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Plaintiff May Rely on Statistical Evidence to Establish Discrimination

Two male television news reporters were laid off by their employer due to network budget cuts. Both were over the age of 40. The employer selected these reporters, among others, because they were not “anchors” or “specialty reporters” and because their contracts were set to expire. The reporters sued, alleging that they were discriminated against on the basis of age and gender. The reporters presented evidence and testimony from a statistician to show that the individuals laid off were older than those not laid off. The employer successfully sought to dismiss the claims on the grounds that they had legitimate, nondiscriminatory reasons for its decisions to lay off these particular reporters, and that neither gender nor age were a part of those decisions. The employer also challenged the statistical evidence presented on the grounds that it did not account for the fact that certain groups of employees were not selected for layoff, nor did it account for contract expiration date or the rest of the employer’s decision-making process. The employer was successful in its challenge to the reporters’ claims, and the reporters appealed. The U.S. Court of Appeals for the Ninth Circuit Court of Appeals found that an employee who relies on statistical evidence to establish a *prima face* case of disparate treatment discrimination bears a relatively low burden of proof, and that statistical evidence does not have to account for the employer’s nondiscriminatory reasons for its decisions in order to show a pattern of

discrimination. Here, because the reporters had submitted statistical analyses that showed age disparities between those employees who were retained and those who were laid off, the court found that this was sufficient to meet their initial burden of proving their case. At the same time, however, the court noted that the reporters nevertheless could not meet their burden of establishing that the legitimate, nondiscriminatory reasons provided by the employer were merely a pretext, and thus, the district court's ruling was ultimately affirmed. Employers must be mindful that their demographical data relating to age, gender, and race, among other things, relating to hiring, firing, and other decision-making may ultimately be produced in the course of litigation, and may provide plaintiff-employees with a foundation for their claims.

Schechner v. KPIX-TV et al., No. 11-15294 (9th Cir. May 29, 2012)

Contact for more information: Amy K. Jensen

Collective Bargaining Agreement Provision on Uncompensated Changing and Travel Time Upheld

A collective bargaining agreement clause provided that "clothes-changing time" was not compensable. The employees' working clothes included flame-retardant pants and jacket, as well as steel-toed boots. The union brought a collective action to recover compensation for time spent in work locker rooms changing clothes and walking from the locker rooms to their workstations. The employer argued that the lawsuit was barred by Section 203 of the Fair Labor Standards Act (FLSA), which allows employers and employees to exclude "clothes-changing time" from compensable time "by the express terms of . . . a bona fide collective-bargaining agreement." The union responded that personal protective equipment was not the type of clothing excludable under the FLSA. The U.S. Court of Appeals for the Seventh Circuit held that because the collective bargaining agreement provided that clothes-changing in work locker rooms was not compensable, then it was not a "principal activity" to start the workday prior to reaching the employees' workstations. The law does not require an employer to pay for time spent traveling to and from principal activities, therefore, the union's claim was dismissed. It must be noted that this decision may conflict with the position taken by the U.S. Court of Appeals for the Sixth Circuit. Employers must very carefully define what time and activities are compensable, especially relating to required clothing.

Clifton Sandifer, et al., v. United States Steel Corporation, No. 10-1821, 10-1866 (7th Cir. May 8, 2012)

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Illegal Alien Status Not a Protected Class Under Title VII

A female bank employee who was married to an illegal alien assisted her husband in opening two bank accounts. After her husband's business failed and he returned to Mexico to sort out his citizenship status, the employee informed her supervisor about her husband's unauthorized status. The bank's

security officer investigated and concluded that the employee's husband must have used fraudulent documents to open the bank accounts, and the employee was terminated. The U.S. Court of Appeals for the Seventh Circuit affirmed the dismissal of the employee's case. The court held that the bank terminated the employee because of her husband's immigration status, not because of his race or national origin. The court stated that, even assuming that Title VII of the Civil Rights Act of 1964, as amended, applies to discrimination against one's spouse, the employee's claim failed because it was based on the employee's husband's status, which is not protected by the statute. In spite of this decision, employers should be cautious about taking actions based upon information regarding an employee's spouse.

Kristi J. Cortezano v. Salin Bank & Trust Company, No. 11-1631 (7th Cir., May 21, 2012)

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Federal Judge Strikes Down NLRB "Speedy Election" Rule

In the May issue of the *Employment Practices Newsletter*, [LINK], we wrote about the National Labor Relations Board's (NLRB's) new rules designed to eliminate delays in elections. Those rules were invalidated 14 days later by the U.S. District Court for the District of Columbia. The decision is noteworthy in that it does not address the substance of the rule. Rather, it is based on the technicality that: only two of the three NLRB members actually voted to approve the rule. The judge stated that "two [members of the NLRB] is simply not enough." He further stated that, "according to Woody Allen, 80 percent of life is just showing up. When it comes to satisfying a quorum requirement, though, showing up is even more important than that. Indeed, it is the only thing that matters." Following the judge's decision, the NLRB issued a press release confirming that it "temporarily suspended the implementation of changes to its representation case process." It must be noted that the NLRB could adopt these rules at any time that a quorum is present. Employers who want to maintain union-free status must continue to be vigilant in the event that the NLRB tries again.

Chamber of Commerce v. National Labor Relations Board, No. 11-2262 (JEB) (D.D.C. May 14, 2012)

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Limitations on Affirmative Defenses in Sexual Harassment Cases

An employee reported to the human resource director that she had been sexually harassed by the company's vice president, who was also the husband of the company's president. The human resources director was fired by the president, who also exonerated her husband after the sexual harassment claims were determined to be unfounded. Both the employee and the human resource director sued the employer alleging sexual harassment of the employee and retaliation against the human resources director. The U.S. Court of Appeals for the Second Circuit affirmed the dismissal of the human resource director's claims. The court held that participation by a human resources director in

an internal employer investigation that is not connected with a formal U.S. Equal Employment Opportunity Commission (EEOC) proceeding does not qualify as a protected activity under Title VII of the Civil Rights Act of 1964, as amended. Regarding the employee's claims, the court concluded that standard sexual harassment affirmative defenses cannot be used by a defendant when the alleged harasser holds a sufficiently high position within the hierarchy of an organization. Therefore, the court upheld the sexual harassment verdict in favor of the employee. Employers are well advised to prevent sexual harassment claims because some defenses may not be effective.

Townsend v. Benjamin Enterprises, Inc., No. 09-0197-cv (2nd Cir., May 9, 2012)

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Burden of Proof for Retaliation Claims

A police officer sued the mayor and other city officials alleging that defendants unlawfully disciplined him and subjected him to termination because of his public criticisms of various departmental officials at police officer union meetings. The U.S. Court of Appeals for the Seventh Circuit explained the elements of a First Amendment retaliation claim: (1) the plaintiff's speech must qualify for constitutional protection; (2) the plaintiff must have suffered a deprivation likely to deter free speech; and (3) the plaintiff's speech must at least constitute a motivating factor in the actions taken by the employer. In this case, the officer's case was dismissed because none of the alleged incidents happened shortly after the protected speech, and the officer's own negative work behavior justified the employer's actions taken against him. Public employers must be exceedingly cautious in any actions taken against employees who exercise their rights to freedom of speech.

Kidwell v. Eisenhauer, et al., No. 09 CV 2179 (7th Cir., May 22, 2012)

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California Physician Partner May Sue Partnership for Retaliation

A physician partner sued her partnership under the California Fair Employment and Housing Act (FEHA) for retaliating against her for her opposition to, and efforts to prevent, the sexual harassment of nonpartner employees. The California Court of Appeals acknowledged that a partner cannot sue the partnership under the FEHA for alleged harassment or discrimination against the partner, or for retaliation for opposing harassment or discrimination against the partner. The court further stated that a partner cannot sue her partnership for harassment, discrimination or retaliation under Title VII of the Civil Rights Act, as amended. However, the court recognized that a partner is a "person" protected from retaliation under the FEHA for opposing alleged sexual harassment of the partnership's employees. The FEHA anti-retaliation provision shields "any person" who opposes employment discrimination, even if there is no existing employment relationship with the defendant. Although, as noted by the

court, these circumstances were "unique," California employers must note the broad interpretation of the FEHA prohibition against retaliation claims.

Fitzsimmons v. California Emergency Physicians Medical Group, No. A131604, RG06-268579, (Ca. App., May 16, 2012)

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Police Chief Not Protected by Qualified Immunity for Employee's Free-Speech Retaliation Claim

After a police department employee offered testimony in connection with a lawsuit filed by a co-worker against their employer, the assistant chief of police terminated the employee. The employee sued the assistant chief, claiming that her constitutional right to free speech was violated because she was terminated in retaliation for providing testimony about alleged misconduct. The U.S. Court of Appeals for the Ninth Circuit held that the assistant chief was not entitled to qualified immunity, and therefore, could be sued. To reach this determination, the court first evaluated the employee's First Amendment retaliation claim by asking: (1) did the employee speak on a matter of public concern; and (2) did the employee speak as a private citizen and not within the scope of her official duties, and, if so, (3) did the employee suffer an adverse employment action, for which her protected speech was a substantial or motivating factor? The court then considered: (1) whether the city had established that its legitimate administrative interests outweigh the employee's First Amendment rights, or (2) whether the city would have taken the adverse employment action even absent the protected speech. Here, the court found that the content, form and context of the employee's testimony demonstrated that her speech was a matter of public concern; that she had provided testimony as a private citizen and not pursuant to her official job duties; and that the assistant chief could not meet his burden of showing that the city would have fired the employee even absent her protected speech activities. While specific immunities and privileges may exist to protect individuals in certain professions from claims, as this case demonstrates, the facts sometimes render those immunities and privileges inapplicable under the circumstances. Employers should work with counsel to evaluate the applicability of any immunities and privileges to claims.

Karl v. City of Mountlake Terrace, No. 11-35343, (9th Cir. May 8, 2012)

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Second Circuit Reverses Labor Board on Union Button Policy

In connection with efforts to unionize employees at a coffee shop chain, a dispute arose between coffee shop management and pro-union workers regarding the employer's policy prohibiting employees from wearing multiple pro-union buttons. The employer's policy encouraged employees to wear pins for special company-sponsored promotions, but limited the number of pro-union pins to one. The union

filed an unfair labor charge based on the prohibition of pro-union buttons. Although the National Labor Relations Board (NLRB) found in favor of the union, the U.S. Court of Appeals for the Second Circuit rejected the NLRB's reasoning and found in favor of the employer. The court determined that allowing employees to wear an unlimited number of buttons could convert the employees into "personal message boards" and seriously erode the information conveyed by the company-issued pins. The court recognized the employer's "legitimate managerial interest" in displaying a particular public image through employee buttons. Employers should recognize that with the NLRB's current makeup, especially with the most recent resignation from the NLRB, decisions continue to trend in favor of unions, which makes strict efforts to document employment decisions, discipline and performance reviews all the more important.

National Labor Relations Board v. Starbucks Corporation, Nos. 10-3511-ag, 10-3783-ag (XAP) (2nd Cir. May 10, 2012)

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