LABOR AND EMPLOYMENT LAW UPDATE

FOUR CATEGORIES OF DISCRIMINATION

The March 30, 2005 decision of the Supreme Court in *Smith v. City of Jackson* serves as a reminder that employment discrimination can take several forms. There are, indeed, four distinct categories of discrimination prohibited by federal and state law.

DISPARATE TREATMENT: This is the most common and easily understood type of discrimination. The employer simply treats one or more persons differently from others because of a protected status or activity. Harassment in the workplace, including sexual harassment, falls into this category of discrimination. To state a claim, a claimant must prove that the employer acted with a discriminatory motive.

FAILURE TO ACCOMMODATE: The protection afforded to religion and disability under federal and state discrimination laws includes a duty of reasonable accommodation. Accommodation is synonymous with preferential treatment. A claimant need only show that that the employer failed to reasonably accommodate the known religion or disability of the claimant.

DISPARATE IMPACT: Sometimes, a facially neutral employment policy or practice has an adverse impact upon members of a protected group. The disparate impact theory holds that an employment practice which is fair in form may still be discriminatory in practice. A claimant need not prove discriminatory intent if he can show a statistical disparity in the manner in which a specific practice operates for a protected group to which he belongs.

PRESENT EFFECTS OF PAST DISCRIMINATION: The mere continuation of an employment practice can have the effect of perpetuating past discrimination against a protected group. Seniority and promotion guidelines are the principal culprits in perpetuating past discrimination. Affirmative action is the recognized remedy for curing the present effects of past discrimination.

SUPREME COURT CLARIFIES REACH OF ADEA

Although the federal Age Discrimination in Employment Act ("ADEA") has been in existence since 1967, the Supreme Court held in *Smith v. City of Jackson* that disparate impact claims are cognizable under the Act.

WHAT TOOK SO LONG? For years, the broad scope of the ADEA was simply presumed to include disparate impact claims. After all, the ADEA is similar to Title VII of the Civil Rights Act of 1964 which has long been construed to address practices which have an adverse impact on minorities. Regulations of the Equal Employment Opportunity Commission ("EEOC") also prohibit disparate impact discrimination under the ADEA. Resourceful defense attorneys argued in recent years, however, that statutory language unique to the ADEA foreclosed disparate impact claims. Conservative courts, such as the Fifth Circuit, were receptive to this argument and held that disparate impact claims could not be brought under the ADEA. The Supreme Court stepped in to clarify the broad reach of the Act.

EMPLOYER'S DEFENSE: The Supreme Court cited the same statutory language which prompted the debate about the reach of the ADEA as the basis for an employer's defense to a disparate impact claim. The Act states that it shall not be unlawful for an employer to take any "otherwise prohibited" action "where the differentiation is based upon reasonable factors other than age." A practice which is shown to be "reasonable" can avoid liability under the ADEA even it has a disparate impact on older workers.

LESSON OF OPINION: *Smith v. City of Jackson* is only the most recent of a long lime of Supreme Court opinions which have rejected the jurisprudence of conservative courts such as the Fifth Circuit regarding employment discrimination laws. The Supreme Court has mandated that discrimination laws must be liberally construed to serve the purpose of eradicating discrimination in the workplace. Every employer is advised to heed this mandate in its employment practices.

RETIREE HEALTH BENEFITS

Smith v. City of Jackson wasn't the only significant ADEA opinion rendered on March 30. In *AARP v. EEOC*, a federal judge in Philadelphia blocked an EEOC rule change regarding health care benefits for retirees. The ruling ends only the most recent battle of a continuing war between younger and older retirees.

ERIE COUNTY RETIREES ASSOC. V. COUNTY OF ERIE: In 2000, the Third Circuit held that an employer violates the ADEA if it reduces or eliminates retiree health benefits when retirees become eligible for Medicare, unless the employer can show either (1) that the health benefits available to Medicare-eligible retirees are equivalent to the benefits provided to retirees not yet eligible for Medicare, or (2) that it is expending the same costs for both groups of retirees. The EEOC later adopted the opinion as its national enforcement policy.

EEOC RULE: In response to intense pressure from employers, labor organizations, benefits experts and state and municipal governments, the EEOC published a final rule in 2004 which reversed its national enforcement policy. The new rule created an exemption from the ADEA for employee benefit plans which "alter, reduce or eliminate health benefits when [a retiree] is eligible for Medicare health benefits or for health benefits under a comparable State health benefit plan." The exemption applies whether or not the retiree enrolls in the other benefit program.

AARP SUES: In February 2005, the AARP sued in federal court to block the EEOC rule. The AARP argued that the rule allowed younger retirees to be provided with better health care benefits than older retirees, in violation of the ADEA. In her March 30 opinion, the federal judge agreed and stated that the EEOC lacked the power to change the judicial construction of the ADEA as set forth in the earlier Third Circuit opinion.

PLANS FOR APPEAL: EEOC Chairwoman Cari M. Dominguez immediately announced her plan to appeal the adverse ruling. The appeal route, however, is not an especially friendly one for the EEOC. Any appeal will be heard by the Third Circuit.

REMINDER

Employers must post in a prominent place a notice explaining the rights of employees under the Unformed Services Employment and Reemployment Rights Act ("USERRA"). A notice in poster format is now available to be downloaded by employers at the United States Department of Labor website: www.dol.gov/vets/programs/userra/poster.pdf.

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