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INSIDE

SUPREME COURT: IS THERE A CONFLICT OF INTEREST WHEN PLAN ADMINISTRATOR AND PAYOR OF BENEFITS ARE THE SAME ENTITY? 1

AMERICANS WITH DISABILITIES ACT . . 1
1. Major Changes on the Horizon? 1
2. Can a Failure to Accommodate Constitute a Constructive Discharge? . . . 1

EQUAL EMPLOYMENT OPPORTUNITY . . 2
1. Cat's Paw Liability: What Is the Legal Test? 2
2. Gender Identity: Can it Be Sex Discrimination? 2

NLRB: WHEN CAN UNIONS PICKET AT MALLS? 3

ANTI-TRUST: WHEN ARE UNIONS LIABLE? 4

Report From Counsel
Klein Zelman Rothermel LLP
485 Madison Avenue
New York, New York 10022
Tel: 212-935-6020
Fax: 212-753-8101
e-mail:
kleinzelman@kleinzelman.com

Editor
Andrew E. Zelman

SUPREME COURT: IS THERE A CONFLICT OF INTEREST WHEN PLAN ADMINISTRATOR AND PAYOR OF BENEFITS ARE THE SAME ENTITY?

In a recent decision, the Supreme Court decided an interesting question: does a plan administrator have a conflict of interest when he both evaluates claims and pays them? *Metropolitan Life Ins. Co. v. Glenn,* 128 S. Ct. 2343 (2008).

In this case, Wanda Glenn, a Sears employee, filed for disability benefits under an ERISA plan. The Social Security Administration determined that she qualified for Social Security disability benefits and paid those benefits to Met Life, which was the insurer and administrator of the plan. However, when Met Life had to determine whether Glenn was entitled to disability benefits, it denied her claim. Glenn brought suit in federal court seeking to review Met Life's determination. She argued that because Met Life both paid the benefits and evaluated them, it had a conflict of interest which invalidated its denial of benefits.

The Supreme Court had little difficulty concluding that there was, in fact, a conflict of interest. The Court had more trouble in deciding what remedy should be available to Glenn because of that conflict. It rejected the argument that Met Life's rejection of Glenn's claim should be automatically nullified and held that the conflict of interest is a factor that the court could consider in determining whether the plan had abused its discretion in denying Glenn's claim for disability benefits. How much weight to afford to the conflict will depend on the facts and circumstances of each case. For example, a conflict of interest will be given greater weight when the conflict influences the ultimate decision.

Until the courts begin interpreting this new standard, it will be difficult to predict how this "case-by-case" approach will operate in practice.

AMERICANS WITH DISABILITIES ACT

1. Major Changes on the Horizon?

For several years, Congress has been besieged with requests to amend the Americans with Disabilities Act ("ADA") by groups which argue that the statute has been undermined by judicial decisions limiting the scope of the Act's protections. It is undoubtedly true that in many cases the courts have given narrow constructions to the definition of "disability" and what it means to be "substantially limited" in performing "major life activities," etc. These interpretations have, from the plaintiffs' point of view, undercut the ADA and, from the employer point of view, sensibly limited the obligation to accommodate.

The winds of change are, however, blowing. By a 402-17 vote, the House approved a bill that would reverse several Supreme Court decisions interpreting ADA. A similar bill is pending in the Senate, which is expected to vote on it shortly, and, by some reports, the bill will pass with a veto-proof majority.

We're following these developments closely and will keep you advised.

2. Can a Failure to Accommodate Constitute a Constructive Discharge?

The court of appeals for the Sixth Circuit addressed the question of whether an employer's failure to accommodate a disability can amount to a constructive discharge. *Talley v. Family Dollar Stores*, __ F.3d __, 2008 WL 4163223 (6th Cir. 2008). The plaintiff in that case, Talley, worked as

a cashier. Because of degenerative osteoarthritis, she was unable to stand for more than 60 minutes. On several occasions, she requested an accommodation that she be allowed to sit on a stool and produced a doctor's note to support her request. The employer denied her request several times and then, after she had gone home on her last day at work, told her that a meeting would be set up to resolve the issue. Talley claims that she called to set up the meeting several times with no response from the company.

The district court dismissed Talley's claim, finding that she failed to show that she had been subject to an "adverse employment action," which is an essential element of a discrimination claim. This conclusion rests on the finding that Talley's failure to return to work was not the result of either a termination or constructive discharge; hence, no "adverse employment action."

The court disagreed. Under its analysis, the crucial issue was whether the employer's refusal to grant a reasonable accommodation constituted a constructive discharge. The court found that there was sufficient evidence on that issue to warrant a trial because a reasonable jury could find that Talley sought a reasonable accommodation which the employer refused without offering any alternative or showing that Talley's request was unreasonable.

The court cautioned that its decision "does not pave the way for an employee to assert a claim for constructive discharge every time an employer fails to accommodate her disability." But, if "an employee makes a repeated request for an accommodation and that request is both denied and no other reasonable alternative is offered, a jury may conclude that the employee's resignation was both intended and foreseeable."

Notwithstanding this disclaimer, the court's decision may well produce the very effect that the court disavows. The court has clearly opened the door to trials in which the plaintiff seeks to convert a claim of failure to accommodate into a claim of constructive discharge.

EQUAL EMPLOYMENT OPPORTUNITY

1. Cat's Paw Liability: What Is the Legal Test?

The doctrine of "cat's paw" liability (also called "subordinate bias" liability) has been evolving for several years. "Cat's paw" liability refers to a situation in which the plaintiff claims that the final disciplinary action taken against him was infected by the involvement of a biased subordinate in the decision-making process so that the final decision was effectively a rubber stamp ("cat's paw") of the previous bias. In *Furline v. Morrison,* 953 A.2d 344 (D.C. Cir. 2008), the DC court of appeals weighed in on the subject and overturned a verdict obtained by the plaintiff, Furling, which had been based on a "cat's paw" theory of liability.

Morrison was given a five-day disciplinary suspension based on the recommendation of Furline, a low-level supervisor. The actual decision to discipline Morrison was made by "other disinterested officials" of the employer, Howard University. Morrison claimed that the discipline was invalid because Furline, who recommended the discipline, was acting from personal bias. The defendants argued that even if Furline had been biased, the final decision was made by other non-biased personnel and, therefore, that any taint from Furline's bias had been removed.

The DC court of appeals agreed. As the court saw it, the ultimate issue was whether the supervisor's biased recommendation "undermined the autonomy of the ultimate decision-making process." The court concluded:

> Where, as in this case, decisionmakers presented with a possibly biased recommendation conducted their own independent investigation, which included hearing from the employee, and did not rely on the supervisor in any material way, the resulting adverse personnel action cannot be said to have been taken by the employer for a prohibited reason.

The court's decision is interesting because it cites and applies several federal circuit court decisions on "cat's paw" liability which collectively provide a roadmap to companies confronted by the claim that a disciplinary recommendation (or decision being internally reviewed) is biased. In those circumstances, the company may well be able to avoid the "cat's paw" problem by doing an independent investigation, thereby effectively canceling the impact of an earlier tainted investigation.

2. Gender Identity: Can it Be Sex Discrimination?

The Library of Congress extended a job offer for a terrorist analyst position to David Schroer, a U.S. Army veteran. It then rescinded the offer after learning that David Schroer was a transsexual who intended to become Dianne Schroer. Schroer brought suit under Title VII, claiming that she was the victim of sex discrimination. The Library of Congress argued that any bias against Schroer was based on her gender, not her sex, and that her complaint must be dismissed. The district court of the District of Columbia ruled for Schroer, finding that she had been discriminated against based on her sex. *Schroer v. James H. Billington*, __ F.Supp. 2d __, 20008 WL 4287388 (D.C.C. 2008).

Before she applied for the analyst job, Schroer had been diagnosed as having a gender personality disorder. Her qualifications for the job were not in question. Before the sex change, she had graduated from the National War College and had 25 years of military service, including combat, and had served as director of a classified 120-person unit of the Army that analyzed terrorist threats. She was ranked first among 18 candidates.

In defense, the Library argued that it had valid business reasons for rejecting Schroer, including that she

might lack credibility with Congress and might not be able to maintain her relationships with the military. It also argued that a hiring decision based on transsexuality is not unlawful under Title VII.

Initially, the court rejected the business justification arguments and, therefore, found that they were pretexts for discrimination. The court then addressed the issue of whether sex discrimination had occurred and found that it had. It noted the line of cases that hold that "discrimination based on sex means only that 'it is unlawful to discriminate against women because they are women and against men because they are men.'" It cited another court's similar conclusion that Title VII does not protect transsexuals because Congress's "'manifest purpose' …was only 'to ensure that men and women are treated equally.'" But according to the court, that approach is not tenable because the "Library's refusal to hire Schroer after being advised that she planned to change her anatomical sex…was *literally* discrimination because of sex."

NLRB: WHEN CAN UNIONS PICKET AT MALLS?

Two circuit courts have issued decisions addressing a recurring and interesting issue: when can unions picket or engage in union activity on premises owned by a company not involved in the labor dispute? *Salmon Run Shopping Center v. NLRB,* 534 F.3d 108 (2d Cir. 2008); *Carpenters v. NLRB,* __ F.3d __, 2008 WL 3891586 (9th Cir. 2008).

In the first case, the Carpenters Union wanted to set up a table at a shopping mall owned by Salmon Run to distribute literature advising the public that a tenant of the shopping mall had built its store using non-union labor. The mall owner, Salmon Run, rejected the union's request, and the NLRB found that the mall owner had, thereby, discriminated against the employees who sought to distribute literature. The second circuit disagreed and denied enforcement of the Board's order.

It is clear that employees have a protected right to distribute literature advising the public that a company is anti-union or uses non-union labor. Issues arise, however, when the union seeks to engage in that kind of activity on the property of an employer which is not involved in the dispute. In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the Supreme Court held that because the Labor Act protects only "employees," non-employees may be excluded from an employer's property except in two circumstances: (i) where the union's activity is directed at employees who are inaccessible by other means; or (ii) the employer is discriminating when it denies access. The inaccessibility exception is a narrow one which applies only when the employees are isolated and unreachable (such as worksites where employees both work and live). This case involved the second exception—whether Salmon Run's denial of access was discriminatory.

The Board found that by denying access to the Carpenters, Salmon Run had discriminated because access had been denied to the Carpenters only because the mall owner didn't want mall business affected by union issues. The court noted that under *Lechmere*, a private property owner has a right to exclude persons from its property and could be arbitrary in doing so subject only to the two exceptions just noted. According to the court, the focus under the discrimination exception should have been on whether the employer had engaged in disparate treatment; in other words, did the employer permit other persons to engage in the same kind of conduct that the Carpenters wanted to engage in? For example, if the mall owner had allowed a store to use mall premises to explain why it hadn't used union labor, then the union would have been entitled access to present its side of the same issue. Finding that there had been no disparate treatment, the court overturned the Board's finding of discrimination.

Before this case, it had been clear that the inaccessibility exception should be narrowly applied. This case makes clear that, at least in the second circuit, the discrimination exception will be similarly narrow, and, therefore, the ability of unions to gain access to the property of a non-involved employer will be similarly limited.

The second case reflects a different approach to the same issue. In the California case, the mall owner denied access to its mall by the Carpenters who were trying to do the same thing that the Carpenters did in *Salmon Run* — publicize the use of non-union contractors hired by one of the stores in the mall. However, unlike the second circuit, the ninth circuit found that under the Supreme Court's decision in *Lechmere,* the rights of non-employee union representatives to gain access to an employer's private property depends on state law. This is a highly problematic premise which often will produce a different result than the approach of the second circuit. Under the ninth circuit approach, if state law excludes non-employees from private property, then they have no right to access. But if state law permits access, then the non-employees obtain access rights under state law that they don't have under federal law.

Applying state law, the ninth circuit found that the California Constitution protects "expressive activities" in a privately-owned mall, including picketing and handbilling, because the mall is, under California law, equivalent to a public street. The degree of scrutiny that a court will apply in reviewing any access restriction will depend on whether the restriction is "content-based" (strict scrutiny) or "content-neutral" ("intermediate" scrutiny). Applying this approach, the court found that a ban on literature that hinders the "commercial purpose" of the mall is content-based because that kind of communication has to be reviewed for substance before it is permitted. Thus, the NLRB's finding of an unfair labor practice is valid and enforceable because it protects the state law right of free speech. This idea that the right of a union to engage in labor activity

under federal law depends on the scope of protection afforded that activity under state law is, as noted above, a highly problematic. But it is the law in California which, in this and other respects, differs from the law in other circuits.

ANTI-TRUST: WHEN ARE UNIONS LIABLE?

There are "labor exemptions" in the federal anti-trust laws which immunize labor unions from anti-trust liability, but those exemptions are limited. A recent decision of the First Circuit Court of Appeals illustrates the limits of the labor exemptions. *American Steel Erectors, Inc v. Local 7, Iron Workers*, 536 F.3d 68 (1st Cir. 2008).

In this case, five non-union steel erecting companies filed suit against Local 7 of the Iron Workers union claiming that the union had conspired with union contractors to keep non-union contractors out of the steel erection business in the Boston area. The union's principal defense was that its conduct was protected by the labor exemptions to the federal anti-trust laws. The court held that if the allegations of the plaintiffs prove to be true, the exemptions do not apply.

The union relied on two exemptions. The first is the so-called "statutory" exemption under which unions are immune from anti-trust liability when it acts in its self-interest and does not combine with non-labor groups. The court held that that exemption did not apply because the plaintiffs were claiming that the unions conspired with non-labor groups (union contractors) to achieve their objective.

The second exemption, known as the "nonstatutory exemption," was created to shield the results of collective bargaining from anti-trust liability. Without this exemption, an industry wage schedule negotiated in a multi-employer bargaining unit would be regarded as a form of price fixing. In this case, the union argued that challenged activity was the creation of a fund, financed by employee wage deductions, which was used to subsidize union contractors bidding for government jobs against lower-paying non-union contractors. Since the fund was the product of collective bargaining, the union argued that the "job targeting" subsidy arrangement was protected by the non-statutory exemption.

The court rejected that argument, finding that the collectively-bargained subsidy program was only part of the conspiracy alleged by the plaintiffs. The clear implication is that the subsidy program, standing alone, would have been shielded by the non-statutory exemption. Because the program was alleged to have been accompanied by other conduct—such as threatening non-union contractors and inducing some of them to default—the complaint had alleged sufficient non-protected activity to remove the shield of the non-statutory exemption.

It remains to be seen in this case whether the plaintiffs can prove their allegations. What makes this case important to unions and non-union employers is the fact that the plaintiffs, who were non-union companies, were able to get the case to trial by claiming that activity outside the bargaining arena tainted the results of bargaining. Whether the employers prevail or not, the threat of a trial with potentially staggering damages may, as a practical matter, force unions to refrain from the kind of "non-bargaining" conduct that unions would otherwise use to keep non-union contractors out of a unionized industry.

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