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From: BNA Highlights [bhighlig@bna.com]
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Latest Developments

GOP Senators Blast NLRB Boeing Complaint, Call for Acting General Counsel's Explanation

Posted May 3, 2011, 3:54 P.M. ET

The 10 Republican senators on the Senate Health, Education, Labor, and Pensions Committee told the National Labor Relations Board's Acting General Counsel Lafe E. Solomon today that they "strongly disagree" with his decision to issue an unfair labor practice complaint alleging that Boeing Co. illegally transferred airliner production from Washington to South Carolina, and they will expect a "greater explanation" of the action when Solomon's nomination to become general counsel is taken up by the committee.

In a letter to the acting general counsel signed by Ranking Member Michael B. Enzi (R-Wyo.) and the other nine Republicans on the committee, the senators said they question the "legal reasoning and motive behind the complaint" and the "chilling effect" that the case "may have on business decisions across the country."

The senators acknowledged that the NLRB proceeding against Boeing "is still in the early stages," but said "there is a need for the Board to explain the reasoning in this case to Congress."

A hearing before an NLRB administrative law judge currently is scheduled to begin June 14.

A full report will appear in the next issue of Daily Labor Report. Click here for the latest issue.

Ninth Circuit Rules SOX Does Not Protect Boeing Auditors' Disclosures to Newspaper

Posted May 3, 2011, 3:56 P.M. ET

Two information technology auditors for Boeing Co. who were fired for providing internal company information and documents to a newspaper reporter cannot proceed with whistleblower claims under the Sarbanes-Oxley Act because the statute does not protect disclosures to the media, the U.S. Court of Appeals for the Ninth Circuit ruled today (Tides v.

Boeing Co., 9th Cir., No. 10-35238, 5/3/11).

Affirming summary judgment to Boeing, the Ninth Circuit said SOX, at 18 U.S.C. § 1514A(a)(1), specifically enumerate only three categories of recipients to whom employees of publicly traded companies may report conduct they believe constitutes fraud or a securities violation: federal regulatory and law enforcement agencies, members of Congress, and employee supervisors. "Members of the media are not included," the court said.

If Congress had intended to protect employee reports to the media, it would have added the media as a recipient category, the court said. Alternatively, it said, Congress could have drafted Section 1514A(a)(1) in a similar fashion to the Whistleblower Protection Act, which protects "any disclosure" of specified information without limiting the recipients of such information.

In so ruling, the Ninth Circuit rejected the employees' argument that reports to the media "may eventually 'cause information to be provided' to members of Congress or federal law enforcement or regulatory agencies."

Adopting such a "boundless interpretation" of SOX would mean that "virtually any disclosure to any person or entity would qualify as protected whistleblower activity, provided the information pertains to one of the stautorily-defined categories of unlawful conduct," the court said. "We decline to afford such an expansive meaning to the statutory language."

Judge Barry G. Silverman wrote the opinion of the court, joined by Judges Andrew J. Kleinfeld and A. Wallace Tashima.

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Administrator Only Required to Look at Plan in Denying Benefit Claim, Sixth Circuit Says

Posted May 3, 2011, 4:46 P.M. ET

The plan administrator for a transportation union's income protection program did not act arbitrarily and capriciously in violation of the Employee Retirement Income Security Act when it denied income replacement benefits to a plan participant who was fired from his job for insubordination, the U.S. Court of Appeals for the Sixth Circuit ruled today (Farhner v. United Transp. Union Discipline Income Prot. Program, 6th Cir., No. 09-4431, 5/3/11).

Affirming a lower court decision, the Sixth Circuit found that the express language of the United Transportation Union Discipline Income Protection Program (DIPP) supported the benefit denial. Under the plan, participants are ineligible for benefits if they have been suspended or discharged for certain behavior, including insubordination.

In a decision by Judge Curtis L. Collier, the court rejected the participant's argument that the administrator should have looked beyond the terms of the plan to consider whether his discharge was proper. The court said the plan administrator was not required to look beyond the plan language as it was unambiguous and did not require the administrator to do so.

The case involved Mark Farhner, a trackman and conductor for Kansas City Southern Railway who was fired for insubordination during a dispute over whether he was entitled to take medical leave under the Family and Medical Leave Act. His claim for DIPP benefits from the union was denied under a plan exclusion barring benefits for employment discharges

resulting from insubordination. He sued the DIPP plan, claiming violation of ERISA.

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Divided Court Revives State Law Age Bias Claim of RIF'd Employee

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A graphic artist terminated at age 57 during a reduction in force by a packaging company raised a triable age discrimination claim under Missouri state law even though he has no federal Age Discrimination in Employment Act claim, a divided U.S. Court of Appeals for the Eighth Circuit ruled May 2 (Clark v. Matthews Int'l Corp., 8th Cir., No. 10-1037, 5/2/11).

In a 2-1 decision, an Eighth Circuit panel granted Matthews International Corp.'s petition to rehear Eddy Clark's claim under the Missouri Human Rights Act, which the appeals panel earlier had ordered dismissed without prejudice in its December 2010 decision affirming that Clark lacked a triable age discrimination claim under the ADEA. A federal district court had granted Matthews summary judgment on the state law age bias claim as well.

But rather than affirm summary judgment on the MHRA claim, the Eighth Circuit majority ruled that Clark's evidence presents a jury issue of age discrimination under state law, which requires plaintiffs to show age was a "contributing factor" in an adverse employment action. In contrast, the U.S. Supreme Court has interpreted the federal ADEA to require that plaintiffs show age was the "but for" cause or determining factor in an adverse action.

Although Clark lacks a triable ADEA claim, "it does not necessarily follow from this conclusion that Clark's evidence does not create a triable issue of fact regarding whether Clark's age contributed to the adverse employment actions taken against him for purposes of the MHRA," Judge Michael J. Melloy wrote for the majority. "On this record, we could not say that it would be unreasonable for a jury to conclude that Clark's age played a part in producing the adverse employment actions he alleges."

In dissent, Judge Steven M. Colloton observed "there is considerable irony" in the court's granting Matthews's petition to reconsider the state law issue over Clark's opposition and then ruling that the employer must stand trial under the MHRA. The dissent would hold that the Eighth Circuit got it right the first time when it declined supplemental jurisdiction over the MHRA claim, leaving it up to Clark whether to pursue the matter in state court. Even assuming the federal court has jurisdiction, summary judgment was properly granted on Clark's state law claim because his evidence does not suggest age was even a contributing factor in the RIF decision, Colloton said.

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