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### Fourth Circuit Finds Allegations of Discriminatory Severance Package Sufficient to State a Claim Under Title VII

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On March 16th, the Fourth Circuit Court of Appeals reversed the dismissal of a woman's claim that she was discriminated against because she was offered a less favorable severance package than that previously offered to men in similar positions. The Court's decision in *Gerner v. County of Chesterfield, Virginia*, is the first opinion by the Fourth Circuit to clearly state that non-contractual severance benefits must be provided in an equitable and non-discriminatory fashion.

#### What happened

The Plaintiff, Ms. Gerner, was the director of human resources management. She was informed that her position was being eliminated and was offered severance of three months' pay and health benefits in exchange for her resignation and a release of claims. Ms. Gerner refused the offer, and the County terminated her employment.

Ms. Gerner filed her Title VII action, claiming that the County did not offer her the same "sweetheart" package it offered her male counterparts when the County sought to terminate their employment. Four male comparators were specifically identified. She claimed that these male employees, including those not meeting performance expectations, were transferred to positions with less responsibility while allowed to continue with the same salary and benefits, or were kept on the payroll with benefits for up to six months to enhance their retirement benefits.

#### The analysis

Title VII prohibits an employer from "discriminat[ing] against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's... sex." The District Court dismissed Ms. Gerner's claim for lack of an "adverse employment action." Its determination was based on the fact that 1) the severance benefits were not a contractual entitlement, and 2) the offer was made after she was terminated and, therefore, no longer an employee. The Fourth Circuit, in an opinion authored by Judge Diana Gribbon Motz, reversed.

First, the Fourth Circuit stated that a claim for discriminatory denial of an employment benefit turns on whether the benefit is "part and parcel of the employment relationship" and not on whether the employer was contractually obligated to provide the benefit. The Fourth Circuit cited U.S. Supreme Court authority for the proposition that, once an employer decides to grant some employees an opportunity, "it may not deny this opportunity to others because of their [protected characteristic]." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Hishon v. King & Spaulding*, 467 U.S. 69, 75 (1984).

The Fourth Circuit, distinguishing this case from its prior rulings, noted that an adverse employment action had not been found where, as part of a reduction in force, an employee *volunteered* for a change in employment benefits or retained a job in lieu of a new benefit. However, Ms. Gerner did not fit either of these categories. Rather, she claimed that, as part of the *involuntary* elimination of her position, she was not offered the same "sweetheart" severance packages offered to other male directors that had been involuntarily terminated.

Second, the Fourth Circuit stated that, although Ms. Gerner was offered the severance package around the time of her termination, Title VII covers "any individual" which includes both current and past employees.

#### Recommendations

In executing any adverse action, it is important to assess not only the non-discriminatory application of written policy but also the organization's past practices in similar situations. The questions to ask are, how has the organization handled similar situations in relatively recent history and what, if any,

justification is there to deviate from past practice.

For additional information or for any questions regarding the *Gerner* decision, you are invited to contact the authors or their colleagues in Venable's **Labor and Employment Practice Group**.