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60

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BEFORE THE

NEW YORK UNIVERSITY'S 34TH NATIONAL
CONFERENCE ON LABOR

NEW YORK, NEW YORK

JUNE 12, 1981

RECENT DEVELOPMENTS IN EMPLOYMENT
ANTI-DISCRIMINATION LAWS

My topic for today is "Recent Developments in Employment Anti-Discrimination Laws". In addressing this topic, I will focus on several recent court cases that may have an impact on the present status of anti-discrimination laws. Of course, I do not intend for you to infer that the cases that I will discuss are the only new developments in EEO laws. They are just some of the ones that I think are important.

A. Markham v. Geller, 24 EPD paragraph 31,417 (2nd Cir. 1980) (Cert. Denied April 27, 1981)

The issue presented in Markham v. Geller was whether Title VII's disparate impact theory applies to actions instituted under the Age Discrimination in Employment Act ("ADEA").

The facts in Markham were that plaintiff, Geller, applied for a teaching position at defendant's school. At the time plaintiff was 55 years old. Plaintiff was rejected because of a cost-cutting policy which defendant adopted. That policy stated:

"Except in special situations and to the extent possible, teachers needed...will be recruited at levels below the sixth step of the salary schedule".

The sixth step was the salary grade reached by teachers with more than five years experience.

At trial plaintiff introduced expert statistical testimony establishing that 92.6% of Connecticut teachers between 40 and 55 years old have more than 5 years experience, while only 62% of teachers under 40 have taught more than five years; hence, the basis of plaintiff's claim of adverse impact.

The court ruled that the "substantive prohibitions of the ADEA were derived in haec verba from Title VII". Although the ADEA did not adopt Title VII's procedural rules entirely, the rule permitting a case to be established by a showing of discriminatory impact, ruled the court, is substantive. Therefore, Title VII's disparate impact theory must be read into the ADEA.

On April 27th of this year, the United States Supreme Court denied cert. in Markham v. Geller, over a strong dissent by Justice Rehnquist. Justice Rehnquist stated:

"In my opinion, the decision of the Court of Appeals is inconsistent with the express provisions of the ADEA and is not supported by any prior decision of [the Supreme Court]. The ADEA makes it unlawful for any employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. The policy under attack in this case, however, makes no reference to age. For budgetary reasons, a school board simply adopted a policy to hire teachers with fewer years of experience".

In my view, Congress did not intend the ADEA to have the restraining influence on local governments which will result from the Decision below. Congress revealed this intention [by the provision of the ADEA] which provides that it shall not be unlawful for an employer to take any action otherwise prohibited 'where the differential is based on factors other than age...'. "

This issue is sure to surface again, but until then, Markham should be read with great deference by management attorneys.

3. Hishon v. King & Soalding, 25 EPD Paragraph 31,703 (D.C. N.D. Ga., 1930)

The issue dealt with in Hishon was whether Title VII principles apply to law firm partnership policies.

The plaintiff, Hishon, was not elevated to partnership in defendant law firm. She claimed that the denial was because of sex in violation of Title VII. The court ruled that Title VII did not apply. It reasoned that Title VII speaks only in terms of employment relations and prohibits discrimination with respect to "compensation, terms, conditions or privileges of employment" and prohibits actions which adversely affect one's "status" as an employee. Since the word employee is not defined in Title VII, the court appears to have ruled that elevation to partnership is really buying into the Employer status and therefore held the facts of this case were not covered by Title VII.

The court distinguished the case of Lucido v. Cravath, Swaine & Moore on the grounds that the main complaint in that action was discharge as an associate because of race and religion, issues which the court held are clearly covered by Title VII. Moreover, the court dismissed as dictum reference in Lucido that denial of promotion to partnership might itself be a Title VII violation.

C. Texas Department of Community Affairs v. Burdine, 25 EPD Paragraph 31, 544. (U.S. Supreme Court, 1931)

The issue presented in Burdine was whether, after the plaintiff has proved a prima facie case of disparate treatment, the burden shifts to the defendant to persuade the court by a preponderance of the evidence that legitimate, non-discriminatory reasons for the challenged employment action existed.

The Fifth Circuit held that the defendant in a Title VII case bears the burden of proving by a preponderance of the evidence the existence of legitimate non-discriminatory reasons for the employment action and that the defendant also must prove by objective evidence that those hired or promoted were better qualified than the plaintiff.

The Court noted that in McDonnell Douglas v. Green it had ruled that the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, non-discriminatory reason for the employee's rejection". Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not true reasons, but were a pretext for discrimination.

The Court, further, stated that the nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all time with the plaintiff.

A prima facie case of disparate treatment is proven by plaintiff proving by a preponderance of the evidence that she applied for an available position, for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination. The prima facie case raises an inference of discrimination, stated the Court, because it presumed that these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. Establishment of the prima facie case, the Court ruled, in effect creates a presumption that the employer

unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the Court must enter judgment for the plaintiff because no issue of fact remains in the case.

SHIFTING OF THE BURDEN

The burden that shifts to the defendant, stated the Court, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else preferred, for a legitimate, non-discriminatory reason. The defendant does not, however, have to persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted.

The burden then shifts back to the plaintiff. In Burdine, plaintiff had to have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden merged with the ultimate burden of persuading the court that plaintiff has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

D. Teal v. State of Connecticut, 25 EPD Paragraph 31,702 (2nd Cir. 1981)

The question presented in this case was whether a plaintiff in a Title VII case may make a prima facie showing of disparate impact based on the disparate results produced by one portion of an employee selection process, where the bottom line reveals no such impact.

The facts in this case were: plaintiff, Teal, sought to attain permanent status as a supervisor. To attain permanent status, plaintiff had to participate in a selection process which required, as the first step, a passing score on a written examination. Those candidates who pass the written examination form an eligibility pool from which the appointing authority selects persons to fill the permanent positions. In making the final determinations the appointing authority considered the past work performance of the candidates, recommendations of the candidates' supervisors, and the candidates' seniority. Lastly, in the final step of the process, the defendants employed an affirmative action program to insure a large representation of minority candidates on the supervisory level. However, only if a candidate passed the written examination and enters the eligibility pool would he be exposed to the rest of the selection process and thus benefit from the consideration of these other factors.

The average test scores of blacks was substantially below that of whites. However, because of the affirmative action program, the bottom line showed that blacks were over represented in supervisory positions.

At the district court, the court evaluated the results of the selection process under the four-fifths rule of the Uniform Guidelines of Employee Selection Procedures prepared by the EEOC. The four-fifths rule provides:

"[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded ... as evidence of adverse impact".

While noting that the results of the written test did not satisfy the four-fifths rule, the district court concluded that the results of the entire selection process should be used to determine whether the plaintiffs had made out a prima facie case of discrimination under the disparate impact rule. Since the results of the entire selection procedure actually were more favorable to the black candidates than to the white applicants, the court dismissed the plaintiffs action for failure to prove a prima facie case.

The appeals court rejected the district courts ruling and held that where an indentifiable pass/fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process, that barrier is prima facie discriminatory. In essence, the court rejected the bottom line concept where there is a barrier beyond which applicants cannot penetrate. This appears to be a reaffirmance of the notion that anti-discrimination laws protect individuals. That is to say, to the individuals who did not pass the test it was irrelevant that some blacks were promoted. The court appears to have said that as individuals they have rights.

E. Northwest Airlines, Inc., v. Transport Workers, 25 EPD Paragraph 31,723 (Supreme Court, 1931).

The question decided in this case was whether an employer held liable for backpay because collectively bargained wage differentials were found to violate the Equal Pay Act and Title VII has a federal statutory or common law right to contribution from unions that allegedly bear at least partial responsibility for the statutory violations.

The facts were: Continuously from 1947 through 1974, petitioner paid higher wages to its male cabin attendants, who were classified as pursers, than to its female cabin attendants, who were classified as stewardesses. During that period, both the male and female cabin attendants were represented by a union and their wages were fixed by collective-bargaining agreements negotiated and executed in response to union demands.

In 1970, Ms. Laffey, a cabin attendant employed by Northwest Airlines commenced a class action against Northwest challenging the legality of the wage differential between pursers and stewardesses. On November 12, 1973, the District Court issued an opinion in which it found that the two positions required equal skill, effort, and responsibility and were performed under similar working conditions. Accordingly, the court held that Northwest had violated the Equal Pay Act and Title VII and entered judgement in favor of the plaintiff class. Unless that judgement is reversed or modified, petitioner will be required to pay in excess of 20 million dollars in backpay, damages, and interest to the members of the Laffey class.

After the entry of judgement against it, petitioner filed appropriate motions in the Laffey case asserting claims for contribution and indemnification against the unions.

On the issue of a statutory right to contribution, the court held that neither the Equal Pay Act nor Title VII expressly creates a right to contribution in favor of employers. Moreover, the court held that there is no common law right of contribution.

F. County of Washington v. Gunther, (U.S. Supreme Court, June 8, 1981)

(NO. 80-429)

The issue raised was whether the Bennett Amendment prohibits a Title VII sex compensation claim where the work performed by the females was not substantially equal to work performed by males.

Plaintiff, Gunther, filed suit against petitioner alleging, among others, that part of the pay differential between women and men was attributable to intentional sex discrimination. This claim was based on a claim that, because of intentional discrimination, the county set the pay scale for female guards, but not for male guards, at a level lower than that warranted by its own survey of outside markets and the worth of the job.

At trial, the District Court found that the male guards supervised more than 10 times as many prisoners per guard as did the female guards, and that the females devoted much more of their time to less valuable clerical duties. It therefore held that the females jobs were not substantially equal to those of the male guards, and that respondents were thus not entitled to equal pay. The District Court also dismissed respondents' claims that the discrepancy in pay between the male and female guards was attributable in part to intentional sex discrimination. It held as a matter of law that a sex-based wage discrimination claim cannot be brought under Title VII unless it would satisfy the equal work standard of the Equal Pay Act. The Court of Appeals reversed, holding that persons alleging sex discrimination "are not precluded from suing under Title VII to protest discriminatory compensation practices" merely because their jobs were not equal to higher-paying jobs held by members of the opposite sex.

The Supreme Court, in a 5-4 decision, stated that the issue before it was very narrow and that was: whether one can prove under Title VII by direct evidence that their wages were depressed because of intentional sex discrimination.

The decision on this issue, of course, required the Court to determine what limitations the Bennett Amendment places on Title VII's otherwise broad prohibitions against sex discrimination.

Title VII generally has broad prohibitions against sex discrimination which includes prohibitions against compensation discrimination. The Bennett Amendment, which is a section of Title VII, permits wage and compensation differences where such differences are "authorized" by the Equal Pay Act.

The Equal Pay Act, in essence, prohibits pay differences based on sex for doing substantially equal work, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than sex.

Petitioner argued that the purpose of the Bennett Amendment was to restrict Title VII sex-based wage discrimination claims to those that could also be brought under the Equal Pay Act, and thus that claims not arising from "equal work" are precluded. Respondent, in contrast, argued that the Bennett Amendment was designed merely to incorporate the four affirmative defenses of the Equal Pay Act into Title VII for sex-based wage discrimination claims. Respondent thus contends that claims for sex-based wage discrimination can be brought under Title VII even though no member of the opposite sex holds an equal but higher paying job, provided that the challenged wage rate is not based on seniority, merit, quality or quantity of production, or "any other factor other than sex".

The Supreme Court ruled that the Bennett Amendment incorporates only the affirmative defenses of the Equal Pay Act into Title VII.

Petitioner argued that this construction of the Bennett Amendment would render it superfluous. Petitioner claimed that the first three affirmative defenses are simply redundant of the provisions elsewhere in §703 (h) of Title VII that already exempt bona fide seniority and merit systems and systems measuring earnings by quantity or quality of production, and that the fourth defense, "any other factor other than sex", is implicit in Title VII's general prohibition of sex-based discrimination.

The Court disagreed, stating: "[I]ncorporation of the fourth affirmative defense could have significant consequences for Title VII litigation. Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation". The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials

A. Markham v. Geller (2nd Cir. 1980) (Cert. denied 1981)

1. Question involving application of disparate impact theory to the ADEA.
2. ADEA's substantive prohibitions derived from Title VII.
3. Disparate impact rule applies to ADEA.

B. Hishon v. King & Spalding (D.C.N.D. Ga., 1980)

1. Question involving coverage of Title VII to elevation to partner in law firm.
2. Partners are not employees of law firm.
3. Elevation to partnership not covered by Title VII.

C. Texas Department of Community Affairs v. Burdine (U.S. Sup. Ct., 1981)

1. Question involving defendant's burden of proof after plaintiff has made initial case of discrimination.
2. Court rejected Fifth Circuit's rule that defendant had to prove by a preponderance of evidence that non-discriminatory reasons existed.
3. Defendant's burden is to produce evidence that plaintiff was rejected for legitimate, non-discriminatory reason.

D. Teal v. State of Connecticut (2nd Cir., 1981)

1. Question presented was whether there is disparate impact when one element of multi-part selection process has adverse impact but where bottom line shows no impact.
2. Court ruled that where there is an identifiable pass/fail barrier with an adverse impact that is prima facie discrimination, regardless of fact that bottom line shows no impact.

E. Northwest Airlines v. Transport Workers (Sup. Ct., 1981)

1. Question presented was whether an employer found liable for discrimination has common law or statutory right to contribution from a union that was partially responsible for discriminatory provision.
2. Court ruled that there is not a right to contribution under the common law, Title VII, nor the Equal Pay Act.

F. County of Washington v. Gunther (Sup. Ct. 1981)

1. The issue raised was whether provision of Title VII prohibits claim for intentional sex discrimination when there was not a male doing similar work for more pay.
2. Court, in narrow ruling, held that case of intentional sex discrimination permissible under Title VII even though there was not a male doing a similar job for more pay.
3. Court ruled that Title VII's sex discrimination provisions limited by the four affirmative defenses of the Equal Pay Act.