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LABOR UPDATE

Recent Developments in Labor and Employment Law

SUPREME COURT EXPANDS REACH OF EMPLOYMENT LAWS

Two recent decisions by the United States Supreme Court have significantly expanded the reach of federal anti-discrimination laws, and, accordingly, the potential liability of employers. In one decision, the Court held that ex-employees can sue former employers, based on certain post-employment conduct. As the result of a separate decision, employers who previously may have considered themselves exempt from certain federal employment laws, may indeed be covered by same.

Former Employees Protected

The case of *Robinson v. Shell Oil* grew out of a negative employment reference, a subject which has proven troublesome for many employers. Defendant Shell Oil fired Robinson, whereupon Robinson filed a discrimination charge with the Equal Employment Opportunity Commission, claiming that his firing was due to race. While that discrimination charge was pending, Robinson applied for work with another company, and that firm contacted Shell for an employment reference. Perhaps not surprisingly, Shell's reference was unfavorable.

In response, Robinson filed an additional claim against Shell, alleging that its negative reference was unlawful "retaliation" for the filing of his original discrimination charge, in violation of Title VII of the Civil Rights Act of 1964. This claim, however, was dismissed by the district court, which held that Title VII's anti-retaliation provision did not apply to former employees.

The district court, along with several federal appellate courts that had also considered this issue, based its decision on the fact this anti-retaliation provision, by its terms, expressly forbids only an employer's discrimination "against any of his employees or applicants for employment," who have brought or assisted Title VII claims. Reasoning that persons cease to be employed upon termination of employment, the lower court held that the term "employees" as used in this provision referred to current employees only. Therefore, Robinson had no claim under Title VII based on retaliatory conduct occurring after his separation.

The Supreme Court disagreed and reversed the district court's dismissal, allowing Robinson's retaliation claim to proceed. While conceding that, "At first blush, the term 'employees' . . . would seem to refer to those having an existing employment relationship with the employer in question," Justice Clarence Thomas, writing for the Court, found this term unclear. Noting that neither Title VII's anti-retaliation provision nor its definition of "employee" (i.e., "an individual employed by an employer") is qualified in time, the Court held that "employees" could be equally interpreted in both present and past tense.

After declaring the term "employees" ambiguous, the Court proceeded to resolve this "ambiguity" by adopting the more expansive definition rejected by the district court. Declaring that its decision was consistent with the broad context of Title VII and its primary purpose of eliminating discrimination, the Court held that former employees are indeed included within Title VII's protections against retaliation. In so holding, Justice Thomas, former chairman of the EEOC, embraced that agency's opinion that depriving former employees of this protection would allow the threat of post-employment reprisals to deter discrimination victims from advancing claims.

Number of Employees on Payroll Dictates Employer Coverage

In *Walters v. Metropolitan Educational Enterprises, Inc.,* the Supreme Court held that the "payroll method" is the proper way to count employees for purposes of determining whether an employer is covered under Title VII. This decision has important ramifications for employers on the cusp of coverage under Title VII and other federal employment laws, especially employers in Illinois, Wisconsin, and Indiana.

Title VII defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." The Age Discrimination in Employment Act and Americans with Disabilities Act employ virtually identical definitions; the former triggers employer coverage at the twenty employee threshold while the latter triggers coverage at fifteen employees. The Family and Medical Leave Act's definition of employer is similar, although that act applies to employers of fifty or more.

The *Walters* case began in the U.S. District Court for the Northern District of Illinois. Like *Robinson*, the case was brought under Title VII's anti-retaliation provisions; Plaintiff Walters claimed that she was unlawfully fired in 1990 for having filed an employment discrimination charge against Metropolitan.

Metropolitan moved to dismiss the case on grounds that it was not covered by Title VII at the time of Walter's firing. Metropolitan established that it had less than 15 employees throughout 1989 (the "preceding calendar year") and, although it had between 15 and 17 employees for most of 1990 (the year of its alleged Title VII violation), there were only 9 weeks in that year in which it actually compensated 15 or more employees on each working day. In light of this showing, the district court granted Metropolitan's motion to dismiss, relying on a rule established by the U.S. Court of Appeals for the 7th Circuit (which governs the Illinois, Indiana, and Wisconsin federal district courts) that employees are to be counted towards the 15 employee threshold only on days on which they actually perform work, or are compensated despite their absence.

After the 7th Circuit affirmed this dismissal, the case was appealed to the U.S. Supreme Court. The Court rejected the 7th Circuit's counting method--and its requirement that a court examine how many employees actually performed work for an employer on a particular day--proclaiming that it necessitated "an incredibly complex and expensive factual inquiry." The Court emphasized that the focus of inquiry should instead be on whether an employer has "employment relationships" with the necessary amount of persons for the requisite number of weeks.

As the primary source of information regarding such employment relationships is usually an employer's payroll, this method of inquiry is often referred to as the "payroll method." However, the Court noted that the existence of an employment relationship is the critical factor, not an individual's appearance on the employer's actual payroll (since occasionally employees on leave may be left off certain payrolls, just as individual's who are not truly "employees" may occasionally be put on). Therefore, explained the Court, although the employer's payroll is helpful in deciding this question; "all one needs to know about a given employee for a given year is whether the employee started or ended employment during that year and, if so, when. He is [to be] counted as an employee for each working day after arrival and before departure."

Robinson and *Walters* illustrate an important lesson for employers, particularly smaller companies in Illinois, Indiana, and Wisconsin, who may have considered themselves exempt from certain employment laws, pursuant to the more favorable counting method formerly at use within the 7th Circuit. As the scope of these laws continues to expand, both in terms of coverage and application, employers should be careful to keep up and comply with all applicable legal obligations, and be especially cognizant of these laws' anti-retaliation prohibitions, the violation of which led to both of these cases.

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COURT EASES COBRA NOTIFICATION REQUIREMENT

The Consolidated Omnibus Budget Reconciliation Act of 1985, better known as COBRA, requires employers that sponsor group health plans to allow qualified beneficiaries the opportunity to continue their coverage, at their own cost, if they lose coverage because of a "qualifying event." Termination of employment is a qualifying event unless the employee's termination is for gross misconduct. In interpreting when employers may avoid giving COBRA notification because of an employee's gross misconduct, there has been confusion as to whether an employer's good faith belief that an employee engaged in gross misconduct was sufficient to qualify for this exception or whether **actual** gross misconduct was required.

A United States District Court in Illinois recently held that an employer's good faith belief that an employee committed gross misconduct was sufficient grounds for not providing the employee with COBRA notification when she was terminated. In *Kariotis v. Navistar International Transportation Corp.*, an employer believed that an employee engaged in fraud after reviewing videotape surveillance of the employee. The court held that Navistar's good faith belief that the employee engaged in gross misconduct was sufficient grounds for not providing COBRA notification.

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BITS AND PIECES

A hospital's anesthesiologist sued his former employer claiming that he was discharged due to his disability. Apparently, the anesthesiologist suffered from a sleeping impairment that caused him to fall asleep during surgical procedures. The court, finding little sympathy for the slumbering doctor, held that the hospital was quite correct in placing patient and hospital safety above the need for a nap. *Brohm v. J.H. Properties, Inc.* (W.D. Ky. 1997).

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The Chicago and Midwest areas have a way to go to wring out excess health-care costs, according to the 11th annual survey of employers with 500 or more employees by benefits consultant Foster Higgins. Health-benefit costs in the Chicago area rose 6.3% in 1996, to an average cost of $4,416 per employee. The Midwest saw its health-benefit costs rise 7.2%, to an average of $4,798 per employee. These increases are well above the 1996 national increase of only 3.6%, resulting in an average cost per worker of $4,332.

The increase in Chicago was considerably more than that in other major cities. Health-benefit costs rose 1.2% in New York, 1.6% in Washington D.C., and actually fell 0.2% in Detroit and Houston.

QUOTABLE

> "But that is the present trend, not only in the legal profession but in almost every walk of life. Too many men are being driven to become government-fearing and time-serving because the Government is being permitted to strike out at those who are fearless enough to think as they please and say what they think. This trend must be halted if we are to keep faith with the Founders of our Nation and pass on to future generations of Americans the great heritage of freedom which they sacrificed so much to leave to us. The choice is clear to me. If we are to pass on that great heritage of freedom, we must return to the original language of the Bill of Rights. We must not be afraid to be free."

Justice Black, dissenting opinion, *In re Anastaplo* (1961)
