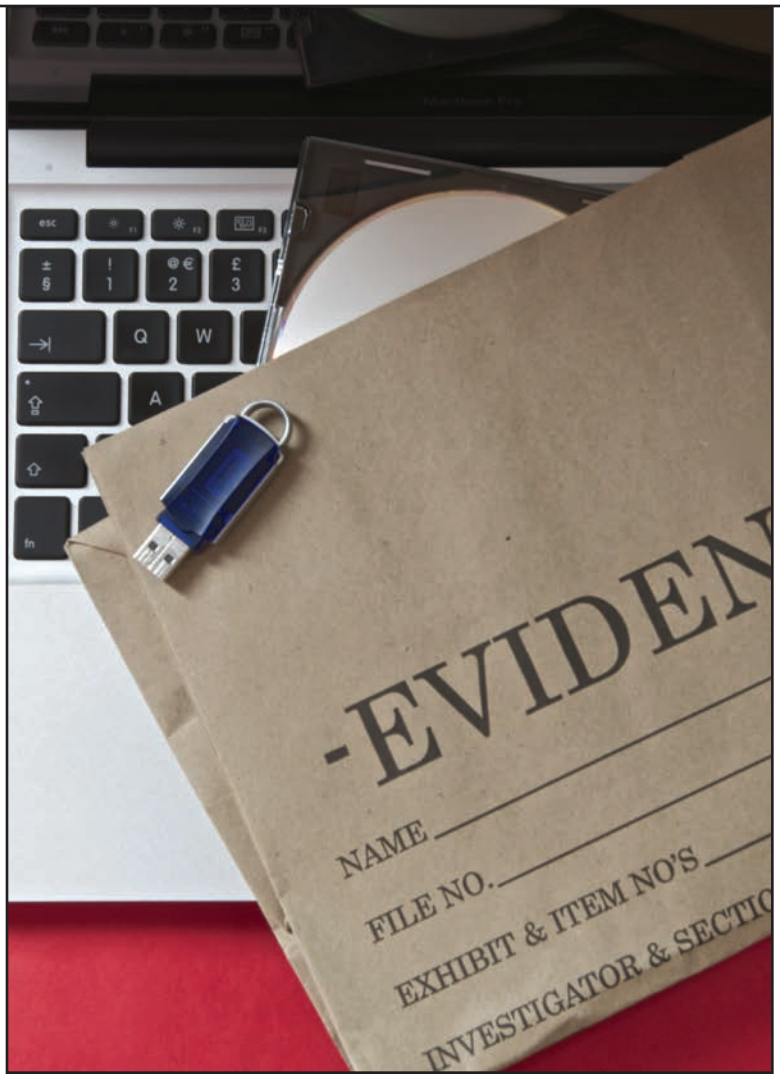
Employment Law Briefing



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You've got trouble

E-mail correspondence bounces ADEA case back to trial

In *Tramp v. Associated Underwriters, Inc.*, the U.S. Court of Appeals for the Eighth Circuit considered whether an employer terminated an employee to lower its health insurance premiums, and if such a termination violated the Age Discrimination in Employment Act (ADEA). The key evidence in the case: e-mail correspondence between the employer and its health care benefits provider.

Exchanging messages

The plaintiff, who was over age 65, argued that she was terminated because her age affected the company's health insurance costs. She stated that the employer's e-mail correspondence with the company's health care benefits provider demonstrated the "but for" cause of her termination wasn't poor performance — it was her age.

In those communications, the employer indicated that it expected a reduction in its health care premiums because of a decrease in the number of older and disabled employees. Specifically, one of the owners of the company wrote:

> We have lost several of the older, sicker employees and should have some consideration on this. If you have provided us with your final rates then that is what we will use in our decision.

Later another owner of the company met with the plaintiff and others and suggested that they use Medicare instead of the company's health care plan.

A few months after the plaintiff's termination, there was another e-mail between the owner of the company and the health care provider discussing the company's high renewal rates. The owner wrote, "Since last year we have lost our oldest and sickest employees.... Please let me know if this is the best we can do...."

At all times, the plaintiff retains the burden of persuasion to prove that age was the "but for" cause of the termination.

Documenting the decision

The employer asserted that the plaintiff was laid off as part of a workforce reduction (four employees were terminated from different departments) and that the plaintiff was specifically selected because of her history of poor performance. Management had formally reprimanded the plaintiff for her job performance, providing three examples as documentation.

The employer had also placed the plaintiff on a 90-day probationary period to improve her work. The probationary period ended a month before the plaintiff was terminated. The company owner further stated that there were other problems with the plaintiff's performance — including her poor attitude, for which she'd received verbal warnings.

The trial court granted summary judgment in favor of the employer. Referring to *Hazen Paper Co. v. Biggins*, the court found that, even though health care costs and age may be similar, they're analytically distinct from one another so as to not implicate the ADEA. (See "An important ADEA precursor" on page 3.) The plaintiff appealed.

Perceiving the premiums

To establish a prima facie case of age discrimination in violation of the ADEA, a plaintiff must show that he or she is:

1. Over 40 years old,
2. Qualified for the applicable job,
3. Suffered an adverse employment action, and
4. In possession of additional evidence that age was a factor in the termination decision.

At all times, the plaintiff retains the burden of persuasion to prove that age was the "but for" cause of the termination.

In light of these requirements, the appellate court reversed — holding that there were issues of fact as to whether age was the "but for" cause of the plaintiff's termination. Specifically, the court found that the employer's perception of insurance premiums could be attached to age and, therefore, there remained a question as to the employer's motivation for terminating the plaintiff.

Furthermore, the appellate court stated that age and health care costs were not so analytically distinct if the employer presumed that the rise in one necessitated a rise in the other. The court found that it was possible for a reasonable jury to conclude from the evidence (e-mail correspondence with the health care provider) that the company believed that insurance costs were directly correlated with the number of older employees.

Therefore, the appellate court held that discrimination may or may not have occurred and summary judgment prematurely disposed of the issue.

Making the difference

This decision reinforces the importance of training your managers to properly and discreetly draft e-mail correspondence. Even without a discriminatory intent, one or more negative or unflattering messages can make the difference between a case being dismissed on summary judgment and proceeding to trial. ♦

An important ADEA precursor

An important, benefits-related precursor to *Tramp v. Associated Underwriters, Inc.* (see main article) is the U.S. Supreme Court's decision in *Hazen Paper Co. v. Biggins*. Here, the 62-year-old plaintiff claimed that his employer had violated the Age Discrimination in Employment Act (ADEA) by terminating him just in time to avoid paying his pension benefits.

The Supreme Court held that, because pension plans typically provide that an employee's benefits accrue once the participant completes a certain number of service years, they're often correlated with age. But that doesn't mean pensions are *always* age-correlated. The Court held that an employee's age can be distinct from service years. For example, an employee who's under 40 (and, therefore, not protected under the ADEA) may have been employed by a company for his or her entire career, while an older worker may have been newly hired.

Therefore, it's possible that an employer may take into account only service years and not age. And because of the distinction between age and service years, a decision based solely on service years wouldn't necessarily violate the ADEA. Thus, without further evidence, the Court vacated and remanded — holding that terminating the plaintiff to prevent his pension benefits from vesting wasn't an ADEA violation.

Communication breakdown: A Title VII case

Communication is an important part of just about every job. But say an employee's strong speaking accent prompts her employer not to renew her contract. Is this tantamount to disparate treatment based on national origin under Title VII of the Civil Rights Act of 1964? That was the question in *Fong v. School Board of Palm Beach County,* a case heard by the U.S. Court of Appeals for the Eleventh Circuit.

Visiting the classroom

The school board hired the plaintiff, who was of Chinese descent and spoke English with a strong accent, to teach math under an annual contract. On the recommendation of the supervising principal, the school board renewed her teaching contract twice. Two years after her hire, the school board brought in a new principal to help improve the school's poor rating. With a high fail rate and many students speaking English only as a second language, the school had received a grade of "D."

The new principal and other school administrators observed the plaintiff while she was teaching and noticed that her students couldn't understand her. Moreover, the plaintiff relied largely on PowerPoint® presentations and videos shown in a darkened classroom.

During the new principal's first classroom visit, he said to the plaintiff, "You have a very strong accent. Your students don't understand you. I don't even understand you. You should record your speech to listen to it."

Later, the principal told her that she talked too much, the classroom was too dark and the students weren't doing anything. The plaintiff responded by asking whether the principal could understand her better now. The principal didn't reply and left the room.

Thereafter, the plaintiff and five other teachers were informed that their contracts wouldn't be renewed for the following school year.

Ensuring effectiveness

At trial, the plaintiff argued that the school principal's statements to her constituted direct evidence of discrimination based on her Chinese origin. The school board countered that the plaintiff wasn't a fit for the high school based on "classroom management issues, her resistance to feedback and change and not [being] willing to learn." The district court granted summary judgment in favor of the school board, and the plaintiff appealed.

The appellate court held that discrimination based on an employee's accent could, under some circumstances, be considered national origin discrimination. But an employee's heavy accent could also be a legitimate basis for an adverse employment action in situations where effective communication skills are reasonably related to job performance — as they are in teaching positions.

Regardless of the fact that she taught math rather than English, the appellate court found that the principal had a legitimate interest in ensuring that the teacher's students were able to understand her. The court further stated that the principal's statements didn't constitute remarks whose only intent was to discriminate on the basis of national origin. There was also undisputed evidence that the principal had a legitimate interest in improving the school's ratings.

Therefore, the employee failed to show that the school's legitimate, nondiscriminatory reason for not renewing her teaching contract — her ineffectiveness as a teacher — was pretext for discrimination based on her national origin.

Minding the distinction

This case serves as a reminder of the distinction between disparaging an employee's accent for the purposes of humiliation or discrimination, and criticizing an accent as it relates to the employee's job performance.

Again, the ability to communicate effectively is an essential function of many jobs. So, regardless of an employee's national origin, you have the ability to ensure that your employees are able to perform their essential job functions. Nonetheless, when taking an adverse employment action against an employee partly based on his or her manner of speaking, consult with your attorney. ♦

Prep your PIPs to avoid a constructive discharge claim

An essential element of most employment discrimination claims is that the employee in question suffered an adverse employment action. An exception to this general rule may occur when an employee suffers a "constructive discharge" — that is, when working conditions are so intolerable that a reasonable person in the employee's position would have felt compelled to resign.

In *Perret v. Nationwide Mutual Insurance Company*, the U.S. Court of Appeals for the Fifth Circuit considered whether an employer had constructively discharged two employees because of their age and/or race.

Process in dispute

The plaintiffs were insurance sales managers who worked for the same supervisor. They were the two oldest managers in their region, and one of them was the only African-American manager in the region.

In November 2009, even though both plaintiffs were near the top of their region in sales, they were placed on coaching plans. The plaintiffs asserted that the coaching plans didn't comply with company policies and were based on minor or trivial performance issues — including vague and subjective criteria that were impossible to meet.

Because of their failure to improve in accordance with the coaching plans, the plaintiffs were put on performance improvement plans (PIPs) in April 2010. They argued that they were preselected for termination because of their age and/or race and that the employer didn't fairly evaluate their compliance with the coaching plans and PIPs. Further, the plaintiffs believed that the PIPs were the final stage in the employer's process for terminating employees, so both resigned.

2 primary allegations

The plaintiffs sued their former employer, alleging that:

1. They were unlawfully disciplined because of their age and/or race, and
2. Their joint resignation was effectively a constructive discharge.

At trial, a jury found that the employer had constructively discharged the employees because of their age and/or race. The employer appealed, arguing that the jury's finding was a mistake.

Relevant factors

On appeal, the appellate court found that there was insufficient evidence of constructive discharge. The court identified the following factors as relevant to constructive discharge:

- Demotion,
- Reduction in salary or job responsibilities,
- Reassignment to menial or degrading work,
- Badgering or harassment,
- Humiliation intended to encourage resignation, and
- Early-retirement offers that would make the employee worse off whether the offer was accepted or not.

The appellate court held that the plaintiffs had failed to provide evidence that their working conditions were so intolerable that a reasonable person in their position would have felt compelled to resign. Although the plaintiffs produced evidence that their bonuses were withheld because they were on PIPs, the court held that the evidence in question didn't rise to the level of the factors noted above.

The plaintiffs also failed to present any evidence that a supervisor or manager ever advised them to resign or asked them whether they would resign. Furthermore, the court held that there was no evidence showing that the PIPs inevitably led to the termination of other managers in the plaintiffs' position.

Therefore, the appellate court reversed the trial court's decision and held that the plaintiffs hadn't been constructively discharged.

Concrete criteria

As this case shows, the threshold for proving constructive discharge is high. Plaintiffs will have to present clear evidence showing one or more of the relevant factors noted to stand a chance of proving their claims.

Nonetheless, the employer in this case incurred considerable expense before finally receiving a favorable determination on appeal. To avoid such costly litigation, ensure that your PIPs have concrete criteria for evaluating employee performance. In addition, keep PIPs consistent with other company policies and include measurable goals to determine whether an employee is improving. ♦

Manager or salesperson?

Overtime exemptions under the Fair Labor Standards Act

Whether an employee should receive overtime pay or is exempt from such compensation under the Fair Labor Standards Act (FLSA) is a common employment law dispute. The issue was raised yet again recently in the case of *Little v. Belle Tire Distributors, Inc.*

Description and duties

The plaintiff, whose job title was First Assistant Manager, brought an action against his employer for unpaid overtime compensation pursuant to the FLSA. The plaintiff was salaried and earned $1,100 biweekly. He was also eligible for bonuses based on store performance. The employer's job description for a First Assistant Manager included phrases such as:

- "Professional selling skills,"
- "Inventory control and pricing,"
- "Knowledge of location payroll control,"
- "Necessary supervisory skills,"
- "Managerial skills," and
- "[Knowledge of] hiring and termination procedures."

The employer argued that the plaintiff was influential in hiring and actively led employee training and other management tasks.

The plaintiff asserted that he was a salesman who provided clerical assistance to the store manager. He stated that his "influence in hiring" was limited to two brief

interviews, and the training consisted of sessions on topics selected solely by the employer, using forms and videos prepared by the employer.

A district court granted summary judgment in favor of the employer, finding that the plaintiff was exempt from the FLSA's overtime requirements under both the administrative and executive exemptions. The plaintiff appealed, arguing that the trial court had improperly found him exempt.

Executive examination

To be considered exempt from overtime pursuant to the FLSA's executive exemption, an employee must:

1. Receive compensation on a salary basis at a rate of not less than $455 per week,
2. Perform as a primary duty the management of the enterprise or of a customarily recognized department,
3. Customarily and regularly direct the work of two or more employees, and
4. Hold the authority to hire or fire other employees or make weighted contributions to decisions related to the hiring, firing, promotion or other status changes of employees.

The U.S. Court of Appeals for the Sixth Circuit held that, though the plaintiff met the first factor of the executive exemption by making a salary of more than $455 per week, there were genuine disputes regarding the other factors.

For example, though the plaintiff played some role in interviewing job candidates, preparing schedules and conducting training, there was a question of how much discretion he really had. The plaintiff testified that preparing the schedule was clerical: He inputted the time off and submitted the schedule to the store manager for approval. The plaintiff also presented evidence that his other job functions were clerical and limited by his supervisor.

Therefore, the appellate court held that the record didn't clearly establish that the plaintiff fell within the executive exemption and reversed the trial court's decision.

Administrative assessment

In addition, the appellate court held that there were genuine disputes regarding the plaintiff's classification as an administrative exempt employee. To qualify for the FLSA's administrative exemption, an employee must:

1. Receive compensation on a salary basis at a rate of not less than $455 per week,
2. Perform as a primary duty office or nonmanual work directly related to the management or general business operations of the employer, and
3. Exercise discretion and independent judgment with respect to matters of significance.

The plaintiff's testimony suggested that his discretion was highly constrained regarding his administrative tasks. For instance, he submitted purchase orders but the company chose the vendors.

Furthermore, the plaintiff testified that, 80% to 90% of the time, he performed mostly sales duties. The appellate court noted that selling a product wasn't considered work directly related to the management or general business operations of the employer.

The appellate court recognized that the amount of time spent on a single task wasn't the only factor in determining an employee's primary duty. But the fact that the plaintiff spent most of his time on nonadministrative tasks that he couldn't perform concurrently with administrative tasks created a dispute as to whether his administrative responsibilities were, in fact, his primary duty.

Therefore, the appellate court again reversed the trial court's decision and remanded the case to the lower court for further consideration.

Clear reminder

This case is a clear reminder that, even if you include the word "manager" in a job title and pay an employee a salary, he or she may not be exempt from overtime. Whether an employee is exempt depends on the actual job duties and functions that he or she performs. It's advisable to, on occasion, verify that the employees you consider exempt from overtime are, in fact, performing work qualifying as exempt under the FLSA. ♦

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