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Weekly Employment Brief

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Laid Off Employees Need Not Show Replacement By Younger Worker To Show Age Discrimination

The Sixth Circuit Court of Appeals (encompassing Ohio and Michigan, among other states) recently held that an employee terminated in a reduction in force did not need to prove that a younger worker replaced him to establish a prima facie case of age discrimination. In *Cichewicz v. UNOVA Industrial Automotive Systems, Inc.*, the employer terminated Cichewicz as part of a reduction in force. Cichewicz sued, alleging a violation of the Age Discrimination in Employment Act. In the district court, UNOVA successfully argued that Cichewicz failed to establish a prima facie case of age discrimination because he failed to demonstrate that he was replaced by a younger person or treated differently than younger, similarly-situated employees. The appellate court reversed, holding an employee does not have to prove replacement by a younger person when the employee was discharged in the context of a reduction in force. Rather, the employee need only present evidence, direct or circumstantial, that the company singled him out for discharge based on his age. In this case, the court found Cichewicz provided sufficient evidence to suggest a pattern of targeting older individuals for discharge. Employers should be aware that even though laid off workers are not being "replaced," there remains a potential for discrimination claims during a reduction in force, including claims that the layoff impacts certain protected groups more heavily than their statistical representation in the workforce.

Bad-Faith Harassment Complaints Cannot Support Title VII Retaliation Claims

The Seventh Circuit Court of Appeals (encompassing Illinois, among other states) clarified that all Title VII retaliation claims—both those stemming from an employee's internal opposition to purported unlawful conduct and from the employee's participation in external administrative or legal complaints regarding such conduct—are subject to the requirements of good faith and reasonableness. In *Mattson v. Caterpillar, Inc.*, Thomas Mattson alleged his employer retaliated against him for his filing a sexual harassment charge with the EEOC and a state agency. Matson first raised concerns about physical contact by his female supervisor, Beth Cone, five days after Cone criticized his failure to adhere to safety protocols. Specifically, Matson complained that Cone's breast had touched his arm during a conversation. While an investigation by Caterpillar's Equal Employment Opportunity Coordinator found that Matson's complaint was without merit, Caterpillar counseled Cone to be careful about how close she stood to people. After Mattson subsequently filed an EEOC charge against Caterpillar, the company initiated a second investigation. This time a new witness came forward and signed an affidavit stating Mattson told him his goal was to get Cone "out of here any way possible." Caterpillar concluded Mattson had filed the charge in bad faith and terminated him for dishonesty and retaliatory conduct. Mattson sued Caterpillar, alleging he was discharged for filing his EEOC charge. The district court granted Caterpillar's summary judgment motion, and Mattson appealed. He argued that although internal opposition to unlawful conduct must be reasonable and in good faith to receive Title VII protection, the law absolutely protects those who file administrative charges or legal complaints, even if those are unreasonable, false, or even malicious and defamatory. The Court rejected Mattson's argument, holding that Title VII does not protect employees who file bad-faith charges. Although employers should tread carefully when deciding whether to terminate employees who have filed discrimination or harassment claims, this case demonstrates that employees cannot use bad-faith claims to shield themselves from termination.

Federal Agencies Finally Propose a Definition of "Applicant"
Breaking a three-year deadlock and public silence, the OFCCP, EEOC and the U.S. Department of Justice have finally and formally proposed a definition of the term "applicant." (*See 3/4/04 Federal Register* at pp. 10152-58.) Under the proposal, the following three events must occur before a person is considered an "applicant" for employment (with consequent implications for adverse impact calculations and the ability of the individual to sue if rejected):

1. "The employer has acted to fill a particular position";

2. "The individual has followed the employer's standard procedures for submitting applications"; and

3. "The individual has indicated an interest in the *particular* position." (Emphasis added.)

The third requirement (good for companies) means that not all persons who either apply or who the employer considers are "applicants." However, the federal agencies' complete silence (bad for companies) on the question whether those "less than minimally qualified" are "applicants" is very problematic. The new proposal implies heavily that less than minimally qualified persons are "applicants," and the employer has the duty to justify their exclusion by reference to proof of "business necessity" if qualification standards have a legally significant disproportionate impact.

The "applicant" definition takes the form of proposed additional "Questions and Answers" to the *Uniform Guidelines on Employee Selection Procedures* ("UGESP"). If finalized, these "Qs and As" are only "interpretive" – they do NOT have the binding force and effect of law. The proposal seeks public comment to be received not later than May 3, 2004.

For more general information or materials discussing the "applicant" issue, please feel free to contact John Fox's secretary, Michele DeGonia, at mdegonia@fenwick.com. In addition, on April 20, 2004, the Silicon Valley Industry Liaison Group (SVILG) will present a special conference dedicated to a thorough discussion of the proposed definition. The conference will take place from 8:30 a.m. to Noon at the Sun Microsystems campus in Menlo Park. For more information and registration information, contact Joanne Snow at JSATrain@aol.com or Linda Grossman at planaap@aol.com.
