



DYKEMA GOSSETT PLLC

Employment Law Developments

Employment Discrimination Cases: On the Rise and Evolving

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Employment Discrimination Cases Are on the Rise

The number of employment discrimination cases filed in the private sector rose during the last fiscal year according to a recent report issued by the Equal Employment Opportunity Commission (EEOC).¹ Charging parties filed 4.5% more charges with the EEOC in the Fiscal Year 2002, which ended in September, 2002, than in Fiscal Year 2001.

Not only were there more charges filed during the last fiscal year, but the EEOC also processed the charges that were filed at a more rapid pace. The EEOC took 6% less time to process charges in Fiscal Year 2002, than during the same time period in 2001. There were also 11% less pending charges during Fiscal Year 2002 than during Fiscal Year 2001. According to EEOC Chair Cari M. Dominguez, the EEOC is “operating at the most efficient levels in the Commission’s history to eradicate employment discrimination. We are resolving charges faster and more proficiently, while simultaneously enhancing public outreach and education to proactively prevent discrimination.”

The increased filings and efficient resolution of EEOC charges filed resulted in a record \$310.5 million recovery for parties alleging discrimination. One fifth of charges filed resulted in a positive outcome for the charging party through settlement or litigation, among others.

The increase in charges filed with the EEOC may be a direct result of September 11, 2001 and the depressed state of the economy. Religious discrimination charges increased 21% and national origin discrimination charges increased 13%. Both increases could be related to changing perceptions after the events of September 11, 2001. Most charges during the Fiscal Year 2002 came from the retail, food services, and manufacturing industries. The retail, food services, and manufacturing industries are typically strongly effected by a declining economy. Age bias charges also increased 14.5%, which may be indicative of displeasure with elimination of jobs as employers made economically driven changes.

New Case Clarified Adea Law and Could Represent Beginning of Evolution in Employment Law

Not only do employment discrimination cases seem to be on the rise, but a recent decision issued by the United States Court of Appeals for the Sixth Circuit, which includes Michigan, Ohio, Tennessee, and Kentucky, indicates that the face of employment law in the Sixth Circuit may be changing.

On January 27, 2003 the Court of Appeals for the Sixth Circuit decided, on rehearing, *Wexler v. White's Fine Furniture, Inc.* In *Wexler*, a 59 year old male employee, Donald Wexler, filed suit against his employer, White's Furniture, alleging that he was demoted in violation of the Age Discrimination in Employment Act (ADEA). The Court of Appeals, on rehearing, reversed and remanded the lower court's decision in favor of White's. In doing so, the Court of Appeals took the opportunity to "clarify several important, recurring issues in employment discrimination law."

White's operates retail furniture stores in the Columbus, Ohio area. White's hired Wexler in 1993, at the age of 55, to be a sales representative at one of its stores. Two years later, Gordon Schiffman, the president of White's who was in his late sixties, promoted Wexler to manager. Sales at Wexler's store began to decline dramatically about a year and a half after his promotion. Wexler met with Schiffman and Davis Lively, the executive vice-president of White's who was in his early thirties, in the middle of 1997 to discuss the declining sales at Wexler's store. Schiffman and Lively made complaints about Wexler's performance, which Wexler responded to in writing the next day.

About a week after this mid-1997 meeting, Schiffman and Lively informed Wexler they were going to demote him to his original position as sales representative and hire a younger individual to replace him as manager. Schiffman and Lively made several age related comments to Wexler when they informed him of his

demotion as well as when they announced his change in status to the other staff. Wexler also contended that company officials had made other, negative age related comments in the past.

Sales continued to decline once John Neilson, in his mid-thirties, replaced Wexler. About five months later, Alvie Crank, also in his mid-thirties, replaced Neilson as manager. Sales continued to decline, but White's did not take any adverse employment action against Crank for the declining sales.

Wexler filed suit against White's in the spring of 1998, alleging age discrimination. The lower court granted White's motion for summary judgment made at the close of discovery. The lower court ruled that Wexler had failed to establish a prima facie case, and that even if he had, he could not have proved that White's legitimate non-discriminatory reason was a pretext "designed to mask age discrimination." A panel of the Court of Appeals initially affirmed the lower court's summary judgment determination, but upon rehearing, the full Court of Appeals reversed and remanded in light of the clarifications set out in the opinion.

The Court of Appeals first outlined how an employee can establish an age discrimination claim. It is clear that an employee can establish age discrimination through direct or circumstantial evidence. With direct evidence, the employee establishes that age discrimination was a motivating factor in the employment decision. With circumstantial evidence, the fact finder infers that age discrimination took place.

Wexler offered various statements made by Schiffman and Lively to establish direct evidence of age discrimination. The lower court had determined that the statements offered were "too abstract, irrelevant, and prejudicial to support a finding of discrimination." The lower court found it significant that Schiffman had both hired and demoted Wexler and held that the fact that the same actor had hired and demoted Wexler led to a "strong inference that discrimination was not a

determining factor” for Wexler’s demotion. The lower court also noted that Schiffman was a few years older than Wexler and felt it significant that the decision maker was in the same class as Wexler.

Often, an employer may consider legitimate (for example, economic) and illegitimate (for example, age related) reasons for making an employment decision. When an employer considers legitimate and illegitimate reasons when making a decision, the employer is said to have a mixed-motive and the employee alleging discrimination must then prove through direct evidence that the employer considered illegitimate reasons when making the decision. If the employee accomplishes this, the employer can then attempt to prove it would have made the same decisions regardless of the presence of the illegitimate reasons.

Some of the statements offered by Wexler to establish discrimination contained criticisms related to his age. The Court of Appeals held that these criticisms could clearly have been illegitimate reasons for making the decision to demote Wexler. Therefore, a question of fact remained: Would White’s have made the same decision regardless of its’ criticisms of Wexler’s age? Since a question of fact remained, the district court should not have granted summary judgment.

The Court of Appeals took the opportunity to clearly state the law in the Sixth Circuit regarding the same-actor inference (when the same individual hires and fires an employee). The Court of Appeals rejected the idea that the fact-finder must interpret the fact that the same actor hired and fired an employee in favor of the employer. The Court of Appeals instead found that the fact-finder *could* interpret the information that way, but could not grant summary judgment on that fact alone if the employee had raised a genuine issue of material fact. The Court of Appeals also rejected the lower court’s inference that a member of a group is not likely to discriminate against another member of the same group. Such an inference is impermissible in the Sixth Circuit.

The Court of Appeals also analyzed whether Wexler had offered sufficient circumstantial evidence and found that he had. The framework of circumstantial evidence in discrimination cases requires the employee to first establish the prima facie case. The employer can then offer legitimate, non-discriminatory reasons for its employment decision. The Court of Appeals held that it was improper for the lower court to consider White’s legitimate reasons when analyzing the prima facie case.

As part of his prima facie case, Wexler must prove he was qualified for the job. The Court of Appeals outlined what exactly is required for Wexler to establish he was qualified. Objective, not subjective, qualifications are relevant. Wexler could show he was qualified “by presenting credible evidence that [his] qualifications are at least equivalent to the minimum objective criteria required for employment in the relevant field.” The court should consider “education, experience in the relevant industry, and demonstrated possession of the required general skills.”

The lower court, when determining whether White’s reasons were a pretext for discriminatory reasons, relied heavily upon the “business judgment” of White’s. The Court of Appeals made it clear, that “[a]n employer’s business judgment, however, is not an absolute defense to unlawful discrimination.” Rather, the court must look into the reasonableness of that business judgment when determining whether the reason given was the actual reason for the employment decision.

In *Wexler*, as outlined above, the Court of Appeals clarified several areas of law, with regards to when summary judgment will be appropriate. The Court of Appeals widened what qualifies as a question of fact and therefore precludes summary judgment. The lower federal courts may soon apply the same standards as outlined in *Wexler* to other discrimination cases.

¹ Report available at <http://www.eeoc.gov/press/2-6-03.html>

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