"Your Workplace Is Our Work"®

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## Inside this Issue



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LEHR MIDDLEBROOKS & VREELAND, P.C.
LABOR & EMPLOYMENT LAW

# Employment Law Bulletin

## To Our Clients And Friends:

**An employer knows it is about to be taught a lesson when a court's opinion begins with "[D]espite considerable racial progress, racism persists as an evil to be remedied in our nation."** So began the decision of the Eleventh Circuit Court of Appeals in the case of *Goldsmith v. Bagby Elevator Company* (January 17, 2008). The appellate court upheld an award of more than $500,000 to Greg Goldsmith, an African American employee who was subjected to repeated racial slurs by supervisors and terminated when he refused to sign a mandatory arbitration agreement that would include his pending race discrimination charge.

The facts were bad. **Although the company had a policy that said to report behavior that may be discriminatory or harassing, Goldsmith's report about his supervisor, Farley, was rebuffed. The company's vice president, Steber, told Goldsmith "Well Goldy, you know, that's just the way Ron is. You are just going to have to accept it."** Key points the court made are as follows:

- Steber testified that he heard the owner and president of the company, utter racial slurs at the Birmingham Country Club. Those comments by Bagby were admissible, ruled the court, because "if Steber had heard Arthur Bagby…utter a racial slur, Steber could have inferred that racially discriminatory acts he perpetuated would be tolerated by Bagby Elevator."

- The court also upheld the admissibility of testimony from three other black employees who were terminated prior to Goldsmith after they either filed discrimination charges or complained about racial slurs. Known as "me too" evidence, the court ruled that such evidence was admissible "to prove the intent of Bagby Elevator to discriminate and retaliate."

- The company asked all of its employees to sign a mandatory arbitration agreement after Goldsmith filed his discrimination charge. The employees were told that if they did not sign the agreement, they would be terminated. The agreement would have applied to Goldsmith's pending charge. Every other employee signed the agreement except Goldsmith and a white employee. However, the company cajoled the white employee to reconsider and he ultimately signed the agreement. The company made no such effort to persuade Goldsmith to reconsider. This supported Goldsmith's argument that the company retaliated against him for filing a discrimination charge.

- The court upheld the district court's decision to permit into evidence the EEOC's "reasonable cause" finding against Bagby Elevator. The court stated that "this determination was best left to the sound discretion of the district court…there may be some circumstances in which the probative value of an EEOC determination is trumped by the "danger of creating unfair prejudice in the minds of a jury." The court added that "Goldsmith and Bagby Elevator presented ample evidence at trial to place the EEOC determination in its proper context."

There are several lessons learned from this decision:

1. Well written policies mean nothing if the employer does not act when a potential violation arises.

2. Individuals in positions of responsibility, from supervisors through executives, must be held accountable for the stewardship of the Company's commitment to workplace free of discrimination, harassment and retaliation.

3. The comments and behavior of leaders and owners away from work is still a message to their workforce about what the company really believes.

## FMLA LEAVE TO BE EXPANDED FOR MILITARY FAMILIES

On Monday, January 28, 2008, President Bush signed into law the National Defense Authorization Act, which included two significant expansions for FMLA law, the first significant expansion since the law was adopted in 1993. **The first provision adds a new qualifying event—a spouse, parent, or child being called to or serving in active duty—that entitles employees to 12 weeks FMLA leave to attend to certain demands. The second provision allows an employee up to 26 weeks of leave in a twelve month period to care for a close relative injured in active duty.**

The first provision, the "call to duty" provision, will require that the serviceperson have been summoned for a "contingency operation," a term of art in military law that would cover most assignments of military personnel. The requirement that employers grant 12 weeks of leave in response to a spouse, parent, or child being called to or serving in active duty will not be effective until the Department of Labor defines for what purpose the leave may be taken. The law states that leave may be used for handling "qualifying exigenc[ies]," but specifically leaves it to the Department to define the term. The Department of Labor encourages employers to begin providing this leave immediately; however, compliance is not presently required by law as the law is not effective until the Department issues regulations defining "qualifying exigency."

Unlike the first provision, the Department of Labor has indicated that the second provision, the "caregiver" provision, is effective immediately. To qualify, the employee must be "next of kin" (spouse, parent, child, or nearest blood relative), and the serviceperson must have suffered an injury or illness that leaves him or her "medically unfit to perform the duties of the member's office, grade, rank, or rating." Note that this definition appears to be broader than "serious health condition." An employee who qualifies for 26 weeks of leave is limited to 26 total weeks of FMLA leave as the initial 12 weeks is included as part of the 26 weeks, rather than in addition to the 26 weeks.

Until comprehensive regulations are published, employers who are obligated to (or choose to) provide leave under these new provisions may request similar documentation of the serviceperson's active duty status or injury or illness. Further, it is noted that revised FMLA regulations have been "expected" for some time and it may be some (additional) time before regulations regarding the expanded statute are issued. Counsel should be consulted to ensure that the employer complies with the spirit of the responded statute as well as the employer's other obligations to its service member employees and their families.

*This article was prepared by Whitney Brown, an attorney with Lehr Middlebrooks & Vreeland, P.C. She can be reached at wbrown@lehrmiddlebrooks.com. 205.323.9274.*

## WORKERS' COMPENSATION FOR ILLEGAL ALIENS?

As immigration issues have become increasingly controversial in recent years, one sub- issue is still developing: if an injured worker turns out to be an illegal alien who submitted fraudulent documentation to get the job, is the worker entitled to workers' compensation benefits? A growing number of states are answering that question in the affirmative.

South Carolina became the most recent state to find illegal aliens entitled to workers' compensation benefits. In December, the South Carolina Supreme Court unanimously found in favor of Mario Curiel, a Mexican national who injured his eye while working on a demolition site for Environmental Management Services, a South Carolina company. The employer argued that Curiel should not be entitled to workers' compensation benefits after learning that Curiel had obtained his job by submitting fraudulent documentation as to his eligibility to work in the United States. The court decided that allowing benefits to injured illegal alien workers would not conflict with the federal Immigration Reform and Control Act's policy against hiring them, and that disallowing benefits would mean that unscrupulous employers could hire undocumented workers without the burden of insuring them -- a consequence that would encourage rather than discourage the hiring of illegal workers.

**Employees' entitlement to workers' compensation benefits vary from state to state, as each state has its own particular workers' compensation scheme. Although some states have expressly provided by statute or through court decisions that illegal aliens are not entitled to workers' compensation benefits, the majority of states that have decided the issue have awarded benefits.**

This issue has not yet been decided in several states but employers may be able to predict the likely results based on decisions in other states. For example, Alabama law defines a "worker" to include "aliens" but does not expressly distinguish between legal and illegal aliens. Most states with statutory language expressly including "aliens" but not distinguishing between legal and illegal aliens have found illegal aliens

to be entitled to benefits. Most significantly, the state of Minnesota has awarded such benefits to illegal aliens, which is important because Alabama's workers' compensation scheme is based on the one in Minnesota. In the past Alabama courts have often been persuaded by decisions of the Minnesota courts as to workers' compensation issues. Thus, if this issue were to arise in Alabama, there is a good chance that Alabama courts would also find illegal aliens to be entitled to workers' compensation benefits.

*This article was prepared by Jennifer Howard, a shareholder with Lehr Middlebrooks & Vreeland, P.C. Jen's practice includes workers' compensation, safety and OSHA compliance issues. She can be reached at jhoward@lehrmiddlebrooks.com or at 205.823.8219.*

## ALCOHOLIC SEEKING TREATMENT NOT COVERED BY FMLA

The case of *Darst v. Interstate Brands Corp.* (7th Cir. January 11, 2008) involved the termination of an individual who was seeking but not yet receiving treatment for alcoholism. He claimed that his termination violated the Family and Medical Leave Act.

The employee worked for the company for 15 years. The company had a no fault attendance policy, whereby an individual would be terminated if he or she exceeded 32 points. The company excluded FMLA absences from the points totaled. The employee failed to work for three consecutive days due to heavy drinking. The employee's wife during that binge called a healthcare provider to see if she could bring her husband in for treatment. Ultimately, he was admitted for treatment one day after his three day drinking binge concluded. Under company policy, the employee, Chalimoniuk, was charged 10 points for that three day absence and, therefore, was terminated.

The court referred to U.S. Department of Labor Regulations Section 825.114(d), which states that **"FMLA leave may only be taken for treatment for substance abuse by a healthcare provider or by a provider of healthcare services on referral by a healthcare provider. On the other hand, absences because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave."**

Chalimoniuk also claimed that his medical privacy rights were violated when the company called the hospital about his treatment without his permission. The court stated that "although other statutes may provide recourse to Chalimoniuk for this unauthorized contact with his healthcare provider, the FLMA provides no remedy unless the action interfered with, restrained or denied Chalimoniuk's exercise of his rights under the FMLA."

## OSHA TIP: RECAP FOR '07 – TARGETS FOR '08

*This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Prior to working with the firm, Mr. Hall was the Area Director, Occupational Safety and Health Administration and worked for 29 years with the Occupational Safety and Health Administration in training and compliance programs, investigations, enforcement actions and setting the agency's priorities. Mr. Hall can be reached at (205) 226-7129.*

The Occupational Safety and Health Administration (OSHA) recently announced the release of its enforcement statistics for 2007. In the press release, the agency asserts that the data confirms that positive results are being produced through its enforcement programs.

In FY 2007, federal OSHA conducted 39,324 inspections, which represents a 4.3 percent increase over the stated goal of 37,700. Total cited violations of OSHA's standards and regulations were 88,846, a 6 percent increase over the previous fiscal year. The agency cited 67,176 **serious** violations, a 9 percent increase from the previous year and more than a 12

percent increase over the past 4 years. The number of cited **repeat** violations also rose from 2,551 in FY 2006 to 2,714 in FY 2007. The number of **willful** violations that were issued dropped from 479 in 2006 to 415 in 2007. There has, however, been an increase in willful violations over the past five years of 2.7 percent.

OSHA identified a record 719 **Enhanced Enforcement Program (EEP)** cases in 2007. The EEP is used by the agency to target employers who are found to repeatedly ignore their responsibilities under the OSH Act and place their employees at risk. It is evoked by extremely serious violations that are related to a fatality or to multiple willful or repeated violations. This program may lead OSHA to conduct further follow-up inspections, inspections of other sites operated by an employer and/or requires more stringent provisions to resolve a citation through settlement.

In 2007 the agency developed over 100 "**significant cases.**" A significant case is defined by OSHA as one with an initial proposed penalty in excess of $100,000. These often, but not always, involve a fatality. The practice is to issue a press release to publicize these types of enforcement actions.

The Assistant Secretary of Labor for OSHA, Edwin G. Foulke, Jr., stated that "the fact that OSHA surpassed its inspection goals for FY 2007 proves our enforcement commitment remains strong." OSHA notes in its press release that fatality and injury and illness rates have continued to record lows. The injury and illness rate of 4.4 per 100 employees for calendar year 2006 was the lowest that the Bureau of Labor Statistics has ever recorded. Workplace fatality rates hit an all-time low in CY 2006 with 3.9 fatalities per 100,000 employees.

Given the numbers, and OSHA's assessment of them, one should expect to see little change in the agency's enforcement program in 2008. As in prior years, OSHA pledges in its 2008 budget request to continue to provide "strong, fair and effective enforcement." This would include making around 37,700 federal enforcement inspections which would be an increase of about 1200 over the number projected for 2007.

Expect OSHA to again direct more than 50 percent of its inspections at the construction industry. **Site Specific Targeting** (SST) will continue to be employed to direct non-construction inspections to those worksites with the worst injury/illness rates. Many other inspections will, as has been the case in recent years, be based upon **Local Emphasis Programs** (LEPs). This allows regional and area offices of OSHA to identify and schedule inspections at worksites with known high risks or histories of injuries and illnesses. Finally, it should be anticipated that the agency will continue under its Enhanced Enforcement Program (EEP) to seek out employers who ignore their safety and health responsibilities. This may be particularly true with the recent revision to this enforcement program. The revision became effective on 1/8/08 and, among other things, modifies the case criteria to place more emphasis on an employer's history of violations with OSHA.

## EEO TIP: WHO WINS THE BATTLE BETWEEN AN EMPLOYER'S DRESS CODES AND AN EMPLOYEE'S RELIGION

*This article was prepared by Jerome C. Rose, EEO Consultant for the Law Firm of LEHR MIDDLEBROOKS & VREELAND, P.C. Prior to his association with the firm, Mr. Rose served for over 22 years as the Regional Attorney for the Birmingham District Office of the U. S. Equal Employment Opportunity Commission (EEOC). As Regional Attorney Mr. Rose was responsible for all litigation by the EEOC in Alabama and Mississippi. Mr. Rose can be reached at (205) 323-9267*

Based on conventional thinking, it would seem beyond question that an employer should have every right to establish dress codes which in the employer's judgment are appropriate or

desirable for the conduct of the employer's business. However, notwithstanding an employer's obvious rights, in drafting Title VII of the Civil Rights Act of 1964, Congress foresaw that an employee's religion may conflict with the basic right of an employer to rigidly enforce all of the employer's employment rules or standards, particularly where the employment standards would in effect force an employee to choose between the observance of his/her religious faith and the job in question.

Title VII imposes a duty on an employer to at least attempt to provide a reasonable accommodation to an employee or applicant with respect to his/her religious needs, but limits this accommodation to only *de minimus* cost, which of course may vary for each employer.

Today, with the definition of religion being "wide open," employers are faced with an endless array of applicants and employees who embrace countless religions. Among these are applicants or employees who wear unconventional hair styles such as long braids; rings in their ears, noses or even on their tongues; tattoos on their arms or other places on the body which may be visible to the general public without being obscene, and hats, caps and other headwear such as scarves or head bands. Additionally the wearing of certain types of uniforms or other prescribed wearing apparel such as pants may present a religious conflict for some.

This begs the question: "can an otherwise qualified applicant or employee be lawfully rejected or terminated because the employer didn't like the way the employee looks or dresses? Perhaps, like everything else in law, that depends on the specific circumstances, and we can only generalize as to a solution for any given employer's particular problem.

Assuming for the moment that religion is not a factor, we can start by stating, yes, the cases show that an employer can reject an otherwise qualified applicant or terminate an employee who doesn't fit the employer's "desired employee profile," including grooming standards, for a given job where that standard is based upon business necessity.

For example in the case of *Jesperson v. Harrah's Operating Company* the Ninth Circuit upheld the employer's right to require a female bartender to wear makeup as a part of its grooming and appearance standards. The court determined that a gender-specific grooming code is not necessarily unlawful discrimination where a different but also gender-specific grooming code was also imposed upon male employees.

(**Caveat**: Of course any decision concerning an applicant's or employee's looks which may also be based on **sex, race, color, national origin, age, or disability** may be expressly unlawful. Even decisions which are not directly based on these factors but have an adverse impact on applicants and/or employees within any of these protected groups may be unlawful.)

On the other hand, in cases where religion was a factor or became a factor it is not clear whether employer's or employees (including applicants) are winning the battle when it comes to dress codes. The main problem is that an employee or applicant can always declare that his or her dress, attire, tattoo or hair arrangement is for religious purposes.

For example the courts have ruled in favor of employees in the following cases:

- **Head Scarves For Women.** In the case of *EEOC vs. Alamo Car Rent A Car* a Federal District Court in Arizona ruled that Alamo Rent a Car violated Title VII when it refused to accommodate the request of a Muslim female employee to wear a head scarf during the holy month of Ramadan. Alamo contended that

given public sentiment following the terrorist acts of 9/11, the scarf would result in a loss of business because customers would most likely resent the wearing of such apparel, thus, in turn creating an undue hardship on the business. The court rejected the employer's arguments as being simply a matter of customer preference not justified by business necessity.

- **Head Caps For Men**. In the case of *EEOC vs. Blockbuster Video*, the court ruled that a Jewish employee may wear a yarmulke even though the company had a policy of against letting workers wear headgear. The company agreed to pay a $50,000 penalty. The EEOC's Regional Attorney in commenting on the case stated that "…a yarmulke is not the same as a baseball cap."

- **Tattoos or body art**. In the case of *EEOC vs. Red Robin Restaurants* the court found a violation of Title VII where the restaurant fired an employee who refused to cover his tattoos. The employee asserted that the tattoos, which were written in Coptic with religious sayings, were necessary to his religion, Kemetecism, an ancient Egyptian religion. According to the employee, the tattoos were necessary to show his service to Ra, an Egyptian Sun God, and that covering them would be a sin. The employer argued that the tattoos interfered with its efforts to create a family oriented and child-friendly dining image. The court held that the employer's assertions of undue hardship were merely hypothetical and that such assumptions were not tantamount to actual undue hardship.

So what is an employer to do given the legal "quick sand" that one can fall into in trying to enforce employment standards and dress codes whether justified by business necessity or not?

**EEO TIP:** If an applicant or employee indicates a need for a religious accommodation with respect to his or her appearance or dress, the employer should take the following steps:

1. Make an assessment as to the extent of the conflict between the employee's religious beliefs and the employer's work standards or requirements. In this connection, consideration should also be given to any safety standards that are obligatory upon the employer.

2. Make a determination as to whether any accommodation can be made. For example consideration should be given as to how to make the accommodation and whether or not it would be feasible to do so.

3. Make an assessment as to what burden, if any, it would be upon the business to make the accommodation. What would it cost in terms of sales, income revenue or business expenses, the work environment? Assess what impact it might have on other employees who had to adhere to the work rule or standard in question in terms of morale.

4. Determine whether any reasonable accommodation can be made without undue hardship on the business, keeping in mind that undue hardship may be anything more than mere administrative or marginal costs.

5. Discuss any reasonable accommodation arrived at with the employee and make the offer even though it may not be the accommodation requested or desired by the employee. Keep good records of your deliberations.

As stated above, the definition of religion under Title VII is very broad. Accordingly, employers must cope with a wide variety of requests for accommodations not only with respect to dress codes but all other aspects of religious observances such as holidays, prayer time, and religious symbols and paraphernalia in the work place. Often the legality of these requests is difficult to determine. Please feel free to contact this firm at (205) 323-9267 if you need legal

assistance in making any decisions concerning religious accommodations.

## WAGE AND HOUR TIP: WAGE AND HOUR ANNUAL REPORT

*This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Mr. Erwin can be reached at (205) 323- 9272. Prior to working with Lehr Middlebrooks & Vreeland, P.C., Mr. Erwin was the Area Director for Alabama and Mississippi for the U. S. Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act.*

At the end of 2007, Wage and Hour issued its annual report covering their activities for the Fiscal Year that ended September 30, 2007. Wage and Hour, while they are a very small agency with less than 1000 investigators nationwide, continues to be very active in its enforcement of these statutes and to have an impact upon employers. **During FY 2007, they received almost 25,000 complaints and collected a record $220 million in back wages for over 340,000 employees. The largest portion (over $163 million) was due under the overtime provisions of the FLSA, with over $17 million being due to minimum wage under-payments. The overtime figures include nearly $16 million due to 12,000 employees who were misclassified as exempt under the revised regulations that became effective in August 2004.**

Following the precedent set in previous years, their efforts were concentrated in certain "low wage" industries (i.e. agriculture, day care, restaurants, healthcare, etc.). More than 11,000 employers in these industries were investigated resulting in back wages of over $52 million to more than 86,000 employees. Their published goals for FY 2008 indicate they will continue their targeting of the "low wage" industries.

They also continued devoting extra resources toward the "long-term reconstruction of the Gulf Coast region" resulting from the devastation cause by hurricane Katrina. They have not only reopened their offices in New Orleans and Gulfport, MS but they have also allocated additional bilingual investigators and managers to assist the staff regularly assigned to the area. For example, the manager in the Montgomery, AL office retired and he was replaced by a new manager in the Mobile, AL office who is also responsible for supervising the investigators located in southern Mississippi. During FY 2007, they conducted over 400 hurricane-related investigations with back wage collections since Katrina in excess of $7 million.

Another high priority area for Wage and Hour is ensuring that minors are employed in compliance with the FLSA. During FY 2007 almost 1300 directed child labor investigations were completed resulting in more than 4600 minors found to have been employed contrary to the child labor regulations. Employers were assessed civil money penalties (maximum penalty of $11,000 per violation can be assessed) of nearly $4.4 million for these violations. The major violations resulted from 14 and 15 year old employees working too late or too many hours, but 1000 minors under the age of 18 were found to be engaged in occupations declared to be hazardous. The two primary hazardous areas were the operation of paper balers and motor vehicles. Their FY 2008 goals indicate they are going to concentrate on the illegal operation of paper balers. Thus, if you have a paper baler in your business you need to make every effort to ensure that employees under 18 do not operate the baler or operate a motor vehicle unless they follow the very strict guidelines set forth in the regulations. In addition to the FLSA, there is a state statute in Alabama that tracks the FLSA very closely and provides for criminal penalties against the employer.

Wage and Hour also expends considerable resources in the enforcement of the Family and

Medical Leave Act. In some good news for employers, the number of FMLA complaints has declined in each of the past five years to a point where they received less than 2000 complaints during FY 2007. In addition, the number of employers found to be in violation of the FMLA also dropped by over one-third with a similar reduction in the amount of back wages that were found. The greatest violations were found in the termination of employees who made use of the Act. While Wage and Hour has requested public comments regarding revisions in the FMLA regulations, whether any changes will happen is uncertain. Thus, employers need to be aware of the current requirements and make an effort to comply with them.

At this time we do not know all of the areas that Wage and Hour may be looking at but you can be sure they will continue to make investigations, assess civil money penalties and request the payment of back wages. **There were over 500 Wage and Hour collective action suits filed in 2007. The ten largest wage hour settlements totaled almost $320 million during 2007.**

With an increase in the minimum wage during 2007 and a scheduled increase in 2008 and 2009, both Fair Labor Standards Act and Family and Medical Leave Act litigation will continue to be very prominent. Therefore, employers should be very aware of their potential liability and make sure they are complying with these statutes to the best of their ability. If I can be of assistance do not hesitate to contact me at lerwin@lehrmiddlebrooks.com or 205.323.9272.

## LMV 2008 UPCOMING EVENTS

**ALABAMA DESK MANUAL CONFERENCE**
Birmingham – May 22-23, 2008
Cahaba Grand Conference Center

**AFFIRMATIVE ACTION UPDATES**
Birmingham – December 9, 2008
Bruno Conference Center
Huntsville – December 11, 2008
Holiday Inn Express

**BANKING/FINANCE/INSURANCE BRIEFING**
Birmingham – September 18, 2008
Bruno Conference Center

**EFFECTIVE SUPERVISOR®**
Huntsville-April 2, 2008
Huntsville Holiday Inn Express
Birmingham-April 8, 2008
Bruno Conference Center
Montgomery-April 10, 2008
Marriott Montgomery-Prattville
Decatur-April 17, 2008
Holiday Inn Decatur
Tuscaloosa-May 15, 2008
Bryant Conference Center
Huntsville-October 2, 2008
Holiday Inn Express
Birmingham-October 8, 2008
Cahaba Grand Conference Center
Muscle Shoals-October 16, 2008
Marriott Shoals
Mobile-October 22, 2008
Ashbury Hotel
Auburn/Opelika-October 30, 2008
Hilton Garden Inn

**HEALTHCARE BRIEFING**
Birmingham – June 19, 2008
Bruno Conference Center

**MANUFACTURER'S BRIEFING**
Birmingham – March 28, 2008
Vulcan Park

**RETAIL/SERVICE/HOSPITALITY BRIEFING**
Birmingham – August 5, 2008
Vulcan Park

**WAGE AND HOUR REVIEW**
Birmingham – December 10, 2008
Vulcan Park

For more information about Lehr Middlebrooks & Vreeland, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Maria Derzis at (205) 323-9263 or mderzis@lehrmiddlebrooks.com.

## DID YOU KNOW…

…that Local 28 of the Sheet Metal Workers Union agreed to settle a discrimination claim for $6.2 million? *EEOC v. Local 638* (S.D. N.Y. January 7, 2008). The case alleged that the union discriminated against black and Hispanic union members by not assigning them to the same number of hours and opportunities as white members. The case began in January 1, 1984. Several hundred members will be covered by the settlement.

…that damages adjusters for an insurance company were properly treated as exempt under the Fair Labor Standards Act? *Roe-Midgett v. CC Serves, Inc.* (7th Cir. January 4, 2008). The adjusters argued that the manual and software they used to evaluate claims made their work "production" in nature, and did not involve discretion and judgment. In rejecting that claim, the court stated that the manual and technology were "tools that channel rather than eliminate…the discretion." The employees inspected claims for vehicle damage. They had authority to settle claims up to $12,000 and decided what they thought was an appropriate value for the claim, which included estimating the labor and parts required to repair a vehicle. They also had the authority to declare whether a vehicle was a total loss.

…that a black employee who was passed over for promotion to a manager's job could proceed with his claim that the company preferred to place him in a black, low income neighborhood? *Simple v. Walgreen Company*, (7th Cir. December 26, 2007). Simple was an assistant store manager who sought but did not receive a promotion to store manager in a predominantly white neighborhood. Instead, a less experienced white employee was promoted. The court stated that "the evidence suggests that the [Company] wanted to steer this highly regarded black assistant manager to a store in a predominantly black, lower income neighborhood." The company commented to Simple that the community where the white employee was placed as manager had racial turmoil, which the court said could be evidence to suggest that race played a factor in not promoting Simple to that location.

…that in a filing with the Securities and Exchange Commission, FedEx disclosed that the IRS will fine it $319 million for misclassifying employees as independent contractors? FedEx also stated in the filing that it has "increased regulatory and legal uncertainty with respect to its independent contractors." The Teamsters, who want to organize FedEx drivers but cannot do so if they are independent contractors, cheered this news, stating that "it is a fundamental fact that FedEx has been skirting the law, and the Teamsters welcome the IRS."


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