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Employer Update

After *Staub*, Will Employers Get Burned by the "Cat's Paw"?

By Gary D. Friedman and Courtney P. Fain

In This Issue

On March 1, 2011, in the case of *Staub v. Proctor Hospital*,[1] the United States Supreme Court addressed an issue that long has been vexing to employment law practitioners: under what circumstances will an employer be liable for an adverse employment action where the decisionmaker is unbiased, but relies on information furnished by a biased supervisor? In an unanimous decision,[2] the Court, in an opinion by Justice Antonin Scalia, held that an employer is liable under a "cat's paw" theory when a supervisor is motivated by bias, performs an act that is intended to cause an adverse employment action, and that act is a proximate cause of the ultimate adverse employment action. While the statute at issue was the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), the text of the opinion suggests that the framework adopted by the Court for resolving "cat's paw" claims may be applied to claims brought under certain other employment discrimination statutes, most notably Title VII. Indeed, in framing the issue in the Court's opinion, Justice Scalia stated that the Court was considering "the circumstances under which an employer may be held liable for *employment discrimination* based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision,"[3] without specifically limiting the circumstances to claims brought under USERRA.

In *Staub*, the Court sought to streamline the divergent approaches among the Circuits to determine "cat's paw" liability. In doing so, the Court specifically rejected the stringent alter-ego standard adopted by the Seventh Circuit, which held that an employer is only liable under the "cat's paw" theory where the biased non-decisionmaker has "singular influence" over the decisionmaker.

While *Staub* clarifies the standard for "cat's paw" liability, it leaves to the lower courts the challenge of filling the voids created by the Court's decision, such as the applicability of the standard to other anti-discrimination statutes, such the Age Discrimination in Employment Act ("ADEA"), whose text is materially different from USERRA's, and whether a non-biased decisionmaker's reliance on information from a biased co-worker (rather than a supervisor) is actionable. Despite the Court's express refusal to adopt any "hard-and-fast rule,"[4] *Staub* is likely to cause employers to re-evaluate their approach to conducting internal investigations and making adverse personnel decisions, much as the Court's twin decisions more than a decade ago in *Faragher v. City of Boca Raton*[5] and *Burlington Industries, Inc. v. Ellerth*[6] caused employers to re-evaluate their policies with respect to the reporting of and responding to harassment and discrimination in the workplace.

In this article, we provide a background of both the lower court proceedings and the Court's opinion in the first part, and a discussion of some of the potential implications to employers in the second part.

Proceedings in *Staub*

Petitioner Vincent Staub ("Staub") worked as an angiography technologist at Proctor Hospital ("Proctor") while simultaneously serving in the U.S. Army Reserves. His reserve obligations required him to work at his unit for one weekend a month and to train full time for an additional two to three weeks each year.

The evidentiary record indicated that his immediate supervisor, Janice Mulally ("Mulally"), and her supervisor, Michael Korenchuk ("Korenchuk"), were openly hostile towards Staub because of his military obligations. For example, Mulally regularly scheduled Staub for shifts when she knew he had reserve commitments and commented that Staub's military duty had been a "strain on th[e] department" and asked one of Staub's co-worker to help her "get rid of him." Korenchuk referred to Staub's reserve obligations as "'a b[u]nch of smoking and joking and [a] waste of taxpayers['] money." Additionally, in January 2004, Mulally issued a "Corrective Action" disciplinary warning to Staub for violating an alleged company rule requiring him to remain in his work area even when he was not working with a patient. Staub argued that the warning was issued under false pretenses because such a rule did not exist and, in any event, he had not committed the alleged violation. The warning included a directive that Staub must report to Korenchuk or Mulally whenever he had no patients and his angiography caseload had been completed.

In April 2004, Korenchuk reported to Linda Buck ("Buck"), Proctor's vice-president of human resources, that Staub had violated the January 2004 Corrective Action by leaving his work area without informing a supervisor. Staub told Buck that the allegation was false because he had left Korenchuk a voicemail with his location. Buck relied on Korenchuk's accusation and, after reviewing Staub's personnel file, she fired Staub, stating in his termination notice that Staub had ignored the directive contained in the January 2004 Corrective Action. Staub challenged his termination, alleging that Mulally had fabricated the violation because of her hostility towards his military obligations. In response to the complaint, Buck discussed the matter with another personnel officer, but did not follow up with Mulally about Staub's claim of bias, and affirmed the termination.

[I]n the wake of *Staub*, employers should carefully review and evaluate their internal investigation practices and grievance procedures.

Staub sued Proctor in the U.S. District Court for the Central District of Illinois, alleging that his termination violated USERRA. He did not allege that Buck was hostile to his military obligations, but rather claimed that Mulally and Korenchuk were biased against his military obligations and that their actions influenced Buck in her decision to terminate Staub. The jury found for Staub, concluding that he had proven that his "military status was a motivating factor in [Proctor's] decision to discharge him" and that Proctor had not shown that Staub "would have been discharged regardless of his military status." The jury awarded him $57,640 in damages.

The Seventh Circuit reversed, holding that under the "cat's paw" theory of liability "the discriminatory animus of a non-decision maker is imputed to the decision maker where the former has singular influence over the latter and uses that influence to cause the adverse employment action." The term "cat's paw" is derived from a 17th century fable attributed to Jean de La Fontaine, in which a monkey persuades a cat to pull chestnuts from a hot fire, leaving the monkey with the outcome he desired, the chestnuts, and the cat with nothing other than burnt paws. In the employment discrimination context, "cat's paw" refers to a situation in which a biased employee, who may lack the ultimate decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action.

The Seventh Circuit held that the judge erred in admitting evidence of Mulally's animus without first determining that a reasonable jury could find "singular influence" because, where there is insufficient evidence to support a finding of "singular influence," a district court "has no business admitting evidence of animus by nondecisionmakers." Finding that a reasonable jury could not conclude that Mulally had singular influence over Buck and that Buck was not biased against Staub's military service, the Seventh Circuit granted Proctor judgment as a matter of law. The Seventh Circuit also held that because Buck conducted her own investigation, Proctor was not liable.

The circuit courts have long been split on the evidentiary burden for plaintiffs claiming discrimination under a "cat's paw" theory of liability. Most circuits, including the Second and Third Circuits, have considered, to varying degrees, the level of influence the subordinate had over the decisionmaker. For example, in imputing liability to the employer for the biased actions of its non-decisionmaking employees, the Second Circuit has considered the extent to which the "individual shown to have the impermissible bias played a meaningful role in the ... process" that led to the adverse employment action.[7] The Third Circuit has held that an employer is liable for discrimination even where it is not alleged that the decisionmaker was biased "if those exhibiting discriminatory animus influenced or participated in the decision to terminate."[8] The Fourth and Seventh Circuits, however, applied a stricter alter-ego standard, finding liability only where the subordinate was the *de facto* decisionmaker.[9] Prior to agreeing to hear *Staub*, the Supreme Court had twice granted certiorari in "cat's paw" cases, but both cases settled before argument.[10]

The Opinion

Starting with an analysis of the text of USERRA, which he noted was "very similar to Title VII,"[11] Justice Scalia stated that the "central difficulty" in the case was construing the statutory language – "motivating factor in the employer's action"[12] – because the decisionmaker, Buck, had no discriminatory animus but was influenced by the actions of those who harbored such animus. Drawing heavily from general principles of tort and agency law, the Court concluded that Staub's employer was at fault "because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision."[13] Thus, the Court held that "if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, than the employer is liable under USERRA."[14]

Importantly, the Court specifically rejected Proctor's argument that the decisionmaker's independent investigation (and rejection) of Staub's claim of discrimination should negate the effect of prior discrimination. "We decline to adopt such a hard-and-fast rule," stated Justice Scalia, because the biased report still may remain a causal factor "if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified." In reaching its conclusion, the Court rebuffed the Seventh Circuit's view that an independent investigation would eliminate the taint of the non-decisionmaker's bias: "We are aware of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim-preclusive effect."[15]

The Court, however, expressly left open the questions of whether an employer could be liable if a co-worker, rather than a supervisor, committed the discriminatory act that influenced the ultimate decision and whether the employer would have an affirmative defense to "cat's paw" liability if the employee failed to raise a claim of illegal bias regarding the adverse employment action.[16]

Justices Alito and Thomas concurred in the judgment but disagreed with what they considered to be the Court's straying from the statutory text of USERRA and argued that the employer should be entitled to an "independent investigation" defense which, they said, would encourage employers to establish internal grievance procedures similar to those adopted in the wake of *Faragher* and *Ellerth*.[17]

Implications for Employers

Despite the Court's reversal of the Seventh Circuit's judgment in Proctor's favor, *Staub* is not necessarily a victory for the plaintiffs' bar. Importantly, while the Court's holding rejected the strict "alter ego" standard, that standard had only been applied in the Fourth and Seventh Circuits. The Court's approach in requiring intent and proximate cause may result in a higher burden for plaintiffs in those circuits, such as the First, Second and Third, where the more expansive "influence" standard, which looked only to whether the biased individual may simply have "influenced the decisionmaker," has historically applied.

Moreover, the facts of *Staub* are somewhat unique, and are not likely to be present in the typical "cat's paw" case. For example, the evidence of bias on the part of Staub's supervisors was direct, rather than circumstantial, as evinced by their unvarnished comments to Staub's co-workers. In addition, Buck's "independent investigation" consisted of little more than a review of Staub's personnel file, and she failed to even question Mulally about Staub's claim that the basis for the Corrective Action was fabricated due to Mulally's hostility towards his military service.

While the statute at issue was the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), the text of the opinion suggests that the framework adopted by the Court for resolving "cat's paw" claims may be applied to claims brought under certain other employment discrimination statutes, most notably Title VII.

Plaintiffs, however, are likely to seize on Justice Scalia's reference to Title VII and his discussion of "cat's paw" liability in the context of "employment discrimination" generally to apply this theory to claims brought under other anti-discrimination statutes. Indeed, some district courts have already noted the applicability of *Staub* to cases involving claims for discrimination under Title VII.[18]

How far the lower courts will go in applying this theory to other statutory claims remains to be seen. At least one district court has cited to *Staub* in a case involving claims for unlawful retaliation and discrimination under the Family Medical Leave Act, noting that "discriminatory animus can be inferred upwards where the employee who makes the ultimate decision to punish does so in reliance upon assessments or reports prepared by supervisors who possess such animus."[19] Employers facing "cat's paw" claims under the ADEA will undoubtedly cite to the Supreme Court's 2009 decision in *Gross v. FBL Financial Services, Inc.*[20] to argue that *Staub* does not apply.[21] In *Gross*, the Court specifically noted the distinctive language between Title VII and the ADEA, and, on that basis, among others, held that the higher "but/for" causation standard – not the "motivating factor" standard under Title VII – was the proper standard under the ADEA.

However, in the wake of *Staub*, employers should carefully review and evaluate their internal investigation practices and grievance procedures. One of the lessons of *Staub* is that a superficial analysis of a pending disciplinary action and the failure to properly investigate a claim of bias may result in liability. Although employers cannot realistically conduct a probing investigation for every disciplinary action and look in every crevice for evidence of discriminatory animus, they should train their decisionmakers to, among other things, differentiate between credible and non-credible performance information, analyze multiple sources of data and other evidence and, where possible, seek independent advice and guidance from knowledgeable superiors or colleagues about the contemplated personnel action.

Moreover, no claim of discriminatory bias by an employee should be dismissed without some investigation of the grievance that is proportionate to the nature of the claim and the supporting evidence proffered by the claimant. It is clear after *Staub* that human resources decisionmakers will not simply be given the benefit of the doubt on account of their experience, education and perceived neutrality. They will need to substantiate their adverse employment decisions through a variety of means, including independent investigations and follow through on the material performance elements that form the basis of the personnel decision.

1 *Staub v. Proctor Hosp.*, No. 09-400, slip op. at 1 (U.S. 2011).

2 Justice Scalia wrote the opinion, which Chief Justice Roberts, and Justices Kennedy, Ginsburg, Breyer and Sotomayor joined. Justice Alito filed a concurring opinion, which Justice Thomas joined. Justice Kagan, who was Solicitor General when the office submitted an *amicus* brief in support of the Petitioner, did not take part in the decision.

3 *Id.* at 1 (emphasis added).

4 *Id.* at 9.

5 524 U.S. 775 (1998).

6 524 U.S. 742 (1998).

7 *Holcomb v. Iona Coll.*, 521 F.3d 130, 143 (2nd Cir. 2008) (citing *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 450 (2d Cir. 1999)).

8 *Abramson v. William Paterson Coll. of New Jersey*, 260 F.3d 265, 286 (3d Cir. 2001) (citing *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995)).

9 *See, e.g.*, *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 291 (4th Cir. 2004) ("[A]n aggrieved employee who rests a discrimination

claim under Title VII or the ADEA upon the discriminatory motivations of a subordinate employee must come forward with sufficient evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decision maker for the employer.")

10 *Equal Employment Opportunity Comm'n v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476 (10th Cir. 2006), *cert. dismissed*, 549 U.S. 1334 (2007); *Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277 (4th Cir. 2004) (*en banc*), *cert. dismissed*, 543 U.S. 1132 (2005).

11 *Staub*, No. 09-400, slip op. at 5.

12 *Id.*

13 *Id.* at 9.

14 *Id.* at 10 (footnotes omitted) (emphasis in original).

15 *Id.* at 9.

16 *Id.* at 10 n.4.

17 *Staub*, No. 09-400, slip op. at 3 (Alito, J. concurring).

18 *See, e.g.*, *Ndene v. Columbus Acad.*, No. 2:09-CV-892, 2011 WL 829189, at *6 (S.D. Ohio Mar. 3, 2011) (citing to *Staub* in case alleging violations of Title VII for the general proposition that an employer may be held liable under the "cat's paw" theory).

19 *Blount v. Ohio Bell Tel. Co.*, No. 1:10-CV-01439, 2011 WL 867551, at *6 (N.D. Ohio Mar. 10, 2011).

20 129 S. Ct. 2343 (2009).

21 At least one court considering a claim under the ADEA has cited to *Staub* for the proposition that the discriminatory animus of a non-decisionmaker was only relevant if it was intended to cause an adverse action and was a proximate cause of the adverse action. *See Wojtanek v. Iam Union Dist. 8*, No. 08 C 3080, 2011 WL 1002847, at *6 (N.D. Ill. Mar. 17, 2011). However, the court noted that in *Staub* the plaintiff needed only show that the discrimination was a "motivating factor" and that in the instant case, there was no evidence that the discriminatory animus at issue was a proximate cause, "let alone the 'but for' cause," of any adverse action. *Id.*

U.S. Supreme Court Says Employers Cannot Retaliate Against Those in Certain Close Relationships with Persons Who Bring Title VII Discrimination Claims

By Jonathan Sokotch

The following is a hypothetical scenario that may not be familiar to most readers. Two employees, let's call them Tariq and Sarah, who work for the same employer, let's call it U.S. Industries, are widely known at the workplace to be dating but not engaged to be married. Tariq, who is Muslim, files a charge against U.S. Industries with the Equal Employment Opportunity Commission ("EEOC"), claiming religious discrimination under Title VII of the Civil Rights Act ("Title VII"). One month after Tariq files his charge, U.S. Industries terminates Sarah. Sarah then sues U.S. Industries under a Title VII retaliation theory, claiming that U.S. Industries fired her as retaliation against Tariq, her boyfriend, for filing a discrimination claim. May Sarah permissibly bring such a lawsuit even though Sarah did not engage in any protected conduct herself? Maybe, according to a recent U.S. Supreme Court decision, *Thompson v. North American Stainless, LP*,[1] which added an undefined set of family members and close associates of discrimination claimants to the group of people who can bring Title VII retaliation claims.

The *Thompson* Decision

In *Thompson*, Miriam Regalado ("Regalado") and her fiancè, Eric Thompson ("Thompson"), were both employees of North American Stainless, LP ("NAS"). During her employment with NAS, Regalado filed a claim of sex discrimination with the EEOC. Three weeks later, NAS fired Thompson. Thompson then sued NAS under Title VII in the U.S. District Court for the Eastern District of Kentucky, claiming that NAS fired him in retaliation for his fiancè, Regalado, having filed a discrimination charge with the EEOC. Both the District Court and the U.S. Sixth Circuit Court of Appeals found for NAS, holding that Thompson was not "included in the class of persons to whom Congress created a retaliation cause of action" because he had not engaged in any statutorily protected conduct by "opposing" a practice, bringing a complaint or assisting in an investigation concerning Title VII.

In a unanimous decision, the U.S. Supreme Court reversed the Sixth Circuit, finding that: (i) NAS's termination of Thompson constituted unlawful retaliation under Title VII, and (ii) Thompson had standing to sue even though he personally had not engaged in any protected conduct. In coming to this result, the Court leaned heavily on its ruling in *Burlington Northern v. Santa Fe Railway Co.*[2] in which the Court found that the retaliatory conduct prohibited by Title VII's anti-retaliation provision was not, like the conduct barred by the anti-discrimination provision, only limited to employer acts affecting the terms and conditions of employment. Title VII's anti-retaliation provision, the Court in *Burlington* held, more broadly prohibits *any* employer action that might dissuade "a reasonable worker from making or supporting a charge of discrimination." Because a reasonable worker, the Court found, would be dissuaded from bringing a charge of discrimination if she knew her fiancè would he fired, the Court held that NAS's firing of Thompson constituted unlawful retaliation.

But, as NAS naturally inquired of the Court, what other types of relationships would be entitled to protection against retaliation? What about firing the girlfriend, close friend or trusted co-worker of a discrimination claimant? In addressing these questions the Court refused to identify a "fixed class of relationships" for which third party reprisals are unlawful, but, instead vaguely offered that "firing a close family member" will almost always be prohibited, but that "inflicting a milder reprisal on a mere acquaintance" will almost never constitute unlawful retaliation under the provisions of Title VII. The Court declined to provide more specific guidance, stating that the anti-retaliation provision is not reducible "to a comprehensive set of clear rules" and that any given act of retaliation will often depend on the particular circumstances.

...the Court refused to identify a "fixed class of relationships" for which third party reprisals are unlawful, but, instead vaguely offered that "firing a close family member" will almost always be prohibited, but that "inflicting a milder reprisal on a mere acquaintance" will almost never constitute unlawful retaliation under the provisions of Title VII.

The Court adopted a new standard to determine who is "aggrieved" under Title VII and thus has standing to sue, holding that an "aggrieved" person must fall within the "zone of interests" sought to be protected by the statutory provision. The Court found that Thompson, as an employee of NAS who was the subject of retaliatory conduct intentionally directed at him, was in the "zone of interests" sought to be protected by Title VII, and thus had standing to sue even though he had not engaged in protected conduct under Title VII.

Much Left Undecided by *Thompson*

Because of the uncertainty of the *Thompson* decision as to the sorts of relationships entitled to protection from third-party reprisals, it opens the way for inventive claims that employees were fired, or otherwise faced adverse employment action in retaliation for discrimination claims brought by employees with whom they have some kind of association. It will be left for the lower courts to work out who is in the "zone of interest" and who is not, which uncertainty plaintiffs' lawyers will undoubtedly attempt to exploit in seeking to increase severance awards.

In determining how employers should conduct themselves given this uncertainty, it is useful to delineate what we know and what do not know post-*Thompson*. We do know that if an employee engages in protected conduct under Title VII,[3] the employer may not retaliate against the complainant by firing or otherwise taking adverse action against a fiancè or "close family member" of the complainant. Multiple questions, including the following, remain unanswered:

- How broadly should the term "close family members" be interpreted? Does it only cover members of the complainant's nuclear family, or does it also cover cousins, nephews, second cousins, in-laws, etc., of Title IV complainants? And what about those who are dating or close friends with discrimination claimants, or even acquaintances who face stiffer retaliation than a "mild reprisal?" *Thompson* left each of these questions to the lower courts to decide.

- Does the group of persons protected from third-party retaliation also include those who work for vendors, suppliers, customers, etc. of the claimant's employer, or does it just include employees of the claimant's employer? One federal district court has already found that a person who worked for a vendor of the complainant's employer was protected from third-party retaliation under *Thompson*.[4]
- Do the anti-retaliation provisions of the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA") or of other anti-discrimination laws, also prohibit retaliation against close associates of discrimination claimants? Given the similarity of the anti-retaliation and "aggrieved" language in the ADEA, the ADA and Title VII, plaintiffs' attorneys will undoubtedly argue that the reasoning of *Thompson* extends to those statutes. Additionally, the EEOC has long taken the view that Title VII, the ADEA, the Equal Pay Act, and the ADA all prohibit third-party retaliation against persons "so closely related to or associated" with the persons engaging in protected conduct that the retaliation would "discourage or prevent" the claimant from pursuing her rights. See EEOC Compliance Manual § 8—II(B)(c)(3).

We expect that the federal courts will begin to answer these open questions, and will advise our clients should the courts provide any meaningful guidance on these issues.

Practical Tips for Employers

Here are several pro-active steps employers can take to improve compliance with *Thompson*:

- Current best practice is to have a blanket policy prohibiting retaliation, without regard to who is the subject of the retaliation. This is because organizations, as a matter of policy, generally do not want their employees engaging in retaliatory conduct and are loath to draw fine lines between who can and cannot be retaliated against. Given the ambiguity created by *Thompson* as to who is protected from third party retaliation under the law, adopting such a broad policy seems even more prudent than before. Employers generally want to stay well to the right side of the law, particularly where, as here, the right side is by no means clear. Further, whenever a current employee brings a claim of discrimination, the employer's human resources or in-house legal staff should remind anyone who has supervisory or managerial responsibility (even if indirect) over the claimant, of the employer's policy against retaliation towards anyone.
- Prior to taking adverse employment action against any employee, employers should always engage in some assessment of the potential exposure such action could cause. That assessment should now include whether the subject of the adverse action is related or closely associated to any person who has engaged in protected action. If the answer is yes, the employer should likely seek guidance from counsel before taking an adverse employment action, and should, as always, think through and document its legitimate business rationale for the adverse employment action.

Current best practice is to have a blanket policy prohibiting retaliation, without regard to who is the subject of the retaliation.

1 131 S.Ct. 863 (January 24, 2011).

2 548 U.S. 53, 126 S.Ct. 2405 (2006).

3 As a refresher, Title VII prohibits discrimination in employment on the basis of an employee's or applicant's race, color, religion, sex, or national origin. Conduct protected by Title VII's anti-retaliation provision includes an employee opposing any employment practice, making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing with respect to Title VII.

4 *McGee v. Healthcare Services, Grp., Inc.*, 2011 WL 818662 (N.D. Fla. 2011) (husband of discrimination claimant who worked for vendor of complainant's employer, could pursue a retaliation claim where the complainant's employer terminated vendor's contract after his wife filed a discrimination claim).

Developments in Law of "Inevitable Disclosure"

By Jeffrey S. Klein, Nicholas J. Pappas, and Emilie Adams

When an employee resigns and goes to work for a competitor, that employee may be in a position to exploit the employer's valuable trade secrets.[1] Employers often are understandably concerned that the departing employee will use or disclose such trade secrets and thereby harm the employer's business interests. To prevent such harm, employers may seek emergency relief from the courts, usually in the form of a preliminary injunction ordering the former employee to refrain from working for the competitor for some prescribed period of time. To succeed in obtaining such relief, the employer must demonstrate, among other elements of proof, an ongoing or imminent threat of irreparable harm.

In recent years, New York courts have shown a willingness to grant preliminary injunctions even where the employer presents no evidence of actual or intended disclosure of trade secrets, but where there is evidence that the employee will "inevitably" disclose the trade secrets in his new employment. In this way, the so-called inevitable disclosure doctrine can fill an evidentiary void, allowing an employer to make a critical showing without providing particularized evidence of misconduct. Essential factors in this analysis include 1) the extent to which the new employer is a direct competitor of the former employer; 2) the degree of similarity between the employee's former and new positions; and 3) the value of the purported trade secrets to the new and former employers.[2] Other case-specific factors such as the nature of the industry or the former employer's efforts to prevent the disclosure of trade secrets may be considered as well.

Courts have had little difficulty applying the inevitable disclosure doctrine to prevent use or disclosure of trade secrets by employees with highly technical expertise.[3] By contrast, at least some courts have been reluctant to apply the doctrine to employees occupying managerial positions, and whose confidential business information may be less technical or whose knowledge of trade secrets is merely ancillary to the employee's primary job functions.[4]

International Business Machines Corp. v. Visentin, a decision from the U.S. District Court for the Southern District of New York, provides a very recent example of a case in which a court refused to find that a former senior executive would not inevitably use or disclose the former employer's trade secrets. Although the Court acknowledged that the doctrine could be used as the basis for an injunction in the appropriate case, the Court refused to apply the doctrine to the facts presented in this case, following a painstaking analysis of the employee's job functions at his former employer, the nature of the asserted trade secrets, and whether there was any basis to conclude that the employee would inevitably use or disclose trade secrets in his new job.

In this article, we highlight some of the salient facts in *Visentin* that the Court deemed influential in its decision to deny the preliminary injunction. Based on these salient facts, and the Court's reasoning, we then offer some practical strategies employers may wish to consider as ways to approach either the hiring of an executive from a competitor, or to protect an employer's trade secrets by enforcement of non-competition agreements.

IBM v. Visentin

On January 19, 2011, Giovanni ("John") G. Visentin, a senior executive at International Business Machines, Inc. ("IBM") announced his intention to leave IBM to work for the Hewlett-Packard Company ("HP"). Although Visentin offered to remain at IBM for a reasonable transition period, IBM declined his offer and immediately sent someone to Visentin's home to retrieve his laptop. On January 20, IBM filed a complaint alleging claims for breach of contract and misappropriation of trade secrets, and simultaneously moved for a preliminary injunction with the United States District Court for the Southern District of New York. Following an extensive four-day hearing, the Court denied IBM's motion on February 16, 2011.[5]

Prior to his resignation, Visentin served as General Manager of IBM's Integrated Technology Services ("ITS") business. In consideration of his position and membership on IBM's exclusive Integration & Values Team, Visentin executed a noncompetition agreement with IBM, agreeing not to work for a competitor for one year following the termination of his employment with IBM.

However, immediately after resigning, Visentin joined HP to become a Senior Vice-President.

In its motion for a preliminary injunction, IBM asserted that in his capacity as General Manager, and as a result of his membership on several task forces and teams developing IBM corporate strategy, Visentin was privy to a large amount of confidential IBM information, including strategic initiatives, deal pricing, troubled clients, potential acquisitions, and client "pipeline" information. Despite access to such information, the Court found that Visentin's functions at IBM required general managerial expertise as opposed to highly technical, secret or proprietary information.[6] The Court also credited HP's claim that he would not need to apply any confidential information learned at IBM in his new employment at HP, and, therefore, concluded that the risk of Visentin's use or disclosure of such confidential information in HP's business was minimal.

Good Behavior

Courts have divided over whether an employee's bad faith ought to be considered in inevitable disclosure cases. Specifically, courts have divided between those which find that the doctrine is meant to intercept intentional misconduct, and those courts that would apply the doctrine where disclosure would be truly inevitable, in the sense that even an employee with the best of intentions could not avoid it. Many decisions suggest that an employee's best intentions may not be enough to prevent the court from finding that the employee's new position poses a significant threat of unintentional disclosure.[7] Other cases suggest that in some circumstances, courts may require the former employer to show that the employee is untrustworthy before invoking the doctrine.[8]

... the Court concluded that IBM's actions changed the status quo, and, therefore, IBM's own actions exacerbated the emergency from which it sought the Court's assistance to avoid.

The Court's analysis in *Visentin* suggests that the employee's demonstrated "good faith" or continuing loyalty lessened the perception that his work for HP could threaten IBM – for example, Visentin's decisions not to take any IBM documents with him to HP and to provide HP with a list of customers for whom he could not work because of his responsibility for those customers at IBM. These actions supported his representations that he had no intent to use or disclose IBM's trade secrets in the future. His good behavior as a departing employee, in effect, gave the Court a basis from which it reasonably concluded that he would not "eventually be 'motivated' to break the law."[9]

By contrast to Visentin's good behavior, a recent case involving a departing Estée Lauder executive illustrates the impact on the court of evidence that a departing employee engaged in conduct which breached ongoing duties of loyalty or fiduciary duties. In that case, the court granted a preliminary injunction prohibiting the employee from working for a competitor.[10] The court found that the employee began doing work for the competitor while still employed by the former employer, going so far as to use the former employer's resources to perform work for the competitor.[11]

IBM's Reasonableness

In considering whether to grant a motion for preliminary injunction to enforce a noncompetition agreement, courts assess not only the employee's loyalty and good faith, but also the reasonableness of the employer's actions in dealing with the former employee. *Visentin* suggests that an employer's initial reaction to the news of the executive's resignation may be an important factor which influences the court's assessment of the equities. The Court devoted considerable attention to IBM's decision to refuse Visentin's offer to remain at the company and IBM's refusal to discuss the new position with Visentin.[12] Based on this fact, the Court concluded that IBM's actions changed the status quo, and, therefore, IBM's own actions exacerbated the emergency from which it sought the Court's assistance to avoid.[13]

IBM's abrupt reaction to Visentin's departure contrasts sharply with IBM's reaction to the departure of the employee in *International Business Machines v. Papermaster*, in which case IBM succeeded in obtaining preliminary injunctive relief.[14] In *Papermaster*, IBM not only offered the defendant a substantial pay increase to stay at IBM, but also offered to pay the employee one year's salary in exchange for his agreement not to work for competitor Apple for one year. This attempt, despite being ultimately unsuccessful, helped IBM establish not only its good faith efforts to resolve the situation, but also demonstrated IBM's concern that Papermaster would inevitably disclose important trade secrets.

The former employer, however, is not alone in having to consider carefully the reasonableness of its actions in the aftermath of an employee's decision to leave one position for the other. Employers seeking to attract top talent should likewise consider taking steps to avoid receiving a competitor's business information from a new employee. A hiring employer's efforts to establish that it is not interested in the former employer's trade secrets can provide powerful evidence that there is no risk of inevitable disclosure of the competitor's trade secrets. As other cases have made clear, mere representations to that effect will not be enough to overcome the appearance of likely disclosure when the two positions are similar enough to make the use of such information seem inevitable.[15]

In *Visentin*, HP clearly thought about Visentin's responsibilities at IBM and carefully structured Visentin's new job functions so as to minimize overlap with his job functions at IBM. These efforts appear to have helped HP convince the Court that the likelihood of disclosure was insufficient to require an injunction. Further, HP's and Visentin's agreement not to use or disclose IBM trade secrets buttressed the Court's perception that both parties were sincere in their desire to avoid disclosure.

Practice Pointers

The Visentin case holds several important lessons both for employers concerned with protecting their trade secrets, and those who wish to hire new employees from the ranks of their competitors.

Employers who wish to maximize the likelihood that they will be able to protect their trade secrets when employees leave to work for competitors should take steps well in advance of any such departure. For example, employers should invest appropriately in efforts to maintain confidential information, including entering into confidentiality agreements with the critical employees who have access to such information and adopting policies which define with precision the information that the employer considers to be trade secrets. To the extent confidential information exists on computer networks, employers should ensure that such networks are accessible only with appropriate passwords and other security measures designed to prevent the unauthorized use or disclosure of trade secrets.

Employers faced with news of an employee departing to work for a competitor should refrain from acting prematurely, or overreacting to news of the employee's intention to leave, as such a reaction may lead a court to conclude that the former employer has acted punitively toward the departing employee. Although IBM ultimately may have had little choice but to sue Visentin following his resignation, IBM may have endeavored to avoid the type of conduct that the Court found to have been the cause of the emergency – for example, could IBM have extended Visentin's employment while at the same time seeking to learn more about his future job at HP and the extent to which Visentin and HP could comply with IBM's noncompetition agreement? At a minimum, IBM might have sought to create a record that it was acting deliberately and cautiously to protect its interests, and not for the purpose of punishing Visentin or HP.

A hiring employer's efforts to establish that it is not interested in the former employer's trade secrets can provide powerful evidence that there is no risk of inevitable disclosure of the competitor's trade secrets.

Conversely, the hiring employer should ensure that the departing employee does not take any documents from the former employer so as to minimize any appearance that the employee intends to use or disclose the former employer's trade secrets during the new employment. While asking for a customer list may help to limit conflict with an employee's previous position, doing so may also inadvertently require the employee to disclose information that the court could later determine to be proprietary. Thus, the hiring employer and the departing employee who seek to use a customer list for this purpose should implement appropriate safeguards to avoid improper use or disclosure of any customer list and to be able to demonstrate those safeguards in any subsequent litigation.

Hiring employers also should invest appropriate time and attention to structuring the departing employee's new job in order to minimize the risk that the new job will be perceived as identical, or in significant conflict with the employee's former position. As *Visentin* makes clear, the potential to mitigate the risk of inevitable disclosure by appropriate structuring of the new job can be very persuasive to a court considering a motion for a preliminary injunction.

Conclusion

Given the intensely fact-driven, somewhat unpredictable application of the doctrine of inevitable disclosure, employers cannot derive a one-size-fits-all "rule of thumb" that would achieve the objective of either protecting trade secrets, or avoiding violation of a competitor's non-competition agreements. *Visentin*, however, provides helpful guidance as to some of the ways in which the equities, taken as a whole, can influence the court's application of the doctrine.

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1 New York common law uses the following factors to determine whether certain information is a trade secret: "(1) the extent to which the information is known outside the business; (2) the extent to which the information is known by employees and others involved in the business; (3) the extent of measures taken by the company to guard the secrecy of the information; (4) the value of the information to the company and its competitors; (5) the amount of effort and money expended by the company in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." *See, e.g., DoubleClick Inc. v. Henderson*, 1997 WL 73143, at *4 (N.Y. Co. Ct., Nov. 7, 1997) (citing factors listed in the Restatement of Torts § 757, comment b).

2 *See, e.g., Earthweb v. Schlack*, 71 F. Supp. 2d 299, 310 (S.D.N.Y. 1999).

3 *See, e.g., Intern. Bus. Machines Corp. v. Papermaster*, 2008 WL 4974508 (S.D.N.Y. Nov. 21 2008) (microprocessors); *Integrated Cash Mgmt. Servs., Inc. v. Digital Transactions, Inc.*, 732 F. Supp. 370, 378 (S.D.N.Y. 1989) (computer software program). *See also Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102 (3d Cir. 2010) (employee knew, among other trade secrets, the precise recipe for Thomas' English Muffins).

4 *See, e.g., American Airlines v. Imhof*, 620 F.Supp.2d, 574, 582 (S.D.N.Y. 2009) ("[I]t is well to bear in mind that we are dealing with an individual responsible for sales of a widely used service as distinct, for example, from a food chemist privy to the secret formula for Coca-Cola or even a salesman for a highly specialized, technical product used only by small numbers of obscure manufacturers.").

5 *Int'l. Bus. Machines. Corp. v. Visentin*, 2011 WL 672025 (S.D.N.Y. February 16, 2011).

6 Despite Visentin's high-level management position, the Court makes frequent reference to Visentin's "general" traits and skills. *Id.* at *53 ("...Visentin's general managerial skills are his marketable trait"). Indeed, Visentin's position as a high-level manager as opposed to a "front line" employee convinced the Court that his job would not require him to use confidential knowledge. *Id.* at *22 ("Although trade secrets may have lurked somewhere on the periphery, the real thrust of his position was to manage his teams to make them as efficient as possible."). *Cf. Estée Lauder Cos. v. Batra*, 430 F. Supp. 2d 158, 175 (S.D.N.Y. 2006) ("The fact that [the employee] was not the scientist behind the formulas and the development of new products bears not on whether or not [the former employer] has carried its burden of demonstrating irreparable injury.").

7 *Global Telesystems, Inc. v. KPNQwest, N.V.*, 151 F. Supp. 2d 478, 482 (S.D.N.Y 2001) (finding that despite the departing employee's "best intentions," there was a high likelihood that disclosure of trade secrets would occur) (citing *Cheng v. GAF Corp.*, 631 F.2d 1052, 1058 (2d Cir. 1980)). *See also Papermaster*, 2008 WL 4974508, at *10 (finding a high likelihood of "inadvertent disclosure"); *Monovis, Inc. v. Aquino*, 905 F. Supp. 1205, 1234 (W.D.N.Y. 1994) ("even assuming the best of good faith, it is doubtful whether the defendant could completely divorce his knowledge of the trade secrets...").

8 *See, e.g., Oce North American, Inc. v. Brazeau*, 2010 WL 5033310 (N.D. Ill. March 18, 2010); *Barilla America, Inc. v. Wright*, 2002 WL 31165069, at *9, 11 (S.D. Iowa July 5, 2002).

9 *Visentin*, 2011 WL 672025, at *49.

10 *Id.* at 176.

11 *Estée Lauder Cos. v. Batra*, 430 F. Supp. 2d at 164.

12 *Visentin*, 2011 WL 672025, at *57 (noting that the lack of discussion marked a departure from IBM's normal process).

13 *Id.* at *20 ("Thus, it was IBM that changed the status quo, leading to its seeking a mandatory injunction.").

14 *Intern. Bus. Machines Corp. v. Papermaster*, 2008 WL 4974508 (S.D.N.Y. Nov. 21 2008).

15 *See, e.g., Payment Alliance Int'l. v. Ferreira*, 530 F. Supp. 2d 477, 482 (S.D.N.Y. 2007) (finding that new employer's "professed lack of interest" in former employer's trade secrets not enough to overcome the nearly identical new position).

Employee's Communication Not Subject to Attorney-Client Privilege Where Sent Via Work E-mail Account

By Alex M. Solomon

Introduction

In the July-August 2010 edition of the *Employer Update*, we discussed a Supreme Court of New Jersey opinion that held an employer could not review e-mails between an employee and his or her counsel sent from the employer's computer via the employee's personal, password protected e-mail account.[1] This January, the California Court of Appeal – Third Appellate District addressed a slightly different scenario, and arrived at a very different conclusion in *Holmes v. Petrovich Development Company et al.*[2]

The issue in *Holmes* was whether e-mails sent by an employee to her own attorney using a company computer via a *work* e-mail account were subject to the attorney-client privilege. The *Holmes* court ruled in Defendants' favor, holding that the communications were not privileged because the employer maintained a policy – communicated to Plaintiff – that it would randomly and periodically check work e-mail accounts to enforce its rule limiting use of such accounts solely for work purposes.

Although the opinion was authored by a California state intermediate appellate court, employers across the country should take note of *Holmes* because it is an arrow in employers' quivers to defeat past or current employees' claims of privilege under certain circumstances.

The Facts of *Holmes*

Holmes arose out of alleged discrimination against Plaintiff based on her pregnancy. Plaintiff and a senior executive got into a dispute over the amount of time that Plaintiff planned to take for maternity leave. Although Plaintiff and the senior executive resolved their dispute, Plaintiff discovered that the senior executive had forwarded her e-mails regarding the pregnancy to other employees. Plaintiff became "very upset because she 'thought that it went without saying' the e-mails should not be disseminated to others."

Later that day, Plaintiff e-mailed an attorney from her work e-mail account – using her company computer – in which she asked for a reference for an employment lawyer. The attorney responded by asking for details on what was occurring with Plaintiff, to which Plaintiff responded that the senior executive had made hurtful and upsetting comments. Moreover, Plaintiff made additional accusations, and also forwarded some of the senior executive's e-mails to the attorney.

The attorney replied via e-mail, instructing Plaintiff to delete their communications from the work computer as Plaintiff's employer may claim a right to access those communications. Additionally, the attorney advised Plaintiff to confer by telephone, and stated that she was available for lunch the following day. Plaintiff met with the attorney the following day, and after that meeting, Plaintiff e-mailed the senior executive, informing him that she was quitting.

Plaintiff subsequently filed a lawsuit against the senior executive and the employer for sexual harassment, retaliation, wrongful termination in violation of public policy, violation of the right to privacy, and intentional infliction of emotional distress. Plaintiff objected to Defendants' use of the attorney-client e-mails at a deposition, in the motion for summary adjudication, and at trial.[3] Plaintiff further moved for discovery sanctions against defense counsel for failing to return the e-mails, which Plaintiff claimed were subject to the attorney-client privilege. The trial court overruled Plaintiff's objections, and denied Plaintiff's motion for sanctions because it found that Plaintiff had waived the attorney-client privilege.

On appeal, Plaintiff claimed, in part, that the trial court abused its discretion by (1) "denying her motion demanding the return of privileged documents" (i.e. Plaintiff's e-mails to her attorney, referenced above) and (2) "permitting the introduction of the documents at trial." The California Court of Appeal – Third Appellate District ruled in favor of Defendants.

The Court's Rejection of Plaintiff's Claim of Privilege

Under California law, a communication is subject to the attorney-client privilege if it is "a confidential communication between client and lawyer."[4] A "confidential communication between client and lawyer" is "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information *to no third persons* other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted."[5] The court held that a communication transmitted by an employee through electronic means is not "priviliged" when: (1) "the electronic means used belongs to the defendant; (2) the defendant has advised the plaintiff that communications using electronic means are not private, may be monitored, and may be used only for business purposes; and (3) the plaintiff is aware of and agrees to these conditions."[6]

In *Holmes*, the employer maintained a policy, of which Plaintiff was so informed, that an individual's work e-mail account was to be used only for company business, that e-mails sent from the company address were not private, and that the company would randomly and periodically monitor e-mail to ensure compliance with these policies. Therefore, "the company computer was not a means by which to communicate in confidence any information to her attorney. The company's computer use policy made this clear, and Holmes had no legitimate reason to believe otherwise, regardless of whether the company actually monitored employee e-mail."[7] The court compared Plaintiff's attorney-client communication, sent through her work e-mail account, "to consulting her attorney in one of the defendants' conference rooms, in a loud voice, with the door open, yet unreasonably expecting that the conversation overheard by [the senior executive] would be privileged."[8] Accordingly, Plaintiff's communications were not "'confidential communication[s] between client and lawyer'" because they were not "transmitted 'by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation.'"[9]

The court rejected Plaintiff's argument that she believed the e-mails between her and her attorney would be private because Plaintiff's work computer was password protected, and because Plaintiff deleted "the e-mails after they were sent." The court found this belief unreasonable in light of the fact that the employer had warned that work e-mail accounts were subject to monitoring. Plaintiff also argued that she had a reasonable expectation of privacy in her e-mail because, to her knowledge, the "operational reality" was such that no search of employees' company e-mail accounts occurred.[10] The court concluded the "operational reality" test should not apply. But even if the "operational reality" test were to apply, the court would have still ruled against Plaintiff because "the company explicitly told employees that they did not have a right to privacy in personal e-mail sent by company computers, which e-mail the company could inspect at any time at its discretion, and the company never conveyed a conflicting policy."[11]

Although the opinion was authored by a California state intermediate appellate court, employers across the country should take note of *Holmes* because it is an arrow in employers' quivers to defeat past or current employees' claims of privilege under certain circumstances.

Implication for Employers

Holmes is an especially powerful decision for employees in that the court stated it is of no significance whether an employer actually engages in monitoring an employee's work e-mail account, so long as the employer does not "explicitly contradict[] the company's warning to [employees] that company computers are monitored."[12] Thus, under a literal reading of *Holmes*, an employer may be able to defeat claims of privilege by only setting concrete policies establishing its right to monitor and review employees' e-mails without having to undertake the often costly and time-consuming monitoring of employees' accounts.

The *Holmes* opinion is in accord with *Scott v. Beth Israel Medical*

Center, Inc.[13] In *Scott*, Judge Ramos of the Supreme Court, New York County, employing similar reasoning to that in *Holmes*, ruled that the defendant satisfied one prong of a four-part test – whether "the company monitor[s] the use of the employee's computer or e-mail" – for determining whether an employee's e-mail was subject to the attorney-client privilege.[14] The *Scott* court concluded that this prong was met because even though the employer acknowledged that it did not monitor the plaintiff's e-mails, it retained the right to so monitor. However, this position is not universal.[15]

Therefore, *Holmes* is a significant development for employers because it serves as additional authority that the relevant consideration is employers' establishment of computer and e-mail usage policies that eliminate employees' expectation of privacy – not whether such policies are enforced.

The Court compared Plaintiff's attorney-client communication, sent through her work e-mail account, "to consulting her attorney in one of the defendants' conference rooms, in a loud voice, with the door open, yet unreasonably expecting that the conversation overheard by [the senior executive] would be privileged."

1 A. Dinkoff & D. Spencer, "Employer Access to Employee E-mail Communications," *Employer Update* (Weil, Gotshal & Manges LLP), July-August 2010, at 8-10.

2 191 Cal. App. 4th 1047 (Cal. Ct. App 2011).

3 The trial court granted summary adjudication for the Defendants on sexual harassment, retaliation, and constructive discharge. However, the court denied summary adjudication as to intentional infliction of emotional distress and the violations of the right to privacy. Subsequently, the jury ruled in favor of the Defendants on those two causes of action. The appellate court affirmed the trial court's grant of summary adjudication.

4 191 Cal. App. 4th at 1064 (quoting Cal. Code Evid. § 954) (internal quotation marks omitted).

5 191 Cal. App. 4th at 1064-65 (quoting Cal. Evid. Code § 952) (emphasis added and internal quotation marks omitted).

6 191 Cal. App. 4th at 1068.

7 *Id.* at 1071.

8 *Id.* at 1068.

9 *Id.* (quoting Cal. Evid. Code § 952).

10 191 Cal. App. 4th at 1069-70 (citations omitted).

11 *Id.* at 1071.

12 *Id.* The court used the following analogy: "Just as it is unreasonable to say a person has a legitimate expectation that he or she can exceed with absolute impunity a posted speed limit on a lonely public roadway simply because the roadway is seldom patrolled, it was unreasonable for Holmes to believe that her personal e-mail sent by company computer was private simply because, to her knowledge, the company had never enforced its computer monitoring policy." *Id.*

13 17 Misc. 3d 934 (N.Y. Sup. 2007)

14 *Id.* at 940-41 (quoting *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005)) (internal quotation marks omitted and alterations in original). The *Scott* court adopted the four-part test established in *In re Asia Global Crossing* for establishing whether a communication by an employee to his or her attorney via an employer's e-mail system is subject to the attorney client privilege. The four-part test is whether: (1) "the corporation maintain[s] a policy banning personal or other objectionable use," (2) "the company monitor[s] the use of the employee's computer or e-mail," (3) "third parties have a right of access to the computer or e-mails," and (4) "the corporation notif[ies] the employee, or was the employee aware of the use and monitoring policies?" *Scott*, 17 Misc. 3d at 941 (quoting *In re Asia*, 322 B.R. at 257) (internal quotations omitted and alterations in original).

15 *See Curto v. Med. World Commc'ns, Inc.*, No. 03-CV-6327(DRH)(MLO), 2006 U.S. Dist. LEXIS 29387 (E.D.N.Y. May 15, 2006) (holding magistrate did not err in concluding an employer's enforcement of its computer usage policy was a relevant consideration in determining whether the plaintiff waived the attorney-client privilege).

Is It Illegal to Discriminate Against Unemployed Job Applicants?

By Patricia Wencelblat

Employers and recruiters have long had some preference for those applicants who are currently employed, but in the midst of this recession, there have been reports of this practice becoming both more prevalent and more direct. Some companies have even gone as far as stating "Unemployed candidates will not be considered" in job postings and announcements. Such bans are sometimes linked to the duration of joblessness, which may cover only workers who have been unemployed for six months or more. Discriminating against unemployed applicants may or may not be prudent given the high-quality employees who have lost their jobs through no fault of their own, but is it illegal?

The reports of discrimination against unemployed job seekers began to circulate in the summer of 2010, and continued through the fall. As a result, on November 17, 2010, 54 members of Congress wrote a letter to Jacqueline Berrien, Chair of the Equal Employment Opportunity Commission ("EEOC"), urging her to investigate how such discrimination might have an adverse impact on minority groups and be an unnecessary barrier to employment for minorities. The members of Congress also requested that the EEOC issue a statement detailing that discriminating against the unemployed could be illegal if it has a disparate impact on minority groups.

The EEOC held hearings on February 16, 2011 to examine the treatment of unemployed job seekers. The purpose of the testimony was to "learn about the emerging practice of excluding unemployed persons from applicant pools." (EEOC Press Release Feb. 16, 2011.) The exclusion of job applicants who are not currently employed may violate federal employment laws despite the fact that Title VII does not identify the unemployed as a protected category of workers, because Title VII prohibits employers from using a practice that disproportionally excludes people based on their race, sex, national origin, or religion, unless the employer can demonstrate that the practice is job-related for the position and consistent with business necessity.

The EEOC heard anecdotal evidence of discrimination against unemployed candidates, including overt discrimination in the form of job postings and statements made during interviews, as well as evidence that such practices have recently become more prevalent. The testimony also focused on whether African-Americans, Hispanics, women, older workers, and disabled Americans suffer a disparate impact when employers categorically exclude unemployed applicants from job openings.

African-American and Hispanic Candidates

Alergnon Austin, Director of the Economic Policy Institute's Program on Race, Ethnicity, and the Economy, testified about the differences in unemployment rates by race. Austin noted that while the white unemployment rate peaked at 9.4%, the African-American unemployment rate peaked at 16.5%, and in January 2011, the Caucasian unemployment rate was 8%, but the unemployment rate for African-Americans was 15.7%. A two-to-one ratio between African-American and Caucasian unemployment rates has remained steady since the 1970s, and persists even if the study population is restricted to only those employees who have received bachelor's degrees or higher.

Austin also testified as to the differences between the Hispanic unemployment rate and the Caucasian unemployment rate, which yielded a ratio of 1.5 to 1 in January 2011, a typical ratio between the two. Austin noted that the sizeable difference remained even when restricted to college-educated workers, where that comparison yielded a ratio of 1.4 to 1.

Austin argued that because the unemployed population is disproportionally comprised of people of color, any practice which disadvantages unemployed workers relative to similar employed workers will likely have a negative impact on people of color. Austin did not address whether unemployed African-American or Hispanic workers have longer durations of unemployment when compared to unemployed Caucasian workers.

Female Candidates

Fatima Goss Graves, Vice President for Education and Employment at the National Women's Law Center, testified that creating barriers to employment for those who are out of the workforce could have a disparate impact on women, particularly for those women who work in non-traditional fields, older women, women of color, and women returning to the workforce after caregiving. Graves noted that while the recession had a dramatic impact on male workers, who lost seven out of every ten jobs between December 2007 and June 2009 (leading some to call it a "mancession"), the jobs recovery has also skewed towards men, with men gaining 438,000 jobs between July 2009 and January 2011, while women lost 366,000 jobs during this same time period. Women filled less than one in every twenty of the 984,000 jobs created between January 2010 and January 2011. Thus, Graves noted that the unemployment rate for women has actually risen during the economic recovery, while it has declined for men.

Graves argued that there are at least three reasons why the exclusion of the unemployed from applicant pools may have an adverse impact on women: (1) women older than 45 years old and women of color are more likely to be among the long-term unemployed, and therefore will be adversely impacted if an employer requires applicants to be recently employed; (2) women experience a higher unemployment rate in certain occupations, particularly those in non-traditional fields for women; and (3) women are much more likely than men to leave the workforce temporarily to care of children and/or relatives.

Discriminating against unemployed applicants may or may not be prudent given the high quality employees who have lost their jobs through no fault of their own, but is it illegal?

Graves further argued that such a disparate impact cannot be justified by a business necessity defense, because thus far no employers have put forward evidence demonstrating job-relatedness. Even assuming some employers underwent limited layoffs to retain only their top employees, the use of employment status is not an appropriate measure of skills, because many employees lost their jobs for reasons totally unrelated to job performance, such as a mass layoff, business closure, or leaving the workforce temporarily to become caregivers. Graves also noted that unsupported generalizations about these unemployed workers is reminiscent of and likely to exacerbate stereotypes that caregivers are less competent or less committed to their employers.

Older Workers

Christine Owens, Executive Director of the National Employment Law Project, offered testimony on how bans on hiring unemployed candidates would impact older workers. Owens noted that the persons most likely to be affected by such bans are those workers who have been unemployed the longest, and older workers are far more likely than younger workers to be among the long-term unemployed. Even if an employer does not have an explicit link to the duration of unemployment, longer periods of unemployment are more obvious, and therefore, more likely to trigger exclusion. The statistics support the assertion that older workers are more likely to be unemployed for longer periods of time. As of December 2010, over 40% of unemployed workers over the age of 55 were unemployed for more than one year, as compared to only a quarter of unemployed workers under the age of 35.

Owens argues that the impact of discrimination against the unemployed has already had a disparate impact against older workers, as the average duration of unemployment has increased for older workers between January 2010 and January 2011.

Disabled Candidates

Joyce Bender, CEO of Bender Consulting Services, testified only 20% of Americans with disabilities are considered to be in the labor force, and in that population 13.6% are unemployed. Bender argued that because a high percentage of Americans with disabilities are either unemployed or not in the work force, they would be excluded from any blanket rule excluding any job applicant who is not currently employed.

The Employers' Perspective

The EEOC heard testimony from James S. Urban, a partner at Jones Day, who represents and counsels employers about their employment practices, and from Fernan R. Cepero, on behalf of the Society for Human Resources Management.

Neither Urban nor Cepero defended the use of employment status as a valid means of excluding candidates from consideration. Rather, their testimony focused on their own research and experiences with employers, which led to their individual conclusions that the practice of such blanket exclusions is not widespread, as employers seek to hire the most qualified candidates, regardless of employment status.

Urban also focused on the requirements for demonstrating a disparate impact claim, and argued that under the EEOC's guidelines, the statistical differences between the employment rates of African-Americans and Hispanics, as compared to Caucasians, does not meet the requisite threshold level. The EEOC has taken the position that evidence of an adverse impact exists when the selection rate for any race, sex, or ethnic group is less than four-fifths (80 percent) of the rate for the majority group. Using the Bureau of Labor Statistics unemployment statistics, Urban argued that employment rates for African-Americans and Hispanics exceeds 80% of the employment rate for whites, and therefore, the statistics alone would not demonstrate the existence of a disparate impact.

The exclusion of job applicants who are not currently employed may violate federal employment laws despite the fact that Title VII does not identify the unemployed as a protected category of workers.

Conclusion

Given the EEOC's attention on blanket prohibitions against hiring unemployed applicants, employers run the risk of raising the EEOC's interest when imposing these types of bans, which could culminate in a lawsuit brought by the EEOC or by individual job applicants denied employment because of such a prohibition. Even if the EEOC or a claimant would not ultimately prevail, given the cost and distraction associated with defending against such claims, it would be prudent for employers to investigate alternative ways of achieving their goals, if practical, rather than relying solely on employment status as means of evaluating job candidates.

There are a few common reasons employers cite to as justification for using employment status as a blanket prohibition. However, in each of these cases, a less risky and more accurate measure of a candidate's abilities may be available depending on an employer's particular concern. First, employers may use current employment status as a proxy for skills under the assumption that employers will lay off the least productive workers and retain the most productive. However, employers should consider whether in their circumstances the use of employment status as a measure of skills may be too blunt of an instrument in this economy, where many workers have lost employment for a myriad of reasons having nothing to do with performance. Similarly, employers may use employment status as a measure of an employee's current, up-to-date, knowledge of an industry, but in some instances unemployed workers may have been able to keep their knowledge up to date through classes or volunteer work.

In each of these scenarios, an individualized evaluation of each applicant would reduce the employer's risk of liability, and might also yield a stronger applicant pool. If an employer determines that there are no appropriate alternatives to the use of employment status, the fact that the employer completed such an evaluation process would bolster a defense based on business necessity, as the employer could demonstrate that no appropriate alternative practices exist.

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