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Fenwick Employment Brief

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U.S. Supreme Court Allows Disparate Impact Theory in Age Discrimination Cases

In *Smith v. City of Jackson*, Mississippi, the U.S. Supreme Court held that the disparate impact theory of recovery is permitted under the federal Age Discrimination in Employment Act ("ADEA"). Because of a perceived need to raise the pay of lower-ranked police officers to match surrounding communities, the City of Jackson adopted a plan that awarded proportionately greater raises to junior-ranked officers compared to those with more seniority. A group of more senior officers filed suit alleging the plan discriminated against them on account of their age. They alleged both disparate treatment (*i.e.*, intentional discrimination) and disparate impact (*i.e.*, unintentional discrimination, yet having a discriminatory "impact" on a protected class). In a previous case in 1971, the U.S. Supreme Court applied the disparate impact theory to a race discrimination case, but only now extended the concept to age claims. In one favorable development for employers, the court further held that an employer may avoid disparate impact liability if it can show a "reasonable factor other than age" supported the decision or practice in question. This is in contrast to Title VII cases where the employer must meet a more stringent standard to avoid liability, *i.e.*, the business necessity test, requiring a showing that there are no other ways for the employer to achieve its goals that do not result in a disparate impact. In the *Smith* case, the court dismissed the plaintiff's disparate impact case because the City had established that granting proportionately greater pay raises to junior-ranked officers (to match the pay of officers in surrounding communities) was based on a "reasonable factor other than age" that legitimately achieved the City's goal of retaining police officers. The *Smith* case is anticipated to have little impact on California employers because California law already allows the disparate impact theory in age cases. Further, California applies the business necessity test to such cases, and not the less-stringent "reasonable factor" test.

Employers May Not Require Medical Examination Before Making "Real" Job Offer

In *Leonel v. American Airlines*, the federal Ninth Circuit Court of Appeals (that covers the western U.S. including California) ruled that an employer may not require applicants to undergo a medical examination or respond to medical inquiries until after making a "real" job offer. The court explained that an offer is "real" where the employer has completed all non-medical components of its application process or demonstrates that it could not reasonably have done so before issuing the offer. Because the employer in this case could not satisfy this legal standard, the court reversed a summary judgment in the employer's favor and remanded the matter for a jury trial. In *Leonel*, plaintiffs were three applicants who applied for flight attendant positions at American Airlines. All were HIV positive. American offered them jobs, but the offers were conditioned upon satisfactorily passing a background check and a medical examination. Before completing the background check, American required plaintiffs to submit to a medical examination. In response to questions about their medical history, plaintiffs did not reveal their HIV condition. The medical examination included a blood test. One

plaintiff asked about the reason for the blood test and the employer's nurse responded that the blood would be used to test for anemia. In fact, the blood test included a full battery of tests that disclosed plaintiffs' HIV condition. Thereafter, American rescinded the job offers because plaintiffs had falsified their medical history. Plaintiffs sued alleging the medical examinations violated federal and state disability discrimination laws (collectively the "ADA") and California's constitutional right of privacy. The court ruled that the medical examination and inquiries were premature under the ADA because American had not completed its background check before making its job offer. Further, the employer was unable to demonstrate that it was not reasonably possible to complete the background check before issuing the offer. Under such circumstances, the employer could not lawfully penalize the applicants for failing to disclose their HIV status. The court further opined that the employer may have violated plaintiffs' right of privacy by not fully disclosing the nature of the blood test, and indeed allegedly misled one plaintiff that the test diagnosed only anemia. *Leonel* is an important legal development for employers who require post-offer medical examinations. Medical examinations and inquiries are lawful only after a "real" job offer, *i.e.*, the employer has completed all non-medical components of its application process (*e.g.*, a background check) or where the employer is able to prove that it could not have reasonably completed these non-medical components before making the job offer.

"Retaliation" Jury Verdict Reversed Because No "Adverse Employment Action"

In a favorable decision for employers, *McRae v. Department of Corrections*, the California Court of Appeal overturned an Alameda County jury verdict for $75,000 in favor of plaintiff McRae because the employer's alleged retaliatory acts were insufficient to rise to the level of a legal wrong. Plaintiff McRae, an African American, was a physician working for the state prison system. She alleged that after filing an administrative complaint against the state for failure to promote her on account of her race, the department allegedly retaliated against her. She complained about 1) a "letter of instruction" because she left an emergency room unattended, 2) an internal investigation into plaintiff's alleged failures to follow instructions by management, and 3) a transfer to another prison. The court explained that to state a cause of action for retaliation, a plaintiff must show an "adverse employment action," *i.e.*, an action that causes substantial and tangible harm, including but not limited to a material change in the terms and conditions of employment. Although something less than an "ultimate employment action" (*e.g.*, termination of employment) may be actionable, the action complained of must be a "final employment action," *i.e.*, an action that is not subject to reversal or modification through internal review processes. The court held that the actions complained of by McRae did not satisfy this legal standard. The "letter of instruction" (instructing McRae not to leave the emergency room unattended) did not result in any loss of pay, status or job responsibilities. The internal investigation resulted in a recommendation to suspend plaintiff for 30 days. However, the recommendation was never implemented. Further, the recommendation was not final and plaintiff had the right to an administrative appeal had the state attempted to implement the suspension. Lastly, the court explained that a transfer could amount to an adverse employment action if it resulted in substantial and tangible harm. However, plaintiff failed to establish that the transfer to another prison involved any significant change in her job responsibilities, pay or benefits. The *McRae* decision, if not further appealed or changed by the legislature, signals an important change in retaliation law. Henceforth, only "final" employment actions that cause substantial and tangible harm will support such a claim. Interim actions, or even final actions that do not cause substantial or tangible harm, will not support a retaliation claim.

No FMLA Protection When Leave Started Before Employee Covered

In a case of first impression, a federal district court in Iowa held that an employee failed to state a claim for violation of the federal Family and Medical Leave Act ("FMLA") when she started a medical leave before she was FMLA qualified. Generally, under the FMLA, an employee must work for 12 months and at least 1250 hours before s/he is entitled to an FMLA leave of absence. In *Willemssen v. Conveyor Company*, plaintiff had a history of absenteeism. Several weeks before her one-year anniversary, plaintiff was hospitalized because of pregnancy-related complications, and remained on medical leave until her one-year anniversary. On that date, the employer terminated her employment for excessive absenteeism. Of the 52 weeks of plaintiff's employment, she was on unpaid leave for 18 weeks. The court held that because none of plaintiff's leave was covered by the FMLA, the employer did not violate the Act when it terminated her for absenteeism. California employers are urged to exercise caution in terminating an employee in similar circumstances. Even if the FMLA did not protect the employee, California employers must also consider whether the employee is entitled to protection and accommodation under the Pregnancy Disability Act and/or state or federal disability discrimination laws.