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Employment Litigation in Review #2

January 3, 2012

Welcome to our second installment of "Employment Litigation in Review." We hope that everyone is enjoying the holiday season and we look forward to continuing our blog into 2012. It has been a while since our last post, so hopefully this helps summarize what has been going on in the employment and labor field since then.

NLRB Delays Notice Posting Rules Again

Two-and-one-half months after delaying implementation of the notice posting requirement to January 1, 2012, the National Labor Relations Board ("Board") has agreed to postpone the effective date of its employee rights notice-posting rule for a second time. The postponement comes at the request of the federal court inWashington,DC, which will be hearing a legal challenge regarding the rule. According to the NLRB announcement, the new implementation date is April 30, 2012.

NLRB Issues Final Rule Amending Representation Election Procedures

On December 22, 2011, the Board adopted a final rule which amends the procedures applicable to union representation elections. The final rule will become effective on April 30, 2012. The amendments to the union representation election procedures are intended to shorten the time period between the filing of a representation petition and the election. According to the Board:

> *The rule is primarily focused on procedures followed by the NLRB in the minority of cases in which parties can't agree on issues such as whether the employees covered by the election petition are an appropriate voting group. In such cases, the matter goes to a hearing in a regional office and the NLRB Regional Director decides the question and sets the election.*
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> *Going forward, the regional hearings will be expressly limited to issues relevant to the question of whether an election should be conducted. The hearing officer will have the authority to limit testimony to relevant issues, and to decide whether or not to accept post-hearing briefs.*

In response to the final rule, on December 20, 2011, the U.S. Chamber of Commerce and the Coalition for a Democratic Workplace filed a lawsuit in the U.S. District Court for theDistrict of Columbia, challenging the Board's authority to adopt the final rule.

Vaughn v. Woodforest Bank, No. 11-60102 (5th Cir. Dec. 22, 2011)

The plaintiff in this action was a white female who worked as an assistant manager in a regional bank. During her tenure, she received multiple raises and a positive review during 2008 and early 2009, but was subsequently fired based on an "Unsatisfactory Conduct" report, which stated that the Plaintiff made "inappropriate comments in the presence of employees and customers that created a perception of racial discrimination and [an] uncomfortable work environment." The plaintiff's comments were in regard to the then newly-elected President Obama. For example, one comment made was, "[the plaintiff] wished the media would stop making President Obama's election a 'black and white issue.'"

The district court originally granted summary judgment in favor of the defendant; however, after being reviewed by the 5th Circuit the order was reversed in favor of the plaintiff. Although the 5th Circuit rejected the plaintiff's attempt to establish pretext through the use of comparator evidence, based on the lack of an appropriate comparator, the court found that the plaintiff had produced sufficient evidence of pretext due to the employer's false and unworthy of credence explanation of why the employee was terminated. Ultimately, the district court's grant of summary judgment was reversed and the case remanded to let a jury decide whether the employer discriminated against the plaintiff because of her race.

Ash (Hithon) v. Tyson Foods, Inc., No. 08-16135 (11th Cir. Dec. 16, 2011)

After almost fifteen years of litigation, the 11th Circuit determined that the plaintiff was entitled to keep a jury award of $35,000.00 for back pay, $29,049.33 for back pay interest, and $300,000.00 for mental anguish. Although the employer asserted that it did not promote the plaintiff because its plant had been performing poorly, the court determined that there was ample evidence that the employer's reason was pretextual. Moreover, there was evidence that the person who was promoted (a white employee) lacked the qualifications for the job, and that the defendant had greater (almost 13 years more) work experience.

The court also found that there was background evidence that management was hostile to African-Americans. For instance, the employer referenced the plaintiff as "boy" on multiple occasions. After the Supreme Court reversed the 11th Circuit's original decision regarding this evidence, the 11th Circuit (as instructed by the Supreme Court's opinion) held that this statement supported an inference of discrimination, especially in light of the "context, inflection, tone of voice, local custom, and historical usage." *Ash v. Tyson Foods, Inc.*, 546 U.S. at 456 (2006). Consequently, the court held in favor of the plaintiff and awarded $364,049.33 in compensatory damages.