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Johnson v. Beatrice Foods Co., 921 F.2d 1015

Author: Judge Barrett

Plaintiff, Johnson, appealed from the district court's entry of summary judgment in favor of his former employer, defendant, Beatrice Foods Co. ("Beatrice"), on a claim of intentional infliction of emotional distress. Johnson alleged that he was constantly harassed and intentionally discriminated against by his supervisor. The district court found that the state law claims were preempted by the Labor Management Relations Act (the "Act"). The district court stated that claims arising under a collective bargaining agreement must be resolved by federal law. On appeal, Johnson contended that the district court erred in finding that the portions of his claim relating to wrongful suspension and discipline were preempted by the Act.

The Tenth Circuit affirmed, holding that Johnson could not avoid federal jurisdiction under the Act by framing the labor contract complaints in terms of a tort theory such as intentional infliction of emotional distress. The court reasoned that all of Johnson's claims were directly related to explicit or implicit rights derived from the Collective Bargaining Agreement and must be resolved under uniform federal law pursuant to the Act.

United Mine Workers v. Big Horn Coal Co., 916 F.2d 1499

Per Curiam

Plaintiff, United Mine Workers ("Union"), brought suit seeking to compel defendant, Big Horn Coal Company ("Big Horn"), to arbitrate certain employee grievances which arose after the collective bargaining agreement's expiration. The district court held as a matter of law that the obligation to arbitrate existed. In particular, the district court found that Big Horn's unilateral implementation of its last offer extended its contractual obligation to arbitrate. Big Horn subsequently appealed.

The Tenth Circuit reversed, holding that the district court lacked jurisdiction. The court explained that the Labor Management Relations Act required a violation of a contract between the parties to invoke the court's jurisdiction. The court ruled that since a contractual relationship did not exist by virtue of Big Horn's last offer, the parties lacked the contractual relationship required for jurisdiction.

Bishop v. Federal Intermediate Credit Bank of Wichita, 908 F.2d 658

Author: Judge Tacha

Plaintiff, Bishop, brought suit against defendant, Federal Intermediate Credit Bank of Wichita ("FICB"), alleging that he was wrongfully discharged from his position as president of the Chandler Production

Credit Association ("Chandler"), in violation of Oklahoma law and the first amendment of the U.S. Constitution. Bishop appealed three district court orders: (1) a partial summary judgment in favor of FICB and a dismissal of his state law tort claim of wrongful discharge as preempted by the Farm Credit Act; (2) a denial of his motion to reconsider the dismissal of the wrongful discharge claim; and (3) a judgment on the pleadings dismissing his first amendment claim because FICB was not a government actor for purposes of establishing constitutional deprivation.

On *de novo* review, the Tenth Circuit stated that Congress has not clearly expressed intent to completely occupy the field of farm credit to the point of barring state employment law tort claims. The court reasoned that employment questions generally do not have a "direct and substantial impact" upon decisions to grant credit. Furthermore, no conflict exists between the Farm Credit Act which grants FICB authority to remove Bishop, and Oklahoma state law which creates a wrongful discharge cause of action. Consequently, the court ruled that Bishop stated a proper claim for wrongful discharge. Thus, the district court erred in not reconsidering this claim. Accordingly, the court remanded the state claim for a determination of whether Bishop's discharge was wrongful under the public policy exception to the employment at-will doctrine. Finally, the court found that, in accordance with prior decisions, the district court properly found that federal intermediate banks are not government actors for the purposes of establishing a first amendment cause of action.

Coastal Derby Ref. Co. v. NLRB, 915 F.2d 1448

Author: Judge Seymour

Plaintiff, Coastal Derby Refining Company ("Coastal"), filed a petition for review of the National Labor Relations Board's ("NLRB") decision that Coastal was a successor employer and, therefore, obligated to recognize and bargain collectively with the union. NLRB cross-petitioned for enforcement of the order.

The Tenth Circuit affirmed the decision of the NLRB and thus denied Coastal's petition. The court further granted the cross-petition for enforcement of the order. The court stated that the NLRB adopted a rule which was consistent with the provisions of the National Labor Relations Act. Accordingly, the rule was entitled deference from the courts. Moreover, the court stated that a union enjoys a conclusive presumption of majority status for one year following its certification as the bargaining representative. A change of ownership in a company will not disturb this presumption if the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor. Thus, if the new employer is in fact a successor of the old employer and the majority of its employees are employed by its predecessor, the presumptions will carry over. The court then determined that this test was satisfied by Coastal.

Department of the Interior v. Federal Labor Relations Auth., 908 F.2d 570

Author: Judge Ebel

Plaintiff, United States Department of the Interior ("DOI"), sought review of a final order of the Federal Labor Relations Authority ("FLRA"). The FLRA order declared that Sunday premium pay for DOI's non-supervisory, hourly operations and maintenance employees was a negotiable aspect of a new collective bargaining agreement. The FLRA cross-petitioned for enforcement of its order. DOI argued that, in accordance with § 9(b) of the Prevailing Rate Systems Act and § 704(b) of the Civil Service Reform Act, it was not required to negotiate Sunday premium pay. It reasoned that such pay was neither the subject of prior negotiations nor was it a prevailing practice in the relevant area.

The Tenth Circuit reversed the order of the FLRA and remanded the matter for further proceedings. The court found that the FLRA misinterpreted the legislative history of §§ 704 and 9(b). The court ruled that only those matters which were specifically negotiated in previous bargaining agreements were within the scope of current bargaining obligations between federal employers and prevailing rate employees. The court also stated that previous payment of Sunday premium pay was the result of a perceived statutory right which did not make the issue currently negotiable. Finally, the court ruled that to be negotiable, such pay must have been prevailing practice in the relevant area. The FLRA admitted that Sunday premium pay was not a prevailing practice in the local area under consideration.

Facet Enters., Inc. v. NLRB, 907 F.2d 963

Author: Judge Baldock

After unsuccessful negotiations, the United Automobile, Aerospace and Agricultural Implement Workers of America (the "union") filed charges against Facet Enterprises Incorporated ("Facet"). The administrative law judge ("ALJ") found Facet liable of: (1) dealing directly with its picketing employees rather than bargaining through union representatives; (2) insisting to impasse on removing the EBW operator from the bargaining unit; (3) refusing to provide the union with information necessary for the performance of its collective bargaining responsibilities; and (4) unilaterally changing employment conditions after the strike without first bargaining to impasse on those subjects. The ALJ also found that Facet's improper conduct converted the union's economic strike into an unfair labor practice strike. Facet petitioned for review the NLRB's order, finding it liable for a series of unfair labor practices.

The Tenth Circuit enforced the NLRB's order except as to its finding of conversion at the Detroit strike. First, the court found that the letters Facet sent to Detroit employees, combined with the picketline communications, indicated it did not bargain in good faith with the union representatives. Moreover, the court ruled that Facet was not

prejudiced nor were its due process rights violated. The court reasoned that it had at least constructive notice and an opportunity to contest the charge that it improperly dealt directly with striking employees. Second, as a permissive subject of bargaining, Facet was proscribed from insisting upon removing the EBW operator from the bargaining unit once the union communicated its unwillingness to negotiate. Third, the charge that Facet refused to provide the union with information necessary for the performance of its collective bargaining responsibilities was not time-barred. The court reasoned that the time limitation period argued for does not apply to the amending of a timely filed complaint. The court then held that the employer's duty to provide the bargaining representatives with information on its financial status was triggered. The court held that Facet's refusal to provide the union with information concerning the removal of machinery, and the discipline of Facet employees for picketline misconduct, was improper. The court explained that the information was relevant to the union's fulfillment of its obligation to preserve its members' jobs. Fourth, the court ruled that Facet's unilateral change in employment conditions after the strike, without first bargaining to impasse, were not *de minimis* violations. Finally, the court affirmed the ALJ's conversion decision. Specifically, Facet's conduct with respect to the EBW issue and its direct dealing in Elmira effectuated a conversion of those strikes from economic to unfair labor practice ones.

United Food & Commercial Workers Int'l Union v. Gold Star Sausage Co., 897 F.2d 1022

Author: Judge Logan

Plaintiff, United Food & Commercial Workers International Union (the "union"), brought suit against defendant, Gold Star Sausage Company ("Gold Star"). The union alleged that Gold Star violated a provision of the parties' expired collective bargaining agreement ("CBA") by not resolving certain grievances through arbitration. On appeal, the Tenth Circuit was asked to decide whether any dispute arising within a reasonable time after expiration of the contract was governed by the arbitration clause.

The Tenth Circuit, on *de novo* review, concluded that in order for an expired CBA to govern, the dispute must relate back to the time during which the CBA was in force. This requires the dispute to involve rights accrued or vested during the life of the contract, or to have occurred during the time the contract was in force. In the case at hand, the parties agreed that all events leading up to the dispute occurred after the agreement expired. Thus, the rights must have vested during the life of the agreement in order for the grievances to be submitted to arbitration. The court ruled, however, that the rights in question expired with the contract that created them. The rights involved were: (1) the right to be discharged for just cause; (2) seniority rights; and (3) the right to exclude supervisors from performing work reserved under the contract

for bargaining unit employees. Thus, the compulsory arbitration clause did not apply. Further, the court rejected the union's argument that arbitration should be ordered under Gold Star's unilaterally implemented final offer. The court ruled that since Gold Star's last offer was not a contract pursuant to 29 U.S.C. § 185(a), it was without jurisdiction.

Horne v. J.W. Gibson Well Serv. Co., 894 F.2d 1194

Author: Judge Thompson, sitting by designation

Plaintiff, Horne, a rig operator for defendant, J.W. Gibson Well Service Company ("Gibson"), was terminated after testing positive for two drug tests. Horne brought an action for breach of contract, but the district court awarded summary judgment to Gibson. Horne appealed, alleging that: (1) Gibson breached an obligation of express or implied contract based on employment policies; (2) Gibson violated its duty of good faith and fair dealing; and (3) Gibson's drug testing policy violated public policy.

The Tenth Circuit affirmed the district court's judgment. First, the court held that Gibson did not breach an employment contract with Horne because Horne's employment for an indefinite term was "at will" and could be terminated by either party with or without cause. Moreover, under Wyoming law, personnel policies can make employment contractual, thereby restricting an employer's right to discharge an employee. The mere existence of personnel policies, however, does not result in a contractual arrangement. Gibson's employment manual did not contain the provisions that would negate employment at will. Second, Gibson did not display bad faith or unfair dealing. The court explained that Gibson followed its stated procedure. The employees, including Horne, were fully informed of its rules and the consequences for violation of those rules. In addition, Horne was not improperly singled out or dealt with unfairly. Also, Gibson had a legitimate business purpose in protecting the safety of other employees, which the court stated was closely tied to a drug free policy. Moreover, the court reasoned that Wyoming has not yet implied a duty of good faith and fair dealing into employment contracts. Last, the court cited a recent Wyoming case, which found that attempts to ensure a safe, drug-free workplace do not violate the public policy of Wyoming. The court stated, however, that the facts of this case did not fall within this public policy exception.

Johns-Manville Sales Corp. v. NLRB, 906 F.2d 1428

Author: Judge Anderson

Defendant, Johns-Manville Sales Corporation ("Manville"), sought review of plaintiff, National Labor Relations Board's ("NLRB"), decision that Manville violated the Labor Management Relation Act, 29 U.S.C. § 158(a). The NLRB determined that Manville improperly withdrew recognition of a previously certified union, without reasonable

grounds to doubt the union's majority status. Manville contended the withdrawal was legally justified.

The Tenth Circuit reversed the NLRB's decision. The court stated that withdrawing recognition of a union is justified when either the union does not have majority support or the employer has a good faith doubt of the union's majority support. Good faith doubt must be shown by objective evidence to substantiate the doubt. The NLRB erred when it required proof of express anti-union statements by each individual worker, comprising a majority of the bargaining unit. Instead, the NLRB should have given full weight to the cumulative effect of the totality of the circumstances. Moreover, the court determined that Manville was legally justified to withdraw its recognition of the union. The court based its decision on the objective manifestation of lack of majority support.

Lucas v. Mountain States Tel. & Tel., 909 F.2d 419
Per Curiam

Plaintiff, Lucas, filed a grievance with the Communication Workers of America, District 7 (the "union"), after he was discharged from Mountain States Telephone & Telegraph ("Mountain States"). After several unsuccessful attempts to reach agreement with Mountain States, the union notified Lucas, on May 14, 1987, that no further action would be taken. Lucas then filed suit on December 7, 1987, against Mountain States, alleging violation of his collective bargaining agreement. He also filed suit against the union, alleging breach of duty of fair representation. The district court granted summary judgment in favor of Mountain States and the union, reasoning that the suits were barred by the applicable statute of limitations. Lucas subsequently appealed.

The Tenth Circuit affirmed the summary judgment. The court reasoned that the facts were undisputed, and both defendants were entitled to the judgment as a matter of law. The court ruled that the six month statute of limitation prescribed by the National Labor Relations Act applied since the suit was a hybrid one; that is, it charged both the employer and representative union. Accordingly, the statute of limitations began on the day Lucas was notified that the union ceased taking any further action. Lucas knew of the union's abandonment of his grievances and filed his suit more than six months after the notification. The action was, therefore, barred.

Masters v. Daniel Int'l Corp., 917 F.2d 455
Per Curiam

Plaintiff, Masters, appealed the district court's dismissal of his complaint. The complaint alleged a state-law claim against Master's employer, defendant, Daniel International Corporation, based on retaliatory discharge for reporting nuclear safety violations. The Tenth Circuit ruled that The Energy Reorganization Act ("Energy Act") pre-

empts such state-law claims. The Supreme Court remanded the case for further consideration.

The Tenth Circuit reaffirmed the district court's dismissal of Master's claim. The court held that even though Master's claim was no longer preempted by the Energy Act, the claim was, nonetheless, still precluded because an alternative remedy was available.

Merrick v. Northern Natural Gas Co., 911 F.2d 426

Author: Judge Tacha

Plaintiff, Merrick, filed suit alleging Northern Natural Gas Company, a division of Enron Corporation ("Northern"): (1) terminated Merrick in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-34; (2) breached an employment contract; and (3) both Northern and Merrick's immediate supervisor, defendant, Roberts, intentionally inflicted emotional distress. Roberts counter-claimed against Merrick for intentional infliction of emotional distress and *prima facie* tort on grounds Merrick allegedly harassed and mistreated her. Merrick and Roberts appealed the district court's dismissal of their respective claims on summary judgment.

The Tenth Circuit affirmed the district court's grant of summary judgment on all claims. First, the court stated that Merrick failed to introduce a genuine issue of fact suggesting his termination was pretextual. Second, the court stated that Northern did not breach an employment contract. The court reasoned that as an at-will employee, Merrick had no contractual rights to good faith treatment with respect to his termination. Third, the court stated that Merrick and Roberts were involved in an ordinary employee-employer conflict, and the record was devoid of any evidence supporting any claims of intentional infliction of emotional distress. Specifically, Merrick did not demonstrate that Roberts' actions rose to the level of an "extraordinary transgression of the bounds of civility." Insults, yelling, and hostile reactions do not give rise to a cause for intentional infliction of emotional distress. Finally, no Oklahoma Supreme Court case has extended the *prima facie* tort doctrine outside the context of malicious injury to business or property interests.

Patterson v. United Bhd. of Carpenters & Joiners, 906 F.2d 510

Per Curiam

Defendant, United Brotherhood of Carpenters & Joiners (the "union"), appealed the district court's summary judgment in favor of plaintiff, Patterson. The district court ruled that the union improperly increased dues and violated the local union members' right to vote under the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(3) ("LMRDA"). On appeal, the union argued that: (1) the members had an opportunity to reject a dues increase; and (2) the union had authority to raise dues without local membership approval. Patterson cross-appealed, stating that the district court abused its discretion by denying his attorney's fees.

The Tenth Circuit affirmed the decision of the district court. The court ruled that although the members had a choice between higher dues or a per capita tax, both options would, in fact, result in a dues increase. The court reasoned that whether there was a dues increase is determined by the direct effect of the financial burden imposed on the individual members. Second, the court stated that a dues increase was improper because it was not a majority vote, and Colorado local unions were not allowed to participate in the representative vote. Moreover, the court rejected Patterson's claim for attorney's fees, reasoning that it would not be in the interest of justice.

Pratt v. Petroleum Prod. Management, Inc. Employee Savings Plan & Trust,
920 F.2d 651

Author: Judge Baldock

After being terminated from employment, plaintiff, Pratt, was entitled to receive a distribution of his interest in his employer's contribution account. Eight weeks after Pratt's termination, the pension plan was retroactively amended to include a redefined, interim, valuation date which reduced his distribution by over twenty thousand dollars. Pratt filed suit, claiming an improper valuation date was used. The district court granted summary judgment in favor of Pratt on his claims, including an award of attorney's fees. Defendant, Petroleum Production Management, Incorporated, Employee Savings Plan & Trust, ("PPM"), appealed.

The Tenth Circuit reversed and remanded the award of attorneys' fees. The court explained that there was an inadequate record explaining why the award was made. The court affirmed the decision regarding the valuation date. The court looked at the express, unambiguous language of the plan which gave Pratt, at termination, a vested and accrued right to receive a distribution valued on the defined valuation date. The court reasoned that the pension plan was a contract which required PPM to follow the procedure in existence at the time of Pratt's termination. That procedure could not be subsequently amended to reduce his fully vested rights.

Public Serv. Co. v. International Bhd. of Elec. Workers, Local III, 902 F.2d
19

Per Curiam

Plaintiff, Public Service Company of Colorado ("PSC"), brought an action in district court appealing a labor arbitration board's (the "board") decision in favor of defendant, International Brotherhood of Electrical Workers, Local Union No. III (the "union"). The board directed PSC to use union personnel for all custodial work at a particular job site. The district court affirmed the board's decision. PSC appealed, claiming that the board exceeded its authority because the union contract was silent as to the hiring of union custodians.

The Tenth Circuit affirmed the district court's order in favor of the

union. The court found that PSC was estopped from denying that during the contract negotiating sessions, it left reasonable impression with the union that all custodial service work would be done by union employees. The court held that: (1) the board's decision properly drew its essence from those provisions of the contract relating to the assignment of custodial work; and (2) the board did not act beyond its authority in applying equitable principles in determining that the company could not subcontract custodial work to nonunion employees.

Rucker v. St. Louis Southwestern Ry. Co., 917 F.2d 1233

Author: Judge Tacha

Plaintiffs, seven locomotive engineers, claimed that defendant, St. Louis Southwestern Railway ("SLSW"), violated federal law by contravening an Interstate Commerce Commission ("ICC") order. This order required SLSW to follow a prior agreement governing the labor rights of employees (Rucker). The district court held that the claim should be dismissed under the doctrine of primary jurisdiction. The district court also ruled that a six month statute of limitations barred the engineers' seniority rights claims. This determination overruled Rucker's claim that a two year statute of limitations was applicable. Last, the district court granted SLSW's motion for summary judgment on the engineers' breach of the duty of fair representation claim. The engineers subsequently appealed.

On *de novo* review, the Tenth Circuit affirmed the district court's decision for the reasons set out in the district court's memorandum and order. First, summary judgment was properly based on primary jurisdiction grounds. Specifically, jurisdiction was declined because the administrative agency has the expertise and opportunity to decide the issues. Second, the six month statute of limitations period governed the suit. The engineers should have known of their seniority rights, which were negotiated in an agreement more than six months before the lawsuit was filed. Third, summary judgment on the breach of the duty of fair representation claim was proper. A breach of this statutory duty only occurs when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. The district court found no evidence of arbitrary or discriminatory behavior.

Utah Power & Light Co. v. Secretary of Labor, 897 F.2d 447

Per Curiam

Emery Mining Company ("Emery") was cited after refusing to allow a non-employee union member to participate in a walkaround inspection pursuant to § 103(f) of the Federal Mine Health and Safety Act of 1977, 30 U.S.C. § 813(f). When Emery contested the citation, an administrative law judge ruled against it. The Federal Mine Safety and Health Review Commission, upon review, affirmed, deciding that walkaround rights extend to nonemployee miners' representatives, and that the representative need not first comply with the requirements of

30 C.F.R. Part 40. Emery and Utah Power & Light Company then petitioned for review.

The Tenth Circuit affirmed that a non-employee miners' representative was entitled to walkaround rights, but held that the mandatory requirements of Part 40 must be complied with to exercise those rights. The legislative history and statutory language of § 103(f) made clear that walkaround rights were extended to any authorized miners' representative without being limited to representatives who were also employees. Section 103(f), however, was subject to regulations promulgated by the Secretary of Labor, including 30 C.F.R. Part 40. Because severe penalties could be imposed for refusing to grant walkaround rights, operators need a method to determine who is an authorized representative. Compliance with Part 40 identifies those representatives and defines their scope of authority.

White v. American Airlines, Inc., 915 F.2d 1414

Author: Judge Ebel

Plaintiff, White, brought suit against American Airlines, Incorporated ("Airlines"). White alleged that he was discharged in retaliation for his refusal to commit perjury on behalf of American in connection with a DC-10 accident suit. A jury found in favor of White, awarding him \$1,516,000. The jury found that White was terminated in violation of Oklahoma's public-policy exception to the employment-at-will doctrine. American appealed, claiming error in the jury instruction. Specifically, American argued that the jury instruction should have stated that the refusal to commit perjury must have been a "substantial factor" in the decision to terminate him.

The Tenth Circuit ruled that the district court committed reversible error. The district court should have instructed the jury that White's failure to perjure himself must have been a "significant factor" in causing his discharge.

YMCA of the Pikes Peak Region, Inc. v. NLRB, 914 F.2d 1442

Author: Judge Seymour

Dissent: Judge Baldock

Plaintiff, YMCA, appealed a National Labor Relations Board ("NLRB") order that affirmed and adopted the ruling of the administrative law judge ("ALJ"). In response to a previous unfair labor practice charge, YMCA and a union entered into a settlement agreement. Subsequently, YMCA employee Ague was discharged. The union filed an unfair labor practice charge, which cited Ague's discharge, pre-settlement conversations between YMCA and Ague, and a pre-settlement letter of reprimand to employee O'Bryan. The ALJ set aside the settlement agreement and found that the YMCA violated §§ 8 (a)(1), (3) and (4) of the National Labor Relations Act ("NLRA"). On appeal, YMCA contended that: (1) its impact on interstate commerce was insufficient to warrant NLRB's exercise of jurisdiction; (2) the ALJ erred in finding

that the discharge of Ague constituted an unfair labor practice in violation of §§ 8(a)(1) and (3); and (3) the post-settlement conduct should not have been used to set aside the pre-settlement agreement.

The Tenth Circuit granted enforcement of the NLRB's order. First, the court held that charitable organizations must have sufficient impact on interstate commerce in order for the NLRB to assert jurisdiction. YMCA satisfied the retail standard dollar amount. Specifically, the direct inflow of materials from outside of Colorado met the NLRB's jurisdictional guidelines. Second, there was sufficient evidence to support a violation of 8(a)(1) and (3). The court explained that the four requirements needed to prove a violation were satisfied: (1) Ague was engaged in concerted activity; (2) YMCA knew of the activity's concerted nature; (3) the concerted activity was protected under the NLRA; and (4) YMCA's discrimination was motivated by Ague's protected concerted activity. Last, the settlement agreement was properly set aside because of post-settlement conduct. The court reasoned that the pre-settlement agreement was related to the post-settlement conduct. Specifically, the prior conduct included threats of action against Ague, and the post-settlement conduct included implementation of those threats.

