Knoxville Bar Association

Employment Law Update

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U.S. Supreme Court Term

- Employers win on slim docket.
- Rejected "continuing violation" treatment of paychecks in Title VII pay discrimination claims.
- Upheld exclusion of "companionship workers" employed by third parties from FLSA overtime requirements.

Ledbetter v. Goodyear Tire and Rubber Co., **127 S. Ct. 2162 (May 29, 2007).**

- Plaintiff alleged pay discrimination over 19 years, but did not show animus for any decision ***within*** SOL.
- Sharply divided "Roberts Court" found pay decisions were ***discrete acts*** and plaintiff's claims time barred. Reversed $3.25 million judgment. *Bazemore v. Friday* was distinguished.
- Possible legislative "fix" and remember *Booker v. The Boeing Company*, 188 S.W.3d 639 (Tenn. 2006).

Long Island Care at Home Ltd. v. Coke, 127 S. Ct. 2339 (June 11, 2007).

- Unanimously upheld DOL regulatory exclusion of ***"companionship workers"*** employed by ***third parties*** from minimum wage and overtime requirements.
- At issue: Was DOL's regulation a proper exercise of power under FLSA?
- Answer: Yes. Statutory provision gave broad authority to DOL, which was properly exercised.

The Upcoming Term

- *LaRue v. DeWolff, Boberg & Assoc., Inc., cert granted*, 458 F.3d 359 (4th Cir. 2006).
- Plaintiff sought recovery under ERISA for harm to *his* "interest in the plan."
- Issues: (1) Is individual relief for breach of fiduciary duty available under ERISA § 502 (a)(2) (which is limited to relief that "inures to the benefit of the plan as a whole"; (2) are damages for breach of fiduciary duty available under § 502 (a)(3) (which only allows equitable relief)?

The Upcoming Term Continued

- *Holowecki v. FedEx*, 440 F.3d 558 (2nd Cir. 2006) *cert granted.*
- Multiple plaintiffs brought pattern and practice age discrimination suit based on EEOC ***intake questionnaire*** that never resulted in investigation by EEOC.
- Issue: Is a "charge" timely made where claimant only filled out intake questionnaire and supplied affidavit?
- Anticipate the "duck rule," if it looks like a duck . . .

The Upcoming Term Continued

- *Mendelsohn v. Sprint/United Mgm't. Co.*, 466 F.3d 1223 (10th Cir. 2006) *cert. granted.*
- Age discrimination plaintiff appealed exclusion of ***"me too"*** testimony by others not supervised by her superior.
- Issue: In RIF setting, should same supervisor rule be permitted to exclude "me too" evidence?
- ***Significant*** case - - broad summary judgment and trial implications.

Employers, we recognize there are problems out there!

"Performance Reviews"
Quotes from actual Federal Employee Performance Reviews:

- Since my last report, this employee has reached rock bottom and has started to dig.
- He sets low personal standards and then consistently fails to achieve them.
- This employee is depriving a village somewhere of an idiot.
- This employee should go far, and the sooner he starts, the better.
- He does not have ulcers, but he is a carrier.
- When his IQ reaches 50, he should sell.

The Sixth Circuit

Pollett v. Rinker Materials Corp., 477 F.3d 376 (6th Cir. 2007).

- Suspended employee sought ***disability benefits*** in ***between suspension and termination***.
- Issue: Is disciplinary leave an "excused leave of absence" under the disability plan's terms?
- Result: No. An employee on unpaid disciplinary suspension was not "actively at work" as required by plan.

Bryson v. Regis Corp., 2007 U.S. App. LEXIS 19481 (6th Cir. 2007).

- Hair stylist had knee surgery, supervisor threatened to fire, called her "selfish," a "faker" and a "cripple."
- Was fired for failure to return on the day her 12 week leave ended; but ER ***did not receive the notice*** that she could not return until 5 days later.
- Result: "Interference claim" barred because could not return; but "retaliation claim" reinstated - - company's reasons looked phony due to timing, no after-acquired evidence for retaliation.

Mutchler v. Dunlap Mem'l Hosp., 485 F.3d 854 (6th Cir. 2007).

- Nurse needed bi-lateral carpal tunnel surgery in two stages. First leave was approved for FMLA.
- The problem: She was not eligible. (1,242.8 hours) ***Before*** end of first leave, ER tells EE that FMLA protection would ***not*** apply to second leave. Returned to undesirable schedule.
- Result: No estoppel against employer because plaintiff could not show detrimental reliance.
- FMLA estoppel of dubious enforceability.

Denhof v. City of Grand Rapids, 2007 U.S. App. LEXIS 18170 (6th Cir. 2007).

- Two officers claiming sexual harassment against Police Department subjected to "fishy" fitness for duty exams and terminated.
- City's psychiatrist declared them unfit for duty conflicting caregiver's opinions ignored.
- Result: "Honest belief " defense rejected because jury could find City's reliance on psychiatrist was ***unreasonable***.

Leffman v. Sprint Corp., 481 F.3d 428 (6th Cir. 2007).

- Laid off worker ***denied early retirement benefits*** because Sprint excluded her 1976 maternity leave from creditable service.
- Issue: Was complaint filed in 2000 time barred?
- Result: Yes. Discriminatory act was the original exclusion not its impact on her during RIF. *United Airlines v. Evans* controls.

Tysinger v. Police Department of Zainesville, 463 F.3d 569 (6th Cir. 2006).

- ***Pregnant*** officer sought ***temporary light duty*** after fight with suspect. Denied by City.
- Issue: Is accommodation required? Was fact that co-workers who were not able to fully perform continued working evidence of *de facto* accommodation for non-pregnant EE's?
- Result: No. Plaintiff requested non-existent light duty – co-workers faked ability to fully perform rather than take leave. Not similarly situated in all relevant respects.

Asmo v. Keane, Inc., 471 F.3d 588 (6th Cir. 2006).

- ***Plaintiff's pregnancy announcement*** greeted ***silence*** by supervisor, who selects her for RIF two months later.
- Issues: Causal nexus and pretext.
- Held: Temporal proximity, ***standing alone***, is sufficient for nexus, company's explanations were conflicting and comments by non-decision-making V.P. were admissible.
- Disturbing reasoning by **J. Cudahy** on supervisor's reaction and hearsay statement.

Rodriguez v. FedEx Freight East, Inc., 487 F.3d 1001 (6th Cir. 2007).

- ***Hispanic driver sought promotions***, but his supervisor allegedly told decisionmakers he was unsuitable because of his "accent" and "speech patterns." He complained, but no investigation or corrective action resulted.
- Held: Such statements are **direct evidence** of national origin discrimination, shifting production and persuasion to employer.
- Result: Remand to see if FedEx can show he would not have been promoted anyway.

Clay v. United Parcel Service, Inc., 2007 FED App. 0354P (6th Cir. 2007).

- African American EE not promoted, filed charge, then fired for "3 day no-call no-show."
- ER records reflected termination letter sent ***after only two days***.
- Result: Reasons given for ***not training*** pretextual; ER cannot meet ***"its burden"*** on honest belief defense
- Troubling language arguably placing burden of honest belief on ER. Look for possible *en banc*.

Michael v. Caterpillar Fin. Svcs. Corp., 2007 U.S. App. LEXIS 18154 (July 31, 2007).

- African American EE placed on ***paid administrative leave*** and ***performance improvement plan*** following ugly meeting with supervisor and complaints that she treated subordinates like personal valets.
- Issues: Were actions "adverse" enough? Did she show pretext?
- Result: Not for discrimination. However, actions "might well have dissuaded a reasonable worker from charging discrimination" to support retaliation claim. But she could not defeat ER's honest belief by her contrary testimony. Correction application of the law.

Kleiber v. Honda, 485 F.3d 862 (6th Cir. 2007).

- Seriously ***head-injured plaintiff*** wanted ***transfer*** near end of twelve month leave limitation, but no positions were found and Honda terminated him.
- Issues: Was Kleiber qualified? Did Honda fail to engage in interactive process?
- Result: Even with job coach, Kleiber was ***not "otherwise qualified"*** for any Production Assistant jobs. Also, though interactive process less than perfect, Honda interacted enough.
- Unanswered: Must plaintiff show he is "otherwise qualified" for interactive process claim?

Macy v. Hopkins County School Board of Education, 484 F.3d 357 (6th Cir. 2007).

- ***Head-injured teacher*** filed EEOC complaint; ***fired*** 8 months later after ***threatening to kill students*** (investigation revealed other misdeeds.)
- Issues: Did lack of earlier discipline or superficially disparate treatment of non-disabled teacher create pretext issues?
- Result: No. Teacher engaged in misconduct, mental disability no excuse; that alleged "comparable" she pointed to was not similarly situated.

EEOC v. Jefferson Cty. Sheriff's Dep't, 467 F.3d 571 (6th Cir. 2006).

- Plaintiff ***denied disability retirement benefits*** because he kept working beyond minimum retirement age. Facially discriminatory policy.
- Issue: Earlier Sixth Circuit decision, *Lyon v. Ohio Educ. Ass'n*, 53 F.3d 135 (6th Cir. 1995), required, in addition to facially discriminatory terms, showing of animus.
- Result: *Lyon* is overruled, where plan/policy is facially discriminatory, no animus s necessary for PF case.
- Plan also violated OWBPA.

Tuttle v. Metro Gov't of N'ville
474 F.3d 307 (6th Cir. 2007).

- Low performing plaintiff subjected to age-conscious statements, called "Supervisor of the Fridge," lied to about transfer and not given performance review. Terminated shortly after EEOC charge is filed.
- Issue: Was jury's finding reasonable?
- Result: Easy case. PF case met where plaintiff was replaced by younger ***temporary EE***. Abundant evidence of pretext; inconsistent reasons plus age conscious statements.

Federal Legislation and Regulation

Fair Labor Standards Act

- Raised to $5.85; raises to $6.55 in July of 2008, and to $7.25 in July of 2009.
- Posters available at www.dol.esa/regs/compliance/posters/flsa.htm.

1-9 Safe Harbor Regulations

- New DHS regulations expanding definition of "constructive knowledge" of employing unauthorized workers ***were*** scheduled to go into effect mid-September, but are on hold pending court challenge.
- In event of "mismatch" letter from SSA (or DHS), employer and employee would have maximum of 93 days to clear up problem. 8 C.F. R. Part 274a.
- Issues: Are the regulations even authorized under IRCA? Until regulations become effective, be sensitive to wrongful termination claims.

Tennessee Decisions

Cambio Health Solutions, LLC, et al., v. Reardon, 213 S.W.3d 785 (Tenn. 2006).

- Minority shareholder executive sought to enforce contract providing severance.
- Parent companies resisted and invoked immunity for ***tortious interference with contract.***
- Sixth Circuit certified question.
- Held: Only parents with 100% control may invoke immunity. There is no complete unity of interest between entities where one has minority shareholder.
- Result: Jury award in excess of $1 million upheld.

Gooden et al., v. Coors Technical Ceramic Co., 2007 Tenn. LEXIS 779 (Tenn. Sept. 6, 2007).

- EE was injured in ***voluntary*** regular pick-up basketball game on ***unpaid break***.
- Issue: Was employee injured within scope of employment?
- Result: Yes! Court backtracked on *Young v. Taylor-Whitt, LLC*, 181 S.W.3d 324 (Tenn. 2005) (injury in three legged race at company picnic not compensable).

Little v. Eastgate of Jackson, LLC, 2007 Tenn. App. LEXIS 242 (Tenn. Ct. App. 2007).

- Store clerk left store with baseball bat to assist woman being assaulted. ER, "You're fired for exposing us to liability." ***Good Samaritan*** sued ER.
- Issue: Was termination a retaliatory discharge violating clearly established public policy?
- Result: Yes! Strong public policy in favor of protecting human life. Only applies to acts to "rescue or protect another reasonably believed to be in imminent danger of death/serious bodily harm."

Tennessee Legislative Update

- Tenn. Code Ann. § 63-1-148 – Physician no-competes are back, limited to 2 years, but not to emergency medicine or radiology.
- Tenn. Code Ann. § 39-17-1801 – Non-Smoker Protection Act goes into effect October 1, 2007. No smoking in enclosed places of employment or commercial vehicles (with 7/person); ER's policies should ban smoking inside; tell applicants; post signs; warn the violators.