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Workplace Labor Update

JUNE 2004

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APPLICATION OF NO-REHIRE POLICY CONSTITUTES A "QUINTESSENTIAL" LEGITIMATE, NONDISCRIMINATORY REASON FOR EMPLOYER'S ACTIONS

By Jan W. Sturner

In *Raytheon Co. v. Hernandez*, 124 S. Ct. 513 (2003), the Supreme Court held that in a disparate treatment case arising under the Americans with Disabilities Act ("ADA"), an employer's neutral, no-rehire policy satisfied its obligation to provide a legitimate, nondiscriminatory reason for its refusal to rehire a former employee who had been previously terminated for violating workplace conduct rules.

The protections of the ADA do not extend to individuals who are currently engaged in the use of illegal drugs. The Act does, however, provide protection for those who have rehabilitated themselves. Generally, therefore, employment decisions based on an employee's or applicant's history of drug abuse problems might run afoul of the Act.

The plaintiff in *Raytheon*, Joel Hernandez, was forced to resign from his employment with Raytheon Co.'s predecessor, Hughes Missile Systems, after testing positive for cocaine and admitting that his conduct violated the employer's workplace conduct rules. After more than two years, Hernandez applied to be rehired. He stated on his new application that he had previously been employed by Hughes Missile Systems, and attached letters from his pastor describing his regular participation in church activities and from an Alcoholics Anonymous counselor concerning his regular attendance at meetings and his recovery.

Hughes Missile Systems reviewed and rejected Hernandez's application. The Labor Relations Department employee who made the decision to reject Hernandez testified that the employer had a clear policy of prohibiting the rehiring of employees who were fired for misconduct in the workplace. She also testified that she did not know of the Plaintiff's former drug addiction at the time she made the rejection decision.

In response to his rejection, Hernandez filed an ADA action claiming that he was the target of discrimination based on his record of drug addiction and/or because he was regarded as being a drug addict. The District Court granted the employer's motion for summary judgment on the disparate-treatment claim. In review, the Ninth Circuit held that

Hernandez had made out a case of disability discrimination, and the employer had not met its burden of providing a legitimate, nondiscriminatory reason for its employment decision. In so ruling, the Ninth Circuit explained that the employer's no-rehire policy, even though it may have been lawful on its face, was unlawful as applied to employees who were lawfully forced to resign for illegal drug use but had since been rehabilitated.

The Supreme Court reversed the Ninth Circuit, holding that in reaching its ruling that the no-rehire policy was not a legitimate reason for the employer's decision, the Circuit Court improperly applied a disparate-impact analysis to Hernandez's disparate-treatment claim.

The Court began its analysis by noting that it had consistently distinguished between disparate-treatment and disparate-impact claims. A ***disparate treatment*** claim, the Court explained, is made out where an employer treats certain employees more or less favorably than others because of a protected characteristic such as race, gender or, in this case, a disability. An employer's potential liability in such circumstances turns on whether the protected characteristic truly motivated the employer's action. By contrast, a ***disparate impact*** claim arises where a facially neutral employment practice affects one protected group more harshly than another and that difference cannot be justified by business necessity. Such practices can be deemed discriminatory without evidence that the employer subjectively sought to discriminate against the affected employees.

Hernandez's claim was limited to the disparate-treatment theory that the employer refused to rehire him because it regarded him as disabled and/or because of his record of disability. The Court found that the employer's reliance on its neutral no-rehire policy unambiguously satisfied its obligation under *McDonnell Douglas* to provide a legitimate, nondiscriminatory reason for refusing to rehire Hernandez.

The Court held that the only remaining question before the Ninth Circuit was whether, notwithstanding its proffered explanation, Hughes Missile Systems did make its decision about Hernandez based on his "disabled" status (that is, that the no-rehire policy was not the real reason that the employer had failed to rehire Hernandez).

To the extent the Ninth Circuit had "strayed from its task by considering not only discriminatory intent but also discriminatory impact" of the facially neutral, no-rehire policy, the Supreme Court remanded the case back to the Ninth Circuit for further proceedings consistent with its opinion.

Employers should view this decision with some caution, however. The Court's decision in *Raytheon* was limited to the question of whether a no-rehire policy constituted a legitimate business reason sufficient to defeat a ***disparate treatment*** claim. The issue was not before the Court and thus the Court ***did not*** rule upon the issue whether the Hughes Missile System's facially neutral no-rehire policy would create a ***disparate impact*** on employees who were lawfully forced to resign for illegal drug use but have since been rehabilitated. It is likely that, if a timely claim for disparate impact had been brought by the plaintiff in *Raytheon*, the result would have been quite different for the employer.

Supreme Court Strikes Down Reverse Age Discrimination Claims

By Darryl L. Franklin

In a 6-3 decision, the U.S. Supreme Court in *General Dynamics Land Sys., Inc. v. Cline*, 124 S.Ct. 1236 (2004) held that a plaintiff may not assert a "reverse age discrimination" claim under the Age Discrimination in Employment Act ("ADEA").

In *Cline*, a collective bargaining agreement between General Dynamics and the United Auto Workers eliminated the company's obligation to provide health benefits to subsequently retired employees, except as to then current workers who were at least 50 years old. The plaintiffs, who were at least 40 years old at the time the collective bargaining agreement was adopted, and thus, protected by the ADEA, but under the age of 50, were without the promise of benefits.

In dismissing the plaintiffs' ADEA claim, the district court recognized that no federal court had ever granted relief under the ADEA for "reverse age discrimination" and it was clear that "the ADEA 'does not protect the younger ***against*** the older.'" However, a divided panel of the Sixth Circuit reversed the district court's ruling opining that the ADEA's prohibition against

discrimination based on age was clear on its face and that "if Congress had meant to limit its coverage to protect only the older worker against the younger, it would have said so." In further support of its decision, the Sixth Circuit relied upon an EEOC regulation that states "if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down one on the basis of age, but must make such decision on the basis of some other factor." Although the Sixth Circuit recognized that its ruling was in conflict with other Circuits, it criticized those rulings for paying too much attention to the "'hortatory and generalized language' of the congressional findings incorporated in the ADEA."

In reversing the Sixth Circuit's decision, the Court held that the legislative history speaks "almost unanimously to an understanding of discrimination as directed against workers who are older than the ones getting treated better." In addition, the Court recognized that the legislative history was "devoid of any evidence that younger workers were suffering at the expense of their elders, let alone that a social problem required a federal statute to place a younger worker in parity with an older one." Moreover, the Court ruled that "[i]f Congress had been worrying about protecting the younger against the older, it would not likely have ignored everyone under 40." The Court further stated that "[t]he youthful deficiencies of inexperience and unsteadiness invite stereotypical and discriminatory thinking about those a lot younger than 40, and prejudice suffered by a 40-year old is not typically owing to youth, as 40-year-olds sadly tend to find out" and that "[t]he enemy of 40 is 30, not 50."

In reaching its decision, the Supreme Court has now provided employers with a ruling that assures them that claims for "reverse age discrimination" are no longer viable. The Supreme Court's decision makes it clear that the ADEA's prohibition covers discrimination based on age that helps the younger employee to the detriment of older employees. As such, in establishing and enforcing policies and procedures, employers should be mindful that they are no longer prohibited from giving older employees preferential treatment, even if all employees over 40 years old do not receive such treatment.

Employers should take note that state law analogs to the ADEA might be interpreted differently. For example, employers with employees in Maryland should be aware that Article 49B of the Maryland Code, unlike the ADEA, does not limit its protection against age discrimination to "individuals who are at least 40 years of age." Rather, Article 49 prohibits an employer from considering an employee's age when making an employment decision, unless the employer can establish that age is a "bona fide occupational qualification." *See* 87 Op. Att'y Gen. No. 02-217, 2002 WL 31248993 (Md. A.G. 2002).

The Year in Employee Benefits: Three Important ERISA Decisions that Might Affect Your Benefits Plans

Marty Wagner and Thomas Tollefsen

This term, the Supreme Court heard three important employee benefits cases addressing an array of issues. Cases heard by the Supreme Court involved complete preemption under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), of state law tort claims against HMOs; the ability of pension plans to alter suspension of benefit rules once payments under those plans have commenced; and the coverage of working employers under benefits plans.

Aetna Health Inc. v. Davila, ___ S. Ct. ___ , Nos. 02-1845, 03-83, 2004 WL 1373230 (2004) (9-0)

ERISA completely preempts certain tort claims filed by participants and beneficiaries against their HMOs for denying coverage of medical treatment recommended by their treating physicians, the Supreme Court ruled in *Aetna Health Inc. v. Davila*. *Davila* involved claims under the Texas Health Care Liability Act ("THCLA") for alleged failures of certain HMOs to exercise ordinary care in the handling of coverage decisions. The claims had been brought by individuals covered under two separate employee benefit plans. The HMO claims decisions at issue involved a refusal to pay for an arthritis pain treatment drug and the denial of an extended hospital stay for a patient who had undergone surgery.

Reversing the decision of the Fifth Circuit, the Supreme Court determined that because the actions at issue were related to denials of medical coverage, these suits fell within the ambit of ERISA Section 502(a), were completely preempted, and removal to federal court was proper. State-law causes of action that duplicate, supplement, or supplant the ERISA enforcement remedy do not avoid preemption, the Court said, because to allow plaintiffs to invoke such state-law

remedies would work against Congress' clearly expressed intent to make ERISA's civil enforcement mechanism exclusive.

The individuals had argued that removal was improper because the Texas law in question provided duties that were independent of ERISA or the terms of any ERISA plans. The Court rejected these arguments because interpretation of ERISA plans formed an essential part of their state law claims, and hence liability would only exist as a consequence of defendant-petitioners' administration of the ERISA plans.

Moreover, the Court found, characterization of the claims as tort-based rather than contract-related did not avoid ERISA's preemptive effect because the substance of claims prevails over form, and the individuals were making claims for benefits. "[I]f an individual brings suit complaining of a denial of coverage for medical care, where the individual is entitled to such coverage only because of the terms of an ERISA-regulated employee benefit plan, and where no legal duty (state or federal) independent of ERISA or the plan terms is violated, then the suit falls within the scope of ERISA § 502(a)(1)(B)," the Court determined.

In a concurring opinion, Justices Ginsburg and Breyer called for congressional action to fill the regulatory vacuum that allegedly exists when "[v]irtually all state law remedies are preempted but very few federal substitutes are provided."

***Central Laborers Pension Fund v. Heinz*, No. 02-891, 2004 WL 1237456 (U.S. June 7, 2004) (9-0)**

In *Central Laborers Pension Fund v. Heinz*, the Supreme Court held that a multiemployer pension plan had violated ERISA's anti-cutback rule by expanding the categories of postretirement employment that triggered suspension of payments of early retirement benefits that had already accrued and were in pay status. In a unanimous decision that affirmed the decision of the Seventh Circuit, the Supreme Court ruled that a beneficiary's right to receive certain benefit payments on a certain date may not be limited by a new condition that narrows that right, and only conditions set ***before*** a benefit accrues can survive application of ERISA's anti-cutback rule.

The Plaintiffs in *Heinz* were employees who, in 1996, had opted to receive unreduced early retirement payments under a defined benefit plan, which offered subsidized monthly payments that equaled what the plaintiffs would have received if they had retired at normal retirement age. At that time, the plan prohibited beneficiaries of such benefits from working construction worker jobs after retiring, but did not bar taking supervisory jobs in that same industry. After retiring, the employees in *Heinz* worked as construction supervisors and received monthly benefits.

In 1998, however, the pension plan was amended to prohibit work in ***any*** capacity in the construction industry, including supervisory work, and the employees subsequently were informed that early retirement payments would be suspended if they kept working.

The plan argued that ERISA's anti-cutback rule did not apply to this matter because benefits were not being eliminated or reduced but merely suspended. The Court rejected this argument, finding that although ERISA's statutory text is less than clear, as a matter of common sense, a plan amendment placing materially greater restrictions on receipt of the benefit reduces the benefit.

"We simply do not see how, in any practical sense, this change of terms could not be viewed as shrinking the value of Heinz's pension rights and reducing his promised benefits," the Court said.

***Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. William T. Hendon*, 124 S. Ct. 1330 (2004) (9-0)**

In *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. William T. Hendon*, the Supreme Court determined that working owners of businesses may qualify as "participants" under pension plans covered by the Employee Retirement Income Security Act of 1974 (ERISA).

Addressing a split between the circuits, the Court held that if a pension plan covers at least one employee other than the working owner and the owner's spouse, the owner may participate in the plan on equal terms with other employees and enjoy the protections provided under ERISA.

In *Yates*, a physician was the sole shareholder and president of a professional corporation that maintained a profit sharing pension plan. From the plan's inception, at least one person other than the physician or his wife participated in the plan. In 1989, the physician borrowed $20,000 from the plan, subject to a monthly repayment requirement over a five-year term, but did not make any payments. In 1992, the physician renewed the loan for five years and again did not make any payments.

In late 1996, a few weeks prior to the filing of an involuntary bankruptcy petition against him, the physician used the proceeds from the sale of his house to transfer $50,467.46 to the pension plan, representing the principal and interest due on the loan.

The bankruptcy court concluded the payment constituted a preferential transfer and ruled that the physician-debtor could not prevent recovery of the loan repayment because, as a working owner, he was not an employee under ERISA and could not enforce the plan's anti-alienation protections. The Sixth Circuit affirmed.

In reversing the Sixth Circuit, the Supreme Court stated that although it is unclear whether ERISA's definition of "employee" includes working owners, an examination of ERISA's text provides multiple indications that Congress intended to allow working owners to be plan participants.

The Court noted that allowing working owners to gain ERISA coverage acts as an incentive for employers to create plans that benefit owner and nonowner employees. In addition, having working owners covered under ERISA avoids the anomaly of applying separate legal regimes (state versus federal) to the same plan, promoting uniformity in treatment of employee benefit plan claims.

From the Editor's Desk

The Department of Labor recently issued new COBRA regulations imposing new notice requirements on Group Health Plan Administrators. The WLU will be examining the new obligations imposed on Plan Administrators by the regulations, as well as their impact on COBRA references in employee policy manuals in its upcoming edition.

In the meantime, Venable has developed a new model COBRA policy to address the changes expressed in the new regulations. Employers who are interested in making changes to their existing COBRA policies should contact their Venable attorney.

Workplace Labor Update is published by the Labor and Employment Law Section of the law firm of Venable LLP, Two Hopkins Plaza, Suite 1800, Baltimore MD 21201; 575 7th Street, NW, Washington, DC 20004; One Church Street, Fifth Floor, Rockville, MD 20850; 210 Allegheny Avenue, P.O. Box 5517, Towson, MD 21204 and 8010 Towers Crescent Drive, Suite 300, Vienna, VA 22182. Internet address: http://www.venable.com. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations.

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