

## Age Act Does Not Prohibit Preferential Treatment of Older Workers to Detriment of Younger Workers, Supreme Court Rules

The Age Discrimination in Employment Act was not meant to stop an employer from favoring an older worker over a younger one, according to a recent ruling from the U.S. Supreme Court. The ADEA prohibits age discrimination that “helps the younger by hurting the older,” but not the other way around, the Court ruled in *General Dynamics Land Sys., Inc. v. Cline* (U.S. February 24, 2004).

agreement discriminated against them because of their age in violation of the ADEA, 29 USC §623(a)(1).

The Supreme Court rejected arguments of the employees and the Equal Employment Opportunity Commission that statutory age discrimination prohibitions should work both ways, protecting younger as well as older employees from age discrimination.

A district court had characterized the claim as one of “reverse age discrimination” and held that it was not viable under federal law. The Sixth Circuit Court of Appeals, however, reversed and said the claim could go forward. Its ruling was at odds with those of other courts, setting up a conflict that the Supreme Court agreed to resolve. The Court resolved the split of authority by favoring the rationale of such courts as the Seventh Circuit Court of Appeals, based in Chicago.

The Court reviewed the history and Congressional intent in enacting the ADEA, noting that “the ADEA was concerned to protect the relatively older worker from discrimination that works to the advantage of the relatively young.” Moreover, the ADEA singles out for protection those employees who are 40 or older. The Court reasoned: “If Congress had been worrying about protecting the younger against the older, it would not likely have ignored everyone under 40. ... The enemy of 40 is 30, not 50.”

In the course of reaching its decision, the Court also rejected an EEOC regulation that interpreted the ADEA to prohibit preferences for older workers based on age. The Court said it did not need to give deference to the EEOC’s view because “the Commission is clearly wrong.”

### New Name, New Look, Same Team

Effective January 1, 2004, Schiff Hardin & Waite became Schiff Hardin LLP. As you can likely tell from this newsletter, we’ve also taken on a new look. But rest assured, the same team of lawyers is ready to assist you with your legal needs.

The new year also brings a very exciting addition to the Labor & Employment Group. Rob Campbell, a former Schiff attorney who left us to work as Vice President of Labor and Employee Relations at a major employer, has rejoined the firm. Rob’s experience with employment counseling, traditional labor matters and employment discrimination litigation will be a great addition to the Group. Please join us in welcoming him back.

The ruling gives solid support to employers that wish to make changes to employee benefit plans but had feared that to do so might expose them to liability for age discrimination.

The case arose after General Dynamics and the United Auto Workers, which represented a unit of the Company’s employees, agreed to changes in the collective bargaining agreement that allowed the company to eliminate its obligation to provide post-retirement health benefits to employees except those current employees who were at least 50 years old as of a certain date. A group of employees in their 40s as of that date brought suit, claiming that the

## Compensatory, Punitive Damages Unavailable for ADA Retaliation Claim, Court Rules

An employee who claims retaliation under the Americans with Disabilities Act cannot recover compensatory and punitive damages and is limited to equitable remedies, according to a recent ruling from the U.S. Court of Appeals for the Seventh Circuit in a case in which Schiff Hardin LLP represented the successful employer.

The Court also ruled that because compensatory and punitive damages were not available, the employee was not entitled to a jury trial. The appellate court affirmed the trial judge's decision to hold a bench trial on the ADA retaliation claim arising in the employment context. The ruling in *Kramer v. Banc of America Securities, LLC*, (7th Cir. January 20, 2004) is the first appellate opinion to analyze fully the statutes at issue to determine that compensatory and punitive damages are not available as a remedy for a retaliation claim under the ADA.

The ruling applies only to those cases in which a plaintiff has alleged retaliation in employment under the ADA. It does not affect remedies for disability discrimination under the ADA, such as alleged failure to accommodate or alleged failure to hire or promote because of a disability. The case also did not address remedies available for retaliation claims under Title VII.

For employers who are faced with defending a retaliation claim under the ADA, the ruling in the *Kramer* case may be useful to encourage settlement negotiations earlier in a case. In addition, the case will provide useful authority to proceed with a trial to a judge, rather than a jury, on an ADA retaliation claim and to limit the potential damages that will be available to a plaintiff in the event that liability is proven.

District courts had been split on the issue of available damages for an ADA retaliation claim in an employment setting. Some courts (including the lower court in the *Kramer* case) have held that there is no statutory authority for compensatory and punitive damages for an ADA retaliation claim in the employment context, while others have determined that plaintiffs can pursue such remedies.

The Seventh Circuit determined that the 1991 Civil Rights Act, which expanded the remedies for certain civil rights violations to allow for recovery of compensatory and punitive damages and a jury trial, did not specifically list the retaliation section of the ADA in its text at 42 USC §1981a(a)(2). Therefore, the plain meaning of the statute is that such remedies are not available for an ADA retaliation claim, the Court held. The Court cited the U.S. Supreme Court for the principle that “courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”

The only remedies that a plaintiff bringing a claim of retaliation against an employer under the ADA is entitled to seek are equitable in nature — injunctive relief, reinstatement of the employee, back pay or any other equitable relief the court deems appropriate, the Court held. Therefore, there is no statutory or constitutional right to a jury trial of an ADA retaliation claim.

The Court also affirmed the district court's decision not to hold a jury trial by consent or to use an advisory jury under Rule 39 of the Federal Rules of Civil Procedure. While the issues of back pay and front pay are not beyond the scope of parties' consent to a jury trial under prior circuit precedent, the Court nevertheless held that even if both parties had consented to a jury trial, a party can withdraw its consent prior to trial where there is no jury trial as of right. Moreover, even if the parties consent to a jury trial, the district court is not obligated to use a jury where one is not required by statute or the Constitution. “While the litigants are free to request a jury trial on an equitable claim, they cannot impose such a trial on an unwilling court.”

Unless there is a further appeal, the *Kramer* ruling will be considered binding authority for district courts within the Seventh Circuit, which covers Illinois, Indiana and Wisconsin. The Court's decision on the ADA statutory question also may be helpful as persuasive authority to argue to courts in other circuits that a plaintiff's damages should be limited to equitable remedies for retaliation under the ADA.

## Appeals Court Favors Employer's Rights in Workers' Compensation Retaliatory Discharge Case

An Illinois appellate court has ruled that an employee's Worker's Compensation retaliatory discharge claim is doomed where the employee was terminated because of a dispute over his ability to return to work. The First District Court of Appeals (which covers Cook County), in *Drallmeier v. Airport Group International*, (December 31, 2003) reversed a lower court's finding of retaliatory discharge. In so holding, the First District joined the Second District (which covers the remaining counties in the Chicago and Rockford metropolitan areas) in establishing a legal standard for worker's compensation retaliation that is very favorable for employers. Schiff Hardin LLP represented the successful employer in this case.

At issue in the *Drallmeier* case was whether an employer could be held liable for retaliatory discharge where it terminated an employee after he failed to provide the company with medical documentation to support his request for light duty or to provide the company with any information relating to the duration of his incapacity.

The plaintiff sought to apply a Fifth District case that holds that an employer cannot terminate an employee based on the employer's questioning the duration or extent of the injury. The company in this case sought to apply the Second District's rule that retaliatory discharge only exists where the employee is terminated because of his claim for benefits — as opposed to an issue arising out of his inability to work.

The First District joined with the Second District and found that terminating an employee because of a dispute over his ability to return to work was not retaliatory discharge. This holding is very important for employers throughout Illinois. Not only does it make a strong argument for the limitation of retaliatory discharge claims, it is also valuable precedent disagreeing with the Fifth District's holding.

The plaintiff has requested that the Illinois Supreme Court grant leave to appeal this case.

### Save The Date

We are planning a full day seminar on October 14, 2004.

We hope you'll put it on your calendar and plan to be there.

Stay tuned for more information...

## Age Act, continued

However, Justice Scalia, in dissent, said he would have deferred to the EEOC's conclusion.

Justice Thomas dissented from the majority's ruling and wrote that the ADEA clearly prohibits discrimination because of age, whether an individual is too old or too young. He claimed that the majority resorted to an "interpretive sleight of hand" to reach its conclusion.

In addition to giving some peace of mind to employers who have been grappling with post-retirement benefits questions, the ruling in the *General Dynamics* case also will prevent age claims by younger workers who claim that an employer has given preference to an older worker in other areas beyond the employee benefits context.

While the ruling in *General Dynamics v. Cline* settles the issue of reverse age discrimination under the federal ADEA statute, employers should be mindful that some state anti-discrimination statutes prohibit age discrimination to people who are younger than 40. If it is foreseeable that an employment action may have an impact on workers because of their age, it is best to consult with counsel to determine the risks of an age claim before proceeding.

## Illinois Wage Statute Covers Non-resident who Works for Illinois Employer

Employees who live out of state but who work in Illinois for Illinois companies may look to an Illinois wage law for relief if they have claims for unpaid wages, according to a recent appellate court decision.

In *Adams v. Catrambone*, (7th Cir. February 19, 2004), the court considered whether an employee who works for an Illinois employer but who is not an Illinois resident is protected by the Illinois Wage Payment and Collection Act (IWPCA). The district court had dismissed the relevant claim on the grounds that only Illinois residents are employees within the IWPCA's protection. The plaintiff appealed, claiming that the IWPCA and its protections are meant to be read broadly.

Because the Illinois Supreme Court has not considered this question, the Seventh Circuit was required to predict what the Illinois court would do if it were deciding the case. The Seventh Circuit relied on the statutory language and found that an individual who resides outside Illinois but works in Illinois for an Illinois employer may qualify as an employee under the IWPCA.

The *Adams* decision also is interesting for the court's statement, in a footnote, that the reimbursement of business expenses may be a form of relief under the IWPCA statute.

However, it has generally been accepted that business expenses are not "wages" and thus cannot be sought under the IWPCA. It is not clear what impact, if any, the Seventh Circuit's statement will have on the ability to bring claims for business expenses under the IWPCA.

## Voluntary Affirmative Action Plans Pose Risks in Discrimination Cases

Voluntary affirmative action programs may have an unexpected sting. In *Frank v. Xerox Corp.*, 347 F.3d 130 (5th Cir. 2003), the Fifth Circuit Court of Appeals found that a voluntary affirmative action program could be used against the employer in a discrimination suit. Former and current employees of Xerox brought suit alleging racial discrimination in promotions and pay increases as well as hostile work environment. The plaintiffs pursued their case claiming both that the affirmative action policy had a disparate impact on black employees and that the plan was direct evidence of discrimination. The trial court granted summary judgment in favor of Xerox, dismissing all claims. On appeal, the Fifth Circuit reversed the disparate impact and adverse employment action claims.

The focus of the lawsuit concerned Xerox's Balanced Workforce Initiative ("BWF"). Xerox established the BWF to insure that "all racial and gender groups were proportionately represented at all levels of the company." To accomplish the stated purpose, Xerox produced reports listing actual and desired racial and gender compositions for each office. In doing so, Xerox determined that its Houston office had an over-representation of black employees and an under-representation of white employees compared to local populations. The Houston office created its own localized reports to remedy the disproportionate representation and evaluated managers based on their compliance with the BWF objectives.

To establish a disparate impact claim, the plaintiffs initially had to prove that Xerox maintains a facially neutral policy or practice that caused the disparate impact. The appellate court found the BWF reports were sufficient statistical evidence for a finding that the neutral policy was resulting in a reduction in the percentage of black employees in the Houston office.

To assess the adverse employment action claims, the appellate court applied the *McDonnell-Douglas* burden-shifting framework. The court held the existence of the BWF program to be sufficient direct evidence of a form or practice of

## Employee Claiming Whistleblower Protection Under Sarbanes-Oxley Wins Favorable Ruling

In one of a handful of recent decisions interpreting the whistleblower provisions of the Sarbanes-Oxley Act of 2002 (the “Act”), an Administrative Law Judge (“ALJ”) recently ruled that a Chief Financial Officer who made reports of potential wrongdoing was terminated in retaliation for his protected activity under the statute, and ordered the CFO to be reinstated with back pay. See *Welch v. Cardinal Bankshares Corporation*, 2003-SOX-15 (Jan. 28, 2004). This decision, which is likely to be appealed, and others like it have important implications for employers.

By way of background, Section 806 of the Act protects employee “whistleblowers” in publicly-traded companies who provide information to any number of designated authorities regarding conduct which the employee **reasonably believes** constitutes a violation of an SEC rule or other federal law designed to deter fraud against shareholders. 18 U.S.C. § 1514A.

In this case, the Company’s CFO reported certain questionable conduct that he believed might be in violation of the law. The company’s management called a subsequent meeting with its attorney and outside auditor to investigate the allegations, but the CFO refused to attend the meeting without his personal attorney.

The Company suspended him that day and fired him the following week for refusing to attend the meeting. The CFO filed a complaint claiming that his termination was in retaliation for his protected activity under the Act. The Occupational Safety and Health Administration (“OSHA”), the federal agency designated to handle such complaints, denied the complaint. On appeal, the ALJ first determined that the employee had engaged in a number of activities that constitute “protected” activities under the Act, including: 1) informing an external

auditor and the President/CEO and Chairman of the Board of Directors that he could not certify certain financial statements because the statements contained improper entries that could potentially mislead investors; 2) notifying an external auditor that he could not attest to the validity of the company’s financial statements because the auditors had not given him sufficient access to the company’s financial data; 3) reporting concerns that the company’s internal controls were deficient because too many entries were made by individuals outside of the finance department; and (4) reporting to management his concerns that these problems could constitute fraudulent activity under the Act. After finding that the employee had engaged in protected activity, the ALJ went on to find that the protected activity was a **contributing factor** in the adverse employment action. In a lengthy decision, the ALJ ruled that the proximity in time between the employee’s protected activities and his termination (6-7 weeks) was sufficient to create an inference of unlawful discrimination. The ALJ rejected the company’s stated reason for the firing — that the employee refused to attend the meeting — as a mere “pretext” for the retaliatory motive. In reaching his decision, the ALJ noted that whether the company **actually violated** any federal fraud statute or regulation was not at issue; rather, the fact that the individual **reasonably believed** that his employer engaged in such conduct and reported this concern, and suffered an adverse employment action as a result, was sufficient to show that he was fired in retaliation for his protected activity under the statute.

The ALJ ordered reinstatement, back pay, litigation costs and expenses, and gave the CFO 30 days in which to produce evidence upon which the back pay award and the litigation fees and expenses could be calculated. It is likely that the Company will appeal the adverse ruling to the Administrative Review Board.

### Voluntary Affirmative Action, continued

discrimination. The Fifth Circuit’s holding follows an earlier Eleventh Circuit ruling, which explained that the existence of an affirmative action plan combined with evidence that the plan was followed in an employment decision was sufficient to constitute direct evidence of unlawful discrimination unless the plan is valid. *Bass v. Bd. Of County Comm’rs, Orange*

*County, FL*, 256 F.3d 1095, 1110 (11th Cir. 2001). However, by allowing reliance on the BWF without evidence that the plan was used in specific instances of discrimination, *Frank* goes a step beyond *Bass*. The *Frank* decision should serve as a warning to any employer who has implemented (or is considering implementing) a voluntary affirmative action plan.

## Company's Request That Employees Report Union Harassment Deemed an Unfair Labor Practice

It is well settled that employers have the right to protect their employees from union threats and harassment. However, there is a fine line between employers protecting their employees and employers usurping employees' rights to unionize, as a recent court ruling illustrates.

In *Bloomington-Normal Seating Co. v. NLRB*, the Seventh Circuit Court of Appeals considered the legality of actions that the company took during a meeting to address the employees' unionization efforts. The company held the meeting shortly after a supervisor saw an employee reading a union newspaper. During this meeting, a production manager read a prepared speech that stated, "if you are threatened or harassed about signing a union card, I hope you will let us know about it." The union filed an unfair labor practice charge. The court found that it would evaluate four factors in determining whether Bloomington-Normal violated the NLRA: (1) the timing of the speech; (2) the words used in the speech; (3) whether the speech targeted union supporters; and (4)

whether the speech was directed toward employees who were being threatened.

The Seventh Circuit concluded that because there were no prior reports of threats or harassment, because the company's directive targeted only union supporters, because the term harassment may include protected organizational activity, and because the company's speech was made immediately after finding out about the union's presence, it was reasonable for the NLRB to conclude that the speech encouraged employees to report unionization efforts and violated Section 8(a) of the NLRA.

In the aftermath of the *Bloomington-Normal* ruling, employers can still request their employees to inform them about "threats" and "harassment" in general, but employers should ensure that their requests do not single out union harassment or threats.

## Use of False Academic Degree Now a Crime in Illinois

While inflating one's credentials on a resume can lead to unfavorable consequences in the job-search market, the use of a false academic degree may lead to the harsher sanction of criminal prosecution under a new Illinois law.

It is now unlawful in Illinois for a person to knowingly use a false academic degree for the purpose of obtaining a job, a promotion, or higher pay in employment. In addition, a false academic degree cannot lawfully be used to obtain admission to a college or university or to be admitted to an advanced degree program.

The provision, which is part of the Illinois Criminal Code at 720 ILCS §5/17-2.5, also takes aim at those who manufacture and sell false academic degrees, unless the degree explicitly states that it is "for novelty purposes only."

A false academic degree is defined as a certificate, diploma, transcript or other document purporting to be issued by an institution of higher learning, such as a public or private university or community college, when the person has not completed the academic program indicated on the document.

The provision focuses solely on false documents. Therefore, it appears on its face that it would not cover circumstances in which a person misrepresents academic credentials on a job application or resume but does not present a false transcript, diploma or other documentary evidence as verification.

A violation of the "false academic degree" provision is designated as a Class A misdemeanors, which means the penalty for a conviction would range from probation to a minimal jail term.

## New Illinois Laws Affect Employers

A number of new laws from the Illinois legislature impact employers. The following statutes are of particular note:

**Amendments to the Criminal Identification Act Relevant to Employment Applications.** Effective January 1, 2004, employers in Illinois who seek criminal identification information on their job applications must include specific language on the application that the applicant is not obligated to disclose sealed or expunged records of conviction or arrest. This statement must appear on the application itself. Further, employers may not ask — on the application or in an interview — whether an applicant has had records expunged or sealed, nor may employers consider an expunged or sealed record in any employment decision.

**Uniform Mediation Act.** Effective January 1, 2004, the Uniform Mediation Act provides that communications that occur either during a mediation or for purposes of considering, conducting, participating in, initiating, or continuing a mediation are *privileged* and not subject to discovery or admissible in evidence, unless the privilege is waived. The privilege is held by the parties, the mediator, and non-party participants to the mediation.

The Act applies to mediations conducted under the following circumstances: 1) the parties are required to mediate by statute or court or administrative agency rule, or referred by a court, administrative agency or arbitrator; 2) the parties agree to mediate in writing or through electronic medium that demonstrates an expectation that mediation communications will be privileged against disclosure; and 3) the parties use as a mediator an individual who holds himself out as a mediator. The Act does not apply to mediations related to the establishment, negotiation, administration, or termination of a collective bargaining relationship; disputes pending or part of the processes established by a collective bargaining agreement; or mediations conducted by a judge who might make a ruling in the case. The parties to the mediation, the mediator and non-party participants have the right to waive their own privilege in a written record or orally during a proceeding.

**Amendments to the Illinois Insurance Code.** These amendments relate to insurance companies and insurance plans, but have an affect on Illinois employers with *outside insured* plans.

As of January 1, 2004, individual or group accident and health insurance policies that are amended, delivered, issued or renewed in Illinois after January 1, 2004, and that provide coverage for outpatient services and outpatient prescription drugs or devices, must provide coverage for all outpatient contraceptive devices and all outpatient contraceptive drugs and devices approved by the FDA. Coverage required under this section may not impose any deductible, coinsurance, waiting period, or other cost-sharing or limitation that is greater than that required for any outpatient service or outpatient prescription drug or device covered by the policy. An “outpatient contraceptive device” is defined as a consultation, examination, procedure, or medical service provided on an outpatient basis and related to the use of contraceptive methods (including natural family planning) to prevent an unintended pregnancy. This Amendment will not be construed to require insurance companies to cover services related to an abortion, or services related to permanent sterilization that require a surgical procedure.

Similar amendments to the Insurance Code require that individual and group policies that provide coverage for prescription drugs may not limit coverage for prescription inhalers based upon any restriction on the number of days before an inhaler refill may be obtained, if, contrary to the restrictions, the inhalants have been ordered or prescribed by the treating physician; and require that individual and group policies that provide coverage to residents in Illinois must provide benefits or coverage for all colorectal cancer examinations and laboratory tests for colorectal cancer prescribed by a physician in accordance with the American Cancer Society guidelines on colorectal cancer screening or other guidelines issued by nationally recognized professional medical societies.

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