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Employer Update

'Comcast v. Behrend': Bigger Than We Thought at First Blush?

By Allan Dinkoff

In This Issue

The full implications of the Supreme Court's recent decision in *Comcast Corp. v. Behrend*[1] are not immediately apparent. The Court clearly held that whether damages could be decided on a class-wide basis was relevant to the predominance inquiry under Rule 23(b)(3). And the Court reiterated the message from *Wal-Mart Stores, Inc. v. Dukes*[2] that plaintiffs must demonstrate at class certification that causation can be established for all class members in a class trial. But the Supreme Court's decision to GVR (grant/vacate/remand) *RBS Citizens, NA v. Ross* in light of its *Comcast* decision[3] sheds some interesting light on the Court's thinking and suggests that *Comcast* may have a lot more to tell us than appeared at first blush.

Comcast and RBS

First, a brief recap of *Comcast* and *RBS*. *Comcast* involved an antitrust challenge to various practices employed by Comcast in building out its cable network. The Court granted review to decide "[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis."[4] The Court held that plaintiffs failed to satisfy Rule 23(b)(3)'s predominance requirement because they failed to demonstrate at the class certification stage that damages could be established on a class-wide basis at the class trial. Absent a method for establishing damages on a class-wide basis, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class."[5]

RBS,[6] on the other hand, involved an effort to certify two classes of workers alleging violations of Illinois's overtime laws. The Seventh Circuit upheld the district court's grant of class certification. At issue on appeal was whether plaintiffs had satisfied Rule 23(a)(2)'s requirement that there exist a single issue of law or fact common to the class. RBS argued that plaintiffs failed to identify a common issue because plaintiffs' claims would "require the same significant and time consuming individualized liability inquiries that the Supreme Court found problematic in *Dukes*."[7] The Seventh Circuit disagreed, finding that the class in *RBS* was much smaller than the one at issue in *Dukes* (approximately 2,000 in *RBS vs*. 1.5 million in *Dukes*) and that the type of proof the plaintiffs were required to offer in the two cases differed

significantly – proof of subjective intent to discriminate in *Dukes* and proof of whether RBS had "an unlawful overtime policy [that] prevented employees from collecting lawfully earned overtime compensation."[8]

Comcast and *RBS* seem largely disconnected – (1) *Comcast* involved predominance under 23(b)(3), whereas the issue in *RBS* was whether a common question existed under 23(a)(2), a far lower hurdle than (b)(3) predominance,[9] and (2) damages were not at issue in *RBS*. But the Supreme Court felt otherwise.

The Intersection of Comcast and RBS

The GVR in *RBS* teaches us a few things. First, *Dukes* signaled a blurring of the lines between the common question requirement of Rule 23(a)(2) and the higher burden imposed by 23(b)(3), with the Court insisting on a far more rigorous analysis of whether the common questions posed by plaintiffs to satisfy 23(a)(2) really provide common answers for the entire class rather than just raising common questions. Recall that the dissent in *Dukes* took the majority to task on this very point.[10] The GVR of *Ross* in light of *Comcast* suggests that the Court is serious about requiring that the common questions posed by plaintiffs actually provide common answers for all class members.

> The Supreme Court's decision to GVR (grant/vacate/remand) *RBS Citizens v. Ross* in light of its *Comcast* decision sheds interesting light on class certification jurisprudence – *Comcast* may have a lot more to tell us than appeared at first blush.

In *RBS*, the Seventh Circuit brushed off issues of whether liability for each class member turned at least in part on individualized issues of particular duties performed or hours worked by the members of the putative class. The circuit court held that, contrary to RBS's "assertion, an individualized assessment of each [assistant branch manager's] job duties is not relevant to a claim that an unlawful company-wide policy exists to deny [assistant branch managers] overtime pay."[11] The Supreme Court would seem to disagree, or at least think that its *Comcast* decision requires the Seventh Circuit to revisit this analysis.

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This conclusion is bolstered by the statement at the end of the Court's *Comcast* opinion that "[t]he first step in a damages study is the translation of the legal theory of the harmful event into an analysis of the economic impact of that event."[12] In other words, causation – did defendant's wrongful conduct cause injury to each class member. *Comcast* makes this statement in the context of predominance under Rule 23(b)(3), but it is consistent with *Dukes*, which addressed the same question in the context of whether there is a common question under Rule 23(a)(2). The Court in *Dukes* said that the critical inquiry under Rule 23(a)(2) is whether the answer to plaintiff's articulated common question provides a common answer as to whether each class member was injured by defendant's wrongful conduct. 131 S. Ct. at 2552 (in the context of plaintiffs' discrimination claims, the class trial must "produce a common answer to the crucial question *why was I disfavored*" (emphasis in original)). The GVR of *RBS* would seem intended to drive this home and emphasize the importance of this inquiry, whether it arises in the context of Rule 23(a)(2)'s common-question inquiry or in the context of predominance under (b)(3).

Conclusion

The holding of *Comcast* may be relatively narrow, if not significant, but its reach is broad, as the GVR in *Ross* emphasizes. The case stands for the clear proposition that not only must plaintiffs establish at class certification that damages can be established on a class-wide basis, but it puts a stake in the ground that the Court meant what it said in *Dukes* when it emphasized that the common questions under (a)(2)

must provide common answers at the class trial on the causation issue for all class members, and presumably on their damages as well.

1 2013 WL 1222646 (Mar. 27, 2013).

2 131 S. Ct. 2541 (2011).

3 2013 WL 1285303 (Apr. 1, 2013).

4 This is a different question than the one put forth in Comcast's petition: "[W]hether a district court may certify a class action without resolving ëmerits arguments' that bear on [Rule] 23's prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3)."

5 2013 WL 1222646, at *5.

6 *Ross v. RBS Citizens, N.A.*, 667 F.3d 900 (7th Cir. 2012).

7 *Id*. at 908.

8 *Id*. at 909-10. Of course, *Dukes* was also a disparate impact case. 131 S. Ct. at 2554.

9 *Comcast*, 2013 WL 1222646, at *4.

10 131 S. Ct. at 2555 (Ginsburg, J., dissenting).

11 667 F.3d at 910.

12 2013 WL 1222646, at *7(emphasis in original) (quoting Federal Judicial Center, *Reference Manual on Scientific Evidence* 432 (3d ed. 2011)).

The Unemployed are a Now Protected Class Under New York City Human Rights Law

By Celine J. Chan

According to the United States Department of Labor's Bureau of Labor Statistics, as of March 2013, the unemployment rate in New York State was 8.2 percent.[1] According to the New York State Department of Labor, the unemployment rate of New York City, as of March 2013, was 8.9 percent, or 1.3 percent higher than the national rate of 7.6 percent.[2] In this era of persistent high unemployment, individuals who are out of work and looking for employment can find themselves in a frustrating Catch-22 when they encounter employers who do not want to hire, or even consider, anyone who does not already have a job. Advocates for protecting the unemployed have argued that such practices unfairly exclude otherwise qualified, but unemployed individuals, who may be without a job due to no fault of their own, and whose unemployed status may not reflect potential job performance. On the other hand, employers argue that any legislation would subject businesses – particularly small businesses – to costly litigation if they fail to hire an unemployed applicant and would limit employers' ability to gather useful hiring information.

Against this debate, on March 13, 2013, over Mayor Bloomberg's veto, the New York City Council voted to pass Bill 814-A,[3] which amends the New York City Human Rights Law (NYCHRL)[4] and prevents covered employers and agencies from discriminating against job applicants based on an individual's unemployed status. Effective June 11, 2013, this law will become the first in the country to provide a private right of action for job applicants who believe they were rejected from employment because they presently are unemployed.

The Amendment's Provisions

Bill 814-A applies to employers, employment agencies, or agents that employ four or more persons, including independent contractors, and prohibits covered entities from basing decisions with regard to hiring, compensation, or terms, conditions,

or privileges of employment on an applicant's unemployed status. The terms "unemployed" or "unemployment" covers those: (1) "not having a job"; (2) "being available for work"; and (3) "seeking employment." [5]

Effective June 11, 2013, an amendment to the New York City Human Rights Law will make it the first law in the country to provide a private right of action for job applicants who believe they were rejected from employment because they presently are unemployed.

The new law also prohibits employers and employment agencies from advertising that current employment "is a requirement or qualification for [any] job," or that they will not "consider individuals for employment based on their unemployment."

The legislation does recognize that there are certain circumstances under which an employer could reasonably consider an applicant's unemployment as part of the application process. Specifically, the legislation permits employers to "consider[] an applicant's unemployment, where there is a substantially job-related reason for doing so," and, separately, to "inquir[e] into the circumstances surrounding an applicant's separation from prior employment." [6]

The law permits employers to consider and advertise for "substantially job-related qualifications" which include, but are not limited to, "a current and valid professional or occupational license; a certificate, registration, permit, or other credential; a minimum level of education or training; or a minimum level of professional, occupational, or field experience." Employers also still are permitted to limit opportunities to their current employees or give their own employees priority in hiring, compensation, or employment terms, conditions, and privileges. Moreover, employers may base compensation and other terms or conditions of employment on an employee's actual amount of experience, and may also continue to exercise any rights pursuant to collective bargaining agreements.

Disparate Impact Claims

The amendment provides that New York City Commission on Human Rights (the Commission) or a private plaintiff may bring a disparate impact claim based on a facially neutral policy or practice. To proceed under this theory, the Commission or private plaintiff must demonstrate that a policy or practice "results in a disparate impact to the detriment" of unemployed applicants. The employer then has the burden to plead and prove as an affirmative defense that each policy or practice "has as its basis a substantially job-related qualification or does not contribute to the disparate impact." Even if the employer meets this burden, the Commission or private plaintiff can still prevail if he or she "produces substantial evidence" that an "alternative policy or practice" that would have a less disparate impact is available, and the employer fails to prove such an alternative would not serve it as well.

It will be important to monitor the extent to which courts draw on Title VII disparate impact jurisprudence for guidance in applying the unemployment discrimination disparate impact provision of the NYCHRL

A particularly notable aspect of the law is that the Commission or private plaintiff may sustain a claim against an employer by demonstrating merely that a "group of policies or practices results in a disparate impact," without having "to demonstrate which specific policies or practices within the group results in such disparate impact." This provision appears to differ from Title VII's express requirement that a plaintiff identify a "*particular* employment practice"[7] that has a disparate impact, unless the plaintiff demonstrates that an entity's decision-making process is not capable of separation for analysis.[8]

Rights and Remedies

Individuals who believe that an employer has violated the NYCHRL can either file a complaint with the Commission within one year of the alleged discriminatory act, or file a civil suit in court, for

which the statute of limitations is three years. The Commission is empowered to order violating employers to "cease and desist" any unlawful discriminatory practices, to pay back pay and front pay to an aggrieved job applicant, and to fine a violating employer up to $125,000 for any violation, or up to $250,000 for any willful violation. The Commission may also order an employer to hire or reinstate an aggrieved individual. In a civil suit, a court may award to a prevailing plaintiff damages, including punitive damages, injunctive relief, and attorneys' fees and costs.

Other Jurisdictions' Unemployment Discrimination Measures

Three other jurisdictions have passed unemployment discrimination bills (and a number of states have considered similar bills), but none have been as expansive as New York City's law.

In 2011, New Jersey passed a law[9] prohibiting employers from advertising current employment as a job prerequisite for any job vacancy. New Jersey permits employers to identify other necessary job qualifications, such as education or licensing, and to consider only current employees for open, internal positions, but does not expressly prohibit employers from considering unemployment during the decision-making process. Unlike New York City's, New Jersey's statute does not create a private right of action.[10] Rather, employers are subject only to fines payable to the New Jersey Department of Labor and Workforce Development.

In 2012, Oregon became the second state to address unemployment discrimination. The Oregon law prohibits employers from advertising current employment as a job qualification. Oregon does not bar employers from setting forth minimum qualifications for the job, and like New Jersey, does not expressly prohibit employers from considering an applicant's employment status during the course of hiring. Also like New Jersey, Oregon does not create a private cause of action. Rather, only the Commissioner of the Bureau of Labor and Industries can pursue a violation and assess penalties.

The District of Columbia (DC) passed legislation[11] in 2012 that is more expansive than the New Jersey and Oregon laws, but not as far-reaching as New York City's law. DC prohibits employers and employment agencies from disqualifying, failing to consider, or refusing to hire an individual because of the person's unemployed status, and from indicating in any job advertisements that they would do so. Like New Jersey and Oregon, DC does not create a private right of action. Rather, the DC Office of Human Rights is responsible for handling complaints, and is charged with distributing any penalties assessed against the employer among any employee or potential employee who filed a claim alleging unemployment discrimination.

While unemployment currently is not a protected class under federal law, Congress focused on this issue when it considered Bills H.R. 2501 and S. 1471, known as the Fair Employment Opportunity Act of 2011. The Equal Employment Opportunity Commission has also previously investigated how such discrimination might adversely impact minority or protected groups.[12]

Open Questions and Practical Implications for Employers

In light of a number of open questions and ambiguities under the statute's language, Bill 814-A has the potential to become the subject of much litigation.

While the definition of "unemployed" or "unemployment" arguably suggests that only current unemployment is covered, whether past unemployment is also protected will likely be up for debate.

The line between impermissible hiring considerations and permissible considerations concerning either "substantially job-related" reasons or "circumstances surrounding an applicant's separation from prior employment" is also a thin one to tread, and little guidance exists to help employers walk this line. As an initial matter, the statute does not clearly instruct which party bears the burden of proving whether a given consideration is "substantially job-related." While the disparate impact section expressly provides

that the employer must "plead and prove" that a policy or practice has a "substantially job-related qualification" as its basis, no such provision appears in connection with the section permitting an employer to consider an applicant's unemployment where there is a "substantially job-related" reason for doing so. The meaning of the phrase "substantially job-related" is also ambiguous, and litigants will undoubtedly debate whether courts ought to draw its meaning from jurisprudence interpreting "job-related" in other contexts, such as under Title VII.

Moreover, although employers are expressly permitted to ask about "circumstances surrounding an applicant's separation from prior employment," they should remain vigilant of the method and nature of those inquiries and the extent to which they rely on those circumstances for hiring decisions, so as to not lend credence to any claim that the employer was focused on those circumstances merely as pretext for actually considering the applicant's unemployed status.

Further, while it is technically not unlawful to ask about certain gaps in an applicant's resume – as certain periods may not be "unemployment" as expressly defined under the law – employers must now be acutely aware of when an applicant indicates that he or she was *looking for work* during a gap period. Indeed, if the employer rejects that candidate, it must carefully document the considerations leading to that particular employment decision for the candidate.

It is also important to highlight some of the differences between this new statute's disparate impact provisions and a traditional disparate impact analysis under Title VII. Under Title VII, plaintiffs must establish that a neutral policy or practice "causes" a disparate impact. If they succeed, the employer must establish that the policies are "job related" and "consistent with business necessity."[13] If the employer establishes such a business necessity, plaintiffs still can prevail if they prove that an equally effective "alternative employment practice" exists.[14]

Under Bill 814-A, the Commission or private plaintiff must "demonstrate" that a policy or practice "results in a disparate impact." This burden is similar to the first stage of Title VII's disparate impact analysis, although the phrase "results in" arguably could denote a different showing than "causes." The employer then has the opportunity to "plead and prove" *either* a "substantially job-related qualification" defense or that the policy or practice "does not contribute to the disparate impact," an affirmative defense not expressly provided for under Title VII, although it is implicit in the statute. The complaining party then must "produce" substantial evidence that an alternative policy or practice is available. Whether the Commission or a private plaintiff must also bear the burden of persuasion on this alternative practices showing will likely be subject to litigation. Further, under the new statute, unlike under Title VII, the burden expressly shifts back to the employer to "prove" that such alternative would not serve it as well. Given the similarities and differences between this new statute and Title VII, it will be important to monitor the extent to which courts draw on Title VII disparate impact jurisprudence for guidance under this statute.

Until the law is further developed, it will also be unclear what factors employers can continue to consider that may typically be associated with unemployment. For example, while the statute permits employers to set "compensation or terms or conditions of employment" based on an applicant's "actual amount of experience," to the extent employers set lower wages for previously unemployed persons because their most recent base compensation is zero, employers could be vulnerable to challenges relating to unemployed individuals' wages.

While we wait for the case law to develop, New York City employers should consider taking at least the following steps in order to reduce their potential litigation exposure:

- Review paper and electronic job advertisements, application forms, and recruiting policies to ensure current employment is not a prerequisite or disqualifier for a job, and that recent experience is required only if it is a "substantially job-related qualification";
- Train all internal and external personnel involved with recruiting, interviewing, and hiring so that they understand what questions and considerations are permissible;

- Remind interviewers to focus questions on an applicant's actual qualifications and length of experience, as opposed to how long he or she has been out of work;
- Emphasize the need to document the reasons an unemployed candidate was not selected for a position, or the reasons for compensation-related decisions; and
- Update all employment policies to include unemployment as a protected classification.

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1 United States Dept. of Labor, Bureau of Labor Statistics, *Local Area Unemployment Statistics: Current Unemployment Rates for States and Historical Highs/Lows, available at* http://www.bls.gov/web/laus/lauhsthl.htm (last visited May 19, 2013).

2 New York State Department of Labor, *Labor Statistics for the New York City Region, available at* http://www.labor.ny.gov/stats/nyc/ (last visited May 19, 2013).

3 Bill 814-A is titled "A Local Law to amend the administrative code of the city of New York, in relation to prohibiting discrimination based on an individual's unemployment."

4 The NYCHRL currently makes it unlawful for employers to refuse to hire, discharge, or discriminate against an individual in compensation or in terms, conditions, or privileges of employment because of the individual's age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation, or alienage or citizenship status.

5 A previous version of the bill merely defined the term "unemployment status" vaguely and ambiguously as "an individual's current or recent unemployment."

6 A prior version of the bill would have imposed an additional requirement that employers demonstrate a "bona fide reason" for considering an applicant's unemployment status, but this did not make it into the final bill.

7 42 U.S.C. § 2000e-2(k)(1)(A)(i) (emphasis added).

8 42 U.S.C. § 2000e-2(k)(1)(B)(i).

9 N.J.S.A. § 34:8B-1.

10 *Id*. § 34:8B-2 ("Nothing set forth in this act shall be construed as creating, establishing or authorizing a private cause of action by an aggrieved person against an employer who has violated, or is alleged to have violated, the provisions of this act.").

11 D.C. CODE § 32-1362, titled the "Unemployed Anti-Discrimination Act of 2012."

12 *See* Wencelblat, Patricia, "Is It Illegal to Discriminate Against Unemployed Job Applicants?", *Employer Update* (March-April 2011).

13 42 U.S.C. § 2000e-2(k)(1)(A)(i).

14 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

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