EDWARDS ANGELL PALMER & DODGE

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Reductions in Force (RIFs) May Impact Qualified Retirement Plans

During this period of economic instability, many employers are contracting their businesses by laying off a portion of the workforce or closing (or selling off) a plant, division or line of business. An often overlooked and possibly costly consequence of a significant reduction in force is whether the employer's qualified retirement plan (i.e., 401(k) plan) experienced a "partial plan termination."

The Internal Revenue Code provides that when a qualified retirement plan terminates or partially terminates, all "affected" participants must be made fully (100%) vested in the benefits accrued or amounts credited to their accounts under the plan through the date of the termination or partial termination. Failure to vest "affected" participants could cause the disqualification of the plan, resulting in the loss of deductions for the employer, the recognition of income for participants, and possible lawsuits against the plan sponsor and plan fiduciaries responsible for failing to maintain the tax-qualified status of the retirement plan.

"The Internal Revenue Code provides that when a qualified retirement plan terminates or partially terminates, all "affected" participants must be made fully (100%) vested in the benefits accrued or amounts credited to their accounts under the plan through the date of the termination or partial termination."

Neither the Code nor regulations define the term "partial plan termination." The regulations provide that whether a partial plan termination occurs shall be determined with regard to all the facts and circumstances of the particular case, including the exclusion from the plan, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan.

20% Presumption

Recent IRS guidance provides some clarity as to how to determine whether a partial plan termination has occurred. According to the IRS, a partial plan termination is presumed to occur if the "turnover rate" is at least 20%. The turnover rate is determined by dividing the number of actively participating employees who had an "employer-initiated" severance from employment during the applicable period by the sum of all participants at the start of the applicable period and any employees who become participants during the applicable period.

In calculating the turnover rate, an employer should consider the following:

- All active participants are taken into account in calculating the turnover rate, including participants who are already fully vested in their accounts or benefits.
- An "employer-initiated severance" is broadly defined to include any separation from

Continued on page 2

In This Issue:

UPCOMING SEMINAR

Every Company's Nightmare: Privacy and Data Breach Risks

See Page 8 For Further Details

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employment, other than separation on account of death, disability or retirement on or after the participant's normal retirement age. A severance will be considered "employer-initiated" even if caused by events outside of the employer's control, such as a severance due to depressed economic conditions. If the employer is able to verify, through information in the participant's personnel file, employee statements or other corporate records, that a participant's separation was not "employer-initiated," but voluntary on the part of the participant, such participant will not be taken into account when determining the reduction in plan participants.

- The applicable period over which to calculate the turnover rate is generally the plan year. In the case of a plan year that is less than 12 months, the applicable period is the short plan year plus the immediately preceding plan year. Depending on the circumstances, the applicable period could be a longer period if there are a series of related severances from employment; however the IRS does not provide any information on how to determine whether the severances are related.
- Participants who have had a severance from employment as a result of being transferred to a different controlled group are not considered as having an "employer-initiated" severance for purposes of calculating the turnover rate provided they continue to be covered by a plan that is a continuation of the plan under which they were previously covered (i.e., a spin-off of the plan).

"Employers who have implemented a reduction in force or are contemplating downsizing their workforce should carefully evaluate whether such actions will cause any qualified retirement plan to incur a partial plan termination. Failure to identify a partial plan termination on a timely basis may prove costly to the employer, particularly if the plan forfeits "affected" participants' nonvested account balances."

The IRS guidance makes clear that the determination of whether a partial plan termination has occurred depends upon all of the facts and circumstances. The 20% presumption is not a bright line test and, in appropriate cases, may be disregarded. Facts and circumstances indicating that the turnover rate for an applicable period is routine for the employer may favor a finding that there is no partial plan termination for that period. Information as to the turnover rate in other periods, the extent to which terminated employees were actually replaced, whether the new employees performed the same job functions, had the same job classification or title, and received comparable compensation are relevant to determining whether the turnover rate is routine for the employer.

Employers who have implemented a reduction in force or are contemplating downsizing their workforce should carefully evaluate whether such actions will cause any qualified retirement plan to incur a partial plan termination. Failure to identify a partial plan termination on a timely basis may prove costly to the employer, particularly if the plan forfeits "affected" participants' nonvested account balances. Although the recent IRS guidance offers more definitive guidelines, whether a partial plan termination has occurred is ultimately determined based on all the facts and circumstances in the particular case.

Appearance Policies and Sex Discrimination: More Than Meets the Eye?

Employers are entitled to enforce grooming policies and dress codes designed to meet legitimate business interests. Care must be taken, however, to avoid claims that the policies are discriminatory.


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Employers should take extra precautions where restrictions on personal appearance impact protected categories such as race, sex, color, national origin, age, and religion. Generally, appearance policies should be reasonable, applied uniformly, and grounded in a nondiscriminatory business related concern. Potential policies are as varied as the industries they seek to regulate, and the nondiscriminatory reasons underlying those policies may include safety concerns, company image, enhancing employee productivity, boosting employee morale, preventing conflicts, and/or preventing workplace harassment or distractions.

Policies Upheld

Appearance policies are evaluated in the context of the business to which they apply. When evaluating dress code and grooming policies, think carefully about the legitimate business interests sought to be protected.

In some industries, policies have been found enforceable and nondiscriminatory even though the policies do not apply equally to men and women. For example, employers have been permitted to require only their male employees to be clean shaven with short hair, and federal appellate courts have ruled that hair length restrictions for men, but not for women, do not constitute sex discrimination under Title VII of the Civil Rights Act of 1964 (Title VII). Title VII's prohibition against sex discrimination was designed primarily to discard outdated sex stereotypes which posed employment disadvantages for one sex. Because hair restrictions for men were part of a comprehensive personal grooming code applicable to all employees, courts have found that any differences in the appearance requirements for males and females were permissible because they had a negligible effect on employment opportunities.

Further, in other industries, employers may be able to require female employees to wear skirts or dresses and sometimes high heels and makeup depending on the legitimate interests of the business. For example, courts have held that a casino can require its female employees to wear makeup, stockings, colored nail polish, or certain hair styles because the business interests of the casino include customer expectations that casino employees will project an image of glamour and style, and requiring women to wear cosmetics is based on societal norms in terms of dress in the casino industry. As long as a restriction is tailored to an employer's legitimate business interests, does not impose a greater burden on one sex over the other, and is not based on a demeaning or offensive stereotype, it will likely be upheld.

Disfavored Policies

The following represents examples of policies deemed problematic and should be avoided by most employers. When an appearance policy places a greater burden on one sex unsupported by a legitimate business need, or when the rules are founded in stereotypes, courts have found discrimination. For example, courts have held that employers cannot require only women to wear contact lenses, prohibit tattoos on women but not men, or have different weight requirements for men and women, with one being more burdensome than the other.

"As long as a restriction is tailored to an employer's legitimate business interests, does not impose a greater burden on one sex over the other, and is not based on a demeaning or offensive stereotype, it will likely be upheld."

Further, when women are required to wear uniforms but men are not, the dress code perpetuates the stereotype that women are of a lesser rank than their male counterparts, and the justification that women cannot be expected to exercise discretion in choosing attire is sufficient to form the basis for a sex discrimination claim under Title VII. In the frequently cited case, *Carroll v. Talman Federal Savings & Loan Ass'n*, the employer's dress code permitted males to wear "customary business attire" but required women to wear uniforms. The court found disparate treatment because there was a "natural tendency to assume that the uniformed

Continued on page 4

"No matter how an employer chooses to deal with dress codes, grooming policies, or any other restriction on employee appearances, it is important to have an established set of rules and procedures for determining whether an employee's appearance violates those rules."

women have a lesser professional status than their male colleagues attired in normal business clothes." 604 F. 2d 1028, 1032-33 (7th Cir. 1979).

These examples are a representative sampling only. Depending upon the industry in which an employer operates, there may be additional inadvisable restrictions. When in doubt, employers should seek legal advice tailored to their specific needs and circumstances.

Advice for Employers

No matter how an employer chooses to deal with dress codes, grooming policies, or any other restriction on employee appearances, it is important to have an established set of rules and procedures for determining whether an employee's appearance violates those rules. If restrictions are not applied consistently, are not founded upon legitimate business concerns, are based on stereotypes, or disproportionately burden men or women, an employer may find itself on the wrong end of a discrimination or sexual harassment claim. Employers should consider the following guidelines in evaluating, adopting, or changing their appearance policies:

- *Put it in Writing*
  Memorializing the policy clarifies the boundaries for employees, makes it easier to enforce, and, if properly drafted, will serve as a strong defense to legal claims.
- *Be Specific*
  It is much easier to enforce a policy with clearly defined prohibitions.
- *Explain the Business Concerns Behind the Policies*
  Employees will be more likely to follow a policy they understand, and explanations may assist an employer if litigation ensues.
- *Document Complaints and Violations*
  As with all disciplinary matters, an employer should take care to document each complaint related to an employee's appearance and each dress code violation.
- *Be Consistent*
  Employers should make sure their human resources department, supervisors, and managers are aware of the company policies and their boundaries in identifying and dealing with infractions of appearance policies.
- *Seek Legal Advice Tailored to the Industry and Geographic Area*
  What is permissible and what constitutes actionable discrimination depends on the appearance policies themselves, the industry in which the employer operates, the manner of enforcement, and the geographic area in which the employer operates.

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A Catch-22 for Employers: Supreme Court Rules Against City of New Haven in Reverse Discrimination Case

In a 5-4 decision, the United States Supreme Court in *Ricci v. DeStefano* offered little in the way of practical guidance to employers walking the fine line of race-neutral hiring and employment practices, but provided no shortage of controversy for pundits and commentators.

Not only did the five-justice majority side with plaintiffs, a group of predominantly white firefighters, in this contentious, high-profile reverse discrimination lawsuit, they also criticized and overturned a Second Circuit Court of Appeals panel which included newly appointed Supreme Court Justice Sonia Sotomayor. Setting aside the political implications of its decision, the Court addressed an issue of first impression in the civil rights framework by resolving an open conflict between competing anti-discrimination provisions of Title VII of the Civil Rights Act of 1964 ("Title VII").

The plaintiffs in this case are 18 New Haven, Connecticut ("the City") firefighters (17 white and one Hispanic) who took and passed an examination designed by the City to identify candidates for promotion within the fire department. To create the examination, the City hired an outside consultant who took a number of what were determined to be precautionary steps to create a racially unbiased examination. However, when the City received the results of the examination, it was clear that white candidates had performed better across the board than their black and Hispanic peers. Based on the examination, disparately few minority firefighters would be selected for promotion. Accordingly, the City held a series of meetings to debate the results with City officials, the City's attorney, firefighters, citizens and various experts and, ultimately, refused to certify the examination results because the examination clearly had a disparate impact on minority firefighters.

"...a private employer should be wary of utilizing any standardized examination, test or other criteria to determine priority for employee hiring or promotion. If such a process is deemed necessary, it is critical that all efforts be made to ensure that the test or process used for the evaluation be racially neutral."

Title VII prohibits discrimination on the basis of race, color, religion, sex or national origin, including discrimination that is intentional ("disparate treatment") and discrimination that is unintentional, but nonetheless has a disproportionately adverse effect on minorities ("disparate impact"). Plaintiff firefighters alleged that the City's refusal to certify the examination results on the basis of race was a violation of the disparate treatment prong of Title VII because the City's action was based solely on the fact that white firefighters outscored minority firefighters. The City argued that it was justified in refusing to certify the examination because the results demonstrated a disproportionately adverse effect on minorities. The City concluded that its use of examination results in awarding promotions would violate the disparate impact prong of Title VII and subject it to liability. The District of Connecticut granted the City's motion for summary judgment, and the Second Circuit affirmed.

The Supreme Court granted *certiorari* and reversed, holding that the City's refusal to certify the examination results violated the disparate treatment prong of Title VII. First, the Court found as a matter of law that the City's decision to throw out the examination based on the racial disparity of the results was *per se* disparate treatment. In other words, the City made its decision solely upon the racial disparity of the examination results. The Court then examined whether the City's refusal to certify the examination based on its clearly discriminatory results was justified. The Court likened the City's refusal to certify the examination to the creation of a de facto quota system, which is prohibited by *Richmond v. J.A. Croson Co*. The Court held that an employer cannot engage in such disparate treatment unless it can articulate a "strong basis in evidence" that its failure to do so would have a disproportionately adverse effect on minorities. While the Court's holding did not overrule *Griggs v. Duke Power Co*., which requires that employment practices such as the examination be directly tied to job requirements and "business necessity," it certainly limits an employer's ability to disregard results of examinations which it believes do not comply with *Griggs*.

The Court's reasoning in *Ricci* applies most directly to public hiring and screening practices, the results of which are often required to be made public. Still, a private employer should be wary of utilizing any standardized examination, test or other criteria to determine priority for employee hiring or promotion. If such a process is deemed necessary, efforts should be made to ensure that the test or process used for the evaluation is racially neutral. For instance, the *Ricci* Court approved of the City's hiring of a consultant to design a race-neutral examination. Once the decision has been made to utilize an examination, an employer generally must accept the results, even in the face of evidence and accusations that the process has a disparate impact on a protected group. After all, under *Ricci,* an employer can only throw out examination results where it can articulate a "strong basis in evidence" that the examination had a discriminatory impact. For these reasons, an employer wishing to avoid the City's "no-win" dilemma should ensure that any standardized selection process be racially neutral and closely tied to the particular requirements of the job.

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Recognitions

Martin Aron, a partner in the firm's Madison office and Co-Chair of the Labor & Employment Group, has been named to the Executive Committee of the Labor and Employment Committee of the NJ State Bar Association. EAPD Partner, **Paulette Brown** holds the title of Treasurer of this Section.

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Multi-Million Dollar Jury Verdicts Serve as Reminder to Beware of Retaliation Claims

In 2006 the Supreme Court's decision in *Burlington N. & Santa Fe Ry. Co. v. White* changed the standards for evaluating Title VII retaliation claims. Prior to the *White* decision, employees in some circuits could recover only when they demonstrated that they suffered an adverse and ultimate employment decision, such as being fired or other actions affecting the terms and conditions of their employment, in retaliation for the employee's complaint of discrimination (or participation in other protected activity). As a result of the *White* decision, the scope of actionable conduct under Title VII's anti-retaliation provision was expanded, allowing employees to recover with evidence of other minor, materially adverse actions as long as such actions would deter a reasonable employee from pursuing a complaint of discrimination.

Not surprisingly, the number of retaliation charges filed with the EEOC has increased significantly since *White* was issued. In fact, the number of retaliation charges rose from 22,555 in 2006 to 26,663 in 2007 (an 18.2% increase), and to 32,690 in 2008 (a 45% increase over claims brought in 2006). These are significant increases compared to the mere 1.2% increase in retaliation charges brought in the year before *White* was decided. These claims translate to significant awards and settlements by employers. In 2008, the EEOC recovered more than $111 million in connection with retaliation claims (this figure does not include settlements and verdicts obtained through litigation removed from the EEOC). These statistics, along with two recent multi-million dollar jury verdicts, serve as a stark reminder of how retaliation claims can often lead to significant judgments against employers, even in cases where the employees fail to prove their primary discrimination claim.

$4.6 Million Dollar Jury Verdict Allowed to Stand

In *Monteiro et al. v. City of Cambridge* (a recent Massachusetts state court decision), the defendant city filed a motion for summary judgment as to the various claims brought by the plaintiffs, including for retaliation. The city's motion was allowed in part and denied in part, based upon the evidence each plaintiff presented and the applicable legal standards for racial discrimination and retaliation claims. Thereafter, the case went to trial on all counts of plaintiff-Monteiro's complaint, in which she alleged disparate treatment on account of her race and national origin (Cape Verdean), including alleged disparity in pay and refusal to recommend her candidacy to a city affiliated graduate school scholarship program. The jury rendered a verdict in the plaintiff's favor on the retaliation claim only, finding that the city retaliated against her after she lodged a discrimination complaint in 1998. The jury awarded the plaintiff nearly $4.6 million in compensatory and punitive damages, and the Court awarded her over $600,000 in pre- and post-trial interest, along with attorneys' fees and costs.

The city challenged the jury's verdict on a motion for judgment notwithstanding the verdict and filed a motion for new trial (or alternatively to reduce the verdict), contending that the jury had no basis to infer causation or animus because five years separated the filing of plaintiff's discrimination complaint and her termination. Ordinarily, a retaliatory motive may be inferred from temporal proximity alone where the adverse action occurs very shortly after the protected activity. However, the greater the time between the protected activity and the adverse employment action, the more the plaintiff must rely upon other evidence beyond temporal proximity to establish a causal connection between a complaint and a subsequent termination. In *Monteiro*, the defendant argued that because the jury failed to award the plaintiff damages for any intermediate employment actions between the 1998 complaint and the 2003 discharge, such actions could not be "materially adverse" since they did not produce any injury or harm as required by *White*.

The Court rejected the city's challenges to the verdict, including the city's interpretation of the Supreme Court's holding in *White*. In doing so, the Court noted that the *White* decision does not require an evaluation of the level of seriousness to which the injury or harm must rise before liability can attach and damages can be awarded. Rather,

according to *White*, a court must determine whether an action constitutes legally actionable retaliation by evaluating whether the action would dissuade a reasonable worker from making a charge of discrimination. Based upon this analysis, the Court held that because the jury found that the plaintiff endured materially adverse actions between her discrimination complaint and termination, she proved her case of retaliation, despite the fact that the jury did not award her any specific monetary damages for the retaliatory intra-employment actions. These "materially adverse" actions included documenting a complaint against the plaintiff without informing the plaintiff; removing some of the plaintiff's responsibilities; forwarding to the police commissioner a newspaper article in which the plaintiff was quoted about racial profiling occurring in the police department; and launching a one-year investigation into the plaintiff's performance on the police review board.

The Superior Court likewise rejected the city's argument that punitive damages could not be awarded for the city's post-complaint conduct where the jury found that the employment actions did not produce any injury or harm to the plaintiff. Again, in denying the city's post-trial motions, the Court held that because the jury affirmatively found that the city's conduct was retaliatory, punitive damages could be awarded even where the plaintiff sustained no compensatory damages as a result of the conduct.

Jury Awards Former Employee $3 Million in Damages

A Federal Court jury in Colorado recently awarded plaintiff Jennifer McInerney, a former United Airlines ramp-services supervisor, $3 million in damages after finding that she was retaliated against due to her complaint of sex discrimination. The former employee became pregnant in May 2005, and requested consideration for alternative positions because she anticipated complications with her pregnancy. She claimed that she was denied alternative positions because she was a pregnant woman and complained in December 2005 that United's failure to consider her for open positions was discriminatory. Her son was born 11 weeks premature in November 2005 and she took family and medical leave, vacation leave and sick time until her available time off expired in March 2006. United denied her request for additional unpaid leave, and instructed her to return to work in March 2006. When she did not return to work, United terminated her employment. United contended that there was a shortage of ramp supervisors, and that when the plaintiff requested additional leave, the company could not hold her job open any longer.

As in the *Monteiro* case, the jury found that the plaintiff failed to establish her underlying discrimination claim. Rather, the jury found that the plaintiff was terminated in retaliation for the gender discrimination complaints she made in December 2005. Although it is unclear what ultimately led the jury to reject the plaintiff's discrimination claim, yet credit her retaliation claim, the jury's decision provides a general warning to employers to use caution when considering requests for leave or other accommodations and to avoid taking adverse actions against employees in such circumstances, particularly following an employee's complaint of discrimination.

General Guidance

The importance of avoiding exposure to retaliation claims is highlighted by the fact that in both *Monteiro* and *McInerney* the respective juries found in favor of the defendant-employers on the underlying claim of discrimination, but determined that the employers' post-complaint actions were retaliatory. As a result, liability was created for the employers which, perhaps, could have been avoided by making appropriate employment decisions concerning those employees following their complaints. In essence, in cases such as this, the retaliation claims have become the proverbial tail wagging the dog, and are exposing employers to multi-million dollar verdicts when they did not discriminate against the employee in the first instance. Given the increasing frequency of retaliation claims since the *White* decision, and the higher likelihood that retaliation claims will go to trial, employers should not take the potential for retaliation claims lightly when making employment decisions about employees engaged in protected activity. Rather, employers are encouraged to evaluate their current anti-discrimination policies and take steps to ensure that they do not inadvertently expose themselves to liability for a retaliation claim. In particular, employers can:

- Revise and/or develop policies to ensure that they contain an express prohibition against retaliation and describe the consequences of violating the prohibition against retaliation;
- Encourage employees to report complaints of retaliation, report actions believed to be retaliatory and provide alternative channels for complaints to be reported;

Continued on page 8

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Recognitions

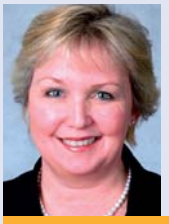
Paulette Brown, a partner in the firm's Madison office, has been named to the Executive Committee of the American Bar Association. Her term begins at the conclusion of the Annual Meeting, August 4, 2009.

"...employers are encouraged to evaluate their current anti-discrimination policies and take steps to ensure that they do not inadvertently expose themselves to liability for a retaliation claim."

- Educate and train supervisors and employees alike on anti-retaliation policies to ensure that employees understand that retaliation against individuals who engage in protected activity is illegal and strictly against company policy;
- Involve counsel or human resource management in any employment actions impacting employees who have raised complaints of discrimination or engaged in other protected activity;
- Consider carefully whether job transfers, shift changes or changes in employee's responsibilities following a claim for discrimination are appropriate or necessary, and whether they might deter a reasonable employee from engaging in protected activity;
- Maintain files concerning the claim of discrimination separate from any personnel file, so that only those personnel with a need to know have access to and knowledge of the complaint;
- Whenever possible avoid having a supervisor conduct the employee's evaluation, who is involved in (or accused of) the discriminatory action, and consider whether a supervisor who is not privy to the employee's complaint or protected activity can properly evaluate the employee;
- Act consistently in enforcing anti-retaliation policies as well as in enforcing any other workplace policies; and
- Evaluate and document all employment actions taken against employees carefully, including the legitimate business reasons for such actions, while avoiding targeted monitoring of such employees, which is inconsistent with the treatment of other similarly situated employees.

Legal Updates

Company's Damaging E-Mail and Inconsistent Statements Preserve Applicant's Discrimination Claim




By Sheryl D. Hanley and Erika C. Farrell
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The United States District Court for the District of Idaho recently held in *Wold v. El Centro Fin. Inc.* that Kenneth Wold, a job applicant, had presented sufficient evidence for a jury to conclude that El Centro Finance Inc.'s decision not to hire him was motivated by age bias.

After receiving a cover letter and resume from Wold in his application for a position as operations manager, El Centro's chief executive officer inadvertently sent Wold an e-mail which stated, "Damn ... Check it out – I don't know what I think. He must be old – and just looking for something to do." After not receiving any further response, Wold filed a discrimination charge with the Idaho Human Rights Commission. During the course of the investigation, El Centro claimed that Wold was rejected because his application suggested aggressiveness.

Wold received a right to sue letter and filed suit in federal court. At the conclusion of discovery, El Centro filed a motion for summary judgment against Wold. In its motion, the company claimed that Wold's application was never considered by the hiring coordinator. The District Court found that El Centro had offered inconsistent, and thus non-credible, explanations for the decision not to hire Wold based upon its statements to state investigators in relation to the charge with the Idaho Human Rights Commission and the contradictory defense El Centro raised with the court. Additionally, the court found that El Centro's CEO's e-mail to Wold was sufficient evidence of discriminatory animus. In particular, the comment "just looking for something to do" suggested an unacceptable bias by implying that older workers are seeking work "to just keep themselves busy." The court stated that "[t]his broad, negative characterization of older employees is precisely the type of prohibited stereotype the ADEA seeks to remedy and gives rise to an inference of discrimination."

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U.S. Supreme Court Holds That Age Must be "But-For" Cause of Adverse Employment Action

In a surprise 5-4 decision, the United States Supreme Court held in *Gross v. FBL Financial Services, Inc.* that employees bringing a claim of age discrimination under the Age Discrimination in Employment Act (ADEA) must prove that age was the "but-for" cause of an adverse employment action, not merely "a motivating factor." The Court further found that the burden of persuasion does not shift to the employer in a "mixed-motive" ADEA case, even if the plaintiff introduces direct evidence that age was a factor in the challenged decision.

This case arose after FBL transferred its employee, Jack Gross, a 54-year old long-term employee, from his position as claims administration director to claims project coordinator. In addition, many of Gross' duties were transferred to another employee, then in her forties, who once reported to Gross.

Gross filed suit under the ADEA in federal court. At trial, Gross presented evidence suggesting that FBL's actions were based at least in part on Gross' age. Jury instructions issued by the district court stated that if Gross proved by a preponderance of the evidence that his age was a "motivating factor," a verdict must be returned in his favor. The jury ultimately returned a verdict for Gross for approximately $47,000. The Court of Appeals for the Eighth Circuit reversed and remanded for a new trial, holding that the jury had not been properly instructed under the burden-shifting framework derived from U.S. Supreme Court decisions regarding Title VII discrimination claims, including the *Price Waterhouse v. Hopkins* decision. Under this framework, if a Title VII plaintiff proves discrimination was a motivating factor in an adverse employment action, the burden of persuasion shifts to the employer to show that it would have taken the same action regardless of age. The petition for *certiorari* asked the Supreme Court to decide if a plaintiff must present "direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII case." Gross conceded that he did not show, through direct evidence, that he was discriminated against.

The Supreme Court vacated the Court of Appeals' decision and remanded for further proceedings. The Court found that, before deciding the issue presented, it first had to determine "whether the burden of persuasion ever shifts to the party defending an alleged mixed-motives discrimination claim under ADEA" if an employee presents direct evidence of an improper motive. The Court held that it does not. Relying on textual differences between Title VII and the ADEA, the Court found that the ADEA does not authorize mixed-motive age-discrimination claims because the burden of persuasion always remains on the employee in a disparate treatment case to prove that age was the "but-for" cause of an employer's adverse decision, not merely a motivating factor.

Interestingly, the Supreme Court indicated that there was some doubt as to whether *Price Waterhouse* would be decided the same way today because "it has become evident in the years since that case was decided that its burden-shifting framework is difficult to apply."

"...the court found that the Wage Act "would have little value if employers could exempt themselves simply by drafting contracts that place compensation outside its bounds..."

Involuntarily Terminated Employees Must be Paid Accrued Vacation Time, Despite Company Policy to the Contrary

In a recent decision, *Electronic Data Sys. Corp. v. Attorney General*, the Massachusetts Supreme Judicial Court held that employers must pay an involuntarily terminated employee any unused vacation time even where the employer has a written policy that states otherwise. The court upheld a determination by the Massachusetts Attorney General that unpaid vacation pay is considered earned "wages" which an employer is required to pay to an involuntarily discharged employee.

Francis Tessicini was an employee of Electronic Data Systems (EDS) whose position was eliminated in 2005. EDS had a written policy providing that "vacation time is not earned and does not accrue. If you leave EDS, whether voluntarily or involuntarily, you will not be paid for unused vacation time (unless otherwise required by state law)." At the time of his discharge, Tessicini had only taken one day of the five weeks of vacation time he was entitled to in the calendar year 2005. EDS refused to pay Tessicini for his unused vacation pay.

Tessicini filed a complaint with the state attorney general's office, alleging that EDS was required to pay him for his unused vacation time. The attorney general agreed and ordered EDS to pay Tessicini accrued unpaid vacation pay. The superior court affirmed the attorney general's decision. On review, the state supreme court examined EDS's policy and found that "paid vacation is earned" under the policy because it linked the amount of vacation pay for which an employee was eligible to the number of years an employee had worked. The court also analyzed the Massachusetts Wage Act (Massachusetts Chapter 149, Section 148) which requires that "any employee discharged from such employment shall be paid in full on the day of his discharge." As a result, the court found that the Wage Act "would have little value if employers could exempt themselves simply by drafting contracts that place compensation outside its bounds – as EDS attempted to do, when it stated that 'vacation time is not earned.'" Notably, the Massachusetts Supreme Judicial Court recognized the validity of "use-it or lose-it" vacation policies and explicitly declined to decide whether an employee who leaves a job voluntarily, with earned but unused vacation time, must be paid for such time.

"Perfectly Clear" Successor Doctrine Clarified

The United States Court of Appeals for the District of Columbia Circuit recently held in *S&F Market St. Healthcare LLC v. NLRB* that the National Labor Relations Board (NLRB) misapplied the "perfectly clear" successor doctrine wherein a successor employer is bound by the terms of a collective-bargaining agreement only when it is "perfectly clear" that the new employer intends to retain all of its predecessor's bargaining unit employees without changing the terms and conditions of their employment.

S&F Market Street Healthcare LLC (S&F) purchased a nursing home from Covenant Care Orange Inc. (Covenant) in 2004. The nursing home was renamed Windsor Convalescent Center of North Long Beach after the purchase. Covenant had collective bargaining agreements with Service Employees International Union Local 434B covering two bargaining units of workers. S&F repeatedly expressed its intent to "implement significant operational changes" and made it clear that while certain Covenant employees would be hired on a temporary basis, and may be eligible to apply for regular employment, terms and conditions of employment would be those set forth in Windsor's personnel policies and employee handbook.

The union filed unfair labor practice charges after S&F refused to bargain with it, claiming that a representative complement of employees had not been hired as of yet. The NLRB found that S&F was a perfectly clear successor because it "failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment."

The appeals court disagreed with the NLRB and stated that the "perfectly clear successor" doctrine "applies only to cases in which the successor employer has led the predecessor's employees to believe their employment status would continue unchanged after accepting employment with the successor." The court cited *NLRB v. Burns International Security Services* where the United States Supreme Court discussed the "perfectly clear" exception and found that "successor employers are not bound by the substantive provisions of a collective-bargaining contract negotiated by their predecessors but not agreed to or assumed by them" except for "instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit." Thus, the appeals court held that the NLRB misapplied the doctrine since "no employee could have failed to understand that significant changes were afoot" under S&F's management. Importantly, while a new employer is required to make it clear that it intends to establish new terms, the employer does not have to announce the specific new terms that will be put in place prior to the succession.

Federal Minimum Wage Increase

The federal minimum wage increased to $7.25 on July 24, 2009. This is the final part in the three-year annual increases begun in 2007.

Complaints Must be Written to Trigger Retaliation Protections Under FLSA

In a decision widening the divide between federal appeals courts, the United States Court of Appeals for the Seventh Circuit in *Kasten v. Saint-Gobain Performance Plastics Corp.* ruled that verbal complaints are not protected activity under the Fair Labor Standards Act (FLSA).

Kevin Kasten worked in Saint-Gobain's high-performance plastics manufacturing plant and received numerous disciplinary notices for failing to properly punch in and out. Kasten claimed that he made several verbal complaints that the location of the time clocks did not allow employees to be paid for time spent putting on protective gear, but the company denied receiving such complaints. Ultimately, Kasten was fired for a further violation regarding the time clocks. Kasten sued Saint-Gobain under the FLSA, claiming he was retaliated against for his verbal complaints.

The FLSA deems that it is unlawful "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint." After determining that verbal complaints are not protected under the FLSA, the district court granted summary judgment to Saint-Gobain. Kasten appealed the decision to the Seventh Circuit. The Seventh Circuit noted that there is a circuit split on the issue of whether the FLSA's retaliation provision protects verbal complaints. The Fourth Circuit has ruled that verbal complaints are not protected while the Sixth, Eighth, and Eleventh Circuits have found that verbal complaints are covered by the FLSA's retaliation provision.

The Seventh Circuit interpreted the FLSA's use of the phrase "file any complaint" as a deliberate narrowing by Congress which contemplated the protection of written complaints only. The court decided two questions: "whether intracompany complaints that are not formally filed with any judicial or administrative body are protected activity; and second, whether unwritten verbal complaints are protected activity." The appeals court affirmed the district court's holding that internal complaints are protected activity. Further, and importantly, the court found that "[l]ooking only at the language of the statute, we believe that the district court correctly concluded that unwritten, purely verbal complaints are not protected activity." Essentially, the court held that the FLSA's use of the phrase "to file" requires "the use of a writing" and thus only written complaints are protected.

Events / Announcements

- On September 15, **Antoinette Theodossakos**, a partner in our West Palm Beach office, will be a faculty member for Sterling Education Services' "Problem Employees in a Challenging Workplace" seminar to be held at the Crowne Plaza West Palm Beach in West Palm Beach, Florida.
  For more information, visit:
  http://sterlingeducation.com/

- Edwards Angell Palmer & Dodge is a sponsor of the New Jersey Chapter of the Association of Corporate Counsel's (NJCCA) 7th Annual Full Day Conference to be held September 24 in Whippany, New Jersey. **Martin Aron**, a partner in the firm's Madison office and Co-Chair of the Labor & Employment Group, **Leslie Levinson** and **Eric Fader**, partners in the firm's New York office and members of the Business Law and Insurance Groups, respectively, and Heidi Allen, General Counsel of Team Health, Inc., will be presenting "Doing Deals During an Economic Downturn: Can it Be Done? How?" at this conference.
  For more information, visit:
  http://www.acc.com/chapters/njcca

- On October 13, **Martin Aron**, a partner in the firm's Madison office and Co-Chair of the Labor & Employment Group will be a moderator and speaker at the New York City Bar Association's program entitled "Current Issues in Reductions in Force (RIF) and RIF Litigation."
  For more information, visit:
  https://www.nycbar.org

- On October 30, **Sheryl Hanley**, counsel in the firm's Providence office, will be a presenter at the Labor Arbitration Conference sponsored by the University of Rhode Island's Schmidt Labor Research Center. She will give an update on Rhode Island law. The conference will be held at the Newport Marriott Hotel in Newport, Rhode Island.
  For more information, visit:
  http://www.uri.edu/research/lrc/

A list of our offices & contact numbers are below. We hope you find this publication useful and interesting and would welcome your feedback. For further information on topics covered in this newsletter or to discuss your labor & emplomentissue, please contact one of the editors or any of the attorneys listed on page 12:

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