

Selected Labor & Employment Law Updates

Compiled by Updates Editor

This section of the *Journal* provides notes on recent cases, pending or newly-enacted legislation, and other current legal materials. The Updates section is designed to aid the practitioner in relating the *Journal* articles to the daily practice of labor and employment law. The *Journal* welcomes outside submissions of brief judicial and legislative summaries.

Court holds that a union rule limiting eligibility for local office to union members who have attended at least eight of their local's monthly meetings in the previous two years is unreasonable and invalid. Herman v. Local 1011, United Steelworkers of America, No. 99-3146, 2000 U.S. App. LEXIS 4501 (7th Cir. Mar. 23, 2000).

The U.S. Court of Appeals for the Seventh Circuit held that a rule in the United Steelworkers constitution that limited those eligible for local office to union members who have attended at least eight of their local's monthly meetings in the last two years was unreasonable and invalid. The Appeals Court upheld a summary judgment ruling by the lower court in favor of the Department of Labor.

Under § 401 of the Labor-Management Reporting and Disclosure Act of 1959, all union members are eligible to run for office subject to "reasonable qualifications." The Appeals Court held that the constitutional restriction was unreasonable. The court cited the union's failure to show that the rule was supported by compelling need and was not burdensome.

Judge Richard A. Posner wrote that "the proper approach, and one that is consistent with the case law. . . is to deem a condition of eligibility that disqualifies the vast bulk of the union's membership from standing for union office presumptively unreasonable. The union must then present convincing reasons, not merely conjectures, why the condition is either not burdensome or though burdensome is supported by compelling need."

Court holds that plaintiffs who have raised claims under Title VII of the 1964 Civil Rights Act under the "pretext" standard of causation do not

have the right to seek jury instructions under the "mixed-motive" standard of causation. Watson v. Southeastern Pa. Transp. Auth., Nos. 98-1832, 98-1833, and 98-1834, 2000 U.S. App. LEXIS 4342 (3d Cir. Mar. 20, 2000).

During trial, plaintiff challenged the court's standard jury instruction regarding her sex discrimination claim. Plaintiff argued that the 1991 Civil Rights Act's amendment to the 1964 Civil Rights Act eliminated the distinction between the standards of causation for pretext and mixed-motive cases. The trial court disagreed.

According to the court, in a pretext case, the plaintiff must show that an illegitimate consideration was the determinative factor in a decision. In a mixed-motive case, on the other hand, the plaintiff must show that an illegitimate consideration was a "substantial motivating factor" in an employer's adverse decision.

In *Price Waterhouse v. Hopkins*, the Supreme Court held that in a mixed-motive case, an employer is not liable if it can show it would have taken the adverse action even in the absence of discriminatory animus. The Civil Rights Act of 1991 was enacted in order to limit the Supreme Court's decision. Section 107(a) of the 1991 Act assigns liability when an illegitimate factor motivates an adverse employment action.

The trial court in the *Watson* case gave a trial instruction that plaintiff must show that "but for plaintiff's sex, the adverse employment action would not have occurred." The trial court held that the 1991 Act did not counteract the second holding in the *Price Waterhouse* case that the shift in burden of proof to the employer only occurs if the plaintiff demonstrates with "sufficiently direct" evidence that an impermissible factor was a motivating factor.

The Third Circuit, in the *Watson* case, held that according to the *Price Waterhouse* case, the shift in the burden of proof does not apply to the pretext cases. The Circuit Court further held that the text of the 1991 Act "was designed to apply only to *Price Waterhouse* mixed-motive cases."

Only two other appeals courts have addressed this issue. The holding of the Third Circuit is in agreement with the holdings of the Second Circuit in a 1997 case, and the Fourth Circuit in a 1995 case.

Court holds that a former employee is not entitled to an award in excess of \$25 million for intentional misrepresentation which led him to continue his employment. Mackenzie v. Miller Brewing, No. 97-3542, 2000 U.S. App. LEXIS 156 (Wis. Ct. App. Feb. 22, 2000).

In *Mackenzie v. Miller Brewing*, the plaintiff claimed that he was fired for making remarks to a female coworker about an episode of the television show "Seinfeld." At the trial there was testimony that the plaintiff was

fired after repeatedly making unwelcome remarks to a coworker about sexual innuendo on which the Seinfeld episode was based. Despite the media attention and the case widely being referred to as the "Seinfeld case," neither the jury award nor the appeals court decision turned on the "Seinfeld" aspect.

The plaintiff's suit claimed wrongful termination and intentional misrepresentation. While the claim for wrongful termination was dismissed at an early point, the plaintiff's jury verdict was based on the claim that the company misled him by not disclosing a change in his job's grade level classification, which is used by the employer to determine seniority.

The Appeals Court stated that for the plaintiff to prevail he must show that he justifiably relied on a misrepresentation of fact. The court reversed the jury award because the plaintiff offered no evidence of a causal connection between the misrepresentation and his alleged damages or that plaintiff was intentionally misled by defendant's failure to disclose that his job classification's grade level had been changed.

The federal government agrees to pay \$508 million to a class of more than 1,100 women alleging denial of jobs based on their gender.

The Department of Justice announced a settlement of \$508 million with a class of over 1,100 women alleging that the Voice of America and U.S. Information Agency denied them jobs on the basis of their gender. The gender bias suit was initially filed in 1977. According to civil rights litigators, the settlement is the highest dollar amount paid by a discrimination defendant under the 1964 Civil Rights Act.

The lead plaintiff, Carolee Brady, nee Hartman, initially filed the suit after being told that she would not be hired for the position of magazine editor because she was not a man. The class alleged that the government deliberately excluded women from consideration for several occupations. Allegations included rigging tests to ensure that certain male candidates were hired, selecting males who failed tests over women who passed the same tests, and destruction of test files to cover up the discrimination.

The trial court's initial finding of liability occurred in 1984. The government lost appeals and review was denied by the U.S. Supreme Court in 1997.