

Recent Employment Law Opinions — February 2008
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ADEA: admissibility of evidence of other incidents of discrimination

Sprint/United Mgmt. Co. v. Mendelsohn, No. 06-1221, 128 S. Ct. 1140 (U.S. Feb. 26, 2008)

This opinion holds that a *per se* rule excluding testimony by nonparties alleging discrimination by supervisors of the employer who had no role in the plaintiff's adverse employment decision is an abuse of discretion. The Court holds that "[t]he question whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case."

The procedural holding of this opinion is a little frightening for practitioners and district courts. Under the facts, the district court excluded testimony of other former employees who said their supervisors had discriminated against them on the basis of age. None of the former employees had worked in the same group as the plaintiff and none had the same supervisor. By an *in limine* ruling, the district court excluded evidence of discrimination against employees not similarly situated, and defined "similarly situated" as requiring proof that the same supervisor was the decision-maker and that there was temporal proximity. The Tenth Court of appeals treated the *in limine* order as a *per se* exclusion and reversed and remanded for a new trial.

The Supreme Court first observes that district courts are to be afforded broad discretion in their evidentiary rulings. The Court next states that the *in limine* order gives no analysis or reasoning to show the district court applied a *per se* rule of exclusion, and that it would be inappropriate to assume that because an objecting party argues in favor of a *per se* rule that the court adopted that reason for its ruling. Because the Supreme Court determined that the District Court's *in limine* ruling was ambiguous as to the reasons supporting the ruling, the Court remands the case to the District court to state why it excluded the evidence, and the Court goes on to note that a *per se* rule of exclusion is error.

ADEA: "charge alleging unlawful discrimination"

Federal Express Corp. v. Holowecki, No. 06-1322, 128 S. Ct. 1147 (U.S. Feb. 27, 2008)

This case considers the question of what a "charge alleging discrimination" is under the Age Discrimination in Employment Act. The Plaintiffs were a putative class seeking to represent all couriers over the age of 40 who were subject to alleged acts of age discrimination by FedEx. FedEx sought dismissal of the suit because one of the Plaintiffs had not filed her charge with the EEOC a least 60 days prior to filing suit. The Plaintiff had in fact submitted EEOC Form 283, labeled an "Intake Questionnaire."

Deferring to the EEOC's interpretations and after balancing various policy considerations, the Supreme Court holds that in addition to the information required by federal regulations (an allegation and the name of the charged party), if a filing is to be deemed a "charge", it must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee.

Examining the plaintiff's intake form, the Court concludes that it contained all of the information required by the federal regulations. Further, after noting that the form itself did not give rise to an inference that the employee was requesting action against the employer, the Court goes on to observe that the employee supplemented the form with a detailed 6-page affidavit stating, "[p]lease force Federal Express to end their age discrimination plan so we can finish out our careers absent the unfairness and hostile work environment." The Court concludes that this language is sufficient to state a charge.

ERISA: defined contribution plan; right of individual action

LaRue v. DeWolff, Boberg Assocs., Inc., No. 06-856, 128 S. Ct. 1020 (U.S. Feb. 20, 2008)

This case considers whether a participant in a defined contribution pension plan can sue a fiduciary whose alleged misconduct impaired the value of the plan assets in the participant's individual account.

Plaintiff alleges that he directed DeWolff to make certain changes in the investments in his account, but DeWolff never carried out his directions. The Court concludes that the type of conduct alleged falls within the second type of civil action authorized by Section 502(a) of ERISA, which authorizes a plan participant to bring an action on behalf of a plan to recover for violations of the obligations defined in Section 409(a).

The Court distinguishes its opinion in *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), noting that the plaintiff in *Russell* received all the benefits to which she was entitled, but was seeking consequential damages. The Court also concludes that defined contribution plans differ from the disability plan at issue in *Russell*. The Court holds that Section 502(a)(2) provides a remedy for individual injuries distinct from plan injuries resulting from fiduciary breaches that impair the value of plan assets in a participant's individual account.

Section 1983 suit for retaliation and First Amendment free speech rights: interlocutory appeal with respect to qualified immunity

Davis v. McKinney, No. 07-20184, 518 F.3d 304 (5th Cir. Feb. 21, 2008)

This suit arises out of an internal investigation that Plaintiff was asked to conduct into UT Health Sciences Center physicians who were accessing pornography. After she confiscated various computers to copy the hard drives, Plaintiff was asked to return the computers.

Thereafter she attempted to meet with superiors regarding her findings, but to no avail, and she concluded that upper management was turning a blind eye to her investigation. Later, she applied for a new position in the internal audit department. She also contacted the EEOC about discriminatory behavior of the upper management. She wrote a complaint letter to the president of the Health Sciences Center to complain about a pattern of sweeping the investigation under the rug and about more favorable treatment of certain white males than black employees. Plaintiff subsequently tendered a report to the FBI of possible child pornography. Plaintiff then resigned because she felt her termination was imminent. She filed suit asserting that the defendants violated her civil rights pursuant to the 14th Amendment and Section 1983, by retaliating against her for exercising her First Amendment rights in her complaint letter, and by failing to promote her and thereafter constructively discharging her.

The court of appeals considered whether the First Amendment protected the Plaintiff's speech in her complaint letter. After consideration of the letter and the applicable standards, the court concludes that some portions of the Plaintiff's speech may have been protected speech and the court remands for further proceedings consistent with the analysis and guidance contained in the opinion.

Title VII: Class certification — exhaustion of remedies and scope of class standing; isolation of employment practice; back pay calculations; injunctive relief specificity; attorney's fee reduction

McClain v. Lufkin Indus., Inc., No. 05-41417, 519 F.3d 264 (5th Cir. Feb. 29, 2008)

In this case, the plaintiffs brought a Title VII class action suit complaining that Lufkin's delegation of subjective decision-making authority over assignments and promotions disparately affected them. Several issues of import are discussed.

Lufkin first complained that the named plaintiffs did not exhaust administrative remedies. Noting that the scope of the administrative claim governs the scope of the class claims, the court of appeals examines the complaints of the two named plaintiffs and holds that the district court erred in relying on an investigation conducted by a federal agency other than the EEOC with respect to one plaintiff's claim. As to the other plaintiff, the court held that exhaustion of administrative remedies was sufficient as to some of the plaintiff's claims, but that exhaustion was not sufficient as to other claims.

The court of appeals next analyzed whether the decision-making process was subjective and whether it could be separated into components for purposes of the disparate-impact claims. Based upon a review of the evidence, the court concludes that there was no clear error in the district court's finding that the decision-making process was subjective. In an opinion of first impression, the court addresses the conditions under which employment practices are not capable of separation for analysis and concludes that the district court's finding that Lufkin's practices were incapable of separation was not clear error.

The court of appeals also considered whether the district court abused its discretion in discrediting the testimony of Lufkin's expert regarding the disparity in the promotion of blacks. Upon review of the evidence, the court holds that there was no clear error.

Lufkin challenged the district court's decision to award class-wide back pay using a formula, rather than computing damages on an individual basis. Noting that it is preferable to award back pay on an individual basis, the court went on to hold that under some circumstances in class action employment cases, a class-wide approach to back pay "may be necessary." The appellate court held that the size of the class and inherent uncertainty of the individual claims in this case justified a class-wide approach to the back-pay award. The court further held that "the accepted way to apportion damages among a class of plaintiffs who outnumber the lost promotion spots is to compute the total additional wages attributable to each year to each promotion and divide the value among the class members."

With respect to complaints the plaintiffs raised on appeal, the court of appeals held that the district court did not abuse its discretion in refusing to certify a Section 1981 disparate-treatment claim. To avoid problems of predominance, the class representatives would have had to forfeit compensatory and punitive damages, which would have created a serious conflict of interest.

Finally, the court of appeals vacated injunctive relief awarded by the district court because the order lacked specificity and the court vacated an attorney's fee award because the district court had not explained with a reasonable degree of specificity the findings and reasons underlying the award. The case was remanded to the district court for further proceedings.

ERISA and NLRA: preemption

E.I. DuPont de Nemours & Co. v. Sawyer, No. 06-20865 & 07-40574, 517 F.3d 785 (5th Cir. Feb. 15, 2008)

This interlocutory appeal considers whether Plaintiffs' claims that DuPont fraudulently induced them to terminate employment and accept employment with a subsidiary that was later sold are preempted by ERISA and the NLRA.

Prior to selling off one of its divisions, Dupont engaged in collective bargaining over the effects of a separation of one of its plants. As a result of the discussions, many employees transferred to the separated plant, which DuPont subsequently sold. The Plaintiffs' terms of employment became less favorable after the sale.

The court of appeals held that the NLRA did not preempt the Plaintiffs' claims because their state-law claims focused on representations between DuPont and individual employees, while the NLRA is concerned with and regulates DuPont's relationship to the union. The employee's complaints occurred after DuPont had reached a deal with the union.

The court of appeals also rejected DuPont's assertion that the Plaintiffs' claims were preempted by ERISA. The court reasoned that the Plaintiffs were not complaining that DuPont's administration of the ERISA plan was improper. Because the state-law claims did not affect an area of the relationship that was comprehensively regulated by ERISA, the court held that ERISA did not preempt the Plaintiffs' claims.

Arbitration: illusory arbitration clauses in distributorship agreement

Morrison v. Amway Corp., No. 06-20138, 517 F.3d 248 (5th Cir. Feb. 6, 2008)

Plaintiffs challenged a district court order compelling arbitration by asserting that the arbitration agreement was not valid and enforceable due to Amway's retention of a unilateral right to modify the agreement. Relying on Texas state law, the court of appeals noted that there was no savings clause like that contained in *In re Halliburton Co.*, 80 S.W.3d 566 (Tex. 2002). The Plaintiffs' complaints arose prior to the time Amway unilaterally amended its distributorship agreement to insert new rules of conduct providing for arbitration. Under such circumstances, the court of appeals concluded that the arbitration agreement was illusory and unenforceable.

Defamation and Age discrimination: employment at-will and economic damages

Exxon Mobil Corp. v. Hines, No. 14-06-00745-CV, 252 S.W.3d 496 (Tex. App.—Houston [14th Dist.] Feb. 26, 2008, pet. denied)

Exxon terminated employees Hines and Everett for violation of guidelines governing Exxon's Educational Matching Gift Program. An internal audit disclosed that Hines and Everett made contributions to their alma mater (Graceland University) during the same period of time in which their children were receiving scholarships from the fund—in violation of company policy. After Exxon fired Hines and Everett, it sent a letter to all employees stating that Graceland was no longer eligible to receive matching fund because of the abuses of the program by a few individuals and institutions. Hines and Everett sued for defamation and for age discrimination.

The trial court granted Exxon a summary judgment as to the Plaintiffs' age discrimination claims. After a jury found against Exxon on the defamation claims, Exxon appealed and asserted that the Texas employment at-will doctrine barred the Plaintiffs' claims for economic damages. In addressing Exxon's contentions, the court of appeals first notes that Plaintiffs' defamation claims were not based upon any communications outside the company. The court holds that a terminated employee may not recover damages resulting from employment termination simply because the reason for termination may have been internally communicated within the company.

The court also held that the evidence was legally insufficient to sustain any economic damages for excessive publication, for mental anguish, and for damage to reputation.

The Plaintiffs challenged the summary judgment regarding their age discrimination claim. The court of appeals concluded that the evidence of pretext was at best, very weak evidence. The court overruled the Plaintiffs' issue in their cross-appeal.