

NEW TRAPS FOR THE UNWARY – RECENT EEO DEVELOPMENTS

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I. INTRODUCTION

The purpose of this presentation is to touch upon recent developments in the areas of Equal Employment Opportunity and unlawful discrimination. The title of this presentation, “New Traps for the Unwary,” is more threatening than perhaps justified because, except for two exceptions, recent developments have for the most part been favorable to employers. The two exceptions to the good news are first, the Michigan Supreme Court has made it easier for whites and males to sue for discrimination, and second, the United States Supreme Court has made it easier for older workers to sue for discrimination. But first, the good news.

A. Jury Awards Must Be Reasonable.

The Michigan Supreme Court has made it very clear that it will not tolerate runaway jury verdicts in discrimination cases. In *Gilbert v DaimlerChrysler Corp.*, 470 Mich 749 (2004), the Michigan Supreme Court vacated a \$21million verdict for the plaintiff in a sexual harassment case because it was excessive. The Supreme Court also ordered a new trial because the plaintiff’s trial counsel, Jeffrey Feiger, “engaged in a sustained and deliberate effort to divert the jury’s attention from the facts and the law.

The Supreme Court ruled that the following “objective factors” must be considered to be sure that jury verdicts properly compensate the injured party for proven losses: (1) whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; (2) whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; and (3) whether the amount awarded is comparable to awards in similar cases within the State and in other jurisdictions. In this case, the jury had awarded the plaintiff \$1 million for lost earnings and medical expenses, even though the plaintiff was still employed and she had produced no evidence to support her claim for medical expenses. The jury also awarded \$20 million for pain and suffering, which the Supreme Court said greatly exceeded any other hostile environment/sexual harassment jury verdict in the country.

Even if jury awards are reasonable, the total cost to an employer can be substantial. In *McCombs v Meijer, Inc.*, _____ F3d _____ (CA 6, 2005), the 6th Circuit Court of Appeals upheld a jury verdict in favor of the plaintiff for \$25,000 in compensatory damages, \$100,000 in punitive damages, and attorney fees in excess of \$474,000. The plaintiff had complained that she was sexually harassed by a co-worker with whom she worked for six months.

B. The Plaintiff Must Himself Have Been Mistreated.

In *Honor v Booz-Allen & Hamilton, Inc.*, 383 F3d 180 (CA 4, 2004), the federal Court of Appeals for the 4th Circuit held that an African-American human resources director who was not himself mistreated could not support a hostile work environment claim by alleging that African-Americans were poorly treated at work. He also could not base a hostile environment claim on “professional frustrations” that have no clear link to his race. The plaintiff alleged that other African-Americans had been abused and treated in a discriminatory manner by the employer, but he admitted that he himself had not been subjected to such treatment. Therefore, the Court held, he had no basis to sue.

C. Proximity In Times Does Not Automatically Establish Causation.

In *Groves v Cost Planning and Management Int'l*, 372 F3d 1008 (CA 8, 2004), the Federal Court of Appeals affirmed summary judgment in favor of the employer, even though the decision maker decided to discharge the employee almost immediately after learning that she was pregnant. The Court of Appeals ruled that the employer was entitled to summary judgment because the employee failed to offer any evidence that suggested that the employer's legitimate, non-discriminatory explanation for the discharge was unworthy of belief. The Court said: "timing alone does not sufficiently undermine [the employer's] justifications...."

Obviously, if an employer learns that an employee is pregnant just before making a discharge decision, or learns that the employee has recently complained about discrimination, the employer should exercise great care in taking adverse action against the employee. However, the employer is not prevented from taking adverse action. Rather, the employer should satisfy itself that it has a legitimate, non-discriminatory reason for the adverse action that is about to be taken. The proximity in time between learning of some protected act or protected condition and the decision to terminate is important, but it is not determinative.

D. The Employer May Enforce Work Environment Rules Despite Religious Beliefs.

In *Peterson v Hewlett-Packard Co.*, 358 F3d 599 (CA 9, 2004), the Court held that the employer did not violate the rights of a "devout Christian" employee who believes homosexuality is forbidden by God when it fired him for posting on his cubicle and refusing to remove biblical scriptures that condemned homosexuality and fornication. The Court held that the employee was discharged not because of his religious beliefs, but because he violated the company's harassment policy by attempting to generate a hostile and intolerant work environment, and because he was insubordinate when told to remove the demeaning postings.

Employers in many situations are required to make reasonable accommodations for employees religious beliefs, but an employer is not required to allow an employee to create a hostile work environment by posting materials condemning other employees' beliefs.

II. MICHIGAN SUPREME COURT MAKES IT EASIER FOR MAJORITY EMPLOYEES (WHITES AND MALES) TO SUE

A. Lind v City of Battle Creek, 470 Mich 230 (MI. Sup. Ct., June 11, 2004).

Lind, a white police officer, sued his employer, the City of Battle Creek, claiming that the City had violated the Michigan Civil Rights Act, MCL 37.2202(1)(a), by promoting to the rank of sergeant a black officer, rather than Lind, on the basis of race. The collective bargaining agreement permitted the City to select any one of the top five scoring candidates on the written and oral examinations. Plaintiff was rated second among the top five eligible officers, and the black officer who was promoted was rated fifth.

The issue in the Lind case was whether a white plaintiff claiming “reverse discrimination” must satisfy standards different from those required of minority plaintiffs claiming discrimination. The Court of Appeals in the Lind case held that a “majority,” i.e., a white plaintiff, in a “reverse discrimination” case, in order to make a prima facie showing of discrimination, must, in addition to proving the elements a “minority” in a discrimination case must prove, also must prove an additional element. The additional element a white employee must prove, according to the Court of Appeals, is that there are “background circumstances supporting the suspicion that the defendant is that unusual employer who discriminates against the majority....” In ruling that a white plaintiff must prove more in a discrimination case than a minority plaintiff must prove, the Court of Appeals relied on the earlier decision of the Court of Appeals in Allen v Comprehensive Health Services, 222 Mich App 426, 429-433; 564 NW2d 914 (1997). The Allen case involved a claim of gender discrimination, rather than race discrimination, and the Court of Appeals held in the Allen case that a majority plaintiff in a “reverse discrimination” case must prove the additional element of “background circumstances supporting the suspicion that the defendant is an employer who discriminates against the majority....”

The Michigan Supreme Court reversed the Court of Appeals Lind decision and overruled the Allen precedent. According to the Supreme Court, a white plaintiff is *not* required to prove more than a minority plaintiff in a discrimination case. In reaching this decision, the Supreme Court noted that the Michigan Civil Rights Act (MCL 37.2202(1)(a)) provides that: “[a]n employer shall not ... discriminate against an individual with respect to employment ... because of ... race....” The statute draws no distinction between “individual” plaintiffs on account of race.

B. Effect of the Lind Ruling.

Prior to the Lind decision, it was more difficult for a white or a male employee to prove a claim of discrimination. Therefore, employers were sometimes not as careful in insuring that they could prove a legitimate, non-discriminatory basis for a personnel decision adversely effecting a white person or a male. After the Lind decision, an employer, when making a decision that adversely effects a white employee or a male and benefits a minority or female employee, will need to consider whether it can prove a legitimate, non-discriminatory reason for the decision. It should be noted, that the Lind decision applies not only to cases where the basis for the claim of discrimination is race, but also cases where the claimed basis of discrimination is gender.

C. Federal Court Decisions On Reverse Discrimination.

The United States Supreme Court has not yet addressed the issue of whether “majority,” i.e., white or male, plaintiffs must prove something more in a “reverse discrimination” case than a minority must prove in a discrimination case. Further, there is no consensus among the Federal Circuit Courts of Appeals regarding what “majority” plaintiffs must prove in a “reverse discrimination” case.

There are three general approaches followed by the Federal Circuit Courts of Appeals. The majority of the Federal Courts of Appeals require majority plaintiffs to prove the additional factor of “background circumstances,” that is, the majority plaintiff must show background circumstances that support the suspicion that the defendant is that unusual employer who discriminates against the majority. This approach is followed by our own 6th Circuit Court of Appeals, as well as the United States Courts of Appeals for the District of Columbia, the 7th and the 8th Circuits. The fact that the 6th Circuit Court of Appeals takes this approach leads to the anomalous result that a white male suing in a federal court in Michigan under Title VII for discrimination must prove the extra element. But, if the same white male sues in state court under the Michigan Civil Rights Statute for the same act of discrimination, he does not need to prove the extra element.

The second approach does not require the plaintiff in a reverse discrimination case to prove an additional element. This approach is followed by the third and eleventh Circuit Courts of Appeals; and this is the approach that was recently adopted by the Michigan Supreme Court in the Lind decision.

The third approach allows a majority plaintiff to establish a prima facie case in one of two ways: by using the “background circumstances” test, or by showing “indirect evidence sufficient to support a reasonable probability, that but for the plaintiff’s status as a member of the majority the challenged action would have favored the plaintiff.” This approach is followed by the 4th and 10th Circuit Courts of Appeals.

D. The Prima Facie Case of Discrimination

The civil rights statutes prohibit discrimination against an individual because of some protected category, such as race. Sometimes there is direct evidence of discrimination, such as the case where the employer admits that a person was promoted because of his or her race. But in most cases, there is no smoking gun. Therefore, the case law has evolved, starting with the United States Supreme Court decision in McDonnell Douglas that allows a plaintiff to create a presumption of discrimination by offering a prima facie case of discrimination. To establish the prima facie case of discrimination, the plaintiff must present evidence that: (1) he or she belongs to a protected class; (2) he or she applied and was qualified for a job for which the employer was seeking applicants; (3) despite his or her qualifications, he or she was rejected; and (4) after the rejection, the position remained open and the employer continued to seek applicants from persons with similar qualifications.

Prior to the Supreme Court’s decision in Lind, majority (i.e., white or male) plaintiffs were required to prove a fifth element: that this employer was one of those rare employers who discriminates against majority employees.

III. U.S. SUPREME COURT EXPANDS AGE DISCRIMINATION EXPOSURE

A. Smith v City of Jackson, Mississippi, 544 U.S. ____ (March 30, 2005).

In Smith, a group of police officers employed by the City of Jackson, Mississippi filed suit contending that salary increases they received in 1999 violated the Age Discrimination in Employment Act of 1967 (ADEA) because they were less generous to officers over the age of 40 than to younger officers.

The City had done a salary survey and determined that the City needed to raise the pay of police officers in order to be competitive with surrounding communities. Police officers who had less than five years of tenure received proportionately greater raises than those police officers with more seniority. The plaintiffs were a group of older officers who filed suit claiming that most of the older officers had more than five years of service and therefore they received proportionately smaller pay increases. This, the plaintiffs argued, violated the ADEA because it had a “disparate-impact” on older officers.

The plaintiffs argued that the City may not have *intended* to discriminate on the basis of age, but the result of the new plan “disparately-impacted” the older officers and, therefore, violated the ADEA. Both the Federal District Court and the Federal Court of Appeals who heard the case dismissed the suit, ruling that disparate-impact claims are categorically unavailable under the ADEA. The Supreme Court ruled that the District Court and the Court of Appeals were wrong, and that there can be valid disparate-impact claims under the ADEA. However, the Supreme Court also ruled that the particular plaintiffs in this case did not have a valid age discrimination claim because the City had shown that its decision to give bigger pay raises to the newest officers was “based on reasonable factors other than age.” In other words, the City’s pay survey had shown that the City had fallen far behind in the pay of newer officers compared to the pay levels of surrounding cities, but the City had not fallen as far behind in the pay of more senior officers. Therefore, the difference in the percentage of pay raises was “based upon reasonable factors other than age.”

B. Types of Discrimination.

In General, there are two types of discrimination, “disparate treatment” and “disparate-impact.” “Disparate Treatment” means that the employer *intentionally* treated a person differently because of his or her age, sex, race, or some other protected category. Under the disparate treatment theory, a plaintiff must prove that the employer *intentionally* acted to the plaintiff’s disadvantage due to the plaintiff’s membership in a protected group. For example, in a sex discrimination case in which a woman was fired, she must prove that the employer discharged her *because of* her sex. Proving the employers’ wrongful intent is essential to the claim. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

In “disparate-impact” cases, the intent of the employer is irrelevant. Rather, the issue is did the employment practice more harshly effect a statutorily protected group, and if so, was the employment practice justified by business necessity. For example, in the case of Griggs v Duke Power Co., 401 U.S. 424 (1971), the Supreme Court held that the employer’s practice of requiring a high school education as a condition of employment was unlawfully discriminatory and a violation of Title VII because the educational requirement disqualified African-Americans at a substantially higher rate than white applications, *and* the employers could not show that the high school education was necessary or was significantly related to successful job performance. The employer had adopted the high school diploma requirement without any intent to discriminate and had acted in good faith. Nevertheless, the Supreme Court in Griggs held that the employer’s good faith “does not redeem employment practices or testing mechanisms that operate as built-in headwinds for minority groups and are unrelated to measuring job capability.

It has been well-known since the U.S. Supreme Court decided the Griggs case in 1971 that an employee could sue for race, color, religion, sex or national origin discrimination under Title VII based upon “disparate impact.” But until the recent decision in Smith v City of Jackson, it was not recognized that a person could sue for disparate impact discrimination based upon age.

Griggs v Duke Power Co. was a lawsuit for racial discrimination in violation of Title VII. Title VII prohibits discrimination based upon race, color, religion, sex or national origin. However, Title VII does not prohibit age discrimination. The Federal Age Discrimination in Employment Act was passed later, to prohibit age discrimination.

The ADEA uses the same language to prohibit age discrimination that Title VII uses to prohibit “race, color, religion, sex or national origin” discrimination. However, there is a major difference between Title VII and ADEA. The ADEA has additional language that provides that any “otherwise prohibited” action is permitted “where the differentiation is based on reasonable factors other than age.” Therefore, a defendant employer in an age discrimination case can win a disparate-impact claim by showing that the difference in treatment was “based upon reasonable factors other than age.” In the City of Jackson case, the employer showed that the difference in the amount of pay increases was due to competitive pay rates in the area, rather than due to age.

As a result of the recent Supreme Court decision in Smith v City of Jackson, employers need to consider whether a particular employment practice disproportionately adversely affects older employees. If it does, the employer must be certain that the differentiation is based upon some reasonable factor other than age.

IV. PENDING LEGISLATION

Senator Virg Berneo and 13 other sponsors have introduced Senate Bill No. 381, which they call the “Employee Privacy Protection Act.”¹ The Senate Bill is unlikely to become law, but if it does, it will radically alter how Michigan employees handle personnel matters. The Senate Bill provides in part as follows:

“...an employer shall not fail or refuse to hire or recruit, discharge or otherwise discriminate against an individual with respect to employment, compensation, or a terms, condition, or privilege of employment because the employee engages in, or is regarded as engaging in, a lawful activity that is both off the employer’s premises and during non-work hours.”

The Senate Bill would allow any person injured by a violation of the act to sue for injunctive relief, damages and attorney fees and costs.

If the Senate Bill becomes law, it is likely that many employees discharged in the future will claim they were discharged because of their outside activities.

¹ A copy of the Senate Bill is attached.

V. EMPLOYMENT BACKGROUND CHECKS

A. **Credit Reports: The Applicant's Consent Is Necessary.**

Perhaps the highest-level, most comprehensive background check of an applicant is a credit report. The Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681a(d)(1), defines a *consumer report* as “any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living.”

The Fair Credit Reporting Act, 15 U.S.C. 1681, *et seq.*, permits employers to request a credit report on an applicant if the employer intends to use the information for employment purposes. *Employment purposes* means the use of a consumer report for the purpose of “evaluating a consumer for employment, promotion, reassignment or retention as an employee. (15 U.S.C. 1681a(h)).

In order to use a credit report in the employment process, the FCRA requires employers to give applicants or employees written notice that a credit report may be used and requires that the employer obtain the applicant’s or employee’s written authorization before requesting a consumer credit report. (15 U.S.C. 1681b(b)(2)).

Further, if the employer uses a credit report to deny employment or take other adverse employment action, the employer must do the following:

1. Before relying on the consumer report to deny a job application, to reassign or terminate an employee, or to deny a promotion, the employer must give the individual a pre-adverse action disclosure that includes a copy of the individual’s consumer report and a copy of a Federal Trade Commission mandated document called *A Summary of Your Rights Under The Fair Credit Reporting Act*. 15 U.S.C. 1681b(b)(3)).
2. After an employer has taken an adverse employment action, the employer must give the individual an adverse action notice that must include: (1) the name, address, and phone number of the consumer reporting agency that supplied the report; (2) a statement that the agency that supplied the report did not make the decision to take the adverse action and cannot give specific reasons for it; and (3) a notice of the individual’s right to dispute the accuracy or completeness of any information the agency furnished and of his or her right to an additional free consumer report from the agency on request within 60 days. (15 U.S.C. 1681m(a)).

The EEOC has held that screening applicants on the basis of credit reference has a disproportionate impact on minority group members. EEOC Decision Number 72-1176 (February 28, 1972). Therefore, if an employer is going to require good credit reports, the employer must be prepared to prove, if challenged, that good credit is necessary for the job.

An employer may not discriminate against an applicant because the applicant sought protection under the bankruptcy act, or because the applicant was insolvent before or during the bankruptcy. (11 U.S.C. 525(b)).

B. An Applicant's Driving Record May Be Obtained From the Secretary Of State.

The employer may obtain an applicant's driving record by submitting to the Michigan Department of State Record Lookup Unit a form called Michigan Department of State Commercial Record Request. The employer should have the applicant sign the form, unless the information sought relates to the holder of a commercial driver's license, in which case the applicant's consent is not needed. (MCL 257.208(c)).

C. To Review A Personnel File, Obtain The Applicant's Consent.

If a prospective employer wishes to review the applicant's employment file from a former employer, a signed consent should be obtained from the applicant. However, the Bullard-Plawecki Employee Right-To-Know Act, MCL 423.501, *et seq*, imposes limitations on the release of an employee's disciplinary reports, letters of reprimand and other disciplinary actions to third parties. (MCL 425.506(1)).

Except when release is ordered in legal action or arbitration, an employer must delete from the file being released any disciplinary reports, letters of reprimand, or other records of disciplinary action that are more than 4 years old. (MCL 423.507). Where the disciplinary materials are less than 4 years old, the employer may not release them without providing written notice of the release to the employee by First Class mail to the employee's last known address. The notice must be mailed on or before the day the information is divulged from the personnel record. This notification requirement does not apply where: (1) the employee has specifically waived the written notice as part of a written, signed employment application with another employer; (2) the disclosure is ordered in a legal action or arbitration to a party in that legal action; or (3) the information is requested by a governmental agency as a result of a claim or a complaint by an employee. (MCL 423.506(2), (3)).

D. To Review An Applicant's Educational Records, A Signed Release Is Necessary.

The Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. 1232g, prohibits the release of student records without written consent and generally applies to all public and private educational institutions to which funds have been made available under any program administered by the U.S. Secretary of Education. The term "educational records" means records that directly relate to a student and are maintained by an education agency or institution.

Under FERPA, parents and eligible students have the right to prevent disclosure of personally identifiable information without the parent's or eligible student's prior written consent. The consent must specify the records that may be disclosed, set forth the purpose of the disclosure, and identify to whom the disclosure is to be made. (20 U.S.C. 1232g(b)(2)(A); *see also* 34 C.F.R. 99.1, *et seq.*)

E. Criminal Records Check.

1. Records of Conviction. An employer may lawfully obtain a records of convictions. A formal criminal record check on a person can be obtained from the Department of State Police pursuant to the Michigan Freedom of Information Act for a \$10.00 fee.

2. An Employer May Not Request Arrest Records. The Michigan Elliott-Larsen Civil Rights Act (ELCRA) prohibits an employer from requesting arrest records, but this prohibition does not apply to information relative to a felony charge before conviction or dismissal. (MCL 37.2205(a)(1)).

Federal law also prohibits an employer from requesting or gathering *arrest* record information about an applicant or an employee. The reason employers are prohibited from obtaining arrest records is that minorities may have a higher rate of arrests that do not lead to convictions than members of the majority population.

3. Informal Criminal Background Check. There are websites that can be checked for public information on persons who have been imprisoned or who are convicted sex offenders:

a. www.michigan.gov/corrections

This is the official website of the Michigan Department of Corrections. Once you reach this website, click on "Offender Search" or "Offender Tracking Information System (OTIS)." This site provides Internet users with information about offenders who are or were under the supervision of the Michigan Department of Corrections. OTIS contains information about more than 300,000 prisoners, parolees and probationers.

This site does not contain information about anyone who has been arrested and convicted, but not yet sentenced. It also does not contain information about prisoners who were sentenced to jail only, because jails are operated by counties.

OTIS contains photographs of offenders, unless the offenders left the system before electronic photographs were available.

The Department of Corrections is proposing to delete former prisoners from the OTIS website once they are released from prison and discharged from parole. But for the time being, all offenders, past and present, who were ever subject to the Michigan Department of Corrections, are on the website.

b. www.michigan.gov/msp

This is the home page for the Michigan Department of State Police. Just click on the box entitled “Michigan Sex Offender Registry.” This website can be searched by zip code or by name of offender.

Currently, the Michigan Sex Offender website does not contain photographs of the sex offenders. However, beginning in May 2005, the State will begin posting pictures of convicted sex offenders on the website.

There is currently no national sex offender website. Therefore, if a sex offender from another state visits Michigan, you will not be able to find that person on the Michigan Sex Offender website, or any national sex offender website. If you happen to know the state the person is from, you might be able to check the sex offender website for that state. Federal law requires all states to have a sex offender website, but the various states’ sex offender lists have not been collected on one national list. The federal Child Protection Act of 2005 has been introduced in Congress but has not yet been adopted by Congress. If adopted, it will create a national sex offender website. The FBI maintains a federal data bank of sex offenders, but that data bank is not available to the public.

c. www.bop.gov/

This is the website for the federal prison systems. Once you reach this website, click on “Inmate Locator.” After consenting to the privacy policy, you will be able to search by name for any inmate who is currently in a federal prison or has been released from federal prison since 1982. Unfortunately, this website does not contain photographs of the inmates or provide any information regarding the criminal offense that led to incarceration.

4. Criminal Record Check Should Be Done In a Uniform And Consistent Manner. If an employer is not consistent in making criminal background checks, there may be an allegation of discrimination against certain racial or ethnic groups. A complete check of criminal records requires an authorization and release from the employee.

An employer should be careful in adopting a blanket policy of refusing to hire any applicant with a criminal record. Some courts have held that a policy of refusing to consider for employment any person convicted of a crime may violate Title VII because of the disparate impact on racial or ethnic groups.

5. Obtain a Release From the Applicant. Since a consent is necessary to obtain many different types of records, the employer should obtain a signed consent form as part of the employment application process. The consent form can be part of the application form itself and can be similar to the following:

The facts set forth above are true and complete. I hereby authorize investigation of all statements contained in this application and full disclosure of my present and prior work record. I grant permission to the Company to obtain information concerning my general reputation, character, conduct, and work quality and authorize any person or organization contacted to furnish information and opinions concerning my qualifications for employment, whether same is a matter of record or not, including personal evaluation of my honesty, reliability, carefulness, and ability to take disciplinary action assessed by previous employers. I hereby release such person or organization from any and all liability which may result in such person, organization, or prior employer from any obligation to provide me with written notification of such disclosure. I understand that employment is contingent upon this investigation and, if employed, false statements in this application as well as misrepresentations or omissions of information shall be considered cause for dismissal. I understand and agree that if, in the opinion of the Company, the results of the investigation are unsatisfactory, that an offer of employment that has been made may be withdrawn or my employment with the Company may be terminated.