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“Employee Briefs”
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Settlements and Awards

Staples, Inc. agreed to pay \$42 million to settle 13 lawsuits involving allegations that the company had misclassified more than 5,000 assistant store managers as being exempt from federal and state wage and hour laws and therefore did not pay them overtime wages. The cases go back to 2002.

In a case filled with irony, the EEOC was required by a Federal District Court Judge in Iowa to pay \$5 million in damages to CRST Van Expedited, Inc. The judge determined that the EEOC violated its statutory obligation to investigate and conciliate Title VII claims filed with the agency. The EEOC had filed a complaint against the employer in Federal Court. The complaint against the employer alleged that 220 women had been sexually harassed by the employer. The court dismissed the lawsuit against all but 67 of the claimants and found that the EEOC “did not conduct any investigation of the specific allegations of the remaining claimants, let alone a reasonable cause determination as to their allegations or conciliate them.” The EEOC failed to interview any claimants or subpoena any documents or make a specific cause evaluation of the claims of the remaining claimants or even try to conciliate before filing the lawsuit. The court held that its award of \$5 million in damages and attorney fees was necessary to guarantee the observance by the EEOC of its statutory requirements and not to continue to burden the employer and the Court with additional unnecessary expense and wasted time.

Supremes

The Civil Rights Attorney Fees Awards Act provides that an attorney who successfully represents a client in a civil rights case for little or no fee will have their fees paid by the losing party on the basis of the attorney’s skill, experience, the issue that was litigated and the success achieved in litigation. In Perdue v. Kenny, the Eleventh Circuit affirmed the award of reasonable attorney’s fees based on these factors and added an increase, referred to by the court as an enhancement, in the fees which must be paid by the losing party to the attorney for the plaintiffs for superior results and superior performance. While this is a case involving foster children, the results will impact the fees awarded to attorneys representing clients in civil rights cases. The Solicitor General of the United States filed an amicus brief arguing that reasonable attorney fees already reflect an attorney’s performance and abilities and therefore should not be enhanced.

In Lewis v City of Chicago, which was briefly reviewed in a past issue of **Employee Briefs**, the Court must decide a case involving its prior decision in Ricci v Destefano and its decision in Ledbetter v Goodyear which was followed by the passage by Congress of the Lilly Ledbetter Act. In Ricci, the Court decided by a 5 to 4 margin that the city of New Haven was wrong to throw out the results of a firefighter promotion test because too few minorities qualified for promotions. The Ledbetter case, also decided by a 5 to 4 margin, involved the issue of the EEOC’s statute of limitations in filing complaints of discrimination.

The issue before the Court in Lewis is the timeliness issue. However, the case has at its core the same type of testing issue that the Court confronted in Ricci. In this case, the city of Chicago required an entry level firefighters’ test. 26,000 applicants took the test. 45% were white, 37% black. The city initially

decided that applicants would have to score 65% on the test to qualify for the next step in the employment process. When faced with a large number of applicants who scored 65% or more, the city then created two groups of applicants; those “well qualified” who scored 89% or better and those who were “qualified” who scored between 65% and 88%. The city then limited hiring to the “well qualified” group of applicants. 75% of the well qualified applicants were white and 12% were black. The qualified black applicants who scored between 65% and 88% sued and won when a federal judge ruled that the city’s actions violated Title VII’s prohibition of hiring practices that seem neutral, but have a “disparate impact” on minorities. The judge also ruled that there was no proof that those who scored higher made better applicants and that each time the city hired from a well qualified list it constituted “a fresh act of discrimination.” The city appealed the decision and argued that the black applicants had filed their claim too late, in that they missed the 300 day deadline for filing a complaint after the city created the two lists of applicants thereby disqualifying the merely qualified applicants. Whether or not the Court reverses the Court of Appeals, the issue of tests will continue to be confronted by a number of federal courts. A New York federal judge recently held that a test hurt black applicants because it was part of “a pattern, practice and policy of intentional discrimination against black firefighter applicants . . .” In January 2010, the U. S. Justice Department filed suit against the state of New Jersey over its use of a written test required of all policemen seeking to be promoted to sergeant. Because black and hispanic applicants pass the test at significantly lower rates and the state has not shown that such written tests are necessary to make employment decisions, the Justice Department contended that there was a disparate impact in violation of the law.

Retaliation

The Sixth Circuit in Thompson v North American Stainless LP after a rehearing by the entire court reversed a decision by a three judge panel of that court. The case started when the District Court held that a third party, the fiancé of a fellow female employee, who filed a charge of sexual discrimination against the employer, who himself was discharged three weeks after his fiancé filed the complaint, could not prevail on a claim of retaliation because there is no provision in the law for claims of retaliation by third parties. After the District Court granted a motion for summary judgment, the plaintiff appealed to the Sixth Circuit. A three judge panel of the Sixth Circuit by a 2 to 1 margin reversed the District Court and held that “Title VII prohibits employers from taking retaliatory action against employees not directly involved in protected activity, but who are closely related to or associated with those who are directly involved, that it is clear that the protected activity motivated the employer’s action.” The full court reversed the panel’s decision and held that because Thompson, the male fiancé, did not engage in any protected activity of his own, by making a complaint of Title VII discrimination or testifying in, participating in or assisting in an investigation of another employees complaint, he could not state a claim of retaliation under Title VII.

Sexual Harassment Policy

The Second Circuit vacated a District Court’s granting of a motion for summary judgment awarded to Jet Blue Airways. The case was brought by a former customer service employee who complained to her supervisor that he had sexually harassed her by causing a hostile work environment. The supervisor made inappropriate comments to the female employee and other female employees and about them to other employees and the public on a plane, over a seven month period. The male supervisor did not apologize and the airline, who knew of complaints by other female employees against the same supervisor, took no disciplinary action against the supervisor. The female employee did not file her complaints with other higher supervisors or the human relations department as provided in the sexual harassment policy. Jet Blue argued in support of its motion at the district court level that it was entitled to the affirmative defense articulated by the Supreme Court in the Farragher/Ellerth case because the employee failed to follow the company’s sexual harassment policy for reporting alleged harassment which gave employees options for reporting harassment to persons other than supervisors who were accused of harassment. The Farragher/Ellerth affirmative defense is that an employer may escape liability when it can show that it “exercised reasonable care to prevent and correct promptly any discriminatory harassing behavior” and “the plaintiff employee unreasonably failed to take advantage of any preventive or

corrective opportunities provided by the employer . . .” The Second Circuit held that “there is no requirement that a plaintiff exhaust all possible avenues made available where circumstances warrant the belief that some or all of the avenues would be ineffective or antagonistic” and that the court would evaluate the circumstances of each case in making the determination whether the Farragher/ Ellerth defenses should apply. The court found significant that prior to the filing of this case when another female employee complained to the human relations department about the harassment by this same supervisor, the complaining employee was fired three weeks later. The court concluded that the alternative means for filing a complaint appeared to be ineffective or even “threatening.” The issue of whether the employee acted reasonably by believing that it was futile to file a complaint through the other avenues in the sexual harassment policy was an issue of fact which should be decided by a jury. The court remanded the case to the district court to hold a jury trial. Diane Gorzynski v Jet Blue Airways Corporation

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