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Legal Update: Discrimination, Harassment, and Retaliation Law

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Employment Discrimination: Class Actions

- *Wal-Mart Stores, Inc. v. Dukes, et al.*, 131 S. Ct. 2541 (2011)
  - 1.5 million current & former female employees
  - plaintiffs' claims for back pay were not properly certified under Rule 23(b)(2)
  - plaintiffs failed to meet the "commonality" requirement of Rule 23(a)(2)

Discriminatory Motive

- *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011)
  - A “Cat’s Paw” is sufficient to create employer liability for discrimination
  - Mr. Staub lost his job as a technician at Proctor Hospital after prolonged disputes with his supervisors over the time he took off to fulfill his occasional duties as an Army Reserve member.

Discriminatory Motive

- *Schandelmeter-Bartels v. Chicago Park Dist.*, 634 F.3d 372 (7th Cir. 2011)
  - Employer held responsible based upon the racial motivations of a supervisor.
  - "Cat's Paw" theory used to create liability when the ultimate decision-maker was influenced by an individual with discriminatory intent.

Pregnancy Discrimination

- *Appel v. Inspire Pharmaceuticals, Inc.*, Case No. 10-10960, 2011 U.S. App. LEXIS 11505 (5th Cir. 2011)
  - Pregnant manager ordered to bed rest
  - Unable to perform essential functions of job
  - Pregnancy blind

Sex Stereotyping

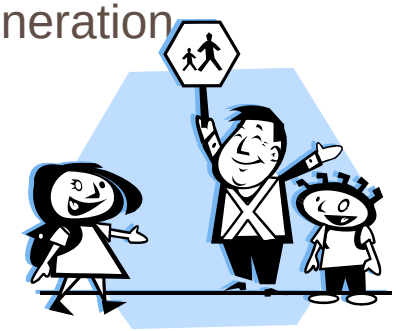
- *Gilbert v. Country Music Assn., Inc.*, Case No. 09-6398, 2011 U.S. App. LEXIS 15933 (6th Cir. 2011)
  - Discrimination based upon sexual orientation is not protected under Title VII.
  - The Court, however, did note that Title VII prevented "sex-stereotyping" as a prohibited form of gender discrimination.

Causal Relationship

- *Davis v. Time Warner Cable of Southeastern Wisc.*, Case No. 10-1423, 2011 U.S. App. LEXIS 13636 (7th Cir. 2011)
  - "Zero tolerance" company policy was violated
  - Company had consistently terminated employees for violations of such policies in the past.
  - Employee could not establish his termination was based upon discrimination.

Expansion of Title VII

- Volunteers
  - *Bryson v. Middlefield Volunteer Fire Department, Inc.*, No. 10-3055, 2011 U.S. App. LEXIS 18447 (6th Cir. 2011)
    - "employee" vaguely defined under Title VII
    - rejects Second Circuit's test
      - Must first determine if the purported "employee" received remuneration
      - Then, examine the common law agency test
    - Uses the common law agency test, including remuneration as a factor.



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EXPANSION OF DISCRIMINATION LAW

Posted by Kathleen Portman, Cleveland on September 27, 2011

Title VII of the Civil Rights Act of 1964 ("Title VII") forbids employers with 15 or more employees to discriminate on the basis of race, color, sex, religion or national origin.

In a case of first impression, the Sixth Circuit recently affirmed that a volunteer may constitute an "employee" under Title VII. Expressly rejecting the Second Circuit's two-step test, which requires a putative employee to make a threshold showing of remuneration before a court may determine whether an employment relationship exists under the common-law agency test, the Sixth Circuit distinguished itself from the Second, Fourth and Eighth Circuits by holding that "significant remuneration" is only one factor that must be weighed along with all aspects of the employment relationship.

This case is significant as it demonstrates the Sixth Circuit's willingness to throw volunteers into the employee tally, expanding the range of "employers" that may fall under the purview of Title VII. So will this result in employers treating volunteers more like employees (e.g., conducting performance reviews)? Only time will tell, but employers are best advised to look beyond their payroll records and instead examine the degree of control that they are exercising over the individual and the work that is being accomplished. For more information on the case, visit Squire Sander's Sixth Circuit blog.

Tags: discrimination, Sixth Circuit, Title VII, volunteers

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Title VII Damages

- *Black v. Pan American Laboratories, L.L.C.*, 646 F.3d 254 (5th Cir. 2011)
  - the amount of compensatory and punitive damages "awarded under this section shall not exceed, for each complaining party," the specified statutory cap.
  - The Court concluded, therefore, that "the plain language of Section 1981a(b)'s cap applies to each party in an action"
  - in line with the Sixth, Seventh and Tenth Circuits and the DC Courts of Appeals.

Lateral Transfer = Adverse Action

- *Porter v. Valdez*, Case No. 10-10409, 2011 U.S. App. LEXIS 9675 (5th Cir. 2011).
  - Lateral transfers can clearly be a demotion or constitute adverse discriminatory action.
  - Is the new position "objectively worse," such as offering less pay, a decrease in title, less prestige, less interesting work, or a decreased opportunity for advancement.

Age Discrimination

- *EEOC v. Minnesota Law Enforcement Assn.*, Case No. 10-2699, 2011 U.S. App. LEXIS 16423 (8th Cir. 2011).
  - The collective bargaining agreement contained an "Early Retirement Incentive Program."
  - The "Early Retirement Incentive Program" violated the ADEA because it denied benefits based solely upon an employee's age.

Pending Legislation

- Discrimination Against Unemployed
  - Job postings: unemployed candidates will not be considered
  - Equal Employment Opportunity Commission held a forum earlier this year

- U.S. Senate

  - S. 1471

- U.S. Congress
  - H.R. 1113
  - H.R. 2501

Harassment: Liability for Third Party Employees

- *EEOC v. Cromer Food* , Case Nos. 10-1476 & 10-1552, 2011 U.S. App. LEXIS 4279 (4th Cir. 2011)
  - Driver allegedly suffered constant sexual harassment at one of his stops
  - Employer could be liable for acts of non-employees
    - Did the employer know or should the employer have known of harassment and fail to take appropriate action?

Harassment: Following Internal Policies

- *Hoyle v. Freightliner, LLC*, No. 09-2024, 2011 U.S. App. LEXIS 6628 (4th Cir. 2011)
  - The employer had notice of incidents of sexual harassment but failed to follow its own policies calling for a firm response.
  - The case was remanded for trial on this issue.
- *Sutherland v. Wal-Mart Stores, Inc.*, 632 F.3d 990 (7th Cir. 2011)
  - The employer responded to the complaint of harassment by conducting an investigation and responding appropriately to end the harassment.
  - The employee's claim therefore, failed.

Harassment: Equal Treatment

- *Smith v Hy-Vee Inc.*, 622 F.3d 904 (8th Cir. 2011)
  - Both men and women were similarly harassed by one employee
  - Court found no gender discrimination

Retaliation: Third Party

- *Thompson v. North American Stainless,* 131 S. Ct. 863 (2011)
  - Sixth Circuit: No cause of action for third-party retaliation for persons who did not themselves engage in protected activity
  - Supreme Court: although the plaintiff had not engaged in statutorily protected activity, he could maintain a third-party retaliation claim against his employer because he fell within the "zone of interest" protected by Title VII
  - statutory phrase "person claiming to be aggrieved" is broad enough to include "any plaintiff with an interest 'arguably [sought] to be protected by the statutes,'" and as an employee who was intentionally harmed as a means of retaliation against another employee, the plaintiff fell "well within the zone of interests sought to be protected by Title VII."

Retaliation

- *Hatmaker v. Memorial Medical Center*, 619 F.3d 741 (7th Cir. 2010)
  - Employee fired for comments she made regarding her boss during an investigation of possible sex discrimination
  - Comments employee was fired for had nothing to do with the investigation
  - Comments instead demonstrated poor judgment
  - Termination was not retaliatory
  - Different result than the previous cases from the 5th, 6th and 8th Circuits

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