2015 CLM Annual Conference
Palm Desert

EFFECTIVE MANAGEMENT OF EMPLOYMENT PRACTICES LITIGATION (EPL) CLAIMS

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A. CASE LAW DEVELOPMENTS IN WORKPLACE HARASSMENT

1. "Title VII is not a civilty code"

- Quote from Justice Scalia in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998)
- *Johnson v. City University of N.Y.* (S.D.N.Y. Sept. 8, 2014)
  - **Facts**: Plaintiff was a college lecturer who regularly complained about bullying and harassment from his Department Chair. He took his case to Court after the EEOC found no violation of Title VII, but told the Court "that he was not alleging that his Chair's hostility was motivated by his race, sex, age, or national origin."
  - **Holding**: Bullying and harassment have no place in the workplace, but unless they are motivated by the victim's membership in a protected class, they do not provide the basis for an action under Title VII.

Contrast This With…

- *Turley v. ISG Lackawanna, Inc.* (2d Cir., Dec. 17, 2014)
  - **Facts**: African-American employee at steel plant subjected to racial harassment that included "KKK" graffiti and gorilla pictures on his locker, monkey sounds from co-workers, being called "boy" on numerous occasions, and a stuffed toy monkey with a noose around its neck left dangling from his car mirror. Supervisors were aware of and

even occasionally participated in the harassment. Jury awarded punitive damages totaling over $25 million.

- **Holding**: 2nd Circuit affirmed award of $1.32 million in compensatory damages and reduced the punitive damages to $5 million on remittitur. Plaintiff's counsel was awarded attorney's fees and costs.

  - **Takeaways**:

    - This behavior was truly repulsive – different from occasional "rudeness" "bullying" or off-hand remarks.
    - Differs substantially from cases where supervisors act and respond to complaints of harassment - here, supervisors did nothing to stop the behavior or intervene.
    -

2. Same Sex Workplace Harassment Claims on the Rise

- *EEOC v. Boh Bros. Const. Co.* (5th Cir. 2013)

  - **Facts:** Plaintiff was being harassed by his supervisor at work because he was "feminine" and did not conform to gender stereotypes of "rough iron workers."

  - **Holding:** 5th Circuit held that the harassment was based on the Plaintiff's sex because he was harassed for not being "manly" enough. Case was remanded to lower court where parties entered into consent judgment of $125,000 in compensatory damages.

- *Barrett v. Pennsylvania Steel Co., Inc.* (E.D. Pa. July 21, 2014)

  - **Facts:** Plaintiff claimed that he had been made fun of and sexually harassed because he did not participate in cursing or engage in crude banter with his male co-workers. After complaining to his supervisor, the supervisor merely told him to close his office door, which led to increased teasing/taunting.

  - **Holding:** The Court held that the Employer was liable under Title VII because nothing was done to address Plaintiff's complaint and the Employer was negligent in controlling the working conditions.

- *EEOC v. Pitre, Inc.* (U.S. Dist. Ct., Dist. of New Mexico, 2014)

  - **Facts**: Lawsuit alleged that managers at Albuquerque car dealership subjected a class of men to egregious forms of sexual harassment, including shocking sexual comments, frequent solicitations for oral

sex, and regular touching, grabbing, and biting of male workers on their buttocks and genitals.

- **Outcome**: Settled for over $2 million.

3. In §1983 Complaint Against Multiple Defendants, Plaintiff Must Establish Motivation of Each Individual Defendant

- *Raspardo v. Carlone* (2d Cir. Oct. 6, 2014)

  - **Facts**: Three women police officers brought suit against five male officers for hostile work environment and discrimination. The nature of the conduct ranged from offensive comments to actual touching in some cases. The women alleged that they were each harassed by one or more of the defendants, but there was no allegation that the men's harassment was some form of "conspiracy" or "concerted" activity.

  - **Holding**: When a plaintiff alleges that multiple defendants have engaged in uncoordinated and unplanned acts of harassment, she must show that each individual defendant was motivated by gender. Where a defendant has not personally violated a plaintiff's constitutional rights, the plaintiff cannot succeed on a §1983 action against the defendant.

4. Unpaid Interns Now Entitled to Protection From Workplace Harassment

- *New Jersey Intern Protection Act*

  - Passed by NJ Senate in September 2014 – awaiting vote by NJ Assembly Labor Committee as of December 2014.

  - Will join D.C., California, and New York as the only States which afford unpaid interns hostile work environment protection.

  - Promulgated in response to Wang v. Phoenix Satellite Television US, Inc. (S.D.N.Y. 2013). An unpaid intern from Syracuse University's journalism school and several of her co-workers were invited out to dinner by their boss. After dinner, when the others had left, the boss asked the plaintiff if she wanted to accompany him to his hotel room to discuss job prospects. He then allegedly sexually molested her before she was able to get away and leave the room. The District Court dismissed plaintiff's claims, holding that the State employment anti-harassment laws did not apply to unpaid interns.

  - The law will amend the NJLAD, CEPA, and Freedom from Intimidation Act by allowing unpaid interns to sue their employers under these statutes just as employees would.

B *YOUNG V. UPS:* WILL THE SUPREME COURT BROADEN THE PROTECTIONS OF THE PREGNANCY DISCRIMINATION ACT?

1. Overview

The Pregnancy Discrimination Act of 1978 ("PDA") amended Title VII to clarify that discrimination based on pregnancy, childbirth or related mental conditions is a form of sex discrimination prohibited by Title VII.

42 U.S.C. § 2000e(k) includes the amendment:

> (k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes…

2. *Young v. United Parcel Service, Inc.* ("UPS"), No. 12-1226

A. Factual Background

- Plaintiff Young worked as a UPS driver under a collective bargaining agreement.
- The collective bargaining agreement required UPS to provide temporary modified work assignments to employees injured on the job, employees with DOT medical restrictions and employees required to be accommodated under the Americans with Disabilities Act.
- Young became pregnant and her physician imposed a 20-pound lifting restriction.
- UPS determined Young did not fit in any category with the collective bargaining agreement and was not entitled to light duty.

B. Court Proceedings to Date

- Young filed suit in the United States District Court for the District of Maryland. The District Judge granted summary judgment, finding the UPS policy to be both "gender neutral" and "pregnancy blind." The 4th U.S. Circuit Court of Appeals affirmed the District Court's decision.
- The Supreme Court granted certiorari and the case was argued on December 3, 2014.

3. EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues (July 14, 2014)

- The PDA does not limit itself to current pregnancy but covers employment decisions made both subsequent to pregnancy and decisions made on the basis of prior pregnancies.

- The PDA covers female employees who indicate an intention to bear children in the future.
- It is a violation of the PDA to deny contraception coverage if the employer's medical plan provides preventive coverage for non-pregnancy-related medical issues.
- Termination of an employee due to pregnancy-related impairments or pregnancy-related impairments of the employee's child violate Title VII.
- It is a violation of Title VII for an employer to discharge an employee for either having an abortion of failing to have one.
- A light-duty work policy which grants relief to employees deemed as disabled under the Americans with Disabilities Act, as amended, but fails to grant the same relief to pregnant employees violates Title VII. (The position directly contradicts the 4th Circuit's decision in *Young*.)
- Although pregnancy is not a disability under the Americans with Disabilities Act, pregnancy-associated impairments (e.g., gestational diabetes, preeclampsia and pregnancy-related carpal tunnel) will require accommodation.

4. What Does the Future Hold?

- Will the Supreme Court find the UPS policy to be gender neutral?
- Will the Supreme Court defer to the EEOC's July 14, 2014, enforcement guidance?

C. AGE DISCRIMINATION OVERVIEW AND UPDATE

1. Purpose

The Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. § 621 *et seq.* recites the findings of Congress that older workers are "disadvantaged in their efforts to retain employment" and "to regain employment when displaced from jobs." The stated purpose of the statute is to "promote employment of older persons based on their ability rather than age" and to "prohibit arbitrary age discrimination in employment." Congress specifically found that:

> the "setting of arbitrary age limits regardless of potential for job performance" was harmful to older workers;
>
> that unemployment among older workers tended to result in "deterioration of skill, morale and employer acceptability" as compared to unemployment among younger workers;
>
> that "arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce" (thus giving Congress jurisdiction to act).

2. Coverage

The statute prohibits employers with at least twenty employees from refusing "to hire or to discharge … or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age;" or to limit, segregate or classify" employees so as to "adversely affect" their employment status. 29 USC § 623(a)(1) & (2).

Employees with less than twenty employees may come under the jurisdiction of state age discrimination laws.

The operative age for purposes of protected status under the statute is forty. § 631(c)(1).

However, it is not unlawful for employers to take actions that would otherwise be discriminatory if "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age …" § 623(f)(1).

3. Elements of a Claim

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) made applicable to ADEA, established that the plaintiff in a Title VII discrimination case has the burden to show:

1. that plaintiff is a member of protected class;
2. that plaintiff applied for and was qualified for the job;
3. that plaintiff was rejected despite qualifications (or suffered adverse employment action); and
4. that following that rejection or adverse action, "circumstances arose sufficient to support an inference of discrimination." *McDonnell Douglas* at 802.

Age discrimination does not cover younger workers who may feel they are being unfairly disadvantaged by employment perks granted to older employees with seniority. *Hamilton v. Caterpillar Inc.*, 966 F.2d 1226 (7th Cir. 1992) (ADEA "does not prohibit reverse discrimination" and "does not protect the young as well as the old, or even, we think the younger against the older.")

Second, the plaintiff must allege facts sufficient to establish disparate treatment based on age. In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) the Court held that plaintiffs need not enumerate in their initial complaints all the factors set out under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) as being necessary to establish a prima facie case of discrimination, as the *McDonnell Douglas* standards were intended to establish an evidentiary standard and not a standard for pleading.

The Supreme Court in *Swierkiewicz*, however, held that in order to survive a motion to dismiss, the plaintiff was required to provide the defendant notice of the claim; it was not necessary for the plaintiff to plead the specific evidence necessary to establish his burden at trial. 534 U.S. at 510.

More importantly, the *Swierkiewicz* Court noted that "the *McDonnell Douglas* framework does not apply in every employment discrimination case." *Id.* at 511. If a plaintiff is able to adduce direct evidence of discrimination, for example, then the prima facie case which rests on inference is not appropriate or necessary. In addition, a plaintiff may need to establish particular facts through discovery after the lawsuit is filed. The Court held that "the precise requirements of a prima facie case can vary depending on the context and were 'never intended to be rigid, mechanized, or ritualistic.'" *Id.* at 512.

4. Burden of Proof

Unless the discriminatory treatment involves a formal, facially discriminatory policy requiring adverse treatment of employees protected by the statute, the plaintiff has the burden of going forward with sufficient evidence to establish intentional discrimination and will always have the burden of persuasion by preponderance of the evidence to establish that age actually motivated the employer's decision. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000).

Mixed motive discrimination cases are not permitted by the ADEA. *Gross*, 557 U.S. at 173. Congress amended Title VII to expressly authorize mixed motive cases, but did not amend the ADEA to do so. *Gross FBL Fin. Serv., Inc.*, 557 U.S. 167, 175-176 (2009).

Under the ADEA, the plaintiff "must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action." *Gross v. FBL Fin. Serv., Inc.*, 557 U.S. 167 (2009). ("An act or omission is not regarded as a cause of an event if the particular event would have occurred without it." *Prosser & Keaton on Law of Torts*, 265 (5th ed. 1984).

The ADEA language requires that an employer take adverse action "because of" age. The Court has explained that "because of" means that age was the "reason" that the employer decided to act. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (an ADEA claim "cannot succeed unless the employee's protected trait actually played a role in [the employer's decision-making] process and had a determination influence on the outcome.")

The employee may establish that the employer's proffered reason for termination is a "pretext" by "demonstrating that:

1. has no basis in fact;
2. did not actually motivate the defendant's challenged conduct; or
3. was insufficient to warrant the challenged conduct." *Hale v. ABF Freight System, Inc.*, 503 F. Appx 323, 334 (6th Cir. 2012).

Pretext can be shown by such weakness, implausibilities, inconsistences, incoherences, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the

employer did not act for the asserted non-discriminatory reasons. *Adamson*, 750 F.3d 73, 79 (1st Cir. 2014).

5. Defenses – Bona Fide Occupational Qualification (BFOQ)

An employer may set age limits or classify employees according to age in those circumstances where age constitutes a "bona fide occupational qualification reasonable necessary for the normal operation of the particular business …" 29 USC § 623(f)(1). The employer has the burden of establishing this defense, and because it is an exception to the statutory prohibition against discrimination based on age, it has been "narrowly construed" by the courts.

In *Williams v. Hughes Helicopters*, 806 F.2d 1387 (9th Cir. 1986) the Court of Appeals sustained the employer's adherence to two "stop-flying" policies – one directed at experimental test pilots, who were to stop flying at age fifty-five, and the other to production test pilots, who were to stop flying at age sixty. *Id.* at 1389.

The court noted that "in order to prevail on a BFOQ defense, an employer need only show that a challenged age qualification is reasonably related to the essential operations of its business." *Williams*, 806 F.2d 1387, 1390-91 (9th Cir. 1986). The employer must demonstrate either that there is a factual basis for believing all or substantially all persons above the age limit would be unable to perform safely or that it is impossible or highly impracticable to determine job fitness on an individualized basis. *Id.* at 1391. *See also Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985).

In *EEOC v. Ky State Police Dep't*, 860 F.2d 665 (6th Cir. 1988) *cert denied*, 490 U.S. 1066 (1989), the Court of Appeals refused to uphold a mandatory retirement age of fifty-five years for the Kentucky State Police, finding that the limitation did not constitute a bona fide occupational qualification under the facts adduced in that case.

In order to justify any job requirement under the ADEA, the employer must demonstrate that this job requirement is "reasonably necessary to the essence of" the job being performed. *Id.* at 668. If that demonstration is made, then, in order to justify a mandatory age requirement, the employer must establish that the age standard is something it is "compelled to rely on" as a means of ensuring that these safety requirements are met. *Id.*

6. Defenses – Reasonable Factors Other Than Age (RFOA)

An employer may implement a policy even if it has a disparate impact on older workers if the policy is based on reasonable factors having nothing to do with age. For example, suppose an employer has a policy that employees must be willing to transfer to a new location every five years for purposes of preventing cliques and infusing each workplace with ideas that have worked at other sites on a regular basis.

In *Meachan v. Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008), the Supreme Court has held that "reasonable factors other than age" (RFOA) is a statutory affirmative defense, and the employer has the burden both of going forward with evidence to demonstrate such factors

and the burden of persuading the trier-of-fact that what would otherwise be illegal employer activity because of its disparate impact on the protected class is justified by RFOA. *Id.* at 2406-07.

If the employer enforces this policy across the board, the fact that it may be less advantageous for older workers, who may be more likely to have family ties that make moving unattractive or health problems that make moving unattractive or health problems that make moving impractical, is not a sufficient reason to invalidate the policy. *Grossman v. Dillard Dep't Stores, Inc.*, 109 F.3d 457 (8th Cir. 1987).

7. Recent ("Most Cited") ADEA Cases

- *Adamson v. Walgreens Co.*, 750 F.3d 73 (1st Cir. 2014)—affirming district court's grant of summary judgment for employer, finding that 58-year-old employee's termination, based on a second infraction under employer's rules, made him significantly different from other employees who were subject only to a final written warning after a first infraction.
- *Ben-Levy v. Bloomberg, L.P.*, 518 F. App'x 17 (2d Cir. 2013)—affirming district court's grant of summary judgment for employer, finding that employer had failed to make a showing of discrimination under the ADEA because he had failed to rebut his employer's explanation that his termination was the result of two division-wide reorganizations and his superiors' documented concerns over his management abilities.
- *Burton v.* Teleflex Inc., 707 F.3d 417 (3d Cir. 2013)—vacating district court's grant of summary judgment for employer on ADEA claim because the district court improperly found that there was no dispute of fact as to whether the employee resigned or was terminated.
- *E.E.O.C. v. Baltimore County*, 747 F.3d 267 (4th Cir. 2014)—affirming district court's grant of partial summary judgment for plaintiff EEOC on the issue of liability and holding that different rates of employee contribution to a retirement benefit program which required older employees pay a greater percentage of their salaries based on their ages at the time they enrolled in the plan violated the ADEA and that the safe harbor provision in the ADEA for retirement benefit plans did not apply.
- *Miller v. Raytheon Co.*, 716 F.3d 138 (5th Cir. 2013)—holding that the District Court's denial of the employees motion for judgment as a matter of law following a jury verdict for the employee was proper where the record raised fact issue for jury concerning whether 54-year-old employee's termination by layoff was age discrimination in violation of ADEA.
- *Sadie v. City of Cleveland*, 718 F.3d 596 (6th Cir. 2013)—affirming district court's grant of summary judgment for the city and holding that the city's retirement plan which required the retirement of all police officers who reached age 65 was not a ploy used to evade the requirements of the ADEA.
- *Teruggi v. CIT Group/Capital Finance, Inc.*, 709 F.3d 654 (7th Cir. 2013)—affirming district court's grant of summary judgment for employer, holding that a reasonable inference of discrimination or retaliatory discharge did not arise from vague litany of complaints about a variety of workplace decisions.

- *Brown v. City of Jacksonville*, 711 F.3d 883 (8th Cir. 2013)—affirming district court's grant of summary judgment for city and finding that there was insufficient evidence that the city's stated reasons for terminating the employee were pretexts for age discrimination under the ADEA.
- *Doyle v. City of Medford,* 512 F. Appx 680 (9th Cir. 2013)—affirming district court's grant of summary judgment for city and holding that the city's actions were based on RFOA and that the employee's claims were time barred because they accrued upon the city's final refusal to provide continued health insurance
- *Roberts v. International Business Machines Corp*., 733 F.3d 1306 (10th Cir. 2013)—affirming district court's grant of summary judgment for employer and holding, inter alia, that an instant messaging conversations between two of employer's HR managers referencing plaintiff's; "shelf life and lack of billable hours were not direct evidence that the employee was terminated because of his age.
- *Sims v. MVM, Inc.,* 704 F.3d 1327 (11th Cir. 2013)—affirming district court's grant of summary judgment for employer, finding that 71-year-old employee had failed to establish that his employer would have kept him on the job but-for his age. Also held that the proximate causation standard for cat's paw liability in Uniformed Services Employment and Reemployment Rights Act cases did not apply to cat's paw cases involving age discrimination under the (USERRA) ADEA.
- *Wilson v. Cox*, 753 F.3d 244 (D.C. Cir. 2014)—reversing district court's grant of summary judgment for defendant, holding that genuine issue of material fact concerning whether a military retirement home's decision to eliminate a resident employee program in favor of a resident stipend program and terminate a non-resident retiree working as a security guard was motivated by discriminatory intent precluded summary judgment where the CEO made statements " you didn't come here to work, you came here to retire" and older security guards were " not doing their jobs property as from time to time they would be found asleep."

D. RETALIATION CLAIMS UPDATE – DUELING STANDARDS OF PROOF

1. "But For Causation" - Title VII of the Civil Rights Act

Title VII prohibits employers from taking an adverse employment action against an employee for having opposed, complained of, or sought remedies for unlawful workplace discrimination

Protected EEO Activity Includes:

Opposition to a practice believed to be unlawful or

Participation in an employment discrimination proceeding

Heightened Standard for Proving Retaliation:

In *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517, the Supreme Court heightened the burden of proof for employees bringing claims under Title

VII holding that employees have to prove that the employer's desire to retaliate was the "but-for" cause for the employer's adverse action.

The Supreme Court held that the "motivating factor" standard commonly applied to Title VII status-based discrimination claims is not the proper standard for Title VII retaliation claims.

Under this standard, the employer is not liable for retaliation if it would have taken the same action for other, non-discriminatory reasons.

The Court highlighted the ever-increasing frequency of retaliation claims and the importance of the "but-for" cause standard to the "fair and responsible allocation of resources in the judicial and litigation systems."

The Court discredited the relevant EEOC Compliance Manual, which had adopted the motivating factor standard for Title VII retaliation claims.

2. Motivating Factor Statutes – OSHA Administered Statutes such as the OSH Act, The Asbestos Hazard Emergency Response Act, the International Safe Container Act, and six other Environmental Statutes (SDWA, FWPCA, TSCA, SWDA, CAA, CERCLA)

All of these require a higher standard of causation – "motivational factor" and apply the traditional burden of proof.

The investigation must disclose facts sufficient to raise the inference that the protected activity was a motivating factor in the adverse action.

The Department of Labor relies on standards derived from discrimination case law as set forth in:

Mt. Health City School Board v. Doyle, 429 U.S. 274 (1977) (mixed motive analysis)

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) (pretext analysis)

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (pretext analysis)

3. Contributing Factor Statutes OSHA Administered Statutes such as the Affordable Care Act, the Sarbanes-Oxley Act of 2002, the Federal Railroad Safety Act (and 10 other Federal Whistleblower Statutes)

Contributing factor statutes require a lower standard to establish causation by the employee AND a higher standard of proof in order to establish an employer's affirmative defense.

> If an employee shows *by a preponderance of the evidence* that their protected activity was a contributing factor in the employer's adverse employment action, and the employer cannot show *by clear and convincing evidence* that they would have acted in the same way absent the protected activity, the employee should prevail