Microsoft Outlook

From: BNA Highlights [bhighlig@bna.com]
Sent: Tuesday, May 10, 2011 5:29 PM
To: Abruzzo, Jennifer
Subject: May 10 -- BNA, Inc. Daily Labor Report - Latest Developments

Latest Developments

Highway Worker Afraid of Heights Has Triable ADA Claims, Seventh Circuit Says

Posted May 10, 2011, 4:37 P.M. ET

A state highway maintainer on a bridge crew in Illinois who was diagnosed with acrophobia, a fear of heights, can proceed to trial on his claims that he was fired because of his disability in violation of the Americans with Disabilities Act, the U.S. Court of Appeals for the Seventh Circuit ruled today (Miller v. Ill. Dep't of Transp., 7th Cir., No. 09-3143, 5/10/11).

Reversing a district court's grant of summary judgment in favor of the Illinois Department of Transportation (IDOT), the Seventh Circuit held that a reasonable jury could conclude that IDOT regarded Darrell Miller as substantially limited in the major life activity of working. Upon learning about Miller's formal diagnosis, the court said, IDOT immediately prevented Miller from performing any bridge crew duties, including ones that could be conducted from the ground, and placed him on nonoccupational disability status.

The appellate court said a reasonable jury also could find that performing work above 25 feet in an exposed position is not an essential function of a bridge crew highway maintainer, and that Miller's accommodation request, which involved IDOT's substituting him for other team members on tasks requiring work at such heights, was reasonable given that his crew already had a history of swapping tasks among members based on their strengths and limitations.

Additionally, the Seventh Circuit ruled a triable issue of fact exists as to whether IDOT's proffered reason for terminating Miller, based on his alleged threat against a personnel manager, was a pretext for retaliation in response to his reasonable accommodation requests.

In its ruling, the Seventh Circuit relied on case law, and statutory and regulatory provisions in existence prior to the enactment of the ADA Amendments Act, which went into effect on Jan. 1, 2009.

Judge David F. Hamilton wrote the court's opinion, joined by Judges Richard A. Posner and Ilana D. Rovner.

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

issue.

Legislators, Business Groups Rip Solomon, White House in NLRB Boeing Case

Posted May 10, 2011, 4:52 P.M. ET

Republican legislators today joined South Carolina Gov. Nikki Haley (R) and executives from several national business associations in criticizing National Labor Relations Board Acting General Lafe E. Solomon for authorizing a controversial unfair labor practice complaint against Boeing Co. Meanwhile, some of the speakers at a U.S. Chamber of Commerce press conference called on President Obama to "weigh in" on the dispute or withdraw Solomon's nomination to serve a full term as NLRB general counsel.

The press conference followed a meeting between the legislators and more than 60 business leaders that was convened to discuss the NLRB complaint, which alleges that Boeing unlawfully decided to locate some manufacturing of its 787 Dreamliner jets to South Carolina in retaliation for the involvement of employees in Washington in lawful economic strikes led by the International Association of Machinists.

Haley said "we are demanding that the president respond to what the NLRB has done, because this goes against everything we know our American economy to be."

Sen. Rand Paul (R-Ky.) said he wants to ask President Obama whether the White House has assembled an "enemies list" targeting Republican states.

Sen. Lamar Alexander (R-Tenn.) said he will offer legislation by the end of the week to protect state right-to-work laws and limit the authority of NLRB over business decisions on plant sites, but Sen. Lindsey Graham (R-S.C.) said the president could "fix" the Boeing litigation immediately by removing Solomon's nomination to a full term as NLRB general counsel.

Sen. Tom Harkin (D-Iowa), chairman of the Senate Health, Education, Labor and Pensions Committee, reacted quickly to the criticism of NLRB, saying Republicans have attacked a "routine unfair labor practice charge" with an "overly dramatic response" and "disturbing misinformation" that he said "has needlessly complicated the legal process and distorted the public discussion of this case."

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

NLRB Complaint Against CNA Alleges Unlawful Inclusion of Statement in Contracts

Posted May 10, 2011, 4:10 P.M. ET

The National Labor Relations Board has issued a complaint against the California Nurses Association/National Nurses United alleging the union unlawfully included a "Weingarten rights" statement on or inside the cover of a number of collective bargaining agreements, without the consent or agreement of the employers.

The complaint, which was issued at the end of April in response to an unfair labor practice charge filed by Henry Mayo Newhall Memorial Hospital in Valencia, also alleges that CNA violated Section 8(b)(1)(A) of the National Labor Relations Act by "restraining and coercing employees in the exercise of their rights guaranteed in Section 7" of the act.

James J. McDermott, the regional director for Region 31 in Los Angeles scheduled a hearing on the complaint for Aug. 1 before an NLRB administrative law judge.

According to the complaint, CNA represents at least 2,000 registered nurses at Henry Mayo, and the current contract runs from Jan. 22, 2009, through Jan. 21, 2012.

In April 2009, the parties reached agreement on that contract. When CNA printed the contract in October 2010 it included a statement on the back cover telling nurses they must request that a union representative be called into any disciplinary meetings. The hospital objected, alleging it did not agree to the inclusion of the statement, and that the statement "implies that employees must request a Union representative during investigatory meetings, and therefore, employees are not free to exercise their Section 7 right to avoid union activity altogether."

Mori Pam Rubin, the deputy regional attorney in NLRB Region 31, told BNA today that the hospital filed an unfair labor practice charge with the board alleging that CNA systematically includes this unlawful overbroad statement on many, if not all, of its contracts throughout the nation. The hospital also alleged that the union includes this statement unilaterally, without the agreement of the other employer parties to those agreements, she said.

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

Employee Did Not Exhaust Claim That Employer Retaliated by Filing Counterclaims, Tenth Circuit Finds

Posted May 10, 2011, 5:17 P.M. ET

An accounting and finance director who was fired by a New Mexico security service provider failed to exhaust her administrative remedies with respect to her claim that the company retaliated against her in violation of Title VII of the 1964 Civil Rights Act and New Mexico law by filing counterclaims in her discrimination lawsuit, the U.S. Court of Appeals for the Tenth Circuit has decided (McDonald-Cuba v. Santa Fe Protective Servs. Inc., 10th Cir., No. 10-2151, 5/9/11).

Lynn McDonald-Cuba, who was fired for starting a competing company, needed to file a new charge with the Equal Employment Opportunity Commission alleging that the counterclaims constituted retaliation, but she did not do so, the Tenth Circuit found. The employer counterclaimed for breach of contract, breach of duty of loyalty, and intentional interference with prospective economic advantage.

The court vacated summary judgment to Santa Fe Protective Services (SFPS) on McDonald-Cuba's retaliation claim and remanded it to the U.S. District Court for the District of New Mexico with instructions to dismiss it without prejudice because of lack of jurisdiction.

Meanwhile, summary judgment to SFPS was proper on McDonald-Cuba's other Title VII claims that the company engaged in sex discrimination and retaliation when it fired her and that it retaliated against her by making false statements to third parties about her alleged conflict of interest and about her discharge, Judge Stephen H. Anderson wrote for the appeals court in the May 9 decision.

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

This e-mail is published as a supplement to Daily Labor Report® (ISSN 1522-5968) by The Bureau of National Affairs, Inc., 1801 S. Bell Street, Arlington, VA 22202. Full reports on the contents of this e-mail will appear in the next regular edition of Daily Labor Report®.