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Latest Developments

ALJ Denies Boeing Bid to Dismiss Complaint, Allowing Trial of Unfair Labor Practice Issues

Posted June 30, 2011, 4:09 P.M. ET

The National Labor Relations Board administrative law judge hearing Acting General Counsel Lafe E. Solomon's allegations that Boeing Co. unlawfully transferred jetliner production work from Washington state to South Carolina June 30 [denied](#) the airplane manufacturer's motion to dismiss the complaint (Boeing Co., NLRB ALJ, No. 19-CA-32431, 6/30/11).

ALJ Clifford H. Anderson said it is rare to dismiss unfair labor practice allegations in an NLRB proceeding before the board's general counsel has even begun to introduce evidence. He further observed that Boeing has not yet established facts to support its argument that Solomon has taken out of context the allegedly unlawful comments Boeing executives made about the opening of the South Carolina plant.

Anderson rejected Boeing's challenge to Solomon's allegation that the company illegally discriminated against union-represented employees in Washington when it built a second assembly line for 787 Dreamliners at a nonunion site in South Carolina. Boeing argued there could be no finding that it violated the National Labor Relations Act without proof that building the South Carolina line adversely affected the Washington workers represented by the International Association of Machinists, but the ALJ disagreed, finding that NLRB precedent could support Solomon's claim of unlawful discrimination.

Finally, the ALJ refused to strike from the administrative complaint Solomon's request that Boeing be ordered to have the second Dreamliner assembly line handled by the unionized workers in Washington rather than the nonunion workforce in South Carolina. Anderson observed that the acting general counsel has not disputed the company's right to oppose the requested remedy as unduly burdensome, but the ALJ said it would be inappropriate to issue a pretrial ruling that would preclude the parties from making a full record on the question of remedial relief to be ordered if the complaint against Boeing is sustained.

A full report will appear in the next issue of Daily Labor Report. Click [here](#) for the latest issue.

Eleventh Circuit Reinstates Fired White Supervisor's Reverse Race Bias Claims

Posted June 30, 2011, 2:23 P.M. ET

A white supervisor fired by a Lockheed-Martin Corp. subsidiary for forwarding to another employee a racially insensitive "joke" e-mail disparaging African Americans may pursue federal law race discrimination claims based on evidence the company disciplined black employees less harshly for similar offenses, the U.S. Court of Appeals for the Eleventh Circuit [ruled](#) today (Smith v. Lockheed-Martin Corp., 11th Cir., No. 09-15428, 6/30/11).

In reversing a district court's grant of summary judgment, the Eleventh Circuit said Anthony Mitten's failure to identify black supervisors who were treated more leniently for comparable offenses was not fatal to his race discrimination claims under Title VII of the 1964 Civil Rights Act and the Civil Rights Act of 1866 (42 U.S.C. § 1981).

The U.S. District Court for the Northern District of Georgia had reasoned that Mitten, who was fired in 2005 by Lockheed-Martin Aeronautics Co. for violating a "zero-tolerance" policy against "transmission of ethnic slurs or racial comments," failed to establish a prima facie case of discrimination because he could not identify a black comparator who was treated more leniently. Although Mitten did identify two black employees who received only temporary suspensions for sending similarly racially offensive e-mails, the district court found that those employees were not similarly situated to Mitten because they were not supervisors who have heightened obligations to prevent and report violations of Lockheed's internal anti-discrimination policies.

The Eleventh Circuit, however, ruled that Mitten produced adequate circumstantial evidence of disparate discipline of white and black employees for similar offenses to establish a prima facie case of race discrimination and raise triable claims under Title VII and Section 1981.

Among other things, the court said, a reasonable jury could find that adverse media publicity about shootings at a Lockheed plant in Meridian, Miss., and a pending Equal Employment Opportunity Commission investigation of an alleged racially hostile work environment at Lockheed may have contributed to management firing Mitten as an example of taking a hard line against racial harassment. A jury should resolve whether racial considerations contributed to Mitten's termination while black employees were disciplined less harshly for using racist speech, the appeals court said.

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First Circuit Interprets 'Calendar Year' for Setting Caps on Damages Under Title VII

Posted June 30, 2011, 4:15 P.M. ET

A federal district court abused its discretion when it reduced to \$50,000 a \$300,000 sexual harassment jury verdict in favor of a female former construction worker in Puerto Rico by using the calendar year in which the damages were awarded as the relevant time period for determining damage caps under Title VII of the 1964 Civil Rights Act, the U.S. Court of Appeals for the First Circuit [ruled](#) June 29 in an issue of first impression (Hernandez-Miranda v. Empresas Diaz Masso Inc., 1st Cir., No. 10-1639, 6/29/11).

Under 42 U.S.C. § 1981a(b)(3), the appellate court said, damage caps in Title VII claims involving intentional discrimination range from \$50,000 to \$300,000 depending on the number of employees an employer has "in each of 20 or more calendar weeks in the current

or preceding calendar year.”

Reversing and remanding the U.S. District Court for the District of Puerto Rico, the First Circuit joined the Fourth, Fifth, and Seventh Circuits in interpreting Section 1981a(b)(3)'s reference to the “current” calendar year as meaning the time period of the alleged discrimination, and not the time period in which the jury entered its verdict.

To reach its conclusion, the appellate court relied on judicial interpretations of the phrase “current or preceding calendar year” in 42 U.S.C. § 2000e(b), a parallel provision in Title VII that limits the definition of an “employer,” as meaning the year of discrimination. Additionally, the court said its interpretation of “current” calendar year “best serves” Title VII's purpose of “encouraging resolution of disputes before litigation commences.” Such purpose, it said, is “best advanced by providing clarity and certainty as to the size of potential damage awards from the outset of a dispute.”

In the instant case, the First Circuit said, the district court applied a \$50,000 damage cap to the \$300,000 awarded to Edna Hernandez-Miranda based on employer Empresas Diaz Masso Inc.'s (DM) employment of 25 individuals in 2008, the year of the jury verdict. However, the court said, Hernandez-Miranda alleged sexual harassment that occurred in 2004, when DM had approximately 247 employees. Based on that employee figure, a \$200,000 damage cap instead should apply to Hernandez-Miranda's award, the appellate court held.

Chief Judge Sandra L. Lynch wrote the court's opinion, joined by Judges Juan R. Torruella and Eugene E. Siler.

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Fired Supervisor's 'Cat's Paw' Claim Failed With No Intent, Causation Proof, Court Says

Posted June 30, 2011, 5:39 P.M. ET

A former supervisor in an Iowa hog-processing plant did not prove he was retaliated against for seeking accommodations for an injured worker under the “cat's paw” theory of employer liability because he did not show that an intermediate supervisor had any retaliatory animus, the U.S. Court of Appeals for the Eighth Circuit [held](#) June 28 (Diaz v. Tyson Fresh Meats Inc., 8th Cir., No. 10-1472, 6/28/11).

Affirming summary judgment for Tyson Fresh Meats Inc. on the claim brought under the Iowa Civil Rights Act, Judge D.P. Marshall said there was “some tension” in James Diaz's assertion of the cat's paw theory in this case. “We need not, however, resolve the doctrinal tension in Diaz's case because his cat's paw theory fails on its own terms,” the court concluded.

The undisputed evidence showed that Diaz's supervisor, Tom Hanson, may have lied during an investigation into the failure to accommodate the injured worker, but Hanson's actions were intended to protect himself from discipline, not to dupe a neutral decisionmaker into making a discriminatory decision, the court said.

Even if Hanson had set up Diaz to be fired, the court said, the plant manager's decision to fire Diaz was “untainted” because it was based on Diaz's admission that he did not honor work restrictions set by a company nurse.

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