



Labor and Employment Law Reporter

Newsletter for the clients of The Williams Firm, P.C.

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DISCRIMINATION FOUND IN CASE OF ASSOCIATING INDIVIDUAL

The Sixth Circuit Court of Appeals has decided that an individual can sue for racial discrimination when the discrimination is based on that individual's mere association with members of a protected group, so long as the individual has been the target of the discriminatory conduct. *Barrett, et al v Whirlpool Corporation*, 556 F3d 502 (CA6, 02/23/09).

Barrett involved three (3) women – Barrett, Melton, and Nickens – who regularly associated with African-American colleagues at work. The women each encountered co-worker Travis making racist comments. Attempts to involve their supervisor proved fruitless, as many were joining in on the jokes and comments. When Barrett complained to Travis about his behavior, he responded that he owned a handgun. When Nickens complained about Travis to another supervisor, Travis was subsequently fired.

Believing Nickens was responsible, Travis had two (2) friends still working at the plant tell Nickens that Travis was going to harm her after work. When Nickens complained to her supervisor, the supervisor assured her that it was unlikely that anything would come of it, but did nothing further.

The three (3) eventually sued their employer when the company refused to address their concerns about attitudes in the workplace. The three (3) women claimed that they were discriminated against for their association with African-Americans and their advocacy for their co-workers. Each woman sued the company for both retaliation and a hostile work environment.

(continued on Page 2)

**Cont. from Page 1 - DISCRIMINATION
FOUND IN CASE OF ASSOCIATING**

Barrett based her retaliation claim on having work directed away from her, but she never complained to management on that issue. Melton based her retaliation claim on being given a new position that was more physically difficult for her to do because of ongoing medical problems. Nickens based her retaliation claim on the belief that a supervisor whom she had reported for racist remarks blocked her from getting a better position. All three (3) retaliation claims were dismissed.

The court established that in order to survive summary judgment on a hostile environment claim, Plaintiffs must demonstrate that they were subjected to extreme harassment that was targeted at them. None of the comments witnessed by Barrett were directed at Barrett. Melton heard many insults around her, but none of the derogatory terms were levied at her. However, Nickens' hostile environment claim was allowed to go to trial because she demonstrated an extreme action, the threats of harm, and those threats were directed at her for her perceived advocacy.

The court dismissed all three (3) Plaintiffs' claims for retaliation. None of the three (3) suffered any real change in employment, and no change that did not have some other possible reason. When discussing Barrett, the court noted that retaliatory action does not include a refusal to be given supplies.

The important lesson from this case is that association with and advocacy for a protected class of people, such as women, African-Americans, or the disabled, to name a few, can be the basis for a hostile workplace claim. Any Plaintiff in such a case must establish, however, that the comments were *directed* at him or her rather than merely *heard* by him or her at the workplace.

**A THREAT TO SUE IS NOT A VALID
REASON FOR DISCHARGE**

A threat to sue was not a valid reason to discharge an employee who was complaining about his work assignment. The employee, Shelson, was newly returned from a worker's compensation leave of absence to recover from hand surgery.

The Defendant's president directed the employee to return to work two (2) days before the doctor had cleared the employee to return. After he returned, the president told him that he was not working fast enough. In response, the employee threatened to sue.

Following the threat, the Defendant discharged the employee. The Michigan Court of Appeals ultimately decided the case based upon a number of deficiencies in the Defendant's pleadings. The Defendant failed to follow several Michigan Court Rules when answering the Complaint. The court also confirmed that a threat to sue is not an overriding justification to fire someone, when an employee has threatened to sue to enforce his rights under the Worker's Disability Compensation Act. *Shelson v. Schmidt Industries, Inc.*, Mich App; 2009 LEXIS 553 (unpublished, 03/10/09).

COBRA PREMIUMS SUBSIDIZED

With the signing of the American Recovery & Reinvestment Act of 2009, President Obama and Congress have created a system where COBRA premiums are subsidized for nine (9) months. This subsidy is limited to employees whose employment was involuntarily terminated between September 1, 2008 and December 31, 2009. Under this new plan, eligible employees will only need to pay thirty-five (35%) of the COBRA premium. The Employer pays for the remainder with a reimbursement in the form of a proportional deduction in federal payroll tax payments. Employers will receive a government reimbursement for any excess beyond the given tax liability.

Employers will need to amend their current COBRA election notices to include information about the premium subsidy and must include:

- 1) Forms necessary for establishing eligibility for premium subsidy;
- 2) Contact information of plan administrator and other personnel with information on the subsidy;
- 3) Description of the extended election opportunity;

(continued on Page 3)

Cont. from Page 2 - COBRA PREMIUMS

- 4) Description of an assistance-eligible individual's obligation to notify the plan when he or she becomes eligible;
- 5) Description of the qualified beneficiary's right to COBRA subsidy and conditions; and
- 6) Description of option to enroll in different coverage under the health plan.

For individuals already eligible, a similar notice must be given within sixty (60) days of enactment.

In light of these changes, we recommend that employers do the following:

- ◆ Compile a list of all assistance-eligible individuals who will need to be notified, which generally includes all former employees whose employment was involuntarily terminated on or after September 1, 2008, and any eligible spouses and dependents who were enrolled in coverage prior to the termination;
- ◆ Revise payroll systems to identify eligible individuals in order to report the tax credit to the government and receive the subsidy;
- ◆ Check with the insurance carrier, if a plan is insured, to determine the appropriate procedures for enrolling assistance-eligible individuals who are not currently enrolled in COBRA continuation coverage;
- ◆ Review stop-loss contracts, if the plan is self-insured, to determine whether coverage applies to assistance-eligible individuals who are not currently enrolled in COBRA continuation coverage; and
- ◆ Modify applicable COBRA premium billings for March 2009 coverage to take into account the sixty-five (65%) subsidy.

LIMITATION ON COST-SPLITTING IN ARBITRATION AGREEMENTS

The Sixth Circuit Court of Appeals has recently articulated a test to determine whether a cost-splitting provision in an arbitration agreement is enforceable. The provisions are to be analyzed by whether:

The potential costs of arbitration are great enough to deter [potential litigants] and similarly situated individuals from seeking to vindicate their federal statutory rights in the arbitral forum.

Mazera v. Varsity Form Management Servs., LLC et al., 565 F3d 997 (CA 6, 05/19/09).

In *Mazera*, the court was evaluating a case where an employee, who spoke very little English, signed his contract of employment which contained an agreement to arbitrate with a cost-splitting provision.

The provision in that employment contract instructed the employee to contribute either five (5) days' pay or \$500, whichever amount was smaller. The Employer in that case agreed in the contract to refund the employee's payment should the employee succeeds at arbitration. The contract also contained a provision that allowed the Employer to waive the deposit after an evaluation of the employee's financial situation.

The court pointed out that if the employee were to pursue his case in court, many attorneys, working on contingency, would cover the fees unless the employee succeeded. This would make litigation cheaper than arbitration for the employee, which runs counter to one (1) of the purposes of arbitration (that of arbitration being a cheaper alternative to litigation). Also unfair to the employee was the short period of time (ten [10] days) within which to come up with the necessary funds. The ultimate point is that employees cannot be deterred from exercising a statutory right by agreeing to split arbitration costs when those costs could mean the difference between the employee being able to afford a remedy and being financially unable to seek redress.

In this case, however, the matter was allowed to proceed to arbitration under the agreed to terms, solely because the Employer could waive the employee's cost and was willing to do so. Otherwise, this cost-splitting provision was not valid.

THE WILLIAMS FIRM SPOTLIGHTS "AARON CHAMPNEY"

Mr. Champney was the firm's 2009 Summer Law Clerk. Many thanks for your support, and we wish you the very best in your future endeavors.

U.S. SUPREME COURT ALTERS THE FRAMEWORK IN MIXED MOTIVE AGE

The Supreme Court in a five (5) to four (4) vote has changed the test for evaluating mixed motive cases under the Age Discrimination in Employment Act (ADEA). The court held that in cases where discrimination might only be part of the motive for the adverse employment action against the employee, the employee must demonstrate that the discrimination was a “but for” cause of the action.

The Plaintiff in *Jack Gross v. FBL Financial Services, Inc.* was fifty-four (54) years old when his Employer reassigned him to another position with fewer job responsibilities. 2009 U.S. LEXIS 4535 (06/18/09). The Plaintiff was paid the same in both positions. The Employer went on to create a new position in the company that had the Plaintiff’s old job responsibilities. The Employer staffed that new position with a woman in her early forties (40s) and who was once an employee under Plaintiff’s supervision.

The Plaintiff sued the company alleging the adverse employment action of reassignment. The complaint was particularly based on a mixed motive of age discrimination contrary to the ADEA. The Employer’s motive, it was determined, was to put a new person in the Plaintiff’s position. The concern was that this motive might be partially based on age.

The Eighth Circuit Court of Appeals applied the mixed motive framework adopted from Title VII cases. In that test, if the evidence shows that discrimination was a motivating factor (even if not the primary one), then the Employer must show that it would have taken the action regardless of that discriminatory motive. The Supreme Court examined both Title VII and the ADEA and decided that the evidentiary burdens were not intended to be equal between the statutes. The court held that the ADEA does not support a mixed motive claim. Instead, the Plaintiff in an ADEA case must show that *but for* his or her age the Employer would not have acted against him or her.

For Employers, this case may seem to grant more latitude to replace older employees with younger ones. Employers should be cautious, however. First, the court’s holding was by

a narrow majority, and a stronger set of facts and another opportunity to evaluate the ADEA may be decided differently. Second, the change in the test is not particularly dramatic. If the Employer’s motive looks to be primarily due to age discrimination, the employee still has the ability to sue under this new framework.

\$16 MILLION AWARD GIVEN IN AGE DISCRIMINATION CASE

On appeal, the Sixth Circuit sent a case back to the District Court for a reduction in the \$10 million dollars in punitive damages awarded against an Employer. The court cited Ohio law that requires a finding of “reprehensibility” in order to award punitive damages and that the punitive damages cannot exceed the compensation. The \$6 million dollar compensatory damages award stood, however. *Morgan v. New York Life Insurance Co.*, 559 F3d 425 (CA 6, 03/12/09).

The Plaintiff, a Managing Partner at New York Life, was chiefly responsible for finding and training new managers and insurance agents. The Managing Partner’s pay is dependent on how well he or she meets the corporate performance goals. The Plaintiff’s performance in reference to his goals was up for some debate. After a performance warning that required improvements in his “manpower” numbers, the company terminated the fifty (50) year-old Plaintiff and replaced him with a forty (40) year-old.

A key to the court’s analysis of the case was that the company had prepared part of a list of candidates to replace the Plaintiff *before* the Plaintiff ever failed to meet his manpower goals. The court also noted that the basis for termination of Plaintiff’s employment changed based on which member of the corporation was asked. In addition, the Plaintiff introduced a series of statements made by management regarding other employees as too old for the job. The corporation made many more exceptions for younger employees who failed to meet their goals.

Employers should be cautious about what they say relative to the future of a company. The court in this case makes the distinction that making vague statements about reorganizing for the
(continued on Page 5)

**Cont. from Page 4 - \$16 MILLION
AWARD GIVEN IN AGE**

future are fine, but when an individual is named, the statement can only lead to trouble.

Additionally, an Employer should never create a list of replacements (even if not a complete list) until that employee is no longer employed with the company.

**USERRA PREVENTS EMPLOYER FROM
IMPOSING ANY ADDITIONAL**

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) protects the jobs of those men and women who leave their jobs for active duty with the country's armed forces. A county Employer was found to have violated USERRA when it required a returning serviceman to submit to a "return-to-work" examination, to ascertain whether he was still physically and emotionally fit to be a police officer. *In re Petty*, 538 F.3d 431 (CA 6, 08/18/08), *cert. denied*, 129 S. Ct. 1933 (2009). The Sixth Circuit ruled that such additional requirements violated USERRA. The court pointed out that USERRA has its own threshold requirements that should satisfy Employers.

The Plaintiff was a police officer and made it to the rank of Sergeant before his Army Reserve unit was "called up." While stationed in Kuwait, the Plaintiff was arrested and charged with manufacturing alcohol and distributing alcohol to fellow soldiers—both of which violate the Military Code of Justice. Rather than face court martial, the Plaintiff accepted an honorable discharge. The photocopied discharge form became a source of contention in the case. Upon his return to the United States, the Plaintiff enlarged the form to "make it easier to read" but, in doing so, he cut off the reason for his discharge. The employer asked the Plaintiff upon reemployment whether he had been arrested during his absence and he said, "yes". However, he did not go on to explain the reasons.

The Plaintiff was reemployed, but the Internal Affairs Department began to question his story about the arrest. After an investigation, Internal Affairs decided that he had not omitted any crucial information, and the Director of Internal Affairs told the plaintiff that the case was closed. Shortly afterward, Plaintiff made a request of the department to allow him to return to his off-duty jobs (working private security is common among law enforcement employees), and the department turned him down. Also, Internal Affairs learned of the photocopying incident and started a second investigation (after the first investigation and the re-entry exam), prompting the Plaintiff to file suit for a violation of USERRA and discrimination under USERRA.

USERRA has four (4) threshold requirements, after which it requires the prompt reemployment (within two [2] weeks) of an enlisted person who returns from military service.

- 1) The individual notified his employer in advance of his military service departure;
- 2) The cumulative length of the service is less than five (5) years;
- 3) The requested reemployment is within the statutory time frame; and
- 4) The separation from the service was under honorable conditions.

Since the Plaintiff in this case met all of these requirements, the Employer had no right (contractual or otherwise) to require the Plaintiff to go through a return-to-work exam. Furthermore, his statements during this exam should not have been the basis of any investigation. The court reminded the Employer, and us, that USERRA does allow a "for cause" termination at any time after reemployment (even if that same day!).

Petty's discrimination claim was analyzed using the same standards used for traditional discrimination cases, with the "protected category" being enlisted persons. The denial by the company of his request to return to his off-duty employment was found to be discriminatory, as the e-mail (*continued on Page 6*)

**Cont. from Page 5 - USERRA PREVENTS
EMPLOYER FROM IMPOSING ANY
ADDITIONAL REQUIREMENTS FOR**

correspondence within the company revealed that his military service and his activities during it were part of the decision made in his denial.

Employers would be wise to pay attention to the four (4) requirements for reemployment under USERRA. As more and more people return from active duty, many companies are going to be expected to follow the Act when they are faced with returning employees. Ex-soldiers must be reemployed if those four (4) factors are met. The question remains of what this might mean for the people that filled in for the absent person.

**OKLAHOMA GUN LAW PREVENTS
EMPLOYERS FROM OUTLAWING GUNS**

The Tenth Circuit Court of Appeals upheld the Oklahoma legislature's passage of a bill that would make it illegal for employers to restrict their employee's rights to have a gun in his or her vehicle in the company parking lot. This decision disappointed many business owners, since they may now face criminal prosecution if their work rules restrict the firearms rights of their employees.

The statute protects only legally owned firearms, and they must be placed in a locked vehicle. Various business interests were not satisfied with these two (2) requirements (believing them to be too lenient), claiming that the new law improperly infringed on their right to control their property and their general duty under the Occupational Safety and Health Act (OSHA). The employers argued that OSHA required them to prevent hazards "likely to cause death or serious physical harm" in the workplace, and, therefore, they should be allowed to ban firearms from their property.

The court disagreed and found that in the absence of any OSHA standard governing firearms, the employers could not infringe on a protected right. This decision will be monitored, since many states are passing laws similar to Oklahoma's. If Michigan passes such a law, there will be a good chance that the employers here will not be allowed to keep handguns off their property.

**U.S. SUPREME COURT RULES THAT THOSE
WHO SPEAK OUT ABOUT
DISCRIMINATION ARE PROTECTED FROM**

The Metropolitan Government of Nashville and Davidson County ("Metro") internally investigated reports of sexual harassment. A human resources officer asked the Plaintiff whether she had ever witnessed any "inappropriate behavior." *Crawford v. Metro. Gov't of Nashville & Davidson County*, 129 S. Ct. 846; 172 L.Ed.2d 650 (01/26/09). The Plaintiff complained about Hughes, who had previously harassed her. After this answer, Metro fired the Plaintiff, ostensibly for embezzlement. Three (3) other women also told the investigator that Hughes had harassed them. Shortly after doing so, the employment of each was terminated by Metro. The county retained Hughes, however.

After the Plaintiff's employment was terminated, she sued Metro, alleging that she was illegally fired for engaging in protected activity, namely, reporting the harassment to the investigator when asked. The District Court (with the Court of Appeals affirming) ruled that the Plaintiff could not sue because she had not approached her employer on her own initiative.

The Supreme Court overturned the lower court's rulings that the Plaintiff could not sue for the activities in this case. The court stated that protected behavior can be prompted by an employer's own investigation, and does not need to be started by the employee. The court pointed out that if an employee could be penalized for honest answers to an employer's investigation, then the investigations would be pointless, as no employee would ever answer truthfully.

This is a cautionary example for employers, even if an employer does not anticipate firing anyone for reporting harassment. The employer in this case terminated the women's employment shortly after each responded to the investigator's questions. If the employer believed that there was some other conduct that warranted the termination of each woman's employment, then Metro should have had a large amount of evidence to that effect. Waiting until after each woman testified about sexual harassment to terminate her employment created an unfavorable inference against the employer.

BOARD OF EDUCATION AVOIDS UNFAVORABLE OUTCOME IN SUIT OVER

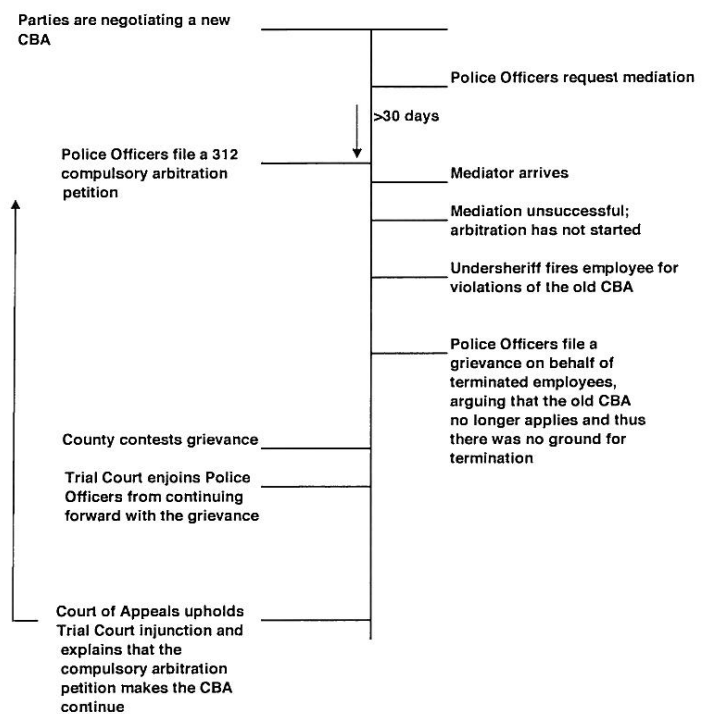
The Oak Park Board of Education (Board) successfully defeated a case brought by a number of teachers who wished to take advantage of an early retirement plan. *Langer v. Oak Park Bd. of Educ.*, Mich App; 2009 LEXIS 854 (unpublished, 04/21/09). The Board had voted in February 2005 to propose an early retirement plan to the teachers in order to establish the level of interest there would be in such a plan. The plan was still subject to a financial determination of the fiscal impact such a plan would have on the district.

The Board then hired an outside firm to prepare the Employee Severance Plan (ESP) documents for distribution to eligible teachers. The teachers received a memorandum from the superintendent announcing the suggested plan, a copy of the plan (which expressly notified them that it was subject to a determination of whether the teacher is eligible to retire and that it could be deemed null and void by the district), and an "Indication of Interest" form. The Plaintiffs turned in their "Indication of Interest" forms, along with enough other teachers that the Board received its orally-stated requirement of interest. However, based on the financial impact analysis, the Board voted to not implement the plan in June 2005.

The Plaintiffs sued in the hope that they could get the court to enforce what they believed to be a binding contract. The courts agreed with the district that the documents put together did not constitute a contract. The court also is not required to create a contract to "do justice" because the statements by the Board were not an "actual, clear, and definite promise" to offer the ESP. Other boards of education and employers generally should note that caveat. The Board was wise and fortunate that none of its statements were considered to be definite enough to create a contract. An employer needs to be cautious in its statements about a potential new policy or benefit when it is attempting to ascertain the potential interest of the employees.

FILING A 312 PETITION FOR ARBITRATION CONTINUES THE COLLECTIVE BARGAINING

In *Jackson County Board of Commissioners v. Police Officers Labor Council*, Mich App; 2009 LEXIS 1685 (unpublished, 08/21/09), the Michigan Court of Appeals had the opportunity to analyze the effects when a Collective Bargaining Agreement (CBA) continues past its anticipated expiration date. The facts are fairly complex, and easiest to understand by using the following flow chart. The chart is read from top to bottom.



In short, under these facts, the court held that a grievance filed in response to discipline by the employer under an old CBA causes the CBA to continue. If an employer wishes to keep a CBA from extending after its end date, then employees cannot be disciplined for violations of the old CBA.

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