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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Merrill Brokers Urge 7th Circ. To Revive Bonus Bias Action

By **Megan Stride**

Law360, Chicago (October 24, 2011, 3:40 PM ET) -- A lawyer for a putative class of black Merrill Lynch & Co. Inc. financial advisers alleging Bank of America Corp.'s bonus system is racially discriminatory told the Seventh Circuit on Monday that the compensation program is not legally protected.

At oral arguments, Linda D. Friedman of Stowell & Friedman Ltd., attorney for the plaintiffs, said the retention bonus program Bank of America enacted for brokers immediately after it acquired Merrill Lynch did not qualify as a bona fide, legally protected production-based compensation system.

Bank of America's system "doesn't measure what it purports to measure," Friedman told the panel.

The black financial advisers are appealing the March dismissal of their putative class action alleging that Bank of America Corp. paid them smaller retention bonuses than their white counterparts after it purchased Merrill Lynch in 2009.

The same plaintiffs previously accused Merrill Lynch of racial discrimination in a separate lawsuit filed in 2005, alleging that the company engaged in "systemic discrimination" against black applicants and brokers in hiring, promotions and compensation and steered business opportunities away from black advisers.

That earlier suit is still pending, but a district court judge denied the brokers class certification, and the U.S. Supreme Court refused earlier this month to take up that issue on appeal.

In the immediate suit, the plaintiffs allege that the bonuses, which were calculated based on the financial advisers' "annualized production" through September 2008, disproportionately excluded black brokers and that awards given to black financial advisers were lower than they would have been without unlawful racial discrimination by Merrill Lynch.

In his March dismissal order, U.S. District Judge Robert W. Gettleman found that the plaintiffs had failed to prove the bonus system was established with discriminatory intent.

The brokers had merely alleged discriminatory conduct without showing they were entitled to relief, the district court judge ruled, noting that the law protects an employer's bona fide merit, seniority or production-based compensation system even when that system has a discriminatory impact.

But on Monday, Friedman told the Seventh Circuit that the lower court's decision "flies in the face" of the legislative history of Title VII of the Civil Rights Act of 1964 and of subsequent employment law.

Friedman argued that Bank of America should not be able to "take cover" under Title VII's provision protecting bonus systems that measure earnings by quantity or quality or production because the plaintiffs have alleged that the program does not measure their actual productivity.

The plaintiffs said in their appeals brief that they have also alleged that the compensation differences in the bonus program stem from intentional discrimination.

Circuit Judge Diane S. Sykes said, however, that to the extent the bonus is a continuation of Merrill

Lynch's alleged discrimination, there is remedy available to the plaintiffs in the still-pending suit they filed in 2005.

Representing Bank of America, Allan Dinkoff of Weil Gotshal & Manges LLP told the Seventh Circuit that Bank of America's transitional retention program was the "only possible solution" a reasonable employer could make.

The program awarded greater bonuses to more productive brokers, smaller bonuses to less productive brokers and no bonuses to the least productive brokers, Dinkoff said, adding that the compensation system was based on "rational business judgments."

Dinkoff also said the plaintiffs were arguing that the inputs for the bonus system were discriminatory and that the defendants knew about those flawed inputs. However, to meet the applicable pleading standards, they needed to instead allege that the bonus system itself was "specifically manipulated" to discriminate against black workers, he said.

Circuit Judges Diane S. Sykes and John Daniel Tinder and U.S. District Judge Jon DeGuilio, sitting by designation, sat on the panel for the Seventh Circuit.

The plaintiffs were represented by Linda D. Friedman of Stowell & Friedman Ltd.

The defendants were represented by Allan Dinkoff of Weil Gotshal & Manges LLP.

The case is George McReynolds et al. v. Merrill Lynch & Co. Inc. et al., case number 11-1957, in the U.S. Court of Appeals for the Seventh Circuit.

--Additional reporting by Abigail Rubenstein. Editing by Kat Laskowski.

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