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THE EAGLE'S VIEW

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Supreme Court Makes It Easier for Employers to Sue Union

The U.S. Supreme Court has ruled that the Labor Board lacks the authority to punish an employer for prosecuting an unsuccessful lawsuit with a retaliatory motive against a union. *BE&K Construction Co. v. NLRB,* 170 LRRM 2225 (6/24/02). The Court interprets the Labor Act by concluding that nothing in the statute prohibits an employer from bringing an unsuccessful but reasonably based lawsuit against a labor union. The court adopts this limiting construction of the Labor Act to avoid what it considers a serious First Amendment question, since access to the courts is an aspect of the First Amendment.

The case arose when BE&K Construction Co., a non-union firm from Alabama, won a contract to modernize a steel mill in California. The company alleged that it was subjected to a "corporate campaign" by various construction unions. This campaign included lobbying by the unions for an environmental standard that would delay the project, even though the unions had no real concern in this regard. The unions also allegedly handbilled and picketed the construction site and encouraged strikes among the company's subcontractors, without revealing reasons for their disagreement. The unions also filed actions in state court regarding alleged worker safety and health violations to delay the project, and launched various other proceedings against the company's joint venture partner.

BE&K eventually sued the unions under the Taft-Hartley Act and the anti-trust laws, but the federal court ruled in favor of the unions. Two unions filed charges against BE&K with the Labor Board, and the Board found that the BE&K lawsuit lacked merit because the unions obtained judgments on the claim and that the employer thus violated the Labor Act in suing the unions regardless of whether there was a reasonable basis for the employer to bring the suit. The Board also found that BE&K's lawsuit was unlawfully motivated because it was directed at protected union activity, and the lawsuit tended to discourage that activity. Among other things, the Board ordered BE&K to cease and desist suing the unions and to reimburse the unions for their attorneys' fees and costs in defending themselves against BE&K's lawsuit.

Although Section 8(a)(1) of the Labor Act prohibits employers from interfering with, restraining, or coercing employees in the exercise of their right to assist labor unions and to engage in other concerted activities, the court found nothing in the statutory text indicating that the Section "must be read to reach all reasonably based but unsuccessful suits filed with a retaliatory purpose" and held that the Board's standard, which allows it to penalize such suits, is invalid.

Editor's Note - *This Supreme Court ruling may affect both union and management tactics in the future. The attorney for BE&K Construction said that in recent years "many employers have been unfairly attacked by labor unions, using smear tactics known as 'corporate campaigns' involving slander, mass demonstrations, and secondary pressure on neutrals. Employers faced with such unfair union tactics in the future will now have greater freedom to respond in court."*

Inside.....

Our 23rd Annual Labor Relations & Employment Law Update Conference will be held at the Sheraton Music City, Nashville, TN, on November 14 & 15, 2002. SEE INSERT FOR GUEST SPEAKER ANNOUNCEMENT, PROGRAM TOPICS AND REGISTRATION INFORMATION

Supreme Court Clarifies Limitations in Discrimination Cases

Under Title VII, a plaintiff must file an employment discrimination charge with the EEOC within either 180 or 300 days after an "alleged unlawful employment practice occurs," based on whether or not the state in question has a discrimination agency authorized to grant relief. In a recent ruling, the U.S. Supreme Court addressed what constitutes an "unlawful employment practice" and when that practice "occurred" for the purpose of applying the 180 or 300 days statutes of limitation. *National R.R. Passenger Corp. v. Morgan,* 88 FEP Cases 1601 (6/10/02).

The case arose when Morgan, an African American male, filed a charge of discrimination and retaliation with the EEOC against Amtrak, alleging that he had been subjected to discrete discriminatory and retaliatory acts and had experienced a racially hostile work environment throughout his employment. While some of the allegedly discriminatory acts occurred within 300 days of the time that Morgan filed his EEOC charge, many took place prior to that time period. Morgan contended that all of his claims were timely, inasmuch as they were part of a "continuing violation," a concept which

provides that an otherwise untimely claim may be considered timely filed if the employer's violations of the law are continuing in nature and not confined to a single incident.

The Court first addressed the issue of "discrete" discriminatory acts, such as termination, failure to promote, denial of transfer, or refusal to hire. The Court rejects the plaintiff's claim regarding untimely charges of discrete discriminatory acts, ruling that such acts are not actionable if time-barred, even when they are related to acts alleged in timely filed charges. Ultimately, the Court said, each discrete act "starts a new clock for filing charges alleging that act," and plaintiffs cannot string together related discrete acts that fall both inside and outside the time period allowed for filing charges. "The existence of past acts and the employee's prior knowledge of the occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are

independently discriminatory and charges addressing those acts are themselves timely filed," the Court said, noting also that prior acts can still be used as background evidence in support of the timely act.

However, the Court reached a different ruling involving hostile environment cases. The Court observed that in hostile environment cases, "their very nature involves repeated acts of conduct," and thus a hostile environment "occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." The Court explained that the language of Title VII supports the idea that hostile environment claims comprising a series of separate acts comprise one "unlawful employment practice," and therefore naturally will include acts that go beyond their 180 or 300 day charge filing period. It is irrelevant, the Court said, "that some of the component acts of the hostile work environment fall outside the statutory time period." As long as one act "contributing to the claim occurs within the filing period, the entire period of the hostile environment may be considered by a court for the purposes of determining liability."

Editor's Note - *This ruling by the Supreme Court is consistent with the view taken by most courts in the past, and is not surprising. The result basically is that in most states, a charge must be filed within 300 days of a discrete act, which is a disciplinary act or failure to hire or promote, but in the case of a hostile environment practice, need only be filed within 300 days of a portion of that practice. The Court leaves unresolved several issues, such as whether there can be more than one hostile environment "practice" involving the same ground of discrimination, thus rendering untimely the claims relating to the earlier "practice."*

Employer Can Refuse to Employ Person in Job That Would Pose Threat to Health

In a ruling that is a victory for employers who argued that they would be forced to hire people who would turn around and sue over workplace injuries, the U.S. Supreme Court has ruled that disabled people cannot demand jobs that would threaten their lives or health. *Chevron U.S.A., Inc. v. Echazabal,* 13 AD Cases 97 (6/10/02). While this result may at first glance not seem debatable, the issue arose because the ADA itself explicitly says that employers do not have to hire disabled individuals if they pose a threat to others in the workplace. But the statute itself says nothing about a threat to self. However, the EEOC had issued a regulation adding the threat to self - defense for employers. The case at Chevron involved a worker who initially was offered a job, contingent upon passing a medical exam. The offer was rescinded when Chevron's doctors determined that exposure to the chemicals at work would further damage Echazabal's already reduced liver functions, seriously endangering his health, and could potentially kill him. Echazabal argued that he had no symptoms, could physically do the job, and should be able to decide for himself whether to take the job.

Chevron argued that the EEOC rule was reasonable. Employers want to avoid time lost to sickness, excessive turnover for medical retirement or death, litigation under state tort laws, and a risk of violating OSHA. The Supreme Court, in a 9-0 ruling, indicated that although it was an "open question" whether an employer would be liable under OSHA for hiring a worker for a job that posed a threat to that worker's health, "there is no denying that the employer would be asking for trouble." An employer's decision to hire the disabled worker would put the worker's ADA rights "at loggerheads" with OSHA's policy of insuring the safety of every worker. The Court also rejected the argument that the EEOC regulation fosters the type of workplace paternalism that the law was meant to prevent. The Court distinguished an earlier Supreme Court ruling striking down employment policies excluding women from jobs seen as too risky, reasoning that those cases "were concerned with paternalistic judgments based on the broad category of gender." Here, however, the "EEOC has required that judgments based on a direct threat provision be made on the basis of individualized risk assessments." The Court remanded the case to determine whether Chevron's decision not to hire Echazabel was based on a reasonable medical judgment.

Editor's Note - *This case is the latest in a series of rulings that define and limit worker rights under the ADA. In January, the Supreme Court ruled against an assembly line worker with carpal tunnel syndrome, holding that the condition did not substantially affect day to day life and thus should not legally require a special accommodation under the Act. In April, the Court ruled 5-4 against an airline worker who wanted to go around the company's seniority policy to claim a job that did not aggravate his back injury. Although the Chevron ruling is favorable to employers, it still leaves complicated questions on the lawfulness of hiring the worker whose health or safety consequences are not certain but can only be predicted.*

Manner of Carrying Out Personnel Action Quite Important

Over the years the authors of this newsletter have emphasized that the manner of carrying out a personnel action is extremely important, even if the action appears to be entirely lawful. Procedures are important because, based on human nature, judges, juries, and administrative agencies are highly influenced by the equities or fairness of a particular procedure. If the employer acts in a seemingly inappropriate manner, it is human nature to say "there ought to be a law against it," and to interpret such an action as unlawful, even though it would have otherwise been entirely lawful. Over the years, numerous studies have shown that juries are particularly likely to interpret what appears to be an unfair action on the part of an employer, as unlawful. Even though there is no general federal law prohibiting "unfairness," unfairness is likely to be confused with unlawfulness or discrimination with the resulting adverse consequences to employers. Even judges, supposedly above the frailties of human nature, may have these tendencies, at least to the point of allowing such actions to be determined by juries, rather than thrown out by the court without a trial.

Although there is no general federal law prohibiting unfairness, there are state laws relating to unfairness called "outrageous conduct," which is often defined as conduct "likely to shock the conscience of the community." A recent illustration of such a concept occurred in a case in Colorado, in which the court found that supervisors' conduct so far exceeded the bounds of decency as to be atrocious and utterly intolerable in a civilized community and, therefore, surpassed the higher threshold of liability for an employee's outrageous conduct claim. *Archer v. Farmer Brothers Co.,* 18 IER Cases 1059 (2002). The supervisors, who had never before visited the employee or been invited to his home, went to his home when the employee was recuperating after a heart attack, and entered uninvited. They did not announce the purpose of their visit or inquire about the employee's health, but found the partially undressed employee lying in bed. They announced to the employee that they had termination papers that the employee needed to initial.

Although the employee was being investigated for alleged misconduct, he had no reason to anticipate that he would be fired and was shocked to receive the news. The employee was noticeably upset by the incident and demanded that the supervisors leave. In finding a state law violation of outrageous conduct, the court noted that the termination incident could have triggered a fatal heart attack and that the employee attempted suicide later that evening.

This case illustrates that although the personnel action itself, the termination, had been entirely lawful, that the manner of the termination could have adverse consequences to the employer. In the *Archer* case, the manner violated the state court law concept of outrageous conduct, sometimes known as intentional infliction of emotional distress. In other fact patterns, the manner of discipline may be so offensive as to be considered by judges and juries as strong evidence of discriminatory or otherwise unlawful conduct.

Applying these concepts to appropriate disciplinary action, one asks what procedures are most likely to be deemed fair by judges and juries. Some of these features might include, but are not necessarily limited to, the right to have notice of employer rules and policies, the right to be able to tell one's side of the story prior to being disciplined, the right to be informed of the reasons for the action, and the right not to be humiliated in front of others by the announcement of the discipline.

KNOW YOUR ATTORNEY

ROBERT S. HAHN

Bob became associated with the firm in December of 1997 and practices in the Morristown, Tennessee office. He received his Bachelor of Science degree in 1987 from Bridgewater College in Bridgewater, Virginia. He received his Master of Business Administration in 1992 from James Madison University in Harrisonburg, Virginia. He received his Doctor of Jurisprudence degree in 1997 from the University of Tennessee. Bob practices primarily in the area of Workers' Compensation, Employment Law and counseling employers on related issues.

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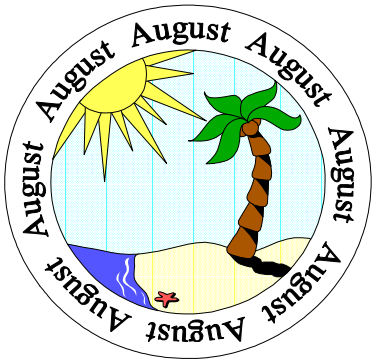

TAMPA OFFICE OPENED

The Wimberly & Lawson group of affiliated firms is very pleased to announce the opening of an office in Tampa Florida on July 8, 2002. The firm is named Wimberly, Lawson, Suarez & Russell, LLC and is located at 5005 West Laurel Street, Suite 210, Tampa, Florida 33607. (Ph: 813-262-1523; cellular 813-966-6598; and Email: lawyers@wimlaw-tpa.com). The office is headed by Ed Suarez and Phillip Russell.

Ed has more than eleven years experience advising employers in all aspects of labor and employment law. He was also a field attorney for the NLRB in Denver after graduating from law school at Mercer University and receiving degrees in Public Administration, Management Science AND Personnel and Industrial Relations from St. Louis University and Georgia College. Fluent in Spanish, Ed is also a principal of the Employer's Resource Group (a/k/a/ West Coast Employers Association) of Tampa.

Phillip is formerly Of Counsel to our Atlanta office and has represented management for seven years in labor and employment matters. He is active in alumni activities at Georgia Tech, his alma mater, and graduated from StetsonUniversity's College of Law in St. Petersburg.

Please join all of us in our Georgia, Tennessee and South Carolina offices by welcoming Ed Suarez and Phillip Russell as they open the new Tampa office.

Visit our Website at http://www.wlswd.com

Our web site includes comprehensive information about our lawyers and practice areas as well as upcoming seminars, conferences, publications available from our firm, and information about the latest labor and employment law developments on the newsletter page. Check it out today!