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Employment Law

In This Issue

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Employment Cases On the Supreme Court Docket for the 2003-2004 Term

By Eve B. Masinter and Melissa M. Mulkey

When the Supreme Court opens its 2003-2004 term, it will have several important employment cases on its docket. These cases range from a challenge to a hiring policy under the Americans With Disabilities Act to recovery of attorneys' fees under the Equal Access to Justice Act. The following is a brief summary of the issues presented in employment law cases before the court.

Raytheon Co. v. Hernandez, U.S., No. 02-749

On October 8, 2003, the Court heard the first, and likely the most significant, of its employment cases this term. Hernandez involves an appeal from the Ninth Circuit's decision reversing a grant of summary judgment in favor of Raytheon Company in claims brought by a former employee, Joe Hernandez. Mr. Hernandez worked for Hughes Missile Systems (later acquired by Raytheon) for 25. In July of 1991, Ms. Hernandez tested positively for cocaine use on the job, an offense which was grounds for his immediate termination. Rather than being terminated, however, Mr. Hernandez was given the option to resign in lieu of termination, which he choose to do. This was noted on his personnel file and, pursuant to an "unwritten" policy, resulted in his ineligibility for rehire.

Two and a half years later, in January 1994, Mr. Hernandez applied to be rehired with Hughes. He was not selected for rehire based on the unwritten policy against rehire of individuals who had resigned in lieu of termination. Mr. Hernandez filed suit under the Americans with Disabilities Act ("ADA"), alleging that he was denied employment based on his record of drug addiction.

In reviewing the district court's grant of summary judgment, the Ninth Circuit determined that Mr. Hernandez met his *prima facie* burden of demonstrating that he had a record of disability (drug addiction), applied and was qualified for the position, and was not hired because of his record of disability (because there were disputed issues of fact as to whether the employer knew of the alleged disability at the time of its decision). In examining whether the employer met its burden of articulating a legitimate nondiscriminatory reason for its actions, the Ninth Circuit held that "Hughes' unwritten policy against rehiring former employees who were terminated for any violation of its misconduct rules, although not unlawful on its face, violates the ADA as applied to former drug addicts whose only work-related offense was testing positive because of their addiction." Thus, the Ninth Circuit held that not only had Hernandez provided sufficient evidence to proceed to a jury on his failure to hire claim, but that "a policy that serves to bar the re-employment of a drug addict despite his successful rehabilitation violates the ADA."

This case presents some interesting issues for the Court. First, it will be the first time that the Court has addressed the issue of a "qualified individual with a disability" in the context of a recovered drug addict. Second, although the Ninth Circuit specifically found that the plaintiff's "disparate impact" claim was time barred, it appears to have utilized a disparate impact analysis in this disparate treatment case by holding that an employer's articulated reason is not sufficient if based on a policy that, in effect, bars employment based on a disability. Finally, there is the broader issue of an employer's use of a neutral policy and under what circumstances employers must tailor such policies to the individual circumstances of its employees or applicants.

General Dynamics Land Sys. Inc. v. Cline, U.S., No. 02-1808

On November 12, 2003, the Court will hear the second of its employment cases. This case also presents a significant issue and will resolve a split among the Circuit Courts of Appeal. Specifically, the Court will address a claim for "reverse" age discrimination and resolve the current split on whether such claims are actionable under the ADEA.

Cline involved a claim by employees between the ages of 40 and 49 who sued after their employer entered into a collective bargaining agreement providing retiree medical benefits only to those individuals who had 30 years of service and were 50 years of age or older. This agreement replaced the previous collective bargaining agreement, which only required 30 years of seniority for eligibility (no minimum age requirement). The employees argued that by entering into this agreement, the employer discriminated against them on the basis of age in violation of the Age Discrimination in Employment Act ("ADEA"). The district court granted the employer's motion for summary judgment on the grounds that the ADEA does not prohibit "reverse" age discrimination (i.e. actions that favor older workers over younger ones). The Sixth Circuit disagreed, finding that the plain language of the ADEA provides protection to any individual over 40 who is discriminated against on the basis of age.

In contrast, the First and Seventh Circuits have found that the ADEA does not provide a cause of action for "reverse discrimination." In other words, younger workers, even if over 40 and thus protected under the ADEA, cannot challenge practices that favor older workers. These Circuits looked beyond the plain language of the ADEA and focused on the intent of the Act.

The Supreme Court will be called upon to resolve this split and determine whether a claim for "reverse" age discrimination is viable.

Jones v. R.R. Donnelley & Sons, Inc., U.S., No. 02-1205

The Supreme Court has also agreed to resolve a split among the Circuit Courts of Appeal concerning the proper limitations period for racial harassment and termination claims under the Civil Rights Act of 1866 (42 U.S.C. §1981). Specifically, the Court will be asked to determine whether the four-year "catch-all" statute of limitations implemented pursuant to 28 U.S.C. §1658, or the statute of limitations from the forum state, applies to section 1981 claims.

For those who enjoy a close examination of statutory interpretation, this is your case. As many of you know, in Patterson v. McLean Credit Union, 491 U.S. 164, 176-77 (1989), the Supreme Court held that section 1981 "extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment." Subsequently, Congress amended section 1981 by way of the Civil Rights of Act of 1991, specifically making it applicable to "the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. §1981(b).

Between these two events, in 1990, Congress enacted a uniform catch-all statute of limitations for "civil actions arising under an Act of Congress" enacted ***after*** the effective date of the statute and for which a specific limitations period is not provided. 28 U.S.C. §1658.

In this case, the Seventh Circuit addressed whether the federal four-year, or the forum state's more restrictive two-year, limitations period applied. The plaintiffs argued that because, based on the Supreme Court's ruling in Patterson, no cause of action "existed" prior to the enactment of the Civil Rights Act of 1991, the court should utilize the four-year limitations period for these claims. The employer urged that the two-year period was appropriate because section 1658 was only meant to encompass new enactments, not amendments to existing statutes.

Ultimately, after much analysis, the Seventh Circuit adopted the employer's argument, holding that the four-year catch-all limitations period only applied to statutes enacted after section 1658, not to existing statutes amended after the enactment of section 1658. Thus, the forum state's period applied to the plaintiffs' section 1981 claim because the Civil Rights Act of 1991 merely amended section 1981. The Seventh Circuit joined the Third and Eighth Circuits. In contrast, the Tenth Circuit has ruled that the catch-all limitations period applies to section 1981 claims. The Court will resolve this conflict.

It is of interest to note that, in August of this year, the Solicitor General filed an *amicus* brief arguing that the four-year period should apply because these claims did not exist until Congress passed the Civil Rights Act of 1991.

Scarborough v. Principi, U.S., No. _____

Just a few weeks ago, the Court granted review of a case involving a claim for fees pursuant to the Equal Access to Justice Act ("EAJA"). In this case, the Court will be asked to determine whether failing to make all of the required allegations in a fee application is jurisdictional, or if a party can later amend the application.

In this case, after prevailing in the underlying litigation and within the 30-day time period, Mr. Scarborough applied for attorneys' fees under the EAJA, 28 U.S.C. § 2412(d), but failed to allege in the fee application that "the position of the United States was not substantially justified," as required by the statute. The Government argued that this pleading requirement was jurisdictional and that he could not later amend his application. The Federal Circuit agreed, finding that the required allegations are jurisdictional in nature and must be made within the 30-day application period.

This decision is at odds with the Third and Eleventh Circuits, both of which have held that the allegations are pleading requirements that can be met by amending a timely pleading. The Supreme Court will resolve this split as well.