LABOR & EMPLOYMENT LAW
REPORT
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Supreme Court Report

U.S. Supreme Court Endorses EEOC Guidelines On Distinguishing Employers from Employees

The Supreme Court has issued a decision affecting whether small employers are covered under the Americans With Disabilities Act (ADA). *Clackamas Gastroenterology Associates, P.C. v. Wells,* 123 S. Ct. 1673 (2003). The Court specifically held that deciding whether to consider physician-shareholders of a professional corporation as employees, entitled to ADA coverage, can be determined by how much corporate control these shareholders exercise. In so ruling, the Court endorsed guidelines adopted by the Equal Employment Opportunity Commission (EEOC).

Only employers with "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year" are covered by the ADA. 42 U.S.C. § 12111(5). The ADA, however, unhelpfully defines an employee as "an individual employed by an employer." 42 U.S.C. § 12111(4). In the case of *Clackamas*, it was covered by the ADA only if its four physician-shareholders counted as employees.

The District Court had ruled that Clackamas was not covered by the ADA because the physician-shareholders were analogous to partners, and partners were not employees. The Court of Appeals reversed, holding that choosing to form the business as a corporation precluded treating the shareholders as partners and that the physician-shareholders could not have it both ways; that is, be treated as corporate shareholders to limit their personal liability, but as partners to qualify for coverage by discrimination laws.

Reversing the Court of Appeals, the Supreme Court sent the case back to the lower courts for further proceedings. However, the Supreme Court disagreed with the District Court's view that the physician-shareholders were not employees because they were analogous to partners. Rather, the Court adopted a more nuanced test. As the Court saw it, the question was not simply whether the physician-shareholders were partners, but whether they functioned as employers within the

(*See Clackamas, pg. 2)*

Special Labor Report

The Chairman Speaks

NLRB Chairman Robert Battista recently spoke to the Chicago Bar Association's Labor and Employment Law Committee (chaired by Seyfarth Shaw partner Douglas Darch) outlining his agenda for the Board during his term. One of Chairman Battista's primary goals is to reduce the backlog of pending cases ("inventory" in Washington-speak). He also stated his intention to have the Board issue, at least monthly, a lead case on an important issue that was unsettled or ongoing. The Chairman gave as an example of such lead case, the issue of supervisory status following the Supreme Court's decision in *Kentucky River*. Another of the chairman's goals is improving the Board's credibility. This is to be accomplished by issuing well-reasoned balanced decisions; by respecting longstanding precedents; by paying greater heed to appellate court decisions; and by moving more quickly to resolve splits in the circuits.

Although the Chairman's agenda is certainly good news for employers, attaining this ambitious goal will be even greater news. Chairman Battista's agenda became readily apparent as he identified ten major issues before the Board for decision. These ten issues are:

1. Determining the status of graduate teaching assistants;
2. Determining the status of residents and interns;
3. Formulating a test for supervisory status following *Kentucky River*;
4. The extension of *Weingarten* rights;
5. Prescribing the appropriate remedy in successorship cases when there's been a discriminating refusal to hire;
6. Deciding whether a union's right to videotape employees is greater than an employer's;
7. Formulating a test for retaliatory lawsuits following *BE&K*;
8. Determining whether the Board's test for a waiver of the right to bargain should reflect the "covered-by" analysis;
9. The unit placement of temporary agency employees; and
10. Addressing an employer's right to establish an e-mail policy.

As a bonus issue the Chairman identified the effect to be given to a supervisor's conduct in supporting a union organizing campaign.

Douglas A. Darch (Chi.)

In this issue:

Clackamas (cont'd from pg. 1)

meaning of the ADA. The Court relied on the common law in ruling that whether someone is an employer depends on the amount of control that person exercises over the employing entity.

The Court endorsed the EEOC's guidelines on the issue. These guidelines identify six factors to examine in determining whether someone is an employer or an employee. These six factors are: (1) whether the employing entity can hire or fire the person or set the rules and regulations of that person's work; (2) whether and to what extent the employing entity supervises the person's work; (3) whether the person reports to someone higher; (4) whether and to what extent the person influences the employer entity; (5) whether the parties intend the person to be an employee; and (6) whether the person shares in the profits, losses, and liabilities of the employer entity. [Paraphrased from the EEOC Compliance Manual § 605:0009.] The Court held that these factors, rather than someone's title as "partner" or "director", guided the determination of employer status.

It is important to note that the Court's holding does not make individual physician-shareholders liable as individuals for employment discrimination because they were employers and not employees. The Court's holding only concerns who was and who was not an employee for purposes of counting the employing entity's number of employees. To whatever extent a person is an "employer" because he or she shares in the employer entity's losses and liabilities, the individual "employer" will still be harmed if the employing entity is found liable.

Thus the *Clackamas* decision establishes a general rule for the courts to follow in determining whether an individual is an employer or employee for purposes of ADA coverage and that of federal discrimination laws with similar definitions of "employee" such as Title VII and the Age Discrimination in Employment Act (ADEA). This case's greatest effect will be on smaller employers — especially professional corporations and partnerships — where the degree of control shareholders or partners retain could affect whether the organization is subject to suit under federal discrimination laws.

Of course, the decision may also affect which individuals can be ADA or Title VII plaintiffs and determine what damage caps apply to an organization that has fewer than 500 employees under Title VII or the ADA. Someone who exercises a great deal of control over an employer entity — and, consequently, is not considered an employee in determining how many employees the employer has for coverage purposes — presumably would not be an employee to bring suit and could not sue for employment discrimination under Title VII or the ADA. On the other hand, factors governing the control analysis can make it

difficult for an employer to argue that someone who was terminated exercised enough control over the organization not to be considered an employee.

Also, both Title VII and the ADA cap the amount of compensatory and punitive damages that may be awarded to a discrimination plaintiff depending on how many employees an employer has. Employers with more than 14, but fewer than 101 employees are subject to a $50,000 cap; employers with more than 100, but fewer than 201 employees are subject to a $100,000 cap; employers with more than 200, but fewer than 501 employees are subject to a $200,000 cap; and employers with more than 500 employees are subject to a $300,000 cap. *Clackamas* does not suggest counting employees any differently to determine which cap applies than for determining the number of employees for coverage purposes. Thus the degree of organizational control exercised by the people who lead an employer entity could affect the employer's liability limits where those leaders make the difference between an employer having 100 or more employees, 200 or more employees, and 500 or more employees.

John M. Vande Walle (Chi.)

EEO Update

Punitive Damages Affirmed for Retaliatory Discharge

In an unpublished opinion, the 7th U.S. Circuit Court of Appeals determined that a trial court had properly upheld a jury verdict of nearly $500,000 in punitive damages for a physician who was fired after alerting his employer about false bills being submitted to Medicare. The court reasoned the damages were not excessive and that the jury was free to ignore the employer's claim of low financial worth. Further, the court denied the employer's motion for a new trial because it was filed more than two years after the limitations period for such a motion had expired. *Brandon v. Anesthesia & Pain Management Associates* (7th Cir. 2003).

"Regarded As" Claim Fails Because Vision Test Was Reasonable

The 7th U.S. Circuit Court of Appeals has ruled that, although a steel company warehouse worker alleged he had sufficient evidence for a jury to find that the company considered him "disabled", the worker could not show that he was qualified for the position. The employee, who was missing one eye, had started in a *temporary* position with the employer, in which he manipulated large sheets of steel and used various machines and tools. When he applied for a *permanent* position, a personnel assistant, without giving him the company's vision test, told him he could not be hired because he had only one eye. Without asking him anything further about his position, the company fired him. The court found that the jury might think this action inferred that the employer regarded the one-eyed employee as disabled. Moreover, the court opined, the employee did not show that the employer's test was unreasonable. Nor did he rebut the an expert witness's conclusion that he would be unable to pass the test with vision in only one eye. *Dyke v. O'Neal Steel Inc.* (7th Cir. 2003).

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8th Circuit Recognizes "Constructive Demotion" Theory in ADA Case

In an issue of first impression in the circuit, the 8th U.S. Circuit Court of Appeals has held that a locomotive engineer with limited use of his right arm and hand provided sufficient proof that a jury could find he was "constructively demoted" when his employer failed to accommodate his disability. The employee alleged he was limited in the major life activity of caring for himself. Initially, the railroad's informal policy was to give on-call engineers from two to two-and-one-half hours' notice before a shift, even though the union contract called only for one-and-one-half hours' notice. When new management eliminated the extra notice time, the engineer requested an exemption and asked to be given the extra time. After the railroad denied his request, the engineer had to take a lower position that paid less and offered fewer hours. Joining the 1st, 5th and 6th Circuits, the 8th Circuit held that the employee had met his burden of proving that that his work environment was so abusive, it would compel an objective person in his position to self-demote. *Fenney v. Dakota, Minn. & E.R.R. Co.* (8th Cir. 2003).

Accommodation Request Must Flow from Disability to Be Reasonable

Because a requested accommodation did not flow directly from the employee's disability, the 2nd U.S. Circuit Court of Appeals ruled that the accommodation was not reasonable under the ADA. A New York City subway token-booth clerk suffered from insomnia as a result of post-traumatic stress disorder. The employee developed this condition after learning another railroad clerk had been firebombed. She requested assignment to an above-ground position, which was refused, and was then terminated when she could not return to work. The court reasoned that the requested accommodation related to her fear of working in the subway, which *was not* a disability, rather than to her insomnia, which *was* a disability. *Felix v. New York City Transit Auth.* (2d Cir. 2003).

Company's Response to Harassment Held Adequate

Upholding summary judgment for ExxonMobil Oil Corp., the 10th U.S. Circuit Court of Appeals has held that three sexual harassment incidents — taking place while the company was investigating and disciplining alleged harassers — did not evidence failure to respond to the original harassment claim. Several times, a female worker was the subject of "demeaning graffiti" found in her work area. Whenever they appeared the company photographed them, then promptly removed them, while interviewing employees and security guards to identify

the perpetrator. The company also called meetings for all employees, to reiterate its sexual harassment policy, added more guards, fences and lights, and increased security. Upon netting the perpetrator, the company fired him and no further graffiti appeared. Although other (unconnected) harassment incidents occurred during this time, the court found that the company responded promptly and efficiently to each one. *Scarberry v. Exxon Mobil Oil Corp.* (10th Cir. 2003).

"Constructive Discharge" is Tangible Employment Action in 3rd Circuit

Deciding an issue of first impression for the circuit, the 3rd U.S. Circuit Court of Appeals held that "constructive discharge" due to sexual harassment is a tangible employment action in applying the *Ellerth/Faragher* affirmative defense. Although the District Court held that the employer had properly asserted the affirmative defense to the state employee's claim, the 3rd Circuit found that the lower court failed to analyze the employee's claim of constructive discharge and whether it precluded use of the affirmative defense. The employee, a police communications operator, claimed that she was subjected to sexual harassment by three supervisor officers throughout her employment. Nevertheless, the circuit courts are split on whether constructive discharge constitutes a tangible employment action. *Suders v. Easton* (3d Cir. 2003).

RIF Sufficient Reason for Termination

Because the company's proffered reasons for terminating a 56-year old vice president were reasonable and based on discernable facts, the 7th U.S. Circuit Court of Appeals has affirmed the District Court's grant of summary judgment to the employer on the plaintiff's age discrimination claim. Lucent Technologies claimed that the plaintiff was selected for the RIF because it was seeking to restructure the research and development area of the unit for which he worked, and that it eliminated other workers who, like the plaintiff, merely *managed* software rather than developed it. The court acknowledged that the plaintiff proved a *prima facie* case of age discrimination, but found that he did not provide sufficient evidence to show Lucent's reasons were pretextual. Age-based comments cited by the plaintiff were determined to be stray remarks unrelated in time and circumstance to the layoff. *Schuster v. Lucent Technologies Inc.* (7th Cir. 2003)

No Racial or National Origin Discrimination Inferred from Critical Statements

The 8th U.S. Circuit Court of Appeals has ruled that comments made about a Middle Eastern manager's body odor did not constitute race or national origin discrimination. Said Hannoon worked for Fawn Engineering as information services manager. A new chief financial officer discussed Hannoon's body odor with him, noting complaints from other employees. The officer also told Hannoon he had poor writing skills, failed to meet deadlines, and was too passive. Following this conversation, Hannoon was fired. Granting summary judgment to the employer, the court found that none of this criticism indicated racial or national origin bias. Further, though the officer mentioned the fact that Hannoon took Friday afternoons off for prayers, his schedule did not influence the decision to terminate him. *Hannoon v. Fawn Engineering Corp.* (8th Cir. 2003).

4th Circuit Allows Religious Discrimination Section 1983 Claim to Proceed

Reasoning that other religious minorities were allowed to ignore the state detention center's dress code, the 4th U.S. Circuit Court of Appeals has allowed a Rastafarian correctional officer — who was disciplined for wearing dreadlocks — to pursue his religious discrimination claim. The court reasoned that the public sector plaintiff need not plead a claim under Title VII to bring suit under Section 1983. Though the court agreed with the lower court that, on its face, the dress code was not discriminatory or designed to inhibit religion, the 4th Circuit criticized the District Court for not examining whether it was indiscriminately applied. The plaintiff provided evidence that both Sikh and Jewish officers were granted exemptions from the dress code. *Booth v. Maryland* (4th Cir. 2003).

Pregnancy Discrimination Case Allowed to Proceed

In an unpublished opinion, the 9th U.S. Circuit Court of Appeals has ruled that because evidence showed that an employer — who defended suit on the grounds that a pregnant employee was fired because she lied about being ill — *did not know* of the lie when it ended her employment. Further, the company didn't cite lying as a reason for her termination when she was fired. Therefore, the employee could proceed with her pregnancy discrimination claim. The employee also showed that she had performed satisfactorily up to the time she was fired, and that the company did not fire a male employee although it doubted his medical excuse for being absent. *Fulkerson v. AmeriTitle Inc.* (9th Cir. 2003).

Traditional Labor Law Developments

Hospital Unlawfully Removed and Confiscated Buttons

The 6th U.S. Circuit Court of Appeals has ruled that a Michigan hospital committed an unfair labor practice by confiscating and forcing registered nurses to stop wearing buttons that protested the hospital's use of forced overtime. Nurses started wearing the buttons after the hospital refused to extend an expired letter of understanding that granted the nurses double pay for overtime, resulting in an increase in *forced* overtime. Wearing the buttons constituted concerted activity but did not amount to a work stoppage or strike, thus it did not violate the collective bargaining agreement, was not disruptive, and was not shown to cause the hospital any problems. Therefore, the court affirmed the Board's ruling that prohibiting the buttons in non-patient-care areas was an unfair labor practice. *Mt. Clemens Gen. Hosp. v. NLRB* (6th Cir. 2003).

Striking Workers Who Were Then Locked Out Not Entitled to Unemployment Benefits

Union members who participated in a strike, which then developed into a lockout, were not entitled to unemployment benefits, the D.C. Circuit has ruled. The union based its argument on an amended state law which clearly states that workers unemployed because of a labor dispute, other than a lockout, were not entitled to unemployment benefits, highlighting the addition of the "other than a lockout" phrase. Under the amended statute the court reasoned it's the *initial cause* of unemployment (a strike) not the ultimate events (a lockout) that determine benefits eligibility. *American Broad Companies v. District of Columbia Dep't of Employment Servs.* (D.C. Cir. 2003).

Court Can Enforce Arbitration Subpoenas Against Non-Signatories

Applying federal common law developed under LMRA Section 301, the 7th U.S. Circuit Court of Appeals has held that the International Brotherhood of Teamsters could sue to enforce arbitration subpoenas against two companies that were not signatories to the disputed collective bargaining agreement. A Teamsters local invoked grievance arbitration against Active Transportation Co., claiming that it violated the CBA by transferring work at a terminal to Auto Truck Transport Corp., a non-union shop. The claim named Dennis Troha, majority owner of both Active and Auto Truck — and also chairman and chief executive officer of JHT Holdings Inc., an affiliated company. When the arbitration board issued subpoenas directing Troha to appear, testify and produce documents, and directing JHT to produce documents, the parties refused to comply. Though the District Court ruled it did not have jurisdiction, the 7th Circuit found that the Supreme Court had held that federal courts can create common law to enforce collective bargaining agreements under Section 301, and that this concept included enforcing arbitration subpoenas. *Automotive Transporters Indus. Negotiating Comm. v. Troha* (7th Cir. 2003).

...the 7th Circuit found that the Supreme Court had held that federal courts can create common law to enforce collective bargaining agreements under Section 301, and that this concept included enforcing arbitration subpoenas.

Two Companies with Same Location and Same Executives Are Single Employer

The D.C. Circuit has upheld the NLRB in ruling that two contractors who shared the same headquarters — and who were run by the same corporate officers — constitute a single employer under the NLRA. RC Aluminum Industries (RCA) manufactured and installed doors, windows and handrails. Operating as a mostly nonunion company, RC Erectors Inc. (RCE) installed the same products that RCA built; and its workers were represented by two unions, including Local 272 of the International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers. Local 272 and Local 698 of the same union filed a joint-representation petition to represent workers at both companies. The Board based its conclusion of finding a single employer on the fact that the two companies shared the same offices, RCA's president handled labor matters for both companies, RCA made some fringe benefit payments for RCE and RCE installed the products that RCA manufactured. The court also upheld the board's decision that two bargaining units should be formed: one representing RCA's production and maintenance workers and the other representing installers for both companies. *RC Aluminum Indus. Inc. v. NLRB* (D.C. Cir. 2003)

NLRA Does Not Preempt Executive Order Requiring Beck Notices

In a 2-1 opinion the D.C. Circuit has held that the NLRA does not preempt President Bush's executive order mandating that federal contractors post Beck notices. Several unions and professional organizations challenged the executive order, and the U.S. District Court granted summary judgment in favor of the plaintiffs. The court opined that the full preemption analysis should apply because the executive order was regulatory in nature. Looking to the lower court opinion, the appeals court stated that the District Court improperly focused on whether the NLRA prohibits employers from posting Beck notices, and that the issue was whether the statute prohibits requiring employers to post such notices. Because the Board has held that it is not an unfair labor practice for an employer not to say anything to employees about their Beck rights, the court found that, at this time, preemption did not apply. *UAW Labor Employment and Training Corp. v. Chao* (D.C. Cir. 2003).

Union Owed No Duty of Fair Representation to Probationary Employee

Because an employee was terminated for cause while on probation, the 10th U.S. Circuit Court of Appeals held that the International Association of Machinists did not owe her a duty of fair representation which would require it to file a grievance on her behalf contesting the termination. The employee began working for Cessna Aircraft. Due to various acts of misconduct, Cessna stated it was going to extend her probationary period, in keeping with past practice approved by the union of extending the probationary period of problem employees. During the extended probationary period, the employee made an inappropriate comment about a co-worker and was fired. Though she sought to file a grievance, the union refused to represent her because of her probationary status. *Traffas v. Cessna Aircraft Co.* (9th Cir. 2003).

7th Circuit Rules Employer Must Bargain Over Using of Surveillance Cameras.

Agreeing with the NLRB's policy that using hidden surveillance cameras is a mandatory subject of bargaining, the 7th U.S. Circuit Court of Appeals has held that National Steel Corp. violated the NLRA by refusing to bargain over the issue. Without telling employees, National Steel installed a hidden video camera in a manager's office to determine who

was making unauthorized long-distance phone calls from the office. After the company discharged an individual caught on video, the union filed a grievance, arguing that in *Colgate-Palmolive Co.*, 323 N.L.R.B. 515 (1997), the Board held that employers must bargain over the issue before installing hidden surveillance cameras. The court found the Board's conclusion that the use of hidden surveillance cameras is akin to physical examinations, drug and alcohol testing, and polygraph examinations, was objectively reasonable.

Employer's Misconduct Justifies Overturning Elections

Finding that the Board was correct in setting aside the first two of three elections based on employer misconduct, the 6th U.S. Circuit Court of Appeals, in an unpublished opinion, ruled 2-1 that the Board also properly certified the union as bargaining representative for production and maintenance workers at a Nashville paper packaging plant. During the first two elections, which the union lost, the Board concluded that the employer violated the NLRA by trying to pack the unit with anti-union employees who did not belong in the unit, soliciting grievances, asking employees to report contacts by union representatives, and promising better benefits if employees voted against the union. A dissenting judge opined that the employer actually requested employees to report harassing behavior by union representatives, which is lawful and that the employer's Excelsior list which included many non-unit employees did not infringe on the employees' free choice nor did it affect the outcome of the election. *Werthan Packaging Inc., NLRB* (2003).

Employer Unlawfully Threatened Loss of Pay Increases

The D.C. Circuit has ruled that by threatening to withhold annual wage increases if a competing union beat the incumbent union in a representation election, More Truck Lines violated the NLRA. Drivers at More Truck Lines were represented by Brotherhood, an independent union. But Local 952 of the International Brotherhood of Teamsters sought to represent them. More Truck Lines informed its employees that if the Teamsters won, the existing collective bargaining agreement would be voided, and therefore the company would not pay the wage increases provided for in the contract. The court pointed out that if the Teamsters won, the employer was obligated to bargain with the union — and could not unilaterally change terms and conditions of employment. Because, in practice, the annual wages become a major employment term and condition, the court upheld the Board's conclusion that More Truck Lines' statements constituted unlawful threats. *More Truck Lines Inc. v. NLRB* (D.C. Cir. 2003).

Boston Bulletin

Employee with ADHD — and History of Outbursts — Not "Disabled" Under ADA

In *Calef v. The Gillette Co*., a former employee with a history of angry outbursts in the workplace claimed disability discrimination after being fired from his job. The U. S. Court of Appeals for the 1st Circuit affirmed summary judgment in favor of the employer, concluding that the plaintiff's inability to handle stressful work situations without inappropriate outbursts did not entitle him to the protections of the Americans With Disabilities Act (ADA).

Calef, a production mechanic, had a checkered employment history at Gillette, marked by a series of outbursts and confrontations with his supervisors and co-workers. In 1995, Gillette issued Calef a final warning because he threatened to punch a 60-year-old coworker "in her face" if she asked him for assistance with her machine again. At that time, Calef began private counseling, during which he was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). Following this diagnosis, Calef began taking Ritalin to control his ADHD, reporting a significant improvement in his ability to think clearly and to complete assigned tasks without becoming distracted. Both Calef and his therapist testified during discovery that Calef's ADHD, although it affected his response to workplace stress, was not the cause of his angry outbursts.

On December 6, 1996, after separate interchanges with Calef about a scheduling dispute, his group leader and his group leader's supervisor found Calef to be barely coherent and possibly dangerous. The supervisor asked Calef to accompany him to Gillette's Medical Department. There, the nurses found Calef irrational and belligerent. As a result, Gillette sent him home, and later terminated his employment for unacceptable behavior and insubordination. Calef sued claiming disability discrimination.

The 1st Circuit, assessing whether Calef was disabled, noted he had no impairment that substantially limited one or more major life activities. The court stated that Calef's ADHD diagnosis alone was insufficient. Although Calef claimed that he was substantially limited in the major life activity of learning and speaking, the court found no evidence of either. Indeed, diagnostic tests and medical evaluations placed Calef within the "normal" range for both learning and speaking. Further, Calef himself testified that taking Ritalin controlled the ADHD symptoms. As to learning, the court found it significant that Calef had demonstrated an ability to learn both before and after his ADHD diagnosis. With regard to speaking, the court found that Calef interrupted others in conversation, a limitation in his ability to speak that the court found was not substantial. The court also concluded that Calef had difficulty responding to stressful situations, which only occasionally resulted in incapacity. As such, Calef's condition did not rise to the level of a protected disability.

The court could have stopped at its finding that Calef was not disabled, but went on to consider whether Calef (if disabled) was a "qualified" individual with a disability. To be deemed qualified, an employee must be able to perform the essential functions of a position, with or without an accommodation. Relying on evidence that Gillette had terminated other employees for behaving like Calef, the court concluded that handling stressful situations was an essential function of his

job. The court stated, "the ADA does not require that an employee whose unacceptable behavior threatens the safety of others be retained, even if [it] stems from a mental disability. Such an employee is not qualified."

In sum, *Calef* will serve as an additional guidepost for employers applying disciplinary measures to disabled employees. Most importantly, an employer need not accept threatening behavior, even if an employee claims such misconduct results from a disability. However, employers should proceed cautiously with any claimed disability, considering a variety of factors, before concluding that an employee is, or is not, protected by the ADA. Further, this decision only analyzes the plaintiff's claim under the ADA. Its impact on courts interpreting disability discrimination claims under the Massachusetts Fair Employment Act, G.L. c. 151B, is not completely certain.

Daniel Klein (Bos.)

West Coast Report

California Appeals Court Requires Laid-Off Whistle Blower to Exhaust Employer's Internal Complaint Procedures Before Suing for Wrongful Discharge

In *Palmer v. Regents of the University of California*, the California Court of Appeals upheld a decision to dismiss a University of California employee's common-law wrongful discharge damages action because the employee failed to follow the university's whistle-blowing complaint procedures. Future courts may confine the decision to its facts or may expand it to other contexts, such as lawsuits against private employers who have internal grievance procedures.

...an employer need not accept threatening behavior, even if an employee claims that such misconduct results from a disability. However, employers should proceed cautiously...

The California Whistleblower Protection Act provides a statutory cause of action specifically for University of California at Los Angeles employees who claim the university retaliated against them for their protected disclosures. The Act, however, requires aggrieved employees to submit their complaints to specially appointed university officials before suing. UCLA describes its responsibilities under the Act in a manual, including the university's internal complaint procedures.

In January 1997, UCLA administrators notified a group of its employees — including lab technician Patricia Palmer — that the university was laying them off, with the provision that they could reapply for restructured positions. Palmer applied but was not offered a job because the university selection committee found better-qualified candidates.

She did not exhaust UCLA's internal complaint procedures before suing the University Regents alleging common-law wrongful discharge that violated the school's public policy against retaliation for reporting unlawful activity. Palmer contended that she repeatedly reported that the lab where she worked falsified data — violating state regulations requiring the review of test results — and that the university laid her off, without rehiring her, in reprisal for her whistle-blowing activities.

The court held that "[w]hen a *private association* or *public entity* establishes an internal grievance mechanism, as the Regents [have] done, failure to exhaust those internal remedies precludes any subsequent private civil action." The court primarily relied upon a California Supreme Court decision requiring physicians to exhaust a hospital's internal grievance procedures before suing over the denial of staff privileges. But it also referred to similar cases against cities, universities, and state-funded agencies. The court concluded that the exhaustion requirement applied to parties, such as "hospitals, voluntary private or professional associations, or public entities" that provide internal remedies for their "*quasi-judicial*" determinations.

The court reasoned that, in these contexts, "compelling" policy considerations favor enforcing an internal exhaustion requirement. It "serves the salutary function of eliminating or mitigating damages," because it gives organizations an early opportunity to identify and correct their errors. Moreover, it promotes judicial economy by according "recognition to the 'expertise' of the organization's quasi-judicial tribunal."

The court distinguished its decision from cases involving contractual remedies. It held that the requirement's rationale did not depend upon a contract relationship. The court also distinguished its decision from cases requiring exhaustion of external administrative remedies for statutory discrimination claims, and excusing exhaustion of external remedies for common law discrimination claims. The court observed that the university's procedures were internal, rather than external, and that Palmer's claims were common law, rather than statutory. Nevertheless, the court holding — that the statute required university employees to exhaust internal remedies before filing statutory whistle-blower claims — reinforced its decision to apply this requirement to common law whistle-blower claims.

Future litigation probably may address whether the California courts will: (1) find the university immune from common-law whistle-blower claims; (2) find the internal exhaustion requirement applies to other employment claims; (3) identify contexts where private employers not just private associations and public entities make "quasi-judicial" determinations; and (4) defer to private employers' internal grievance procedures for challenging such determinations.

Todd C. Amidon (San Fran.)

Upcoming Events

The 2003 Labor & Employment Law Symposium Series

A one-day symposium for human resources professionals, in-house counsel, and senior management offering practical guidance in labor and employment law.

Topics include: Disability Discrimination and the Interactive Process / Wage and Hour Developments / Reducing the Risk of Class and Collective Lawsuits / Discrimination Update / Immigration / Employee Benefits / Changes in Workplace Staffing / Labor Law for Non-union Employers / Workplace Investigations

Dates

October

8	New York	Grand Hyatt Hotel
9	Washington	National Press Club
10	Boston	Babson Center for Executive Education
14	Houston	The Houstonian Hotel
21	Dallas	Hotel Crescent Court
23	Atlanta	The Four Seasons Hotel
29	Chicago	Sheraton Hotel & Towers
30	Los Angeles	The Beverly Hills Hotel

November

5	Sacramento	Radisson Hotel
6	San Francisco	Sheraton Palace Hotel

To register or for more information, please visit our Web site at www.seyfarth.com/clients/events or email Andrew Zeilenga at azeilenga@seyfarth.com.

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