VEDDER PRICE
Labor Law

A newsletter designed to keep clients and other friends informed on labor and employment law matters

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U.S. SUPREME COURT REJECTS PRETEXT-PLUS STANDARD IN ADEA CASES

The United States Supreme Court recently decided that a plaintiff may prevail in an age discrimination case if, after

establishing a *prima facie* case of discrimination, the plaintiff produces evidence sufficient for the factfinder to disbelieve the employer's stated business reason for its actions. *Reeves v. Sanderson Plumbing Products*. Rejecting the argument that the plaintiff must provide additional evidence that the real reason was discrimination, as the Fifth Circuit Court of Appeals had held, the Supreme Court resolved a split among the Circuit Courts of Appeals regarding the type of evidence necessary to sustain a finding of intentional discrimination.

The Pretext-Plus Standard

Courts have established a burden-shifting framework for plaintiffs to prove discrimination based on circumstantial evidence. Initially, the plaintiff must prove a *prima facie* case by showing that he is a member of a protected class, was qualified for the position, suffered an adverse employment action and that the employer replaced the plaintiff with a person not in the plaintiff's protected class, or treated the plaintiff differently than similarly situated others. At that point the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions. Once the employer establishes the legitimate business reason, the plaintiff must prove that the employer's reason is a pretext for discrimination by showing that the reason is false or unworthy of credence. Before *Reeves*, some courts required a plaintiff to show the employer's legitimate business reason was pretextual *and* to provide additional evidence of discrimination, the so-called pretext-plus standard of proof. *Reeves* rejects the pretextplus standard.

The Fifth Circuit's Decision

In *Reeves*, the plaintiff was a 57yearold supervisor whose responsibilities included recording the attendance and hours of the employees under his supervision. In 1995, Reeves's supervisor (Caldwell, age 45) informed upper management that production had decreased in the department because employees were absent, coming in late and leaving early. Management ordered an audit of the department's time sheets for a three-month period, which revealed numerous timekeeping errors on the part of Caldwell, Reeves and a younger supervisor. Because of the investigation, the company terminated Reeves and Caldwell, but not the younger supervisor.

Although the company asserted at trial that it terminated Reeves for his failure to maintain accurate attendance records, Reeves offered evidence that he accurately had recorded the attendance and hours of the employees he supervised. A jury returned a verdict for Reeves. The Fifth Circuit Court of Appeals reversed, stating that while Reeves may have offered sufficient evidence for the jury to disbelieve the company's business reason for termination, he did not present additional evidence sufficient for a jury to conclude that the real reason for his discharge was his age. The Supreme Court agreed to resolve a conflict among the appellate courts on the quantum of proof necessary to sustain a finding of intentional discrimination.

The Supreme Court's Rationale

Writing for a unanimous Court, Justice O'Connor stated that the Fifth Circuit Court of Appeals "misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence." In arriving at this conclusion, the Court relied on its 1993 decision in *St. Mary's Honor Center v. Hicks*, where the Court held that the factfinder's disbelief of the employer's legitimate business decision, combined with a *prima facie* case, may warrant but does not compel a finding of intentional discrimination.

Furthering the *St. Mary's* analysis, the Court in *Reeves* explained that the employer is in the best position to provide the actual reason for its decision. Under appropriate circumstances, a fact-finder can infer that if the employer's explanation is shown to be false, the employer is covering up a discriminatory purpose. Therefore, the Court concluded that a plaintiff's *prima facie* case combined with evidence that the employer's reason is false may permit a finding of discrimination. However, the Court cautioned that this evidentiary showing will not always result in a finding of liability because there may be instances where the evidence reveals other nondiscriminatory reasons, or the plaintiff's evidence that the employer's business reason was false is particularly weak.

Although *Reeves* arose under the ADEA, there is no question that its holding will be imported to other federal anti-discrimination statutes. Experts are already speculating that *Reeves* will make it easier for plaintiffs to

survive summary judgment motions and to prevail at trial. Whether or not that is true, this decision underscores the importance of employer documentation when taking adverse employment actions to create a verifiable record that can be used in litigation to support a business decision.

If you have any questions about the *Reeves* case, please call Bruce R. Alper (312/609-7890 or any other Vedder Price attorney with whom you have worked.

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NLRB EXTENDS *WEINGARTEN* RIGHTS TO NONUNION EMPLOYEES

As reported in a recent Vedder Price Bulletin, the National Labor Relations Board by a slim 3-2 majority decided on July 10, 2000 that non-union employees enjoy the right to have at their request a coworker present during an investigatory interview that may lead to discipline. *Epilespy Foundation of N.E. Ohio*. The Labor Board's decision extends what is known as the *Weingarten* right to unorganized employees. In 1975 the United States Supreme Court in *NLRB v. J. Weingarten Inc.* held that the right to union representation during investigatory interviews falls within the National Labor Relations Act guarantee that employees may engage in "concerted activities for the purpose of mutual aid or protection."

The Labor Board has waffled on the applicability of *Weingarten* to non-union employees, first holding in a 1982 decision (*Materials Research Corp.*) that they have this right and three years later deciding exactly the contrary (*Sears, Roebuck & Co.*).

The employer in *Epilepsy Foundation* will appeal the Board's decision to the federal court of appeals and the decision could be reversed. However, even if that occurs, the Labor Board likely will apply its decision in other appellate jurisdictions unless and until the Supreme Court decides the issue. Thus employers should consider *Epilespy Foundation* to be the law for now.

How Should Employers Respond?

First, you need not inform employees of the right to employee representation. An employee must request a coworker's attendance to activate the right.

Second, the right extends only to non-management employees. Supervisors are not covered by the statutory right to engage "in concerted activities for the purpose of mutual aid and protection" which underlies *Weingarten*.

Third, an employee is entitled to a coworker's presence only at investigatory interviews that may lead to discipline. Representation is not required if discipline already has been decided and the meeting is being held only to communicate the disciplinary action.

Fourth, the employee may request only the presence of another employee. *Weingarten* has not been extended to attorney or other third party representatives.

Fifth, although the coworker representative may speak during the meeting to assist the employee under investigation, he cannot be abusive or disruptive. You do not have to bargain with the representative.

Sixth, you normally do not have to postpone a meeting because a particular coworker representative is unavailable if other representatives are available.

Last, you may elect to cancel the meeting and forego interviewing an employee who insists on a coworker being present. However, that option is risky. If discipline results and litigation follows, you may find yourself in the awkward position of having to explain (possibly to a jury) why you did not get the employee's side of the story before taking adverse action.

If you have any questions, please call Jim Petrie (312/609-7660), Bruce Alper (312/609-7890), Tom Wilde (312/609-7821), or any other Vedder Price attorney with whom you have worked.

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COURTS DIFFER OVER VALIDITY OF FMLA NOTICE REGULATIONS

Several decisions in recent months have highlighted the split among federal courts concerning U.S. Department of Labor ("DOL") regulations requiring employers to notify an employee that a leave of absence will be considered leave under the Family and Medical Leave Act ("FMLA") at risk of not counting that leave against the employee's 12-week statutory entitlement.

Sections 825.208 and 828.700(a) of the regulations interpreting the FMLA require an employer who knows or should know that an employee's leave is due to an FMLA-qualifying reason to notify the employee promptly that the leave is being considered an FMLA leave. Failure to give the notice can result in some or none of the leave being credited toward the employee's annual FMLA leave entitlement, which effectively gives the employee more FMLA leave than the statute provides.

Impermissible Expansion of FMLA

In July 1999 the Eleventh Circuit Court of Appeals struck down the rule, holding that the DOL regulations improperly "convert the statute's minimum of federally mandated unpaid leave into an entitlement to an additional 12 weeks of leave unless the employer specifically and prospectively notifies the employee that she is using her FMLA leave." *McGregor v. Autozone*. Several district courts subsequently have agreed. *See Schloer v. Lucent Tech., Inc.* (D. Md. Jan. 21, 2000); *Neal v. Children's Habilitation Ctr.* (N.D. Ill. 1999); *Donnellan v. New York City Transit Authority* (S.D.N.Y. 1999) (criticizing the regulations but finding for the employer on narrower grounds).

Last month the Eighth Circuit agreed. In *Ragsdale v. Wolverine Worldwide, Inc.* (July 11, 2000), the plaintiff, who was being treated for cancer, was terminated when she could not return to work after taking seven months of company-provided leave. She argued that because her employer never designated those seven months as FMLA leave, she was entitled to 12 more weeks of leave under the FMLA in accordance with the DOL regulations.

The Court held that under the FMLA, "12 weeks of leave is both the minimum the employer must provide and the maximum that the statute requires." According to the Court, the regulations are inconsistent with the statute to the extent they provide an employee with more than 12 weeks of leave just because the employer does not tell an employee he is using FMLA leave. Finding that Congress "did not intend to construct a trap for unwary employers who already provide for 12 or more weeks of leave for their employees," the Court invalidated the regulations.

Notice May Be Necessary

At the same time courts have recognized that notice may be necessary in some circumstances to protect an employee's substantive rights. In *McGregor* the Eleventh Circuit found that by failing to make a distinction for such cases, the DOL regulations impose a "disproportionate penalty" on employers in all cases where they fail to designate leave as FMLA leave.

McGregor pointed to *Longstreth v. Copple* (N.D. Iowa 1999) as an example where notice should have been provided. In *Longstreth,* the employee asserted that the sole reason she exceeded her FMLA entitlement was because her employer failed to inform her that she was on FMLA leave. She stated that she would have returned to work at the end of 12 weeks if she had known. This situation is distinguishable from those in *McGregor* and *Ragsdale* where the plaintiffs were trying to add FMLA leave at the end of their employer-provided leaves because they were unable to return to work at that time.

Similarly, the district court in *Donnellan* declined to decide the validity of the regulations, but recognized that in certain circumstances, employer failure to give notice may interfere with or deny an employee's substantive FMLA rights. As examples, the Court cited situations where an employee needs leave to care for a family member but does not know he is entitled to FMLA for that time off. In those circumstances, the employee might schedule leave to coincide with holidays or arrange for other people to provide care to the family member unless he knew the time off was covered under the FMLA.

Another DOL notice regulation came under attack last month. The Seventh Circuit in Chicago struck down Section 825.110(d) relating to employee eligibility for

FMLA leave. *Dormeyer v. Comerica Bank-Illinois* (July 24, 2000). To be eligible for FMLA an employee must have worked at least 1,250 hours during the 12 months preceding the requested leave. Section 825.110(d) deems an employee eligible if the employer fails to inform the employee that he is not eligible prior to the date the requested leave is to begin. The Seventh Circuit struck down this regulation as an impermissible expansion of an employee's statutory rights. However, it noted that the regulation might be upheld if limited to situations where an employee reasonably believed due to his employer's silence that he was eligible for FMLA leave and suffered an adverse employment action as a result.

Regulations Upheld

In contrast, the Sixth Circuit recently upheld the DOL regulations as "evincing a reasonable understanding of the FMLA, reflecting Congress's concern with providing ample notice to employees of their rights under the statute." *Plant v. Morton International, Inc.* (May 12, 2000). Disagreeing with *McGregor*, the Sixth Circuit held that because the FMLA was intended to set out minimum labor standards, the regulations are not inconsistent with legislative intent "merely because it creates the possibility that employees could end up receiving more than 12 weeks of leave…due to an employer's failure to notify."

In *Ritchie v. Grand Casinos of Mississippi* (S.D. Miss. 1999), the court stated that, because the FMLA does not specify when the 12-week leave period begins, the DOL regulations permissibly "fill in the gaps" of the statute. Finding the notice regulations not "arbitrary, capricious or manifestly contrary to the provisions of the FMLA," the court upheld them.

Similarly, in *Chan v. Loyola University Medical Ctr.* (N.D. Ill. 1999), a Chicago federal district court said the regulations imposed only a "modest burden" on employers, giving employers flexibility as to the form of such notice. Although recognizing that the construction of the FMLA set forth in *McGregor* was plausible, the Court found that it was not the only reasonable interpretation of the FMLA. Rather, the Court held that the DOL regulations recognized the importance of employees, being informed of their rights under the FMLA and concluded that the regulations reflected a reasonable accommodation of conflicting policies.

Employers Should Still Give Notice

Although the courts are wary of regulations that seem to expand the substantive rights provided in the FMLA by providing more than 12 weeks of leave, the validity of the notice regulations is far from settled. Particularly in circuits where an appellate court has yet to rule, or where there are conflicting district court opinions, such as in the Northern District of Illinois, employers would be well advised to comply with the regulatory requirement that they designate time off as leave under the FMLA as soon as possible.

Should you have any questions about this or other FMLA issues, please call Charis Runnels (312/609-7711) or any other Vedder Price attorney with whom you have worked.

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FAILURE TO DISCUSS ACCOMMODATIONS IN "INTERACTIVE PROCESS" IS NOT AN INDEPENDENT VIOLATION OF THE ADA, SAYS SEVENTH CIRCUIT

Any employer who has been forced to defend its treatment of a disabled employee is likely familiar with the term "interactive process." Indeed, one of the questions you may have been asked by an agency investigator or an attorney for the employee is: "Well, after Mr. Smith informed you that he required an accommodation for his condition, did you engage in the interactive process?" A recent Seventh Circuit opinion suggests that the wrong answer to this question is not necessarily fatal to your defense.

The requirement that an employer engage in an "interactive process" with an employee to discuss and consider reasonable accommodation is not found in the Americans with Disabilities Act ("ADA"). Rather, it is an obligation imposed by the EEOC in its regulations interpreting and enforcing the ADA. These regulations

state that "[t]o determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation." The regulations further provide that "[t]he appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability." The courts have upheld this regulatory requirement.

Put more simply, the EEOC expects that employers will participate in an exchange of ideas with the employee who has requested an accommodation. Where the proposed accommodation is straightforward, affordable and practicable, there often is no need to discuss the employee's request the employer will be expected to comply. However, the EEOC requires discussion when the employer disagrees or is not able to comply with the employee's request. The EEOC requires employers in such circumstances to sit down with the employee and try to hammer out a mutually agreeable solution.

Because the law does not require an employer to provide the specific accommodation sought by the employee if another equally effective alternative is available, the accommodation provided may be different from what was originally requested. This solution, of course, must satisfy the employee's needs. Where an employer fails to communicate with the employee or neglects to provide the employee with information that would enable him to suggest an alternative to a rejected request, the employer will be viewed as responsible for the "breakdown" of the interactive process. By the same token, an employee who fails to provide her employer with a sufficiently detailed request or an adequate explanation of her condition can likewise bear the blame for the parties' failure to arrive at an acceptable solution. This emphasis on participation in the interactive process begs the question of whether and when the process becomes an end in itself.

In *Rehling v. City of Chicago*, the U.S. Court of Appeals for the Seventh Circuit was asked to decide whether an employer violated the ADA when it failed to discuss potential accommodations proposed by a disabled police officer who did not want to accept the accommodations offered by the City. Plaintiff Rehling was a police officer who lost a leg in a work-related accident. There were no

desk jobs available in his district when he was able to return to work. Nevertheless, he requested assignment to such a position. Rehling's commander offered him his choice of an assignment with the Alternative Response Team ("ART") or one at O'Hare Airport. Rehling was able to perform the duties of either position, but expressed reservations about each job. Despite these concerns, the City assigned Rehling to the ART. Rather than accept this position, Rehling took a leave of absence and applied for a disability pension. He later filed suit under the ADA, claiming that the City discriminated against him on the basis of his disability by not providing a desk job in his district. The City won partial summary judgment with respect to Rehling's failure- to-accommodate claim because the district court found the ART job to be a reasonable accommodation.

Rehling challenged this decision, arguing that a question of fact existed as to whether the City engaged in the proper exchange of ideas relating to his request for a desk job in his district. The Seventh Circuit rejected Rehling's argument, explaining that the interactive process is simply a "means for determining what reasonable accommodations are available" as opposed to an end in itself. As such, it is not enough to show that an employer failed to engage in the interactive process to succeed on a failure-to-accommodate claim. Rather, an employee must demonstrate that the employer's failure to engage in the interactive process resulted in a failure to identify a reasonable accommodation. Because Rehling was offered a reasonable accommodation, the City's failure to engage in an interactive process with him was immaterial.

This decision does not mean that an employer simply may make a take-it-or-leave-it offer of an accommodation that the employer views as reasonable. There are often issues the employee may raise that bear on the effectiveness and reasonableness of the accommodation. Therefore, communication with the employee is often useful and necessary in developing the best response to an accommodation request, though as *Rehling* shows, it is not an end in itself.

If you have any questions about the ADA, please call Aaron R. Gelb (312/609-7844) or any other Vedder Price attorney with whom you have worked.

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Price, Kaufman & Kammholz, P.C.

Chicago
222 North LaSalle Street
Chicago, Illinois 60601
312/609-7500
Facsimile: 312/609-5005

New York
805 Third Avenue
New York, New York 10022
212/407-7700
Facsimile: 212/407-7799

New Jersey
354 Eisenhower Parkway
Plaza II
Livingston, New Jersey 07039
973/597-1100
Facsimile: 973/597-9607

EEOC ISSUES NEW COMPLIANCE MANUAL SECTION ON THRESHOLD ISSUES FOR ADDRESSING BIAS COMPLAINTS

On May 12, 2000, the Equal Employment Opportunity Commission ("EEOC") released a new section of its Compliance Manual focusing on what it regards as "threshold issues" that the Commission investigates and analyzes when a charge is first filed. The EEOC stated that it was issuing the new section to help streamline the information available to agency staff, employers, workers and their representatives, on a broad range of questions regarding what claims can be brought under the anti-discrimination laws.

When a discrimination charge is filed with the EEOC, the assigned investigator ordinarily will determine whether certain threshold requirements are satisfied before considering the merits of the claim. The new section discusses coverage, timeliness and other issues to be considered when a charge is filed under Title VII of the Civil Rights Act of 1964, Age Discrimination in Employment Act, Equal Pay Act, or Americans with Disabilities Act. The section's guidelines provide answers to the following initial questions:

- Is there an appropriate claim? Does the charge allege discrimination pertaining to a characteristic that is protected by law, and to an issue that is covered by the EEO statutes?
- Appropriate parties: Does the charge allege that a protected individual was subjected to discrimination by a covered entity?
- Does the charging party have standing to file a charge?
- Is the charge timely (does it meet all statute of limitations requirements)?

- Is the charge precluded by a prior state or federal court decision?

Throughout the new section, the EEOC reviews and defines terms, and provides specific examples of allegations that the agency would investigate and analyze under its threshold inquiry. For example, in the section discussing who qualifies as a protected individual, the EEOC distinguishes between volunteers who are not protected and employees who are.

The new section does not directly address defenses that an employer may raise in order to defeat a charge of discrimination. However, the section provides many references to secondary sources (including case law and governmental regulations), which would be useful in developing such arguments.

The section serves as a useful guideline for employers, human resource professionals or counsel who want a basic review of EEO issues, or who want to develop a more in-depth review with accessible secondary research sources. The full text is available on the agency's website at www.eeoc.gov, and is easy to use as an on-line resource. It is divided by topical heading, and each substantive section is hyperlinked for easy on-line viewing within the Commission's website. All references within the section and its endnotes are also hyperlinked.

If you have any questions, please contact our Labor Legal Assistant, Peter A. Havighorst at (312/609-7749) or any Vedder Price attorney with whom you have worked.

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ODDs & Ends

A Simple "Gesundheit" Would Have Been Cheaper

Russell Carroll was in a business meeting when he felt a sneeze coming on. Trying to stifle the sneeze, Mr. Carroll suffered a torn retina. A Pennsylvania appellate court recently ruled that the employee's injury qualified for worker's compensation benefits.

"Even-Handed Treatment" Takes on New Meaning

A married couple who worked together at an Indiana state agency had the same male supervisor. Suing under Title VII, the couple claimed that their boss had sexually harassed each of them, separately and individually, by inappropriate touching and lewd propositions. The U.S. Court of Appeals in Chicago recently affirmed a trial court's dismissal of the complaint, holding that Title VII did not cover "an equal opportunity harasser," who "is treating both sexes the same (albeit badly)."

Employers Can't Blackball Employees Without Mental Disabilities (In Ohio, at Least)

The Phoenix Society of Cuyahoga is an Ohio mental health agency. When the Society terminated a clerical worker, the employee sued, claiming reverse disability discrimination under state law. The plaintiff alleged he was singled out for discharge because he was the only Society employee *without* a mental health disability or the history of one. An Ohio appellate court recently held that the worker was entitled to proceed with his wrongful discharge action, because "reverse discrimination is a viable exception to the at-will employment doctrine."

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