**RASHRM**

**EMPLOYMENT LAW UPDATE**

**FEBRUARY 2014**

**DISCRIMINATION**

Federal Circuit Courts

*Alexander and Rogers v. Casino Queen, Inc.*, No. 12-3696 (7th Cir. January 8, 2014)

***Facts***: Plaintiffs were two African-American women who worked as cocktail waitresses for Casino Queen. They claimed race discrimination in the manner in which floor assignments were made on the casino floor and that they were often assigned to undesirable locations and white waitresses were assigned to the more desirable and more profitable floor areas. Floor assignments were usually bid upon by seniority, but were subject to re-assignment if a waitress was absent or went home early. Plaintiffs also claimed they were disciplined more harshly than their white colleagues with respect to absences, breaks and eating at work. Lastly, they also claimed that their requests for vacation or personal days were denied without explanation, but the employer routinely approved white cocktail waitresses’ requests. In addition to race discrimination, their complaints alleged retaliation and a hostile work environment.

***Summary***: Title VII makes it unlawful for an employer to discriminate against any individual because of his or her race. A plaintiff may prove race discrimination through direct or indirect proof. Under the direct method, the plaintiff must have direct evidence of discriminatory intent or circumstantial evidence reflecting a suspicious timing, ambiguous statements or behavior directed to other employees in the protected group. In addition, circumstantial evidence must demonstrate that similarly situated employees outside the protected class received systematically better treatment.

Under the indirect method of proof, a plaintiff must first establish a prima facie case of discrimination: (1) the plaintiff is a member of a protected class (2) that the plaintiff was meeting the employer’s legitimate expectations (3) the plaintiff suffered an adverse employment action; and (4) at least one similarly situated employee, not in the protected class, was treated more favorably. If this prima facie case is shown, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment action. If the employer meets this burden, the burden returns to the plaintiff to establish by “a preponderance of the evidence” that the stated reason is a pretext for race discrimination.

In this case, cocktail waitress floor reassignments was considered an adverse employment action sufficient enough to state a cause of action for race discrimination, because of the impact on tips and income that could be earned by a particular floor assignment. As to the employer’s articulated legitimate reason for action, it claimed that all floor re-assignments were made in a “race-neutral” fashion and that plaintiffs were disciplined for violating policy. The Court determined these to be fact issues more appropriate for a jury to decide and overturned the trial court’s grant of summary judgment.

*Green v. American Federation of Teacher*s, No. 13-2823 (7th Cir. January 23, 2014)

***Facts***: Plaintiff was fired as a teacher and asked his union to file a grievance under the collective bargaining agreement. The union refused. The plaintiff pursued his own claim, won, and was reinstated. He then filed a claim against the union for race discrimination claiming comparable white employees had been assisted in the grievance process by the union. He also claimed that the union retaliated against him because he had opposed earlier discrimination. The trial court dismissed the race discrimination claim and retaliation charge because the plaintiff failed to establish any duty under the collective bargaining agreement or any statute that required the union to represent him.

***Summary***: The federal circuit court reversed and remanded the case for further proceedings. The Court found that actions under Title VII of the Civil Rights Act do not hinge on any other statutory or contractual duty. Instead, if an employer, or in this case a labor organization, takes action on account of a person’s race, an action may be maintained. To hold otherwise, stated the Court, would provide that Title VII does not apply to at-will employment.

**ERISA**

United States Supreme Court

*Heimeshoff v. Hartford Life & Accident Insurance Co.* No. 12-729 (December 16, 2013)

***Facts:***Employee of Wal-Mart brought ERISA claim against Wal-Mart and the Plan Administrator, Hartford Life & Accident Insurance Company. The plan had a provision that required any suit to recover benefits to be filed within three years after “proof of loss” was due. After exhausting administrative remedies, suit was filed. However, when the suit was filed, it had been almost three years from the Plan Administrator’s final administrative denial and more than three years after proof of loss was due.

***Summary:*** The contractual limitations period in the plan was enforceable. While it is true that a plan participant’s cause of action under ERISA does not accrue until the plan issues its final denial, there is nothing to prevent a Plan document from commencing the limitations period before that time. The Court held that a contractual limitations provision is enforceable so long as the limitations period is of reasonable length and there is no statute to the contrary.

Federal Circuit Courts

*Teamsters Local Union No. 705 v. Burlington Northern Santa Fe, LLC*, No. 11-3705 (7th Cir. January 24, 2014)

***Facts:*** Teamsters Union represented employees that worked for an independent contractor that ran a rail yard for the Burlington Northern railroad. Burlington Northern terminated its contract with the independent contractor. In so doing, it terminated the employees, but offered the employees an opportunity to apply for a job with Burlington Northern’s new contractor. The new contractor’s wages and benefit packages were not as good as the Teamsters offered. A class action suit was brought by the Teamsters claiming Burlington Northern had violated ERISA in unlawfully interfering with the attainment of retirement benefits.

***Summary:*** ERISA prohibits any person to discharge, fine, discipline or discriminate against a participant in an employee benefit plan for the purpose of interfering with the participant’s attainment of benefits under the plan. However, in this case none of the participants were actual employees of Burlington Northern. Rather, Burlington Northern hired an independent contractor to provide certain services in its rail yard. Since the only employer relationship was between the independent contractor and its employees, Burlington Northern could not be liable under ERISA.

**RETALIATORY DISCHARGE**

Federal Circuit Courts

*Gaines v. K-Five Construction Corp.*, No. 12-2249 (7th Cir. January 3, 2014)

***Facts:*** Plaintiff questioned the “road worthiness” of two different trucks he was assigned to drive. Although management attempted to address his concerns, the trucks never reached the level of safety sought by the plaintiff. He was subsequently terminated. Plaintiff brought claims for race discrimination and retaliatory discharge.

***Summary:*** As to the race discrimination claim, this claim was dismissed because plaintiff failed to identify a similarly situated person that did not suffer the same adverse employment action as plaintiff. The Court found that in making “comparisons” for adverse employment action based on policy infractions, the “similarly situated” employees’ infractions had to be “at least as serious” of an infraction of policy as that of the plaintiff.

Plaintiff’s retaliatory discharge claims were brought under the Surface Transportation Assistance Act and Illinois common law. Both provide an employee protection from retaliation for engaging in statutorily protected activity. An employer is prohibited from retaliating against its employee for taking action if the employee had a good faith and reasonable belief that he was opposing an unlawful practice. This is true even though the complaint or report filed by the employee contains inaccurate information.

**PUBLIC EMPLOYMENT – FIRST AMENDMENT – UNION ACTIVITIES**

Federal Circuit Courts

*Cillo v. City of Greenwood Village*, No. 12-1395 (10th Cir. December 31, 2013)

***Facts:*** The plaintiff was a police sergeant who was terminated following an incident where he was in charge when subordinate officers violated the Fourth Amendment. He filed an action against the village and the police department’s chief and a lieutenant under Section 1983 claiming that he was terminated in violation of the First Amendment because of his union activities, and his right of free association was clearly established at the time the command staff terminated him.

The plaintiff was a well-decorated, 28-year veteran of the city’s police force, who was never formally disciplined prior to his termination in 2009. In 2007, he helped form the police union, which advocated for collective bargaining for all member police officers. The evidence indicated that the defendants were actively opposed to the union. In 2008, the defendants transferred the plaintiff to a unit with non-union members and stripped him of another leadership role, which reduced his pay. Following the incident in 2009, the defendants terminated the plaintiff (and two other union members) for failing to effectively supervise officers at the scene, even though the department’s policy was additional training rather than formal discipline. In addition, the defendants imposed the lowest form of discipline of a non-union member involved in the incident with a similar infraction.

***Summary:*** Section 1983 of the Civil Rights Act allows a public employee to seek damages against public officials who have violated his or her federal rights while acting under the color of state law. The doctrine of qualified immunity shields these officials from damage actions unless their conduct was unreasonable in light of clearly established law.

The district court granted the city’s motion for summary judgment. The district court concluded that the plaintiff failed to show a genuine issue of disputed fact that his union activities was a motivating factor in the city’s decision to terminate him. The Appellate Court, however, reversed and remanded finding that the city and the individual defendants were not entitled to summary judgment because the evidence – when seen in a light favorable to the plaintiff – showed that there were issues of material fact as to whether the plaintiff’s union activities were a motivating factor in the city’s decision to terminate him. If so, the defendants violated the plaintiff’s First Amendment rights. In addition, the defendants were not entitled to qualified immunity because the plaintiff’s First Amendment rights of free association was clearly established at the time of his termination.

**RESPONDEAT SUPERIOR – THE TRAVELING EMPLOYEE**

Illinois Appellate Courts

*Pister v. Matrix Service Industrial Contractors*, 2013 Ill.App (4th) 120781

***Facts:*** Plaintiff was killed in an automobile accident involving the defendant’s employee. The employee was traveling from Ohio to a construction site in Champaign, Illinois to start working at a job for the defendant. The employee’s vehicle crossed the centerline and struck the plaintiff’s car, resulting in the death of both drivers. The plaintiff brought suit against the employer under the doctrine of respondeat superior.

***Summary:*** Generally, a “traveling employee” is an Illinois workers compensation concept describing an employee who is required to travel away from his employer’s premises in order to perform his job. A traveling employee is held to be “in the course of his employment” from the time he leaves home until he returns. Respondeat superior is a legal doctrine under which an employer may be found liable for the wrongful acts of its employee. In refusing to extend the traveling employee concept to the respondeat superior doctrine, the Court rationalized that the purpose of the Worker’s Compensation Act was to provide financial protection for employees who suffer work-related injuries. However, respondeat superior assigns liability to employers based upon an employee’s negligence when acting within the scope of employment. So long as the employee is not on “a special errand” for the employer, such as transporting tools or materials for the employer’s benefit, the traveling employee concept cannot be used to impose tort liability.

**WORKERS’ COMP**

Illinois Appellate Courts

*Village of Village Park v. Illinois Workers’ Compensation Commission*, 2013 IL App (2d) 130038WC (December 31, 2013)

***Facts:*** The claimant, a code enforcement officer for the village, suffered injuries to his back and knee after he fell down the back stairs of the police station where he was stationed. The claimant had previously injured his knee on his private property during non-working hours and his superiors knew of his knee problems.

***Summary:*** Initially, the workers’ comp arbitrator concluded that the claimant failed to prove that his injuries arose out of and in the course of his employment because the arbitrator found that he act of walking down stairs by itself did not establish a risk greater than those faced outside the work place. The Workers’ Comp Commission, however, reversed the arbitrator, finding the claimant’s back injury was caused by an accident arising out of and in the course of his employment. The Commission determined that the claimant’s use of the stairs fell within the “personal comfort doctrine” as he was forced to use that particular stairway to complete his work related activities. Therefore, the claimant was entitled to his workers’ comp claim for his back injury. His knee injury, however, was not compensable because the evidence did not indicate that his knee injury was exacerbated by the fall down the stairs.

The Illinois Appellate Court affirmed the Commission’s decision. The Court determined that the evidence in the record support the Commission’s finding that the claimant’s back injury arose out of and in the course of his employment. The evidence indicated that the claimant was required to use those stairs to complete his work related activities, and the village required him to continuously traverse those stairs even though it knew of his knee injury. According to the Court, these facts were more than sufficient to support both the conclusion that the claimant’s employment placed him in a position of greater risk of falling, and that the frequency with which the claimant was required to traverse the stairs constituted an increase risk on a quantitative basis from that to which the general public is exposed.

Submitted by:

Clayton L. Lindsey

VP of Gov’t Affairs-RASHRM

Attorney at Law

WilliamsMcCarthyLLP

[clindsey@wilmac.com](mailto:clindsey@wilmac.com)

G:\Wpdocs\_bev\CLL\R\RSHRM\feb2014.docx