Fenwick Employment Brief

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The California and U.S. Supreme Courts handed down three very important decisions in recent weeks that affect several key aspects of employment law.

NEW HAVEN CONNECTICUT FIREFIGHTER DECISION

In *Ricci v. DeStefano,* the U.S. Supreme Court held that the refusal by the city of New Haven, Connecticut to certify the results of a firefighters' exam due to its racially skewed results constituted disparate treatment under Title VII, even though the city's refusal was based on its interest in avoiding disparate impact liability under Title VII.

In 2003, New Haven issued a test to its firefighters to assist with decisions about promotions to lieutenant and captain. When the test results demonstrated that white candidates had outperformed minority candidates, a public debate ensued. Certain firefighters argued to city officials that the racially skewed performance results proved that the test had been racially biased, and they threatened to bring a Title VII disparate impact suit if the city made promotional decisions in reliance on the test results. Title VII's disparate impact prong prohibits employer practices that, although neutral on their face, are "discriminatory in practice."

Swayed by this threat, New Haven discarded the test results. A group of white and Hispanic firefighters, whose strong test performance would have likely earned them a promotion, sued the city alleging that its refusal to certify the test results based on the race of the successful candidates constituted a violation of Title VII's disparate treatment prong. That prong, which prohibits intentional discriminatory practices, makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." A district court dismissed the lawsuit, and a court of appeal affirmed the dismissal. The Supreme Court agreed to hear the case, and reversed, holding that New Haven engaged in disparate impact discrimination.

The Supreme Court held that it is impermissible under Title VII for an employer to discard test results based on the race of the outperforming candidates absent a strong basis in evidence that, had it not taken the action, the employer would have been liable for disparate impact discrimination. In applying this newly-enunciated standard to New Haven, the Court concluded that the city had not met this evidentiary threshold. Specifically, while the Supreme Court acknowledged that the minority firefighters likely would have established a prima facie case of disparate impact discrimination against New Haven due to the "significant" racial adverse impact of the test results, the Court reasoned that New Haven would have ultimately prevailed against the theoretical lawsuit because the exam was job-related and consistent with business necessity. Noting that "fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions," the Court was not convinced that New Haven's decision to discard the test was warranted under the circumstances.

Ricci may leave employers feeling stuck between a rock and a hard place—this marks the first time that the Supreme Court has held that an employer's good faith effort to avoid disparate impact liability under Title VII could ultimately render the employer liable for disparate treatment discrimination. Notably, this decision only applies to decisions to invalidate test results after the test has been administered. The Court explicitly noted that "Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in

order to provide a fair opportunity for all individuals, regardless of their race."

ADEA BURDEN-SHIFTING FRAMEWORK

In *Gross v. FBL Financial Services, Inc.*, the U.S. Supreme Court held that a plaintiff bringing a claim under the federal Age Discrimination in Employment Act (ADEA) must prove by a preponderance of the evidence that age was the "but-for" cause of the employer's adverse decision. Distinguishing from Title VII cases, where the burden of persuasion shifts to the employer so long as the employee can demonstrate that discrimination was a motivating factor in an employment decision, Gross holds that under the ADEA, the burden of persuasion remains with the plaintiff at all times.

Mr. Gross, a 54 year-old, was reassigned from his position as Director of Claims Administration to Coordinator of Claims Administration with defendant FBL, and many of his former job duties were transferred to a newly created position occupied by a younger female employee. Gross sued FBL for age discrimination under the ADEA, alleging that the reassignment constituted a demotion that was based on his age. The trial court instructed the jury that Gross had satisfied his burden of proof if he had proven, by a preponderance of the evidence, that age was a motivating factor in FBL's decision to demote him. The trial court also instructed the jury that FBL had satisfied its burden of proof if it had proven by a preponderance of the evidence that it would have demoted the plaintiff regardless of his age. The jury returned a verdict for the plaintiff, awarding him $46,945 in lost compensation.

A federal court of appeals reversed, finding the trial court's jury instructions improper under the standard established in *Price Waterhouse v. Hopkins.* In *Price Waterhouse,* the Supreme Court held that in Title VII cases, the burden of persuasion shifts to the employer if a plaintiff can demonstrate, by "direct evidence," that discrimination was a "motivating" or "substantial" factor in the employer's adverse action. Once the burden of proof has shifted, the plaintiff will succeed in his claim unless the employer can convince the jury that it would have made the same decision regardless of plaintiff's status in a protected class. The court of appeals held that because the trial court had failed to make the distinction between "direct evidence" and other types of evidence, its burden-shifting instructions to the jury were flawed.

The Supreme Court granted review of the question of whether a plaintiff must "present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case." The Supreme Court went beyond the scope of this question, however, holding that the burden of persuasion never shifts to the employer in cases brought under the ADEA. Reasoning that Title VII decisions do not apply to the Supreme Court's construction of the ADEA, the Court held that a plaintiff alleging age discrimination must prove by a preponderance of the evidence that the adverse employment action would not have occurred but for the plaintiff's age; at no point does the burden of persuasion shift to the employer.

The decision invited both a harsh dissent from the Court's liberal wing, and scrutiny from Congress' Democratic majority, which may seek to amend the ADEA to "undo" the decision. In the meantime, Gross will make it more difficult for plaintiffs to win discrimination claims under the ADEA. The decision does not impact court interpretations of the burdens of proof and persuasion under state law age discrimination statutes.

CALIFORNIA PRIVATE ATTORNEY GENERAL ACT CLASS ACTION STANDARD

The Supreme Court of California held in *Arias v. Super. Ct. of San Joaquin County* that plaintiffs who sue in a representative capacity — *i.e.* on behalf of themselves and other employees — under the state's unfair competition law must meet class certification requirements, whereas plaintiffs who sue in a representative capacity to recover penalties for themselves and other employees under the state's Private Attorney General's provision of the Labor Code (PAGA) need not establish such requirements.

Plaintiff Jose Arias sued his former employer, Angelo Dairy, asserting claims on behalf of himself and other current and former Angelo Dairy employees under PAGA and California's unfair competition law (Bus. & Prof. Code, § 17200 et seq.). PAGA permits plaintiffs to recover civil penalties on behalf of themselves and other current or former employees, with 75% of any recovery distributed to the state's Labor and Workforce Development Agency and the remaining 25% going to the aggrieved employees. The trial court dismissed Arias' representative claims on the ground that he failed to meet class certification standards — for example, commonality among the class members — that apply to class actions brought under other state laws.

A state court of appeal reversed in part, holding that PAGA representative claims are not subject to class certification requirements. The Supreme Court of California affirmed. While the Supreme Court acknowledged that Proposition 64 — passed by California voters in 2004 — added a class certification requirement to class actions brought under the state's unfair competition law, the court held that plaintiffs need not satisfy such requirements when seeking civil penalties under PAGA.

Not having to satisfy class certification requirements in a PAGA penalties class action gives plaintiffs a significant strategic advantage in pursing such claims against their current or former employers, and the Arias decision portends more wage/hour class actions in California.

NEWS BITES

DLSE OPINION LETTER PROVIDES GUIDANCE ON MEAL PERIODS

On June 9, 2009, the Division of Labor Standards Enforcement (DLSE) issued an Opinion Letter that appears to relax the standard for satisfying the requirements for an on-duty meal period.

Under Wage Order 9-2001, subd. (11)(C), an on-duty meal period is lawful if all three of the following requirements are met: (1) the nature of the work prevents an employee from being relieved of all duty, (2) the employer and employee have agreed in writing to an on-the-job paid meal period, and (3) the written agreement states that the employee may, in writing, revoke the agreement at any time.

The DLSE affirmed that "the critical determination" is whether the employer can establish that the facts and circumstances in the matter point to the conclusion that the nature of the work prevents the employee from being relieved of all duty. Significantly, the DLSE disavowed in part a 2002 Opinion Letter that permitted "on duty" meal periods only when they are "virtually impossible to avoid," finding that the express language of the wage order contains no such requirement and that there is no rational basis to impose such a "narrow, imprecise, and arbitrary standard."

The DLSE also concluded that an employee whose working conditions prevent him or her from taking an off-duty meal period may enter into a "blanket" agreement for on-duty meal periods so long as the conditions necessary to establish that the nature of the employee's work prevents the employee from being relieved of all duty are met for each applicable on-duty meal period taken. Therefore, the Opinion Letter clarifies that it is not necessary for the employer and employee to enter into separate agreements for each meal period.

WALL STREET BROKERAGE FIRMS SUED FOR DISCRIMINATORY RETENTION BONUS SYSTEMS

Bank of America is facing two new class action lawsuits, one brought by African-American brokers and another by female brokers, alleging the smaller retention bonuses they received during Bank of America's purchase of Merrill Lynch were the result of discriminatory practices. The plaintiffs argue that because Merrill Lynch had a discriminatory practice of steering its wealthiest clients to white male brokers, Bank of America knowingly and willingly endorsed this discriminatory practice by tying retention bonuses to fees earned on clients' assets.

SEVENTH CIRCUIT HOLDS THAT RETALIATION AGAINST EMPLOYEES FOR PURELY VERBAL COMPLAINTS NOT ACTIONABLE UNDER FLSA

In a surprising decision, the Seventh Circuit Court of Appeals held that verbal complaints about wages do not support a retaliation claim under federal law. In *Kasten v. Saint-Gobain Performance Plastics Corp.,* the plaintiff alleged that he had been fired in retaliation for his verbal complaints regarding the location of the time clocks at his employer's facility. The plaintiff alleged that he verbally complained to his supervisors that the location of the time clocks was illegal because it prevented employees from being paid for time spent donning and doffing their protective gear, and that he had told at least one supervisor that he was thinking of commencing a lawsuit. The plaintiff was subsequently terminated, and he brought a retaliation suit under the Fair Labor Standards Act (FLSA). The district court granted summary judgment to the employer, concluding that plaintiff had not engaged in protected activity because he had not "filed any complaint" about the allegedly illegal location of the time clocks. The Seventh Circuit affirmed, reasoning that purely verbal complaints do not qualify as "protected activity" under the FLSA and therefore cannot be the basis for retaliation suits.

EMPLOYER'S REFUSAL TO MODIFY FLOORING TO AID IN USE OF SERVICE DOG MAY VIOLATE ADA

In *McDonald v. Department of Envtl. Quality,* the Montana Supreme Court reversed a trial court's ruling that an employer has no duty to provide accommodations regarding service animals, reasoning that "if a disabled employee's assistive device is not usable in the workplace, then allowing her to bring the assistive device to work is pointless." The court remanded the case to determine whether the employee's request for new non-skid floor coverings to prevent her service dog from slipping, which would have cost the employer between $1,500 to $8,000, constituted a reasonable accommodation.

FEDERAL MINIMUM WAGE INCREASE

On July 24, 2009, the federal minimum wage will increase from $6.55 to $7.25 per hour. This adjustment has no impact on state minimum wages, which are often higher than the federal minimum.