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NLRB

The two attorneys selected by President Obama to fill vacancies on the NLRB will no doubt attempt to change the rules governing NLRB conducted elections. Craig Becker was, for years, an attorney for the Service Employees International Union (SEIU). Mark Pearce was an attorney for the AFL-CIO. With these interim appointments, which expire at the end of 2011, three of the five Board members are viewed as pro -union. The interim appointment of Mr. Becker is of special concern for employers because he has strongly advocated allowing union organizers, after a petition has been filed, to come into places of work and speak to voting employees for as long as employers speak concerning union elections. He has also advocated not allowing employers to participate at all in hearings concerning elections or unfair labor practices. His position has been that the NLRB can make these changes without authorization from Congress. He has also advocated allowing unions to utilize intermittent strikes in mid contract concerning grievances.

Some employer representatives have predicted that an effort will be made by the newly constituted NLRB members to:

- Increase penalties for employer unfair labor practices
- Restrict an employer's right to replace economic strikers
- Reduce the maximum period from the filing of the election petition to two weeks
- Allow temporary employees to vote in elections as if they were permanent employees
- Have elections held at a neutral site
- Eliminate employer observers during an election

One other thing that is of concern to employers is the expiration this summer of the term of the Republican appointed general counsel of the NLRB. The current general counsel will be replaced by a different attorney appointed by the President.

Rude Behavior

The Fifth Circuit affirmed the granting of a motion for summary judgment to an employer in Reine v Honneywell International, Inc. The case involved an allegation of sexual harassment and hostile work environment. The plaintiff alleged that on twenty occasions her supervisor was rude, harsh and demeaning in his remarks about her abilities and performance. The Fifth Circuit noted that the plaintiff "easily proved that her supervisor was insulting and demeaning," but that "more must be shown." The harassment must be proven to be based on the plaintiff's sex. In this case, the court concluded that the supervisor was an equal opportunity harasser who spoke harshly to many male as well as female employees. The plaintiff's burden was to prove that the "supervisor's behavior toward female employees was more severe than his treatment of male employees in the same position." This she could not prove.

Performance Appraisals

The Sixth Circuit in Cutcher v Kmart reversed a Federal District Court grant of the employer's motion for summary judgment because, the court found, that there was an issue of disputed fact as to whether the layoff of an hourly employee was part of an overall reduction in workforce or was, in fact, retaliation because of the employee's recent FMLA leave. The plaintiff had been employed by the employer for 20 years and had always received the highest or at worst the second highest rating in the employer's annual performance appraisals. While the evaluation supervisor indicated that she had some problems with team work, she never received any warnings or discipline. Within weeks of the completion of her six week FMLA leave during which she was compensated by the employer's short term disability insurance, the employer announced a nationwide layoff. Each store was directed to evaluate each employee's most recent appraisal. This employee's appraisal score, which included input from supervisors, was much lower than her recent appraisal and she was one of six employees who were laid off. The employee sued and the Federal District Court granted the employer's motion for summary judgment. The Sixth Circuit reasoned that a reasonable fact finder could conclude that the termination was, in fact, in retaliation for the FMLA leave. The court noted that the employer did not provide to the district court the documents on which they based their decision to select the plaintiff for a layoff.

Essential Job Functions

The First Circuit in Richardson v Friendly Ice Cream Corp agreed with a district court's conclusion that an employee was not terminated in violation of the ADA. The court based its holding on the fact that the employee could not perform the essential job functions of her job even with reasonable accommodations. The employee injured her shoulder while working as an assistant manager and took an FMLA leave of absence. Surgery was necessary as a result of her shoulder injury and, following the surgery, she informed the employer that she could no longer perform repetitive activity or lift weights heavier than five pounds with her right arm. The employer terminated her because she remained on leave beyond the time limit specified in the employer's FMLA policy. She sued claiming an FMLA violation. After reviewing the job description of the assistant manager position she previously held and testimony about the duties she performed, the court concluded that even with a reasonable accommodation she could not perform the essential functions of her job and therefore there was no violation of the FMLA. The court specifically rejected the employee's contention that a reasonable accommodation would allow her to delegate to other employees all lifting and repetitive motion activity.

Age Regulations

The EEOC proposed regulations defining when employers will be able to prove that "reasonable factors other than age" motivated them to take adverse employment action, including terminating an age protected employee. The regulations are intended to effectuate two U. S. Supreme Court decisions, Smith v City of Jackson and Meacham v Knolls Atomic Power Laboratories, which were discussed in previous issues of ***Employee Briefs***. The Court held in these decisions that an employer could defend against an allegation of age discrimination if it could prove that it took an adverse employment action against an over age 40 employee because of a "reasonable factor other than age." The regulations proposed by the EEOC listed six factors that it would consider relevant in determining whether an employment practice is reasonable and therefore a defense to age discrimination claims:

1. Whether the employment practice and the manner of its implementation are common business practices.

2. The extent to which the factor related to the employer's business goal.

3. The extent to which the employer took steps to define the factor accurately and to apply the factor fairly and accurately, e.g., training, guidance, instruction of managers.

4. The extent to which the employer took steps to assess the adverse impact of the employment practice on older workers.

5. The severity of the harm to individuals within the protected age group in terms of both the degree of injury and the number of persons adversely affected and the extent to which the employer took preventive or corrective steps to minimize the severity of the harm, in light of the burden of undertaking such steps.

6. Whether other options were available and the reasons that the employer selected the option it did.

These proposed regulations are subject to public comment before being finalized and, most important, subject to review and approval or rejection by courts.

Ledbetter Law

The D. C. Circuit held in Schuler v Pricewaterhousecoopers that the Lilly Ledbetter Fair Pay Act of 2008 does not apply to allegations of age discrimination because of failure to promote under the ADEA. The Ledbetter Act, named after the plaintiff in a controversial decision of the U. S. Supreme Court in which the Court denied an allegation of sexual discrimination even though a female employee was for years, without her knowledge, paid less than male employees whom she trained who were performing the same job. The Court's denial was because the female employee did not file her claim within the required statute of limitations which the court determined started when the discriminatory practice started, even though the employee had no way of knowing when the discriminatory practice started. The purpose of the Ledbetter Act was to overturn the Court's decision by restarting the statute of limitations for filing a claim involving compensation or "other practice" each time an employee receives a paycheck or other forms of compensation. The Act applies to all protected categories of employees specified in Title VII. In rejecting the plaintiff's arguments in this case, the D. C. Circuit held that "discrimination in compensation means paying different wages or providing different benefits to similarly situated employees, not promoting employees to a more remunerative position." It will be interesting to see what other circuit courts decide. If any circuit court disagrees with the D.C. Circuit, this issue will likely wind up back at the Supreme Court level.

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