

Federal Law Update (2008): What You Need to Know

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U.S. Supreme Court

Section 1981, like Title VII, encompasses retaliation claims

In *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008), Humphries filed suit against Cracker Barrel both because he is black and because he complained to managers that a black co-employee was also dismissed for race-based reasons. The court dismissed his claims under Title VII of the Civil Rights Act of 1964 because he failed to timely pay filing fees under that law. The lower court also dismissed Humphries' claims under §1981, a law passed after the Civil War that grants "[a]ll persons ... the same right ... to make and enforce contracts ... as is enjoyed by white citizens." The lower court determined that §1981 only included discrimination claims, not retaliation.

After a lengthy discussion of previous case law and statutory interpretation, the Supreme Court held that §1981 had always been interpreted to include retaliation claims. Although CBOCS argued that allowing retaliation claims under the guise of §1981 would allow plaintiffs to circumvent the procedural requirements of Title VII, the Court stated that Congress intended employment and discrimination laws to overlap to some extent.

Practically speaking, this ruling solidifies the right of employees to file retaliation claims under both Title VII and §1981. While §1981 gives plaintiffs a right to sue for retaliation without going through the extensive process required by Title VII, it is unlikely that plaintiffs will abandon Title VII claims altogether. Instead, it will broaden the claims available to plaintiffs and give them one more avenue to try to obtain relief.

Kentucky's retirement system does not discriminate against workers who become disabled after becoming eligible for retirement based on age.

Kentucky permits "hazardous position" workers, e.g., policemen, to receive normal retirement benefits after working either 20 years or 5 years and attaining age 55 and pays "disability retirement" benefits to workers meeting specified requirements. Kentucky's "Plan" calculates normal retirement benefits based on actual years of service. The Plan calculates disability benefits by adding to an employee's actual years of service the number of years that the employee would have had to continue working in order to become eligible for normal retirement benefits, adding no more than the number of years the employee had previously worked. Charles Lickteig, who continued working after becoming eligible for retirement at age 55, became disabled and retired at age 61. He filed an age discrimination complaint with the EEOC after the Plan based his pension on his actual years of service without imputing any additional years. The EEOC filed suit against Kentucky and others (collectively Kentucky), arguing that the Plan failed to impute years. *Kentucky Retirement Systems v. EEOC*, U.S., No. 06-1037 (June 19, 2008)

The ADEA forbids an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U. S. C. §623(a)(1) A plaintiff claiming age-related "disparate treatment" (i.e., intentional discrimination) must prove that age actually motivated the employer's decision. In a previous case, *Hazen Paper Co. v. Biggins*, 507 U. S. 604 (1993), the Court found that, without evidence of intent, a dismissal based on pension status was not a dismissal "because ... of age," *id.*, at 611-612, noting that, though pension status depended upon years of service, and years of service typically go hand in hand with age, the two concepts are "analytically distinct," *id.*, at 611. And the dismissal at issue there, if based purely on pension status, would not embody

the evils prompting the ADEA: It was not based on a “prohibited stereotype” of older workers, did not produce any “attendant stigma” to those workers, and was not “the result of an inaccurate and denigrating generalization about age.” *Id.*, at 612. However, the Court noted that discrimination based on pension status could violate the ADEA if pension status was a “proxy for age.” *Id.*, at 613. Pp. 4–6.

The Court specifically held that its opinion in no way unsettles the rule that a statute or policy that facially discriminates based on age suffices to show disparate treatment under the ADEA. The Court is dealing with the quite special case of differential treatment based on pension status, where pension status—with the explicit blessing of the ADEA—itsself turns, in part, on age. Accordingly, it is important to understand that this holding is specific to the pension arena only and does not change the interpretation of the ADEA in any other area.

ADEA: Employer bears the burden of persuasion to show that its action was based on reasonable factors other than age

This case arose after Knolls Atomic Power Laboratory (KAPL), faced with significant budget cuts, laid off thirty-one workers. *Meacham v. Knolls Atomic Power Laboratory, Inc.*, U.S. No. 06-1505 (June 19, 2008). Of those, thirty were over the age of forty and therefore fell under the ADEA’s protections for older workers. In 2005, the Court held in *Smith v. City of Jackson* that the ADEA gives rise to “disparate impact” liability when an employer adopts practices that have such a statistical disparity in their effect on older workers, but noted that the ADEA carves out an exception for cases in which the employer’s decision is based on “reasonable factors other than age” (RFOA). *City of Jackson* left open, however, the question of which party bears the burden of proving whether the RFOA exception has been met. This was the key question in *Meacham*, after the lower court found the evidence of reasonableness to be pretty balanced between the parties.

As a result of the budget cuts, KAPL was forced to implement an “involuntary reduction in force” (IRIF), using procedures that were based in part on practices used by companies such as IBM, GE, Pepsi, and Ford. First, KAPL developed a budget for each unit within the lab and identified those units that were over-budget. Within these units, it placed all employees on a “matrix” and asked managers to rate their employees based on four factors: performance, “flexibility,” “criticality,” and years of service. Performance scores were based taken from recent performance reviews, and years of service scores were determined by a simple formula. But for flexibility and criticality scores, managers were given only limited guidance, and they were ultimately left with substantial discretion to make highly subjective evaluations. Once these matrices were completed, the lowest-ranked employees were tentatively designated for termination. KAPL then performed an “impact analysis” to make sure that the results did not discriminate by race or by sex, but no comparable analysis was performed with regard to age. KAPL ultimately laid off thirty-one workers, thirty of whom were over forty years of age and thus deemed “older workers” protected under the ADEA.

The Court determined that when an employer engages in business practices that place a disproportionate burden on older workers, the employer bears the burden of persuasion of showing that its action was based on reasonable factors other than age. The decision eases the burden on plaintiffs bringing disparate impact claims under the ADEA.

This case confirms the importance of making a thorough analysis of the impact of a reduction in force on older workers as well as other classification of workers. Leaving too much discretion in the hands of supervisors could open an employer up to ADEA claims if the impact of the reduction in force has a disparate impact on workers over forty.

To Be Decided Fall 2008

Does an arbitration clause in a collective bargaining agreement waive an employee’s right to sue for violation of anti-discrimination laws?

When employees sued claiming age discrimination, the employer filed a motion to compel them to take the case to arbitration. The employees were covered by a collective bargaining agreement which prohibited age discrimination and also said “All such claims shall be subject to the grievance and arbitration procedure [in the collective bargaining agreement] as the sole and exclusive remedy for violations.” The trial court denied the motion to compel arbitration, and the 2nd Circuit affirmed. *14 Penn Plaza LLC v. Pyett*, 498 F.3d 88 (2d Cir. 2007), *cert. granted* 128 S. Ct. 1223 (Feb. 19, 2008).

The 2nd Circuit held that "arbitration provisions contained in a [collective bargaining agreement], which purport to waive employees' rights to a federal forum with respect to statutory claims, are unenforceable." The Supreme Court will hear oral argument this fall and determine whether such arbitration provisions are enforceable.

Legislation and Regulation

New federal law expands FMLA for relatives of injured servicemen and women for up to 26 weeks of protected leave

In January 2008, President Bush signed into law the "National Defense Authorization Act," which expands the Family and Medical Leave Act (FMLA) to provide two new forms of protected leave for eligible employees with family members serving, or injured during, active military duty. This is the first expansion of the FMLA since it was passed in 1993.

Under this first new type of leave, the Service Member Family Leave, which took effect immediately, an eligible employee who is the spouse, child, parent, or "next of kin" of an injured, "covered service member" may take up to 26 workweeks of unpaid leave in a single 12-month period to provide care for that family member. "Next of kin" is a new concept for the FMLA and is defined as the closest blood relative of the injured or recovering service member. The Service Member Family Leave also requires:

- The employer to continue to pay health benefits during the entire period of protected leave, up to 26 weeks;
- The leave may be taken intermittently or on a reduced leave schedule;
- Employees must provide 30 days prior notice or give notice "as soon as practicable," (generally one or two business days) and the notice does not need to be in writing;
- Employers may require a written certification from the health care provider with the same information the employer currently requires for other FMLA leave;
- An employee is only entitled to one 26-week leave per 12-month period;
- Spouses employed by the same employer are limited to taking a combined total of 26 weeks in a 12-month period.

The second type of leave, the Family Member Military Duty Exigency Leave, does not take effect until the Department of Labor (DOL) publishes interpreting regulations. With this type of leave, an eligible employee whose spouse, child, or parent is on active duty (or has been notified of an impending call or order to active duty) will be entitled to up to 12 workweeks of unpaid leave in a 12-month period to deal with "any qualifying exigency" related to or affected by the family member's call to service or active duty. While this amendment to the FMLA is not effective until the DOL issues final regulations which define "any qualifying exigency," the DOL is encouraging employers to immediately provide this type of leave. Employers should therefore consider granting leave to a qualified employee who asks for time off to help a family member prepare for active duty, even in the absence of a "serious health condition."

Family Member Military Duty Exigency Leave requires:

- Although the "exigency" leave is unpaid, employers are required to continue the employee's existing paid health coverage during the entire period of protected leave, up to 12 weeks;
- The leave may be taken intermittently or on a reduced leave schedule and a showing of medical necessity is not required;
- Employees are only required to provide "such notice to the employer as is reasonable and practicable." It is likely that the DOL will provide further guidance on this issue in its regulations;

- It is not yet clear what certification employers may require. The type and manner of certification that may be required will be established by the DOL in its regulations;
- The new law does not appear to limit or require aggregation of leave for spouses who are employed by the same employer.

Although the DOL has not issued final rules, there are some examples of “qualifying exigency” in its Notice of Proposed Rulemaking, including:

- ⇒ Making arrangements for childcare required due to the service member’s absence.
- ⇒ Making financial and legal arrangements to address the service member’s absence.
- ⇒ Attending counseling related to the service member’s active duty.
- ⇒ Attending official ceremonies or programs where the military requests participation of the family member.
- ⇒ Attending to farewell or arrival arrangements for the service member.
- ⇒ Attending affairs caused by the missing status or death of the service member.

The DOL is working to prepare more comprehensive guidance regarding these new FMLA leaves. However, in the interim, it is requiring employers to act in “good faith” in providing the new leaves. This means that employers should grant an eligible employee’s request for leave, if such leave is for a family member serving, preparing to serve, or injured during active military duty. Employers should also review and revise their FMLA policies and forms, and train their human resources staff and managers on these new types of leave.

Immigration Issues

DHS working on regulations regarding SSA “no-match” letters

In August 2007 the U.S. Department of Homeland Security (DHS) took initial steps to finalize proposed regulations regarding employers’ obligations to respond to so-called “no-match” letters originated by the Social Security Administration (SSA). The regulations indicated DHS’s intent to pursue legal action against employers having “constructive knowledge” that an employee is not legally authorized to work in the United States and established that a “no-match” letter could provide such constructive knowledge. However, the regulations also described a method for employers to obtain a “safe harbor” from prosecution for knowingly employing an unauthorized worker.

In late 2007, shortly before the SSA was to send out a new round of “no-match” letters and implement the DHS’s new tougher enforcement standards against employers, a federal district court judge in the case of *AFL-CIO v. Chertoff*, pending in the Northern District of California, enjoined enforcement of the newly-proposed DHS regulations. The court’s injunction provided employers a reprieve from the new DHS enforcement policy during the pendency of the lawsuit or until such time as the preliminary injunction is dissolved. The court has subsequently agreed on more than one occasion to delay the case to allow DHS an opportunity to revise its regulations.

DHS issued on March 26, 2008 a supplemental proposed rule to clarify its “no-match” regulations in response to the lawsuit. On June 13, 2008, the court once again agreed to delay further action in the case until at least August 1, 2008, while DHS compiles public comments on the supplemental proposed rulemaking.

Employers who receive no-match letters should check with legal counsel to determine the current status of regulations involving such letters, as well as best practices for responding to no-match letters.

Ninth Circuit: SSA “no-match” letters insufficient notice to warrant termination for violation of federal immigration laws

In *Aramark Facility Services v. Service Employees Int’l Union, Local 1877*, 9th Cir., No 06-56662 (June 16, 2008), the Ninth Circuit determined that the receipt of a no-match letter is not, in and of itself, sufficient to necessitate immediate termination of the worker.

The 1986 Immigration and Control Act (“IRCA”) imposes civil and criminal penalties against an employer that hires or continue to employ an illegal alien “knowing” that the person is not authorized to work in the United States. Therefore, employers are understandably concerned when they receive a “no-match” letter, which is a letter sent by the SSA informing an employer that the Social Security number(s) the employer provided on W-2 forms for one or more employees does not match the SSA’s records. The Ninth Circuit Court of Appeals, which includes Washington, recently cautioned employers that they should not immediately discharge employees identified in these no-match letters.

The employer, Aramark Facility Services, employs approximately 170,000 workers in the United States, including workers at the Staples Center in downtown Los Angeles. Aramark received notice from the SSA informing it that approximately 3,300 of its employees, including 48 at the Staples Center, had social security numbers that did not match the SSA’s database. Aramark sent a letter to the 48 workers, requiring that they submit a new social security card or a verification form that showed a new card was being processed. Aramark provided the employees three working days from the postmark date of the letter to comply or be terminated. Aramark ultimately terminated 33 employees who were unable to comply within the three-day period.

Service Employees International Union filed a grievance on behalf of the 33 employees who were fired, stating that Aramark violated the collective bargaining agreement by firing the employees without just cause. The case worked its way up to the Ninth Circuit Court of Appeals, which held that Aramark had wrongfully terminated the 33 employees and ordered the employees reinstated with back pay. The Ninth Circuit recognized that an employer may not “knowingly” employ undocumented workers. The Ninth Circuit concluded, however, that no-match letters, standing alone, do not put employers on constructive notice that its employees are undocumented, because no-match letters could indicate typographical errors, name changes, and inaccurate or incomplete employer records. Moreover, the SSA specifically warns employers that a no-match letter does “not make any statement about . . . immigration status and is not a basis, in and of itself, to take any adverse action against the employee.”

The Ninth Circuit seemed especially concerned about the extremely short turnaround time for the workers to respond to the no-match letters. According to the Ninth Circuit, the three-day turnaround time is more demanding than the federal safe harbor regulations. Employers can attain “safe harbor” and avoid prosecution based on constructive knowledge of a violation if they ask “employees to provide further documentation from the SSA within 90 days of the date the employer received the no-match letter.” An employer “can still qualify for the safe-harbor if it completes a new Form I-9 for the employee.” In this instance, however, the limited timeframe provided by Aramark weighed against its argument that it had constructive knowledge that the employees were undocumented workers.

Given the quickly-changing legal landscape relating to “no match” letters, employers should check with legal counsel to determine the current status of regulations involving no-match letters, as well as best practices for responding to no-match letters.

Executive Order requires all employers with federal contracts to agree to enroll in E-Verify

On June 11, 2008, President Bush issued an amended executive order requiring employers with federal contracts to agree to enroll in E-Verify and use the resource to verify the employment status of employees staffed on the contracts. The new law would make it mandatory for employers who have contracts with the federal government or federal agencies to include a clause in their contracts that the employer agrees to enroll in and use E-Verify for all of their future hires and to E-Verify existing employees who will be working on the federal contracts.

The employer must then sign a Memorandum of Understanding (MOU) and essentially give up their Fourth Amendment rights against search and seizure without probable cause. The MOU states that the Department of Homeland

Security (DHS) reserves the right to make periodic visits to view the employer's employment records including Forms I-9 in order to verify compliance with the law and fair hiring practices. The MOU also allows the DHS to interview the employees. Although E-Verify is supposed to be a verification system, the MOU grants the enforcement arm of DHS, Immigration and Customs Enforcement (ICE), access to the information, albeit in a case by case manner, to use the information for enforcement purposes.

It is important to note that the executive order only requires the employer to agree to use E-Verify, through a contract clause, it does not require the employers to use E-Verify. While this may appear to be just a question of semantics, the difference may play a role in enforcement of the order. Because of the backlash DHS has experienced because of E-Verify, the Secretary of Homeland Security has not yet issued regulations regarding the consequences of failing to sign the MOU or failing to enroll in E-Verify once the employer has agreed to do so in an MOU. It is also unclear what changes, if any, a new presidential administration will make to the current immigration scheme.