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Third Circuit: Court Determines Whether Plaintiff Entitled to Back Pay

In a decision that will significantly impact the conduct of trials in many employment cases, the Court of Appeals for the Third Circuit recently concluded in a case arising under the Americans with Disabilities Act that because back pay is an equitable remedy, the determination of whether back pay should be awarded and, if so, in what amount, is appropriately decided by the trial court in its discretion. *Spencer v. Wal-Mart Stores, Inc.*, Nos. 05-2143, 05-3435, 05-3471 (Nov. 22, 2006).

The ruling is an important one because it provides clear guidance to courts, many of which had previously allowed juries to determine plaintiffs' entitlements to back pay, in discrimination and retaliation cases under Title VII and the ADA. Additionally, the Court of Appeals in *Spencer* stated that it would align itself with the decisions of a number of other circuit courts and hold that an award of back pay is inappropriate as a matter of law in a case of alleged hostile work environment harassment, absent proof by the plaintiff of a constructive discharge.■

Federal Court: Factual Dispute for Termination of Employment Warrants Jury Trial for Age Discrimination Claims

Where there are evidentiary disputes regarding the reasons for the termination of a plaintiff employment (i.e., whether he was laid off or terminated for cause), and whether the plaintiff was provided the necessary information along with a proposed release, the employee is entitle to a jury determination regarding the effect of that release.

In 1990, Congress strengthened the provisions of the Age Discrimination in Employment Act (ADEA) by passing the Older Workers Benefit Protection Act (OWBPA). The OWBPA, in part, regulates releases of ADEA claims; to be legally valid, releases of claims of age discrimination must meet OWBPA's often stringent requirements. One recent case, *Wells v. XPEDX*, No. 05-2193, 2006 WL 3133984 (M.D. Fla. Oct. 31, 2006), addressed OWBPA and offered some insights into what it actually requires. The plaintiff in the case, Joseph Wells, had brought an ADEA claim against his former employer Xpedx. Roughly a month after his employment was terminated, Wells signed a release purporting to waive his rights to bring any lawsuit against Xpedx, including one arising under the ADEA. In return for executing that release, Wells received a severance package.

The key question in the case was whether the release that Wells signed was valid. Among its other requirements, the OWBPA mandates that "if the release is offered in connection with an exit incentive or group termination program, the employer must provide information relating to the job titles and ages" for both the parties offered the incentive (or, as the case may be, the ones selected for termination) and for the parties not offered the incentive (or selected for termination).

The question the court in *Wells* had to address was twofold. First, was this release "offered in connection with an exit incentive or group termination program"? Second, if so, were the OWBPA's requirements satisfied?

Ultimately, the court concluded that the defendant had not conclusively established either of these two prongs, and denied summary judgment. On the first point, while Xpedx argued that Wells was simply an individual that had been fired for

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cause, the court found that there was some evidence that Wells had actually lost his job in a reduction-in-force, a circumstance that, if proven, would be a "group termination program" that would bring the OWBPA's requirement into play.

Wells, for example, pointed to a letter from Xpedx suggesting that he was laid off in a reduction-in-force, and also introduced evidence that Xpedx was making efforts to comply with certain other requirements of OWBPA which would only apply in RIF cases.

On the second point, the court—assuming for the moment that the OWBPA requirement in question did apply—concluded that it was unclear whether Xpedx had complied with it. Xpedx claimed that it provided the job titles and ages of all of the people in Wells' 'decisional unit'—the legal term for the population of people within which the employer is making layoff decisions. But Wells argued that his decisional unit was broader in scope that Xpedx was admitting—and that he should have been given the job titles and ages for numerous additional employees. Having already decided that it was unclear whether there was in fact a reduction in force, the court quickly concluded that it lacked sufficient information on how large Wells' decisional unit actually was. Having determined that genuine issues of material fact remained, the court denied Xpedx's motion for summary judgment.

This case is a reminder to employers about how difficult it can be to design releases of employment claims that can withstand judicial scrutiny. The requirements of a release can change depending on a number of circumstances and satisfying those requirements can obligate an employer to articulate the reasons for an employee's termination at a very early point. Accordingly, employers and their counsel must be diligent about noticing subtle changes in context, as they can, down the line, have radical implications for the enforceability of releases.■

Eighth Circuit: Employer's Pre-employment Strength Test Violates Title VII by Disparately Impacting Female Applicants

The United States Court of Appeals for the Eighth Circuit recently held that a pre-employment strength test used by an employer to evaluate potential employees violated Title VII of the Civil Rights Act of 1964 because the test had an unlawful disparate impact on the hiring of female applicants. *EEOC v. Dial Corp., Nos. 05-4183, 05-4311, 2006 WL 3332815 (8th Cir. Nov. 17, 2006).* The court also concluded that significant statistical disparities in the rates of hiring men and women justified a jury's finding that Dial engaged in a pattern and practice of intentional discrimination against female applicants.

Starting in 1996, The Dial Corporation implemented several new safety measures at the company's meat canning plant in Fort Madison, Iowa, to help reduce the rising number of employees injured while working in the "sausage production area" of the plant. These measures included the addition of a strength test, known as the Work Tolerance Screen (WTS), to the application process for entry-level positions in the sausage production area. The WTS required applicants to repeatedly lift and load a 35 pound bar on frames up to 60 inches high.

Throughout the test, applicants were monitored by company personnel who documented each candidate's performance and wrote an evaluation. Although women had successfully worked alongside men in the sausage production area for many years before Dial introduced the WTS, only 38% of women managed to pass the test while men had a 97% passage rate. Consequently, the number of women hired for the sausage production area dropped from 46% before the test to 15% after the test.

In 2002, the Equal Employment Opportunity Commission (EEOC) sued Dial on behalf of over 50 female applicants who were denied employment after failing the company's strength test. The EEOC argued that Dial's use of the strength test revealed an intentional pattern and practice of discrimination against female applicants in violation of Title VII. In its defense, Dial argued that use of the strength test was necessary to establish a safe working environment in the company's plant. In support of its argument, Dial presented evidence showing that the number of injuries in the sausage production area had drastically decreased since the strength test was introduced. The trial court rejected Dial's argument, and awarded back pay and benefits to the applicants. Dial appealed the trial court's decision, but the Eighth Circuit affirmed.

The Eighth Circuit's opinion disagreed with Dial's challenges to the lower court's finding of both intentional discrimination and an unlawful disparate impact. With regard to the former, the court found that a verdict based on intentional discrimination could reasonably be based upon evidence that the rates of hiring of men and women were more than 10 standard deviations apart. Regarding disparate impact, the court rejected Dial's contention that there was a business necessity for its strength test.

First, the court found that Dial failed to prove that passing the test was necessary for safely performing entry level jobs in the sausage production area. The court

noted that women had safely worked in the sausage area for several years before the strength test was implemented. In fact, the evidence revealed that women had a lower injury rate than men in some of those years preceding the test. The court was also persuaded by expert testimony that the strength test was more difficult than the actual entry level sausage production jobs. Finally, the court found that the overall reduction of injuries cited by Dial was linked to other safety measures that the company implemented at the plant, and not the strength test. Importantly, those other safety measures were gender-neutral, and afforded Dial the level of safety the company desired.

The Eighth Circuit's opinion does not suggest that strength tests and/or any other pre-employment screening tests are per se invalid if they produce a disparity in the hiring of men and women. However, employers who use such measures should ensure that the test is neutral and that it does not unjustifiably screen out large numbers of women or members of any other protected group. Employers should also ensure that the test replicates actual working conditions by only testing skill-sets that are relevant to the position the applicant is applying for. Finally, before implementing a pre-employment test, employers should explore whether there are less restrictive alternatives the company can implement to achieve the results desired by the company.■

IT Support Specialists *Not* Exempt from Minimum Wage and Overtime Requirements

In opinion letter FLSA2006-42, dated October 26, 2006, the Department of Labor (DOL) concluded that Information Technology (IT) Support Specialists do not qualify for minimum wage and overtime pay exemptions under the FLSA. This conclusion, which aligns generally with case law decided under earlier Regulations, may be a significant one for employers looking to maintain large staffs of technical systems maintenance and "troubleshooting" personnel.

The FLSA, which affects most private and public employers, establishes minimum wage, overtime, recordkeeping, and youth employment standards for workers. The Act is implemented through Department of Labor Regulations (29 C.F.R. Part 541 Regulations).

Certain classes of employees are exempt from either the overtime or both the overtime and minimum wage provisions of the Act. Section 13(a)(1) of the FLSA exempts from both minimum wage and overtime pay "any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman." 29 C.F.R. § 541.99. Sections 13(a)(1) and 13(a)(17) also exempt certain skilled computer employees, but this exemption generally applies only to highly skilled employees who are genuine programming, design, or systems analysis experts.

In contrast, the opinion letter defined the duties of an IT Support Specialist as follows:

- 55% – Analyzes, troubleshoots, and resolves complex problems with business applications, networking, and hardware
- 20% – Installs, configures, and tests upgraded applications
- 10% – Participates in the design, testing, and deployment of client configurations
- 5% – Participates in the analysis and selection of new technology required for expanding computer needs
- 5% – Documents technical processes and troubleshooting guidelines
- 5% – Monitors automated alerts and makes decisions on the most effective resolution

The DOL determined that employees performing these tasks do not qualify for either exemption because their primary responsibilities cannot be characterized as administrative. Moreover, they do not satisfy the requirements of the FLSA's computer employee exemption.

According to the DOL's FLSA Regulations, administrative employees are those whose primary responsibilities include the exercise of discretion and independent judgment and whose work directly relates to management or general business operations. 29 C.F.R. § 541.201(c); 29 C.F.R. § 541.200(a). The DOL concluded that IT Support Specialists' duties, although they are essential to an employer's business operations, do not directly relate to management or general business operations. Moreover, the primary work of IT Supports Specialists does not necessitate the exercise of discretion or independent judgment. The DOL drew a sharp distinction between exercising discretion and performing skills that are highly technical yet fundamentally systematic and routine—IT Support Specialists perform duties characterized as the latter.

The DOL also concluded that IT Support Specialists do not satisfy the professional computer employee exemption. The identified responsibilities of IT Support Specialists simply did not involve the theoretical or practical

application of specialized knowledge illustrated in the duties discussed in 29 C.F.R. § 541.400(b).

The DOL's decision clarifies the boundaries of exemptions under the FLSA. Companies should take care to ensure that their Information Technology workforce is properly classified, making sure to keep in mind that it is not the title given to employees that matters under the FLSA guidelines, but the actual duties performed.■

First Circuit's Standard for Retaliatory Failure to Hire Cases Aimed at Protecting Employers

In *Velez v. Janssen Ortho, LLC*, No. 05-2721, 2006 WL 3114299 (1st Cir. Nov. 3, 2006), the Court of Appeals for the First Circuit held that in order to establish the adverse employment action necessary for retaliatory failure to hire, a plaintiff must show that he or she was applied for a specific vacant position with the employer for which he or she was qualified.

The case involved Gladen Velez, who was employed by Janssen Ortho, LLC for approximately nine years before being terminated when Janssen closed the plant where she was employed. During her employment with Janssen, Velez had sued Janssen for alleged sexual harassment by a supervisor and retaliation. Nearly three years after her termination, Velez sent Janssen a general cover letter and resume, requesting employment in "any position available" for which the human resources department considered her qualified. She suggested several general job categories for potential employment. When Janssen rejected her inquiry but posted an advertisement for two available positions three days later, Velez sued Janssen for retaliation under Title VII because of her previous lawsuit, as well as asserting claims under a variety of other laws.

To establish retaliation in the employment context, a plaintiff must establish that:

- He or she engaged in protected activity
- He or she suffered an adverse action
- There was a causal connection between the protected conduct and the adverse action

Unlike the majority of failure to hire cases, in which the predominant inquiry is the causal connection between the protected conduct and subsequent adverse action, the First Circuit never reached the causal connection inquiry, deciding that there was no adverse employment action. Noting that there cannot be a failure to hire in the absence of a job application, the court ruled that Velez's letters expressing a general interest in employment were not sufficiently specific to be the equivalent of an application for a discrete, identifiable position. Consequently, the court announced that an adverse employment action in a failure to hire case requires that the plaintiff establish that he or she applied for a particular position that was vacant and for which he or she was qualified but not hired.

The First Circuit's decision was predicated on a desire to avoid unfairly requiring employers to "review an applicant's generally stated credentials any time a position becomes available." However, the court expressly indicated that there could be potential exceptions to its announced general standard in unusual cases. This case provides an important protection against a retaliation claim that employers should be able to invoke at an early stage in litigation. But employers must nevertheless recognize that there remains a significant risk that courts will side with employees in cases in which it appears that applicants have been rejected for alleged noncompliance with overly technical policies.■

NLRB: Private Equity Firm's Union Neutrality Agreement is Lawful

In a potentially significant decision for businesses investing in companies whose employees may be targets for unionization, the National Labor Relations Board (NLRB) recently held that a private equity firm's agreement with the United Steelworkers of America that it would require its newly acquired entities to, among other things, maintain neutrality during union organizing campaigns and recognize the Steelworkers based upon a card check, did not violate § 8(e) of the National Labor Relations Act.

In the case, *Heartland Industrial Partners LLC*, Case No. 34-CE-9, the Board considered the permissibility of an agreement between Heartland, a firm focused on making investments in manufacturing companies in the Midwest, and the Steelworkers that obligated Heartland to, upon notification from the Steelworkers, require a "covered business entity (CBE)" (defined generally as a company in which Heartland holds a controlling interest) to agree to adopt a position of neutrality during a union organization campaign, notify employees of the entity's neutrality position, grant the Steelworkers access to the entity's premises to distribute information and meet with employees, provide a list of employee names and addresses and recognize the Steelworkers based upon a majority showing after a card check.

According to the General Counsel, the agreement violated § 8(e), which prohibits any contract or agreement to "cease doing business with any other person," because it restricts Heartland from investing in entities that refuse to abide by the terms of the agreement.

The majority of a divided panel disagreed, with Members Schaumber and Walsh holding that Heartland's agreement neither did not on its face preclude Heartland from doing business with any company, nor did the General Counsel offer sufficient evidence to show that it effectively "caus[ed] Heartland to refrain from investing in any company." Distinguishing the agreement from an unlawful one that "prohibit[s] the signatory employer from establishing or continuing an affiliation with a nonunion firm," the majority noted that "[o]n their face, [the challenged terms of the agreement] do not require Heartland to choose between inducing a CBE to become unionized or severing its relationship with the CBE [and] do not—on their face—require Heartland to sever its relationship with a CBE that does not become bound by [the agreement]." Significantly, however, the majority suggested that an agreement such as Heartland's might violate § 8(e) if there was evidence that it effectively required the employer either to refrain from investing in an entity that refused to abide by the agreement, or to divest its interest in the entity as a remedy for failure to secure the entity's assent to the terms of the agreement.

While the Board's decision does appear likely to permit private equity firms to prospectively and proactively manage some of the labor relations issues that are likely to arise in connection with their future investments, those firms should remain keenly aware of the Board's suggestion that it may look beyond the face of an agreement to determine whether a firm's arrangement with the union in practice restricts the firm's discretion in making investments.■

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