Cray • Huber

Labor and Employment Law Notes

BIG FIRMS SUED, THE UNITED STATES SUPREME COURT SIDES WITH CHICAGO FIREFIGHTERS AND PUBLIC SECTOR EMPLOYMENT LAW CASE UPDATES

1. BIG LAW FIRMS BEWARE: YOU ARE NOT IMMUNE TO RECESSION-RELATED DISCRIMINATION SUITS

The downturn of the economy has resulted in an increase in employment related lawsuits against law firms. McDermott, Will & Emery is the latest law firm to face a lawsuit connected to recession-related layoffs, with a former billing specialist claiming the firm fired her because of her age, according to the complaint filed in the 7th Circuit Court of Appeals in Chicago. In her suit, the plaintiff alleged McDermott laid her off in February 2009, as part of broader staff cuts. The plaintiff, who was 50 at the time and had worked at the firm for 8 years when she was laid off, claims the firm soon hired younger employees at a lower cost to do the billing work she had been doing. She further alleged that the reasons McDermott stated for termination were "false." The firm representing the plaintiff stated that his firm often represents employees suing former employers, but that he has rarely sued a law firm. He said you generally see law firms doing things the right way with respect to layoffs. Plaintiff filed a complaint with the EEOC last year. The EEOC issued a right-to-sue notice indicating that the plaintiff had a right to sue McDermott. McDermott is not the first firm to face law suits related to employment decisions made during the recession. Fried, Frank, Harris, Schriver & Jacobsen is facing at least three employment-related suits. Separate claims have been filed against Covington & Burling, Turocy & Watson, and several other firms. There have also been a multitude of suits filed by former law firm partners alleging discrimination after having their partnership status removed or being terminated from the firms as the result of the downturn of the economy.

2. THE UNITED STATES SUPREME COURT SIDES WITH CHICAGO FIREFIGHTERS AND CLARIFIES CHARGE FILING REQUIREMENTS FOR DISPARATE-IMPACT CLAIMS

In 1995, respondent the City of Chicago gave a written examination to applicants seeking firefighter positions. In January 1996, the City announced it would draw candidates randomly from a list of applicants who scored at least 89 out of 100 points on the examination, whom it designated as "well qualified." It informed those who scored below 65 that they had failed and would not be considered further. It informed applicants who scored between 65 and 88, whom it designated as "qualified," that it was unlikely they would be called for further processing but that

the City would keep them on the eligibility list for as long as that list was used. That May, the City selected its first class of applicants to advance, and it repeated this process multiple times over the next six years. Beginning in March 1997, several African-American applicants who scored in the "qualified" range but had not been hired filed discrimination charges with the Equal Employment Opportunity Commission (EEOC) and received right-to-sue letters. They then filed suit, alleging (as relevant here) that the City's practice of selecting only applicants who scored 89 or above had a disparate impact on African-Americans in violation of Title VII of the Civil Rights Act of 1964, see 42 U. S. C. §2000e–2(k)(1)(A)(i).The district court certified a class—petitioners here—of African-Americans who scored in the "qualified" range but were not hired. The court denied the City's summary judgment motion, rejecting its claim that petitioners had failed to file EEOC charges within 300 days "after the unlawful employment practice occurred," §2000e–5(e)(1), and finding instead that the City's "ongoing reliance" on the 1995 test results constituted a continuing Title VII violation. The litigation then proceeded, and petitioners prevailed on the merits. The Seventh Circuit reversed the judgment in their favor, holding that the suit was untimely because the earliest EEOC charge was filed more than 300 days after the only discriminatory act—sorting the scores into the "well qualified," "qualified," and "not qualified" categories. The later hiring decisions, the Seventh Circuit held, were an automatic consequence of the test scores, not new discriminatory acts.

Held: A plaintiff who does not file a timely charge challenging the adoption of a practice may assert a disparate-impact claim in a timely charge challenging the employer's later application of that practice as long as he alleges each of the elements of a disparate-impact claim.

3. RECENT 7TH CIRCUIT DECISIONS INCLUDING PUBLIC SECTOR EMPLOYERS

Wragg v. the Village of Thorton: In a 16-year-old 42 U.S.C. Section 1983 lawsuit against a village and individual defendants, alleging that his substantive due process rights were violated by the defendant's deliberate retention of a fire chief who molested him, despite knowledge of his prior improprieties with other minors resulted in a summary judgment in favor of the defendant. The summary judgment was affirmed where 1) the village was not liable for retaining the fire chief because a quorum of the village's Board of Trustees had no knowledge of his prior sexual misconduct; and 2) the plaintiff presented insufficient evidence for a reasonable jury to find that the president knew that retaining the fire chief posed a substantial risk to the plaintiff.

Kodish v. Oak Brook Terrace Fire Protection District: A former firefighter's suit alleging violation of his due process rights, violation of his First Amendment rights by terminating him for engaging in a pro-union speech, as well as wrongful termination and defamation under Illinois State Law, resulted in summary judgment for the defendant. The 7th Circuit Court of Appeals reversed that decision where: 1) The Illinois Fire Protection Act grants a firefighter an entitlement to continued employment in the absence of cause for discharge after the firefighter has held the position for one year; and 2) The plaintiff had presented sufficient evidence that, but for his protected pro-union speech, the members of the Board of Trustees of the District informed by the Chief, would not have voted to terminate his employment.

Goelzer v. Sheboygan County: In the plaintiff's lawsuit against her former county employer for her termination two weeks before she was scheduled to begin two months of leave under the Family and Medical Leave Act (FMLA), claiming the employer interfered with her right to

reinstatement under the Act and retaliated against her for taking FMLA leave, summary judgment in favor of the defendants was reversed. The 7th District Court of Appeals found that the plaintiff had put forth enough evidence for this case to reach a trier of fact, including comments suggesting her supervisor's dissatisfaction with her use of FMLA leave, her positive performance reviews, and the timing of her termination.

Levin v. Lisa Madigan et al.: In this case a state employee brought an action against the state, the state agency and several officials, alleging that his employment was terminated on the basis of his age and gender. The defendants' motion to dismiss was denied. In so holding the district court stated: 1) The employee sufficiently pled sex and age discrimination claims under Title VII and the Age Discrimination in Employment Act (ADEA); 2) Officials were not entitled to qualified immunity from the employee's equal protection claim for sex discrimination brought pursuant to Section 1983; but 3) Officials had qualified immunity from the employee's equal protection claim for age discrimination brought pursuant to Section 1983; 4) The state was not an employer within the meaning of Title VII or the ADEA, and thus was not the proper defendant with respect to the employee's sex and age discrimination claims; 5) The employee's claims against the State Attorney General, in her official capacity, and the State's Office of the Attorney General, were redundant; 6) The employee was not entitled to request more than $300,000 in damages for emotional distress on a sex discrimination claim under Title VII; and, 7) The employee would likely suffer irreparable harm, if he were reinstated, in the absence of a preliminary injunction requiring the defendant to cease engaging in discrimination. The appellate court granted in part and denied in part the plaintiff's appeal. The appellate court found that the issue of whether a state employee was an "employee" protected from unlawful employment practices by Title VII and the ADEA was not the proper subject of a motion to dismiss for lack of subject matter jurisdiction, since it was a question relating to the merits of his case, not a jurisdictional issue.

The former employee stated sex and age discrimination claims under Title VII and the ADEA against the state agency and various officials by alleging he was a 62-year-old male who was meeting his employer's legitimate expectations when he was nonetheless terminated and replaced by a substantially younger, less qualified female employee, and that, around the same time that his employment was terminated, two other co-workers who were over the age of 50 and whose work performances were satisfactory or better were terminated and replaced with younger, less qualified females. The ADEA does not provide the exclusive federal remedy for age discrimination in employment, so as to foreclose equal protection claims for age discrimination brought pursuant to Section 1983. State officials were not entitled to qualified immunity from the employees equal protection claim for sex discrimination brought pursuant to Section 1983, where the employees' constitutional right to be free from gender discrimination was clearly established at the time of the alleged violation. Section 1983 does not permit injunctive relief against state officials sued as distinct from their official capacity. The State of Illinois was not an "employer" within the meaning of Title VII or the ADEA and, thus, was not a proper defendant with respect to a state employee's sex and age discrimination claims, where the Office of the Attorney General, not the state, has the power to hire and fire employees. Illinois, its Attorney General, and the Office of the Attorney General, have 11th Amendment immunity from a former state employee's claims seeking monetary damages on his equal protection claim for sex and age discrimination brought pursuant to Section 1983, where Illinois has not consented to suit. Congress did not abrogate the State's sovereign immunity when it enacted Section 1983 and the defendants were not "persons" who could be subject to suit for damages

under Section 1983. The 11th Amendment prohibits private parties from filing a federal law suit against a state, state agency, or state official unless the state waives its 11th Amendment immunity by consenting to suit, or Congress unequivocally abrogates the state's immunity. Congress did not abrogate a state's sovereign immunity when it enacted Section 1983.

Lemmenes v. Orland Fire Protection District: Declining to follow a recent opinion by the Appellate Court for the First District, Sixth Division, the Illinois Appellate Court for the First District, Second Division, held that a former lieutenant firefighter's knee injury, which he incurred during a training exercise, was in response to what was reasonably believed to be an "emergency," for purposes of the Public Safety Employee Benefits Act. Therefore, the firefighter's employing fire protection district was required by the Act to pay health care insurance premiums for the firefighter and his eligible dependents after the firefighter was unable to continue working due to the injury. Even though the firefighter was injured during a training exercise, he was required by the exercise to perform a mock emergency rescue of a trapped firefighter who was running out of oxygen. Although there was no fire present, other conditions present during the exercise simulated an actual fire rescue. Moreover, the firefighter was required, as part of his duties, to participate in the training.

Swearnigen-Al v. Cook County Sheriff's Department and Egonmwan v. Cook County Sheriff's Department: In a plaintiff's (Swearnigen-Al) suit against the county, the County Sheriff's Department and individuals, claiming constructive discharge and malicious prosecution for charging him with custodial sexual misconduct while employed as a corrections officer at a county jail (women's division) for which he was acquitted of in state court, the judgments of the district court are affirmed where: 1) grant of summary judgment was proper because no reasonable jury could find that the plaintiff was constructively discharged; 2) the plaintiff cannot avoid summary judgment on his gender discrimination claims; 3) the plaintiff cannot avoid summary judgment on his race discrimination claim as he has not shown discriminatory motivation under the direct method or carried his burden under the indirect method; 4) summary judgment was appropriate on the plaintiff's First Amendment retaliation claim as he failed to show that his speech was constitutionally protected; 5) summary judgment was appropriate on the plaintiff's malicious prosecution claim as under Illinois Law as a grand jury indictment is prima facie evidence of probable cause; 6) summary judgment was appropriate on plaintiff's intentional infliction of emotional distress claim as he failed to claim that the defendants' conduct was extreme and outrageous; and 7) plaintiff's Title VII retaliation claim was properly dismissed.

In the companion case plaintiff (Egonmwan) filed suit against Cook County, the Cook County Sheriff's Department and individuals arising from his prosecution for custodial misconduct while employed as a correctional officer in a county jail's women's division and subsequently terminated, the district court's grant of summary judgment in favor of the defendant is affirmed where: 1) summary judgment was proper on plaintiff's gender discrimination claim; 2) summary judgment was proper on plaintiff's race discrimination claim as he had not shown discriminatory motivation under the direct method or carried his burden under the indirect method; and 3) there was no evidence that the district court abused its discretion in denying the plaintiff's motion for reconsideration.

Ogden v. Atterholt: In a 42 U.S.C. Section 1983 brought by a former employer at the Indiana Department of Insurance claiming that a memo he wrote was protected speech and his forced

resignation violated his rights under the First Amendment, summary judgment in favor of the defendant was affirmed. The plaintiff was speaking as a governmental employee and not a citizen when he wrote the memo under Garcetti because his complaints about the Deputy Commissioner and his request for a departmental reorganization were made in the performance of his professional duties as the manager of the title insurance division.

Gratzel v. the Office of the Chief Judges of the 12th, 18th, 19th and 22nd Judicial Circuits: The 7th U.S. Circuit Court of Appeals has affirmed a ruling in a case where a court reporter claimed that the Office of the Chief Judges of the 12th, 18th, 19th and 22nd Judicial Circuits failed to accommodate her disability under the Americans with Disabilities Act and the Rehabilitation Act. Plaintiff suffered from incontinence since about 1991. Unable to improve her condition with medication, she left the court-reporting job and began to teach court reporting at McCormick College, which allowed her to manage her incontinence by leaving the room whenever necessary. As her condition worsened she applied for an electronic court reporting position in the control room at the DuPage County courthouse, believing this position would allow her to manage her condition. She was hired and her arrangement worked so well that no one was aware of her incontinence. In 2006, the State of Illinois eliminated the "Court Reporting Specialist" job title and consolidated all reporters under the title of "Official Court Reporter." The Chief Judge of the DuPage courthouse decided that all court reporters would be required to do the same job, including a full rotation in which all reporters would rotate through all the court rooms, including the control room. The plaintiff explained her medical condition to the Chief Judge, saying that because of her condition, she would be unable to do in-court reporting. Her attorney asked the Court to accommodate her condition by allowing her to return to the control room. In response, court personnel proposed several possible accommodations but the plaintiff felt none accommodated her condition properly. She was subsequently terminated. She sued the Office of the Chief Judges under the American with Disabilities Act and the Rehabilitation Act for failing to accommodate her incontinence. Defendants moved for and had granted their motion for summary judgment wherein the court found that the plaintiff had not established that she was disabled under the terms of the ADA and the Rehabilitation Act.

The appeals court affirmed. The appeals court said the district court found that the plaintiff had failed to establish that she had a disability because she had not presented any evidence that she was substantially limited in a major life activity. The activity the plaintiff cited–the elimination of waste–was not explicitly listed in the ADA or its implementing regulations as a major life activity at the time she requested the accommodation. Even if she established that she was a qualified individual with a disability she would have to show she was qualified for the job–that she was able to perform the essential functions of the job, with or without reasonable accommodation. The appellate court agreed with the district court and found that she was not qualified for the job. In addition, the appeals court said that an employer need not create a new job or strip a current job of its principle duties to accommodate a disabled employee. To be entitled to a reasonable accommodation, the plaintiff had the burden of establishing that she is a "qualified individual with a disability" under the ADA, and she presented no evidence that she could perform the essential functions of an official court reporter in the DuPage County courthouse–with or without reasonable accommodations.

Leonard v. Eastern Illinois University: In a Title VII suit against a university brought by a Native American employee claiming that a promotion denial was motivated by anti-Native American bias, summary judgment in favor of the university is affirmed as plaintiff lacks evidence that the

university officials refused to promote him in retaliation for his civil rights complaint concerning university athletic shirts depicting an Indian Chief, or for any reason other than his relatively poor performance.