

October 22, 2004

Breaking Employment Developments from D.C.

Election matters aside, October has been a busy month in Washington, especially with regard to employment law developments. Just today, President Bush signed into law a bill making it easier to settle employment discrimination cases — without substantively prejudicing either side. Earlier this month, the Supreme Court announced its docket for 2004-2005, including a case involving (in part) the settlement issue just addressed by Congress. The Court will also decide this term whether plaintiffs can pursue disparate impact claims under the Age Discrimination In Employment Act (ADEA) — an issue the Court had previously agreed to hear but then decided not to decide. The EEOC has likewise been busy this month, issuing a guidance “Fact Sheet” on October 20, 2004, which details Americans With Disabilities (ADA) requirements applicable to persons with intellectual disabilities.

Double Taxation of Attorney’s Fees Awards Grabs Attention of Both Congress and the Supreme Court

President Bush today signed the American Jobs Creation Act of 2004, which includes the Civil Rights Tax Relief Act (the “CRTRA”). (The Jobs Creation Act is the widely-publicized export tax law.) The CRTRA ends the “double taxation” of settlement or judgment amounts attributable to attorney’s fees in employment discrimination cases. As detailed below, most courts and the IRS had viewed such amounts as taxable both to plaintiffs and their attorneys. Under the CRTRA, attorney’s fees portions of future settlements will be taxable only to the attorney. This means plaintiffs will generally find settlements more attractive. For example, before CRTRA, under a \$21,000 settlement with \$7,000 being paid to the plaintiff’s attorney, both the attorney and the plaintiff would have been taxed on the \$7,000 (with the plaintiff of course being taxed on the rest). Now, only the attorney will pay taxes on the \$7,000, thereby increasing the plaintiff’s net and making settlement more attractive.

The CRTRA was supported by pro-employer groups, such as the U.S. Chamber of Commerce and the Society for Human Resource Management, as well as the plaintiff’s

bar. Among the laws to which CRTRA applies are Title VII Civil Rights Act of 1964, the Civil Rights Act of 1991, the Age Discrimination in Employment Act, the Americans With Disabilities Act, the National Labor Relations Act, the Fair Labor Standards Act, the Family and Medical Leave Act, and all federal whistleblower protections.

On November 1, 2004, the U.S. Supreme Court will hear oral argument in two consolidated cases regarding whether settlement or judgment amounts attributed to attorney’s fees are taxable as income to the plaintiff, as well as the plaintiff’s attorney. In the cases of *Commissioner of Internal Revenue v. Banks* and *Commissioner of Internal Revenue v. Banaitis*, Case Nos. 03-892 and 03-907, the Court will decide whether to follow the IRS’s view that such amounts are taxable as income to both the plaintiff and the plaintiff’s attorney, even if the money is paid directly to the attorney. In *Banaitis*, the Ninth Circuit Court of Appeals, interpreting Oregon state law, held that because the plaintiff’s attorney had an ownership interest in the fees portion of a settlement, the plaintiff would not be taxed on that portion. Similarly, the Sixth Circuit in *Banks* held that the attorney’s part of the settlement would not be taxable to the plaintiff. The appellate court noted that the federal circuits have been divided on the issue, with the Fifth, Sixth, and Eleventh Circuits holding that fees are taxable only to the attorney, whereas the Third, Fourth, Seventh, Ninth, Tenth, and Federal Circuits have generally taken the opposite view — that fee payments are taxable to both the plaintiff and the attorney.

Seyfarth Shaw will continue to monitor these two cases. Although mooted with regard to future cases by the CRTRA, the cases before the Court remain relevant to matters settled before October 22, 2004. Plaintiffs in such matters who have not yet paid taxes on settlement amounts will doubtless take the position that attorney’s fees are taxable to the attorney only. Indeed, if the Court’s decision in the tax cases were to be given retroactive effect, plaintiffs who have paid taxes on prior settlements might seek a refund of taxes attributable to attorney’s fees under prior settlements.

Supreme Court to Address Disparate Impact Claims Under The Age Discrimination in Employment Act

On November 3, 2004, the U.S. Supreme Court will hear oral argument in *Smith v. City of Jackson, Miss.*, Case No. 03-1160. The Court took the case to settle a conflict among the courts of appeals as to whether plaintiffs can bring "disparate impact" claims under the ADEA. Such claims allege that an employer's facially neutral employment practice has a disproportionately adverse effect on members of a protected class. Indeed, plaintiffs proceeding under disparate impact theory need not prove intent to discriminate by the employer. Disparate impact claims are permissible under Title VII and some other employment discrimination statutes. However, the Supreme Court declined to decide back in 1993 whether such claims are viable under the ADEA. The Court granted certiorari on the issue in 2001, but dismissed the case prior to deciding it.

The Fifth Circuit in *Smith* rejected ADEA disparate impact theory based on the statutory language and its legislative history. The appellate court noted that the Second, Eighth, and Ninth Circuits had recognized ADEA disparate impact claims, whereas the First, Seventh, Tenth and Eleventh Circuits had rejected them.

The Supreme Court's resolution of this issue will have broad implications for employers, especially those undergoing reductions-in-force. Reductions are often based on facially neutral considerations (for instance, because a function has been outsourced due to cost), but can disproportionately affect older workers. Seyfarth Shaw will follow the *Smith* case and communicate the Court's decision once it is announced.

EEOC Addresses Employment Rights of People with Intellectual Disabilities

On October 20, 2004, the Equal Employment Opportunity Commission issued a new fact sheet regarding employment rights of people with intellectual disabilities (f/k/a mental retardation). In a series of Questions and Answers, the EEOC's new guidance addresses when an intellectual impairment qualifies as a disability under the ADA, when employers may ask applicants or employees about an intellectual disability, what types of reasonable accommodations may be needed by individuals with intellectual disabilities, how to address safety and conduct concerns in the workplace, and how an employer can prevent harassment of employees with intellectual disabilities.

The EEOC fact sheet provides several useful examples of workplace situations concerning the intellectually disabled. The examples include when and to whom an employer may disclose information about an individual's intellectual disability, as well as what types of reasonable accommodations may be required. Such accommodations can include: job restructuring, job training, a job coach, a modified work schedule, assistance in understanding job evaluations or disciplinary proceedings, acquiring or modifying workplace equipment, and work station placement. The examples also tell employers when they have an affirmative duty to ask someone whether he or she needs a reasonable accommodation. While it is generally the employee's responsibility to request a reasonable accommodation, an employer should act proactively when the employer knows the employee has a disability, knows or has reason to know the employee is having trouble due to a disability, or knows (or has reason to know) that the disability prevents the employee from requesting a reasonable accommodation. For more information, please connect with www.eeoc.gov/facts/intellectual_disabilities.html or with your Seyfarth Shaw attorney.

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ATLANTA

One Peachtree Pointe
1545 Peachtree Street, N.E., Suite 700
Atlanta, Georgia 30309-2401
404-885-1500
404-892-7056 fax

BOSTON

Two Seaport Lane, Suite 300
Boston, Massachusetts 02210-2028
617-946-4800
617-946-4801 fax

CHICAGO

55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
312-346-8000
312-269-8869 fax

HOUSTON

700 Louisiana Street, Suite 3700
Houston, Texas 77002-2797
713-225-2300
713-225-2340 fax

LOS ANGELES

One Century Plaza
2029 Century Park East, Suite 3300
Los Angeles, California 90067-3063
310-277-7200
310-201-5219 fax

NEW YORK

1270 Avenue of the Americas, Suite 2500
New York, New York 10020-1801
212-218-5500
212-218-5526 fax

SACRAMENTO

400 Capitol Mall, Suite 2350
Sacramento, California 95814-4428
916-448-0159
916-558-4839 fax

SAN FRANCISCO

560 Mission Street, Suite 3100
San Francisco, California 94105
415-397-2823
415-397-8549 fax

WASHINGTON, D.C.

815 Connecticut Avenue, N.W., Suite 500
Washington, D.C. 20006-4004
202-463-2400
202-828-5393 fax

BRUSSELS

Boulevard du Souverain 280
1160 Brussels, Belgium
(32)(2)647.60.25
(32)(2)640.70.71 fax