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Newsletters

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Eighth Circuit Denies Class Certification Based on *Dukes* and Admits Third-Party Evidence to Prove Plaintiffs' Claims

Six African American employees who worked in their employer's steel plant in Blytheville, Arkansas, sued the employer. They alleged that the employer had violated Title VII of the Civil Rights Act of 1964, as amended, by systematically refusing to promote black employees and by allowing for a racially hostile work environment. In addition to their own claims, the employees sought to represent a class of approximately 100 other employees and job applicants representing the plant's five different departments. The district court denied the request for class certification but allowed the employees' six hostile work environment claims to proceed to jury trial. Each plaintiff was awarded $200,000 in damages. The employer appealed, contending that the court erred during the trial by allowing admission of evidence of alleged discrimination against employees other than plaintiffs. Plaintiffs cross-appealed, objecting to the court's denial of class certification. The U.S Court of Appeals for the Eighth Circuit affirmed the district court on both grounds. First, in addressing plaintiffs' argument regarding the denial of class certification, the court looked to the U.S. Supreme Court's recent determinations on class action matters in this context and determined that although all of the claims involved the Blytheville plant, the class was improper under *Wal-Mart v. Dukes,* 564 U. S. ____ (2011), because "employment practices varied substantially across the plant's various production departments." Second, regarding the employer's evidentiary objections, the court found that the nonparty evidence was admissible because such evidence "can be relevant to a plaintiff's hostile work environment claim," and because, in this case, the district court had conducted a fact-based analysis to determine whether each piece of evidence involved "the same place, the same time, [or] the same decision-makers" as the plaintiffs' claims. This case demonstrates the compromise that some courts have begun striking in the wake of *Dukes*: where class actions are denied, parties are permitted to more broadly use evidence of discrimination or other wrongs against nonparties to prove their cases. Employers should be aware of this when managing employees' complaints or preparing to defend a lawsuit.

Bennett, et al. v. Nucor Corporation, Nos. 09-3831/3834 (8th Cir. Sept. 22, 2011)

Wal-Mart v. Dukes, 564 U. S. ____ (2011)

Employee's Failure to Demonstrate Satisfactory Job Performance Renders ADA Claim Invalid

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Service Areas

Employee Benefits

Immigration

Labor & Employment

Workers' Compensation Defense

A part-time janitor did not receive any of the promotions for which he applied, and was later terminated for performance reasons. He sued his employer, claiming that his termination was discriminatory in that it was based upon his mental disability. In reviewing the evidence and ruling on the employer's motion for summary judgment, the court determined that, while the employee did have a mental disability and had made a complaint about discrimination, he had significant performance-related issues that contributed to his lack of promotion and his ultimate termination. Because the employee failed to demonstrate that he was meeting the employer's reasonable expectations of the job and performing his job satisfactorily, he could not maintain his claims under the Americans with Disabilities Act. Further, the fact that a supervisor made a comment to him that he "should not be suing [his] employer" if he wanted to get a promotion was not determinative and the remark, alone, did not support his claim for retaliation. This case demonstrates the significance of having well-documented performance records, which, here, helped to overcome a supervisor's "imprudent" remark and ultimately assisted the employer in securing a dismissal in its favor.

Dickerson v. Board of Trustees of Community College District No. 522, No. 08-CV-716 (7th Cir. Sept. 16, 2011)

Employee Fails to Demonstrate that Termination Was Act of Discrimination or Interference With Leave

An employee was terminated after she took approved Family and Medical Leave Act (FMLA) leave for surgery, but failed both to contact the employer after leave expired and to return to work. The employer's FMLA leave policy required employees to "properly report" their absences to their department prior to the beginning of their shift each day until the employee received formal notification that FMLA leave had been approved. Failure to provide proper notification for three consecutive workdays subjected the employee to termination. Separate and apart from the FMLA issue, the employee had also complained to her supervisor twice that an African American employee was being treated unfairly due to race. Following her termination, the employee sued, claiming retaliation in violation of 42 U.S.C. § 1981, and interference and retaliation under the FMLA. The U.S. Court of Appeals for the Tenth Circuit found that the only evidence presented by the employee was, at best, that of potential pretext, not of actual retaliatory intent. Employers should have handbook provisions and posted notifications about FMLA leave so that employees are aware of their rights and responsibilities. Employers should also have policies and procedures in place for communications with employees while out on leave.

Twigg v. Hawker Beechcraft Corp., No. 10-3118, (10th Cir. Oct. 13, 2011)

Employee's Complaint About Another Employee's "Imprudent" Remark Insufficient to Support Retaliation Claim

At a company dinner, a supervisor commented to a young male employee that she preferred younger men and had engaged in multiple workplace relationships. A vice president of the company learned of the supervisor's comments and reported them to management as sexual harassment in violation of Title VII of the Civil Rights Act of 1964, as amended (Title VII). At the same time, he reported that the same supervisor was racially discriminating against a subordinate whom he believed she had treated too harshly. The vice president was subsequently fired due to his inadequate work performance. He then sued the employer alleging that he was fired in retaliation for opposing the supervisor's sexual and racial harassment of other employees in violation of Title VII and Section 1981. The U.S. Court of Appeals for the Seventh Circuit rejected the vice president's claim. The court found that the vice president did not engage in "protected activity" when he reported the supervisor's purported sexual harassment because he could not have reasonably believed that the supervisor's behavior, "a single instance of sexually charged remarks," amounted to sexual harassment. The court reasoned that while the supervisor's remarks were "imprudent," they were "relatively tame." Although the court did find that the vice president engaged in protected activity when he reported what he believed to be racial discrimination, the vice president did not present evidence to rebut the employer's legitimate reason for terminating him, in that his work performance was not adequate. The court consequently dismissed his case. Employers must be certain that adverse action is never taken against an employee for having opposed what he or she reasonably believed to be unlawful discrimination or harassment.

O'Leary v. Accretive Health, Inc., No. 10-1418 (7th Cir. Oct. 19, .2011)

Court Allows Employee's Harassment Claim to Proceed to Jury to Determine Causation

During a business dinner, a member of the organization's board of directors told an employee that he "fantasized about making love to her on a dance floor and wanted to take her to Las Vegas and other places around the world." The employee declined the board member's advances, and complained to the human resources department about the harassment. Shortly thereafter, the employer underwent personnel changes, which included the hiring of a new president. In this process, the employee was notified that her position was being eliminated. She sued, alleging sex discrimination, harassment and retaliation under Title VII of the Civil Rights Act of 1964, as amended. With respect to the sex harassment claim, the U.S. Court of Appeals for the Seventh Circuit held that the single sexual advance by the board member did not rise to the requisite level of "severe and pervasive" harassment. However, as to the remainder of the claims, the court found that there existed sufficient questions of fact such that the claims should go to the jury. For instance, the court indicated that the jury should make the determination of whether or not the employee's termination was causally related to the making of her harassment complaint, particularly given the fact that four new employees were hired at or around the time the employee was terminated. As best practice, employers should ensure that all employees—particularly management-level employees—receive training in anti-discrimination and anti-harassment policies. Employees must be made aware that their conduct, even during off-site or off-duty events, may constitute harassment.

Egan v. Freedom Bank, No. 10-1214 (7th Cir. Oct. 6, 2011)

Court Rejects "But For" Standard in Federal Sector Age Discrimination Claim

An employee who had worked for her government employer for more than 30 years did not receive a promotion that she had sought. The position was instead given to a younger employee. The employee sued her employer, alleging age discrimination, sex discrimination and retaliation. The employee claimed that she was not only deprived of the position due to her age and gender, but that she was also retaliated against because she was not given the promotion due to her prior complaints of discrimination. The U.S. Court of Appeals for the First Circuit held that the employee had failed to meet the burden of establishing her claims. Specifically, although the employee based her claim of age discrimination on a memorandum in which the employer referenced a need for "new blood," that was not dispositive of age discrimination. Further, the employee failed to overcome the fact that the younger employee received the promotion because he had performed more favorably during the interview and had more experience in the industry at issue. Notably, the court applied the "mixed-motive" analysis, and not the more stringent "but for" standard recently applied by the U.S. Supreme Court in *Gross v. FBL Financial Services, Inc.,* 129 S. Ct. 2343 (2009). The court held that the employee did not have to show that age was the "but for" cause of her failure to receive the promotion because that standard did not apply to federal sector workers. In age discrimination cases, different standards of liability may therefore apply to different employers, depending upon whether the employer is in the private or public sector.

Velazquez-Ortiz v. Vilsack, No. 10-1787 (1st Cir. Sept. 22, 2011)

Employee's ADA Claim Fails Due to Inability to Establish That She Was a "Qualified Individual"

An employee sued her employer claiming that she was: (1) discriminated against based upon her disability, (2) retaliated against, and (3) subjected to a hostile work environment when the employer failed to provide her with a disabled-access parking spot. The employee suffered from fibromyalgia and other health problems, which ultimately led to her taking considerable time off of work. In at least one year, she was absent for 59 percent of the time. In response to her claim, the employer indicated that the employee's attendance was entirely unpredictable and that she rarely gave advance notice of her absences. The U.S. Court of Appeals for the First Circuit determined that the employee's claim failed from the inception because she was unable to establish that she was a qualified disabled individual, or, more specifically, that she was able to perform the essential functions of her job. The provision of a disabled parking space was not determinative, because it was questionable whether the space would have enabled her to perform the essential functions of her job. Because being present at her workplace was an essential function, and the employee's history of absences demonstrated that she was incapable of regularly being at work, she could not overcome this initial hurdle. The court similarly determined that the employee was unable to establish a hostile work environment or retaliation based upon the same facts. Disability discrimination claims are on the rise. Employers must ensure that their policies and practices comply with the ADA and/or corresponding state anti-discrimination laws.

Colon-Fontanez v. San Juan, No. 10-1026 (1st Cir. Oct. 12, 2011)

Temporarily Recalled Worker's Age Discrimination Claim Time-Barred

An employer notified its employees that it would be closing down its facility and merging operations with another plant. The employer's long-term accounts payable clerk was informed that there would be no position available for her once the facility closed. The employer also notified her of a pending layoff. Four days after the plant closed, the employee was recalled for temporary accounts payable work at the open facility. The employee continued to work for approximately five months with the hopes that she would become permanently employed once again. When her temporary assignment came to an end, her employment was severed. The employee filed a claim with the U.S. Equal Employment Opportunity Commission (EEOC) alleging age discrimination. She subsequently sued the employer and prevailed in that lawsuit. The employer claimed that the employee's claim was time-barred. The U.S. Court of Appeals for the Fifth Circuit considered the fact that the employee did file her EEOC charge within 180 days of her ultimate termination, but failed to file the charge within 180 days of the notification of her layoff. Because the notification of layoff was the alleged discriminatory act, the employee was required to file her claim based upon that point in time, as the statute of limitations began to run at the time that the employer unambiguously notified the employee that her employment would be ending, not at the point when her temporary work ended. Because the lower court incorrectly determined that the adverse employment action occurred at the end of the temporary period of employment, the court of appeals determined that the claim was time-barred. This case demonstrates the importance of providing clear, unambiguous timely notifications to employees in advance of plant closures and layoffs.

Phillips v. Legget and Platt, Inc., No. 10-60585 (5th Cir. Sept. 21, 2011)

Employee Fails to Establish Race Bias on Part of Union or Union Representative

An African American employee was terminated after it was determined that he was taking extended break periods and playing pornographic videos in the break room. Through his local union, he pursued a grievance and was represented at a hearing. The employee and his representative argued that other individuals had watched pornographic videos at work and that they had not been terminated, and referenced race-based comments which had been made by employees. After the committee denied his grievance, the employee filed a complaint against the representative and the union, claiming that they had violated 42 U.S.C. § 1981 by deliberately discriminating against him because of his race. The employee claimed that the representative had allegedly failed to argue at the hearing that the employee was terminated due to his race. The U.S. Court of Appeals for the Fifth Circuit upheld the lower court's decision, finding that the employee did not establish that he was subjected to an adverse union action, and that he did not demonstrate that he was treated less favorably than employees of other races. The appellate court further found that the employee was properly represented at the grievance hearing, that he had ample opportunity to both present evidence and voice his concerns, and that the representative had, in fact, presented information relating to the race claim.

Wesley v. General Drivers, et al., No. 11-10120 (5th Cir. Oct. 5, 2011)