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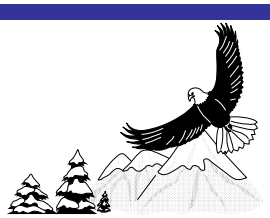

THE EAGLE'S VIEW

August 2001 Volume 1, Issue 2

Supreme Court Says Front Pay to Plaintiffs Is Unlimited

In 1991, Title VII was amended and for the first time plaintiffs were given the right to a jury trial, compensatory and punitive damages. Previously plaintiffs could win only equitable relief such as back pay and reinstatement. But at the same time Congress imposed limits on compensatory and punitive damages, ranging from $50,000 to $300,000, depending on the size of the work force. In a June ruling, the U.S. Supreme Court addressed the issue of whether so-called "front pay" was subject to the 1991 Civil Rights Amendments caps on compensatory damages. Front pay is generally awarded by judges in lieu of reinstatement, where such hostility has been created between the parties that the judge is reluctant to return the plaintiff to the offending environment. A unanimous Court ruled that front pay awards in Title VII cases are not an element of compensatory damages and therefore are not subject to the damage caps. The Court reasoned that it would be unfair to allow front pay awarded with reinstatement to be exempt from the caps, but not include pay awarded when reinstatement is not an option, such as in situations involving continuing hostility or psychological injuries preventing reinstatement.

The plaintiff, Pollard, alleged that she experienced almost daily name-calling and degrading insults; isolation from co-workers; refusals to communicate with her; the setting of false safety alarms on her watch; and the placing in her work area of Bible passages regarding the submission of women

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Supreme Court Says Front Pay to Plaintiffs is Unlimited

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to men. Although she complained to a supervisor and expressed concerns for her safety and plant safety, she alleged nothing was done. She was eventually terminated for refusing to return to work because the company allegedly refused to guarantee that she would not be assigned to work with the men she accused of harassing her. The court had awarded her $107,364 in back pay and benefits and $300,000 in compensatory damages, the most permitted by the law. Pollard's lawyer argued that the award should be supplemented with front pay of about $800,000, in lieu of reinstatement, but the lower court refused to address that issue, ultimately leading to the Supreme Court review.

Editor's Note: *After a jury returns a verdict and "legal" remedies pertaining to remedy, the judge usually determines the equitable portion of the ruling, including reinstatement and front pay. The judge has discretion to award front pay in lieu of reinstatement, particularly when the plaintiff argues that such a remedy is appropriate under the circumstances. Workers generally seek front pay in lieu of reinstatement when they argue that the harassment or discrimination is so severe that they cannot return to the same job. While judges are usually reluctant to award large front pay awards, because that remedy is usually based on earnings that the plaintiff would have received but for the discrimination, in theory an unemployed plaintiff could argue for front pay earnings up to retirement. The result of the ruling is to increase the risk to employers in Title VII cases.*

Does it violate the Wage And Hour laws to pay salaried, supervisory employees additional compensation when they work extra hours?

Fluctuating Workweek Pay Plan Wins Court Approval - Twice

Does it violate the Wage & Hour laws to pay salaried, supervisory employees additional compensation when they work extra hours? A group of plaintiffs tried to argue that it did, but they were soundly defeated in two recent decisions by the U.S. District Court in Atlanta. These are significant rulings because they concern the fluctuating workweek (FWW) method for paying overtime to salaried employees – a method that, used properly, can save employers lots of money in overtime expense.

Last April the U.S. District Court in Atlanta granted a Motion for Summary Judgment in favor of the employer in Smith et al. v. MARTA. This was a collective action under the Wage & Hour law brought by approximately 70 first-line bus and rail transportation supervisors who claimed that they were due potentially hundreds of thousands of dollars in unpaid time-and-a-half overtime.

MARTA had implemented a perfectly legal compensation plan which actually paid these employees more than the minimum they were entitled to by law. The FWW method allows an employer to pay non-exempt (hourly) employees a guaranteed minimum salary plus an extra one-half their regular hourly rate for overtime hours – a great savings over the customary time-and-a-half the law requires if no base salary is paid. Properly used, this system can result in big savings, particularly where long hours are part of the job: the employees have the security of a guaranteed, minimum salary plus some overtime; and the employee can control overtime expense.

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Fluctuating Workweek Pay Plan Wins Court Approval -- Twice

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In this case the employer was paying salary plus "straight time" – additional compensation at the regular rate, or twice the amount allowed under the traditional FWW formula -- to first-line supervisors. The District Court found for MARTA on two grounds: first, that the supervisors were indeed exempt from the overtime law, and thus not entitled to any overtime pay at all; and second, that the FWW compensation method had been properly implemented and all the employees compensated in excess of MARTA's legal obligation. Curiously, the plaintiffs argued that MARTA invalidated the FWW system by paying the supervisors more than the legal minimum. The District Court rejected that argument, noting that nothing in the FLSA prohibits an employer from paying employees more than the minimum they're due

Union Gave Up Employee's Rights To Go To Court

The union gave up an employee's right to sue in court under Title VII when it negotiated a labor contract providing that the parties agreed to "abide by all the requirements of Title VII" and that "unresolved grievances arising under this Section are the proper subjects of arbitration," a federal appeals court rules in *Safrit v. Cone Mills Corp.,* 85 F.E.P. Cases 833 (C.A. 4, 4/27/01). This result was reached even though the employee-plaintiff in question had filed a grievance and the union, which controlled access to arbitration, refused to arbitrate her grievance. Thus, the employee had no recourse to any forum to litigate her discrimination claim. She couldn't go to court because of the arbitration clause in the labor agreement, and the union refused to arbitrate her grievance.

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KNOW YOUR ATTORNEY

William R. Seale

Bill joined the firm of Wimberly Lawson Seale Wright & Daves in January of 1982 and is the Managing Member of the Firm He received his Bachelor of Science degree in Industrial Engineering with High Honors and his Doctor of Jurisprudence from the University of Tennessee at Knoxville. Bill practices out of the Morristown and Knoxville, Tennessee offices. Wimberly Lawson Seale Wright & Daves is a full service Employment Law firm, representing management in matters such as Equal Employment Opportunity, labor relations, employee relations, wage and hour, affirmative action, ERISA, workers' compensation and occupational safety.

Before joining the law firm, Bill spent several years in the United States Marine Corps as a Judge Advocate. While in the Marine Corps, he served as a Special Assistant U.S. Attorney.

Bill is a member of the Hamblen County Bar Association, and is a member of the Labor and Employment Law Section of the Tennessee and American Bar Associations. He previously served as the Editor of the *Tennessee Bar Association Labor Letter.* Bill is also a member of the Chancellor's Associates at the University of Tennessee.

In addition to his law practice, Bill is Vice President of Management Resources Institute, Inc.

Union Gave Up Employee's Rights To Go To Court.......Continued from Page 3)

Editor's Note: The U. S. Supreme Court has previously ruled that there may be a waiver of a right to a court trial in a collective bargaining agreement if it is done in "clear and unmistakable language." Wright v. Universal Maritime Service Corp., 525 U.S. 70 (1998). This 4th Circuit ruling is likely to encourage employers to broaden their grievance and arbitration procedures to allow the arbitration of discrimination claims, thereby arguably possibly precluding court litigation of such claims. See the related discussion in this month's Perspective Article.

PERSPECTIVE – August 2001 – Arbitration Winning Employer Acceptance

Two Cornell University professors have surveyed Fortune 1000 Companies as to their use of mediation and arbitration in resolving disputes. The survey revealed that 80% of the companies had used arbitration at least once during the previous three years. This 1997 survey is consistent with that of many others indicating that the use of arbitration as an alternative dispute resolution (ADR) procedure is increasing dramatically.

In the 1997 survey, the authors conclude that roughly 10% of the Fortune 1000 Companies dislike ADR and rarely use it, while 80% were in what the authors called "an experimental mode." The other 10% of the Fortune 1000 companies have institutionalized ADR by implementing it into their regular system.

One company specifically studied by the two Cornell professors was Philadelphia Electric Co., a utility. This company decided that resolving disputes with employees was quite important, and such a resolution wasn't likely to happen in court. The company therefore decided to expand its ADR program to resolve all employment disputes without having to go to court. The theory not only was to avoid costs and adverse publicity from litigation, but also to change the relationship between employees and managers. The company developed a system whereby if an employee dispute involved a legal issue, like discrimination or harassment, employees would go to mediation or voluntary, binding arbitration. When legal issues weren't involved, but merely personnel issues, employees could request a binding hearing before a Peer Review Panel. The panels consisted of three peers, a manager and a supervisor, none involved in the matter in dispute, and all volunteers with training in the peer review process. Panels weren't authorized to change company policies or procedures, but only to decide whether the supervisors' decisions were consistent with those policies and procedures.

Modification of the Peer Review System was later made whereby prior to peer review, a new option was created called "People Solve." Before the peer review hearings, employees with disputes had the option of meeting with trained peer coaches to prepare them for conversations with their supervisors, and as a result, 92% of the disputes brought to the coaches were resolved without a peer review panel hearing the dispute.

The experiences of this company are just an example of the widespread changes taking place today, and if anything, the trend is expected to increase because of recent court approval of arbitration and other ADR programs. A big boost to employment arbitration was given by the U. S. Supreme Court this year, when the Court ruled in *Circuit City Stores v. Adams* that agreements to arbitrate employment disputes are enforceable under the Federal Arbitration Act for all employees except transportation workers. Some lower courts have even ruled that arbitration procedures in union contracts can sometimes preclude court litigation of legal claims, where the arbitration provisions are broadly drafted in such contracts. Next year, the Supreme Court has agreed to decide in *Equal Employment Opportunity Commission v. Waffle House*, whether an employer's arbitration agreement with an employee can bar the EEOC from seeking relief on behalf of the worker for employment discrimination. As a result of these favorable court decisions, it is likely that challenges to arbitration agreements with employees in the future will deal with the fairness of the arbitration system rather than the agreement itself. It appears, for example, that employers cannot take away legal rights through the use of an arbitration system, impose excessive costs on employees required to use the system in lieu of the judicial process, or set up a system with less than impartial arbitrators.

Wimberly Lawson Seale Wright & Daves has had a great deal of experience in designing arbitration, peer review, and other ADR programs for Fortune 1000 companies, and has found that the systems are generally working quite well. Arbitration has been found to be quicker, cheaper, more private, and less hostile to employer interests, although a great deal of strategy is necessary in the design and implementation of such programs. Furthermore, as is the case of many of the Fortune 1000 companies, many employers are studying others to see if the systems are working successfully, whether they in fact reduce the litigation case load, or whether they create additional headaches for management. Initial reports reveal that most employers are pleased with their programs, particularly those employers that previously had a great deal of litigation. Indeed, many companies cite a major piece of litigation as the "catalyst" that lead them to develop an ADR program.