Memo

To:

From: Chris McHam

Date: Monday, December 13, 2010

Re:

Grey,

You asked the I research a number of issues regarding the Mrs. Teacher file. My understanding of your questions is that you need to know:

1. The exact procedures for bringing a suit for the types of discrimination faced by. Mrs. Teacher;

2. The remedies available in a case like Mrs. Teacher's; and

3. The steps that are required before filing suit for discrimination.

PROCEDURES

As you know employment litigation is a highly complex area of law. At its most basic a plaintiff's prima facie case can be explained within the frame work of two cases: McDonald-Douglas and Desert Palace. McDonald-Douglas has been the framework upon which all employment discrimination cases have been based for over thirty years. Only recently with Desert Palace has any major change been made. The extent of those changes is uncertain, as the circuits have been not fully applied Desert Palace and the ones that have seem to have done so in a manner that is at odds with the case itself. Specifically the Fifth Circuit has released on opinion that relegates the Plaintiff friendly Desert Palace to a minor role, or in the alternative requires that the Plaintiff attempting to use Desert Palace abandon the safe harbor of McDonald-Douglas. I believe that the tension between these two cases is a bit beyond the limits of your request but you should be aware that it exists and has the employment law community on edge.

MCDONNELL-DOUGLAS (411 US 792; 1973):

McDonnell Douglas was an aircraft manufacturer; Green, a black man, was a mechanic for McDonnell Douglas from 1958 until August 1964, when he was laid off as part of a general reduction in workforce; Green was an activist in the civil rights movement; he protested his discharge with other members of the Congress on Racial Equality by illegally stalling his car on the main road leading to the plant during rush hour; in July 1965, McDonnell Douglas advertised for qualified mechanics and Green applied for re-employment; McDonnell Douglas rejected Green because he participated in the stall-in; Green sued, claiming that McDonnell Douglas refused to hire him because of his race and involvement in the civil rights movement, in violation of §703(a)(1) and §704(a). The district court found that the refusal to hire Green was based solely on his participation in the stall-in. The circuit court concluded that nothing in §704(a) protected Green's unlawful activity; however, it reversed the district court's dismissal of Green's §703(a)(1) claim relating to racially discriminatory hiring practices

Issue: what is the order and allocation of proof in a private, non-class action suit challenging employment discrimination? (i.e. what is the analytical framework for providing individual disparate treatment discrimination under Title VII when there is only circumstantial evidence of discriminatory intent?)

Holding:

McDonnell-Douglas triparate analytical framework for proving individual disparate treatment discrimination with circumstantial evidence of discriminatory intent:
PART 1: The Plaintiff in a Title VII case carries the initial burden of establishing a prima facie case of racial discrimination. This may be done by showing:

- **(i) that he belongs to a racial minority;**
- **(ii) that he applied and was qualified for a job for which the employer was seeking applicants;**
- **(iii) that, despite his qualifications, he was rejected; AND**
- **(iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of P's qualifications**

**The facts necessarily will vary in Title VI cases, and this model of proof of P's prima facie case is not necessarily applicable in every respect to differing factual situations

PART 2: The burden (of production) shifts to the Defendant employer to articulate some legitimate, nondiscriminatory reason for the Plaintiff's rejection
Remember that the burden of proof (persuasion) stays with the Plaintiff at all times; the burden of production, however, shifts to the Defendant to articulate a legitimate, nondiscriminatory reason

PART 3: After the Defendant articulates some legitimate, nondiscriminatory reason(and they always will), the burden (of production) shifts back to the Plaintiff to demonstrate that Defendant's reason is pretext for a racially discriminatory reason
The framework presented in McDonnell-Douglas applies to all discrimination suits. It was specifically applied to age discrimination under the ADEA in Bodenheimer (5th Cir. 5 F.3d 955, 957), which stated that the elements are:

(1) Plaintiff was discharged, demoted etc.
(2) Plaintiff was qualified for the position
(3) Plaintiff was over 40 yrs. old
(4) Plaintiff was either:
    1. replaced by someone outside the protected class;
    2. replaced by someone younger; or
    3. otherwise was discharged because of age

There is an unwritten 5th element, which the courts have not fully stated, yet strictly enforce. That 5th element roughly states that the Plaintiff must allege some adverse effect. The courts view Title VII (§701(a)(1): "compensation, terms, conditions or privileges" as encompassing only adverse employment actions such as failure to hire, termination, demotion, etc.; therefore, an adverse employment action is necessary for a prima facie case of Title VII discrimination. For the suit to go forward, the adverse effects have to be material. The court does not want to be bothered with "what if." Cases that the court considers to involve petty actions against an employee (ex. lateral transfer with no diminution in pay, mid-range evaluation, failure to provide a computer) get poured out on Defendant's motion for summary judgment.

As a side note the term constructive discharge often comes up in these cases. Constructive discharge is a situation in which a reasonable person would feel compelled to quit because of the treatment they are receiving. This is not a well settled area of law and should not be depended on.

DESERT PALACE

This case involves the doctrine of Mixed Motives. Basically proving discrimination is difficult when the Defendant can show some other, legitimate reason. In some cases both the legitimate reason and the illegitimate, discriminatory reason where equally factors. The essence of Desert Palace is that a mixed motive is still an evil motive, and deserving of the attention of the courts. Therefore if a Plaintiff can prove that even 1% of the motive was discriminatory, the Plaintiff can carry its burden of proof. The problem is that the Fifth Circuit (traditionally very pro-defendant) has interpreted this case to mean that a Plaintiff must admit that there is a mixed motive before she can use the Desert Palace case. Doing so removes the Plaintiff's ability to rely on the frame work of McDonnell-Douglas, which is a single motivation framework. This is a confusing time for this area of law, and I can predict that there will be further developments and cases taken to the Supreme Court over this. Hopefully clarification and some melding of Desert Palace and McDonnell-Douglas will occur. Until that time, the method and manner of pleading an employment discrimination case will be very important and should this case reach that point we should carefully approach the initial pleadings.

REMEDIES

FEDERAL: §1981a does NOT apply to ADEA cases the ADEA is part of the FLSA and has a different remedial scheme; a discriminate can recover "unpaid wages" which can be doubled

(called "liquidated damages") upon a finding of "willfulness" i.e. the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute [*see Hazen Paper*, 507 US 604]

Note: for a discussion of liquidated damages as applied to the facts of a particular case, *see Russell v. McKinney*, 235 F.3d 129 (5th Cir. 2000)

Under the ADEA → backpay is NOT an equitable remedy, but a legal remedy; since the ADEA was enacted in 1967, the juries have heard ADEA cases, because this legal remedy was available; note: jury trials are still available in ADEA cases

In an age case, the largest recovery is known as backpay (or "unpaid wages"), which includes benefits.

Under the ADEA, the punitive aspect is that these backpay damages can be doubled on a finding of "willfulness" (which is not a difficult standard, because it incorporates "reckless disregard") other than these liquidated damages, there are no other punitive damages under the ADEA, nor compensatory damages

Various courts have awarded other equitable remedies in ADEA cases (like those in §706(g))

Attorneys' fees are recoverable by statute under the FLSA

STATE: Age discrimination claims are covered by the TCHRA (TX Lab. Code Chap. 21) therefore, in an age claim in state court, then the Plaintiff can get Title VII damages: equitable and compensatory damages and possibly punitive damages; therefore, you probably want to file age claims in state court.

§21.2585 Compensatory and Punitive Damages
(a) On finding that a respondent engaged in an unlawful intentional employment practice as alleged in a complaint, a court may, as provided by this section, award:
(1) compensatory damages and
(2) punitive damages
(b) A complainant may recover punitive damages against a respondent, other than a respondent that is a governmental entity, if the complainant demonstrates that the respondent engaged in a discriminatory practice with malice or with reckless indifference to the state-protected rights of an aggrieved individual
(c) Compensatory damages awarded under this section may not include:
(1) backpay
(2) interest on backpay or
(3) other relief authorized under §21.258(b)
(d) The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses and the amount of punitive damages awarded under this section may not exceed, for each complainant:

(1) $50,000 in the case of a respondent that has fewer than 101 employees
(2) $100,000 in the case of a respondent that has more than 100 and fewer than 201 employees
(3) $200,000 in the case of a respondent that has more than 200 and fewer than 501 employees; and
(4) $300,000 in the case of a respondent that has more than 500 employees
(e) For the purposes of (d), in determining the number of employees of a respondent, the requisite number of employees must be employed by the respondent for each of 20 or more calendar weeks in the current or preceding calendar year

Notes: §21.2585 is almost identical to §1981a; the statutory caps are the same
the employer, to be liable under Chap. 21, must have 15 or more employees.

STEPS BEFORE FILING

The steps you laid out in your request for research are essentially correct. The main concern I have is that the State courts require a charge be filed with the EEOC within 180 days of the occurrence. The Federal courts require the charge be filed within 300 days of the occurrence. I am concerned that because the charge was not filed Ms. Mrs. Teacher's claims may be barred. If the demotion and discrimination occurred in August of 2003 the charge would need to be filed in January 2004. Obviously we are quite a bit beyond that. Therefore we will have to rely on the "continuing violation theory." This could potentially be a big problem. Essentially the continuing violation theory is used when there is not one separate and distinct act to look at as the starting date of the discriminatory act. The courts have addressed numerous cases regarding the start date of the discrimination and have uniformly stated that the date of notice of the adverse employment action will suffice. The question in this case will be when notice occurred. Ms. Mrs. Teacher was informed that she would be demoted and was given access to a grievance process. At anytime in that process Ms. Mrs. Teacher's concerns could have been vindicated and she could have been restored to her position. I would argue that until the grievance process ran its full course, Ms. Mrs. Teacher did not receive notice of the adverse act sufficient to trigger the running of the statute of limitations (2 years in state, none in federal) and 180 day period charge filing period. See attached case, Cooper-Day v. RME Petroleum 121 S.W.3d 78 at 86.

Oddly enough, it does not appear that a charge can be filed with the EEOC online. It appears that a charge must be filed, in person, at the Dallas office and the filing must be sworn. It is unclear whether a notary is available at the office. Information explaining the process has been attached as "**EXHIBIT A.**"

Chris McHam