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U. S. Supreme Court Holds Employers Bear the Burden of Production and Proof on ADEA RFOA Defense

The disparate impact theory of discrimination, first developed under Title VII, is the theory that a facially neutral employment policy, which has a substantially disproportionate adverse impact on a protected group, is unlawful (even absent any discriminatory intent) unless the policy is justified by "business necessity." In 2005, the U.S. Supreme Court held in *Smith v. City of Jackson* that the disparate impact theory not only applied under Title VII, but also under the Age Discrimination in Employment Act ("ADEA"), which exempts an employer from liability if the employer's action is based on a "reasonable factor other than age" ("RFOA"). Using the ADEA's language, the Court held that the employment practice challenged in *Smith*—the City's decision to give larger pay increases to police officers with less seniority than to those with greater seniority—was justified by an RFOA, *i.e.*, the larger pay increases for junior officers would make the City's pay scale competitive with other police departments and would improve retention of junior officers. However, left unresolved by *Smith* was the question of whether the employee/plaintiff or the employer/defendant bears the burden of proof regarding the RFOA exemption. On June 19, 2008, the Court resolved this issue in *Meacham v. Knolls Atomic Power Laboratory*.

In *Meacham*, significant budget cuts forced the employer to reduce its workforce. The employer initiated a procedure to determine who would be laid off based on managers' assessments of employees' performance, flexibility, and critical skills, in addition to consideration of the employees' years of service. As a result, the employer laid off 31 employees, 30 of whom were over 40 years old. Some of the employees who were laid off sued the employer for age discrimination under a disparate impact theory.

At the trial court level, the jury found in favor of the *Meacham* plaintiffs. The Second Circuit vacated the judgment of the trial court and remanded the case with instructions to enter judgment for the employer, holding it is the plaintiffs' burden to prove that the employer's justification is unreasonable. The Supreme Court granted certiorari on the issue of whether the employee or the employer bears the burden of proof under the RFOA provision of the ADEA.

The Court concluded the employer bears both the burden of production of evidence and the burden of persuasion, holding Congress designed the RFOA exception to operate as an affirmative defense, not an additional element necessary for plaintiffs to establish a case of age discrimination.

The *Meacham* decision eases the burden on plaintiffs who bring disparate impact claims under the ADEA by forcing employers to prove their employment decisions were ultimately motivated by reasonable factors other than age. The Court acknowledges its decision will make it more difficult and costly for employers to defend themselves against disparate impact suits. However, the Court held such concerns need to be directed at Congress, because the Court's duty is to read the RFOA provision the way Congress wrote it.

Rachael Chong Walters

U.S. Congress and President Bush Pass Genetic Information Nondiscrimination Act of 2008

On May 21, 2008, President George W. Bush signed into law the Genetic Information Nondiscrimination Act of 2008 ("GINA" or "the Act"), which becomes effective on November 21, 2009. In addition to prohibiting the use of genetic information by health insurers offering group coverage in setting their premiums and underwriting policies, GINA expands Title VII of the Civil Rights Act of 1964 ("Title VII") to prohibit discrimination by employers and other organizations on the basis of genetic information.

Title II of GINA, the portion of the Act addressing employment discrimination, applies to traditional Title VII employers with fifteen or more employees, employment agencies, certain labor organizations, employers of state and federal government employees, and joint labor-management committees controlling apprenticeship and other training and retraining programs. GINA Title II makes it unlawful for employers, employment agencies, and labor organizations to refuse to hire, discharge, or otherwise discriminate against any individual because of "genetic information" relating to that person, which is defined as information about (i) the individual's genetic tests, (ii) the individual's family members' genetic tests, and (iii) the manifestation of a disease or disorder in the individual's family members. "Family members" include an individual's first- through fourth-degree family members, and genetic information regarding fetuses and embryos is protected. GINA Title II also makes it unlawful for employers, employment agencies, and labor organizations to limit, segregate, or classify individuals in a way that would deprive or tend to deprive them of employment opportunities due to their genetic information.

In addition, under Title II of GINA, employers are prohibited from requesting, requiring, or purchasing genetic information about their employees, although there are several exceptions to this rule. Employment agencies and labor organizations are prohibited from encouraging or attempting to cause an employer to discriminate on the basis of genetic information, and GINA makes it unlawful for employers, labor organizations, and joint labor-management committees to discriminate against an individual because of genetic information with respect to training or apprenticeship programs. GINA does not, as presently enacted, create a cause of action for disparate impact discrimination on the basis of genetic information as Title VII does with other forms of discrimination. However, employers and other organizations are prohibited from retaliating against employees and members who oppose discriminatory practices made illegal by GINA.

Under the Act, to the extent employers, employment agencies, labor organizations, or joint labor-management committees legally possess or acquire genetic information about an employee or member, the information must be maintained on separate forms and in separate medical files; and it must be treated as a confidential medical record. Employers who treat the information as they would confidential medical records maintained pursuant to the Americans With Disabilities Act will be considered to be in compliance with GINA. GINA limits the disclosure of genetic information except under certain circumstances as well, so employers should be cognizant of these restrictions.

Employees who believe they are discriminated against in violation of GINA must file a charge of discrimination with the Equal Employment Opportunity Commission, as they would with other alleged Title VII violations. The same damages that are available under Title VII, including back and front pay, compensatory damages, and equitable relief, are available under GINA.

Finally, in Title III of GINA, lawmakers included miscellaneous provisions that increase the severity of penalties for violations of child labor laws under the Fair Labor Standards Act of 1938 ("FLSA"). Persons who violate the FLSA's child labor laws or the accompanying regulations may be fined $11,000 per employee subject to the violation, or $50,000 for any violation that causes the death or serious injury of an employee under 18 years old. For repeated or willful violations, this $50,000 penalty may be doubled. Persons who violate the FLSA's provisions relating to wages will be subject to a $1,100 penalty per violation.

Regulations relating to GINA are expected to be issued within the next year.

Stephanie S. Rojo

A New Wave of FLSA Claims: Employees Using BlackBerrys from Home for Work-Related Purposes

What do you do with employees who use electronic devices after hours – for work-related purposes – and claim they are entitled to compensation under the Fair Labor Standards Act? This question is playing out far too frequently in the new digital age. Consider the following scenario, which is coming to a company near you.

The Acme company issues BlackBerrys to employees who want one. The company strongly encourages employees to use this device so they will be more accessible on work-related projects and even pays part of the BlackBerry usage fees each month. The company does not prohibit employees from using this device for their own personal use.

Bob Smith (a random, typical name, of course), an employee at Acme, works on average 40 hours per week while at work. He has been paid for that time. However, he constantly uses his BlackBerry from home in the evenings and on weekends for work-related purposes such as checking e-mails. Acme never paid for any time he spent performing work on the BlackBerry from home. He has never complained to anyone about not being paid for the work time he spent on his BlackBerry.

Unfortunately, Mr. Smith loses his job for poor work performance about a year or two after being provided with this device. Upset with that decision, he files a lawsuit against the company under the Fair Labor Standards Act ("FLSA"). He claims he should have been paid overtime for all the text messages and other work he did at home on his company BlackBerry. Naturally, the company is shocked to hear this for the first time. Does the company win? Or is Mr. Smith right and owed overtime? These questions, and more, will need to be addressed over the next several years in what has become an increasingly hot topic in the technology age.

From the company's perspective, it will first need to determine if the employee is an exempt or non-exempt employee under the FLSA. If non-exempt, the next step will be to determine if any time spent working on the BlackBerry was compensable. If so, how much was compensable. Naturally, this determination will be difficult and expensive to make, especially since employees at Acme were not specifically prohibited from using the device for personal reasons.

As this story reveals, the company is better served by taking proactive steps before the lawsuit ever begins. For example, have a company policy which describes when and under what circumstances the BlackBerry should be used. To minimize a company's exposure, and presuming it is accurate, the company should state that all employees not spend more than a "de minimis" amount of time checking messages from outside the office. The company should also require employees to report on their timesheets all time spent outside of work checking their work messages or performing other work-related tasks on the BlackBerry. To better monitor the situation, the company may also want to require all employees to get permission first to use their Blackberries after work hours.

Of course, for a small company, all of these things may entail immense administrative headaches. Thus, one easy way to address this issue in Texas is to only give BlackBerrys to employees who are exempt from the overtime laws. Depending on the nature of the business, some or all of these techniques could be helpful in avoiding potential FLSA exposure.

In addition to a BlackBerry or PDA (personal digital assistant) policy, the company should make sure its privacy policies explain there should be no expectation of privacy on any company-provided electronic devices. This will help guard against potential invasion of privacy lawsuits. For example, an employee may claim an invasion of privacy occurred when the company read through e-mails to determine how much time was spent on the BlackBerry for work-related purposes. This policy further addresses the unfortunate situation when dealing with an employee who downloads pornography on a company device and shares it with other co-workers (the employee who keeps on giving situation).

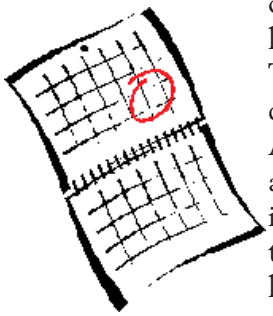
Overall, while a company cannot stop these types of lawsuits, a few preventative steps can certainly make the difference between winning and losing in an age where technology is changing how people work.

Eric J. Hansum

Filing a Claim with the EEOC within 300 Days But Outside 180 Days Does not Satisfy the Texas Labor Code

In January 2008, the Court of Appeals of Texas, in *Ashcroft v. HEPC-Anatole, Inc.*, affirmed a trial court's dismissal of an employee's age discrimination claim which had been filed under the Texas discrimination statute. The plaintiff, Lana Ashcroft, was employed with HEPC-Anatole ("HEPC") and was terminated. Under the Texas statute, an aggrieved party is required to file a complaint of discrimination with the Texas Workforce Commission ("TWC") within 180 days of the date of the alleged unlawful employment practice. Under the federal discrimination statute, in a state like Texas which has its own discrimination statute and an agency like the TWC, the aggrieved person has up to 300 days to file a charge of discrimination with the EEOC. Under worksharing agreements between the EEOC and the TWC, filing a complaint/charge of discrimination with either the TWC or the EEOC normally constitutes a simultaneous co-filing with both.

In this case, Ashcroft filed a charge of discrimination with the EEOC more than 180 days, but less than 300 days, after her discharge. Thus, there was no question the charge was timely filed under the federal statute. However, for tactical and other reasons, plaintiffs often want to sue in state court, rather than federal. Under federal law, the time limits for filing a charge are deemed to be akin to statutes of limitations which can be extended under some circumstances for "equitable" reasons. So, the questions in Ashcroft were whether "equitable tolling" would be permitted under the state statute and, if so, whether the state period should be extended under circumstances, as here, where the charge was timely under federal law but not under state law. The trial court said, "no," and dismissed the suit, based on Ashcroft's failure to exhaust her administrative remedies by failing to file a charge of discrimination within the statutory deadline of 180 days.



Ashcroft appealed the trial court's ruling, claiming that the filing of her claim with the EEOC within the 300-day limitations period, although outside the 180-day limitations period, should result in her claims being effectively filed with both the EEOC and the TWC. The court of appeals rejected the appeal, following several previous Texas Supreme Court cases which hold the 180-day time limit under the Texas Labor Code is mandatory and jurisdictional.

Thus, if an employee/former employee wants to preserve the option of suing in state court under the state statute, rather than being forced to litigate in federal court under federal law, the complaint/charge of discrimination must be filed within 180 days. If not, the employee's/former employee's only option will be under federal law—and, even then, only if the charge is filed within 300 days.

Derrick G. Parker

Quick Tips

- Are you using the revised form I-9 for new hires? The form was recently revised, the first revision to the I-9 in more than 15 years. Use of the new form is required, effective December 26, 2007. The revised form can be downloaded from http://www.uscis.gov/files/form/i-9.pdf. With the revised I-9, there are fewer categories of documents which an employer may accept as proof of employment eligibility. The list of acceptable documents is contained on page two of the new form.

- There is also a new W-4 form employers are supposed to by using, effective in 2008. The 2008 Form W-4 can be downloaded from http://www.irs.gov/pub/irs-pdf/fw4.pdf.

Supreme Court Affirms Alternative Retaliation Remedy

Among the flood of decisions customarily handed down in May and June as the U. S. Supreme Court neared the end of its 2007-08 term, in *CBOCS West, Inc. v. Humphries*, by a 7-2 decision (Thomas and Scalia, dissenting), the Court affirmed the right of an individual to sue his employer for retaliation without having to file a charge with the EEOC and exhaust administrative remedies under Title VII.

Humphries, who is black, had been an assistant manager at a Cracker Barrel restaurant. He complained to senior managers that a fellow assistant manager had discharged an employee for race-based reasons and Humphreys was, himself, thereafter discharged. He filed suit under both Title VII and 42 U.S.C. §1981 for race discrimination and retaliation. The Title VII claims were dismissed for procedural reasons, and the district court granted Cracker Barrel's motion for summary judgment on the §1981 claims on the ground that §1981 did not prohibit retaliation. The Tenth Circuit Court of Appeals reversed the summary judgment, and the Supreme Court decided to review the case to determine "Is a race retaliation claim cognizable under 42 U.S.C. §1981?"

Unlike Title VII, which broadly prohibits employment discrimination on the basis of race, sex, color, national origin, religion, *etc.*, and also contains an express provision prohibiting retaliation, §1981—adopted after the Civil War and intended to afford blacks equal rights with whites—on its face is limited to prohibiting disparate treatment based on *race* and does not say *anything* about *retaliation*.

> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

In a 1989 employment case, *Patterson v. McLean Credit Union*, the Supreme Court read §1981 narrowly to prohibit race-based *hiring* discrimination claims, but not claims based on discriminatory employment decisions made *after* being hired on the theory that *hiring* involved the "making" of a contract (even if only employment-at-will), whereas discrimination occurring *after* hiring did not. Congress responded to *Patterson* by amending §1981 to define the "making and enforcement" of contracts to include the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of [employment]." Despite the fact §1981—neither in its original form, nor as amended in 1991—specifically refers to retaliation, in *Humphries*, the Court concluded that, because the 1991 amendments were intended to encompass post-contract-formation, *i.e.*, post-hiring, conduct—where retaliation claims would be most likely to arise—Congress intended the amended statute to include retaliation claims, at least where the retaliation is based on the plaintiff's assertion of having engaged in protected activity involving a claim of race discrimination.

There are significant potential adverse consequences to employers from the decision.

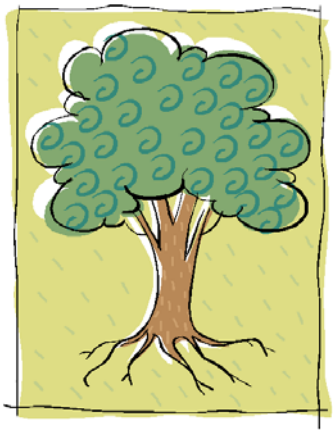
- First, unlike Title VII, under §1981 there is no requirement for a plaintiff to file a charge of discrimination with the EEOC or exhaust any administrative remedies before filing suit. An employee or former employee can go straight to the courthouse.

- Second, the 1991 amendments passed by Congress adopted a four-year statute of limitations for claims based on the amended language of the statute. So, not only is there no requirement for an employee to file a timely charge with the EEOC within 180/300 days, but also the employee can potentially wait up to four years before suing.

- Finally and, perhaps, most significantly, unlike Title VII claims, §1981 claims are not subject to a statutory damage cap on compensatory or punitive damages. Under Title VII, compensatory damages (*e.g.*, mental anguish) and punitive damages are capped at a combined total of between $50,000 and $300,000, depending on the number of employees the employer has. Under §1981, there is no cap.

John L. Ross

Electronic Newsletters



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October 1, 2008

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