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Fenwick Employment Brief

October 26, 2004

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Disparate Impact Claim Fails Even Though Reorganization Primarily Displaced Workers in Protected Classes

In a victory for employers, a California appellate court overturned a jury verdict, originally exceeding one million dollars, recognizing that "the mere fact that each person affected by a practice or policy is also a member of a protected group does not establish disparate impact." In *Carter v. C. B. Richard Ellis, Inc.*, Helen Carter, an Ellis employee of nearly thirty years was terminated as part of a corporate reorganization. Carter claimed discrimination on a disparate impact theory because the reorganization eliminated only the position of administrative manager within the company, and all but one of the 57 administrative managers were female and over half were over age forty. A jury awarded Carter over $1 million on her claims. The court denied Ellis' motion to set aside the verdict and rule in its favor, but granted a new trial when Carter refused to agree to a reduction of damages to $420,000. Both parties appealed.

On appeal, the court rejected Carter's position and directed the lower court to grant Ellis' motion to set aside the verdict and to enter judgment in favor of the company. The court held that, despite the demographic composition of the administrative manager pool, the position of administrative manager was not a protected category. Rather, the court held that, to prove disparate impact in this case, Carter needed evidence of a disparate impact against the entire group of women or older workers among the approximately 10,000 employees at the company, not just against a subgroup like administrative managers. Because Carter failed to provide statistical evidence about the reorganization's impact on any protected class as a whole, her disparate impact claim failed.

Companies should analyze any reorganization plan to ensure it does not operate to unduly impact employees of a particular race, gender or other protected category. However, this case demonstrates that the mere fact that an eliminated position contains a high concentration of employees in a particular protected category does not by itself prove unlawful discrimination.

Insubordination Triggered by Employer's Own Unlawful Conduct Cannot Justify Adverse Employment Action

A recent California appellate decision reminds employers that they must reasonably accommodate employees' religious observances. In *California Fair Employment and Housing Commission v. Gemini Aluminum Corp.*, Lester Young, a Jehovah's Witness, brought a claim for religious discrimination against Gemini with the California Department of Fair Employment and Housing (DFEH). Young had requested two days off to attend a religious convention, but Gemini denied the request. Young informed his supervisor that he would be attending the convention anyway and did so, missing two days of work. Upon his return, Gemini suspended Young for failing to report to work. Young subsequently requested a copy of the leave request to take to the "labor board," and Gemini fired him a few days later. The DFEH found that Gemini discriminated against Young in failing to accommodate his religious beliefs.

After a superior court overturned that decision, the DFEH appealed on Young's behalf. The appellate court reinstated the DFEH's original decision in favor of Young.

California law prohibits discrimination against an employee based on a "conflict between the person's religious belief or observance and any employment requirement," unless the employer first explores "any available reasonable alternative means of accommodating the religious belief or observance," but is unable to accommodate the religious belief without "undue hardship." The appellate court determined that attendance at this particular convention was considered a form of worship and religious study within the Jehovah Witness faith. The court found that Gemini did not explore possible accommodations or demonstrate undue hardship. Moreover, because Gemini's own unlawful conduct in failing to accommodate Young's religious observance triggered Young's "insubordination," the court held that Gemini could not rely on that insubordination to justify its termination decision. This case demonstrates the importance of exploring potential ways to accommodate employee religious beliefs or practices prior to enforcing company policies.

Lawful Alternative Workweek Schedule Upheld Despite Labor Commissioner's Initial Rejection

Although ultimately successful after two appeals, one California employer experienced a costly legal fight defending its lawful alternative workweek schedule ("AWS"). In *Mitchell v. Yoplait*, William Mitchell, a warehouse worker, sued Yoplait for allegedly unpaid overtime. Typically, companies must pay overtime to nonexempt employees in California for every hour worked beyond eight hours in a workday. However, if approved by at least two-thirds of the employees in a secret ballot election, the Labor Code permits employers to use an AWS, under which employees could work up to 10 hours per day within a 40-hour workweek without the payment of overtime. Mitchell filed a claim with the California Labor Commissioner against Yoplait based on an AWS consisting of three twelve-hour shifts and one six-hour shift, with overtime compensation for the eleventh and twelfth hours of the twelve-hour shifts. Mitchell claimed, and the Labor Commissioner agreed, that because Section 511(a) prohibits an AWS of "longer than 10 hours per day within a 40-hour workweek without the payment to the affected employees of an overtime rate of compensation," Yoplait's AWS was illegal. Accordingly, the Labor Commissioner awarded overtime compensation for the ninth and tenth hours of each twelve-hour shift.

On Yoplait's de novo appeal, the superior court reversed the award. The court held that the Labor Commissioner took section 511(a) out of context and completely ignored the next subsection, which addresses overtime compensation for "an affected employee working longer than eight hours but not more than 12 hours in a day pursuant to an alternative workweek schedule." Taken as a whole and reading the statute consistently with Industrial Wage Commission Orders that expressly permit an AWS containing three 12-hour days, the superior court granted summary judgment for Yoplait and found its AWS lawful.

Mitchell's subsequent appeal was denied, and Yoplait was vindicated, but not before these costly proceedings. This case illustrates how, in the absence of case law on a particular employment law issue, the Labor Commissioner can take positions that the courts ultimately may determine to be improper. As the Labor Commissioner is the entry point for many employee claims, employers should at least consider the Labor Commissioner's published positions on employment issues when determining company policies. Even if the Commissioner's position ultimately is reversed by the courts, companies may—like Yoplait—have to navigate a costly process before prevailing.

Congress Passes Bill That May End Double Tax on Contingent Fees

Tucked within the corporate tax benefits the Senate enacted last week was a provision ending the IRS's practice of double-taxing certain contingency fee awards. Currently, a plaintiff who settles a case or wins a judgment has to pay taxes on the entire amount, despite the fact that a third or more of the award might go to the plaintiff's attorney as a contingency fee, and despite the fact that the attorney also would pay taxes on those same fees. The IRS's position was that the entire award went to the plaintiff and should be taxed to the plaintiff, regardless of the existence of an attorney to whom the plaintiff had to pay a portion of the award. The American Jobs Creation Act of 2004 (the "Act"), if signed by President Bush, would exempt from a plaintiff's income that portion of an award set aside for attorneys' fees in specific types of lawsuits, including those involving employment discrimination, harassment and retaliation or violation of other employment-related state and federal laws.

The bill is a mixed blessing for employers. The current double-tax system potentially acts as a mild disincentive for plaintiffs to bring certain smaller claims, because the tax consequences greatly diminish their net recovery and, at times, may actually exceed the amount of damages they retain after paying fees and costs. On the other hand, the double taxation policy also has a tendency to increase the cost of settling some suits, as plaintiffs seek additional money to compensate them for the extra tax payments.

REMINDER: California Law Requires Time Off For Voting Where Necessary

With Election Day coming up on November 2nd, employers are reminded that California law requires employers to permit their employees up to two hours paid time off to vote, but only if the employee does not have sufficient time outside working hours to vote. If employees know in advance of the need to vote during working hours, they must provide two working days' notice. The employer can require that employees take the time off at the beginning or end of their shifts, whichever best facilitates voting time and results in the least amount of time off. California law also requires employers to post a notice setting forth these rights at least 10 days before the election and keep it posted until the election.

ALERT: New California Law Requires Sexual Harassment Training for Supervisors

On September 30, 2004, Governor Schwarzenegger signed a law requiring California employers with 50 or more employees to provide all supervisory employees two hours of sexual harassment training once every two years. The training must be classroom training or other effective "interactive" training (*i.e.*, no video- or audio-recorded presentations alone) and must be conducted by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation. Please feel free to contact a Fenwick & West employment attorney with questions about the specific requirements of this law or interest in such training presentations.