SEE 3PL SUMMIT OFFER FOR OUR READERS ON PAGE 6

ACWI ADVANCE

David Sparkman, Editor **Volume 2, Issue 9** **May 15, 2014**

String of Legal Defeats Leaves EEOC Battered

If insanity is doing the same thing over and over again while expecting different results – in Albert Einstein's famous definition – then the Equal Employment Opportunity Commission should be seeking some serious therapeutic help.

In recent memory no other federal agency has suffered a string of such devastating court defeats and push back from state attorneys general as has the Obama Era EEOC, yet the commission continues to pursue the same actions that have already gotten it into so much trouble.

At the dawn of this year a U.S. District Court judge in New York State issued a summary dismissal of the largest lawsuit on the commission's docket. Six years earlier EEOC had sued Sterling Jewelers alleging widespread discrimination against its female employees.

The judge agreed with Sterling that there was no evidence the commission had conducted a nationwide investigation prior to filing the lawsuit.

On April 9 the Sixth Circuit U.S. Court of Appeals unanimously affirmed a lower court judge's award of summary judgment against the EEOC in its suit alleging that the use of credit checks by Kaplan Higher Education Corp. disparately impacted African-American applicants.

Kaplan runs credit checks on applicants for senior executive and financial positions. A third-party vendor flags items such as bankruptcy filings, delinquency on child support, garnishment on earnings, outstanding civil judgments and Social Security numbers that do not match the number the credit bureau has on file.

Although the vendor's report didn't include any information about the applicant's race, EEOC asserted that a disproportionate number of African-Americans were singled out for review of their credit histories.

EEOC relied on evidence provided by a self-proclaimed expert who claimed to have invented a method of identifying a person's race without interviewing them or reviewing any of their personal information.

The method consists of a five-member team who try to guess an individual's race by looking at their driver license photo. However, it turned out that these "race raters" frequently were unable to agree on a person's race, and were just as frequently wrong when they did agree about the person in the photo.

The appeals court judges were not impressed. They noted that EEOC's expert witness, who holds a doctorate in industrial and organizational psychology, has no evident expertise in constructing methodologies to identify race by visual means.

The judges wrote: "The EEOC brought this case on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself."

(Continued on next page)

In their unanimous decision the judges also pointed out that the EEOC was suing Kaplan for using the same background check process that the commission relies upon in its own hiring process.

Closer to home for ACWI members, on April 4 the Fourth Circuit Appeals Court upheld awarding of attorneys' fees to Propack Logistics after it prevailed over EEOC in a class action claim a lower court found by was frivolous and unreasonable.

An employee filed an EEOC charge in 2003 alleging that he was terminated in favor of Hispanic employees. The EEOC investigation went on for five and one-half years, including periods of inactivity lasting years at a time.

The agency eventually found cause to believe the employer had engaged in national origin and race discrimination, and in 2009 filed suit on behalf of an unidentified class of non-Hispanic employees.

A district court eventually dismissed the claim summarily based on unreasonable delay. It also awarded Propack almost $200,000 in attorneys' fees, concluding that the lawsuit brought by the EEOC was unreasonable.

The Fourth Circuit observed that the company had closed its facility under scrutiny before the suit was filed, making any injunctive relief impossible.

The court also concluded that the EEOC had not told the employer it was investigating the matter as a potential class action until the lawsuit was filed. Because of this, the employer had long since disposed on any records that could identify class members, making monetary relief impossible.

The Propack decision follows two embarrassing decisions last year where courts award massive attorneys' fees after finding EEOC actions were frivolous, unreasonable or groundless.

In one case EEOC was ordered to pay CRST Inc. nearly $4.7 million in attorneys' fees, costs and expenses from defending sexual harassment claims.

In another case EEOC was ordered to pay nearly $752,000 in fees and costs to Peoplemark where it claimed the company had denied employment to convicted felons, with a disparate impact on African-Americans. During discovery, the EEOC learned no such company policy existed and yet continued to litigate the case.

FMCSA Mulls Hiking Truck Liability Insurance Limits

The Federal Motor Carrier Safety Administration announced plans to raise the liability insurance minimum for commercial trucks from the current $750,000 per truck, provoking both criticism and support from the trucking industry.

In a recent report to Congress FMCSA said it has formed a rulemaking team to evaluate the appropriate level of financial responsibility for trucking and made it one of the agency's high-priority rulemakings.

FMCSA cited a recent study showing that while catastrophic truck crashes are rare, the costs from resulting severe and critical injuries can exceed $1 million, primarily due to increases in medical expenses and other crash-related costs.

American Trucking Associations disagreed, saying it has seen no evidence that increased insurance minimums will lead to improved highway safety.

The Owner-Operator Independent Drivers Association says the insurance increase "would be a death nail for small businesses" in trucking.

"The agency seems to be bowing to the economic objectives of the personal injury attorneys and mega-trucking companies who have been campaigning for higher insurance requirements," said OOIDA Executive Vice President Todd Spencer.

"Trial lawyers will see windfall payouts in the increases, and big trucking companies -- who already use special exceptions in the law to avoid buying insurance on the open market -- see an opportunity to drive up business costs and do away with their small-business competitors," he added.

A group of seven prominent carriers called The Trucking Alliance supports FMCSA's action, noting its study found that 42% of almost 9,000 accidents resulted in settlements above the $750,000 threshold, creating greater financial exposure for both carriers and the public.

Port Issues to Create Long, Hot Summer for Importers

Port labor and capacity issues threaten to create a miserable summer for importers.

The biggest immediate concern is the June 30 expiration of the ILWU contract covering the West Coast ports from San Diego to Seattle.

“While shippers would obviously prefer an early resolution, knowledgeable insiders say a more likely scenario calls for talks to continue past the deadline, not necessarily triggering an immediate labor situation, but prolonging the uncertainty well into peak season,” said Larry Gross, a consultant with the FTR consulting firm.

Others predict West Coast ports will experience a series of slowdowns as ILWU negotiations continue beyond the June 30 deadline, into the start of the holiday peak shipping season in July.

According to the National Retail Federation, the major West Coast ports handled 11.2 million cargo containers in 2013, representing 69% of the total at U.S. retail container imports.

More than 60 shipper groups urged negotiators to reach agreement quickly. NRF noted that retailers have already begun to develop alternative plans to ensure the proper flow of holiday merchandise.

“NRF’s members, as well as other stakeholders, have already begun contingency planning to ensure their cargo does not get caught in potential disruptions,” NRF President Matthew Shay said.

He said that port disruptions “add costly delays to our members’ supply chains and other industries relying on U.S. West Coast ports, and it likely further threatens the fragile economic recovery.”

Adding to importers’ woes are attempts to disrupt port operations by a Teamsters attempt to have friendly state officials reclassify drayage drivers as employees instead of independent contractors.

Fueling the gate delays and the cartage drivers’ frustrations is worsening chassis unavailability as ocean carriers exit the business. Congestion in LA/Long Beach stemming from shipment growth also is exacerbated by the complexity of the new, evolving chassis supply model, Gross pointed out.

ACC’s Chemical Barometer Shows Economy Improving

The American Chemistry Council’s Chemical Activity Barometer, which is seen as a leading economic indicator, has reached its highest peak since March 2008.

ACC noted that the unusually harsh winter skewed earlier data. It reported that April’s barometer reflects upward revisions for January, February, and March of 0.1, 0.2, and 0.1 points, respectively.

On a three-month moving average basis, the April CAB reading showed a healthy 0.5% gain over March, which registered a 0.3% increase that was blamed on the extreme winter weather experienced throughout most of the country.

Together with the upward revisions, this suggests further growth momentum in the broader economy in the months ahead, ACC said.

“After an economic deep freeze over the past several months, it looks like the U.S. economy is finally starting to bloom,” said Dr. Kevin Swift, chief economist at ACC.

“Economists around the country are coalescing around the idea that the fundamentals of our economy may be healthier than previously believed,” Swift added. “This is something that the CAB has been suggesting for quite some time.”

Recent Federal Reserve Board data showed U.S. manufacturing output rose for the second consecutive month, and that industrial production was up 0.7%, besting many analysts’ expectations.

Tracking closely with the CAB, Federal Reserve data also revealed capacity utilization to be at its highest point since June 2008, ACC pointed out.

The council said that the CAB, which has been shown to lead U.S. business cycles by an average of eight months at cycle peaks, now stands at 95.2, up 3.2% over a year ago, and is showing an increased pace of growth over the fourth quarter of 2013.

Overall results in four primary components of the CAB were mixed-to-positive, with product/selling prices, production, and inventories up, while equity prices were flat, but still outpacing the broader market, the ACC reported.

OSHA ‘Voluntary’ Chem Limits Seen as Boon for Tort Lawyers

Late last year OSHA issued new "voluntary" standards for workplace chemical exposure instead of engaging in the time-consuming and bothersome notice-and-comment rulemaking process that is required when writing a new regulation.

These new voluntary exposure limits can be found on OSHA's website in tabular format, allowing for side-by-side comparisons of OSHA's existing permissible exposure limits (PELs) with these new, voluntary exposure levels.

For many chemicals, the difference between the enforceable PEL and the voluntary limit is substantial. For example, the OSHA PEL for tetrachloroethylene is 100 ppm and the new voluntary standard is 25 ppm.

“Of course, from a regulatory perspective, OSHA can only enforce its existing PELs,” said attorney Steven M. Siros of the law firm of Jenner & Block.

“From a toxic tort exposure perspective, however, plaintiffs' counsel are sure to argue that these ‘voluntary’ standards establish the appropriate exposure threshold and that any exposure above these voluntary standards is harmful (and in turn, compensible),” he added.

OSHA said these new limits were recommended by organizations such as the National Institute for Occupational Safety and Health and the American Conference of Governmental Industrial Hygienists.

"There is no question that many of OSHA's chemical standards are not adequately protective," said Dr. David Michaels, Assistant Secretary of Labor for Occupational Safety and Health.

"I advise employers, who want to ensure that their workplaces are safe, to utilize the occupational exposure limits on these annotated tables, since simply complying with OSHA's antiquated PELs will not guarantee that workers will be safe," he stressed.

A table with a comparison of PELs and the new limits is available at www.osha.gov/dsg/annotated-pels/index.html. An OSHA toolkit identifying safer chemicals used in place of more hazardous ones, is at: www.osha.gov/dsg/safer_chemicals/index.html.

Decision Stands That BOL Must Detail Cargo Liability

The U.S. Supreme Court has upheld a federal appeals court ruling that limitation of cargo liability must be specifically included in the bill of lading governing the shipment, not just in the carrier’s tariff.

“Carriers are well advised to review current business practices to ensure that limitations of liability are being incorporated as specifically as possible into every customer transaction, said Marc S. Blubaugh, an attorney with the law firm of Benesch Friedlander Coplan & Aronoff LLC.

“Shippers and carriers will both benefit from using precision in their contracting practices.” Blubaugh observed.

In the case under review, CSX Transportation had damaged an electrical transformer worth about $1.3 million which the shipper, ABB Inc., said amounted to more than $550,000.

The railroad contended its liability was limited to a maximum of $25,000 under the bill of lading because it had incorporated a reference to a $25,000 liability limitation in a separate price list.

However, the appeals court decided that the bill of lading was silent regarding the extent of CSX’s liability. The space on the BOL labeled “rate authority” – where a notation regarding rate and liability normally was listed – had been left blank. (*ACWI Advance*, 3-31-14, p. 3)

Because other appeals courts have ruled differently, right now this decision applies directly only to movements within the Fourth Circuit’s jurisdcition, including the states of West Virginia, Virginia, Maryland and North and South Carolina.

However, given the Supreme Court refusal to hear this case, other courts that have not yet ruled on the issue may chose to follow the Fourth Circuit’s example in future cases.

DOL Official's Paper Trail Bares Pro-Union Bias

Confirmed by the Senate on April 28, Dr. David Weil became Administrator of the Department of Labor's Wage and Hour Division of the when he squeaked by on a Senate confirmation vote of 51 votes.

The Wage and Hour Administrator is in charge of interpreting and enforcing the federal Fair Labor Standards Act. The law and enabling regulations cover minimum wage and overtime rules, as well as exemptions from wage and hour requirements.

Because he has spent an almost 30-year long academic career toiling as a professor, Weill has left a paper trail of writing that reveals a great deal about the approach he will take to his new job.

Weil also has written reports for DOL, including one in 2012 on how the Wage and Hour Division should be managed that offers significant insight into Weil's priorities and his approach to enforcement of wage and hour laws. That report identifies several "priority industries"–including logistics providers and moving companies.

Terence Smith of the law firm of DLA Piper LLP cites that report to predict how Weill will act. "Weil is more partisan than scholar; he has openly endorsed aggressively coercive union tactics, including advocating the use of regulatory agencies to advance union campaigns" and his "willingness to subordinate fact to partisan results is well established," Smith says.

He notes that the *Wall Street Journal* called Weil "a life-long, left-wing academic with labor-union sympathies, no private-sector experience or legal training, and limited management experience."

"Under Weil, agency success will be defined quantitatively: that is, success = more DOL lawsuits," Smith says, pointing out that President Obama's budget proposal includes an unprecedented jump in funding for the Wage and Hour Division, with funds earmarked for strategic enforcement activities.

Smith says that under Weil DOL will subordinate the merits to serve union agendas. "Weil's Strategic Enforcement study laments the decline of union representation and encourages an active partnership between regulatory agencies and unions. Put bluntly, a union need only ask to trigger an investigation."

Smith predicts "the emphasis will be on accountability for the sins of others." Weil's 2012 report urges that "fissured industries" – his term for business plans that include outsourcing – requires that companies be held responsible for the violations of other employers they do business with, regardless of existing legal rules. He urges regulators to "act on webs or networks of employers, not on single, fixed organizations."

DOL began applying Weil's plan before he was sworn in, Smith observes. In one case, the department did not question a company's compliance but demanded that it identify every entity with which it had done business and every entity with which it *planned* to do business.

DOL also ordered a company to require its suppliers comply with the FLSA, monitor their compliance, and report those audits to DOL.

"In short, Weil appreciates the cost of far-reaching investigations and litigation, and proposes to use that cost to shakedown the convenient rather than prosecute the guilty," Smith says.

Expect Weil to ignore the law to pursue a personal agenda, Smith warns. "While couched in academic jargon, his own words reveal an intention to ignore the laws passed by Congress in making those shakedowns."

Smith cites this quote taken directly from Weil: 'The direct, two-party relationship assumed in federal and state legislation and embodied in traditional approaches to enforcement no longer describes the employment situation on the ground."

Smith says Weil will approach enforcement like trophy hunter, targeting industries and then targeting the biggest and best companies in those industries. "In short, enforcement efforts will have nothing to do with whether a company has violated the FLSA but only with its success."

12th Annual North American

3PL Summit & Chief Supply Chain Officer Forum

June 11-13 2014, Radisson Blu Aqua, Chicago

Dear *ACWI Advance* Reader,

Gaining first-hand knowledge in logistics is key to staying on top of the industry. That's why ACWI has become a Media Partner of the 2014 Eyefortransport 3PL Summit, June 11-13 in Chicago, a conference highly regarded among logistics executives.

It's the only place where you can meet all the top thought leaders in the industry over three days packed with educational sessions and other events offering unparalleled networking and knowledge-sharing opportunities.

The organizers are offering a special discount of $300 for ACWI Advance readers. Just use the code "ACWI30" when you register to obtain the discount.

Several recent key additions to the program, include:

- A full speaker list with dozens of additions including from Con-way, BlueGrace, Helix, Horizon Lines, Exel, Nestle, US Cellular, Infineon, IBM.
- Speaker allocations on the agenda to help you plan for each session.
- More than confirmed attendees, including the CEO of YRCW, CEO of Syncreon USA, CEO of Lineage, and the Vice President of Finance Logistics and Vice President of Inbound Transportation for Walmart.
- Access to the initial agenda timings to help plan your schedule at the event.
- The addition of a third workshop about reinventing the 3PL model.

To learn more, visit: www.3PLSummit.com