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Judge Rebukes Labor Department Over Shoddy Case

By Walter Olson

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It seems every week or two another federal agency gets smacked down in court for trampling the rights of regulated parties in enforcement litigation. This week it's the Labor Department's turn:

The U.S. Department of Labor must pay more than $565,000 in attorney fees to an oilfield services company it accused of wage-and-hour violations totaling more than $6 million, a federal judge has ruled….

Officials, who opened their investigation in 2010, alleged the business [Texas-based Gate Guard Services, LLC] improperly classified 400 gate attendants as independent contractors.

The agency would have learned that the guards weren't employees had it talked to more than just a few of them, [federal judge John] Rainey wrote in a 24-page order. Because the probe was not "substantially justified," Gate Guard was entitled to recover its attorney fees, he said.

"The DOL failed to act in a reasonable manner both before and during the course of this litigation," Rainey wrote.

Goaded by labor unions and other interested parties, the Obama Labor Department has made wage-and-hour law a big priority, with the President himself pushing the law into new ways of overriding private contractual choice. As for the overzealous enforcement, it's coming to look less like inadvertence and more like systematic Administration policy. Last year we noted an Eleventh Circuit decision rebuffing as "absurd" a Labor Department claim of authority regarding the H-2B guest worker program. The pattern extends to agency after agency, from the EPA (ordered to pay a Louisiana plant manager $1.7 million on a claim that hardly ever succeeds for defendants, malicious prosecution), to white-collar enforcement, to a series of Justice Department prosecutions under the Foreign Corrupt Practices Act.

Probably the agency to suffer the most humiliating reversals is the Equal Employment Opportunity Commission, nominally independent but in fact reshaped in recent years into a hyperactive version of its already problematic self. You can read here about some of the beatings the EEOC has taken in court in recent years, including a case last summer where the federal judge dismissed the commission's lawsuit over a Maryland company's use of criminal and credit background checks using words like "laughable," "unreliable," and "mind-boggling." And just last week, as reported in this space, the Sixth Circuit memorably slapped around the commission's amateurish use of expert testimony in another credit-check case, this time against the Kaplan education firm. As I noted at Overlawyered:

The Sixth Circuit has actually been one of the EEOC's better circuits in recent years. For example, it reversed a Michigan federal judge who in 2011 had awarded $2.6 million in attorneys' fees to Cintas, the employee-uniform company, and reinstated the lawsuit. In doing so, the appellate panel nullified what had been the lower court's findings of "egregious and unreasonable conduct" by the agency, including a "reckless sue first, ask questions later strategy." The commission hailed the reversal as one of its big legal wins — although when one of your big boasts is getting $2.6 million in sanctions against you thrown out, it might be that you don't have much to brag about….

If you wonder why the commission persists in its extreme aggressiveness anyway, one answer may be that the strategy works: most defendants settle, and the commission hauled in a record $372 million in settlements last year.

Perhaps it is time for defendants to start settling less often.

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