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Award

The EEOC secured a jury award in a Federal District Court case of \$756,000 against AT&T in a religious discrimination case. EEOC v AT&T Arkansas. The company appealed to the Eighth Circuit which affirmed the award by the jury. In this case, the employee submitted written requests to the company for a one day leave of absence for a Friday so that the employee could attend the annual convention of Jehovah's Witnesses. While the company had granted such requests in prior years, it denied this request, although the request was submitted in accordance with the company procedures for requesting leaves of absence.

Pensions

The government agency that insures the payment of both corporate and multiemployer pension plans, the Pension Benefit Guaranty Corporation (PBGC) reported a deficit of \$11.15 billion as of the September 30, 2008 end of their fiscal year. No doubt this amount has substantially increased since then with the sharp decline in the value of investments by pension funds. It is estimated that company provided pension plans were underfunded by \$409 billion at the end of 2008 compared to an underfunding of \$60 billion at the end of 2007. Individual companies will double their contributions to corporate pension plans to \$111.2 billion in 2009 from \$50.5 billion in 2008. The significance of the growing deficit at the PBGC is that the deficit will either have to be paid by the taxpayers and/or an increasing amount of mandatory contributions by pension plans to the PBGC.

FMLA

The Eighth Circuit upheld summary judgment in favor of an employer who terminated an employee for failing to comply with a company policy that required employees to call in each day during an extended illness. The employee had previously been granted FMLA leave. Bacon v Hennepin County Medical Center. The union contract covering this employee specified that no calls after an absence of three days was considered a resignation and also specified that company human resources policies applied to FMLA leave requests. The Eighth Circuit held that an employer who can prove that it would have made the same adverse employment decision had an employee not exercised FMLA rights will not be found guilty of violating FMLA. In this case, the employer was aided by their use of language in their FMLA leave request in the employee handbook and in their labor contract that specified that the company human resources policies apply to FMLA leave requests.

Sexual Harassment

The First Circuit in Chaloult v Interstate Brands Corporation affirmed a decision by the Maine U. S. District Court granting summary judgment to an employer charged with sexual harassment. In this case, a female supervisor resigned and accused a male supervisor of questioning whether she had a sexual relationship with a fellow employee. The department manager conducted a prompt investigation and issued a warning letter to the male supervisor in question. A year later the female supervisor who resigned filed suit against the employer alleging sexual harassment during her employment. The Eighth Circuit cited U. S. Supreme Court decisions in Farragher v City of Boca Raton and Burlington Industries, Inc v Ellereth, reviewed in earlier issues of **Employee Briefs**, which held that an employer who has an anti-harassment policy and promptly investigates and takes reasonable action, i.e., “exercises reasonable care” after a complaint of sexual harassment is filed will not be guilty of sexual harassment. In this case, the female supervisor resigned and then filed her complaint instead of filing a complaint during her employment in accordance with posted company policy.

Retaliation

Courts have held that in order to proceed to a trial in a case of alleged retaliation, an employee must first show a prima facie case. The employee must show: (1) He or she engaged in statutorily protected activity; (2) He or she suffered an adverse employment action; and (3) The protected activity and the adverse employment action were causally connected. Once a prima facie case is shown, the burden of proof shifts to the employer to show a legitimate business reason for taking the adverse employment action. The burden then shifts back to the employee to show that the employer’s proffered reason is really a pretext masking the real discriminatory reason for the adverse employment action. The First Circuit in Dennis v Sylvania, Inc upheld a summary judgment in favor of an employer. In this case, the day after a human resources employee gave testimony in a sexual harassment complaint against a coworker, an investigation of an earlier complaint against the human resources employee filed by a job applicant resulted in the human resources employee being given a written warning. A month later the human resources employee was terminated as part of a reduction in force resulting in the termination of several employees. Another human resources employee was retained based on the conclusion by the company that the retained employee was a better employee. The First Circuit decided that the third prong of the prima facie requirement was not proven in that the terminated human resources employee was not able to connect his testimony to his subsequent termination.

The U. S. Supreme Court held in Crawford v Metropolitan Government of Nashville, which was discussed in the December 2008 **Employee Briefs**, that a woman who was fired after answering questions during her employer’s investigation of a claim of sexual harassment filed by a fellow employee could sue the employer under the anti-retaliation provision of Title VII. The decision, written by Justice Souter, was on behalf of a 7 to 2 court majority. The majority concluded that Title VII protects workers who have opposed “any practice” that the Act makes illegal and this includes employees who answer questions during an employer conducted investigation. In this case the employer contended that the employee was discharged because of alleged embezzlement.

Union Membership

Union membership increased by 428,000 in 2008. This is the largest increase in the past 25 years. Most of the new members are government employees. The number of unionized government workers increased by 275,000 in 2008. Private sector unionized workers increased by 150,000. The percentage of workers in unions increased to 12.4% from 12.1% in 2007. The percentage of employees belonging to unions in 1983 was 20.1%. 36.8% of government employees currently belong to unions while only 7.6% of private sector employees belong to

unions. 11.4% of workers in the manufacturing sector belong to unions. 16.1 million workers belonged to unions by the end of 2008. The next big push in union organizing efforts will occur in the House and the Senate when the card check bill (aka, the Employee Free Choice Act) is debated.

Job Cuts

The rapidly increasing volume of layoffs and terminations has resulted in the rapid growth of employment related charges being filed with the EEOC, which no doubt will lead to an increase in employment related lawsuits. In 2008, the number of charges filed at the EEOC increased by 15% to 95,400. The number of charges filed has increased by 26% since 2006. With the even faster increase in layoffs during the first month of 2009, it can reasonably be assumed that the number of charges filed at the EEOC will increase even more rapidly, with a resultant growth in employment related lawsuits. The EEOC now has a backlog of 73,951 cases, up 35% since 2007. Fewer than half the cases are resolved with 180 days.

Settlements

The EEOC settled a class action sexual and religious harassment and retaliation lawsuit with a Chicago dental practice for \$462,500. The EEOC alleged that the dentist discriminated against eighteen employees by sexually harassing them with comments, propositions and touching. The EEOC also alleged that the dentist was guilty of religious discrimination by forcing the employees to learn about Scientology and to engage in Scientology religious practices. The dentist allegedly retaliated against employees who complained about the sexual or religious discrimination.

The Washington, DC area Metro system settled a case with an employee who charged religious discrimination because the employer had a policy of requiring bus operators to wear pants and the employee's religion required the wearing of long skirts. The employer paid \$45,000 to settle the case and agreed to change its policy.

Accommodation

The Sixth Circuit in Talley v Family Dollar Stores reversed the granting of a motion for summary judgment by a trial judge and held that when an employee makes repeated requests for an accommodation and the request is denied and no reasonable alternative is offered a jury could conclude that the employee was forced to resign, thereby resulting in a constructive discharge. The case was remanded for a jury trial. In this case, an employee asked to use a stool and in the alternative to meet to discuss other potential accommodations. The employer refused.

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