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LABOR AND EMPLOYMENT BULLETIN

March 31, 2005

UNITED STATES SUPREME COURT ISSUES TWO KEY LABOR & EMPLOYMENT RULINGS

In the past three days, the United States Supreme Court issued two important decisions of concern to employers. Just yesterday, the Supreme Court held for the first time that “disparate impact” lawsuits may be brought under the Age Discrimination in Employment Act. On Tuesday, the Supreme Court held that an employee may bring an action for retaliation under Title IX of the Education Amendments of 1972.

Disparate Impact Based on Age. Until yesterday, the federal Courts of Appeals were divided on the question of whether the ADEA authorized a cause of action based on “disparate impact”—a theory of liability under which a plaintiff can prevail by showing through statistics that a seemingly neutral policy, procedure or test has a disparate impact on members of protected classes under Title VII, regardless of the employer’s intent. For example, courts have struck down employers’ height and weight restrictions, educational requirements, and the use of certain standardized testing procedures, where those criteria caused disparate impact and were not supported by sufficient evidence of job-relatedness and business necessity.

The United States Supreme Court has now ruled that claims of disparate impact can be brought under the ADEA. However, the Court made it clear that age-based disparate impact claims would be more limited than disparate impact claims based on race or sex. The Court observed that “age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual’s capacity to engage in certain types of employment. . . . Thus, . .



. certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group.” Specifically, the Court wrote that its more relaxed job-relatedness standards set forth in *Ward’s Cove Packing Co. v. Atonio*, rather than the stricter standard of the Civil Rights Act of 1991, would apply to age-based disparate impact claims.

In light of this change in law, employers should carefully evaluate any employment criteria that might be having a disparate impact against older workers. Employers should give special attention to lifting requirements, eyesight and hearing standards, and tests involving memory skills and speed in performing tasks. Employers should also be especially mindful of the possibility of adverse impact against older workers when conducting reductions in force.

The case is *Smith v. City of Jackson, Mississippi*, No. 03-1160 (March 30, 2005).

Retaliation under Title IX of the Education Amendments of 1972. In a 5-4 decision, the United States Supreme Court recognized a private right of action for retaliation under Title IX, which prohibits sex discrimination in educational programs and activities by recipients of federal education funding (Title IX is the statute that requires educational institutions to fund boys and girls sports equally). The Petitioner, a girl’s basketball coach in the Birmingham, Alabama school system, alleged that he began receiving negative work evaluations and was ultimately removed as girl’s basketball coach after complaining about sex discrimination in the school’s basketball program. The district court dismissed the case, holding that Title IX did not authorize suits alleging retaliation. The Eleventh Circuit Court of Appeals affirmed. The Supreme Court reversed, holding that Title IX does authorize such a cause of action.

Title IX does not specifically prohibit retaliation for complaints about sex discrimination. Nevertheless, the Court held that, under the broad language of the statute, retaliation against a complaining employee was itself included in the prohibition against sex discrimination. According to the Court, “retaliation is discrimination ‘on the basis of sex’ because it is an intentional response to the nature of the complaint: an allegation of sex discrimination.” To hold otherwise, the Court reasoned, would stifle Title IX’s remedial purpose because teachers and others would be afraid to bring sex discrimination to the attention of their superiors.

The case is *Jackson v. Board of Education*, No. 02-1672 (March 29, 2005).



SAVE THE DATE
Balch & Bingham's 2005 Labor and
Employment Seminars will be held in:
Birmingham, AL: September 29-30
Biloxi, MS: October 13-14

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