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The Biggest Employment Cases Of 2015: Midyear Report

By **Aaron Vehling**

Law360, New York (July 1, 2015, 1:40 PM ET) -- With 2015 halfway done, the employment litigation landscape has already seen several big decisions in the appellate courts, from a Second Circuit ruling on the limits of class certification to the Colorado Supreme Court's decision about firing a worker who used medical marijuana.

The Second Circuit gave plaintiffs attorneys a boost earlier this year, when it ruled that the high court's Comcast class certification standard doesn't preclude class certification when damages claims vary for individuals.

More recently, in Colorado, that state's high court found that Dish Network LLC could fire a disabled employee who used medical marijuana to manage his pain, and that in doing so the company did not violate a Colorado law that protects employees who engage in lawful off-duty activities.

Here is a closer look at these cases and other important decisions from the first half of 2015:

Roach v. T.L. Cannon Corp.

The Second Circuit in February **lowered the blood pressure of plaintiffs attorneys** when it ruled that the U.S. Supreme Court's **Comcast decision** doesn't mean that the need for individualized damage calculations kills class certification.

The panel **vacated** a decision that found that Comcast allowed class certification under Federal Rule of Civil Procedure 23(b)(3) only when damages were measurable on a classwide basis and denied certification on state law claims from Matthew Roach and other ex-workers at upstate New York Applebee's restaurants owned and run by T.L. Cannon Corp.

The appeals court said the lower court's decision was not required under Comcast and contradicted Second Circuit precedent that "individualized damages determinations alone cannot preclude certification."

The appeals court said U.S. District Judge Thomas McAvoy failed to consider whether the question over the Applebee's employees' individualized damages predominated over the common questions of T.L. Cannon's liability that had been identified by a magistrate judge.

That damages issue was the New York district court's sole reason for denying class certification, according to the opinion.

Although the panel declined to rule in a way that could have made class litigation much more difficult, not all is rosy for the Applebee's workers. After all, the panel vacated, and did not reverse, the denial of class certification. Furthermore, it remanded the case for further analysis, in part because of the narrow focus on damages.

But on the whole, Jeremy Heisler of Sanford Heisler said the Roach decision stands out among the decisions handed down so far in 2015.

"It's important because it defeats one of the arguments defendant-employers often use to avoid class certification," Heisler said.

Littler Mendelson PC's Craig Benson, Elena Paraskevas-Thadani and Erin Smith represent T.L. Cannon.

The restaurant workers are represented by J. Nelson Thomas, Michael J. Lingle and Annette Gifford of Thomas & Solomon LLP, by Frank S. Gattuso and Dennis G. O'Hara of O'Hara O'Connell & Ciotoli and by Scott Michelman and Michael T. Kirkpatrick of Public Citizen Litigation Group.

The case is Roach v. T.L. Cannon Corp., case number 13-3070 in the U.S. District Court of Appeals for the Second Circuit.

Brandon Coats v. Dish Network LLC

Earlier this month, the Colorado Supreme Court ruled that Dish Network LLC **could fire** a quadriplegic customer service representative who used medical marijuana off-the-clock, rejecting his argument that the company violated a state law that protects workers who engage in lawful off-duty conduct.

Brandon Coats had claimed that Dish illegally discharged him for state-licensed medical marijuana use when he wasn't working after he failed a drug test in 2012. However, the state's high court held in a unanimous ruling that the state's statute on lawful activities doesn't shield workers who engage in an activity that is prohibited by federal law — even if it is allowed by state law.

Coats had argued that the term "lawful" referred to an activity's lawfulness under Colorado state law, but the high court said that interpretation was too restrictive.

The statute's ambiguity on the term opens the door for proponents to lobby for legislative changes to protect disabled people who use marijuana medicinally, according to Eric Amdursky of O'Melveny & Myers LLP.

The Colorado high court declined to reach a decision on whether the state's statute confers a legal right to smoke marijuana, or just a defense, he said. California, a state with legalized medical marijuana, has previously ruled that the law created only a defense or an immunity, not a lawful right.

Contrast that with a patient's lawful right to take a prescription drug, Amdursky said.

"Typically, you can't be terminated for taking codeine a day or two ago," he said, adding that there's speculation that California might see a bill or constitutional amendment that could confer a similar right for using marijuana.

Of course, hovering over any state action on the issue is a sword of Damocles: federal law. Even if the Department of Justice has largely stayed out of the affairs of those in states with legal recreational or medical marijuana, "it still remains unlawful," Amdursky said.

Coats is represented by Michael D. Evans of The Evans Firm LLC and attorney Thomas K. Carberry.

Dish is represented by Meghan W. Martinez, Ann E. Christoff, Elizabeth Imhoff Mabey and Drew D. Hintze of Martinez Law Group PC.

The case is Brandon Coats v. Dish Network LLC, case number 13SC394, in the Colorado Supreme Court.

Equal Employment Opportunity Commission v. Ford Motor Co.

The Sixth Circuit in April issued a **divided en banc ruling** that said companies can decline to offer telecommuting arrangements to workers to accommodate a disability without violating the law. However, the court **wasn't endorsing** a wholesale bar on telecommuting as an accommodation. Rather, it was said to be bringing the Sixth Circuit back in line with its sister courts.

The ruling came in a case brought against Ford Motor Co. by the EEOC on behalf of former resale buyer Jane Harris, who has irritable bowel syndrome and had requested to work from home up to four days a week. Ford had said the position requires face-to-face interaction and other responsibilities that couldn't be done from home.

The appeals court granted Ford's request for an en banc hearing in late August, about four months after a 2-1 majority panel had **revived** the EEOC's claims. The en banc panel ultimately shot down the EEOC's allegations that Ford violated the Americans with Disabilities Act by failing to reasonably accommodate Harris.

Ford had argued that working regularly on-site was part of the job, which the panel said was consistent with the ADA.

The original 2-1 panel decision that revived the EEOC's suit was a "scary decision for employers," Amdursky said. Even though the en banc decision went down a different road, employers still need to be mindful when approaching the question of telecommuting, he said.

In jobs where attendance is essential, employers should make sure to enforce attendance policies consistently, Amdursky said. And in jobs where it isn't, employers may want to think about allowing telecommuting. Either way, this should be addressed when writing a job description, he said.

Changing technology could have its effects, which the court acknowledged in its opinion. The panel majority acknowledged that jobs that once required on-site attendance, such as Harris', may become appropriate for working from home, Heisler said. Ultimately, though, there's no blanket determination of something like this, he said.

"Despite some broad language, the opinion affirms that ADA accommodation cases will remain fact-intensive inquiries," he said.

The EEOC is represented by Gail S. Coleman and Lorraine C. Davis.

Ford is represented by Helgi C. Walker and Jonathan C. Bond of Gibson Dunn and Elizabeth P. Hardy of Kienbaum Opperwall Hardy & Pelton PLC.

The case is Equal Employment Opportunity Commission v. Ford Motor Co., case number 12-2484, in the U.S. Court of Appeals for the Sixth Circuit.

Boyer-Liberto v. Fontainebleau Corp.

In May, a majority of the full Fourth Circuit **scuttled** a summary judgment win for Fontainebleau Corp. in a suit brought by former waitress Reya C. Boyer-Liberto, ruling that her hostile work environment and retaliation claims should go to a jury. The decision was said to have lowered the bar for retaliation claims under Title VII.

In her suit, Boyer-Liberto alleged that within a 24-hour window in 2010 she was twice called a "porch monkey" and threatened with the loss of her job by a white restaurant manager.

The en banc majority said that an isolated incident of harassment can create a hostile work environment. When it comes to retaliation, the opinion said that an employee who reports an isolated incident of harassment that is physically threatening or humiliating will be shielded even if that incident isn't bad enough to create a hostile work environment.

At the time, some thought that even if it wouldn't lead to an increase in Title VII lawsuits, the Fourth Circuit's ruling would **make it harder** for employers to win summary judgment on retaliation claims.

The full-panel ruling on the retaliation claim is significant in that it reflects the realities of the workplace and the broad protection afforded by Title VII's anti-retaliation provision, according to Andrew Melzer of Sanford Heisler & Kimpel LLP.

The opinion says specifically that a fear of retaliation is the "leading reason" employees remain silent instead of reporting or opposing discrimination in the workplace, so the provision must be read to provide broad protection against retaliation.

"The decision marks a significant step towards providing employees in the Fourth Circuit the full protection of Title VII's anti-retaliation provision," Melzer said.

Reya C. Boyer-Liberto is represented by Robin R. Cockey of Cockey Brennan & Maloney PC.

Fontainebleau Corp. is represented by Harriet E. Cooperman and Brett S. Covington of Saul Ewing LLP.

The case is Boyer-Liberto v. Fontainebleau Corp., case number 13-1473, in the U.S. Court of Appeals for the Fourth Circuit.

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