



Employment Law ALERT

DECEMBER 18, 2008

Oklahoma Supreme Court Increases Employer Lawsuit Exposure

On December 16, 2008, the Oklahoma Supreme Court handed down a decision that could have serious consequences for employers faced with discrimination lawsuits based on a person's protected status — things like age, gender, race, etc.

In *Kruchowski, et al. v. The Weyerhaeuser Company*, a group of employees represented by Oklahoma City attorneys Mark Hammons and Jim Priest brought suit against Weyerhaeuser, asserting that their terminations were the result of age discrimination in violation of the federal Age Discrimination in Employment Act (ADEA). In addition to the ADEA claim, the plaintiffs asserted a tort claim contending their terminations were in violation of Oklahoma's public policy. Such claims are typically referred to as "Burk torts" after a 1989 case which allowed plaintiffs to sue their employers if they believed their terminations violated the state's public policy. Oklahoma law has recognized that alleged acts of discrimination in violation of Oklahoma's discrimination laws provide a basis for one of these so-called Burk tort claims.

Relying on the 1996 Oklahoma Supreme Court case of *List v. Anchor Paint*, Weyerhaeuser argued that given the adequate remedies provided by the ADEA, there was no proper basis for the additional Burk tort claim. The federal District Court sitting in Muskogee saw a potential conflict between the 2006 Oklahoma Supreme Court case of *Saint v. Data Exchange, Inc.* and *List*, and sought clarification from the Oklahoma Supreme Court. Since *Saint*, the employment plaintiffs' bar had sought to extend the Burk tort theory of recovery to status-based discrimination cases but was met with limited success in the lower courts, given the apparent holding of *List*.

In its December 16th *Kruchowski* decision, the Oklahoma Supreme Court resolved the apparent conflict by overruling *List*,



the case Weyerhaeuser was relying on. The Court held that the Burk tort was a proper theory of relief in status-based discrimination claims, including claims of age discrimination. Although the Court made clear that double recovery would not be allowed, the *Kruchowski* decision increases the financial exposure for employers battling discrimination claims because of the potential for virtually unlimited punitive damages, as the caps on punitive damages provided in the federal discrimination laws likely have no application in Burk tort claims. More troubling was the finding that *Kruchowski* would be given retroactive application to cases in the "litigation pipeline" at the time *Saint* was decided.

Although the full impact of *Kruchowski* cannot be known at this point, what is clear is that employers will face increased risk of punitive damage awards at the hands of juries

in employment cases beyond what would be permitted under the federal discrimination laws. Given this risk, employers should give serious thought to implementing a mandatory arbitration program to resolve employment-related disputes. Although an enforceable program could not impose an actual limit on the amount of potential punitive damages an arbitrator could award, an arbitration program could be a means of avoiding the risk of an emotion-based verdict at the hands of a jury and an accompanying emotion-based award of punitive damages.

Should you have any questions about this new change in Oklahoma law, or possible ways to minimize its impact, please contact any of McAfee & Taft's labor and employment attorneys.

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