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IN TWO HOURS, JURY RETURNS VERDICT IN A CLASS ACTION AGE DISCRIMINATION CASE THAT TOOK SEVEN YEARS

On August 2, 2002, a federal district court jury in Chicago returned a verdict for Vedder Price client R.R. Donnelley & Sons Company in *Gerlib v. R.R. Donnelley*, an Age Discrimination in Employment Act class action case that took seven years to get to trial. The outcome at once resoundingly vindicates Donnelley from the allegations of age discrimination and underscores a number of important points for employers facing the potential of big-case litigation in this era of public skepticism about corporate America.

The case arose from the closing of Donnelley's Chicago Manufacturing Division ("CMD") in 1993 and 1994. Printing Sears catalogs was the bulk of the work of Donnelley's CMD. When Sears announced in early 1993 that it was discontinuing its catalog operations, the CMD was no longer economically viable and Donnelley decided to close it.

Donnelley offered the CMD employees, many of whom had long service, a package of attractive separation and enhanced early retirement benefits and undertook an extensive counseling and outplacement program. Among other things, Donnelley established a Clearinghouse at the CMD where positions at other Donnelley divisions around the country were posted so CMD employees could apply for them. Of the 659 permanent employees at the CMD, only 213 applied for transfer, and 115 employees actually received transfers. The total cost of separation and enhanced retirement benefits alone was well in excess of $20 million.

Proving the axiom that no good deed goes unpunished, Donnelley soon found itself sued for age discrimination by over 340 CMD employees (many of whom never applied for transfers at all) who claimed that they were denied transfer to other Donnelley divisions because of age. Seven years of motions and discovery ensued until the case finally went to trial in July 2002.

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After a two-week trial on the plaintiffs' claim of classwide age discrimination, the jury returned its verdict for Donnelley in under two hours. The jury's decision shows that even in this time of outcry about corporate wrongdoing exemplified by the likes of Enron and WorldCom, it is possible to obtain a jury that will not be swayed by the popular prejudices about the motives and honesty of corporations and their officials.

"A single piece of evidence (even one repeatedly proclaimed in this case by the plaintiffs' attorney to be a 'smoking gun') does not mean an employer with an otherwise sound case must throw in the towel."

The verdict also shows that large class action cases do not have to be settled and can be tried and won. Of course, before any class or other case is taken to trial, its strengths and weaknesses must be assessed and the determination made that the case is at once legally sound and one where the employer's actions will be perceived as fair by the jury. In the *Gerlib* case, Donnelley was more than fair to its employees, as the jury's prompt verdict indicates. One improvidently drafted memo, which plaintiffs argued showed that Donnelley favored younger employees for transfer, was overcome by the weight of Donnelley's evidence that there was no bias against older workers (many of whom did transfer to other divisions) and by the convincing testimony of its author, who explained that his memo meant no such thing. A single piece of evidence (even one repeatedly proclaimed in this case by the plaintiffs' attorney to be a "smoking gun") does not mean an employer with an otherwise sound case must throw in the towel.

Careful preparation is indispensable. Among other things, the Vedder Price trial team of partners Richard Schnadig and Michael Cleveland (both of whom have tried and won other employment discrimination class actions) and associate Rachel Barner used mock juries to test themes and arguments prior to trial. Plaintiffs placed substantial weight on the testimony of their statistical expert, and it was necessary for Donnelley to identify and develop testimony from a topflight expert to undercut plaintiffs' expert and to present statistical and economic evidence supporting Donnelley's case. Working with trial consultants, the trial team developed profiles of acceptable jurors as well as demonstrative evidence to help communicate Donnelley's position and actions to the jury in a persuasive visual fashion.

Should you have any questions about this case or about class action litigation in general, please call any member of the *Gerlib* case trial team, Richard Schnadig (312/609-7810), Michael Cleveland (312/609-7860) Rachel Barner (312/609-7836) or any other Vedder Price attorney with whom you have worked.

A SECOND LOOK AT WHO'S ON FIRST AT THE NLRB: AN UPDATE

In our January 2002 issue (Vol. 22, No. 1), we explained how political affiliation traditionally determines who is appointed to serve on the five-member National Labor Relations Board, and we identified those then serving on a shorthanded Board. *The Bush Labor Board: Who's on First?* We noted that President Bush has the opportunity to appoint a majority of Board members with conservative judicial and labor philosophies who might revisit some of the decisions of the liberal Clinton Board.

For much of last year, the Board limped along with a bare quorum of three members needed to issue decisions: Peter J. Hurtgen, named Chairman by President Bush in May 2001, and two former union attorneys, Wilma B. Liebman and Dennis P. Walsh. Walsh departed in December, leaving the Board without a quorum. In January, President Bush named William B. Cowen, a former management attorney, and Michael J. Bartlett, a former U.S. Chamber of Commerce official (and before that an attorney with Vedder Price), to recess appointments, giving the Board its first Republican tilt since 1993.

Has this shift in political composition made a difference yet? Yes. Consider *MV Transportation*, 337 NLRB No. 129, released on July 22, 2002. In that case, the now Republican-controlled Board overruled

St. Elizabeth Manor, 329 NLRB 341 (1999), which held that an incumbent union is entitled to a reasonable period of time in which to bargain with a successor employer without any challenge to its majority status. *St. Elizabeth Manor* was decided when the Board had a Democratic majority and had overruled *Southern Moldings, Inc*., 219 NLRB 119 (1975), decided 24 years earlier during the Gerald Ford administration.

In *MV Transportation*, Chairman Hurtgen and Members Cowen and Bartlett resurrect *Southern Moldings* and return to the previously well-established doctrine that an incumbent union in a successorship situation is entitled only to a rebuttable presumption of continuing majority status; that presumption will not bar a decertification petition or other valid challenge. The Bush Board labels the reasoning in *St. Elizabeth Manor* "faulty and plainly insufficient," noting that it elevated maintenance of bargaining relationships over employee freedom of choice. Predictably, there is a dissenting opinion—by Member Liebman, who participated in the majority decision in *St. Elizabeth Manor*. Fair enough, we suppose, since Chairman Hurtgen dissented in *St. Elizabeth Manor*.

What's on Second?

Is the Board's membership now stabilized? Hardly. Chairman Hurtgen has just stepped down to become director of the Federal Mediation and Conciliation Service. Liebman's five-year term will expire in December, and the recent interim appointments of Cowen and Bartlett will end when the Senate adjourns its 2002 session. Meanwhile, President Bush awaits Senate confirmation of four people he has nominated to serve full five-year terms: Dennis P. Walsh, mentioned above; Justice Department official R. Alex Costa; management attorney Robert J. Battista; and arbitrator Peter C. Schaumber. If Liebman is nominated for a second term, all five may be considered by the Senate as a package. If that package is confirmed, the 2003 Board will be fully staffed and, presumably, Republican-controlled.

Until then, the still shorthanded Board's backlog of pending cases can be expected to grow.

If you have any questions about the NLRB or its recent decision in *MV Transportation*, please call Deric Bomar (312/609-7726), Jim Petrie (312/609-7660) or any other Vedder Price attorney with whom you have worked.

SUPREME COURT REVERSES CLINTON NLRB – TWICE

The liberal slant of the previous Clinton Board has not escaped the Supreme Court's critical attention. Among the spate of labor and employment cases decided by the high court this year are two decisions finding that the Board overextended its remedial powers.

In *Hoffman Plastic Compounds v. NLRB* (decided March 27, 2002), the Court in a 5-4 decision held that federal immigration policy prevents the Board from awarding back pay to an undocumented alien fired in violation of the NLRA. The employer laid off four workers for being union supporters. During compliance proceedings to determine how much backpay was owed, one of the four who had been born in Mexico admitted that he had used a friend's birth certificate to fraudulently obtain a driver's license and social security card and gain employment and that he had never been legally admitted to, or authorized to work in, the United States. Nevertheless, the Board awarded him $66,951 in back pay and interest calculated from the date of his termination to the date his undocumented status was disclosed. The Board's order was enforced by the Court of Appeals for the District of Columbia.

The Supreme Court disagreed, finding that the Board's position subverts the Immigration Reform and Control Act of 1986 and exceeds its remedial discretion under the NLRA. Writing for the majority, Chief Justice Rehnquist states:

> *[A]warding back pay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations.*

The Court noted in passing that the employer did not escape scot-free; it was ordered to cease and desist from violating the Act and to post a notice detailing its prior unfair labor practices and reciting the rights of its employees under the NLRA.

In the second case, *BE & K Construction Co. v. NLRB* (decided June 24, 2002), the Court holds that the Board lacked authority to impose liability against an employer for filing a reasonably based but ultimately unsuccessful lawsuit against several construction unions. The employer, a nonunion contractor hired to modernize a steel mill, sued after the unions tried to delay the project by lobbying, handbilling, picketing and other measures. However, the unions prevailed in the lawsuit and filed unfair labor practice charges claiming that the employer's action had interfered with employees' rights to engage in protected activity. The Board agreed and ordered the employer to (1) cease and desist from prosecuting such actions, (2) post a notice, and (3) pay the union's legal fees and expenses incurred in defense of the lawsuit. The U.S. Sixth Circuit Court of Appeals enforced the Board's order.

Reversing, the Supreme Court found that the First Amendment protects lawsuits that are objectively or subjectively genuine, even though they may not be successful and even though they may interfere with or deter the exercise of NLRA rights. In this case, because the employer's purpose in filing suit was to stop conduct that it reasonably believed was illegal, the lawsuit was objectively and subjectively genuine, and therefore protected despite being unsuccessful and to some degree retaliatory. The Court left open the Board's authority to impose liability in circumstances where evidence of retaliation may be stronger, (*e.g.*, where the employer, indifferent to the outcome of its lawsuit, sues merely to force the union to incur legal fees).

If you have any questions about the U.S. Supreme Court decisions discussed above, please call Jim Petrie (312/609-7660) or any other Vedder Price attorney with whom you have worked.

GOING THROUGH THE MOTIONS OR GOING TO COURT: THE IMPORTANCE OF ADHERING TO STANDARDIZED JOB-FILLING PRACTICES

Perhaps there is that one special employee you want to provide that extra push to climb the ladder. So, you decide to simply give him or her a position that just opened up rather than require the employee to go through the formal application and interview process. Or, maybe you need to fill a vacancy more quickly than normal and are concerned that you cannot afford to wait while the position is posted and every applicant is screened. A number of recent decisions suggest, however, that you will have a difficult time defending your actions if faced with a discrimination complaint-and any irregularities or innocent mistakes, which would otherwise be ignored, may be viewed as evidence of discriminatory intent.

Establishing liability. Typically, to establish the basic elements of a failure-to-promote claim, an aggrieved employee must show (1) that she is a member of a protected group; (2) that she was qualified and applied for a promotion to a position for which the employer was seeking applicants; (3) that despite her qualifications, she was rejected; and (4) that other employees of similar qualifications who were not members of a protected group were promoted at the time plaintiff's request for promotion was denied. Assuming that the employee can meet this test, the employer must offer evidence of a nondiscriminatory reason why the employee was not hired. To prevail, the employee then must respond with evidence that employer's reason is actually pretext for discrimination. This can be accomplished in a number of ways, including by pointing to irregularities in the job filling process or showing that the procedures were applied differently to different applicants.

Two cautionary tales. In most cases, as one might expect, an employee must be able to prove that he or she formally applied for the position at issue before s/he may

proceed with a claim in court. When an employer is unable to point to a largely uniform set of procedures used to fill vacancies, an employee who never applied for an opening may nonetheless be able to sustain a discrimination claim against the employer. In *Lockridge v. Board of Trustees, University of Arkansas*, 294 F.3d 1010 (8th Cir. 2002), the Eighth Circuit Court of Appeals ruled that a professor could proceed with his claim that the University of Arkansas discriminated against him because of his race when it did not consider him for an open dean's position despite the fact that he never applied for the position in question.*

"An employer's failure to adhere to a standard set of procedures when filling a position may also be used as evidence that the employer's stated reason for rejecting the plaintiff was simply a smoke screen for discrimination."

The University argued that the process used to fill the position in question was anything but secretive. The administration posted the position announcement on campus, advertised it in state and local newspapers and e-mailed the announcement to the entire campus community, and plaintiff's supervisor asked him whether he was going to apply for the position. Rejecting this argument, the court examined the University's procedures (or lack thereof) as they related to openings in general—not solely to the one in question—and concluded that a jury could find the lack of a standard process for all positions to be evidence of discrimination. In arriving at this decision, the Court noted that the University was unable to clarify which positions were announced as vacancies at the college could not determine whether everyone was required to apply for promotions or what the usual time frame was between the announcement of a vacancy and the deadline for the submission of an application. In the end, the absence of a standard set of practices and procedures prevented the University from prevailing despite the plaintiff's failure to apply. Indeed, without a "baseline" procedure to point to, the University was hamstrung in its ability to explain any departures from the norm and was instead left trying to justify why some applicants were treated one way and other applicants another.

An employer's failure to adhere to a standard set of procedures when filling a position may also be used as evidence that the employer's stated reason for rejecting the plaintiff was simply a smoke screen for discrimination. In *Dennis v. Columbia Colleton Medical Center, Inc.*, 290 F.3d 639 (4th Cir. 2002), the Fourth Circuit Court of Appeals upheld a jury verdict in favor of a female emergency room registration clerk who was not selected to fill the vacant emergency room registration supervisor position. In its ruling, the Court seized upon evidence that the decision maker approached the promotion process differently with respect to each applicant. Characterizing the process as "peculiarly informal," the Court pointed to the fact that the decision maker appeared to take the initiative with the individual hired, seeking out his candidacy and intensively interviewing him, while not even looking into the plaintiff's in-house work experience, training or evaluations. Indeed, he never even bothered to check her references. The failure to subject each applicant to the same degree of scrutiny and give each the chance to demonstrate their qualifications tainted the entire process.

To this end, the Court also noted with disapproval that the decision maker dismissed the plaintiff's application for lack of management experience without knowing the full extent of that experience. As a result, the Court held that the jury reasonably concluded that the decision maker never gave the plaintiff fair consideration because he had already decided for other reasons not to promote her, and that his proffered explanations for his choices were merely *post-hoc* pretexts covering a predisposition favoring the male applicant. Had the

* This opinion was recently vacated by the Eighth Circuit, which ordered a rehearing by the entire Court of Appeals on October 9, 2002.

Medical Center subjected each applicant to the same degree of scrutiny, it likely would have arrived at the same conclusion and it could have better articulated the reasons for its decision when challenged in litigation.

Practice pointers. So, what is the lesson to be learned here? Simply that there are real risks when you depart from standard practice—no matter how good the reason. In most cases, you should require every person interested in the position—including the one you believe is perfect for the job—to apply and be interviewed. Perhaps you spend a bit more time on the process. But that is better than spending your time in a deposition and having your decisions and your motives questioned. And you may discover that there is an even more qualified candidate. Or maybe your initial inclination is confirmed. Only, now you can point to the uncontroverted opinions of the other interviewers.

Be cognizant of the risks. These decisions aside, situations may arise in which you simply cannot utilize standard job-filling practices and procedures. When this happens, you must weigh the risks and determine whether filling the vacancy quickly or with a particular person is worth the chance of litigation.

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

COMPANY NOT REQUIRED BY ADA TO MAKE TEMPORARY LIGHT-DUTY WORK A PERMANENT ACCOMMODATION

Our May 2002 issue (vol. 22, No. 2) reported the U.S. Supreme Court's decision in *Williams v. Toyota Motor Mfg.*, Kentucky, Inc., 122 S.Ct.681 (2002), that an employee, unable because of carpel tunnel syndrome to perform all the manual tasks associated with her job, was not disabled and not entitled to reasonable accommodation under the Americans with Disabilities Act because the impairment did not substantially limit her major life activity of performing manual tasks—*e.g.*, household chores, bathing and teeth-brushing.

In a recent related Seventh Circuit Court of Appeals case, *Watson v. Lithonia Lighting*, (No. 02-1423 9/20/02), Lithonia had accommodated Watson during her recovery from repetitive motion injuries (which left her unable to rotate through all positions on an assembly line) by placing her temporarily on light duty. When told by her doctor that she would never be able to perform repetitive work with her right arm, Watson asked that her light-duty job be made permanent. Lithonia declined and terminated Watson because it had no job for someone with her limitations. Watson sued in federal court, alleging an ADA violation. The trial court granted summary judgment to Lithonia, and the Seventh Circuit affirmed the judgment on appeal.

> ***"...requiring employees to rotate through all assembly line jobs reduces the risk of repetitive motion injuries and facilitates production by qualifying every worker to perform every task when needed..."***

The Court initially expresses skepticism about whether Watson is disabled for purposes of the ADA, calling this a "doubtful proposition" in light of *Toyota*. But even assuming such a disability, the Court holds that Lithonia was not required to make Watson's light-duty job permanent when she failed to recover from her injuries.

The Court finds that requiring employees to rotate through all assembly line jobs reduces the risk of repetitive motion injuries and facilitates production by qualifying every worker to perform every task when needed, and thus is not "a scheme cooked up to avoid obligations under the ADA." The Court adds that assigning employees recovering from injury to suitable light-duty positions benefits the employee and injured employees by providing experienced workers for reassignment when the employees recover. However, to go further and allow injured

workers to keep their light-duty jobs would be "bad news" for the rest of the work force, the Court adds; it would prevent other employees from entering the light-duty positions held permanently by injured employees, and would increase the frequency of repetitive motion injuries.

The Court's decision is consistent with its earlier holding in *Hanson v. Henderson*, 233 F.3d 521 (2000), that reasonable accommodation does not require an employer to create new jobs tailored to each employee's abilities.

If you have any questions about these cases or any of the issues therein, please call Jim Petrie (312/609-7660) or any other Vedder Price attorney with whom you have worked.

IMPORTANT SEVENTH CIRCUIT RULING LIMITS SECTION 1981 PLAINTIFF'S TIME TO SUE

In a highly technical but very important ruling in another class action case arising from Donnelley's CMD, the Seventh Circuit ruled that claims of race discrimination brought under the Civil Rights Act of 1866, which is often referred to as section 1981, are subject to the two year personal injury statute of limitations found in Illinois law.

The plaintiffs had argued and the District Judge had agreed that some section 1981 race discrimination claims, most notably discipline and discharge claims, are subject to a four year "catch all" limitations period found in federal law. The Seventh Circuit's decision thus significantly limits the claims that plaintiffs may bring under section 1981 and impacts many cases now pending in the three-state area covered by the Seventh Circuit (Illinois, Indiana and Wisconsin). The decision is in accord with decisions of two other federal appellate courts, the Third and the Eight Circuits, but conflicts with a decision from the Tenth Circuit. This conflict means that the question may ultimately be considered and resolved by the Supreme Court. *Jones et al. v. R.R. Donnelley & Sons Co.*

If you have any questions about this case or any of the issues therein, please call Michael Cleveland (312/609-7860) or any other Vedder Price attorney with whom you have worked.

ODDs & ENDs

Are you looking for an expert witness? Well, we may have just the answer for you. Consider contacting the Navaho medicine man who testified as an expert witness in an arbitration and convinced the arbitrator that residual evil from an earlier death plus the personal problems of the grievant, a Navaho bulldozer operator, led to the narcolepsy that brought about the grievant's discharge for sleeping on the job. Although he rescinded the discharge and reinstated the grievant, the arbitrator wasn't so asleep at the switch that he didn't impose some discipline. Because the narcolepsy problem should have been reported to the employer, the arbitrator gave the grievant a three-day suspension.

Apparently Unions are resorting to voodoo to try to stop the loss of membership. The Miami NLRB Regional Office recently rejected a nursing home's objection to a representation election result based on Union supporters' use of voodoo rituals and symbols to intimidate employees into voting for the Union. Using the highly egregious, but ever popular, voodoo rituals such as arranging pennies in patterns and leaving half-empty glasses of water in rooms, the nursing home argued that the rituals and threats were designed to frighten workers, including many Haitians, Jamaicans or individuals from other Caribbean islands, into voting for the Union. In refusing to set aside the election, the NLRB hearing officer said, "To grant a rerun election in these circumstances would send a message that this Agency . . . holds to the belief that if Union supporters or its agents engage in and practice [voodoo], the Union is unable to proceed to an uncoerced election where the employee complement is in large numbers Caribbean nation immigrants."

"This would suggest that the NRLB will be placed in the position of monitoring religious beliefs . . . ."

Editor's Note: Life gets more complicated-er and complicated-er. It doesn't seem that long ago that the only voodoo we were concerned with was a certain presidential candidate's "voodoo economics."

Just to prove we are not sitting down on the job, we note that Edward Law, a south Florida quadriplegic, sued the Wildlife Adult Sports Cabaret for failing to make its lap dance room wheelchair accessible in violation of the Americans with Disabilities Act. He charged that the lap dance room was accessible only by a flight of stairs and that the counter around the stage where the strippers danced was too high, making it difficult for Law to see the stage and set down his drinks. The Wildlife's General Manager responded that Law could have received a lap dance in another area of the club. We will keep you posted as we picture Human Resources folks all over the country racing out to see whether their plant's lap dance area is truly wheelchair accessible.

If you have any questions or comments about ODDs and ENDs, please contact George Blake at (312/609-7520).

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Vedder, Price, Kaufman & Kammholz is a national, full-service law firm with over 200 attorneys in Chicago, New York City, and New Jersey. The firm combines broad, diversified legal experience with particular strengths in labor and employment law and litigation, employee benefits and executive compensation law, occupational safety and health, public sector and school law, general litigation, corporate and business law, commercial finance and financial institutions, environmental law, securities and investment management, tax, real estate, intellectual property, estate planning and administration, and health care, trade and professional association, and not-for-profit law.

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