Klein Zelman Rothermel

Report From Counsel

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EEOC ISSUES

I. Supreme Court Rules on EEOC Statute of Limitation: When Must an Employee File a Discrimination Charge Over Pay?

One of the thornier questions under EEOC law is determining when a charge filed with EEOC is timely. Must the charge be filed when an employee knows she will be fired or on the effective date of the discharge? Similarly, if an employee claims that she was underpaid for discriminatory reasons, does the statute of limitations begin to run on the date of the first underpayment, or does each paycheck begin a new statute of limitations? In *Ledbetter v. The Goodyear Tire and Rubber Co.*, 127 S.Ct. 2162 (2007), the Supreme Court ruled that the limitations period under EEOC law begins when a "discrete act" of discrimination occurs, and that because a pay-setting decision is a discrete act, the time for filing begins when that act occurs.

The plaintiff in this case, Ledbetter, argued that a pay disparity resulting from discrimination is perpetuated each time a paycheck is issued and, therefore, each paycheck constitutes a separate violation. The court noted that Ledbetter's claim required a showing of discriminatory intent. But the alleged act of discrimination which resulted in lower paychecks occurred in 1998. In effect, Ledbetter was arguing that the paychecks were the by-product of a discriminatory act which occurred before the limitations period began.

The Court rejected this argument. It noted an earlier Supreme Court decision in which the plaintiff resigned from United Air Lines when the company refused to employ married flight attendants. When she was rehired years later, she was assigned a new seniority date which did not give her credit for prior service. The plaintiff argued that while she could not timely challenge her forced resignation, she could challenge her seniority date because the prior act of discrimination perpetuated the consequences of past discrimination. The Court held that the critical question was whether any present act of discrimination occurred and that the recurring effects of past discrimination did not constitute a present violation. *United Airlines v. Evans*, 431 U.S. 553 (1977). Similarly, in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the Court held that a charge was time barred when a college teacher received notice of non-renewal of his contract effective one year later but did not file a charge until after he stopped working. The Court found that the limitations period began when the teacher knew that his employment was being terminated, not when he actually left the payroll.

In a nutshell, the Court held that the EEOC charging period is triggered when a discrete act of discrimination occurs and that a new violation does not occur, and a new charging period does not commence, when there are subsequent nondiscriminatory acts that have adverse consequences resulting from the earlier act of discrimination. The Court also recognized that when an employer engages in a series of acts, each of which is motivated by discrimination, each act triggers a new limitations period.

A vigorous dissenting opinion was filed by Justice Ginsburg, joined by Justices Breyer, Souter, and Stevens. Justice Ginsburg analogized a discriminatory paycheck to a claim of hostile environment, which the Court

has recognized as a "recurring" violation. In her view, the Court was holding that: "Knowingly carrying past pay discrimination forward must be treated as lawful conduct" and, even when past discrimination is apparent, a company, under the Court's ruling, can continue to discriminate into the future. According to Justice Ginsburg, the Court's ruling is "totally at odds with the robust protection against workplace discrimination Congress intended Title VII to secure."

2. Scope of a Charging Party's Duty to Exhaust Remedies

Federal Law requires that an employee file charges with EEOC and/or state discrimination agencies before proceeding to court. But what is the charging party's duty? Is it discharged if the charging party files a charge with EEOC but then refuses to cooperate with the EEOC investigation. The Supreme Court decided not to review a court of appeals decision holding that the duty to exhaust does not require that the employee cooperate with EEOC in its investigation. *Doe v. Oberweiss Dairy*, 456 F.3d 704 (7th Cir. 2006).

In this case, the charging party, who was a teenager, alleged that she had been raped by her supervisor but refused to discuss the details with EEOC. The employer argued that the purpose of the exhaustion requirement was to give EEOC the opportunity to resolve discrimination complaints before a lawsuit could be filed and that this purpose is frustrated if a charging party files the required charge but refuses to cooperate in EEOC's investigation. The court of appeals held there is a difference between the charge-filing requirement of Title VII and the general rule of administrative exhaustion. The court held that as long as the employee files a charge with EEOC and waits until a right to sue letter has been received, the employee has standing to bring her discrimination case to court. By not accepting review of this decision, the Supreme Court has not affirmed the court of appeals but has effectively enforced its judgment in this case.

3. "Cat's Paw" Liability

A very interesting case was pending in the Supreme Court, but the employer decided to drop its appeal. However, the same theory has surfaced in other cases, and the Supreme Court, which was in the process of reviewing the case just dropped, is expected to grant review in another case raising the same issues.

Under Title VII, a finding of discrimination usually requires a finding that the defendant acted with discriminatory animus. However, some courts have created an exception to this requirement, finding that discrimination can be found even if the person who fired or disciplined a protected employee had no animus. In the recently-withdrawn case, an Afro-American employee sued for racial discrimination, but the court found that the supervisor who fired her did not act with racial animus. Plaintiff argued that such animus is not necessary if the supervisor acted based on documents that themselves were infected with racial animus. It's an interesting theory (referred to as a "cat's paw" theory), and it will be interesting to see how the Supreme Court rules on the subject.

4. Reasonable Accommodation

Cases continue to be decided on the question of what kind of accommodation is required for a disabled employee. In other words, what do the courts consider a "reasonable" accommodation? In *Rehrs v. The Iams Co.*, 486 F.3d 353 (8th Cir. 2007), the Eighth Circuit court of appeals addressed the question of what kind of scheduling accommodation is required for an employee whose doctor requested that he not be required to work on rotating shifts.

In this case, the plaintiff, Rehrs, had diabetes. The employer's plant operated 24 hours a day on a three-shift basis. When the employer decided to change to two rotating shifts (two 12-hour shifts beginning at 12 AM and 12 PM; the employees on each shift rotated between the 12 AM and 12 PM shifts every two weeks), Rehrs' doctor wrote a letter to the company requesting that Rehrs be limited to one shift without having to rotate because a fixed schedule would facilitate efforts to control his blood sugar level. The employer declined the request, contending that ability to work on rotating shifts was an essential element of Rehrs' job, and, therefore, the requested accommodation was unreasonable. EEOC submitted an *amicus* brief supporting Rehrs.

The court agreed with the employer, rejecting the position advocated by Rehrs and EEOC. The employer argued that shift rotation was part of its high performance work system because day shift employees have different duties than night shift employees, and, therefore, working both shifts broadens employee knowledge and possibilities for advancement. It also contended that allowing one employee to work a fixed shift would create inequities for other employees by placing a greater burden on them. The court accepted these arguments, noting that a requested accommodation will be deemed unreasonable if it causes other employees to work harder or be deprived of advancement opportunities. The court also expressed reluctance to substitute its judgment for the company's about what procedures are most efficient and productive.

This decision is typical of many recent federal court decisions in which the courts have limited the obligation of employers to accommodate disabled employees when the employer can plausibly show that the requested accommodation will adversely affect its business operations.

LABOR LAW

I. Employee Free Choice Act

An Employee Free Choice Act is pending in Congress. If enacted, this law would make major changes in federal labor law. Although chance of passage is almost nil, the law provides interesting insight into what might be passed if Democrats assume control of Congress and the White House.

One change proposed in the bill is that employers would be required to recognize unions based on a showing of authorization cards and without an NLRB election. This is a radical change in procedure. Under the current law, recognition by card check is lawful but the employer has no obligation to recognize a union based on cards and can demand an NLRB election.

The two sides of the underlying policy debate were predictable. The unions argued that a major impediment to unionization is the employer's right to frustrate employee rights by engaging in anti-union campaigns and then, if the union wins the election, frustrate the bargaining process through "hard" bargaining which doesn't produce a contract, leaving the union months or years later without the support needed to achieve a good deal for its members. The employer side argued that the act (called the "EFCA") would radically change existing law; deprive the employer (and indirectly the employees) of the opportunity to learn of the disadvantages of unionization and effectively give the unions an organizing tool that will result in union recognition which would not have occurred if a fair and full discussion of the merits of unionization occurred during an election campaign.

A second major change is that EFCA would require compulsory "interest" arbitration if a first contract were not reached. That means that an arbitrator would set the terms of the first contract if the parties did not reach agreement. This, too, is a radical change. Under existing law, the NLRB regulates the process of bargaining, not the results, which are supposed to be a by-product of the relative economic strength of the opposing parties. Strong unions, in theory, get good contracts, and weak unions don't. Under the EFCA, the union which lacks the economic muscle to obtain a decent contract gets one through arbitral ruling. The unions argue that mandated arbitration is the only practical way to offset the employer's ability to frustrate bargaining with lawful but chilling tactics; the employers argue that EFCA gives the union a contract that it could not obtain on its own and puts the government for the first time in the position of determining the results of bargaining, rather than the parties themselves.

As long as Republicans control the White House, there is little chance that EFCA will become law. However, the strong support for this law suggests that unions may get a major – some would say radical – boost if Democrats take control of the Congress and White House.

2. Employee Use of Email

The NLRB heard oral argument in March on a pending case (*Guard Publishing Co.,* No. 36-CA-8743-1) that is expected to establish new law on employee organizing and communicating by email. The underlying issue is the extent to which employees have a statutory right to use email at work for those purposes.

Existing law stems from a Supreme Court decision in 1946 holding that employees have a right to engage in union activity on company property as long as they are not working at the time. In *Guard Publications,* the Board's General Counsel is arguing that the Supreme Court's decision should generally apply to email and that employees should have a statutory right to use company email for union purposes just as they can engage in organizational activity on company property. The company, supported by several amicus briefs, argues that email use is different than solicitation because email will be received and opened during work hours, thereby interfering with work. Under the Supreme Court decision, an employer is privileged to limit union solicitation to non-work times as long as it does not permit other types of solicitation. But with email, it is almost impossible – and disruptive – to monitor all employee email to insure that it is only being used for business purposes. Therefore, the argument that the employer can protect itself by prohibiting all personal use of mail is theoretically sound but practically unworkable.

We'll see how the Board deals with this difficult issue.

3. Unfair Labor Practice Remedies: Back Pay Calculations

The Board's General Counsel is seeking to change the method of computing back pay by compounding interest. The Board in the past has calculated interest without compounding. This change will significantly increase the cost of back pay. This change is a bit surprising because it is being instituted by a Republican General Counsel. However, compounding interest is used for back pay awards by other agencies; it was a logical justification (to make the employee whole) and, therefore, can't be viewed as a radical change.

4. Preemption

The Supreme Court has decided to review a court of appeals decision upholding a California law which prohibits employers who receive more than $10,000 from state funds from campaigning against unionization. Many states have adopted this kind of "neutrality" law. The purpose is to assist union organizing by requiring employers to remain neutral in organizing campaigns. Employers claim that these laws are pre-empted by federal labor law which allows employers to express their views about

unionization. The circuit courts have been divided on this issue. The Court's decision is expected shortly.

5. Alternate Union Roles

The principal function of a union is to represent employees in collective bargaining. The case of *Department of Labor v. Wolf Run Mining Co.*, 452 F. 3d 275 (4th Cir. 2006) suggests that, in certain circumstances, the union may lawfully fill other roles as well and use those rules to assist its organizing efforts.

The *Wolf Run* case involved an investigation by the Department of Labor of a mining explosion in which twelve miners were killed. The Department of Labor is obligated to investigate mining accidents, and federal law provides that, subject to regulations, a representative of the mine operator and a "representative authorized by his miners" may accompany the Department of Labor personnel on their investigation. The Department of Labor regulations define a representative of miners to mean "any person or organization which represents two or more miners at a coal . . . mine." The issue presented by the *Wolf Run Mining* case is whether a labor union, which has been unsuccessful in organizing the miners at the Wolf Run Mine, may represent a group of Wolf Run miners in a Department of Labor investigation.

Wolf Run argued that the United Mine Workers (U.M.W.A.) was seeking to represent the miners in the investigation as a cloak for its effort to organize the mine. The Court rejected this argument, stating that the Act does not restrict who may serve as a miner's representative in a mining investigation and that under the regulations "any person or organization" may qualify for this purpose.

Wolf Run also argued that allowing the U.M.W.A. to represent a group of miners in the mining investigation would inevitably lead to abuse because the union's real purpose was not to protect the individual miners but to organize the larger group. The court also rejected this argument because it "assumes that it is inevitable that the union will abuse its limited role as the miners' representative."

Recognizing that there was a possibility for abuse, the court concluded that there were other remedies available to Wolf Run if such abuse occurred and that, at least for purposes of a preliminary injunction, the court agreed with the lower court's finding that the broad definition of who could serve as a representative in a mining investigation – "any person or organization" – should not be limited by the court at least in the absence of specific evidence that the union was abusing its role.

What is interesting about this case is that its underlying principle could be used by a union to further its interests in an organizing campaign in the same way that the union seeks to use "salts" (union representatives who are hired by the company for the purpose of organizing) to achieve its objectives. Apart from mines, OSHA investigates claims of safety, and a union which has not been able to organize employees in a plant could obtain access to the plant – and employees – by entering the facility as a representative of employees in an OSHA investigation.

FIRM NEWS

We are pleased to welcome Adam Weiss to our Firm. Adam previously worked at Littler, Mendelson. He will work in all phases of our labor/employment law practice, and we expect him to be particularly active in litigation.

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