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EMPLOYMENT LAW OUTLOOK



U.S. SUPREME COURT MAKES IT EASIER TO SUE FOR AGE DISCRIMINATION

William M. Furr



On March 30, 2005, the U.S. Supreme Court made it easier for employees to sue their employers for age discrimination. In *Smith v. City of Jackson*, the Supreme Court held that employers can be held liable for age discrimination even if the discrimination was unintentional. The Age Discrimination in Employment Act ("ADEA") prohibits

employers from discriminating against individuals over the age of 40. The U.S. Supreme Court reversed a lower court's ruling that required the plaintiffs to prove intentional age discrimination in order to prevail.

Under the Supreme Court's ruling, employees can now sue for age discrimination pursuant to a "disparate impact" theory. The disparate impact theory allows employees to sue an employer when the employer's policies disproportionately harm older workers even if the employer did not have any animus toward older workers. For example, a policy that establishes pay raises for those employees hired after a certain date may have a disparate impact on workers over age 40.

Since 1971, the Supreme Court has allowed disparate impact claims to go forward for race discrimination and other types of discrimination under Title VII of the Civil Rights Act of 1964. Because the ADEA contains language that differs from the Civil Rights Act of 1964, however, the employer in *Smith v. City of Jackson* argued that age discrimination plaintiffs should not be able to pursue lawsuits based on a disparate impact theory. The Supreme Court disagreed with the City of Jackson's position.

Employers should expect to see more age discrimination lawsuits. Approximately one-half of the United States' labor force is over 40. As the baby boomers age, more companies will be sued for age discrimination. Employers can reduce the risk of

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FOREIGN LABOR CERTIFICATION GETS LONG-AWAITED FIX

Susan R. Blackman and Gillian W. Field



In recent years, the waiting times for employers applying for foreign labor certification have grown as long as seven years in some jurisdictions. Due to severe backlogs at the U.S. Department of Labor and state employment agencies, many employers gave up all hopes of being able to get a green card for a foreign worker in a hard-to-fill position. These backlog problems may fade away as a result of the U.S. Department of Labor's long-awaited Program Electronic Review Management (PERM) regulations, which went into effect on March 28, 2005. The PERM regulations are intended to streamline the labor certification process thereby reducing the current labor certification backlog and making the entire system more efficient for U.S. employers.



Under the Immigration and Nationality Act (INA), most foreign employees seeking to immigrate to the United States on the basis of an offer of permanent employment from a U.S. employer cannot obtain green cards without first receiving labor certification from the U.S. Department of Labor (DOL). The purpose of the labor certification process is to test the labor market in the United States to determine that there are not sufficient U.S. workers who are available, willing, and able to fill the position being offered to the foreign employee. Employers seeking labor certification must also confirm that the foreign employee will be paid at least the prevailing wage and that permanent employment of the foreign employee will not adversely affect the wages and working conditions of similarly employed U.S. workers.

Prior to PERM, processing of a labor certification application could take as long as three to seven years. The new PERM

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disparate impact claims by making sure that their policies and practices do not disproportionately harm older workers. Now is a good time for employers to review their employee handbooks and policy manuals to make sure that they comply with the ADEA, Title VII and the other employment laws. ■

FOREIGN LABOR CERTIFICATION GETS LONG-AWAITED FIX

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regulations promise to dramatically reduce this processing time through several key revisions to the labor certification system: (1) employers now have the option of filing labor certification applications electronically; (2) certification of the application is no longer a multi-step process involving both the State Workforce Agency (SWA) and the DOL – instead applications are submitted directly to the appropriate centralized processing center of the DOL; and (3) supporting documentation demonstrating that the employer has completed the required recruitment steps for the offered position is not submitted with the application. In some cases, DOL will never see the recruitment materials. Instead, this information must be maintained by the employer for five years and is subject to government audit. To identify and deter fraud, DOL has the authority to conduct both targeted and random audits, and the Certifying Officer in each case is authorized to order supervised recruitment when he or she deems it to be appropriate.

With the implementation of these changes under PERM, the DOL anticipates that an electronically filed application not selected for audit will have a computer-generated decision within 45 to 60 days of the date the application was initially filed.

While relieved by the promise of expedited processing times, some employers are concerned about other aspects of the PERM regulations, specifically a stricter approach to the prevailing wage standard and a more extensive recruitment process. Employers must now pay the foreign employee at least 100% (rather than the previously required 95%) of the prevailing wage for the offered position. In addition, the revised recruitment process for a professional position now requires the employer to: place a 30-day job order with the SWA; advertise the position in two Sunday newspaper editions; and undertake at least three additional means of recruitment from a list of ten options including job fairs, job search web sites, on-campus recruiting, trade or professional organizations, private employment firms, and radio and television advertisements. Despite the more rigorous recruitment process, the PERM regulations promise to bring a much needed overhaul to the labor certification process that is bound to be a substantial improvement to the previous system. ■

PREVENTING AND DEFENDING EMPLOYEE RETALIATION CLAIMS

Andrew R. Fox



Love and marriage. Death and taxes. Starsky and Hutch.

The individual elements of these coupled concepts are closely related to their counterparts but also possess unique attributes. This also applies to employee claims of discrimination and claims of retaliation. While

employers are generally aware of the protections from discrimination on the basis of race, gender, national origin, religion, disability, and age afforded to their employees by the law, they must also be intimately familiar with the interconnected yet unique concept of retaliation.

Retaliation is unique from other antidiscrimination claims in certain key aspects. First, employees don't need to belong to one of the protected classes identified by Title VII and other antidiscrimination laws; they must merely act to oppose conduct made unlawful by those statutes. Second, even where no unlawful discrimination occurred, an employer may still be liable to an employee for taking retaliatory action as long as the employee acted on a reasonable, good faith belief that the employer was engaged in unlawful discrimination. Though retaliation claims arise only from related discrimination claims, they can take on a life of their own.

Claims of retaliation are often more difficult for employers to defend than underlying claims of discrimination because the employee need only demonstrate a small amount of circumstantial evidence linking an adverse employment action to some protected activity in which they claim to have participated. Once the employee has made this showing, the burden shifts to the employer to produce evidence that it acted in a legitimate and nondiscriminatory fashion. Furthermore, claims of retaliation often involve highly contested issues of fact and in many cases come down to the credibility of the employee and the supervisor. Finally, victims of retaliation are entitled to the full scope of remedies offered under Title VII, including back pay, reinstatement, damages for emotional pain and suffering, punitive damages, and their attorneys' fees.

For these reasons, employers must be especially sensitive to potential claims of retaliation and take steps to prevent such claims and successfully defend them should they arise.

What Are the Elements of a Claim of Retaliation?

To state a claim for retaliation, the employee must prove that he or she engaged in a protected activity, that the employer took an adverse action against the employee, and that there is a causal connection between the two events.

A protected activity is an action taken by an employee to prevent, expose, or report the unlawful discriminatory acts of the employer (opposition) or to assist in the investigation or testify in the adjudication of such a claim (participation). Protected activities may be informal, such as verbally complaining about or discussing the practice the employee believes to be discriminatory; or formal, such as filing a Charge of Discrimination with the Equal Employment Opportunity Commission. Acts of an employee along these lines are protected unless they are illegal, insubordinate, disruptive, or nonproductive.

Informal protected activities often pose special problems for employers. An offhand or isolated comment or complaint in a casual conversation with a supervisor could constitute a protected activity. Similarly, an employee may claim that he or she made verbal complaints to his or her supervisor that were ignored, which can create a contested issue of fact that is difficult for the employer to defend.

An adverse employment action is one that adversely affects the terms, conditions, or benefits of employment. Certain “ultimate” employment actions will easily meet this standard, such as firing, refusing to hire, demoting or refusing to promote, or reducing the compensation of an employee. Less tangible actions may or may not constitute an adverse employment action. Examples include involuntarily transferring the employee into a comparable position in another department, reducing or expanding an employee’s duties or authority, or revoking a privilege or perquisite of employment.

Finally, the employee must prove that a causal connection exists between the protected activity and the adverse employment action. This obstacle is extremely low. In most cases, the employee need only show two things: first that the protected activity occurred prior to the adverse action and the two events occurred within a reasonably short period of time. Second, the employee must demonstrate that the employer was actually aware of the protected activity. These two elements are usually sufficient to satisfy the employee’s burden of showing the required causal connection.

The Employer’s Defense: The Legitimate, Nondiscriminatory Rationale

If the employee satisfies the three elements of the basic retaliation claim, the burden shifts to the employer to show that it took the adverse action for a legitimate reason that was unrelated to the employee’s participation in the protected activity. The employer will meet this burden as long as it expresses a rationale for its action that is unrelated to the protected activity and otherwise consistent with the law.

Where the Rubber Meets the Road: Pretext

Once the employer articulates its reason for taking an adverse

employment action against the employee, the burden shifts back to the employee to prove that the employer has fabricated this rationale to hide its true discriminatory intent. Generally, the employee can demonstrate this to be the fact in one of two ways. First, the employee can demonstrate pretext by producing evidence that undermines the employer’s stated rationale. For example, an employee can point out the lack of documentation supporting the employer’s position. Second, the employee can demonstrate that, although the employer has identified true and accurate evidence in support of its stated rationale, other employees who exhibited similar conduct were not subjected to the adverse action that the employee suffered, thus creating a strong inference of discriminatory intent.

Preventing and Defending Employee Retaliation Claims

Much like the common cold, there is little to nothing an employer can do to completely insulate itself from claims of retaliation, but there are steps it can take to minimize the risk and potential harm associated with such a claim.

- Document employee performance and conduct issues thoroughly and consistently. A negative performance evaluation can provide strong support for an employer’s articulated rationale for taking an adverse employment action, but not if it is the first and only performance evaluation the employee has received despite working for the employer for several years. Similarly, if the employer takes the adverse action on the basis of an ongoing or general rationale (the employee has a ‘bad attitude’ or is insubordinate, for example) that is not supported by individual documentation of events supporting that rationale, the finder of fact will be much more likely to determine the rationale to be pretextual.

Also ensure that managers document claims and complaints of discrimination no matter how minor or how informally stated and bring them to the employer’s attention. An employee’s claim that he or she reported discrimination and that the report was ignored by management creates a very difficult issue of fact for the employer to defend.

- Ensure your Equal Employment Opportunity policy discusses prohibited forms of retaliation and that employees are familiar with the policy. Train managers and supervisors frequently regarding retaliation and include retaliation in any discussions, no matter how hypothetical or preliminary, regarding a potential or actual discrimination claim. Consider requiring that employees’ complaints of discrimination be made in writing. While this will not prevent an employee from stating a claim of retaliation based on an informal report of discrimination, it will help in asserting the employer’s defense that it was unaware of the protected activity and/or that the employee lacked a reasonable or good faith belief that the employer was engaging in unlawful discrimination.

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■ Involve Human Resources, counsel, or another impartial party or parties (such as a supervisor from another department) in employment decisions which could constitute an adverse employment action. Actions independently considered and supported by a third party lend considerable credibility to an employer's claim that its rationale was legitimate and nondiscriminatory.

■ Finally, when a parting of the ways is necessary with an employee who may harbor a belief that he or she has been discriminated against, consider offering severance pay or other consideration in exchange for a release from possible claims. The only way to prevent the risk of a future retaliation claim is to reach a mutually acceptable severance agreement with the employee that includes a release on any and all of the employee's EEO-related claims. ■

NEW USERRA POSTING, EXTENDED HEALTH BENEFIT REQUIREMENTS GO INTO EFFECT

Andrew R. Fox

In December of 2004, Congress enacted and President Bush signed into law the Veterans Benefits Improvement Act. This law chiefly concerns education benefits afforded to veterans of the Armed Forces such as the GI Bill. Of particular importance to employers, however, it also specifies two new obligations under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).

First, the new law requires that employers post a notice of employees' USERRA rights in a prominent place where employees customarily check for such information. The Department of Labor was tasked with establishing the required contents and issued this information in early March. A Portable Document Format (.pdf) version of the new poster is available on the Department of Labor's web site at <http://www.dol.gov/vets/programs/userra/poster.pdf>. This requirement went into effect on March 10, 2005.

The second new requirement pertains to health care coverage. USERRA gives employees who are absent from work because of duties in the uniformed services the right to continue employer-provided health care coverage. The employee may elect to continue his or her health care coverage and cannot be charged more than 102% of the full premium under the employer's plan (this allows the employer to collect a nominal fee for the administrative cost of continuing the coverage). The new act extends the maximum coverage period of employer-sponsored health care for USERRA-covered employees from 18 to 24 months. This new requirement applies to all such elections by employee service members made on or after December 10, 2004.

USERRA is a comprehensive federal law that applies to all employers regardless of size. It protects the rights of all members of the Armed Services and may also extend to several other public service agencies and virtually any group the President designates. Its employment and reemployment rights provisions apply broadly to military reservists (including those who are mobilized to active duty, whether voluntarily or involuntarily for any period of time up to five years), employees without prior service who join the Armed Forces, and nonaffiliated employees who assist other employees in enforcing their rights under the law. ■



LABOR AND EMPLOYMENT LAW

Wm. E. Rachels, Jr.	wrachels@wilsav.com	757/628-5568
William M. Furr	wfurr@wilsav.com	757/628-5651
Samuel J. Webster	swebster@wilsav.com	757/628-5518
Susan R. Blackman	sblackman@wilsav.com	757/628-5646
Timothy M. McConville	tmconville@wilsav.com	757/628-5581
Andrew R. Fox	afox@wilsav.com	757/628-5688

LEGAL ASSISTANTS

Gillian W. Field	gfield@wilsav.com	757/628-5645
Leslie M. Smith	lsmith@wilsav.com	757/628-5621

•

EMPLOYEE BENEFITS

James R. Warner, Jr.	jwarner@wilsav.com	757/628-5570
David A. Snouffer	dsnouffer@wilsav.com	757/628-5678

•

WORKERS' COMPENSATION

Stephen R. Jackson	sjackson@wilsav.com	757/628-5642
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