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Fenwick Employment Brief

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Gender Bias Lawsuit Settlements Result in Substantial Monetary and Non-Monetary Obligations for Boeing and Morgan Stanley

Boeing and Morgan Stanley & Co. recently agreed to settle substantial gender bias class action lawsuits. The settlements highlight the significant non-monetary obligations employers can face when they settle discrimination class actions.

In 1998, a former Morgan Stanley bond seller charged that the company denied her a Managing Director post because she was a woman. The federal Equal Employment Opportunity Commission ("EEOC") investigated the bond seller's charge, and later sued Morgan Stanley on behalf of nearly 350 current and former female employees who allegedly received less pay and fewer promotional opportunities than similarly situated male employees. On the day of trial, the parties entered into a court-approved settlement for $54 million. The settlement also required Morgan Stanley to implement: (i) a mandatory diversity training program; (ii) new anti-discrimination policies, (iii) a complaint-tracking mechanism, (iv) gender-based promotion and compensation analysis, (v) exit interviews with female employees, and (vi) a female retention and promotion program. The settlement further called for the brokerage to create an internal ombudsperson to oversee compliance with the settlement provisions.

Soon after the Morgan Stanley settlement, Boeing agreed to pay approximately $70 million to settle a class action gender discrimination lawsuit, brought on behalf of nearly 30,000 female Boeing employees. Like the Morgan Stanley settlement, the Boeing settlement required the company to impose several non-monetary reforms, including performance evaluation revisions and more objective salary review and promotion policies.

These settlements confirm that discrimination class action suits often force employers to implement detailed corrective mechanisms, and not merely escape with a cash payment.

Anti-Outsourcing Legislation Stymied in Part by Business Group Opposition

In recent months, California legislators have introduced at least ten bills to reduce and regulate the outsourcing of jobs overseas. However, because of substantial pressure from business groups and others, among other factors, only a few bills remain viable as the 2004 legislative session enters its final month.

S.B. 1492 would impose notice and consent requirements relating to the transmission of medical information to a site outside the United States. To keep the bill alive, its sponsor narrowed the definition of a health care business, thereby reducing the number of entities impacted by the legislation.

Legislators significantly revised another proposed law, S.B. 1451, which relates to the transfer and use of consumer information. The bill's sponsor agreed to eliminate provisions (heavily opposed by banks and insurance companies) that would have required entities which send information overseas to notify and obtain consent from the respective consumer.

Another bill, A.B. 1829, would prohibit the use of state funds for state and local contract services unless the contractor provides certification that the work will be performed in the U.S. Further, if a contractor shifts work out of the U.S. at any point while a contract is in progress, it would be required to give up the contract and repay the state for the funds used to pay for work performed overseas.

The California Chamber of Commerce characterizes the remaining anti-outsourcing bills as "job killers" because they prohibit or unfairly restrict lawful business activity abroad. The Chamber argues that such restrictions will invite retaliation from trading partners, which will result in lost California jobs, 25 percent of which are purportedly tied to international trade. Indeed, California ranks first in the nation in the number of jobs created from foreign direct investment, making the state particularly susceptible to polices of other countries that restrict free trade and commerce. Moreover, other business groups, relying in part on a recent Labor Department survey which revealed that the U.S. lost only 4,633 U.S. jobs overseas in the first three months of 2004, have urged that the impact of outsourcing is minimal.

Judge Rejects Whistleblower Claim, Finds No Violation of Sarbanes-Oxley Act

A U.S. Department of Labor ("DOL") administrative judge recently rejected a retaliation claim filed pursuant to the Sarbanes-Oxley Act because the former employee failed to establish that he engaged in protected activity. Wayde Lerbs, a cash manager for the Buca de Beppo restaurant chain, argued that he was terminated because he complained about alleged misleading entries in the company's general ledger, and about the company's practice of hiring accountants previously employed by its auditors (a practice Lerbs felt was inappropriate but not illegal).

To establish a retaliation claim under Sarbanes-Oxley, the plaintiff must prove the following:
(1) the employee engaged in protected activity, (2) the employer was aware of the protected activity, (3) the employee suffered an adverse employment action, and (4) the circumstances raise an inference that the protected activity was a contributing factor in the adverse action. The plaintiff need not prove that a violation of law occurred. However, the plaintiff must show that he had a reasonable (both subjectively and objectively) belief that the employer violated the law.

The DOL concluded that Lerbs' statements about the general ledger entries were simply "general inquiries." The DOL further found that Lerbs did not believe the practice of hiring accountants from the outside auditor was illegal, because Lerbs acknowledged as much. Thus, the DOL concluded that Lerbs did not engage in "protected activity" and thus could not establish a retaliation claim under Sarbanes-Oxley.

Although retaliation claims, especially in California, have become more and more difficult for employers to defend, this ruling confirms that the employee always bears the burden of proof to establish protected activity.

Forcing Employee to Pursue Grievance Remedy to Obtain Benefits May Constitute Discrimination

In *Fonseca v. Sysco Food Services*, the federal Ninth Circuit Court of Appeals held that when an employer knows its employees are entitled to certain opportunities, but forces only employees of a certain race to use the grievance procedure to obtain them, such conduct may constitute actionable discrimination in violation of Title VII.

Sergio Fonseca, a Hispanic of Guatemalan national origin, worked in a Sysco Food Services warehouse. During a one-year period, a Sysco supervisor called a Caucasian employee to work overtime on 13-16 occasions when he should have assigned the work to Fonseca because of his seniority. Fonseca filed and won several union grievances regarding the unfair overtime allocation, yet he was forced to wait several months for his grievance pay. Based in part on the payment delay, Fonseca filed another grievance. He argued that the only occasion where a Caucasian employee was passed over for overtime, Sysco immediately paid the employee after he brought the omission to management's attention, and did not force the employee to file a grievance to obtain relief. The court held that Fonseca suffered an adverse action when Sysco forced him to bring a grievance not only for being passed over for overtime, but also for having to wait unnecessarily for the grievance pay.

This decision highlights the importance of uniform administration of overtime opportunities, both within union and non-union environments.