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Supreme Court Rejects Claim by Relatively Younger Workers

A recent decision of the Supreme Court begins with the following by stating:

"The Age Discrimination in Employment Act...forbids discriminatory preference for the young over the old. The question in this case is whether it also prohibits favoring the old over the young. We hold it does not."

General Dynamics Land Systems v. Cline, 124 S.Ct. 1236, 157 L. Ed. 2d 1094, 1103 (2004).

The case stemmed from a provision in the collective bargaining agreement between General Dynamics and the Auto Workers which eliminated the company's obligation to provide health benefits to subsequently-retired workers unless they were 50 years old when the agreement was signed. The plaintiffs were between 40 and 50 when the agreement was signed and would not qualify for retirement medical benefits under the amended language. They claimed that because they were over 40, they were protected by the ADEA (which protects workers over 40 from "discrimination because of [an] individual's age"), and EEOC agreed. Plaintiff's argued that "discrimination because of [an] individual's age" encompasses all age-based discrimination, not just discrimination against the older.

The Court concluded that this argument does not square with Congress' broad intent to prohibit discrimination "against workers who are older than the ones getting treated better." It noted that the study which recommended inclusion of age

discrimination in federal discrimination laws was grounded in concerns about the stereotyping of the ability of older workers and the arbitrary restrictions against them which resulted from those stereotypes. It also noted the testimony in Congress which focused on the unjustified assumptions about the effect of age on work ability.

Underlying the Court's decision are some practical considerations not articulated in the decision itself. For example, if the Court had agreed with EEOC, then General Dynamics would have been required either to continue providing retiree medical benefits to all future retirees—which almost no company is willing to do today—or it would have had to eliminate retiree medical benefits for all current employees, including those who were getting ready to retire based on their assumption that medical coverage would continue after retirement. It is also interesting that the Court did not issue a decision narrowly tailored to cover reductions in existing benefit plans but broadly stated that the ADEA does not protect the younger against the older. That means that a 41 year old worker has a claim of age discrimination when replaced by a 37 year old worker but a 41 year old worker is not protected when replaced by a 51 year old. It will be interesting to see how this decision is applied in subsequent cases.

Negligence: the Need to Maintain a File on Complaints about Employees

We have often commented in this newsletter that some of the most important and interesting developments in the field of labor and employment law are decisions

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rendered in the state courts. Until fairly recently, state courts did not play a prominent role in developing the law of the workplace. That has now changed and a good illustration of this is a decision by the Alabama supreme court holding a company liable for a rape committed by an employee against a customer. *Saine v. Comcast Cablevision of Arkansas*, 20 IER Cases 941 (2003).

The rape was committed by a cable installer. The evidence showed that the company had no system in place to receive and record complaints about employees and that a year before the rape, a customer had presented a complaint to a company supervisor that the same installer had engaged in lewd behavior while at her house; had taken a whole day to complete a cable installation that should have taken an hour; and that on the night of the installation, a prowler had been seen in the yard, and several windows had been unlocked. There was no record of the complaint in the company's files. The court held that the plaintiff had stated a claim for negligent retention and supervision of the installer and that the evidence described above would support a jury verdict of negligence which caused the rape.

This decision is another example of the need to formally and thoroughly investigate any claim of employee misconduct, particularly where the nature of the claimed misconduct could signal a violent or dishonest propensity of the employee. The teaching of this case is that a company which does not fully investigate the kind of claim described above, and maintain a file of the investigation, does so at its own risk and could be held liable if a similar incident causes harm to another person.

Is an Unharassed Worker Protected by Title VII?

Is an employee who protests against sexual harassment protected by

Title VII or is the protection available only to the employee who was harassed? The courts increasingly are extending the protection to the protesting employee, not only to the harassed employee.

In a recent case in Pennsylvania, an employee who had been terminated sued the employer, claiming that he was fired because he supported other workers who had been harassed, and that his support was an activity protected by Title VII even though he himself was not harassed. The district court agreed. It held that because there was evidence that harassment had occurred and because the plaintiff believed that the harassment was illegal, he was protected by Title VII. The fact that the plaintiff had not presented a formal complaint to his employer was not dispositive; it was sufficient that the plaintiff had complained and that he was fired in retaliation for making that complaint.

The case illustrates a point that companies sometimes forget: that the discrimination laws protect those who protest discrimination as well as those who are victims of the discrimination. Disciplinary action against such a protestor is just as unlawful as the underlying discrimination itself.

Supervisory Harassment: When Is the Company Responsible?

The Supreme Court declined to hear an appeal from a decision of the second circuit court of appeals in New York which seemingly expands a company's responsibility for harassment by supervisors. In *Mack v. Otis Elevator*, 91 FEP Cases 1009 (2d cir. 2003), cert. denied, Nov 27, 2003, the plaintiff, Mack, was a mechanic's helper. She sued Otis Elevator for sexual harassment stemming largely from statements and actions by a "mechanic in charge." Both Mack and the "mechanic in charge" were unionized employees covered by the same collective bargaining agreement. The

"mechanic in charge" had no authority to hire, fire or discipline, but he did have authority to direct and assign work, and he was the senior employee on the job site.

The district court dismissed Mack's harassment complaint, finding that the "mechanic in charge" was not a supervisor and, therefore, Otis Elevator, was not responsible for his actions. The court of appeals reversed and issued an interesting and important clarification of employer responsibility for supervisory conduct.

The court noted that under the Supreme Court's recent decisions in *Burlington Industries, Inc v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), an employer is vicariously (automatically) liable for an unlawful action by a supervisor which culminates in a "tangible employment action" such as firing, discipline or a change in job duties. In such a case, the employer is liable and has no affirmative defense available to it (other than a defense that harassment did not occur). In that kind of case, employer liability will be established as long as the harassing individual qualifies as a "supervisor" under the traditional definition of that term, which would include someone with authority to hire, fire, promote or discipline.

A company, however, can also be liable for supervisory harassment when there is no tangible job action. In such a case, the employer may also be vicariously liable for harassment by a supervisor but the employer has a defense available to it which is only available if the harassment had no tangible employment action—namely, that the company exercised reasonable care to prevent the harassment and correct it when it learned that the harassment had occurred. The court in *Otis Elevator* held that in the second type of case, in other words, a case with no tangible employment action, a broader definition of supervisor is permissible. Thus, the court held that the "mechanic in charge" was Mack's

supervisor even though he had no authority to hire, fire or discipline. According to the court, the "mechanic in charge" was a supervisor because he had authority, bestowed by the company, which enabled him, or "materially augmented his ability, to impose a hostile work environment."

The court seems to be saying that there are two definitions of "supervisor." When the plaintiff has suffered a tangible employment action caused by another, the company is automatically responsible with no affirmative defense, but only if the harasser meets the traditional definition of "supervisor." Where, however, harassment does not involve a tangible employment action, the employer will be vicariously liable under a much more liberal definition of "supervisor" but it will be able to assert the affirmative defense described above.

The lesson to be derived from this case is that companies will be responsible for harassment by persons who may not be supervisors in the traditional sense, such a "mechanic in charge" or a "leadman." Our experience suggests that in many companies there are individuals in the workplace who are legal "supervisors" but neither the company nor the "supervisor" perceives them as such or understands that the employer will be liable for any acts of harassment by them. This makes it all the more important that "marginal" supervisors receive training to understand their obligations as supervisors and avoid harassing behavior.

In a related development, the Supreme Court has decided to review the issue of whether a constructive discharge (meaning a quit caused by conditions that would lead a reasonable person to resign) constitutes a tangible employment action. If so, then the company is responsible for the harassment that

caused the employee's resignation and cannot avail itself of the affirmative defenses. If not, then the harassment may be imputed to the company but it can utilize the affirmative defenses to avoid liability. We'll be interested to see how the Supreme Court resolves this issue.

New Law Limits Restrictions on Employer Investigations of Workplace Misconduct

Many employers conduct background checks before hiring new employees, or even when evaluating current employees for promotion, reassignment or retention. Employers who do so need to be mindful of the requirements of the Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681 *et seq.*, which is designed to protect the privacy of so-called "consumer report" information. A consumer report contains information about an individual's personal and credit characteristics, general reputation, character, and lifestyle. 15 U.S.C. § 1681a. The FCRA imposes specific notice, authorization, and disclosure obligations that must be satisfied in connection with an employer's use of consumer reports for employment purposes.

A few years ago, the Federal Trade Commission, which administers the FCRA, issued two controversial advisory opinions concluding that the FCRA requirements apply to workplace misconduct investigations, such as investigations into complaints of discrimination and harassment, where an employer uses an outside investigator who regularly conducts such third-party investigations. This meant that employers that retain outside investigators were required to notify targeted employees before conducting the investigation, obtain the employee's advance consent, and then fully disclose any investigative reports prior to taking adverse action against that employee.

On December 4, 2003, however, President Bush signed into law the Fair and Accurate Credit Transactions Act which exempts third-party investigations of alleged employee wrongdoing from the FCRA's notice and disclosure requirements. Once the new law goes into effect, employers utilizing third-party investigators need not obtain advance consent and are only obligated to disclose, after taking any adverse action, a summary of the investigative report that does not reveal the sources of information.

Changing Work Rules in Unionized Plants

What role does an arbitrator have when a company implements or modifies work rules in a unionized plant? The National Labor Relations Act requires that the company give the union an opportunity to bargain over work rules before they are implemented or modified. But once that obligation has been discharged and the company and union cannot agree, what authority does the arbitrator have?

In a recent case, *Fairfield Manufacturing*, 118 LA 1485 (2003), the company changed four work rules, and the union challenged the implementation in arbitration claiming that the four changes were unreasonable. The company argued that the contractual management rights clause, which gave it authority to "make shop regulations," required the arbitrator to deny the union's grievance unless the changes modified an express provision of the labor agreement.

The arbitrator rejected the company's contention. He noted that companies have a general right to establish and modify work rules even if there is no management's rights language in the contract. He referred to a number of arbitration awards in which arbitrators had reviewed company work rules under either a "reasonableness" or "arbitrary, unfair or capricious" standard. Finding that the

"reasonableness" test was too subjective and might lead arbitrators to "dispense their own brand of industrial justice," the arbitrator concluded that, notwithstanding the management rights language, he had authority to overturn a work rule—either an initial implementation or a modification of an existing rule—if he found the rule unfair, arbitrary, or capricious. We're not sure that we understand the difference between an arbitrator overturning a work rule because it is "unfair" as opposed to "unreasonable," but the ruling illustrates the broad authority of a labor arbitrator to review new or revised work rules.

The case also illustrates the very limited value of most managements rights clauses. Although many companies hold these clauses dear to their hearts, a managements rights clause has very little value at the Labor Board or in arbitration unless it is specific. In this case, the company probably would have prevailed in arbitration if the clause gave it the right "to implement work rules provided that the rule does not violate an express provision of this agreement." Once the contract establishes the standard for review, an arbitrator would be obligated to apply the contractual standard when reviewing the work rule. Without that kind of specificity, the management rights clause will not be of much help to the employer.

Religious Discrimination and the Duty to Accommodate

The court of appeals in San Francisco, which seems to hear a disproportionately large number of employment law cases, recently decided an interesting case of alleged religious discrimination. *Peterson v. Hewlett-Packard*, DLL, January 7, 2004. The lawsuit was filed by an employee, a religious Christian, who believed that homosexuality was contrary to the commandments of the Bible and

that he had a duty as a devout Christian to expose the "sin of homosexuality." The dispute arose when Hewlett-Packard posted diversity notices in one of its plants which included homosexuals as a protected example of diversity. Believing that he had a religious duty to oppose homosexual activity, Peterson posted biblical references in the plant which described homosexuality as sin. The notices were removed by the company, and Peterson sued, claiming that Hewlett-Packard failed to accommodate his religious beliefs by not allowing him either to post the anti-gay messages or by removing the references to homosexuality in the company's diversity policy.

Companies are obligated make reasonable accommodations to an employee's religious beliefs. The court held, however, that both of the accommodations sought by Peterson, which were the only accommodations he would accept, were unreasonable. Allowing Peterson to post notices describing some of his co-workers as "sinful" would be unreasonable because the notices would demean and insult some of his co-workers. Requiring the company to remove all notices would create an undue hardship for the company by limiting its ability to promote diversity and tolerance in the workplace.

Misrepresentation in Hiring

Another example of state law affecting the workplace is a decision by the court of appeals in San Francisco (yes, that court again) applying California state law, *Arboireau v. Adidas-Salomon*, 20 IER Cases 908 (9th Cir. 2003), to a claim of misrepresentation in the hiring process. In this case, a employee who worked in France was hired by an Oregon company to work in Oregon. The employee sought (but did not receive) an employment guarantee of two years duration because his acceptance of the job in Oregon required that both he and his wife quit their jobs in France and move with

their family to Oregon. Five months after beginning work in Oregon, the employee's position was transferred to Germany and the plaintiff was terminated. He bought suit on several theories.

The court rejected plaintiff's claim that he had been offered a minimum of two years employment, finding that the supervisor had explicitly failed to offer such a guarantee. However, the court found that the company knew about the plaintiff's concern about job security and also knew at the time of hire that there was active discussion within the company that plaintiff's job might be relocated to Germany. On these facts, the court found that the company's failure to disclose the possibility of relocation was an intentional misrepresentation. The fact that the relocation of the job was not certain did not, according to the court, carry weight; disclosure was required because the relocation was a real possibility, if not a certainty.

This decision is similar to those reached in labor law where a company bargains with a union without disclosing the possibility of something like an imminent plant relocation. The NLRB holds that such non-disclosure is a form of "fraudulent concealment" similar to the "intentional misrepresentation" found the court of appeals.

This decision provides another reminder of the need for companies to disclose possible adverse developments in the hiring process when there is a reasonable basis for believing that those developments will occur and could affect the job of the person being hired.

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