The Employment Brief

Updates in labor and employment law to help your business succeed.

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Supreme Court Rejects Mixed Motive Standard in Age Discrimination Cases

by Cliff Geiger

In a surprising 5-4 decision, the U.S. Supreme Court held June 18 that an employee cannot establish a claim under the Age Discrimination in Employment Act (ADEA) by proving that age was a "motivating factor" in an adverse employment decision. Instead, an employee bringing a disparate treatment claim under the ADEA must prove, by a preponderance of the evidence, that the adverse employment action would not have been taken "but for" the employee's age. *Gross v. FBL Fin. Servs. Inc.*, U.S., No. 08-441, 6/18/09). Prior to *Gross*, lower courts uniformly held if there was evidence that age was a "motivating factor" in an employment decision, the burden shifted to the employer to prove that it would have taken the same action regardless of the employee's age. Now the burden of persuasion will remain with the employee throughout. This may not seem like much, but it should make it substantially harder for employees to establish age discrimination under the ADEA.

The case was brought by Jack Gross, a Vice President of FBL Financial Services, Inc. Gross claimed that at age 54 he was reassigned to a different position and stripped of many of his responsibilities. These responsibilities were transferred to a younger coworker who was previously his subordinate. Gross claimed his reassignment was a demotion that violated the ADEA, and he presented evidence suggesting that FBL was motivated, at least in part, by his age. FBL defended its actions on the grounds that Gross's reassignment was part of a corporate restructuring. Over FBL's objections, the trial court instructed the jury that it must return a verdict for Gross if he proved, by a preponderance of the evidence, that FBL demoted him and that his age was a "motivating factor."

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DOJ To Revise Rehabilitation Act of 1973 Regulations

By Adam T. Simons

Federal regulations concerning the Rehabilitation Act of 1973 are scheduled to receive a much needed overhaul. The Department of Justice has recently announced plans to amend its regulations implementing Section 504 of 1973 to reflect the changes to the Act's definition of "disability" by the Americans with Supreme Court decisions which substantially limited the definition of disability; specifically, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), which held that court's must consider "the ameliorative effect of mitigating measures" when determining if an individual is disabled, and *Toyota Motor Mfg. Ky. Inc. v. Williams*, 534 U.S 184 (2002), which narrowed the definitions of "substantially limited" and "major life activity." The ADAAA expanded the definition of "disability" by increasing the covered "major life activities" to include a non-exclusive laundry list of activities and bodily functions, and by prohibiting employers from considering the ameliorative effects of mitigating measures, such as medications or prostheses.

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Kollman & Saucier Named One of Maryland's Top Law Firms

On June 12, 2009, Chambers and Partners announced that Kollman and Saucier has been ranked as one of the top management-side labor and employment firms in Maryland. Eric Paltell and Darrell Van Deusen were included as two of the premier experts in the field, and Eric was one of only seven lawyers in the state to receive a "Band 1" ranking. According to Chambers, "the firm is praised by market sources for its flexible and personal approach."

The Chambers rankings are based on extensive research conducted by Chambers and Partners Legal Publishers, a highly respected English publisher of directories assessing and ranking the world's leading lawyers. Unlike other publishers that allow firms to purchase a mention or ranking, Chambers' listings are based solely on outside evaluations of merit. Its researchers investigate law firms and lawyers in each US state through an exhaustive process of interviewing clients and competitors in major areas of business law.

EEOC Issues New Non-Discrimination Guidance on Caregiving Workers
By Andreas Lundstedt

In 2007, the U.S. Equal Employment Opportunity Commission (EEOC) released *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, a document intended to explain circumstances where treatment of workers with caregiving responsibilities could constitute discrimination. Since then, buzz words such as "work-life balance," "family-friendly," and "family responsibilities" have increasingly been put to use in companies all across America.

Recently, the EEOC revisited the issue by issuing new technical guidance, spelling out proactive measures that go beyond federal non-discrimination requirements. This new best practices document, *Employer Best Practices for Workers with Caregiving Responsibilities*, was released in April and provides recommendations for workplace policies aimed at removing barriers to equal employment opportunity for workers with caregiving responsibilities.

The examples that the EEOC provides are not groundbreaking. In fact, most employers are probably already following many of these practices. Still, the document should give employers some additional assurance that they will have the backing of the government in implementing certain programs. Here are some examples of the *Best Practices* guidance:

Be aware of, and train managers about, the legal obligations that may impact decisions about treatment of workers with caregiving responsibilities; develop, disseminate, and enforce a strong EEO policy; ensure that managers at all levels are aware of, and comply with, the organization's work-life policies; respond to complaints of caregiver discrimination efficiently and effectively; protect against retaliation; and ensure that employment decisions are well-documented and transparent.

It must be emphasized that employers are not required to follow these best practices in order to comply with federal discrimination laws. But implementing some or all of them will surely help prevent claims that an employer discriminates against caregivers in a way that violates federal employment laws. What is more, being aware of these suggestions will help employers stay clear of violating applicable state and local laws that prohibit discrimination based on parental or familial status, which also may occur when an employer discriminates against a caregiver.

The issuance of the *Best Practices* shows how the new administration is continuing to pay attention to this issue. The EEOC suggests that employers adopting flexible workplace policies may not only experience decreased complaints of unlawful discrimination, but may also benefit their workers, their customer base, and their bottom line. EEOC Acting Chairman Stuart J. Ishimaru said that emphasizing flexible work arrangements and leave policies is especially important during these tough economic times, adding that the new guidance will help employers think "broadly about the ways in which family-friendly workplace policies can improve workers' ability to balance caregiving responsibilities with work."

Despite the many other pressing issues on President Obama's agenda, it seems unlikely the new administration is going let this one fall by the wayside.

For a full description of the document, including additional suggestions set forth by the EEOC, see http://www.eeoc.gov/policy/docs/caregiver-best-practices.html.

Holiday Brownies, Anybody?
By Pete Saucier

A school bus driver in Washington County, Alabama, when notified that she was scheduled for a regular drug test, scurried to the restroom with some students before she presented a sample. The test was negative, but the circumstances caused the school system to demand a more closely monitored retest less than 2 weeks later. The school bus driver's urine proved positive for marijuana upon the second test.

After being caught, the bus driver claimed that she had accidently eaten a marijuana brownie at a party. Understandably, the school system found the belated excuse, and the surrounding circumstances, too much to bear. The test results, and the connected deceit, caused the school system to terminate the bus driver's employment. Dutifully, the Alabama Education Association challenged the decision to arbitration.

Enter arbitrator Joann T. Donovan, who employed standards of proof that no court would ever impose. According to the arbitrator, all the bus driver had to do was *say* that she ate a brownie without more – "She is not required to prove her innocence." Perhaps even more amazing, the arbitrator relied upon the testimony of one person who testified that he heard someone at the party say that "somebody had put marijuana in some of the brownies." Although his testimony may be biased it is not impossible that it is a true statement.

So, if one person claims he heard an *unidentified* person say that another *unidentified* person said that there was marijuana in *some* brownies, impossibility is negated. Therefore the arbitrator ruled, there is no proof of the offense and no cause for the discharge. To complete the triangle of confusion, the arbitrator ordered reinstatement and back pay, while directing the exonerated employee "to complete a program of rehabilitation in order to be reinstated to her safety sensitive position as a bus driver . . . ."

Arbitration is a peculiar system that does not obligate the arbitrator to apply either law or logic.

California Court Upholds Starbucks' Tip Pooling Arrangement
By Michael Severino

Ah, the joy of wandering into a Starbucks for a nice latte on a lazy afternoon. While customers may look forward to their drinks, Starbucks' baristas in California may not be so happy in light of the California Court of Appeal's recent decision in *Chau v. Starbucks Corporation.*

The baristas' unhappiness stems from Starbucks' requirement that baristas share tips with non-managerial shift supervisors. Starbucks routinely places a clear, plastic tip jar in front of the register where customers can place tips. Starbucks' policy in regard to tipping is relatively straightforward: The tips placed in the jars are pooled over the course of a week and then divided among baristas (of which Mr. Chau is one) and shift supervisors. Unhappy with the requirement that baristas share these tips with shift supervisors, Mr. Chau and others filed a class action lawsuit alleging that the division of tips with shift supervisors violates California's Labor Code § 351, which prohibits the employer or its agent from sharing in any gratuity that is given to an employee.

The trial court agreed with plaintiffs and awarded the class $86 million in restitution. The trial court ruled that shift supervisors were "agents" of Starbucks within the meaning of § 351 and, therefore, were prohibited from taking tips from communal tip containers without consideration for whom the tips were left. The trial court awarded plaintiffs restitution of all tips paid to shift supervisors during the class period, as well as an injunction prohibiting such conduct in the future. Starbucks appealed.

The appellate court began its analysis with a close examination of shift supervisors' duties and the purpose of the tip jars. First, the appellate court noted that customers leave tip money in the tip boxes for all employees that serve them and with the intent that all such employees receive a portion of the tip. Second, the court noted that shift supervisors are part of the group for whom the tips were left inasmuch as shift supervisors spend between 90 and 95 per cent of their time performing the same tasks as baristas. Finally, Starbucks' has a separate policy that prohibits store managers and assistant mangers (who do not perform the duties that shift supervisors or baristas perform) from sharing in the tips.

With these facts in mind, the appeals court took aim at the trial court's decision. Section 351, the court explained, never prohibited, nor was it intended to prohibit, an employee, including an "agent" of the employer as that term is defined in § 351, from keeping his or her own tips. On the contrary, §351 was intended to prevent an employer or agent of the employer from sharing in tips meant *for others*. Since the tip jar at Starbucks is meant to collect tips for those workers who actually serve customers, and since shift managers primarily serve customers, the court reasoned that the tips collected were meant for shift managers, as well as baristas. The court noted that the legislative intent and public policy of the statute supports the court's interpretation. The statute is meant to protect the public from being deceived when one leaves a tip. Here, customers expect that those who serve them – including shift supervisors – receive part of the tip. Looking past the job title, the appeals court reasoned that those who share in the work should share in the tips.

Staggering $4.1 BILLION Arbitration Award For Former Employee
By Kelly Hoelzer

Many businesses rely on arbitration agreements with their employees as a way to handle potential employment disputes in a quicker and less costly way than dealing with lawsuits in court. Ordinarily, an employment arbitration takes months, instead of lingering in a court for years, at often half the cost of litigation.

That is usually the result when the employer participates in the arbitration process, regardless of the validity of the employee's claim. An employer who ignores the potential power of the arbitrator, however, does so at its peril. This was the multi-*billion* (yes, *billion)* dollar mistake made by iFreedom Communications Inc. ("iFreedom") and its founder, Timothy Ringgenberg in dealing with a breach of contract claim from former executive Paul Chester.

Chester, who only worked for iFreedom for about 15 months, was employed as Chief Marketing Officer. He had an employment contract with the company providing him a monthly salary of $12,000, plus commissions of 5% of gross sales. The contract stated that if iFreedom fired Chester without cause, he would continue to receive commissions indefinitely. Chester was also contractually entitled to 1.1 million shares of company stock upon hiring and an additional 600,000 shares upon meeting certain sales targets.

At some point during his employment, Chester questioned Ringgenberg about his commission payments, and was subsequently fired without cause. After his termination, Chester filed a lawsuit in a California court against Ringgenberg and three corporate defendants, alleging that the company breached his employment contract when it failed to pay him commissions. Chester also claimed violations of California wage laws. After the defendants moved to compel arbitration, the case was sent to arbitration before William F. McDonald, a respected retired state court judge.

For some unknown reason – perhaps to save on attorneys' fees – Ringgenberg then fired the company attorneys and took on the representation himself. Ringgenberg apparently did not take his arbitration obligations seriously. He ignored the arbitrator's request for financial documentation relating to gross sales and calculation of Chester's commissions, and his response to the arbitration hearing notice was a letter stating that he refused to attend.

Both Ringgenberg and his company paid the price for his flippancy. Chester provided the only evidence regarding sales revenues and revenue growth rates at the arbitration hearing, and McDonald had little choice but to rule in Chester's favor based on Chester's financials. He awarded Chester a staggering $977 million in compensatory damages and interest, plus $57,000 in statutory penalties, $634,500 in attorneys' fees and costs, and sanctions against his former employer. To send just the right message to Ringgenberg, after finding that the defendants "engaged in a pattern of despicable conduct that constitutes oppression, fraud and malice," McDonald awarded Chester three times the amount of compensatory damages – or more than $2.9 billion – in punitive damages.

Chester petitioned to confirm the arbitration award in California state court, which was granted on May 28, 2009. The court judgment awards Chester $3.9 billion in damages, over $203 million in interest through May 28, plus post-judgment interest of about $1.125 million per day until the judgment is paid. *Chester v. iFreedom Communications, Inc.*, Case No. BC353567 (Cal. Sup. Ct. May 28, 2009). It will be interesting to see if Chester is able to collect anything on his award, or if he is left with just a paper judgment to hang on his wall.

Revision of Rehabilatation Act

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The Department of Justice's new regulations implementing this amended Rehabilitation Act seek to:
-Add illustrative lists of "major life activities," including "major bodily functions," that provide more examples of covered activities and covered conditions than are now contained in agency regulations (sec. 3(2));

- Clarify that a person who is "regarded as" having a disability does not have to be regarded as being substantially limited in a major life activity (sec. 3(3)); and

-Add rules of construction regarding the definition of disability that provide guidance in applying the term "substantially limits" and prohibit consideration of mitigating measures in determining whether a person has a disability (sec. 3(4)).

The Department anticipates that these changes will be published for comment in a proposed rule within the next 12 months. The Rehabilitation Act regulations will likely mirror considerably the regulations interpreting the amended Americans with Disabilities Act, which currently are in the proposed rule making stage and are due to be finalized later this year.

Discharge for Altered FMLA Certification Form Upheld
By Darrell R. VanDeusen

The FMLA provides job protection for employees who need to take leave for a variety of reasons. To ensure an employee's reason for taking leave is legitimate, employers may -- and should -- require that an employee provide adequate medical certification of the need for leave. The Department of Labor provides these certification forms, which are available online at www.DOL.gov. Certification includes, at a minimum, a list of the symptoms, the expected duration of the condition and leave, and information sufficient to demonstrate that the employee cannot perform the essential functions of her job.

The DOL's FMLA regulations make it clear that employees cannot submit a false certification and receive protection under the Act. Specifically, Section 825.216(d) provides: "An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration or maintenance of health benefits provisions." Thus, an employee who submits a false certification does so at her peril: the employer has grounds to both deny FMLA leave, since the employee has provided insufficient certification of her condition and discharge the employee for dishonesty.

But what about the circumstance where an employee "embellishes" the certification form – adding information that may or may not be true, but that most certainly was not put there by a healthcare provider? The regulations are silent and, until recently, no appellate court had considered the issue. In *Smith v. The Hope School*, 560 F.3d 694 (7th Cir. 2009), the Seventh Circuit was asked to answer this question.

Smith worked at The Hope School and needed FMLA leave for "severe recurrent muscle tension [headaches] and right neck & arm pain [secondary] to trauma suffered at work," according to her doctor's notations on the certification form. But Smith -- on her own -- added "plus previous depression" to the form. Smith later admitted that no doctor had ever diagnosed her with depression. Smith also altered the date on the certification form and submitted an "Attending Physician Statement," which she filled out entirely on her own. When the false statements were discovered, Smith was fired.

Affirming summary judgment in the School's favor, the Seventh Circuit held that there is no distinction between when an employee submits an entirely fraudulent certification, and when the employee materially alters an otherwise sufficient certification by adding an undiagnosed symptom without her physician's knowledge or consent. In both instances, said the court, the employee has not submitted an appropriate certification as required by the law, and the employer is justified in denying leave. Even though under the latter scenario, the employee otherwise may have been entitled to FMLA leave, the presentation of false paperwork overrode the employee's right. Moreover, the Seventh Circuit held that, after an employee submits an altered certification, an employer may discharge the employee both for dishonesty and for unexcused absences, as long as the action is consistent with the company's policies.

The court set forth a definitive and common sense rule: "an employee is not entitled to FMLA leave on the basis of falsified paperwork." But the court also limited its holding. This case was an "especially strong" one for the employer based on the altered certification diagnosis, backdated form, and the entirely fabricated "Attending Physician Statement." The court did not reach the question of what might happen in "closer cases," where insignificant alterations to the form are made. Whether an employer can deny FMLA leave when an employee corrects typographical errors or adds information with the knowledge and approval of a treating physician is, therefore, not entirely clear.

The moral of the story here is clear, however. For employees: DO NOT ALTER YOUR CERTIFICATION FORM! Any alteration may result in the denial of your FMLA leave, even if the need for leave is legitimate. It may also raise an "honest belief" defense on the part of the employer, which could justify employee discipline. The best approach is to make sure your healthcare provider has included the correct information when you receive the form. If an error needs correction, obtain a new form as soon as possible.

For employers, the decision in *Smith* does not provide free reign to deny leave for any altered FMLA certification. There was an "especially strong inference" that Smith submitted false paperwork, and the paperwork was pervasively false by including a non-diagnosed condition. Where fraud is substantial and readily discernable, employers now do have support for denying the leave, and terminating an employee for unexcused absences, as well as dishonesty. But dishonesty may still be the better bet.

In fact, the Seventh Circuit suggested that the School might have avoided the legal morass if it had terminated Smith for dishonesty, rather than for unexcused absences. With this in mind, it is vital that employers ensure their handbooks contain provisions explaining that dishonesty and fraud (in addition to unexcused absences) may be grounds for termination. When confronted with a suspected alteration, the employer should take the steps to confirm the certification is in fact altered, and then determine whether the alteration is substantial enough to be a violation of the company's policy regarding dishonesty and fraud.

Mixed Motive Standard Rejected by Supreme Court
(continued from page 1)

The jury was further instructed that age would qualify as a "motivating factor" if it played a part or role in FBL's decision. Finally, the jury was instructed that the verdict must be for FBL if it had been proved by a preponderance of the evidence that FBL would have demoted Gross regardless of his age.

These instructions are routinely given in "mixed motives" cases, which occur when an employer takes both permissible and impermissible factors into consideration before taking action. In such cases, it had been the employer's burden to show that it would have taken the same action even in the absence of an illegal discriminatory motive. There did not seem to be any disagreement or controversy regarding the application of this burden shifting framework, first developed and applied in Title VII cases, to ADEA claims. The only disagreement was whether Gross was required to present direct evidence of age discrimination before he was entitled to a mixed motives jury instruction. Therefore, the question before the Supreme Court was whether a plaintiff must "present direct evidence of discrimination in order to obtain a mixed motive instruction in a non-Title VII discrimination case." However, Justice Clarence Thomas, writing for the majority, found that "we must first determine whether the burden of persuasion ever shifts to the party defending an alleged mixed-motives claim brought under the ADEA. We hold that it does not." Consequently, it was not necessary for the Supreme Court to rule on the question that was presented and briefed by the parties.

Distinguishing Title VII claims from ADEA claims, Justice Thomas emphasized that "[u]nlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a factor." Title VII provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." So, while Congress explicitly recognized mixed motive scenarios in amending Title VII, Congress did not similarly amend the ADEA. Justice Thomas wrote, "[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally." The text of the ADEA makes it illegal to take adverse employment action "because of" an individual's age. Justice Thomas determined that the plain meaning of this statutory language requires employer liability only if age is the reason the employer decided to act. Noting that nothing in the ADEA carves out a special rule for mixed motives cases, the Court ruled that plaintiffs always have the burden to prove that age was the "but for" cause of a challenged employment decision.

Justices Stevens and Breyer wrote dissenting opinions. In addition to accusing the majority of ignoring its own precedent and the intent of Congress, Justice Stevens said "the most natural reading of the text proscribes adverse employment actions motivated in whole or part by the age of the employee. Justice Stevens further asserted the majority engaged in unnecessary lawmaking. Justice Breyer agreed that the words "because of" do not inherently require a showing of "but for" causation, and he added that such a standard will be very difficult to apply in cases where motive is the key issue.

While only time will tell for sure, it will not be a surprise if Congress takes action to amend the ADEA to undo this decision, as it has done with *Lilly Ledbetter* and other Supreme Court decisions favorable to employers.

Kollman's Corner

By Frank Kollman

At the same time a company that was once the largest in the world is filing for bankruptcy, the University of California at Berkeley is issuing essays in support of the so-called Employee Free Choice Act ("EFCA"). EFCA will make it easier for employees to be unionized because it will effectively eliminate the secret ballot election and allow government arbitrators to dictate collective bargaining agreements. Was anyone watching GM go down under a sea of obligations to unionized workers whose wages and benefits were way out of line with reality? Does Congress and UC Berkeley want to have more companies filing for bankruptcy because of EFCA?

Reading those essays reminded me of how naive people can be. The lead essay, by former Clinton Labor Secretary Robert Reich, is ridiculous nonsense. He should run a business for a few months, as opposed to a bloated government bureaucracy or a state university, and see if he ends up creating jobs or filing for bankruptcy.

When the GM bankruptcy story broke a few weeks ago, the headline in the Wall Street Journal read "GM Collapses Into Government's Arms." What a sad headline to read while idiots are pushing the Employee Free Choice Act. Is anybody watching out there?

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