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Supreme Court Rejects Reverse Age Discrimination Claim by "Younger Older" Employees; Employers Can Favor Oldest Workers

By Bennett Pine

By a vote of 6 to 3, the United States Supreme Court has ruled that the Age Discrimination in Employment Act ("ADEA") does not prevent an employer from giving more preferable treatment to older individuals within the age protected (i.e., over the age of 40) category, at the expense of "younger" workers who are also over age 40. (*General Dynamics Land Systems, Inc. v. Cline*, No. 02-1080, February 24, 2004) The issue arose under a new provision in a collective bargaining agreement which granted certain retiree health benefits only to workers who had reached age 50 by July 1, 1997. The previous agreement granted retiree health benefits to all employees with 30 years of service with the company, regardless of age.

The lawsuit was brought by a group of approximately 200 workers at two company facilities who were between age 40 and 49 as of July 1, 1997. They therefore did not qualify for retiree benefits under the new collective bargaining agreement, but would have under the prior provision.

The U.S. District Court for the Northern District of Ohio dismissed the case on the ground that the ADEA does not permit claims for reverse age discrimination against younger workers. The Court of Appeals for the Sixth Circuit reversed. It ruled that the plain language of the ADEA prohibits employers from discrimination against *any* employee age 40 or over based upon that person's age and reasoned that Congress did not intend to limit the ADEA to protect "only those workers who are *relatively* older."

The Supreme Court reversed the Sixth Circuit and ruled that the ADEA does not bar employers from favoring older workers over younger ones, even though both groups are within the age protected category.

Writing for the Court, Justice Souter focused on the legislative history of the ADEA as being designed to prohibit unjustified stereotypes and assumptions about older employees and their ability to perform. He emphasized that the ADEA's "text, structure, purpose, history and relationship to other federal statutes show that the statute does not mean to stop an employer from favoring an older employee over a younger one." While recognizing that no prior Supreme Court decision addressing the ADEA had focused on this precise issue Justice Souter stated that

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Litigation Corner

Using An Economic Expert in Defending Damage Claims in Discrimination Trials: The Employer's Perspective

By Dona Kahn

I have almost never tried a case on behalf of an employer involving back pay or front pay without the testimony of an economist.

The plaintiff wants to prove to the jury that his or her life has been disrupted by the dismissal. Everyone thinks they know that jobs are impossible to get once a person has been laid off or fired, and, furthermore, the plaintiff may never again work in a job as good as the job he or she had, especially in today's market where the loss of jobs is in the headlines on a daily basis. But on the other hand, jurors know layoffs are much more prevalent in the present economic setting.

A good forensic economist can explain, in lay terms, why the things that "everyone knows" just aren't so. An economist can explain how the plaintiff's salary before the layoff was determined by market forces, and why the plaintiff has every reason to expect that the labor market will value his or her services in the future very much like it did in the past. The employer was not overpaying the plaintiff, and, in all likelihood, his or her next employer will not be underpaying. Moreover, there are masses of Labor Department statistics tending to show that workers who climb the ladder by crossing between employers do as well or better than workers who stay put, even in today's climate.

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"all of them show the Court's consistent understanding" regarding the ADEA as a remedy for those treated less favorably based on relatively *older* age, thus "leaving complaints of the relatively younger outside the statutory concern."

Significance

The Supreme Court's decision was hardly a shock. Most employment law practitioners, and each of the organizations that filed amicus briefs in the case, favored reversal of the Sixth Circuit, arguing that to permit younger workers to sue when older workers were favored would have stretched the ADEA further than was intended by Congress and, indeed, would have turned the ADEA on its head. Accordingly, against the backdrop of changing demographics of increased life expectancies, postponed retirements and continued reductions in force, employers still appear to be on safe ground, at least for the time being, by continuing to take employment actions, fashioning benefit plans, and undertaking voluntary separation packages and other retirement incentives that run in the favor of their older or oldest workers, at the expense of "younger" workers and others who are also in the protected over 40 category. ■

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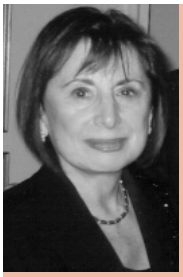
An expert can examine the assumptions underlying the plaintiff's seven-figure wage loss calculation and attack it in ways that will make the plaintiff look foolish. The plaintiff's expert may argue, presumably with a straight face, that the plaintiff could have expected 7 percent annual wage growth for the remaining 25 years of his or her work life had he stayed with his employer (based upon the wage histories of carefully selected co-employees), but that he or she can expect only 2 percent per year at substitute employment. It takes a seasoned forensic economist to explain to the jurors, and make them believe and understand, that it is foolish and avaricious for the plaintiff to argue that the defendant company is the only employer in the marketplace for whom the laws of economics will be suspended for the next 25 years. It is foolish and avaricious for the plaintiff to argue that he or she would have been exempt from those laws had he or she remained with the defendant, but will suffer their full effect out in the marketplace.

Similarly, the plaintiff's economist may have buried within the spreadsheet a low percentage discount rate for the front pay calculation. Depending on what long term treasury bonds are paying, you can argue that the plaintiff's imputed discount rate is implausible or otherwise difficult to defend.

The plaintiff will *always* urge a finding on expected future earnings that is less than common sense suggests will be the case. Often, Labor Department demographic statistics will be very helpful in showing, for example, that a 45 year-old college educated woman in a major metropolitan area will earn, on average, a certain amount per year. Once the defendant's economist has presented plausible statistical evidence on expected future wages, the plaintiff will, as a practical and legal matter, have the burden of explaining why she thinks her wages will average only $28,000 per year over the next ten years. She will have to explain to the jury why she is so much less desirable than the average college-educated woman to whom your economist has referred. Further, she must then explain why the defendant company was willing to pay what it did per year to such a below-average performer.

Also, the plaintiff's economist will often miscalculate the value of the benefits that the plaintiff received while he or she was employed by the defendant company. The defendant company's understanding of its benefit structure is almost always going to be clearer than the plaintiff's understanding, even where the plaintiff's economist has reviewed the defendant's documents. The plaintiff's economist can be made to look either uninformed or devious in front of the jury, and there is no way for the plaintiff to prepare for that attack in advance. All of a sudden, the plaintiff's number begins to change, and the jury may no longer trust the plaintiff's economist or his or her conclusions.

Thus, even in today's bleak economic outlook for job hunters, much can be done to limit or rebut the damages a plaintiff seeks in a lay-off or discharge case. In my experience, a defendant-employer's engagement of an economist to defend a plaintiff's damage claim is money very well-spent. ■



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Wage and Hour Update: Pay Docking For Partial Day Absence and the Loss of "Exempt" Status

By Bennett Pine

Introduction

Employers have on occasion asked whether they may "charge" an exempt, salaried employee with an absence for part of a workday missed. The issue is an important one because it may result in the loss of an employee's "exempt" status. The answer generally turns on the distinction between whether the exempt employee will actually have his or her salary "docked" or merely have the time charged against an accrued vacation/sick/personal time entitlement "bank."

FLSA Background

The federal Fair Labor Standards Act ("FLSA") establishes requirements regarding minimum wage, overtime compensation, record keeping, and the use of child labor. FLSA proscribes employment of an employee "for a workweek longer than forty hours unless such employee receives compensation . . . at a rate no less than one and one-half times [his or her] regular rate." FLSA exempts from this provision, however, "any employee employed in a bona fide executive, administrative, or professional capacity." Employers are entitled to use these so-called "white collar" exemptions if the employee meets the "duties" and "salary" tests set forth in the regulations implementing FLSA.

In general, an employee will be considered to be paid "on a salary basis" within the meaning of the regulations if he or she regularly receives for each pay period a predetermined amount constituting all or part of his or her compensation, *which amount is not subject to a reduction because of variations in the quantity or quality of the work performed*. 29 C.F.R. § 541.118(a). It is well-settled that a private employer is permitted under the regulations to reduce or "dock" the pay of an exempt employee if that employee is absent from work for a *full day*. 29 C.F.R. § 541.118(a)(2).

Partial Day Absence: Reducing Pay Versus Leave Time

What happens when a employee is absent for only *part* of a day such as for a medical appointment, to attend a funeral or for other personal reasons? Presently, if a private employer "docks" the salary or cash pay of a salaried exempt employee for such a partial day absence, the employer may well lose the right to treat the employee as exempt, creating the possibility that such an employee would become eligible to receive overtime. Such a partial day pay reduction is viewed as antithetical to the "salaried" status of the employee, and thus converts him or her into an "hourly" employee.

On the other hand, there is clear authority under federal law permitting an employer to track or make deductions from an employee's accrued vacation, personal or sick time entitlements or "banks" to cover partial day absences. Opinion Letters issued by the Wage-Hour Division of the United States Department of Labor expressly provide that an exempt employee's accrued vacation time and sick leave entitlement banks may indeed be reduced for partial day absences without affecting the exempt status of the employee. In addition, where the employee has no accrued time remaining in his or her leave time "bank," deductions may be made or "borrowed" against the employee's future benefit time accruals. Federal courts in both New York and California, among others, have adopted this view, ruling that while an exempt employee's *salary* may not be docked for partial day absences, employees may be required to draw on their "banked" sick, vacation and personal time to cover partial day absences. While benefits such as personal leave, sick leave and/or compensation time may be viewed as part of a employee's compensation package, they are not viewed as strictly part of an individual's *salary* for purposes of the Fair Labor Standards Act. (*See, e.g., Webster v. Public School Employees of Washington*, 247 F.3d 910 (9th Cir. 2001) (permissible to dock sick and vacation time balances in 15 minutes increments); *Hoffman v. Sbarro, Inc.*, 982 F. Supp. 249 (S.D.N.Y. 1997) (benefits must be distinguished from salary)).

Conclusion

While an exempt employee may not have his or her salary "docked" for less than a full day's absence, it appears to be permissible to track and charge sick, vacation or other personal benefit time entitlements to cover such partial day absences. ■

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Employment Law Q&A

Question: Under the Americans With Disabilities Act, may an employer ask an employee for medical documentation when s/he requests a reasonable accommodation?

Answer: Yes. Although the ADA generally imposes strict limits on an employer's right to make inquiries about the medical condition(s) or medical history of job applicants or current employees, where an employee claims to need an accommodation for a disability which is not known or readily obvious (e.g., a back injury), enforcement guidance issued by the EEOC provides that an employer may require the employee to provide documentation from a treating physician which (i) describes the nature, severity and duration of the impairment; (ii) explains the job activity or activities that the impairment limits; and (iii) substantiates why the accommodation requested is needed. Of course, under the ADA, all disability related inquires must be "job related and consistent with business necessity."