Employment Law Outlook

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Supreme Court Holds Front Pay Not Subject To Cap

By Susan R. Blackman, Esq. and John T. McDonald, Esq.

Currently, successful plaintiffs in employment discrimination cases can recover a variety of damages including back pay, front pay, compensatory and punitive damages as well as injunctive relief and reinstatement. However, Title VII of the Civil Rights Acts of 1964 originally only provided for injunctive relief and "such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay."

In 1972, Congress expanded the language, authorizing the court to award "any other equitable relief as the court deems appropriate." With the addition of this language, several appellate courts held that front pay was available under the statute. Front pay is money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement. When awarded in lieu of reinstatement, front pay generally represents the estimated present value of future lost earnings the plaintiff is likely to incur as a result of the discrimination.

In 1991, Congress again expanded the damages available for violations of the act by providing successful plaintiffs the express right to recover for compensatory and punitive damages if they were successful in proving intentional discrimination. Congress limited these additional damages to specified dollar amounts, based on the size of the employer. The maximum available under these damage caps was set at $300,000, and this applied only to the largest companies–those with over 500 employees. The language of the statute excluded those damages originally available under the civil rights statute from the application of the cap.

Federal Courts of Appeal have since differed in their interpretations of the effect of this damages cap on the availability of front pay. At least one circuit held that front pay fell under the definition of "compensatory damages" and therefore was subject to the cap. Other Circuits have held that front pay has always been available under the Act, and therefore is excluded from the cap. In *Pollard v. E.I. du Pont de Nemours & Co.*, the United States Supreme Court put an end to this split between the circuits, ruling that the damages cap does not apply to front pay.

In *Pollard*, the plaintiff sued her former employer for sex discrimination and asserted that her psychological injuries made it impossible for her to be reinstated at the same company. The jury returned a verdict awarding her $300,000 in compensatory damages, the maximum amount allowed because of the statutory cap. The trial judge found this amount to be insufficient, but determined he could not award an additional amount for front pay because the Court of Appeals in his circuit had previously ruled that front pay was subject to the cap. The plaintiff appealed.

The Supreme Court unanimously reversed. The Court ruled that because the original language in the Civil Rights Act paralleled that of the National Labor Relations Act (NLRA), the two acts should be construed similarly. The NLRA's language had been construed as providing for front pay awards,

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Virginia Supreme Court's Refusal To Enforce Non-Compete Agreement Provides Wake-Up Call For Employers

By William M. Furr, Esq.

Since 1962, the Supreme Court of Virginia has shown a repeated willingness to find non-compete agreements enforceable under Virginia law. Although the Supreme Court requires employers to prove that the terms of the non-compete agreements are reasonable, it has found the vast majority of agreements that it has reviewed to be enforceable. Many Virginia employers have been lulled into a false sense of security regarding the enforceability of their non-competition agreements.

On June 8, 2001, the Supreme Court of Virginia refused to enforce a non-compete agreement because it concluded that the restrictions were overly broad. *Motion Control Systems, Inc. v. East.* The employer, Motion Control Systems, designs and manufactures high performance brushless motors. The non-competition agreement provided that for two years after

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the employee's termination, he could not own, manage, or be employed by any business similar to the type of business conducted by the company" within a 100-mile radius of the company's office. The agreement defined "similar business" as including "any business that designs, manufactures, sells or distributes motors, motor drives or motor controls."

In analyzing the definition of "similar business", the Court concluded that the definition rendered the agreement overly broad and therefore unenforceable. According to the Supreme Court, "the restricted activities include a wide range of enterprises unrelated to the business of [the employer]." By including any business that manufactures or sells any type of motors, the broad definition rendered the agreement unenforceable.

Ironically, the Supreme Court probably would have enforced the non-compete agreement if the employer had not attempted to define "similar business." The Supreme Court has enforced several agreements that do not attempt to define what a similar business is. Employers need to be extremely careful that the language included in their non-competition agreements is not overly broad. Even lawyers experienced at drafting these agreements revise their forms periodically to comply with the most recent decisions by the Supreme Court of Virginia. We suggest that all employers update their non-competition agreements periodically to make sure that they continue to be enforceable. ■

We want to hear from you.

Written questions and comments are welcome. Please send to:

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Piercing the Protective Shield for EEOC Charge by Current Employee

by Wm. E. Rachels, Jr., Esq.

In response to our encouragement for readers to submit issues to be addressed, we have received a request to confront the issue of "dealing with current employees who have filed EEO claims against their employer. How do you discipline them? How do you conduct performance appraisals? It seems they will always cry 'retaliation' for any action taken against them."

A somewhat thorny issue. While some EEOC charges are at least filed in good faith, there is also a group of them which are filed under the theory of "the best defense is a good offense" of filing a charge. Thereby the current employee sets up the foundation for a subsequent retaliation charge for any adverse action taken.

Under the law, retaliation must be proven by establishing (1) the employee engaged in protected activity; (*e.g.*, the filing of the original Charge); (2) an adverse action against the employee (*e.g.*, discipline or low performance appraisal); and (3) a nexus between them. The challenge therefore is to show the lack of nexus by showing the propriety of the adverse action taken.

We need to face the fact that the filing of a retaliation charge in such sequence is a likely reality. Such a charge may be unavoidable where you take necessary action. It will then likely be necessary to disprove the nexus. While court procedure requires the employee to prove the nexus, as a practical matter, at least at the EEOC level, the burden is on the employer to show the absence of the nexus and other legitimate reasons for the action taken.

Notwithstanding the risk, it is critically important to continue to apply uniform standards uniformly. Consistency remains the virtue. It is right to so proceed. If you back away it erodes the credibility of your system for the application of policies and practices. Backing away also plants seeds in other employees who are anxious about their job to file a "protective" charge.

You need to build the response to the retaliation charge as you go. Although it should apply in any situation, be especially careful to adequately evaluate and support any action taken. As usual, documentation is critical, including signed witness statements. Have a second management person present when administering the employment action.

We also recommend that in addressing the issues with the employee you affirmatively state that the action is based upon the legitimate reasons which you explain. Make it clear that it is taken completely without regard to the existing Charge of Discrimination. Write up the meeting and request the employee's signature in addition to those of the management representatives verifying the events so recorded. In short, be careful and be prepared. ■

Benefit Plans May Create Liability

By John T. McDonald, Esq.

Employers drafting guidebooks, benefit plan descriptions and other documents detailing employment policies need to be careful that they do not create liability under federal employment laws. Employers rely on these documents to inform their employees about company policies and to provide support for employment actions and other decisions. For example, a well-drafted sexual harassment policy can aid in defending against a charge of harassment. However, a minor drafting mistake may result in extending liability to situations where, without the document, no liability would exist.

The Seventh Circuit recently illustrated this point. In *Thomas v. Pearle Vision*, the plaintiff brought suit under the FMLA when she was not given her old position after returning from medical leave. There were only twelve employees in the office where the plaintiff formerly worked, and there were less than fifty employees within a seventy-five mile radius. Under the terms of the FMLA, such an employee is not eligible for medical leave. The employer sought summary judgment on this basis. However, the court denied the motion, finding that the employer's Summary Plan Description of Employee Benefits (SPD) extended FMLA coverage to the employee.

The SPD included a section entitled "The Family and Medical Leave Act of 1993." The section stated that all employees who had worked for the employer "for at least one year, and [had] worked 1250 hours or more during the 12 month period prior to requesting leave are eligible for Family and Medical Leave." The court held that this language constituted an express promise by the employer to offer benefits to all employees meeting the stated requirements, regardless of the fact that they may not meet the jurisdictional requirements under the FMLA. The court reasoned that if the employer wanted to extend FMLA benefits only to those otherwise covered by the Act, it simply could have inserted the jurisdictional requirements into its SPD.

Of course, employers are free to offer their employees benefits beyond those required by federal law. However, employers need to carefully draft their employment documents to ensure that they are not unintentionally doing so. ■

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therefore the Court ruled that Congress had the same intent when it drafted the damages provision of the Civil Rights Act. Because the Court ruled that front pay had been available prior to the 1991 amendment, such awards were not compensatory damages subject to the cap.

The Supreme Court's ruling emphasizes the serious nature of employment discrimination claims. Successful plaintiffs who establish that reinstatement is not feasible are entitled to front pay as well as backpay, compensatory and punitive damages. The potential award can be well in excess of the $300,000 cap that applies to compensatory and punitive damages. This ruling serves as another reminder to employers of the value of taking proactive measures to prevent unlawful discrimination and reduce risks of claims by employees. ■

Plan's Failure to Cover Oral Contraceptives Violated Pregnancy Act

by Timothy M. McConville, Esq.

In a case of first impression in the federal courts, a federal district court in Washington State ruled in June that an employer's selective exclusion of contraceptive drugs and devices from its generally comprehensive prescription benefit plan constituted discrimination on the basis of sex. In *Erickson v. The Bartell Drug Co.*, the United States District Court for the Western District of Washington held that the employer's prescription benefit plan violated Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act. The court ordered Bartell to cover each of the available options for prescription contraception to the same extent, and on the same terms, that it covers other drugs, devices, and preventive care for the participants of the plan.

Bartell's prescription plan provided comprehensive coverage and excluded only a few specific drugs and devices. The plaintiffs in the case specifically challenged Bartell's decision not to cover prescription contraceptives such as birth control pills, Norplant, Depo-Prevara, intra-uterine devices, and diaphragms under its prescription benefit plan.

The court held that the plan discriminated against Bartell's female employees by providing less complete coverage than that offered to male employees. Specifically, the court found that "when an employer decides to offer a prescription plan covering everything except a few specifically excluded drugs and devices, it has a legal obligation to make sure that the resulting plan does not discriminate based on sex-based characteristics and that it provides equally comprehensive coverage for both sexes." According to the court, Title VII requires employers to recognize the differences between the sexes and provide equally comprehensive coverage, even if that means providing additional benefits to cover women-only expenses. The *Erickson* ruling has caused many employers to review their prescription benefit plans. ■

Separate Warnings Required

By Samuel J. Webster, Esq.

Mass layoffs have increased dramatically according to the Bureau of Labor Statistics – 46% from May to June, 2001; 28% for the first six months of 2001. These mass layoffs, and concomitant plant closings, invoke the protections of the Worker Adjustment and Retraining Notification Act (WARN). Congress enacted the WARN Act in 1988 to "protect workers, their families and communities from plant closings and mass layoffs without advance notice."

The WARN Act requires an employer to give 60 days notice of a mass layoff or plant closing to *each* affected employee, the affected bargaining unit (if any), and the chief elected official of the local government, if the closing/layoff results in an "employment loss": termination of employment; voluntary resignation or retirement; layoff exceeding six months; hours worked reduced by more than 50% during a six month period. A WARN Act violation may result in back pay and benefits liability and daily penalties.

The United States Fourth Circuit Court of Appeals, covering Virginia, Maryland, West Virginia, North Carolina, and South Carolina, recently concluded that a separate and new WARN Act notice was necessary when a temporary plant closing/mass layoff became a permanent closing. *Graphic Communications Int'l Union v. Quebecor Printing*. On September 18, 1998, Quebecor issued a WARN Act notice for a mass layoff and temporary plant shutdown expected to exceed six months. Eighty-four days later, on December 11, 1998, the shutdown and layoff occurred. Four days later, Quebecor's management determined to close the plant permanently, and Quebecor notified its unions on December 16 that the nature of the September WARN Act notice had been changed from a temporary shutdown to a permanent plant closure.

The Fourth Circuit analyzed the WARN Act and concluded that the Act contemplates that an employee may suffer more than one employment loss, which in turn requires separate notices. Since the change from temporary closing and layoff to permanent closing resulted in a termination on the date of the change, that employment loss was different than the employment loss suffered a week earlier when the plant was initially temporarily closed. Notwithstanding the draconian effect of its decision, the Fourth Circuit hinted that Quebecor had acted in good faith in relying upon its September WARN Act notice to suffice for the December plant closing, in which case the District Court on remand had discretion to reduce the amount of back wage, benefit, and penalty liability.

The WARN Act ameliorates the effect of economic downturns resulting in mass layoffs or plant closings. As the *Quebecor* case illustrates, however, employers must be certain to give the appropriate and timely notices of the mass layoff or plant closing. Failure to give the appropriate notice, or the appropriate notices, may result in additional liability that the employer had not anticipated in giving the original notice. ■