



ROBINSON & COLE LLP

Labor, Employment & Benefits



ADEA Does Not Prohibit a Facially Neutral Policy Having a Disparate Impact on Employees Over Age 40

After Jackson, Mississippi adopted a new performance pay plan giving police officers under the age of 40 larger salary increases than older officers, 30 officers sued the city claiming that the plan violated the Age Discrimination in Employment Act. The officers claimed that the plan was either a deliberate intent to discriminate against employees over the age of 40 or a facially neutral policy that had a disparate discriminatory impact on employees over 40. In [Smith v. Jackson](#) (11/13/03) the U.S. Court of Appeals for the Fifth Circuit allowed the officers to proceed with their claim of deliberate age discrimination, but dismissed their disparate impact claim. The court ruled that, unlike Title VII, the ADEA does not allow employees to bring disparate impact claims. As explained by the court, “ADEA was not intended to remedy age-disparate effects that arise from the application of employment plans or practices that are not based on age.”

Second Medical Certification Is Exclusive Remedy for Challenge to Employee’s Claim of Entitlement to FMLA Leave

JoElla Smith sued the University of Chicago Hospitals alleging violations of the Family and Medical Leave Act. Smith filed a motion asking the court to find that she was entitled to take FMLA leave on account of a serious health condition. UCH admitted that it obtained medical certification of Smith’s health condition and designated her leave FMLA leave for a serious health condition and that it did not request a second opinion from a health care provider. However, UCH argued that Smith’s motion should be denied because it needed to review Smith’s medical records to determine whether she in fact had a serious health condition and whether her FMLA claim was proper. [Smith v. University of Chicago Hospitals](#) (11/20/03) the U.S. District Court for Illinois ruled that an employer that chooses not to use the FMLA procedures for obtaining a second medical opinion to contest an employee’s entitlement to FMLA leave for a serious health condition cannot later seek discovery of an employee’s medical records to challenge the employee’s entitlement to leave in a later civil action.

California High Court Applies “Avoidable Consequences Doctrine” Defense to Sexual Harassment Claims

In [State Department of Health Services v. Superior Court](#) (11/24/03) the California Supreme Court ruled that an employer may assert the “avoidable consequences doctrine” to damages claims under the California employment laws. Under the avoidable consequences doctrine, a plaintiff’s recoverable damages do not include those damages that the plaintiff could have avoided with reasonable effort and undue risk, expense, or humiliation. The court noted that the defense only affects damages, not liability. As explained by the court, if the employer establishes that the employee, by taking reasonable steps to utilize employer-sponsored complaint procedures, could have caused the misconduct to cease, the employer remains liable for any compensable damages suffered by the employee before the time the harassment would have ceased, but the employer avoids liability for any damages suffered thereafter. The court also noted that, to take advantage of the defense, the employer generally must prove that it adopted appropriate antiharassment policies and communicated essential information about the policies to its employees.

Undocumented Alien Barred from Pursuing Wrongful Termination Claim

Esmeralda Morejon sued her former employer, Terry Hinge and Hardware, claiming that she was fired when she requested medical leave in violation of state discrimination laws and public policy. In addition to denying Morejon’s claims, TH&H asserted the legal defense that Morejon was barred from filing her lawsuit by the “unclean hands doctrine” because she was an unauthorized alien who submitted false documentation when she was hired. In [Morejon v. Terry Hinge and Hardware](#) (11/4/03) the California Court of Appeals concluded that Morejon violated the public policy barring the employment of undocumented aliens by providing false work authorization papers. The court ruled that, because Morejon was not legally entitled to the job at TH&H, she was barred from pursuing a wrongful termination claim. The court also ruled that whether TH&H knew that Morejon’s documentation was false was irrelevant to the question of whether Morejon could file her lawsuit.

Company President Jailed for Fraud and Making False Statements to OSHA

The United States Postal Service hired Azteca Services, Inc. to provide cleaning and decontamination services for a distribution center that had been exposed to anthrax. Oscar Miranda, president of Azteca Services, falsely told the USPS that his employees had received the specialized OSHA-required training for decontamination work, including a minimum of 40 hours per employee of hazardous materials training. He also instructed his employees to lie about the training they received and created false documentation to conceal the fact that the training had not occurred. Miranda’s misdeeds were discovered during an OSHA investigation relating to the decontamination. In [United States v. Miranda](#) (11/12/03), the U.S. District Court for New York sentenced Miranda to 34 months in prison, followed by three years probation, and ordered him to pay restitution in the amount of \$1.38 million to the USPS.

Police Officer’s Refusal to Work at Casino Was Not Protected by Title VII’s Religious Accommodation Provision

Benjamin Endres, a Baptist police officer, refused an assignment to work as a Gaming Commissioner agent, claiming that the assignment would require him to facilitate gambling, in violation of his religious beliefs. Because of his refusal, Endres was terminated for insubordination. Endres filed a lawsuit against the Indiana State Police, claiming that it discriminated against him on the basis of religion. Specifically, Endres argued that the police department violated the Title VII provision that prohibits employers from discriminating against individuals because of their religious observances and practices unless the employer demonstrates that it is unable to reasonably accommodate the employee’s religious observances or practices without undue hardship in the conduct of the employer’s business.

In [Endres v. Indiana State Police](#) (11/19/03), the U.S. Court of Appeals for the Seventh Circuit rejected Endres’ claims. The court ruled that it would be unreasonable to require police departments to allow the particular religious beliefs of their officers to dictate work assignments, emphasizing society’s need to hold law enforcement officers to their oath to enforce all laws without favoritism or exception. Because the court considered Endres’ accommodation request to be unreasonable, it did not consider whether his request would have imposed an undue hardship on his employer.

San Francisco Passes Higher Minimum Wage

On February 2, 2004, the minimum wage in San Francisco will be increased to \$8.50 per hour (instead of \$6.75 per hour, the current minimum wage under California law), as a result of approval of [Proposition L](#), by voters on November 4. Currently, this law applies only to businesses with 10 or more employees. Businesses with fewer than 10 employees will be required to pay \$7.75 per hour beginning January 1, 2005, and will not be required to pay \$8.50 per hour until January 1, 2006. Employers who fail to comply with this law may face heavy sanctions.

This is an archive of past issues. As a result, it may contain information that is not current.

The logo for Robinson & Cole LLP, featuring the text "ROBINSON & COLE" in a serif font, with "LLP" in a smaller font to the right, all in white on a dark blue background.

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