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LABOR

Boehm v. Kansas City Power and Light Co., 868 F.2d 1182

Author: Judge Ebel

Plaintiffs, power company linemen, sought overtime compensation under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201-19 for time spent "on call." The linemen argued that they should be paid overtime compensation twenty-four hours a day (in excess of their base forty hours per week) because the defendant power company required them to be available on a standby basis to work during emergencies. The district court entered a directed verdict against certain plaintiffs and a jury verdict for others.

On appeal, the Tenth Circuit ruled that the linemen were not entitled to overtime compensation for the time they spent "on call." The court concluded that the power company linemen were free to leave the employer's premises. They were also free to utilize their off-duty time as they wished, provided they could be contacted and report for work one-third of the time that they were so called. The court determined that under these conditions, overtime compensation was not required under the FLSA. The decision of the district court was affirmed in part, reversed in part and remanded.

Delling v. National Labor Relations Board, 869 F.2d 1397

Author: Judge McWilliams

Defendant, Delling, owned and operated several grocery stores. Unionization attempts were made at one of the stores. General management ordered Kelley, a store manager, to fire five employees because they had signed union cards. Kelley did so, and was later ordered to falsify termination slips giving pretextual reasons for the firings after one of the employees filed an unfair labor practice. Kelley refused to do so, and he was subsequently fired. Plaintiff, National Labor Relations Board ("NLRB"), ordered Kelley's reinstatement, and Delling appealed.

The Tenth Circuit upheld the NLRB's decision. Delling's argument that the National Labor Relations Act does not apply to supervisory employees was found to be incorrect in situations such as this. Where the termination of a supervisory employee directly interferes with the rights of nonsupervisory employees, the termination is unlawful. If Kelley had written the termination slips with the pretextual reasons on them, for example, he would have directly affected the fired employees' rights in their efforts to seek redress under the law.

Dole v. Occupational Safety and Health Review Commission, 891 F.2d 1495

Author: Judge Baldock

Plaintiff, Secretary of Labor ("Dole"), appealed a decision of the Occu-

pational Safety and Health Review Commission ("OSHA"). Dole argued that OSHA erred in vacating her citation of CF&I Steel Corporation ("CF&I"), for violating regulations regarding employee exposure to coke oven emissions. The Tenth Circuit found that requirements of the Occupational Safety and Health Act could reasonably be interpreted more than one way. The court held that when Dole and OSHA have conflicting interpretations of statutes, deference will be given to OSHA, if its interpretation is reasonable. The court explained that normally an administrative agency's interpretation of a statute is entitled to considerable deference and should be disturbed only if unreasonable. Moreover, the court examined legislative history and decided that Congress had reserved adjudicative power for OSHA and prosecutorial power for the Secretary, Dole. The court stressed that Dole's regulatory interpretations should be given substantial weight by OSHA and contravened only if clearly wrong or ambiguous.

Forest Products Co. v. National Labor Relations Board, 888 F.2d 72
Author: Judge Baldock

The National Labor Relations Board ("NLRB") held that Forest Products Company ("Forest") violated the National Labor Relations Act ("NLRA") by refusing to match funds withheld from certain employees' wages under its Christmas savings program because those employees were engaged in an economic strike on the program's disbursement date. Forest petitioned for review of the NLRB's decision and order.

The Tenth Circuit held that the NLRB's decision was not supported by substantial evidence. Specifically, the court held that Forest did not violate the NLRA because it presented a "legitimate and substantial business justification" for withholding the matching funds. By retaining the strikers' contributions to the fund, Forest maintained its eligibility for matching funds until the distribution date. The court further held that Forest's withholding of the funds was not "inherently destructive of employee interests." The court stated that there was insufficient evidence to prove that Forest hindered the union's bargaining position or its members' rights. The court set aside the NLRB's decision since the NLRB failed to prove anti-union intent.

Griess v. Consolidated Freightways Corp., 882 F.2d 461
Author: Judge Baldock

Plaintiffs, Griess and Pate, brought suit alleging retaliatory discharge by defendant, Consolidated Freightways ("CF"). The district court granted CF's motion for summary judgment, holding that the Wyoming Supreme Court would not recognize a cause of action for retaliatory discharge on two grounds: (1) federal labor law, 29 U.S.C. § 185, preempted the state law claim, and (2) the collective bargaining agreement supplied plaintiffs with a remedy. Plaintiffs appealed.

The Tenth Circuit found that plaintiffs' state retaliatory discharge claim against CF was not preempted by 29 U.S.C. § 185. The Wyoming

Supreme Court affirmed that Wyoming recognizes the tort of retaliatory discharge where, as here, the employee is not covered by the collective bargaining agreement. Thus, the Tenth Circuit held that plaintiffs must be permitted to pursue their retaliatory discharge claim against CF in the district court. The court reversed and remanded to the district court.

Harvey v. United Transportation Union, 878 F.2d 1235

Author: Judge Logan

Plaintiffs ("Harvey"), appealed the district court's findings regarding the legality of defendants', Atchison, Topeka & Sante Fe Railway Company's ("Railway"), seniority system. Specifically, Harvey claimed that collateral estoppel prevented the Railway from relitigating the issue. Harvey also appealed arguing that the district court used erroneous legal standards in determining whether the seniority system was legal. The Tenth Circuit previously determined that Harvey's issue preclusion claim was never raised formally until over a year after trial, which was simply too late. The court stated that the notice requirement was especially important here due to the use of offensive issue preclusion. Moreover, the court found that the district court made clear legal errors. In particular, the district court erred in its application of four factors: (1) whether the seniority system discouraged employees equally from transferring between seniority units; (2) whether the seniority units are in the same bargaining units; (3) whether the seniority system had its genesis in racial discrimination; (4) whether the seniority system was negotiated and whether it has been maintained free from any illegal purpose. In addition, the district court failed to consider relevant evidence outside the four factors. The court reiterated the importance of considering the totality of circumstances, even if they are not relevant to the four factors.

International Association of Fire Fighters Local 2203 v. West Adams County Fire Protection District, 877 F.2d 814

Author: Judge O'Connor District

The plaintiff, International Association of Fire Fighters Local 2203 ("Local 2203"), brought an action against the defendant, West Adams County Fire Protection District ("District"), seeking a declaratory judgment that the District was wrongfully providing its employees with compensatory time off in lieu of overtime pay. Local 2203 argued that the District was in violation of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 207(o) (1985). The district court entered summary judgment for Local 2203, and the District appealed. The Tenth Circuit held that the phrase "employees not covered," contained in the FLSA and allowing compensatory time only, applies to employees who do not have designated representatives. It does not apply to situations where the employer refuses to recognize the designated representative. The court further held that the FLSA provision which precludes employers from substituting compensatory time off for overtime pay unless the

substitution is pursuant to an agreement between the employer and employee representative, does not violate the tenth amendment. Attorney fees were not granted because no appellate court had previously interpreted section 207 and the District's appeal was reasonable. The district court's decision was affirmed.

Lear Siegler, Inc. v. National Labor Relations Board, 890 F.2d 1573

Author: Judge Anderson

Defendant, Lear Siegler, Inc. ("Lear"), sought review of a National Labor Relations Board's ("NLRB"), decision. The NLRB held that Lear violated sections 8(a)(1) and 8(a)(5) of the Labor Management Relations Act, 29 U.S.C. § 158(a) (the "Act"), by unilaterally modifying the terms of employment under two collective bargaining agreements. In addition, the NLRB found that Lear violated the Act by: (1) threatening to replace employees if they participated in a strike; (2) refusing to provide information to the unions; and (3) threatening an employee regarding his union activities.

The Tenth Circuit found that the record supported the NLRB's conclusion regarding the first contract. The court found enough evidence showing that Lear insisted to impasse on a decrease in the total wage package under one contract where the contract's reopener provision was limited to negotiating a wage increase. Lear's subsequent unilateral modification of this contract was, therefore, unlawful. The court also found substantial evidence to support the NLRB's finding that: (1) Lear threatened reprisals against workers who participated in a legal strike; (2) refused, without adequate justification, to supply information to the unions; and (3) threatened to discharge an employee if he filed a grievance. The court did not find, however, support in the record for the NLRB's conclusion regarding the second contract. In essence, there was no evidence demonstrating that an impasse had been caused by Lear's insistence on renegotiating terms not included in the contract's reopener provision. Lear was entitled to make a proposal outside the terms of the reopener clause, as long as it did not insist to impasse upon inclusion of the proposal in the contract. The court concluded that the impasse was due entirely to Lear's insistence on negotiating a decrease in the total wage package, which was consistent with the reopener clause of the contract. Therefore, upon reaching an impasse unilaterally, Lear was entitled to adopt the proposed provision. Lear was not entitled, however, to modify terms outside the scope of the reopener clause. The court granted in part the NLRB's petition for enforcement of its order.

Litvak Packing Co. v. United Food and Commercial Workers Local 7, 886

F.2d 275

Author: Judge Logan

Dissent: Judge Seth

Plaintiff filed a grievance with defendant, Litvak Packing Company ("Litvak") on behalf of an employee who had been fired on the day fol-

lowing his failure to perform part of his job. Pursuant to the collective bargaining agreement, the case was heard before an arbitrator, who ruled in favor of the employee and rescinded the discharge. The district court affirmed the arbitrator's award and Litvak appealed.

The Tenth Circuit upheld the decision of the district court, refusing to vacate the award because, where the parties have contracted for an arbitrator to resolve their disputes and the award draws its essence from such collective bargaining agreement, the courts cannot substitute their interpretation of the contract for the arbitrator's interpretation.

Manders v. Department of Mental Health, 875 F.2d 263

Author: Judge O'Connor, sitting by designation

Plaintiff, Manders, a female state employee, appealed the district court's ruling concerning three separate actions filed under section 1983 and Title VII. The actions were filed against Manders' supervisor, employer, and state agency for sexual harassment by the supervisor. The district court granted summary judgment in favor of the supervisor in his individual capacity. The court reasoned that Manders failed to establish evidence of sexual harassment within the two year statute of limitation period for section 1983 claims. The district court also dismissed Manders' Title VII sexual harassment claims for failure to state a claim. Moreover, the district court denied Manders' request for attorney's fees generated when she pursued her complaint internally.

In affirming the district court ruling, the Tenth Circuit held that Manders' section 1983 sexual harassment claims were barred by the applicable two year statute of limitations. The court reasoned that Manders conceded that the supervisor's advances ended before the applicable date. Furthermore, no evidence was presented to establish sexual harassment within the applicable two year period. The court ruled Manders' complaint failed to state a claim of sexual harassment under Title VII because compensatory damages were pled, and Title VII provides for equitable remedies only. The court found that the internal grievance procedure was an optional proceeding and not a prerequisite to the plaintiff pursuing a Title VII court action. Consequently, it was not covered by the attorney's fee provision of the statute.

Oil, Chemical and Atomic Workers' Union v. Amoco Oil Co., 885 F.2d 697

Author: Judge Seymour

Defendant, Amoco Oil Company ("Amoco"), unilaterally implemented an employee drug-testing program (with the propensity for "at-will" management testing for low drug and alcohol levels). Plaintiff, Oil, Chemical and Atomic Workers' Union, was granted an injunction by the district court pending the outcome of the arbitration remedy which was prescribed in the parties' collective bargaining agreement. Amoco's claim on appeal was that the Norris La Guardia Act forbids such injunctions and, therefore, the district court lacked jurisdiction to grant it.

Affirming the district court decision, the Tenth Circuit held that this case falls within the ambit of a narrow exception to the Norris La Guardia Act because this employer breach of the collective bargaining agreement threatened the very process of arbitration itself. Injunctions in such instances are proper when (1) the ordinary principles of equity support the granting of the injunction; (2) the moving party will suffer irreparable injury in the absence of injunction and the movant has a probable chance for success in arbitration; (3) the balance of hardship on the parties favors granting the injunction; and (4) the labor contract prescribes mandatory arbitration and the matter in dispute is the real issue at hand and not a collateral one.

St. Anthony Hospital Systems, Inc. v. National Labor Relations Board, 884 F.2d 518

Author: Judge Moore

St. Anthony Hospital Systems, Inc. ("Hospital") petitioned the Tenth Circuit for review of a National Labor Relations Board ("Board") decision ordering the Hospital to bargain with the St. Anthony Federation of Nurses and Health Professionals. The Hospital claimed the Board's all-technical bargaining unit does not satisfy the "disparity of interests" test adopted by the court in earlier decisions. In addition, the Hospital contended a new election is necessary because the radiologic technologists and registered respiratory therapist positions included in the technical unit more appropriately belong in the professional unit.

The court upheld the Board's findings that since there were sharper than usual differences between the interests of the technical and service/maintenance employees, the all-technical unit is appropriate. In affirming the Board's conclusion that the radiologic technologist and respiratory therapist positions did not satisfy the strict requirements of a "professional" under 29 U.S.C. § 152(12), the court noted that any changes in the job responsibilities of the positions in question would be more appropriately addressed in a unit clarification proceeding.

Southwest Forest Industries, Inc. v. Sutton, 868 F.2d 352

Author: Judge Seymour

Plaintiff, Sutton, brought suit against defendant, Southwest Forest Industries, alleging retaliatory discharge for filing worker's compensation claims. At the time of trial, only the Kansas Court of Appeals had ruled on the issue, allowing at-will employees to maintain actions in tort for retaliatory discharge. After a jury verdict for Sutton and pending appeal, the Kansas Supreme Court ruled in a separate case that an employee covered by a collective bargaining agreement could not maintain an action for retaliatory discharge. The Tenth Circuit thus granted defendant's motion for summary judgment. The Kansas Supreme Court subsequently overruled its decision, holding that employees covered by collective bargaining agreements could maintain tort actions for retaliatory discharge.

The Tenth Circuit upheld the district court's decision for Sutton, holding that the Kansas Supreme Court would give retroactive effect to its decision.

United Food and Commercial Workers Local 7R v. Safeway Stores, 889 F.2d 940

Author: Judge Tacha

Dissent: Judge McKay (dissenting in part)

Cortez had grieved the failure of her employer, Safeway, to recall her to another position after she was laid off. Plaintiff, United Food and Commercial Workers Local Union ("the Union"), delayed arbitration in Cortez's behalf. The arbitrator found that defendant Safeway had violated the collective bargaining agreement by failing to recall Cortez, but due to the Union's delay in bringing the matter to arbitration, a portion of the back pay award was assessed against the Union. The Union appealed the district court's denial of its motion to vacate the award, claiming (1) Cortez had no standing to seek to enforce the award; (2) the arbitrator exceeded his authority in assessing part of the back pay award against the Union; and (3) the district court erred in enforcing a monetary judgment against the Union.

The Tenth Circuit ruled that Cortez did have standing to sue under section 301 of the Labor-Management Relations Act wherein employees can sue only if they have exhausted any grievance procedures provided in the collective bargaining agreement. The court concluded that the Union ceased to act as Cortez's representative by refusing to pay its portion of Cortez's back pay. Thus, Cortez had exhausted her remedies under the collective bargaining agreement and was therefore entitled to sue under section 301. The court further held that the arbitrator had not exceeded his authority in awarding back pay against the Union because the issue submitted to the arbitrator failed to expressly restrict the party from whom relief would be available. The dissent, however, asserted that the Union's liability was not one of the issues submitted to the arbitrator because the Union was not a defendant. The court reversed in part, finding that the district court had exceeded its authority in entering a monetary judgment because the arbitration award was silent as to the amount of damages. The court directed the district court to remand the dispute regarding the amount of back pay to the arbitrator.

United States Department of Energy v. Federal Labor Relations Authority, 880 F.2d 1163

Author: Judge Ebel

Plaintiff, Western Area Power Administration ("WAPA"), petitioned for review of an order of the Federal Labor Relations Authority ("FLRA") which determined that WAPA had committed unfair labor practices by refusing to bargain over wages with certain supervisors within a recognized bargaining unit. The FLRA made its decision based

on section 704 of the Civil Service and Reform Act of 1978, 92 Stat. 1218, 5 U.S.C. § 5343.

The Tenth Circuit held that reclassified supervisory employees could not be included in a mixed bargaining unit of supervisory and nonsupervisory employees. Generally, when the FLRA interprets federal labor relations law, it is entitled to "special deference." Special deference to the FLRA's interpretation of 5 U.S.C. § 5343 was not required in this case, however, since that section was not part of the federal service labor-management relations statute which FLRA was charged with interpreting. The court determined that FLRA had improperly certified a mixed unit of supervisory and nonsupervisory employees and, therefore, reversed the FLRA's unfair labor practice decision.

Zimmerman v. Atchison, Topeka & Santa Fe Railway Co., 888 F.2d 660
Per Curiam

Plaintiff, Zimmerman, brought suit against defendant, Atchison, Topeka & Santa Fe Railway Company ("Railway"), alleging that he was discharged in violation of protective agreements with the Railway and in bad faith. The district court granted the Railway summary judgment, stating that the National Railroad Adjustment Board ("NRAB") had exclusive jurisdiction over this "minor dispute" pursuant to the Railway Labor Act ("Act"). Zimmerman appealed arguing that this was a "major dispute" and, therefore, should be heard in district court.

The Tenth Circuit held that the dispute was a minor one and, thus, the NRAB has exclusive jurisdiction. The court stated that because Zimmerman's complaint was based on the rights of parties to a collective bargaining agreement, it was a "minor dispute" and therefore subject to the Act. The court further held that alleging wrongful discharge did not prevent the dispute from falling under the exclusive arbitration provisions of the Act. The district court's grant of summary judgment was, therefore, affirmed.