

## Supreme Court Allows Disparate Impact Age Claims

The U.S. Supreme Court opened the door for more age discrimination cases and settled a circuit split when it announced that it would allow plaintiffs to bring disparate impact causes of action under the federal Age Discrimination in Employment Act ("ADEA"). Disparate impact claims address employer actions or policies that, while facially neutral, impact individuals in a protected class more than other employees. Disparate impact claims had been recognized under Title VII since 1971, but whether such a claim is available under the ADEA had been unresolved.

The case that brought this issue to the Supreme Court, *Smith v. City of Jackson*, involved a suit brought by police and public safety officers employed by the City of Jackson, Mississippi, after the City granted raises to all police officers and police dispatchers in an attempt to bring their starting salaries up to the regional average. Officers with less than five years' service received proportionally greater raises than those with more seniority, and most officers over 40 had more than five years of service. The officers alleged that they were adversely affected by the plan because of their age. Prior to the Supreme Court's decision, the District Court had granted summary judgment in the City's favor and the Fifth Circuit affirmed, finding disparate impact claims unavailable under the ADEA.

The ADEA was enacted in 1967 and provides that it is unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age..." 29 U.S.C. § 623(a)(2). Except for the substitution of the word "age" for the words "race, color, religion, sex, or national origin," the language of that provision was identical to that found in Title VII. Unlike Title VII, however, the ADEA also provides language that significantly narrows its coverage by permitting any "otherwise prohibited" action "where the differentiation is based on reasonable factors other than age." The Court relied on the similarities between the ADEA and Title VII to hold that, as under Title VII, a disparate impact theory of recovery is cognizable under the ADEA.

However, the Court recognized that the ADEA's protection is narrower than Title VII's because the ADEA permits otherwise prohibited action where the differentiation is based on reasonable factors other than age. Relying on that limitation, the Court found that the officers' disparate impact claim still failed because the City's plan was based on reasonable factors other than age, namely its perceived need to make junior officers' salaries competitive with comparable positions in the market. Thus, the disparate impact was attributable to the City's decision to give raises on seniority and position, which the Court found reasonable given the City's goal.

### Save the Date

Just a reminder that Schiff Hardin's Seventh Annual Labor and Employment Seminar is taking place on **Tuesday, September 13, 2005** at **The Westin O'Hare** in **Rosemont, Illinois**. Watch your mail for more information.

It is now clear that if an employee can identify a specific employment practice responsible for a statistical disparity as to how older workers are impacted by that practice, he or she may have a claim under the ADEA. Employers find protection, however, in the Court's confirmation that practices that adversely impact older workers may still be permissible if the result is attributable to "reasonable factors other than age." Overall, this decision serves as a reminder to employers to consider the effects their policies may have on older workers. If you have questions about your current policies, please contact any member of the Labor & Employment Group for assistance. 🗨️

## **Groundbreaking Electronic Evidence Case Results in \$29 Million Verdict for Employee**

The employment discrimination case of *Zubulake v. UBS Warburg, LLC*, which has become well-known among litigation attorneys for the trial court's groundbreaking rulings on electronic evidence issues, ended on April 6 with a federal jury in New York awarding \$29.2 million in damages to a woman who formerly worked as a Wall Street salesperson.

The sexual harassment case stands as a stark example of the potential harsh consequences to employers that fail to preserve potentially relevant electronic evidence — such as email correspondence and other computer-generated records — when they know or have reason to know that litigation is pending or imminent.

According to published reports, the damages awarded to the plaintiff in *Zubulake* represent the largest amount awarded in a single-individual employment discrimination case. The damages reportedly included \$2,241,000 in back pay, \$6,863,100 in front pay, and more than \$20 million in punitive damages.

As the case proceeded through the pre-trial discovery phase, the opposing sides became embroiled in contentious and costly disputes concerning disclosures of electronic evidence. At one point, the judge ordered UBS to turn over email messages that were stored on back-up tapes, despite protests that the process of restoring, searching and producing such messages was prohibitively expensive. Later, the court imposed sanctions on UBS for the alleged destruction of email messages and failure to preserve electronic evidence. The court's pre-trial rulings on electronic evidence issues have been widely cited for their analysis and standards for electronic discovery in employment discrimination cases and other types of federal court litigation.

The size of the verdict reflects the fact that the case involved a highly compensated employee in the financial services industry. While it is unclear whether or to what extent the jury's verdict was influenced by the document destruction issue, the end result should serve as a message to employers that proper handling of electronic evidence at the outset of litigation may prevent or lessen the potential for such a negative outcome.

Given the cutting-edge rulings in *Zubulake* and other recent cases concerning electronic evidence, federal court officials and the litigation bar are involved in efforts to revise the federal rules of civil procedure to better address discovery obligations with respect to such evidence. Meanwhile, companies are well advised, when faced with potential litigation, to ensure that attorneys, human resources managers and information technology staff work together to preserve electronic materials. 🗨️

## **DOL Clarifies Right to use PTO Banks for Exempt Employees' Partial Day Absences**

The U.S. Department of Labor clarified in an opinion letter that an employer may deduct absences of less than a day from exempt employee paid time off banks ("PTO") without jeopardizing their exempt status under the overtime regulations. The FLSA regulations require that in order for an employee to be deemed exempt from overtime requirements, she must meet three requirements: she must be paid on a salary basis, she must receive a salary of at least \$23,660 annually, and her job duties must satisfy one of the primary duties tests. The question before the Department was whether an employee who had absences of less than a day deducted from her PTO could still be considered to be paid on a salary basis.

Generally, an employee is considered to be paid on a salary basis if she regularly receives a predetermined amount of compensation. Deductions from pay may not be made based on an employee's quantity of work, performance or productivity, nor may they be made if the employer does not have sufficient work for the employee. On the other hand, deductions from pay may be made in full day increments where the employee is absent of her own choosing. Deductions may also be made in full day increments due to sickness or disability, so long as the deduction is made in accordance with a bona fide sick or disability policy.

But less clear was the situation where an employer deducts partial day absences from PTO. In such a situation, the employee still gets the same pay at the end of the week. The difference is that the employee has depleted her PTO.

The Department has clarified this issue by finding that part-day deductions from PTO do not affect salary basis. In so finding, the Department clarified that the requirement that deductions due to employee unavailability be made in full day increments is limited to deductions from an employee's salary. It does not restrict the employer's right to deduct PTO. However, it is important to recognize that once an employee's PTO is entirely depleted, part-day deductions cannot be made from her pay without jeopardizing her salary basis, and thus her exemption from overtime. 🗨️

### **If You Can't Say Anything Nice...**

Thanks to a recent decision of the First District of the Illinois Appellate Court, employees now have one more cause of action that they can file against their employers. The Court held that employers can be sued for defamation based on statements by supervisors or agents even though the only publication of the alleged defamatory statements has been communication inside the company.

In *Popko v. Continental Casualty Company*, the Plaintiff was an attorney who was terminated for poor conduct he displayed during a performance review. The Circuit Court of Cook County allowed Popko to proceed with his claim of defamation against the Company and his two former supervisors and an additional claim against the supervisors for tortious interference with prospective economic advantage. The jury awarded punitive damages against all defendants.

Popko alleged that on July 2, 1999 his immediate supervisor, Tefft, conducted a performance review in which he received a substantially lower review than he had received previously. Tefft reported to his supervisor, Izzo, that during this review Popko used profanity and challenged Tefft's authority. The Company was reducing staff and Tefft recommended to Izzo that Popko's employment be terminated.

Based on Popko's poor conduct during the review, Izzo agreed and reported the incident to his supervisor, Johnston, a Company Vice President. Johnston obtained approval from Human Resources to fire plaintiff and he was fired. The testimony at trial was that Johnston had not investigated the truth of the charges against Popko before terminating his employment. He never asked Popko or other employees about the July 2 incident.

Defendants moved for a directed verdict at trial arguing that there had not been a publication of the defamatory material because the information had only been disseminated within the Company. The court denied the motion.

The jury was instructed that the defendants could claim a qualified privilege if they proved that only Company agents with a "need to know" were made aware of the allegations but that the privilege would be lost if it was abused. The jury found against all defendants.

On appeal the defendants argued that the jury verdict should be reversed because all of the communications were within the corporation and thus there had been no publication of the defamatory material. The Illinois Appellate Court noted that states are divided between finding that intracorporate communications may be publication of defamation and finding that such internal dissemination is not publication.

In the end, the Court found that the internal communications were a publication. The Court noted that corporations can still argue that the communications are entitled to a qualified privilege. But it rejected the argument that an intra-company communication barred a defamation action all together. The Court said that forcing corporations to rely on qualified privilege properly balances the plaintiff's and defendants' interests. The order of proof is that the corporate defendant bears the burden of proving that a qualified privilege exists, which a plaintiff may then overcome by showing that the privilege was abused. This decision may be appealed to the Illinois Supreme Court.

For the time being, what can Illinois employers do to protect themselves? Truth is an absolute defense to defamation. Corporations should strive to make certain that all facts reported about an employee are true. In addition, comments framed as opinions about an employee's performance are not as susceptible to a claim of defamation. Finally, corporations should be sure that information about employees is only given to managers with an absolute need to know the information. We will let you know of any further developments in this area. 🗨️

## **Court Finds IHRA Does Not Require Accommodation of Employee Who Cannot Commute Long Distances**

In an unpublished decision in *Owens v. Department of Human Rights*, the First District of the Illinois Appellate Court affirmed the Illinois Department of Human Rights' dismissal of an employee's charge of unlawful discharge based upon handicap. In *Owens*, an employee was transferred from a downtown Chicago location to a Rolling Meadows location — which required her to commute 50 miles in one direction. When the employee developed a medical condition consisting of congestive heart disease, hypertension, pulmonary disease and sleep apnea, she requested a transfer back to a Chicago location because she could not safely commute that distance. There were no positions available in her job title in the Chicago office, however, and she did not receive a transfer, although her employer gave her information about van pooling and was advised that another employee offered to drive her to work.

When she refused to return to work after her disability leave due to the commute, her employer informed her that she was "let go" for failure to return to work. The employee filed a charge of discrimination with the Department of Human Rights, alleging that she was discharged on the basis of her disability.

The Department of Human Rights dismissed the employee's discrimination charge, finding that she was discharged for failing to return to work after receiving a medical release and not on the basis of her disability. It was undisputed that the employee's medical condition did not impact her ability to do her job as a reports clerk — regardless of location. The Department also found that her employer's failure to transfer her was not unreasonable, as there were no positions available in her job title at the Chicago location.

On review, the Appellate Court affirmed the Department of Human Rights' decision and further addressed the "fundamental issue" of whether an employer must reasonably accommodate an employee with commuting problems. The court noted that under existing law, the duty to accommodate only requires employers to accommodate a handicapped employee in the employee's present position for which she was hired. The Court ultimately held that the Human Rights Act does not require accommodations of commuting problems, because such problems arise outside of the workplace.

We will continue to watch this issue and keep you informed of any developments. Please contact any member of Schiff Hardin's Labor and Employment group if you have any questions. [🔗](#)

## **Retaliation Claims are Viable Under Title IX**

A person who speaks out against sex discrimination in federally funded education programs and is thereafter subject to retaliation can bring a private cause of action under Title IX, even if the person was not the victim of the underlying discrimination, the U.S. Supreme Court has ruled.

In allowing a high school basketball coach to proceed with his retaliation claim under Title IX, the Supreme Court in *Jackson v. Birmingham Board of Education* (decided March 29, 2005) established that retaliation can be a form of intentional discrimination on the basis of sex under the statute. Title IX, which prohibits sex discrimination by recipients of federal education funding, does not require that the victim of retaliation also be the victim of the discrimination that is the subject of the original complaint.

The ruling resolves a split among federal courts of appeal and expands the potential pool of plaintiffs who can bring individual private claims against entities that receive federal education funding.

The Court held that although Title IX (unlike many other federal anti-discrimination statutes) does not expressly mention retaliation, it is implied in the statute, which historically has been interpreted broadly. "Discrimination' is a term that covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave the statute a broad reach."

The Court emphasized in its ruling the important role that private individuals play in Title IX's enforcement mechanisms. Central to its analysis was the Court's recognition that Congress enacted Title IX not only to prevent the use of federal money to support discrimination, but also to encourage the reporting of incidents of discrimination. "If recipients (of federal education funding) were permitted to retaliate freely, individuals who witness discrimination would be loathe to report it, and all manner of Title IX violations might go unremedied as a result," the Court reasoned.

The *Jackson* ruling directly affects entities that are recipients of federal education funding. However, the decision also provides additional High Court insight on retaliation claims in general, which are among the most challenging types of discrimination claims for employers and other entities to defend. 📌

## **Deductible Charitable Contributions: Scholarship Program for Employees' Dependents as an Innovative Benefit Option**

Employers who are looking for ways to make deductible charitable contributions and improve their employee benefit plan can meet both objectives by establishing a scholarship program for the benefit of employees or their family members. This may be a particularly valuable benefit in the current environment of rapidly increasing college tuition rates and decreasing availability of federal grant money for education.

If the company establishes and funds a private foundation to award the scholarships, and if certain IRS guidelines are observed, the company's contributions to the foundation will be deductible as charitable expenses, and the scholarships will not constitute taxable income to the recipient or compensation to the employee whose family member receives the scholarship.

Among the IRS guidelines are:

- The scholarships must be awarded on an objective and nondiscriminatory basis. The selection criteria must be related to the purpose of the scholarship and unrelated to the employment of the recipients or their parents and to the employer's line of business.
- The scholarship must be used for study at a qualified educational institution.
- The person or persons making the selection must be wholly independent of the sponsoring company, its managers and employees, and the foundation.
- The scholarship program can be limited to children of employees as long as the number of scholarship recipients is not more than 10% of the persons eligible for the scholarship.
- The courses of study for which scholarships are available cannot be limited to those that would be of particular benefit to the employer, although such courses of study can be included. The fact that an applicant wishes to pursue such a course of study cannot be a factor in his or her selection as a scholarship recipient.
- The scholarship program cannot be used to recruit employees or to induce continued employment.

The scholarship program can include educational loans as well as scholarships. If your company has broader charitable inclinations, a scholarship program can also be designed to benefit students in the local community, those connected with the employer's industry in general, or any other population group the sponsoring company might care to benefit. To the extent that scholarships will be available to persons other than employees of the sponsoring company or their family members, the IRS guidelines will be relaxed.

If you would like to discuss these matters further, please contact Michael Huft, of the Estate Planning group, at (312.258.5627 or [mhuft@schiffhardin.com](mailto:mhuft@schiffhardin.com)) or any member of the Labor and Employment group. 📍

## **Recent Change to Unemployment Insurance Act Affects Employees' Entitlement to Benefits During Lockout**

Effective January 1, 2006, union employees who are locked out pursuant to a labor dispute are entitled to unemployment benefits — unless a statutory exception applies or the employee is otherwise rendered ineligible by another provision of the Act. This is a significant change to Section 604 of the Illinois Unemployment Insurance Act, which currently provides that individuals unemployed due to a "stoppage of work that exists because of a labor dispute" — including a lockout — are *not* entitled to unemployment benefits unless a statutory exception applies.

The new amendment places some conditions on eligibility, however. The amendment provides that locked out employees are not entitled to unemployment benefits for any week during which 1) the collective bargaining representative refuses to meet under reasonable conditions with the employer to discuss the issues giving rise to the lockout; 2) there is a final adjudication under the National Labor Relations Act that during the period of the lockout, the collective bargaining representative refused to bargain in good faith with the employer over issues giving rise to the lockout; or 3) the lockout has resulted as a direct consequence of a violation by the collective bargaining representative of the provisions of an existing collective bargaining agreement.

Please contact any member of Schiff Hardin's Labor and Employment group if you have any questions about this or other Illinois legislation affecting employers. 📍

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