
WORKPLACE UPDATE[®]

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DISPARATE IMPACT APPLIES
TO AGE CLAIMS

The United States Supreme Court has ruled that the disparate impact theory applies to claims of age discrimination under the Age Discrimination in Employment Act (ADEA). In so ruling, the Court resolved a split among the circuit courts of appeal and reversed a ruling by the Fifth Circuit that disparate impact claims were not available under the ADEA. The majority opinion was written by Justice Stevens and joined by Justices Souter, Ginsberg and Breyer. The case involved a claim by a group of Jackson, Mississippi policemen who alleged that the pay plan put in effect by the city discriminated against them because of their age because officers with less than five years of seniority received a higher percentage of raise than those with greater seniority. In his opinion, Justice Stevens indicated that the disparate impact theory under the ADEA was “narrower” than that under Title VII. The Supreme Court in *Wards Cove Packing Co. v. Atonio*, a 1989 case, ruled that in order to establish a disparate impact claim under Title VII, the plaintiff must identify a specific test, requirement or practice that has an adverse impact on a protected group. That ruling, however, was overturned by Congress in the Civil Rights Act of 1991 which amended Title VII. The legislation did not affect the

ADEA, however, and thus the *Wards Cove* rationale would apply to age claims. Justice Stevens also pointed out that the ADEA contains another provision different than Title VII, namely the “reasonable factors other than age” provision which protects employers against age discrimination claims even though there might be adverse impact on older workers. Justice Scalia concurred on the basis that the EEOC’s interpretation was that disparate impact did apply to age claims and the Court should simply defer to that interpretation. *Smith v. Jackson, Miss.*, U.S. No. 03-1160 (03/30/05).

RETURNING SERVICEMAN —
THE EMERGING BATTLEGROUND

With the number of National Guardsmen and reservists being called up and returning to the workforce, as well as regular servicemen being discharged to re-enter the workforce, lawsuits under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) will become more and more frequent. With public concern for servicemen riding high, employers should follow closely the requirements of USERRA as a misstep could prove costly. This was the case in *Duarte v. Agilent Techs. Inc.*, D. Colo. No. 04-B-0298 (03/31/05). Steve Duarte was a \$90,000 per year design consultant for Agilent and a Reserve Marine Corps officer. He was called up twice for duty in Iraq, October 2001 to April 2002,

after which he returned to his job at Agilent and November 2002 to July 2003, when he was also reinstated by Agilent but with some adjustment to his duties. Agilent went through significant economic problems and reduced its workforce from 4,100 to 2,900. The decision was made to reduce the number of design consultants from 6 to 4 and Duarte was one of those chosen for the reduction in force. This occurred in November 2003, five months after his return from duty. Duarte sued claiming a violation of USERRA and the district court in Colorado agreed. That court found that a number of factors unfairly prejudiced Duarte and led to his termination. Because he was not returned to his precall-up duties, he had only been working in his new position for a short period of time before he was evaluated by a new supervisor. This put him behind the other consultants who were evaluated based upon their work in their regular jobs by their normal supervisors. The court also found the timing of the reduction “problematic” and into conflict with USERRA’s provisions that require returning military personnel to be reemployed in a position with the same seniority, status and pay from which they cannot be discharged within one year of reemployment “except for cause.” The court concluded that there was not cause in this case and awarded Duarte back pay and front pay totaling \$324,000 plus interest and consideration for an award of attorneys’ fees.

NOTICE OF RIGHTS
MUST BE POSTED

Employers are now required to post a notice in the workplace “Your Rights Under

USERRA” to inform employees about their rights under that law. The Department of Labor interim final rule requiring the posting became effective March 10, 2005; the final rule will be issued after a sixty day period. A digital copy of the poster will be available at www.dol.gov/vets/programs/userra/poster.pdf

\$29 MILLION DAMAGE AWARD

What may be the largest damage award to an individual plaintiff in an employment discrimination case was made to a terminated equities saleswoman who was awarded \$29.2 million against her former employer, UBS Warburg LLC, a major Swiss financial services company. The plaintiff, Laura Zubulake, claimed that she had been passed over for promotion because of her sex and fired in retaliation for her having filed a complaint with the EEOC. The jury awarded Ms. Zubulake \$2,241,009 in back pay, \$6,863,100 in front pay, and \$20,169,081 in punitive damages. The plaintiff’s case was reportedly aided by the testimony of the former human resources manager for UBS. *Zubulake v. UBS Warburg LLC*, S.D.N.Y. No. 02-1243 (04/06/05).

ROMANTIC APPOINTMENT NOT
SEX DISCRIMINATION

A male dentist who was the director of the Wisconsin Health Fund claimed that he was discriminated against because of his sex when he was replaced by a female dentist whom he thought was having an affair with the CEO of the Union Health and Welfare Fund that owned the dental clinic. The

district court dismissed the lawsuit and the case was appealed to the Seventh Circuit. In an opinion by Judge Richard A. Posner, that court upheld the dismissal, noting that even if there were such a romantic involvement between the CEO and the female dentist, this did not constitute sex discrimination. The Court noted: “A male executive’s romantically motivated favoritism toward a female subordinate is not sex discrimination even when it disadvantages a male competitor of the woman...” The court went on to state: “It is not surprising when women discriminate in favor of women any more than it is surprising when men discriminate in favor of men. It is surprising, in many though not all cases, when men discriminate against men in favor of women.” *Preston v. Wisconsin Health Fund, et al*, 95 FEP Cases 234 (7th Cir. 02/09/05).

Notwithstanding the holding in this case, romantic involvements between managers and subordinates can and often do lead to workplace problems of a practical, if not legal, nature and should be discouraged.

PENNY WISE, POUND FOOLISH

Nancy Burroughs, a teller for a Chase Manhattan bank branch in New York, loaned a homeless man \$10 of her own money while she was off-duty at the grocery store where the bank branch was located. The homeless man returned the money to Ms. Burroughs and she put it in her cash drawer. She wound up \$10 over on her count and when the source of the money was discovered, she was fired by the bank for alleged violation of the conflict of interest policy for lending money

to a bank customer. Ms. Burroughs said she knew nothing about that policy and sued for religious and age discrimination. Ms. Burroughs alleged that the bank human resources department had told her she was terminated “because her religious beliefs created a ‘conflict of interest’ with the bank.” Ms. Burroughs was a licensed ordained minister and founder and pastor of the Full True Gospel Tabernacle. The court denied the bank’s motion for summary judgment on the religious discrimination claim but threw out the age discrimination and hostile work environment claims. The bank will now be required to litigate the religious discrimination claim based upon Mr. Burroughs’ contention as to what she was told by the human resources department. It seems that this whole issue could have been avoided had the bank taken a different perspective concerning the \$10 loan to the homeless man. *Burroughs v. Chase Manhattan Bank N.A.*, S.D.N.Y. No. 01-CIV-1929 (03/02/05).

OKLAHOMA MAY GRANT SOME RELIEF TO EMPLOYERS ON GUN LAW

In March 2004, Oklahoma enacted the Oklahoma Self Defense Act, which prohibited employers, property owners, business entities and others from establishing “any policy or rule that has the effect of prohibiting any person, except a convicted felon, from transporting and storing firearms in a locked vehicle on any property set aside for any vehicle.” The new law has caused considerable concern among employers who are fearful that their employees may bring a gun to work in their

car and then use it to do violence to employees and others. The Oklahoma Senate has passed an amendment to the act which will exempt employers and others from liability from a civil action “for occurrences which result from the storing of firearms in a locked motor vehicle on any property set aside for any motor vehicle, unless the person, property owner, tenant, employer, or owner of the business entity commits a criminal act involving the use of firearms.” The amendment was passed by the Oklahoma House on February 21 and it will now go to the governor for signature. In the meantime, a federal district court in Oklahoma has temporarily restrained the enforcement of the Self Defense Act.

DEFAMATION BASED ON
INTRACOMPANY STATEMENTS

Many assume that comments made between managers or agents of a corporation about an employee of the corporation cannot form the basis for a defamation claim by the employee since there would be no publication, i.e., the discussion between the two managers is like the company talking to itself. Such is not the case in all jurisdictions. An appellate court in Illinois has ruled that intracorporate communications can constitute publication under some circumstances. In the case before the court, *Popco v. Continental Casualty Co.*, Ill. App. Ct. No. 1-03-3389 (01/21/05), the plaintiff claimed that his supervisor reported to his manager that during a performance review, the plaintiff had acted in an aggressive and belligerent manner, had used profanity and had

challenged the supervisor’s authority. The supervisor recommended that the plaintiff be fired. This recommendation was passed on up the line and the plaintiff was terminated for an alleged “pattern of unacceptable conduct.” The court held that a business does have a qualified privilege with respect to intraoffice communications whereby individuals who have a common interest, such as working for the same company, can share information relevant to their common concerns. This privilege can be lost, however, if it is abused such as where one employee knowingly or recklessly spreads false information about another employee at the company. In the case before the court, the court noted that the supervisor and the manager had made derogatory comments about the plaintiff without bothering to investigate the accusations and had acted recklessly. According to a survey by the Media Law Resource Center, the rule in thirteen states is that intracorporate communications are not publications for purposes of defamation law versus thirty-one states that have reached the opposite conclusion.

WINNING IS NOT EVERYTHING

A hockey coach for the Bozeman Ice Dogs, a Junior A, American West Hockey League team, signed a five year contract with the team which provided that he could only be terminated for cause and that he was entitled to two years’ salary if he was terminated for any other reason. The coach’s salary was \$50,000 per year. The coach was initially successful but then, after two losing seasons and diminishing crowds, the team owner

fired him. The coach claimed that he was entitled to two years' salary, but the owner offered him \$15,000 in return for a release. The coach sued and the owner defended claiming that the coach's losing record constituted "cause" under the contract. The lower court ruled in favor of the coach and the case was appealed to the Montana Supreme Court. That court agreed with the lower court's ruling that the contract "did not contain an obligation to sustain a certain win/loss ratio or that [the coach] had to win a certain amount of games in a season to retain his employment." *Cole v. Valley Ice Garden, Mont.*, No. 03-729 (02/10/05).

UNION WINS
SUPERSIZE ELECTION

The Service Employees International Union (SEIU) has won the right to represent 49,000 home child care providers in Illinois following an NLRB-monitored election. The election was handled by a mail-in ballot supervised by the American Arbitration Association. The workers are employees of the State of Illinois and are not covered by federal or state labor laws. The state gave the workers the right to choose a representative to bargain with the state following an executive order signed by Illinois Governor Blagojevich on February 18, 2005. The election follows the trend of increasing union representation in the public sector while union representation in the private sector continues to decline.

PRIVATE CONTRACTORS TO HANDLE
CALLS TO EEOC

The Equal Employment Opportunity Commission (EEOC) has signed a contract with Pearson Government Solutions to respond to calls from the public to the EEOC through two toll-free numbers and by electronic mail. Under this arrangement, calls to any of the fifty-one field offices of the EEOC will be routed to the contract center or will be answered by commission employees. Representatives of the union that represents EEOC employees, claim that, based upon the sample calls handled to date, many of the answers provided by the contractor were inadequate or incomplete. The calls will be handled out of the company's offices in Lawrence, Kansas (not Bombay, India as has been rumored).

FRILOT, PARTRIDGE, KOHNKE
& CLEMENTS, L.C.
3600 ENERGY CENTRE
1100 POYDRAS STREET
NEW ORLEANS, LA 70163-3600

PRSRT STD
U.S. POSTAGE
PAID
PERMIT No. 665
NEW ORLEANS, LA

FRILOT, PARTRIDGE, KOHNKE & CLEMENTS, L.C.

ATTORNEYS AT LAW
3600 ENERGY CENTRE
1100 POYDRAS STREET
NEW ORLEANS, LA 70163-3600
TELEPHONE (504) 599-8000
FACSIMILE (504) 599-8100