

EMPLOYMENT DISCRIMINATION

Younger Workers Sue For Age Discrimination - And Win!

Can a 40 year old employee sue his employer for age discrimination if his employer treats 50 year old employees better? In other words, can an employee sue for “reverse” age discrimination? While most courts have said no, the United States Court of Appeals for the Sixth Circuit (which covers Kentucky, Michigan, Ohio and Tennessee) recently said yes!

The Age Discrimination in Employment Act (ADEA) prohibits discrimination on the basis of age against employees who are at least 40 years old. When an employer entered into a new collective bargaining agreement which gave better retiree health benefits to employees who were age 50 or over, employees between 40 and 49 years old filed suit. They claimed that the new collective bargaining agreement unlawfully discriminated against them.

Two judges (of a three judge panel) agreed this could be unlawful age discrimination. *Cline v. General Dynamics Land Systems, Inc.*, No. 00-3468. The judge who wrote the majority opinion noted that Congress could have limited the ADEA to protect only those workers who are relatively older, but it did not do so. The dissenting judge wrote as follows:

“Whether you call it ‘reverse discrimination’ or not, no court in the nation has recognized a claim for age discrimination under the ADEA when brought by younger workers within the protected class arguing that they were discriminated against in favor of older workers. As the majority recognizes above, the ADEA was developed by Congress for the purpose of alleviating problems faced by older workers, not the problems of younger ones.”

Now what? Will this open the floodgates for litigation between the middle-aged and the aged? What about severance plans that give an extra amount to employees over a certain age? What about special incentives to retire “early”?

Until the Supreme Court resolves this issue, uncertainty reigns. In the meantime, employers in the Sixth Circuit need to make sure their employment practices and benefit programs don’t discriminate against younger older (i.e., 40+) workers. Employees in Illinois, however, are currently bound by Seventh Circuit precedent that clearly finds “reverse” age discrimination to be oxymoronic (if not just plain moronic).

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Mandatory Arbitration Held Unenforceable Because Employee Could Not Recover Attorneys' Fees

Gloria McCaskill was required to sign an arbitration agreement as a condition of employment. The agreement covered a wide variety of employment-related disputes. It further provided: "Each party may retain legal counsel and shall pay its own costs and attorneys' fees, regardless of the outcome of the arbitration." This provision is contrary to Title VII, which allows a prevailing plaintiff to recover her attorneys' fees and costs. In 1999, McCaskill filed a discrimination charge with the EEOC claiming race discrimination and retaliation. Later, she sued the company in federal court in Chicago.

The company filed a motion to compel arbitration and to dismiss the case. The court agreed that arbitration was required. On appeal, the employee argued that the agreement was unenforceable because of the provision depriving her of the full opportunity to recover attorneys' fees. A three-judge panel, by a 2-1 margin, agreed. *McCaskill v. SCI Management Corp.*, Case No. 00-2839 (7th Cir.). One judge voted to reverse the lower court because he thought the attorney for the employer had conceded during oral argument that the arbitration agreement was unenforceable due to the attorneys' fees provision. Another judge found that the alleged admission during oral argument was not sufficient to justify reversal. But she still concluded that reversal was appropriate, because she found the right to attorneys' fees is integral to the purposes of Title VII. Therefore, even though the judges disagreed as to the reason for their conclusion, they agreed that the arbitration agreement could not be enforced because of the failure to allow the plaintiff to recover her attorneys' fees in the event of a victory.

Although the courts continue to talk about how they favor arbitration, this case again highlights the fact that mandatory arbitration of employment discrimination claims is very difficult to achieve. Because the courts are not uniform on what is required to enforce a mandatory arbitration agreement, employers operating in more than one state must be careful to avoid "one size fits all" agreements.

White Supremacist Organization Entitled to Religious Protections

The World Church of the Creator does not espouse a belief in any sort of supreme being. What it does espouse is a white supremacist doctrine and a disparagement of all non-whites. A "reverend" in the World Church of the Creator who was the manager of a compa-

ny in Wisconsin, had supervisory responsibility over both white and non-white employees. After a newspaper article appeared in which the employee described his involvement in the Church and his beliefs, he was demoted to a non-supervisory position. The demotion letter stated that he was being demoted due to a concern about a possible lack of objectivity when he had to compare whites to non-whites with respect to training, evaluation or supervision.

The employee sued, claiming that his white supremacist views were religious, not political. After a thorough analysis of what constitutes a religious belief protected by Title VII, the court agreed with the employee! Granting summary judgment to the employee, the court found that the employee's white supremacist beliefs functioned as a religion in his life. Furthermore, there was no evidence that he had engaged at work in any racially discriminatory act that would justify his demotion. *Peterson v. Wilmur Communications Inc.*, Case No. 01-C-0162 (E.D. Wis.).

This appears to be a good example of how even the most well-intentioned laws (Title VII was intended to protect non-whites who had long been subjected to discrimination) can be twisted to protect those who the lawmakers never intended to protect (i.e., employers whose proclaimed goal is to discriminate against minorities).

EEOC Not Intimidated By Supreme Court Ruling On Undocumented Workers

In *Hoffman Plastic Compounds, Inc. vs. NLRB*, the Supreme Court held that workers who are not eligible to work in the United States cannot recover back pay even if their termination constituted an unfair labor practice. As a result of that decision, the EEOC has rescinded a 1999 guidance in which it stated that undocumented workers could get the same remedies available to other workers under Title VII of the Civil Rights Act of 1964. The EEOC also indicated that it will no longer seek reinstatement or back pay for those workers.

On the other hand, the EEOC announced that it will not inquire into a worker's immigration status or consider an individual's immigration status when it investigates a charge. If the EEOC finds that there has been discrimination, it will try to recover compensatory and punitive damages for illegal aliens. The EEOC also stated that it will continue to work with community groups as part of its outreach to prevent discrimination against immigrant workers. Presumably, the EEOC made this announcement to ensure that employers realize that the Supreme Court's decision in *Hoffman Plastic Compounds* does not give a free pass to discriminate against undocumented workers.

LABOR-MANAGEMENT

New Law Proposed to Require Secret Ballot Elections Before Union Can Be Recognized

In recent years, many unions have been devising ways to get recognized as the bargaining representative of groups of employees without having to win a secret ballot election conducted by the NLRB. Instead, the union seeks “neutrality” agreements with employers. Generally, these neutrality agreements require employers to recognize the union based on authorization cards signed by a majority of the employees, and they also prohibit the employer from doing or saying anything to discourage employees from signing the union authorization cards. Neutrality agreements have been obtained in many different ways. Sometimes, it is through a collective bargaining agreement requiring neutrality with respect to any new operations of that employer. Other times, it is by state or local government fiat as a condition of being involved in a government-financed project. Some unions have also been successful in “corporate campaigns,” where they pressured the company and/or board of directors through threats of consumer boycotts or adverse publicity.

Regardless of how unions obtain a neutrality agreement, it has become an increasingly important union organizing tool. But Representative Charles Norwood (R-Ga), Chairman of the House Workforce Protection Subcommittee, wants to put a halt to its use. Rep. Norwood has proposed a bill to require a secret ballot election for a union to gain bargaining rights. The bill, known as the “Workers Bill of Rights” (H.R. 4636), would amend the National Labor Relations Act in a variety of ways. For example, it would also require that union members be given the right to vote on whether or not to strike. A hearing was held on the bill on July 23, 2002. After the hearing, Rep. Norwood told the Bureau of National Affairs that he intends to begin advocating for the legislation after the November elections. He recognized, however, that it is likely to take a long time to build support for his legislation, particularly in view of the strong opposition expected from organized labor. We will follow this legislation carefully and keep our readers advised as to its progress, if any.

Union Supporters’ Threats Void Election

A union election at Kentucky Tennessee Clay Company resulted in a union victory by a 23-21 vote. The company filed objections to the election, alleging that two employees had interfered with the free election by threatening other employees that they would lose their jobs if they did not support the union. The National Labor Relations

Board (NLRB) found that the two employees’ statements could not be attributed to the union, and the threats did not taint the election because the employees who were threatened knew that the two pro-union workers did not have the power to fire them. Because the NLRB’s rulings on objections to elections cannot be appealed, the company challenged the ruling by refusing to bargain with the union. The union then filed an unfair labor practice charge against the company. Of course, the NLRB again ruled against the company.

The Fourth Circuit Court of Appeals first disagreed with the NLRB’s ruling that the two employees who made the threats were not union agents. Instead, the court found that the only professional union organizer involved in this case never even visited the facility. Finding that the two employees who made the threats had been delegated tasks by the professional union organizer, the court held that the union was bound by their conduct.

Next, the court found the Board had abused its discretion in determining that the misconduct did not taint the election. According to the court: “[W]e conclude that the employees reasonably believed that [the two pro-union workers] would be able to effectuate their removal from the workforce if the union prevailed, either by ‘setting them up’ to be terminated by management or by making their working conditions so miserable as to force them to leave.” The court therefore found that the threats had a material effect upon the election, since coercing even a single employee could have changed its outcome. Accordingly, the court refused to enforce the bargaining order. *NLRB v. Kentucky Tennessee Clay Company*, Case No. 01-2202.

Controversial Executive Order Upheld By D.C. Court

Shortly after President George W. Bush took office, he issued a series of Executive Orders that organized labor attacked as anti-union. One of those Executive Orders, E.O. 13,202, provided that no federal agency or entity receiving federal assistance for a construction project could require bidders or contractors to enter into a Project Labor Agreement. A Project Labor Agreement generally requires all contractors who work on a construction project to abide by a collective bargaining agreement covering the work on the project.

The Building and Construction Trades Department of the AFL-CIO and the City of Richmond, California, promptly brought a lawsuit challenging the validity of the Executive Order. A few weeks later, a federal judge held

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the Executive Order to be invalid and enjoined its enforcement.

On appeal, a three-judge panel of the Court of Appeals for the District of Columbia held that the President had the authority to issue E.O. 13, 202 and that it was not preempted by the National Labor Relations Act. In the court's opinion, the President acted within his constitutional authority because the Executive Order expresses a "proprietary policy" rather than a "regulatory policy."

The likelihood is that the AFL-CIO will appeal this decision to the Supreme Court. In the meantime, however, it is expected that federal government bids will no longer require the winning bidder to enter into a collective bargaining agreement. This does not mean that federally financed projects will all be performed non-union; it only means that bidders on such projects cannot be required to enter into union contracts as a condition of working on a federally financed project.

MISCELLANEOUS

Babysitting Dad May Have FMLA Rights

Can a parent take leave under the Family and Medical Leave Act to babysit?

Generally, the answer is "no." However, a federal court in Louisiana has ruled that a father who was fired after taking time off to care for his three healthy children while another of his children was hospitalized could pursue a lawsuit under the FMLA.

The employee's sixteen-month-old son became gravely ill and was hospitalized. Since his wife was at the hospital with the child who was ill, the employee took time off to watch his other children at home. He was fired for dishonesty after his employer called his home, but was told that he was not there -- at the same time that the employee was calling off work and indicating that he was at home.

The employer argued that: (1) the employee was fired for dishonesty, not because of the leave; and (2) the employee had no right to take FMLA leave to take care of his healthy children. Generally, FMLA leave is only available when an employee needs leave to care for a child with a serious health condition. The Court acknowledged this and noted that it wasn't "clear beyond doubt" that the FMLA applied to this circumstance. Despite this, it decided to give the employee the benefit of the doubt, and ruled that he could proceed with his lawsuit. *Briones v. Genuine Auto Parts*, No. 01-1792.

What can employers learn from this case? Sometimes it is better to give some extra time to an employee who has a difficult family situation, even if he or she may not be entitled to leave under the strict letter of the law -- since judges and juries may do so anyway.

OSHA Plans Announced

The Assistant Secretary of Labor for OSHA, John L. Henshaw, gave a very positive report to Congress on the state of occupational health and safety. He noted that the overall injury/illness rate has fallen for eight consecutive years and cooperation between business, labor and OSHA is higher than ever.

Henshaw also reported on plans to create more voluntary programs and more partnerships with business and/or labor. In addition to its general enforcement activities, Henshaw said that the agency will focus on increased safety for immigrant workers and increased education and outreach efforts - including an improved OSHA website, more expert advisers, a greater emphasis on help to small businesses, and a new training grant program.

GENERAL GUIDELINES FOR CONDUCTING HARASSMENT INVESTIGATIONS

Claims of harassment, sexual and otherwise, continue to grow. All claims of harassment must be thoroughly investigated. Following are some general guidelines on how to conduct such investigations. These guidelines may not be appropriate in every situation; you should always be prepared to adjust your investigative strategy based on the particular facts and circumstances of the situation confronting you.

Investigation Process:

1. Interim Measures

The investigator should consider taking interim measures to prevent continued harassment during the investigation. These interim measures should be carefully designed to ensure that they do not negatively impact the complainant, and are not perceived by the complainant as retaliation for lodging a complaint. For example, the complainant generally should not be transferred if he or she prefers to keep the same job.

2. Interviewing the Complainant

When the employer becomes aware of an allegation of harassment, the investigator should promptly interview the complainant. If the complainant is a different person than the individual who was allegedly the victim of harassment, then the alleged victim should also be promptly interviewed. The investigator should:

- obtain as much detail as possible from the complainant using open-ended questions (Who? What? Where? When?);
- find out if there are any witnesses to corroborate the allegations;
- assure the complainant that harassment is not tolerated by the employer and that there will be no retaliation for good faith claims of harassment or for providing information about these claims;
- assure the complainant that confidentiality will be maintained to the extent possible and instruct the complainant of the desire to maintain confidentiality;
- assure the complainant that someone will look into the matter and get back to him or her;
- make a written report of the interview which records the facts obtained during the interview, as opposed to the investigator's comments or conclusion; and
- have the complainant review the report, make any corrections and sign it.

Keep in mind that the investigator should not express disbelief about what the complainant is saying (even if there is reason to doubt the truthfulness of what is being said). The investigator should keep an open mind until the investigation is completed.

3. Interviewing the Accused

Generally, the investigator should then interview the accused. There may be occasions, however, when it is more appropriate to interview corroborating witnesses first. The sequence of interviews should be determined on a case-by-case basis. When conducting interviews, the investigator should:

- advise the accused of the nature of the complaint;
- advise the accused that the investigator is conducting an investigation and that a determination has not yet been made;
- obtain a response to each of the complainant's specific allegations;
- find out if there are any witnesses that corroborate the accused's side of the story;
- reiterate the company's policy that harassment will not be tolerated, that the complainant cannot be retaliated against for making a claim of harassment, and that witnesses cannot be retaliated against for providing information about such claims;

- advise the accused that confidentiality will be maintained to the extent possible and instruct the accused to maintain confidentiality;
- make a written report of the interview which records the facts obtained during the interview, as opposed to the investigator's comments or conclusions; and
- have the accused review the report, make any corrections and sign it.

4. **Interviewing Witnesses**

The investigator should also interview any witnesses. The investigator should:

- obtain as much detail as possible from him or her using open-ended questions (Who? What? Where? When?) and, if necessary, ask specific questions;
- explain that no one has made a determination as to the merits of the complaint;
- find out if he or she witnessed anything;
- reiterate the employer's policy that harassment will not be tolerated and that the witness will not be retaliated against for providing information about such claims;
- advise the witness that confidentiality will be maintained to the extent possible and instruct the witness to maintain confidentiality;
- make a written report of the interview which records the facts obtained during the interview, as opposed to the investigator's comments or conclusions; and
- have the witness review the report, make any corrections and sign it.

5. **Determining the Merit of the Complaint**

After concluding the interviews, the investigator should determine the validity of the complaint. The investigator's conclusions regarding the merits of the complaint should be put in writing.

A. Claims that cannot be substantiated

If the company determines that there was no harassment or that it cannot determine whether harassment has taken place, it should inform the complainant of this conclusion. A representative of the company should also meet with the accused and advise him or her that the investigator was not able to substantiate the complaint of harassment -- but the investigator should also reiterate the employer's policy prohibiting harassment and retaliation.

B. Claims that can be substantiated

If the company determines the claim has merit, it must take prompt and appropriate remedial action reasonably calculated to end the harassment. Depending on the severity of the conduct, remedial action may consist of an oral or written warning, transfer of the harasser, suspension, or termination of the harasser's employment. In addition, if the harassment has resulted in a tangible employment action, the company should consider reversing the action. A representative of the company should meet with the accused and advise him or her of the corrective action to be taken and reiterate the policy prohibiting retaliation. He or she should also meet with the complainant and tell him or her the outcome of the investigation, and should again reiterate the policy prohibiting harassment and retaliation.

6. **Monitoring the Situation**

Regardless of the conclusion reached by the employer, it should monitor the situation over the next few months to ensure that the harassment has not continued or escalated and that retaliation has not occurred. For example, the investigator can periodically ask the complainant such open-ended questions as: "How is everything going? Are you having any problems?"

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