ALASKA SHRM STATE COUNCIL

May 13, 2014

Top Ten Cases
2013-2014

Gregory S. Fisher

Davis Wright Tremaine LLP
DEFINING SUCCESS TOGETHER

Scope

- Top Ten cases from 2013 and first few months of 2014
- Court cases and Agency decisions
- Primary focus on U.S. Supreme Court, Ninth Circuit, and Alaska Supreme Court cases

Editor's Discretion

10-- Escriba v. Foster Poultry Farms

- Holding: employee cannot be forced to take FMLA leave even if underlying condition or circumstance would qualify for FMLA leave

Escriba

- Employee requests time off to visit ailing Dad in Guatemala
- Language confusion: employee relates circumstances, but when asked states that she just wants to take vacation time, and not FMLA leave
- Employee leaves, does not return when scheduled to return to work.
- Employer terminates employee for violating 3 day no-show, no-call rule

Escriba

- Employee files suit, argues that Employer was required to designate leave as FMLA leave and to provide her with notice of rights
- Jury returns verdict in favor of Employer because Employee had been asked if she wanted to take FMLA leave and she had said "no" that she did not want FMLA leave
- Escriba appeals, argues that Employer should have designated leave as FMLA leave because the underlying circumstance qualified for FMLA leave

Escriba

- Result? Affirmed
- Forcing an Employee to take FMLA leave over Employee's objection is a form of interference with FMLA rights because leave time is exhausted over Employee's opposition
- Employer clarified Escriba's request, and Escriba said that she did not want to take FMLA leave.
- Not a waiver issue because Escriba was not forfeiting rights, but preserving them for future use

Escriba--Implications

- Employers may have difficulty concurrently running FMLA leave with PTO or other forms of leave
- Employees may have the right to tack different forms of leave
- Note: One argument not made by Escriba was lack of notice. Arguably, she could not have declined exercise because she never received notice explaining/advising her re: rights
- Practice tip: use notice and document declination.

9— *DR Horton* (NLRB—Arbitration)

- *DR Horton*: Fifth Circuit rejected NLRB decision holding that employees cannot be compelled to execute employment agreements that preclude class actions whether in arbitration or in court

DR Horton

- Employer has policy requiring employees to waive right to collective or class action
- NLRB rules that this policy violates Section 7 and Section 8 rights under the NLRA/LMRA
- NLRB files petition with Fifth Circuit to enforce decision, Employer files cross-petition
- Court: Agrees with Employer, and denies enforcement.
- Significance?: Illustrates extent to which Board decisions are out of mainstream

8 –*Whole Foods* and *Stephens Media*

- *Stephens Media*: Board holds that employer committed ULP by discharging employee who secretly taped a meeting with management
- Employer had no policy prohibiting taping and applicable state law (Hawaii) was silent

Whole Foods and *Stephens Media*

- *Whole Foods*: Board holds that Employer's policy prohibiting taping in the workplace is appropriate
- Recording conversations has not been shown to be a protected right, and the policy that was adopted was explained and based on a legitimate workplace reason

Whole Foods and *Stephens Media*

- Recording in the workplace is rampant and easy (smart phones and other devices)
- Recording can result in trade secrets being disclosed, can chill workplace discussions, can be used in ways that were never intended, can give claimants basis for "creating" evidence
- Consider adopting policy that prohibits unauthorized taping or videorecording

7 –*Canning* opinion

- On January 25, 2013, the U.S. Court of Appeals for the District of Columbia held that three Board members had been unconstitutionally appointed, in violation of the President's recess appointment powers.
- Effect? Unknown, but some argue that this nullifies rules and opinions issued by the Board over the past few years.
- Currently on appeal to U.S. Supreme Court, decision before June

6 – *Flex Frac Logistics v. NLRB*

- Holding: Fifth Circuit upholds NLRB decision that struck down an employer's confidentiality policy

Flex Frac

- Employer adopts confidentiality policy to prohibit employees from disclosing confidential information outside organization
- Confidential information defined in traditional terms (financial information, prices, business plans, marketing plans, personnel information, costs, and other subjects)
- Wages not referenced

Flex Frac

- NLRB concludes that policy violates Section 8(a)(1) rights because reasonable employee could interpret it as prohibiting employees from discussing wages
- Employer seeks review, NLRB files cross-petition for enforcement
- Court grants enforcement and denies Employer's petition
- Financial information, including costs, would include wages, and "personnel information"--therefore decision enforced

Flex Frac

- Bewildering decision
- Employers working in competitive industries often adopt similar policies as a means of protecting confidential and proprietary business information, especially where independent contractors are in the workforce
- Moreover, policy itself only prohibited disclosure outside the company.
- Policy did not mention wages.

Flex Frac

- There are Board decisions that uphold similar policies, or policies implemented for similar reasons
- Practice pointer: Draft or revise confidentiality policies to mirror policies that the Board has upheld in prior cases
- BYOD (bring your own device)

5 – *Northwestern and CAPA*

- NLRB rules that scholarship football players at Northwestern University are employees for purposes of NLRA, and may organize and bargain collectively

Northwestern

- Definition: Employees are those who perform services in return for payment under a contract for hire, and are subject to Employer's control
- Scholarship players here fit the definition
- They perform services (generate revenues through games)
- They are paid (tuition, room and board, and other forms of remuneration)
- They have a contract (scholarship)
- Under control (team rules governing life)

Northwestern

- NLRB rejected University's reliance on graduate student cases, concluding that scholarship football players are not "primarily" students because most of their time is dedicated to football
- Significance?: shows broadening definition of "employee" that could extend to other contexts (wage/hour, discrimination, OSHA, or other areas)
- Could impact use of student interns

4 –Class action waiver cases

- Several cases have been decided in the past 18 months addressing waiver of class and collective actions, and/or compelling private arbitration of any and all claims
- Such waivers are enforceable, but you should include express statutory citations and references to be safe
- Pros and cons either way. Confer with counsel. Check policies.

3 – *Sandifer v. US Steel*

- Holding: Time spent putting on or taking off clothes is not compensable

Sandifer

- Steel workers file suit, alleging that they were denied compensation for time spent donning and duffing protective gear
- Employees argued that protective gear should not be considered as clothing
- US Steel argued that anything worn on the body should be characterized as clothing
- Seventh Circuit held in favor of US Steel

Sandifer

- Result? Affirmed
- U.S. Supreme Court rejects everyone's definition of "clothes"
- Clothing includes items designed and used to cover the body and that are commonly regarded as articles of dress
- Donning and duffing protective gear fit this definition for most of the items at issue; the rest of the items involved minimal time that was not compensable

2 *Harris v. Quinn*

- Does compelling non-union employees to financially support costs of collective bargaining violate First Amendment freedom of association rights?
- *Hudson* and agency employees

1 –*Beach* and *Morrison*

- Holding: Alaska Supreme Court holds that failure to interview employees before termination does not violate implied covenant of good faith and fair dealing

Beach and *Morrison*

- Different cases, but similar facts in some respects
- Employees terminated after allegations of misconduct arose
- Relying on *Mitchell v. Teck Cominco*, employees argued that failure to interview them before termination breached the implied covenant because no reasonable investigation was conducted

Beach and *Morrison*

- *Mitchell* case (review): employee terminated after allegations of sexual harassment were made. Employer had never really investigated the allegations, and did not discuss them with Employee.
- Alaska Supreme Court held that the implied covenant was breached because no reasonable investigation was ever conducted

Beach and *Morrison*

- What was different here?
- Court determined that the policies at issue did not address anything about workplace investigations; moreover, there was nothing unreasonable about the extent to which the employers reached their respective decisions
- The decisions were objectively reasonable

Beach and *Morrison*

- What do these decisions mean?
- Don't dispense with workplace investigations
- Never a bad idea to talk with employee and get their version of events—maybe they are right or at least you can lock them into a story
- Consider "fairness" and how it will all look to a prospective jury

BONUS!—NLRB examining handbooks

NLRB

- Confidentiality provisions
- Employee conduct/comportment policies
- Contact with media and law enforcement
- Social media policies
- Dispute resolution and open door policies
- No loitering policies
- Taping policies

Practice tip: if you have these policies, have your attorney review them

Conclusion

- Questions?
- Gregory Fisher, Davis Wright Tremaine LLP, 188 West Northern Lights, Ste. 1100, Anchorage, Alaska 99503 (907) 257-5335 (direct) gregoryfisher@dwt.com
- Follow me on Twitter @GregorySFisher1