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Subjective Hiring Criteria, Without More, Do Not Prove Age Discrimination

The Eighth Circuit Court of Appeals (which covers Arkansas, Iowa, Minnesota, Missouri, Nebraska, and the Dakotas) recently held that a company's use of subjective hiring criteria did not, by itself, create an inference of age discrimination. In *Chambers v. Metropolitan Property & Casualty Ins. Co.*, an insurance company had a reduction in force following sale of the company. A number of downsized former employees, including Edward Chambers, age 51, applied for positions at the new company. Chambers sued for age discrimination when, despite his significant experience in the insurance industry, the company hired other applicants, all of whom were under age 40. The court did not give weight to Chambers' evidence that 13 of the 15 downsized employees were over age 40 because the company terminated everyone in the division, regardless of age. The company, on the other hand, offered subjective evidence that one younger applicant was hired because of her "calmer, more patient style," whereas Chambers "appeared very intense and assertive" during his interview. Offering its notes from the hiring interviews as evidence supporting the legitimacy of its subjective hiring criteria, the company showed that other candidates were hired because they would not need to relocate or because they knew the local insurance market. The court held that although Chambers was objectively qualified, he did not present sufficient evidence to show that the employer's stated subjective reasons were a pretext for age discrimination. Although the court cautioned against using subjective considerations because they can be easily fabricated, the court held that use of such considerations alone is not indicative of discrimination. The court found the objective qualifications of the candidates in this case comparable and held the company's subjective reasons were legitimate business considerations. This case demonstrates the importance to employers of recording their justifications for using subjective factors to defend potential discrimination claims.

Framework For Determining Joint Employment Status Further Complicated By Federal Court's Recent Ruling

A recent decision by the Second Circuit Court of Appeals (which covers Connecticut, New York, and Vermont) further complicates determinations of whether companies are joint employers under the Fair Labor Standards Act. At issue in *Zheng v. Liberty Apparel Co.* was whether Liberty, a garment manufacturer, and several contracting companies whose employees the manufacturer used to stitch and finish pieces of clothing, were "joint employers" within the meaning of the FLSA. Plaintiffs, who were directly employed by the contracting companies, claimed Liberty was their joint employer because they worked predominantly on Liberty's garments, they performed a line-job that was integral to the production of Liberty's product, and their work was frequently and directly supervised by Liberty's agents. Liberty responded that the contracting companies – who, among other things, hired and paid plaintiffs to assemble clothing for numerous manufacturers – were plaintiffs' sole employers. In reversing the district court's ruling that Liberty was not a joint employer, the appellate court stated that courts must look beyond traditional agency principles before declaring that an entity is not a joint employer under the FLSA. The court noted that in certain circumstances an entity can be a joint employer even when it does not hire and fire the workers, directly dictate their hours or pay them. While recognizing various courts use a variety of different tests to determine joint employment under the FLSA, and nominally attempting to avoid further complicating these tests, the appellate court ultimately created a new six-part test based on "the circumstances of the whole activity, viewed in light of economic reality." The six factors examine (1) whether Liberty's premises and equipment were used; (2) whether the Contractor's business could and did shift from one

garment manufacturer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to Liberty's process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which Liberty or its agents supervised plaintiffs' work; and (6) whether plaintiffs worked exclusively or predominantly for Liberty. California employers should note that *Moreau v. Air France* (reported in the September 30, 2003 issue of the WEB), the most recent Ninth Circuit case on this issue, employed a slightly different test that focused on the potential joint employer's power to hire and fire, determine the rate or method of payment, set or control work schedules or conditions of employment; the degree of supervision and control exercised by the alleged joint employer; and the amount of time the workers spent on its premises. Until the Supreme Court resolves the differences between the Circuits, employers should be aware that the outcome of the joint employer inquiry will depend on where they operate.

Minnesota Court Enforces Non-Compete Agreement Against Former California Employee

In a case illustrating the complexities of litigating noncompete agreements, a Minnesota Court enforced an agreement against a former employee residing in California. In *West Publishing Co. v. Stanley*, West sought a preliminary injunction to enforce noncompete provisions of an agreement with a former employee, Timothy Stanley. Stanley argued the action should be dismissed because personal jurisdiction and venue were improper in Minnesota. Alternatively, he sought to transfer venue to California. Stanley was a co-founder of FindLaw, a California-based business that provides services to attorneys, which was acquired by Minnesota-based West in January 2001. After the acquisition, FindLaw's headquarters remained in California, although several key executives supervised its operations from West's Minnesota headquarters. Stanley, too, remained stationed primarily in California, but he also traveled regularly to Minnesota. In April 2003, West fired Stanley. Under the separation agreement, which Stanley executed in California, Stanley agreed not to compete with West or solicit or hire West employees for one year. The separation agreement did not contain a choice of law or forum selection clause. Despite the agreement, Stanley later incorporated a competing business in Nevada. In September 2003, West filed an action in federal court in Nevada alleging that Stanley violated the agreement's non-compete provisions. Stanley objected to the action on the grounds that jurisdiction and venue were both improper. While the Nevada action was pending, Stanley filed an action against West in California state court seeking a judicial declaration that the non-compete was unenforceable under California law. The Nevada court refused to enter a preliminary injunction against Stanley due, in part, to concerns over jurisdiction and venue. Thereafter, West voluntarily dismissed the Nevada action and filed suit in federal court in Minnesota in November 2003. The Minnesota court held that venue was proper, that Minnesota law applied to the dispute and that Stanley had sufficient contacts with the state to establish personal jurisdiction. The court held that although venue would also be proper in California, Stanley had not demonstrated that the balance of the factors "strongly" favored transfer to California. The Court therefore denied Stanley's motion to transfer. It then determined that West was entitled to a preliminary injunction to enforce the agreement. This case illustrates the complications that can arise in drafting and enforcing noncompete agreements where all parties do not work and reside in the same state. Employers should confer with counsel to determine whether to insert choice of law and/or choice of venue provisions when drafting such agreements.