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THE RIGHT RESPONSE AT THE RIGHT TIME

Management Update

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Fifth Circuit Recognizes Age-Based Hostile Environment Claim

Executive Summary: For the first time, the Fifth Circuit Court of Appeals has held that a plaintiff can pursue a claim for a hostile work environment based on age. See *Dediol v. Best Chevrolet, Inc.* (5th Cir. Sep. 12, 2011). If other federal appeals courts follow this reasoning and recognize age-based hostile work environment claims, more employers may find themselves involved in such litigation. Implementing policies prohibiting harassment, establishing effective complaint procedures and training employees and supervisors on these policies and procedures can help prevent costly litigation and/or provide a defense in the event of litigation.

Background

The 65-year-old plaintiff, Dediol, was employed by Best Chevrolet as a car salesman for three months. Dediol, who was also a born-again Christian, claimed that for two of the three months of his employment, his supervisor repeatedly called him names such as "old mother******," "old man" and "pops" instead of using his given name. Dediol also claimed his supervisor made derogatory comments about his religion, such as "God would not put food on your plate" and "[G]o to your f****ng God and see if he can save your job," approximately twelve times over the two months before his employment ended. Additionally, Dediol claimed his supervisor engaged in incidents of violence and physical intimidation toward him, which culminated when the supervisor threatened to "beat the F out of" him and "charged" him in the presence of several employees. After this incident Dediol stopped coming to work and was terminated for abandoning his job.

Dediol subsequently sued the employer and his supervisor, alleging a hostile work environment based on age, religious harassment, constructive discharge and state law claims of assault. The trial court granted the employer's motion for summary judgment; however, the Fifth Circuit reversed this decision.

Hostile Work Environment Claims

Discrimination claims based on a hostile work environment have been recognized under Title VII; however, they have not been widely permitted for age claims under the Age Discrimination in Employment Act (ADEA). Although the Fifth Circuit had previously considered cases involving age-based hostile environment claims, this decision is the first time the court has expressly permitted such a cause of action under the ADEA.

In reaching this decision, the Fifth Circuit followed the reasoning of the Sixth Circuit in *Crawford v. Medina General Hospital,* 96 F.3d 830 (6th Cir. 1996). In *Crawford*, the court held that a hostile work environment claim is cognizable under the ADEA because the ADEA and Title VII share common substantive features and a common purpose – the elimination of discrimination in the workplace.[1]

The court in *Dediol* held that to advance an age-based hostile environment claim, the complaining person must establish that (1) he or she was over the age of 40; (2) the employee was subjected to harassment, either through words or actions, based on age; (3) the nature of the harassment was such that it created an objectively intimidating, hostile, or offensive work environment; and (4) there exists some basis for liability on the part of the employer.

As in a hostile work environment claim under Title VII, an individual claiming an age-based hostile environment must show that the complained-of conduct was both objectively and subjectively offensive. This means that not only must the individual perceive the environment to be hostile, but it must appear hostile or abusive to a reasonable person. To determine whether conduct is objectively offensive, the totality of the circumstances is considered, including: (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or merely an offensive utterance; and (4) whether it interferes with an employee's work performance.

Dediol's Claims Should Be Resolved at Trial

Although the court did not rule on the substance of Dediol's age-based hostile environment claim, it found that the supervisor's repeated profane references to Dediol and his almost daily "strident age-related comments," as well as evidence of the supervisor's physically threatening behavior were sufficient to create issues of fact that should be resolved at trial. Additionally, the court held that conflicting evidence regarding whether the supervisor steered certain deals away from Dediol and toward younger employees should be resolved at trial.

The court also held that Dediol could go to trial on his religion-based hostile work environment claim. "While there is no one 'smoking gun' that establishes a hostile work environment based

on religion, Dediol has pled enough facts to show a pattern of smaller instances" that should be resolved at trial.

1 The court in *Crawford* rejected the specific claims in that case, finding that the plaintiff failed to establish that she was subjected to a hostile work environment based on her age. 96 F.3d at 836.

NLRB Reinstates Recognition and Successor Bar Doctrines

Executive Summary: In a pair of 3-1 decisions, the National Labor Relations Board (NLRB) recently overruled two prior Board decisions and reinstated and refined Board's "recognition bar" and "successor bar" doctrines.

RECOGNITION BAR REINSTATED

In *Lamons Gasket Company*, 357 NLRB No. 72 (August 26, 2011), the Board overruled its 2007 decision in *Dana Corp.*, 351 N.L.R.B. 434, and returned to the rule that an employer's voluntary recognition of a union, based on a showing of the union's majority status, bars an election petition for a reasonable period of time. The Board also defined, for the first time, benchmarks determining a "reasonable period of time."

Recognition Bar and Dana Corp.'s 45-Day Notice Period

Prior to *Dana Corp.*, when an employer voluntarily recognized a union based on signed authorization cards from a majority of employees, usually pursuant to a "card-check neutrality agreement," neither decertification nor rival union petitions challenging this representation could be filed "for a reasonable time." In *Dana Corp.*, the NLRB modified this doctrine and held that a decertification petition or rival union petition could be filed within 45 days of a company's voluntary recognition of a union. During this 45-day period, the employer was also required to post a Notice informing the employees of their right to either file a decertification petition or a petition in favor of another union. If the notice was posted and no petition was filed within 45 days, no decertification or rival union petitions could thereafter be filed "for a reasonable time."

Rejection of Dana Corp. and Parameters of a "Reasonable Period of Time"

In *Lamons Gasket*, the Board overruled *Dana Corp.* and eliminated the 45-day window period and Notice requirement. The Board also defined a "reasonable period of bargaining," during which the recognition bar will apply, to be no less than six months after the parties' first bargaining session and no more than one year. In determining whether a reasonable period has

elapsed, the Board will apply a multifactor test. The General Counsel bears the burden of proof to show that further bargaining should be required.

Under this test, the determination of whether a reasonable period of bargaining has elapsed after six months depends on multiple factors, including:

- Whether the parties are bargaining for an initial contract;
- The complexity of the issues being negotiated and of the parties' bargaining processes;
- The amount of time elapsed since bargaining commenced and the number of bargaining sessions;
- The amount of progress made in negotiations and how near the parties are to concluding an agreement; and
- Whether the parties are at impasse.

Retroactivity

The Board will apply this rule retroactively in all pending cases, except those in which an election was held and the ballots have been opened and counted.

SUCCESSOR BAR DOCTRINE REINSTATED

The Board also overturned its 2002 decision in *MV Transportation* and reinstated the "successor bar" doctrine, which requires a successor employer to recognize the previously chosen representative of its employees for reasonable period of time, without challenge to its representative status. See *In re UGL-UNICCO*, 357 NLRB No. 76 (August 26, 2011). As in *Lamons Gasket*, discussed above, the Board also set forth parameters for determining a "reasonable period of time."

Background of Successor Bar Doctrine

Generally, an asset purchaser must recognize and bargain with the seller's union where the seller's unionized employees comprise a majority of the purchaser's workforce in an appropriate bargaining unit and similarities between the two operations show a "substantial continuity" between the enterprises. However, the purchaser typically is not required to assume the seller's collective bargaining agreement. Thus, in an asset purchase, there often is not a contract in place that prevents challenges to a union's continuing status as the desired representative of a majority of the employees. In *St. Elizabeth Manor*, 329 N.L.R.B. 341 (1999), the Board held that a purchaser had to recognize and bargain with the seller's union for a "reasonable period" of time, even though it might have suspected or even known that most of its employees no longer

desired union representation. Under the NLRB's "successor bar" rule, employers acted at their peril by challenging whether such a union continued to enjoy majority support because the "reasonable period" standard was so imprecise.

MV Transportation

In *MV Transportation*, 337 N.L.R.B. 770 (2002), the Board overturned *St. Elizabeth Manor* and held that an incumbent union in a successor employer situation is entitled only to a rebuttable presumption of continuing majority status, which may be overcome at any time, permitting an employer to withdraw recognition from the union unilaterally, a rival union to file a representation petition, or employees to file a decertification petition.

Board Changes Position Again

In *UGL-UNICCO*, the Board overturned *MV Transportation*, stating that reinstituting the successor bar doctrine, with appropriate modifications, "best serves the policies of the National Labor Relations Act." Under *UGL-UNICCO*, the successor bar will apply in those situations where the successor has abided by its legal obligation to recognize an incumbent union, but where the "contract bar" doctrine is inapplicable, either because the successor has not adopted the predecessor's CBA or because an agreement between the union and the successor does not serve as a bar under existing rules (such as where there has been an agreement for fewer than 90 days or there is an interim agreement that is intended to be superseded by a permanent agreement). According to the Board, in such cases, the union is entitled to a reasonable period of bargaining, during which no question concerning representation that challenges its majority status may be raised through a petition for an election filed by employees, by the employer, or by a rival union; nor, during this period, may the employer unilaterally withdraw recognition from the union based on a claimed loss of majority support, whether arising before or during the period.

Reasonable Period

The Board also defined "reasonable period." Where the successor employer has expressly adopted existing terms and conditions of employment as the starting point for bargaining, without making unilateral changes, the "reasonable period of bargaining" will be six months, measured from the date of the first bargaining meeting between the union and the successor employer.

In situations in which the successor employer recognizes the union, but unilaterally announces and establishes initial terms and conditions of employment before proceeding to bargain, the "reasonable period of bargaining" will be a minimum of six months and a maximum of one year, measured from the date of the first bargaining meeting between the union and the employer. The Board will apply a multi-factor test to determine whether the period has elapsed. The burden of

proof will be on the party who invokes the "successor bar" to establish that a reasonable period of bargaining has not elapsed.

Additionally, the Board held that where (1) a first contract is reached by the successor employer and the incumbent union within the reasonable period of bargaining during which the successor bar applied, and (2) there was no open period permitting the filing of a petition during the final year of the predecessor employer's bargaining relationship with the union, the contract bar period applicable to election petitions filed by employees or by rival unions will be a maximum of 2 years, instead of 3.

Retroactivity

As with the recognition bar discussed above, the Board will apply this rule retroactively.

Board Releases Notice of Employee Rights Poster; Lawsuit Filed to Block Implementation of Final Rule

Executive Summary: On September 8 the National Association of Manufacturers (NAM) filed a federal suit seeking to block implementation of the National Labor Relations Board's (NLRB's) new rule requiring many employers, both union and non-union, to display a notice in the workplace explaining employee rights under the National Labor Relations Act (NLRA). NAM's suit alleges that the NLRB exceeded its authority by promulgating the rule. The rule will take effect November 14, 2011, unless the court blocks it.

Posting Requirement

The notice required by the Board's final rule, "Notification of Employee Rights Under the National Labor Relations Act," is now available for downloading from the agency's web site at: **http://www.nlrb.gov/poster**.

As discussed in our August 30, 2011 Legal Alert, *NLRB to Require Posting of Notice of Employee Rights*, available at **http://www.fordharrison.com/shownews.aspx?Show=7546**, the Board's rule requires employers covered by the NLRA to post this notice "in conspicuous places where [it] is readily seen by employees, including all places where notices to employees concerning personnel rules or policies are customarily posted." The notice requirement does not apply to employers who are not covered by the NLRA, including, among others, any person subject to the Railway Labor Act, as well as entities over whom the Board has been found not to have jurisdiction or over which the Board has chosen not to assert jurisdiction.

Manufacturing Group Sues to Block Board Notice Rule

The National Association of Manufacturers (NAM) has filed suit in federal court seeking to block the implementation of the final rule. See *National Ass'n of Manufacturers v. National Labor Relations Board* (D. D.C. filed Sep. 8, 2011). In the lawsuit, NAM claims the Board exceeded the authority granted to it by the NLRA by promulgating the rule requiring posting of the notice and purporting to create a new unfair labor practice based upon an employer's failure to post the notice. Additionally, the lawsuit claims that the Board has no authority to require an employer to post any notice in the absence of a representation petition or an unfair labor practice charge. Finally, the lawsuit claims that the Board exceeded its authority by providing that an employer's failure to post the notice may toll the statute of limitations in an unfair labor practice charge.

The lawsuit asks the court to declare the rule null and void in its entirety and permanently enjoin the Board from implementing the rule. Although the Board has not yet filed an answer to the complaint, it will likely argue that other government agencies have required employers to display posters on other analogous topics, such as employee safety (OSHA), anti-discrimination laws (EEOC), and workers' compensation rights (state agencies). In light of these similar notice requirements imposed by other federal and state agencies, many knowledgeable observers believe there is only a very slight chance of NAM prevailing, either in whole or part.

The outcome of this litigation and when the court would issue a decision are uncertain. Thus, employers must plan to comply with the posting requirement by November 14.