

Labor and Employment Law Update

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In This Issue

From The Highest Court: The United States Supreme Court Update (p. 1)

Commit To Carefully Crafted Commission Plans (p. 1)

Chambers USA Recognition (p. 1)

GINA: New Law Prohibits Genetic Information Discrimination (p. 2)

2008 Hot Topics In Labor And Employment Law Seminar (p. 3)

DOL Gives Employers Greater Flexibility After Clarifying Rules On Uniforms, Pay Periods, And The Calculation Of Wages For Overtime Purposes (p. 5)

The EEOC Gets Religious: New Compliance Guidelines For Religious Discrimination Claims (p. 6)

Federal Contractors Must Now Use E-Verify (p. 8)

The Nuts And Bolts Of Compliance With The Amended Family And Medical Leave Act (p. 8)

From The Highest Court: The United States Supreme Court Update

By Shannon M. Lynch

The United States Supreme Court recently concluded its 2007 term, during which it decided a number of significant labor and employment cases, four of which are summarized below and three of which reflect significant pro-employee shifts in the law.

The More The Merrier – “Me Too” Evidence Is In

In *Sprint/United Management Company v. Mendelsohn*, the Supreme Court held that “me too” evidence – namely, the testimony of non-party employees alleging discrimination by supervisors who did not participate in the adverse employment action at issue – is neither *per se* admissible nor *per se* inadmissible. Instead, the admissibility of so-called “me too” evidence is to be determined pursuant to a “fact intensive, context specific inquiry.” In short, courts now have the discretion to allow plaintiffs to present evidence about someone else’s discrimination claims.

In *Sprint*, Ellen Mendelsohn was employed in the Business Development Strategy Group at Sprint/United Management Company (“Sprint”) from 1989 through 2002, when she was terminated as part of a reduction in force (“RIF”). Mendelsohn sued Sprint pursuant to the Age Discrimination in Employment Act of 1967 (“ADEA”), alleging disparate treatment based on her age.

In support of her discrimination claim, Mendelsohn sought to introduce the testimony of five former Sprint employees who had also been terminated pursuant to the RIF, but who alleged that *different* supervisors had discriminated against them based on age. None of these former employees worked in the Business Development Strategy Group with Mendelsohn, nor had any of them worked for Mendelsohn’s supervisor or any other supervisor in Mendelsohn’s chain of command. Thus, Sprint moved *in limine* to exclude the “me too” evidence, arguing that the testimony was irrelevant to the issue of whether Mendelsohn’s supervisor terminated her because of her age. In a two-sentence order granting Sprint’s motion, the District Court excluded evidence of discrimination against those not “similarly situated” to Mendelsohn.

continued on page 4

Commit To Carefully Crafted Commission Plans

By G. Michael Palladino

Too often, employers focus up front on the financial incentives of the commission payment arrangement with a sales employee and, unfortunately, fail to address what will happen to an earned commission or advance on a commission following the employee’s termination of employment. As a result, disputes over sales commissions have become fertile ground for wage-and-hour complaints.

Because most state statutes define the term “wages” to include sales commissions, a dispute over what a current or former employee is owed can result in a nonpayment of wages complaint to the state attorney general and, potentially, liability in the form of civil and criminal penalties, multiple damages and attorneys’ fees. It is absolutely critical that employers carefully craft written sales commission plans that address certain key definitions and payment mechanisms, particularly given the recent court opinions and legislation discussed briefly below. In addition, employers should develop, maintain and communicate consistent sales commission payment practices that reflect the terms of written commission plans.

A March 2008 opinion by the Connecticut Supreme Court provides the most recent illustration of the importance of written sales commission plans and policies. In *Ravetto v. Triton Thalassic Technologies, Inc.*, 285

continued on page 3

CHAMBERS USA RECOGNITION

The Firm is thrilled to announce that, for the third consecutive year, Sara Goldsmith Schwartz has been recognized by Chambers USA as a leading attorney in labor and employment law. Sara was listed as one of the top thirty management-side labor and employment lawyers in Massachusetts.

In 2008, Chambers described Sara as a “*formidable advocate*” who “*always does her homework*” in order to sharpen her “*cutting-edge knowledge of the law.*” A “*delight to deal with,*” she is a firm favorite for clients, who appreciate her cost-effective advice.”

In recent years, Chambers described Sara as “*a business woman: diligent, thorough and always prepared,*” with an “*aggressive and adversarial style, much appreciated by her clients,*” and a “*smart and tenacious lawyer. She has the drive and determination to succeed.*”

Chambers publishes guides worldwide, ranking law firms and lawyers, and is a recognized leader in its field.

Congratulations, Sara!

GINA: New Law Prohibits Genetic Information Discrimination

By Shannon M. Lynch

President George W. Bush recently signed into law the Genetic Information Nondiscrimination Act of 2008 (“GINA” or the “Act”) which prohibits employers, employment agencies, labor unions and health insurers from discriminating on the basis of genetic information. Under GINA, which becomes effective in 2009, “genetic information” is broadly defined to include: (1) an individual’s own genetic tests; (2) the genetic tests of family members; and (3) the manifestation of a disease or disorder in family members.

The Act aims to allow individuals to take advantage of genetic testing, technologies and therapies without “fear of losing their privacy, their jobs and their health insurance,” as noted by Sen. Edward Kennedy (D-Mass.).

Significantly, GINA amends the penalty provisions under federal wage-and-hour laws, as is discussed below.

Employers’ Obligations Under GINA

GINA expands the protections afforded by other federal anti-discrimination laws, including Title VII of the 1964 Civil Rights Act (“Title VII”), by prohibiting discrimination in employment based on not only an employee’s own genetic information, but also the genetic information of the employee’s dependents and relatives, and relatives of the employee’s dependents. Under the Act, employers with more than fifteen employees are prohibited from:

- Discriminating against employees in hiring, termination, compensation and the terms, conditions or privileges of employment on the basis of genetic information, regardless of how it is obtained;
- Requesting, requiring, or purchasing genetic information, except in very limited circumstances, such as if the information is required to comply with medical certification requirements of federal or state family and medical leave laws; and
- Retaliating against an employee who opposes discrimination based on genetic information.

GINA also requires employers to maintain the confidentiality of genetic information received by maintaining such information on separate forms and in separate medical files.

Disclosure of genetic information to third parties is prohibited under the Act, except in very limited circumstances such as: (a) upon the employee’s request, (b) to an occupational or other health researcher, (c) pursuant to court order, (d) to a government official investigating compliance with the Act, (e) in connection with the employee’s compliance with federal or state leave laws, and (f) to a public health agency.

Remedies and Enforcement Under Employment Provisions

The Equal Employment Opportunity Commission (“EEOC”), among other federal agencies, has the authority to enforce and provide remedial measures under the Act. Aggrieved individuals asserting employment discrimination based on genetic information must file an EEOC Charge of Discrimination before proceeding to court. Remedies and enforcement of the provisions in GINA related to employment discrimination are similar to those under Title VII, except that so-called “disparate impact” claims are not permitted under the Act. Aggrieved employees or applicants may seek remedies including back pay, front pay, attorneys’ fees, costs, and compensatory and punitive damages.

Health Insurance Anti-Discrimination

Employers should also bear in mind that GINA prohibits group health plans and health insurers from:

- Adjusting health insurance premiums or contribution amounts based on genetic information;
- Requesting or requiring an individual to take a genetic information test prior to an individual’s enrollment; and
- Collecting genetic information for underwriting purposes.

GINA mandates that genetic information shall be treated as “protected health information” under the Health Insurance Portability and Accountability Act (“HIPAA”).

For health plans and health insurers, GINA is effective for plan years that begin on and after May 21, 2009.

Wage and Hour Provisions

Significantly, another provision in GINA amends the penalty provisions of the Fair Labor Standards Act (“FLSA”) effective May 21, 2008. The Act increases the penalty for an employer’s willful violation of the FLSA’s overtime and minimum wage provisions from \$1,000 to \$1,100 per violation.

In addition, the Act announces more stringent penalties for child labor violations, including the imposition of a civil penalty of up to \$50,000 for each child labor violation that results in the death or serious injury of any employee who is under eighteen years old. The penalty may be doubled if the employer’s violation is found to be a repeated or willful violation. “Serious injury” is defined as the permanent loss or substantial impairment of one of the senses (*e.g.*, sight, hearing, etc.); of a bodily member or organ; or of a person’s mental abilities. The phrase also includes paralysis or substantial impairment causing a loss of movement or mobility of a body part.

* * *

Although most of GINA does not become effective until November 21, 2009, employers are encouraged to update their policies and practices to ensure timely compliance with the Act. Employers should update their policies and practices to reflect GINA’s state law counterparts, as well. At least thirty-four states, including Massachusetts, have similar laws banning employment discrimination on the basis of genetic information.

As always, we are available to provide wage-and-hour consultation and to assist with audits and litigation defense in wage-and-hour claims. If you have any questions regarding GINA or if we can be of assistance in ensuring compliance with this new law, please do not hesitate to contact us. ◆

If you prefer to receive a copy of the Firm’s Labor and Employment Law Update by e-mail in pdf (portable document format), please contact Anu Gupta-Lundberg at alundberg@shpclaw.com or (978) 623-0900 to let us know and to provide us with your correct e-mail address. (As you may know, you must have Adobe Acrobat Reader to view the Update in pdf format.)

A searchable archive of past Update Articles and E-Alerts is available on the Firm’s website, www.shpclaw.com.

Commit To Carefully Crafted Commission Plans

continued from page 1

Conn. 716 (2008), the Connecticut Supreme Court held that, absent a specific contractual provision, an employer could not recover an advance on future commissions from a sales employee by withholding salary owed upon termination of employment. In *Ravetto*, a sales executive who received an annual six-figure salary plus commissions had been allowed to take a draw (or an advance) against future sales commissions. When the employer experienced poor financial performance, several employees, including the sales executive, remained with the employer despite the employer's inability to meet its payroll obligations. Ultimately, the company furloughed all remaining employees, including the sales executive, and the sales executive elected to cease his employment with the company.

The sales executive filed a claim under the Connecticut Wage Act for double damages and attorneys' fees, alleging that he was owed unpaid salary plus interest. The company contended that it had withheld all salary due to the fact that the employee had not repaid \$40,000 in commission draws in excess of the commissions earned. The company claimed that the term "advance" in the employee's employment agreement, which was not defined, sufficiently entitled the company to withhold salary for the unreturned draw on commissions.

The Connecticut Supreme Court disagreed. Specifically, the Court held that the employer generally has "superior bargaining power" in the employment relationship, thereby making it the employer's obligation to expressly define repayment terms. Moreover, the Court concluded that terms such as "advance" and "draw" are not self-explanatory and therefore do not, without express defining language, obligate repayment by the employee. Significantly, citing Massachusetts and Georgia case law, the Connecticut Supreme Court stated the general rule that "if no express or implied contract for repayment is established, the employee is not liable to the employer for repayment of advances that exceed earned commissions." *Ravetto*, 285 Conn. at 738.

This decision by the Connecticut Supreme Court is reflective of the trend in many other states with regard to commission plans. For example, effective October 16, 2007, New York law will require all employers, regardless of the industry, to reduce sales commission agreements to writing, and both the employer and the employee must sign the agreement in order for it to be valid. Moreover, the New York law will require the written commission plan to:

- describe how wages, salaries, draws on commissions, commissions and other amounts earned and payable are calculated;
- state the frequency of reconciliation between draws and earned commissions, if the employer allows recoverable draws; and
- describe what happens upon termination of employment to the salesperson's wages, salary, draws, commissions and other monies earned and payable.

Employers in New York will be required to maintain copies of the signed written commission plans for three years. Notably, successful plaintiffs in actions under this new law will be entitled to attorneys' fees and liquidated damages. Finally, consistent with the recent Connecticut Supreme Court decision, an employer's failure to reduce the commission plan to writing

- Reduce their sales commission plan to writing and require the signature of the employee and the employer representative;
- Clearly define key terms such as "draw," "advance" and "sale";
- Ensure that commission calculation mechanisms are understandable and consistent so that they can be easily interpreted by the employee, management and payroll;
- Explain what will happen to a commission upon an employee's termination of employment, whether voluntary or involuntary, and address whether there will be a different outcome if the employee is terminated for cause;
- Identify when commissions will be paid, making sure that the payments will satisfy all applicable state laws governing timely wage payments;
- Consider integrating an at-will employment provision as well as an arbitration clause obligating the employee and employer to submit commission disputes to a third-party neutral instead of the courts; and
- Revisit commission plans and require employees to re-execute commission agreements annually.

* * *

We encourage employers with sales commission plans to ensure state law compliance and to adopt written agreements specifying all material facets of the payment arrangement. This should help avoid liability and substantial monetary damages in the event of a dispute. ♦

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as set forth above creates a presumption against the employer seeking to enforce its interpretation of the commission plan.

Massachusetts law is similar. Under the Massachusetts Wage Act, employees can seek recovery of unpaid sales commissions that are "definitely determined" and have become "due and payable." Significantly, then, a Massachusetts employer that fails to provide an employee with a carefully drafted sales commission plan and withholds commissions may arguably violate the Massachusetts Wage Act. Under an amendment to the Massachusetts Wage Act effective July 13, 2008, the employer would be liable to the employee for *mandatory* treble damages (*i.e.*, three times the monetary damages), interest and attorneys' fees.

Given these recent developments in state wage laws, employers are strongly encouraged to:

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From The Highest Court: The United States Supreme Court Update

continued from page 1

After the District Court jury ruled in favor of Sprint, Mendelsohn appealed to the Court of Appeals for the Tenth Circuit (the “Tenth Circuit”). The Tenth Circuit found, among other things, that: (1) the District Court had abused its discretion in applying a *per se* rule that evidence from employees with other supervisors is irrelevant to proving discrimination in an ADEA case; and (2) the testimony of the other five employees was admissible because it was relevant and not unduly prejudicial.

The Supreme Court rejected the Tenth Circuit’s decision, holding instead that since it is unclear whether the District Court applied a *per se* rule regarding the “me too” evidence, the Tenth Circuit should have remanded the case to the District Court to clarify the reason for excluding the “me too” evidence. Significantly, the Court noted that it would have been an error for the District Court to apply a *per se* rule since “the question whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact-based and depends on many factors, including how closely related the evidence is to the plaintiff’s circumstances and theory of the case.”

The *Sprint* decision will likely encourage plaintiffs to seek broader discovery in discrimination cases, including testimony and documents about claims of discrimination in other divisions of the company. In turn, this may well result in an increase in disputes and motions about the discoverability and admissibility of “me too” evidence.

Taking The Cap Off, And Putting Small Employers On The Hook

In *CBOCS West, Inc. v. Humphries*, the Supreme Court held that employees may bring a private action for discriminatory retaliation under a provision of the Civil Rights Act of 1866, 42 U.S.C. § 1981 (“Section 1981” or “§ 1981”). Section 1981 applies to employers of all sizes and does not contain limitations on damage recoveries, unlike Title VII. (Title VII applies only to employers with fifteen or more employees and caps damages, depending on the size of the employer, between \$50,000 and \$300,000 for each complaining party.)

The Court’s decision exposes all employers, even those with fewer than fifteen employees, to uncapped damages on race retaliation claims. Significantly, this decision comes at a time when retaliation claims are common and increasingly the most difficult claims to defend – often, for example, because a plaintiff will complain of discrimination when he or she is put on a performance improvement plan.

Hedrick Humphries, an African-American and a former assistant manager for CBOCS West, Inc. (“Cracker Barrel”), contended that he was terminated because of (1) racial bias, and (2) his complaint to management about the discriminatory treatment of a black co-worker. Humphries filed suit against Cracker Barrel pursuant to Title VII and § 1981, which provides “all persons . . . the same right . . . to make and enforce contracts as is enjoyed by white citizens.”

The District Court dismissed the Title VII claims because Humphries failed to pay the requisite filing fee in a timely manner and dismissed the § 1981 claims pursuant to Cracker Barrel’s motion for summary judgment, which argued that § 1981 does not include an implied right to sue. The Seventh Circuit affirmed the District Court’s grant of summary judgment with respect to the § 1981 *discrimination* claim; however, the Seventh Circuit ruled in favor of Humphries and remanded for a trial with respect to his § 1981 *retaliation* claim.

Agreeing with the Seventh Circuit, the Supreme Court held that § 1981 encompasses a complaint of retaliation against a person who has complained about a violation of another person’s contract-related right. The Supreme Court reasoned that while § 1981 does not expressly prohibit retaliation, prior Supreme Court decisions recognizing implied rights to sue for retaliation under another provision of the Civil Rights Act, as well as under Title IX of the Education Amendments of 1972, require a similar result under § 1981.

Although Title VII bars retaliation against individuals complaining of racial discrimination, the significance of the *Humphries* decision is that under § 1981: (1) aggrieved individuals have four years to file claims (as

The Sprint decision will likely encourage plaintiffs to seek broader discovery in discrimination cases, including testimony and documents about claims of discrimination in other divisions of the company. In turn, this may well result in an increase in disputes and motions about the discoverability and admissibility of “me too” evidence.

compared to Title VII’s requirement that a charge of retaliation be filed with the Equal Employment Opportunity Commission (“EEOC”) within three hundred days of the alleged retaliation); (2) there are no damages caps (unlike under Title VII, pursuant to which compensatory and punitive damages are capped depending on the size of the employer); and (3) § 1981 applies to all employers, not just those with fifteen or more employees that are covered by Title VII. Accordingly, the *Humphries* decision is likely to increase the number of race retaliation claims, each of which may well be more costly to defend and/or resolve.

Employers’ Freedom Of Speech

In *Chamber of Commerce v. Brown*, the Supreme Court held that the National Labor Relations Act (“NLRA”) preempts a 2000 California law (AB 1889) prohibiting employers that receive certain state grants from using those funds to “assist, promote or deter union organizing.”

The 1947 Taft-Hartley Act, which amended the NLRA, bars any regulation of speech by both unions and employers unless the speech contains a “threat of reprisal or force or promise of benefit.” In *Brown*, the Supreme Court reasoned that AB 1889 interferes with the NLRA’s protection of an employer’s right to communicate with employees regarding unionization. Although the NLRA contains no express pre-emption provision, the Supreme Court held that AB 1889 is preempted because it “regulate[s] within ‘a zone protected and reserved for market freedom.’”

The *Brown* decision is welcome news to employers in California and other states where state and local governments have taken measures to silence employers in union organizing campaigns. In this regard, Massachusetts has a similar law, and commentators have speculated that *Brown* is likely to result in invalidation of the Massachusetts law. Although it is not clear how widely employers were impacted by the Massachusetts law, it certainly seems fair to say that *Brown* is likely to have a broader impact than simply overturning AB 1889.

The Employer’s Burden

The Supreme Court held in *Meacham v. Knolls Atomic Power Laboratory* that an employer defending a disparate-impact claim under

continued from page 4

the Age Discrimination in Employment Act of 1967 (“ADEA”) has the burden of proving the affirmative defense of “reasonable factors other than age” (“RFOA”). Disparate impact claims generally are based on an employer’s policy, practice or other employment action that has a disparate impact on an individual or group of individuals in a protected class. The ADEA sets forth several employer exemptions from the general prohibitions against age discrimination, including the RFOA exemption, which provides in relevant part that “it shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age.”

The *Meacham* case stemmed from layoffs at Knolls Atomic Power Laboratory (“Knolls”), a government contractor. Knolls instructed its managers to select employees for lay off by: (1) scoring their subordinates in performance, flexibility and critical skills, and (2) assigning a score for years of service. Of the thirty-one employees selected by Knolls for lay off, thirty of the employees were age forty or older. Twenty-eight of the former employees sued Knolls, alleging that their employer “designed and implemented its workforce reduction process to eliminate older employees and that, regardless of intent, the process had a discriminatory impact on ADEA-protected employees.”

The Supreme Court held that an employer defending an ADEA disparate-impact claim not only must introduce evidence of an RFOA, but also must satisfy the “burden of persuasion.” That means that the employer must persuade the trier of fact of the reasonableness of the RFOA factors.

Given the ruling in *Meacham*, employers should reevaluate their strategies and procedures for taking employment actions, including reductions in force, that may create the risk of an adverse impact based on age. In a RIF, employers should engage counsel to oversee the preparation of statistical analyses to identify potential evidence that would support a disparate-impact claim and to give the employer an opportunity to protect against such claims before they are actually filed in court. In addition, employers should review their policies and practices with counsel to identify any objective standards that may inadvertently be creating disparate-impact issues. Training managers about how apparently neutral criteria can trigger disparate-impact claims should also minimize the risks of disparate-impact claims being filed in court.

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If you have any questions regarding any of the above cases or their practical implications for employers, please do not hesitate to contact us. ◆

DOL Gives Employers Greater Flexibility After Clarifying Rules On Uniforms, Pay Periods, And The Calculation Of Wages For Overtime Purposes

By Todd A. Newman

On July 29, 2008, the Wage and Hour Division of the United States Department of Labor (the “DOL”) clarified its rules regarding uniforms, an employer’s right to adjust its payroll period for administrative convenience, and the calculation of wages for overtime purposes when such adjustments are made. The DOL made these clarifications in two opinion letters that give employers added flexibility with respect to wage deductions and adjusting employees’ rates of pay.

General Street Clothing Is Not A Uniform

The first opinion letter responded to an inquiry from a restaurant operator that required employees to wear dark shoes with closed toes and nonslip soles. The employer had a program that allowed employees to purchase shoes from a manufacturer offering sixty different nonslip shoes in various styles and dark colors. Participating employees had two payment options: (1) pay the manufacturer directly, or (2) buy the shoes through the employer by deducting the cost from the employee’s paycheck. In some cases, the payroll deduction reduced the employee’s cash wages below the minimum wage. The restaurant operator wanted to know if this arrangement complied with the federal wage-and-hour law known as the Fair Labor Standards Act (“FLSA”).

The lawfulness of this arrangement turned on whether the shoes were “uniforms.” If so, then the restaurant operator would be subject to liability with respect to the shoe-purchase program’s second option because, under the FLSA, the cost to employees of uniforms may not result in wages falling below the minimum wage. The DOL acknowledged that it has no “hard-and-fast” rules for determining when an article of clothing is a uniform. The DOL’s field operations handbook, however, suggests that a “general type of basic street clothing” is not a uniform, while a “specific type and style of clothing to be worn at work, *e.g.*, where a restaurant or hotel requires a tuxedo or a skirt and blouse or jacket of a specific or distinctive style, color, or quality,” is a uniform.

Applying these guidelines, the DOL determined that the required shoes were only a “general type of ordinary basic street clothing” and, as such, were not a uniform. In reaching this conclusion, the DOL noted that the restaurant operator did not set any conditions on the quality, brand, style, model, or type of shoes that were required. The only requirements were that the shoes be dark-colored with open toes and nonslip soles. If employees already owned shoes satisfying these criteria, they were free to use them. Otherwise, there were no restrictions on where employees could buy their shoes.

Because the shoes were not a uniform, the shoe-purchase program’s second option did not violate the FLSA, even though the cash wages of certain employees fell below the minimum wage after the cost of the shoes was deducted from their paychecks. In this respect, noted the DOL, wages can be paid in cash or by furnishing the reasonable cost of board, lodging, or “other facilities.” The restaurant operator’s advancement and subsequent recoupment of funds under the second option, concluded the DOL, is such an “other facility.” Accordingly, the sum of the cash wages and the cost of the shoes satisfied the minimum wage.

Significantly, the DOL added: “It does not matter if the employee in question is paid solely an hourly wage or as a ‘tipped’ employee. The reasonable cost of facilities provided by the employer may be credited towards wages paid to a tipped employee.”

Employers May Adjust Pay Periods For Administrative Convenience, Even If This Lowers The Wage Used To Calculate Overtime Pay

The second opinion letter responded to an inquiry from a school district regarding its ability to adjust pay periods for administrative convenience. Pursuant to a negotiated agreement regarding exempt teachers, the school district had twenty-six pay periods per fiscal year. Thus, each pay period typically covered two workweeks. For administrative convenience, the school district also paid nonexempt employees on this schedule. Specifically, the school district calculated salaries for nonexempt employees by multiplying their hourly rate by 40 and then multiplying the result by 52. These salaries were paid in equal installments in each of the twenty-six pay periods, along with any overtime earned.

continued on page 6

The EEOC Gets Religious: New Compliance Guidelines For Religious Discrimination Claims

By Paul Dubois

The United States Equal Employment Opportunity Commission (“EEOC”) recently updated its Compliance Manual concerning “Religious Discrimination,” clarifying the EEOC’s guidance and instructions for investigating and analyzing charges alleging discrimination based on religion in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”). Dozens of real world examples based on published court decisions, and cases that the EEOC has prosecuted and settled, are used to illustrate the concepts embodied in the Compliance Manual. Additionally, the updated Compliance Manual provides “Employer Best Practices,” which highlight the EEOC’s recommendations about how best to avoid religious discrimination.

The EEOC updated the Compliance Manual because, the EEOC explained, questions about religion in the workplace have increased as religious pluralism has increased. In this regard, the EEOC indicates that the number of religious discrimination charges filed with the EEOC more than doubled between 1992 and 2007.

The Compliance Manual addresses four theories of liability for religious discrimination, including disparate treatment, harassment, reasonable accommodation and retaliation. The EEOC emphasizes that charges involving religion must be investigated and analyzed *under all four theories*, even if the charging party raises a single claim under only one of those theories. Thus, the EEOC’s directive potentially exposes employers to significant additional liability.

The following synopses highlight the information contained in the updated Compliance Manual.

Religion Defined

The Compliance Manual reminds employers that religion is broadly defined under Title VII, and points out that protected religious beliefs “can include unique views held by a few or even one individual.” Protected religious beliefs need not be “theistic” in nature to qualify. Thus, a wide range of unusual belief systems could potentially qualify for protection under the EEOC’s view, as long as

they are “sincerely held.” Employers should therefore be cautious before taking action based on any belief system.

Harassment

Significantly, while verbally harassing conduct is clearly based on religion if it has religious content, harassment can also be based on religion even if religion is not specifically mentioned. For example, an employer may face liability under Title VII if it purposely alters its work schedule to conflict with the religious observance of an employee. Additionally, an employer that alters the work schedule to harass an employee because of his or her religious views may be liable to the employee for (1) denial of a reasonable religious accommodation, and (2) retaliation for requesting a reasonable accommodation. Given the broad definitions of religion and religious harassment, as well as the possibility of multiple claims under Title VII, employers should be proactive in training managers on how to identify signs of harassment and respond to harassment claims.

continued on page 7

DOL Gives Employers Greater Flexibility After Clarifying Rules On Uniforms, Pay Periods, And The Calculation Of Wages For Overtime Purposes

continued from page 5

About once every four years, the school district adjusted one of the pay periods to cover three weeks instead of two. The adjustment was needed to meet the school district’s obligation to pay exempt teachers on a twenty-six-pay-period cycle. Without the adjustment, a calendar quirk would cause there to be twenty-seven pay periods per fiscal year from time to time. Nonexempt employees expressed concern that they were paid “less” during the occasional three-week pay periods. Accordingly, the school district asked the DOL if these periodic adjustments complied with the minimum wage and overtime provisions of the FLSA.

The DOL determined that this arrangement did in fact comply with the FLSA, even though employees received less overtime during the occasional three-week pay periods. The DOL used the example of a non-exempt employee paid \$13 per hour, which the opinion letter implied was the lowest wage among affected employees (the “Employee”).

As the DOL explained, the Employee was paid an annual salary of \$27,040 (\$13 per hour x 40 hours per week x 52 weeks per year) in bi-weekly installments of \$1,040 ($\$27,040 \div 26$ pay periods). As the wage used to calculate overtime pay must be reduced to its “workweek equivalent,” this wage was \$13 per hour during the typical bi-weekly pay period ($\$1,040 \div 2$ weeks $\div 40$ hours), but fell to \$8.67 per hour during the

occasional three-week pay period ($\$1,040 \div 3$ weeks $\div 40$ hours). Thus, with respect to overtime pay, the concerned employees were correct in asserting that they were paid “less” during the adjusted pay periods.

Significantly, the DOL concluded that the reduction in overtime resulting from the adjustment did not violate the FLSA. In the DOL’s view, the school district satisfied the FLSA’s minimum-wage requirement during the most recent adjusted pay period because \$8.67 exceeds the federal minimum wage. Additionally, because the school district paid time-and-a-half for all overtime hours worked, it also satisfied the FLSA’s overtime requirement. In this regard, the DOL implied that the reduction in the wage used to calculate overtime was not material because the reduced wage itself was lawful. The DOL acknowledged that the employees had received advance notice of the pay-period adjustments, although it is unclear whether the absence of such notice would have affected the DOL’s analysis and outcome.

Please note that state wage-and-hour laws can be more restrictive than the FLSA and, as such, might not give employers the same leeway as the DOL with respect to the issues addressed in the opinion letters. We would be happy to address any questions you may have about the opinion letters in particular or wage-and-hour compliance in general. ♦

continued from page 6

Reasonable Accommodation

The Compliance Manual’s discussion of reasonable religious accommodations is particularly instructive, explaining the EEOC’s view on when an employer is considered to have notice of an employee’s requested religious accommodation, what is considered to be a “reasonable” religious accommodation, and what may be considered an undue hardship for an employer.

The EEOC indicates that the following requirements must exist before an employer is obligated to provide an employee with a religious accommodation:

- An applicant or employee seeking a religious accommodation must inform the employer of both the need for accommodation and that such an accommodation is being requested due to a conflict between religion and work;
- Once an employee has put the employer on notice of an accommodation request, the employee must cooperate with the employer’s efforts to determine whether a reasonable accommodation can be granted; and
- The request for an accommodation by an employee must not impose an undue hardship on the employer.

While this analysis is similar to the analysis under the Americans with Disabilities Act, it can be more challenging for employers because accommodating religion often requires granting additional time off during weekends when employees typically do not want to work. The most common methods of providing reasonable religious accommodations to employees include: (1) flexible scheduling; (2) voluntary substitutes or swaps of shifts and assignments; (3) lateral transfers and/or changed job assignments; and (4) modified workplace practices, policies, and/or procedures.

Another common challenge pertains to accommodating requests to depart from rules about dress codes and appearances. In this regard, in providing reasonable accommodations to employees, it is especially important for employers to understand that reliance on the broad rubric of “image” in denying an employee’s requested accommodation may violate Title VII. The EEOC holds that customer fears or prejudices do not amount to an undue hardship, so generally an employer may not refuse to accommodate an employee’s request to wear certain religious garb on such grounds. For example, a restaurant may not deny an employee from having visible reli-

gious tattoos based on the restaurant’s desired family-oriented and kid-friendly image, absent the restaurant’s showing of an actual imposition on coworkers or a disruption of the work routine. However, there are limited situations in which the need for uniformity of appearance is so necessary that a modification of the dress code would pose an undue hardship on the employer (e.g., police departments, correctional facilities, etc.). These situations are carefully scrutinized by the EEOC, so employers should be careful to avoid denying an employee’s request for a religious accommodation where undue hardship cannot be shown.

To establish that a requested accommodation creates an undue hardship, the employer must demonstrate that allowing such an ac-

commodation would require more than a *de minimis* cost. For example, the payment of administrative costs associated with rescheduling or the occasional or temporary payment of overtime wages would probably not constitute more than a *de minimis* cost. However, the regular payment of overtime wages or the hiring of an additional employee to provide an accommodation would likely be considered to exceed the *de minimis* threshold so as to cause an undue hardship on the employer.

Employer Best Practices

The Compliance Manual contains the EEOC’s suggested “best practices” for employers, which, if followed, will help eradicate religious discrimination in the workplace. These practices instruct employers to:

- establish written objective criteria for evaluating candidates for hire or promotion and apply those criteria consistently to all candidates;
- in conducting job interviews, ask the same questions of all applicants for a particular job or category of job and inquire about matters directly related to the position in question;
- carefully and timely record the accurate business reasons for disciplinary or performance-related actions and share these reasons with the affected employee(s);

- when management decisions require the exercise of subjective judgment, provide training to inexperienced managers and encourage them to consult with more experienced managers or human resources personnel when addressing a difficult issue;
- allow religious expression among employees to the same extent that employers allow other types of personal expression that are not harassing or disruptive;
- make sure to have a well-publicized and consistently applied anti-harassment policy that: (1) covers religious harassment; (2) clearly explains what is prohibited; (3) describes procedures for bringing harassment to management’s

To establish that a requested accommodation creates an undue hardship, the employer must demonstrate that allowing such an accommodation would require more than a de minimis cost.

attention; and (4) contains an assurance that complainants will be protected against retaliation. The procedures should include a complaint mechanism that includes multiple avenues for complaint; prompt, thorough, and impartial investigations; and prompt and appropriate corrective action;

- confer with employees to glean necessary information about employees’ religious needs and available accommodation options; and
- make every effort to accommodate an employee’s desire to wear religious garb. If the employer is concerned about uniform appearance in a position involving interaction with the public, it may be appropriate to consider whether the employee’s religious view would permit him or her to resolve the religious conflict by, for example, wearing the item of religious garb in the company’s uniform color.

The EEOC’s updated Compliance Manual also provides helpful guidance on how to prevent religious discrimination, how to spot its existence, and how to comply with the requirements of Title VII.

We would be happy to answer questions about the updated EEOC Compliance Manual or to assist with EEOC-related claims or compliance inquiries.

Federal Contractors Must Now Use E-Verify

By G. Michael Palladino

Pursuant to an amended executive order, federal contractors will soon be required to use E-Verify to confirm the eligibility of their agents and employees to work in the United States of America. Pursuant to the Amendment to Executive Order 12989 (the "Executive Order"), executive departments and agencies of the federal government must require their contractors to use an electronic employment eligibility verification system designated by the Department of Homeland Security ("DHS"). DHS, in turn, has designated E-Verify as the verification system that federal contractors must use.

Under this new directive, federal contractors will be required to use E-Verify to confirm the eligibility of: "(i) all persons hired during the contract term by the contractor to perform employment duties within the United States; and (ii) all persons assigned by the contractor to perform work within the United States on the federal contract." Compliance with the Executive Order does not release federal contractors from their obligation to complete an I-9 Employment Verification Form for each employee or to properly address "no-match" employees and applicants.

The Executive Order will be implemented through a set of federal regulations known as the Federal Acquisition Regulations ("FAR"). In accordance with the Executive Order, the civilian and defense councils responsible for the FAR have formally proposed to incorporate the new E-Verify requirement into the FAR. Under the proposed rule, most prime contracts exceeding \$3,000 would require the federal contractor to use E-Verify. Similarly, all subcontracts exceeding \$3,000 for services or for construction would require the federal subcontractor to use E-Verify. Public comment on the proposed rule was received through August 11, 2008. A final rule will be issued sometime thereafter.

E-Verify began in 1997 as the Basic/Pilot Employment Eligibility Program. According to DHS, E-Verify electronically compares employee information from Form I-9 with approximately 444 million records in the Social Security Administration ("SSA") database and 60 million records in the DHS immigration database. DHS statistics show that 69,000 employers are enrolled in E-Verify and that these employers have already run more than 4 million queries in 2008.

The Executive Order is intended to ensure that federal contractors do not employ illegal workers. E-Verify, however, is not without its critics. Most notably, immigration rights advocates contend that errors in the SSA and

DHS databases can result in false rejections of individuals who are legally authorized to work in the United States. Nevertheless, DHS stresses E-Verify's accuracy rate and states that over 1,000 employers voluntarily register for E-Verify each week.

We encourage every employer to take time now to ascertain whether it is, or could be, considered a federal contractor or subcontractor. Many employers assume, incorrectly, that they are not contractors. We can help with this analysis to minimize the risk of being barred from performing work as a federal contractor or subcontractor.

We encourage employers to review their employee verification practices to ensure that

I-9 Employment Verification requirements are being satisfied and that an effective Social Security No-Match Policy is in place. In this regard, civil monetary penalties for immigration law violations recently increased and, in some cases, are as high as \$16,000 per violation.

* * *

We will continue to monitor developments related to the mandated use of E-Verify, including formal rulemaking. Meanwhile, should you have any questions related to an employer's status as a federal contractor or subcontractor, the Executive Order in particular, or employment verification requirements in general, please do not hesitate to contact us. ♦

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September 18, 2008
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 - Parental Leave
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 - Forms For The Employer
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- ▶ **Ask The Experts**

To register, please contact Kathie Duffy at (978) 623-0900 or kduffy@shpclaw.com.
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- Harassment – It's Not Just About Sex Anymore
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September 22 & 23, 2008

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Tuition is \$900 (\$800 per person for additional participants from same organization).

Registration is limited. There will be a maximum of 12 participants.

To register, please contact Kathie Duffy at (978) 623-0900 or kduffy@shpclaw.com.

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Deadline for Registration: September 12, 2008

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