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LABOR UPDATE – SECOND QUARTER 2008 *RECENT DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW*

COURT SAYS “MAYBE” TO “ME TOO” TESTIMONY: EMPLOYERS SAY, “OH, NO!”

Several weeks ago, the U.S. Supreme Court unanimously reversed the decision of a lower, federal appeals court and declined to hold that so-called “me too” or “other supervisor” evidence is inadmissible *per se* in suits under the Age Discrimination in Employment Act (ADEA). This ruling may make it easier for plaintiffs to prevail in age discrimination cases as well as other job bias claims against employers.

Ellen Mendelsohn worked for Sprint for 13 years until she was terminated as part of a company-wide layoff. Mendelsohn, who was 51 years old at the time she was let go, sued Sprint for age discrimination under the ADEA. At trial, Mendelsohn sought to establish an atmosphere of age discrimination at Sprint through the testimony of five other employees over the age of 40 who were also terminated as part of the same layoff. However, the trial court barred their testimony, ruling that it could only be introduced if the five employees were “similarly situated” to Mendelsohn by virtue of having the same supervisor. Because these five potential witnesses were supervised and selected for lay off by different managers than Mendelsohn’s, the trial court held that their testimony was inadmissible.

At the end of the trial, the jury found for Sprint, and Mendelsohn appealed. The appeals court reversed, ruling that the testimony from the witnesses should have been admitted. Sprint, in turn, appealed that reversal to the U.S. Supreme Court.

Refusing to definitively decide this issue on an “all or nothing” basis, the Supreme Court declared that “me too” evidence was neither admissible nor inadmissible *per se*, but instead needed to be carefully evaluated according to the particular facts and circumstances in each specific case. Recognizing that this type of evidence can be both probative of employee claims and prejudicial to employers, the Court held that trial judges are in the best position to weigh and assess this evidence, and thus balance the respective interests of the parties. Because the record in this case was unclear as to what factors had been considered by the trial court in its original decision to exclude this evidence, the Supreme Court remanded the case back down to that court to clarify and explain its ruling.

This decision came as a disappointment to many employer groups who had filed “friend of the court” briefs urging the Court’s Justices to endorse a blanket exclusion of this type of evidence. Many employers fear that this ruling will significantly add to the burden of defending discrimination cases, potentially allowing plaintiffs to parade other disgruntled colleagues before a jury and create expensive “trials within trials.” Indeed, the impact of this decision may not be fully known for years to come. *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008)

EMPLOYEE'S REASSIGNMENT TO "DO WINDOWS" AFTER MEDICAL LEAVE VIOLATES FMLA

James Breneisen, Jr. worked as "Process Analyst" for Motorola, devising shipping solutions, developing packaging materials and tracking down items lost in the delivery process. He had developed a gastro-intestinal problem and had taken leave at least a dozen times, without incident, utilizing his rights under the federal Family Medical Leave Act. When he returned from his most recent leave, Breneisen was told to work on the "keypad line," lifting heavy boxes and manually pressing buttons on phone keypads to see if they worked properly.

Breneisen's pay and benefits were not affected by this reassignment of responsibility. However, he sued Motorola, claiming that the company had violated the FMLA requirement that he be returned to his former job (or its equivalent if the former job no longer existed). Although Breneisen could show no economic loss, he alleged that his reassignment resulted in severe stress, high blood pressure and a return of his stomach reflux symptoms.

Motorola unsuccessfully argued to the federal appeals court in Chicago that the keypad position was "equivalent" to the Process Analyst position. The court was unimpressed that the pay and benefits for both jobs were the same. Its opinion pointed out that the Process Analyst job was more cerebral and the keypad job almost entirely manual. It found also that the evidence showed the keypad position to have less prestige and visibility within the company. Thus the appeals court found that Breneisen had suffered "adverse action" and should therefore be allowed to present evidence to a jury to determine whether his reassignment to the keypad line job was in retaliation for his utilization of his rights under the Family Medical Leave Act. *Breneisen v. Motorola*, (7th Cir. January 15, 2008)

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DISCRIMINATION BY ASSOCIATION: AN EMPLOYER'S EXPENSIVE LESSON IN COST-CUTTING

In August 2005, Peoria's Proctor Hospital discharged nurse Phyllis Dewitt, whose supervisor had described her as "outstanding" in her most recent employment review. Although non-disabled herself, Dewitt sued the Hospital under the Americans with Disabilities Act ("ADA"), claiming that she was unlawfully fired because of her husband's prostate cancer. Specifically, Dewitt alleged that the Hospital, which was self-insured and covered both Dewitt and her husband, fired her to save the expensive cost of her husband's cancer treatments.

Dewitt brought her claim under a special provision of the ADA that prohibits discrimination against employees based upon their relationship with or association to a disabled person. Courts have interpreted this provision to apply to three different scenarios: 1) "expense;" 2) "disability by association;" and 3) "distraction."

As evidence that her situation fit the "expense" scenario, Dewitt claimed that in September 2004, her supervisor, Mary Jane Davis, confronted her about the treatment her husband was receiving and asked why he had not been placed in less expensive hospice. Davis told Dewitt that a committee was reviewing her husband's medical claims, which she described as unusually high.

Several months later, Davis took Dewitt aside again and asked similar questions. Then in May 2005, Davis convened a management meeting in which she informed staff that the Hospital faced financial troubles, which, in her words, required a "creative" effort to cut costs. Three months after that, the Hospital fired Dewitt and, without explanation, designated her "ineligible for rehire."

The federal appeals court in Chicago, finding these facts sufficient direct evidence to allow a jury to infer that “association discrimination” had motivated Dewitt’s discharge, reversed a lower court’s dismissal of her ADA claim. In so doing, the court emphasized that “an employer who discriminates against an employee because of the latter’s association with a disabled person is liable [for disability discrimination] even if the motivation is purely monetary.”

This case illustrates that while a company’s goal of curbing rising health costs may be legitimate, it should not be pursued by invasive or discriminatory means. Employers must use caution when walking this narrow line. *Dewitt v. Proctor Hospital*, (7th Cir. February 27, 2008)

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CAN EDUCATIONAL DIFFERENCES JUSTIFY UNEQUAL PAY?

When Betty Warren began working as a tool crib attendant at the Solo Cup factory, the company manually tracked parts in and out of its cribs on written cards. Later, the company adopted a software system for the crib attendants to use. When Solo Cup decided to institute tool crib coverage on the third shift it created a new position, which it filled by transferring in Don Lorenz, a security guard.

After she learned that newcomer Lorenz was earning more than she was, Betty Warren sued Solo Cup for alleged gender discrimination and violations of the Equal Pay Act, claiming that she already knew the tool crib job. In defense, the company claimed that Lorenz’ higher pay was justified by his greater computer skills and potential. Lorenz, although he had worked as a security guard before his transfer, had a bachelor’s degree and two master’s degrees.

The federal court of appeals in Chicago upheld the lower court’s dismissal of Warren’s case. It found no Equal Pay Act violation because the evidence was clear that Lorenz’ computer skills were superior to Warren’s. Under the Equal Pay Act, an employer can defeat a claim by affirmatively demonstrating a difference in the skill, effort or responsibility of the positions, or individuals, in question.

The court also upheld the dismissal of Warren’s gender discrimination claim. In that evaluation, the court found that Warren was required to show that Don Lorenz was comparable to her in all material respects, including educational background, experience and qualifications. Warren argued that computer skills should not be considered, since the company’s tool crib attendant job description did not require any sort of degree. However the court said that, “[e]mployers are permitted to compensate employees differently based on skills that are not specifically required in a given job description so long as the employer considers those skills in making the compensation decision.” Since the educational differences between Warren and Lorenz were significant and since Solo Cup had claimed to have considered this in making its decision, the court held that there was no unlawful gender discrimination.

This case highlights the benefits of an employer documenting the factors it considers when making pay decisions. That documentation can become the touchstone for the defense of Equal Pay Act and other discrimination claims. *Warren v. Solo Cup Company*, (7th Cir. February 20, 2008)

BITS & PIECES

The United States Equal Employment Opportunity Commission (EEOC) reported in March that the filing of discrimination cases by employees against private employers increased 9% in the past year. This is the largest increase since 1990. The number of charges filed had been declining in recent years, and the upward spike in 2007 is alarming. Most prevalent were allegations based on race (37% of all charges filed), retaliation (32%), and sex (30%). Discrimination based on age, disability and pregnancy had double digit increases over the previous year.

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The federal appeals court in Chicago ruled on March 14 that Beverly Robinson's extreme sensitivity to perfumes and other fragrances did not amount to a "disability" under the Americans with Disabilities Act. The ADA defines a disability as "an impairment that prevents or significantly restricts an individual from performing a major life activity that the average person can perform." Although Robinson had occasional flare ups because of her sensitivity, the court found in this case that it is the *condition* and not the infrequent flare up that must meet the definition of "disability." The court found that the condition of fragrance sensitivity was not covered by the ADA. *Robinson v. Morgan Stanley*, (7th Cir. March 14, 2008)

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A California woman who was spanked by her employer on three occasions was awarded \$1.7 million by a jury. The company claimed that this was part of "team building." Sales teams were encouraged to compete, and the losers were forced to eat baby food, wear diapers or get spanked on the buttocks.

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Fifty-five percent of the companies responding to a joint study by the American Management Association and the ePolicy Institute said that they monitor employee email. Employers are well advised to have clearly written and well communicated computer/internet/email use policies in place. Peters & Lyons, Ltd. can help you draft or revise your policies.

QUOTABLE

*Discourage litigation. Persuade your neighbors
to compromise whenever you can. As a peacemaker
the lawyer has superior opportunity of being a good man.
There will still be business enough.*

Abraham Lincoln

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