when they sought to remove the president of Texas Apartment Insurance Solutions.	Injunctive relief, declaratory judgment, actual damages, fees and costs
Garcia v. Paylock 2013 WL 1654857	N.Y. Sup. Ct. (Queens)	0701328-2013	4/16/13	Paylock wrongfully terminated plaintiff's employment based on false allegations.	$18 million in monetary, punitive, liquidated and compensatory damages; interest; expenses; fees and costs
Rivas v. San Francisco Giants Enterprises LLC 2013 WL 1625365	Cal. Super. Ct. (San Francisco)	CGC-13-530672	4/16/13	Class action. Defendant San Francisco Giants Enterprises failed to pay its seasonal employees for final wages upon layoff at the end of the baseball season.	Class certification, damages, restitution and interest

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