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MAYER BROWN ROWE & MAW

Employment Law Bulletin

Table of Contents

Lower Courts Use *Burlington* Standard to Dismiss Weak Retaliation Claims

In the wake of the U.S. Supreme Court's opinion in *Burlington Northern & Santa Fe Railway Co. v. White,* 126 S. Ct. 2405 (2006), lower courts have begun to use the objective standard applied in *Burlington* to dismiss weak retaliation cases on summary judgment. While the general reaction among employment lawyers had been that *Burlington* would broaden the scope of Title VII retaliation cases, the lower courts have proven that such perceptions were erroneous, and that the Court actually created clarity among the appellate courts by removing subjective considerations and applying an objective standard to retaliation claims.

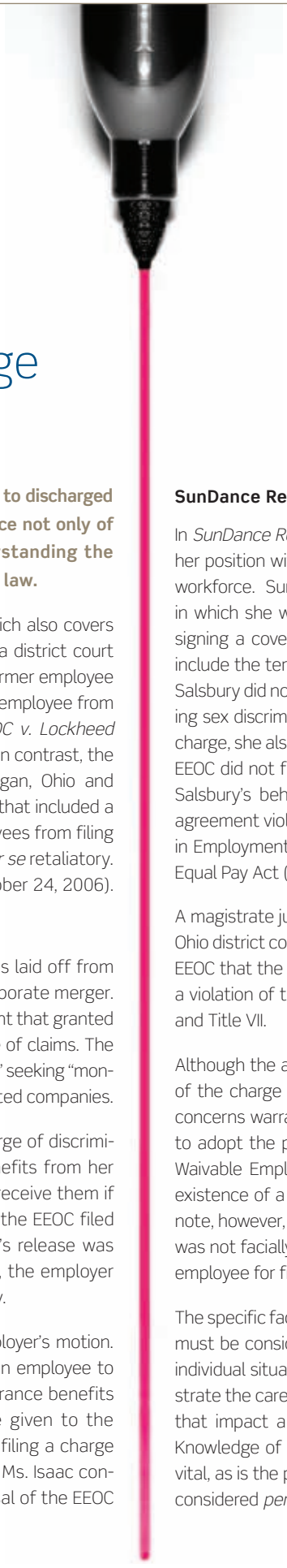
In *Burlington*, the U.S. Supreme Court held that a Title VII plaintiff who alleged retaliation had to show that she was a victim of an employer action that a reasonable employee would find to be "materially adverse" to her interests, even if that action was unrelated to the terms and conditions of her employment.

Of particular importance, the Supreme Court concluded that the anti-retaliation provision of Title VII covered "only those" employer actions that were "materially adverse" to the employee. The Court stressed that it was essential to "separate significant from trivial harms," because "petty slights, minor annoyances, and simple lack of good manners are not enough."

In interpreting *Burlington*, lower courts have made it clear that they intend to rigorously administer the objective standard. For example, the First Circuit ruled that an employee was unable to establish a claim for retaliation when there was no evidence that her employer's delay in satisfying her request for a private bathroom accommodation under the ADA constituted a materially adverse action. The court determined that mere inconvenience was not enough to show material harm under the *Burlington* standard. *Carmona-Rivera v. Commonwealth of Puerto Rico*, 464 F.3d 14 (1st Cir. 2006).

In Massachusetts, a district court held that a lateral job change where the employee's salary, benefits, job prestige and job responsibilities were about the same did not amount to

article continues on page 12



Recent Cases Conflict on Whether Release Language Prohibiting Former Employees from Filing EEOC Charge Was Retaliatory

Two recent decisions concerning whether releases given to discharged employees were per se retaliatory reveal the importance not only of careful severance agreement drafting, but of understanding the distinctions and intricacies of your jurisdiction's case law.

In Maryland (within the Fourth Circuit Court of Appeals, which also covers West Virginia, Virginia, North Carolina and South Carolina), a district court ruled that an employer's offer of severance benefits to a former employee in exchange for a release of claims that would prevent the employee from filing a charge with the EEOC was *per se* retaliatory. *EEOC v. Lockheed Martin Corp.,* 444 F. Supp. 2d. 414 (D.Md., August 8, 2006). In contrast, the Sixth Circuit Court of Appeals (covering Kentucky, Michigan, Ohio and Tennessee), found that that while a separation agreement that included a covenant not to sue that could prevent discharged employees from filing an EEOC charge was perhaps unenforceable, it was not *per se* retaliatory. *EEOC v. SunDance Rehab. Corp.,* 466F.3d. 490(6th Cir., October 24, 2006).

Lockheed Martin Corp.

In *Lockheed Martin Corp.,* the employee, Denise Isaac, was laid off from her job with COMSAT Corporation in connection with a corporate merger. Ms. Isaac was provided with a proposed severance agreement that granted her severance benefits in exchange for executing a release of claims. The release was broadly worded to include any "claims or charges" seeking "monetary relief or other remedies" against COMSAT and any related companies.

Ms. Isaac did not sign the release, and instead filed a charge of discrimination with the EEOC. She requested her severance benefits from her employer but was informed by them that she could only receive them if she dismissed her discrimination claim. She refused, and the EEOC filed suit on her behalf alleging, *inter alia,* that the employer's release was facially retaliatory. Both parties filed preliminary motions, the employer to dismiss the action and the EEOC for a finding of liability.

The court granted the EEOC's motion and denied the employer's motion. Specifically, the court focused on the fact that requiring an employee to forebear from filing an EEOC charge in exchange for severance benefits is *per se* retaliatory. The court found that the release given to the employee was retaliatory because it prevented her from filing a charge with the EEOC. Moreover, the letter from the employer to Ms. Isaac conditioning the receipt of severance benefits on the dismissal of the EEOC charge was an additional retaliatory action.

SunDance Rehab. Corp.

In *SunDance Rehab. Corp.,* employee Elizabeth Salsbury was informed that her position with SunDance was being eliminated as part of a reduction in workforce. SunDance provided Ms. Salsbury with a separation agreement in which she was offered 80 hours of severance pay, conditioned on her signing a covenant not to sue SunDance. The covenant was worded to include the terms "charge," "participation" and "administrative agency." Ms. Salsbury did not sign the agreement, and filed a charge with the EEOC alleging sex discrimination with regard to a previously denied promotion. In her charge, she also alleged retaliation with regard to the agreement. While the EEOC did not find any merit to her sex discrimination claim, it sued on Ms. Salsbury's behalf with regard to her retaliation claim, alleging that the agreement violated the anti-retaliation provisions of the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), the Equal Pay Act (EPA) and Title VII.

A magistrate judge recommended a ruling in favor of SunDance, which the Ohio district court judge refused to accept. The district court sided with the EEOC that the separation agreement was facially retaliatory and therefore a violation of the anti-retaliation provisions of the ADEA, the ADA, the EPA and Title VII.

Although the appellate court agreed with the EEOC about the importance of the charge and filing process, the court did not find that these policy concerns warranted a *per se* bar against such waivers. The court refused to adopt the policy stated in the EEOC's Enforcement Guidance on Non-Waivable Employee Rights, EEOC Notice 915.002 (1997), that the mere existence of a waiver to file charges constitutes a violation. The court did note, however, that while the charge filing ban in the separation agreement was not facially retaliatory, it might be unenforceable if SunDance sued an employee for filing an EEOC charge after receiving the severance payment.

The specific facts and circumstances of the *Lockheed and SunDance* cases must be considered when determining their applicability to an employer's individual situation and agreement. However, these two decisions demonstrate the care that must be taken when preparing separation agreements that impact a former employee's right to file a charge with the EEOC. Knowledge of the particularities of the case law within your jurisdiction is vital, as is the precise drafting of the release language so that it will not be considered *per se* retaliatory.

Seventh Circuit Clarifies Burden for Establishing Pretext

The United States Court of Appeals for the Seventh Circuit recently clarified that in order to make a successful showing of pretext in Title VII cases, a plaintiff must prove that the employer's stated, non-discriminatory reason for its adverse employment action was not the honest and true reason for its decision.

The plaintiff in *Forrester v. Rauland-Borg Corporation,* 453 F.3d 416 (7th Cir. 2006), filed a Title VII employment discrimination suit against his former employer, who had fired him because a female coworker alleged that he sexually harassed her. The district court granted summary judgment to the employer and the plaintiff appealed, arguing that the employer's shoddy investigation into the sexual harassment complaint was sufficient evidence that its stated reason for his termination was pretextual. The Seventh Circuit affirmed the district court's decision, holding that, despite statements in other court cases to the contrary, Title VII pretext is proven only by a showing that the employer's stated reason for its decision was not the real, honest reason motivating its conduct; pretext is not proven by a mere showing that the employer's stated reason was "insufficient to motivate" the action.

Judge Posner, writing for the Seventh Circuit, noted that the purpose of the court's opinion was to lay to rest confusing dictum in other Seventh and Sixth Circuit opinions to the effect that pretext can be shown not only by proof that the employer's stated reason was not the honest reason for its action but also by proof that the stated reason was "insufficient to motivate" the action. These previous opinions stated that a plaintiff could demonstrate pretext by showing that the employer's stated reason (1) had no basis in fact; (2) did not actually motivate its decision; or (3) was insufficient to motivate its decision. The court explained that this three-alternative test confuses the pretext analysis because alternatives one and three can be erroneously interpreted to mean that an employer's reason is pretextual if the judge or jury determines either that the reason was based on the employer's mistaken, but honest, belief about the facts or that the reason *shouldn't* have motivated the employer.

However, when it comes to a showing of pretext, the court reiterated that the question is "never whether the employer was mistaken, cruel, unethical, out of his head, or downright irrational" in making the decision, but only whether the stated reason was the actual reason honestly relied upon by the employer in making its decision. As such, an employer's stated reason for an adverse employment action is only pretextual when that reason is not the true and honest reason for its conduct, regardless of whether the employer is operating under an erroneous set of facts or makes a decision with which the judge or jury disagrees.

The *Forrester* decision should prove helpful to employers at summary judgment, and should be cited to prevent any adverse ruling based on a mere showing that the employer's stated reason was "insufficient to motivate" the action.

Supreme Court Finds Donning and Doffing Time Compensable

The U.S. Supreme Court has resolved a conflict among the appellate courts regarding whether time spent by employees walking to changing areas and the time spent changing itself is compensable under the Fair Labor Standards Act ("FLSA"). ***IBP, Inc. v. Alvarez, et al., 126 S. Ct. 514 (2005).***

In the first of two cases consolidated before the Supreme Court, employees brought suit against their employer seeking compensation for time spent donning and doffing required protective gear and walking from the locker rooms to the production floor of a meat processing facility. The district court found all of these activities to be compensable, and the United States Court of Appeals for the Ninth Circuit affirmed the finding. *Alvarez v. IBP, Inc.,* 339 F.3d 894 (9th Cir. 2003).

In the second case, employees brought suit against their employer seeking compensation for time spent donning and doffing required protective gear at a poultry processing plant, as well as the attendant walking and waiting times. The district court in the second case, however, found only the donning and doffing time to be compensable, and denied compensation for the attendant walking and waiting times. The United States Court of Appeals for the First Circuit affirmed the lower court findings. *Tum v. Barber Foods, Inc.,* 360 F.3d 274 (1st Cir. 2004). Thus, a conflict existed between the Ninth and First Circuit Courts of Appeal on the issue of compensable time.

> The Supreme Court held that the time employees spend walking to their changing areas and waiting to don protective equipment is not compensable time.

In *Alvarez,* the Supreme Court confirmed that the time that employees spent donning and doffing protective equipment is compensable. The Court explained that donning and doffing required gear is "integral and indispensable" to employees' work and therefore is a "principal activity" under the FLSA. Accordingly, relying in part on the Department of Labor's continuous workday regulation, the Court reasoned that employers must also compensate employees for time spent walking between the protective equipment changing room and the production area.

Time spent by an employee *prior* to donning their protective equipment or after such equipment has been removed, however, is not compensable. Specifically, under most circumstances, the Supreme Court held that the time employees spend walking to their changing areas and waiting to don protective equipment is not compensable time. The Court reasoned that such waiting and walking is "two steps removed from the productive activity," and therefore "comfortably qualifies as a 'preliminary' activity," for which compensation is not required under the FLSA. The Court explained that "[t]he fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are 'integral and indispensable' to a 'principal activity'."

The Court did caution, however, that such waiting time may be compensable if the employer requires employees to arrive at a particular time in order to begin waiting. The Court also made clear that the time that employees spent exiting the changing area after doffing protective equipment was also not compensable time.

While the Supreme Court's decision in *Alvarez* certainly expands the scope of compensable time in some circuits, it is case specific. Thus, care should be taken before expanding the Court's holding beyond the particular facts at issue.

Second Circuit Makes it Tougher to Prevail on Adverse Impact Claims under the Age Discrimination in Employment Act

In a complete reversal of an earlier jury verdict and judgment in favor of a class of former employees terminated as part of an involuntary reduction in force ("IRIF"), the Court of Appeals for the Second Circuit found in favor of the employer, holding that adverse impact claims cognizable under the Age Discrimination in Employment Act ("ADEA") should be evaluated under a "reasonableness" test instead of the previously used "business necessity" test. *Meacham v. Knolls Atomic Power Lab.,* 461 F.3d 134 (2nd Cir. Aug. 14, 2006). This decision will make it significantly more difficult for plaintiffs within the Second Circuit (New York, Connecticut, Vermont) to prevail on adverse impact claims premised on the ADEA.

30 of 31 Terminated Employees Over 40 Years of Age

A class of 28 former employees of Knolls Atomic Power Laboratories ("KAPL"), who were terminated as part of an IRIF brought suit in the District Court for the Northern District of New York in 1995. Thirty-one employees were selected for termination, 30 of whom were over 40 years of age at the time of their termination and were therefore within the class protected by the ADEA. Plaintiffs argued that KAPL's consideration of subjective factors in selecting employees for termination as well as its poor monitoring and auditing of this selection process, adversely impacted older employees by causing this skewed result. The termination decisions were based, in large part, on managers' assessments on a matrix of each employee's "flexibility" and "criticality," which, plaintiffs argued, required highly subjective judgments.

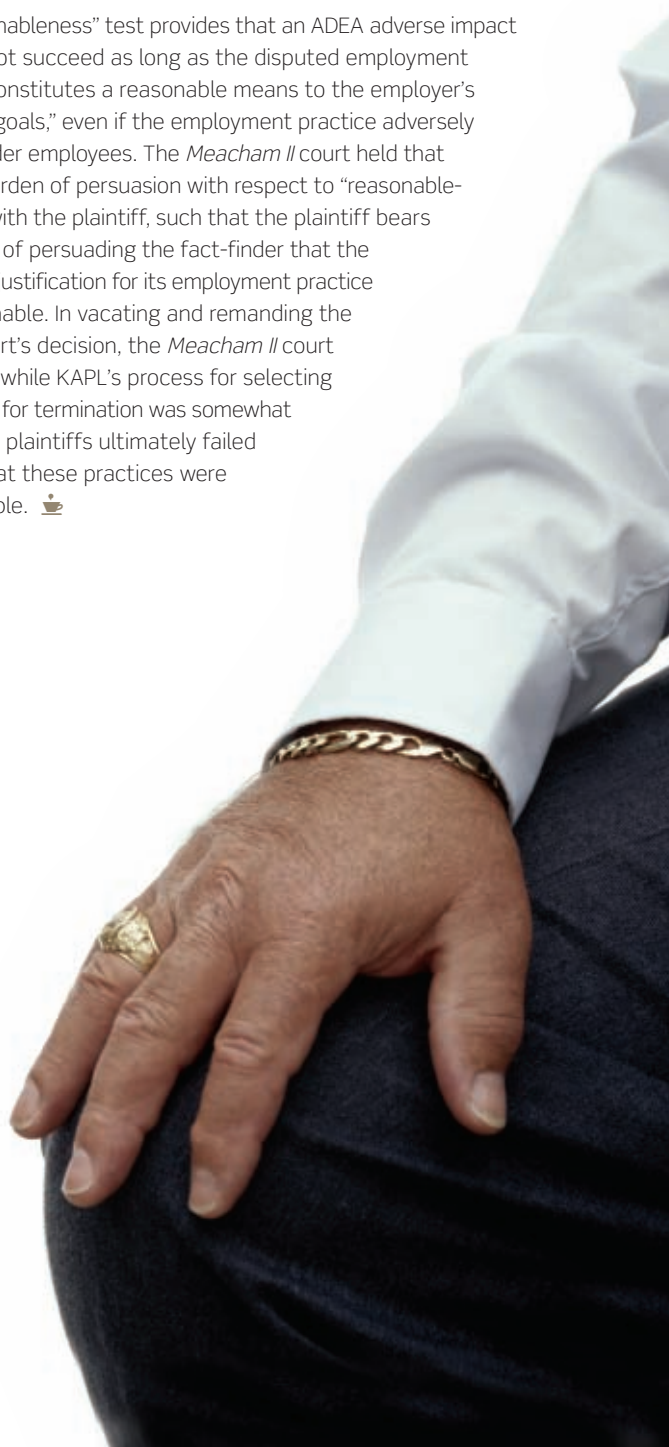
Earlier Judgment Vacated and Remanded by U.S. Supreme Court

A jury empanelled by the district court found for the plaintiffs on their ADEA and parallel New York State Human Rights Law adverse impact claims. This verdict was affirmed by the Second Circuit Court of Appeals *("Meacham I")*, but this affirmance was ultimately vacated by the U.S. Supreme Court and remanded for reconsideration in light of the Supreme Court's seminal ADEA adverse impact decision, *Smith v. City of Jackson,* 544 U.S. 228, 125 S.Ct. 1536 (2005).

Court Adopts "Reasonableness" Test

On remand, the Second Circuit vacated the judgment of the district court and remanded with instructions to dismiss the case in favor of KAPL *("Meacham II")*. This was a complete reversal of the appellate court's finding in *Meacham I*, where the court held that plaintiffs had succeeded on their adverse impact claim by (a) establishing a *prima facie* case under the ADEA by demonstrating the disparate impact on older workers of the subjective decision-making involved in the IRIF, and (b) by establishing that this practice failed the "business necessity" test by offering evidence of an equally effective, but less discriminatory, alternative to the subjective components of the IRIF. In *Meacham II*, the Second Circuit, per *Smith v. City of Jackson,* jettisoned the "business necessity" test, and adopted in its place a "reasonableness" test to be used in connection with ADEA adverse impact claims.

This "reasonableness" test provides that an ADEA adverse impact claim cannot succeed as long as the disputed employment practice "constitutes a reasonable means to the employer's legitimate goals," even if the employment practice adversely impacts older employees. The *Meacham II* court held that the final burden of persuasion with respect to "reasonableness" lies with the plaintiff, such that the plaintiff bears the burden of persuading the fact-finder that the employer's justification for its employment practice is unreasonable. In vacating and remanding the district court's decision, the *Meacham II* court found that while KAPL's process for selecting employees for termination was somewhat flawed, the plaintiffs ultimately failed to show that these practices were unreasonable.



Second Circuit Limits Section 1981 to Acts Occurring within the Jurisdiction of the United States

The United States Court of Appeals for the Second Circuit recently held that 42 U.S.C. § 1981 (Section 1981) does not apply to employees working outside the jurisdiction of the United States, unlike other statutes addressing employment discrimination, including Title VII, the Americans With Disabilities Act (the ADA) and the Age Discrimination in Employment Act (the ADEA). Section 1981 prohibits all racial discrimination in the making and enforcing of contracts, which includes the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

In *Ofori-Tenkorang v. AIG,* 460 F.3d 296 (2d Cir. 2006), the plaintiff, an employee of AIG, lived in Connecticut when he began working as a Research Analyst. In 2003, the company transferred him on a temporary basis to work in its South African office. According to a letter of assignment confirmation that the plaintiff received from AIG, the United States was to remain his "home base" and South Africa would be his "host country." Two years later, the plaintiff filed a lawsuit against AIG alleging that the company violated Section 1981 when it subjected him to discriminatory treatment on the basis of his race both before and after he began working in South Africa.

The Second Circuit affirmed the district court's dismissal of the plaintiff's Section 1981 claim with respect to the discrimination that allegedly occurred while he worked in South Africa, holding that nothing in the text or legislative history of Section 1981 indicates that Congress intended to extend its coverage to acts occurring outside the United States. Thus, because the alleged discrimination took place while the plaintiff was working in South Africa, Section 1981 did not apply.

Section 1981 provides that "all persons within the jurisdiction of the United States shall have the right in every State and Territory to make and enforce contracts...." The Second Circuit rejected plaintiff's argument that because his employment contract was formed in the United States and the alleged discriminatory acts were directed by executives at AIG's offices in the United States, he was "within the jurisdiction of the United States" while he worked in South Africa. The court found that Congress' explicit use of the language "all persons within the jurisdiction of the United States" without addressing the statute's application to persons outside the United States was clear evidence that it did not intend to so extend the statute's scope of coverage.

Notably, in other contexts where Congress intended to extend a statute's coverage beyond the jurisdiction of the United States, it did so with explicit language. For example, both Title VII and the ADA provide that "with respect to employment in a foreign country, [the] term ["employee"] includes an individual who is a citizen of the United States." Similarly, the ADEA includes in its definition of "employee" any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country. Courts have interpreted the plain language of these three statutes to extend their coverage to discrimination occurring outside of the United States, unless the employer is a foreign corporation not controlled by a United States employer.

The Second Circuit went on to emphasize that it is the location of the employee that determines Section 1981's applicability. Section 1981's focus on "*persons* within the jurisdiction of the United States" indicates that its territorial limitation is defined by the location of the subject of discrimination, not the decisionmaker's location. This language similarly renders irrelevant the place in which the employment contract was formed as well as the employment relationship's "center of gravity."

In sum, the relevant inquiry for purposes of determining Section 1981's applicability is whether particular acts of discrimination occurred when the employee was within the jurisdiction of the United States. If acts of discrimination occurred when the employee was outside the jurisdiction of the United States, they are beyond the reach of Section 1981.

U.S. Supreme Court to Hear Illegal-Pay Discrimination Case During 2006-2007 Term

This term, the United States Supreme Court will review *Ledbetter v. Goodyear Tire and Rubber Co.,* (U.S., No. 05-1074) and consider "[w]hether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period." Petition for Writ of Certiorari, *Ledbetter,* 126 S. Ct. 2965 (2006) (No. 05-1074), 2006 WL 448515 ("Petition"). The limitations period specified is the 180 days before the plaintiff's EEOC filing.

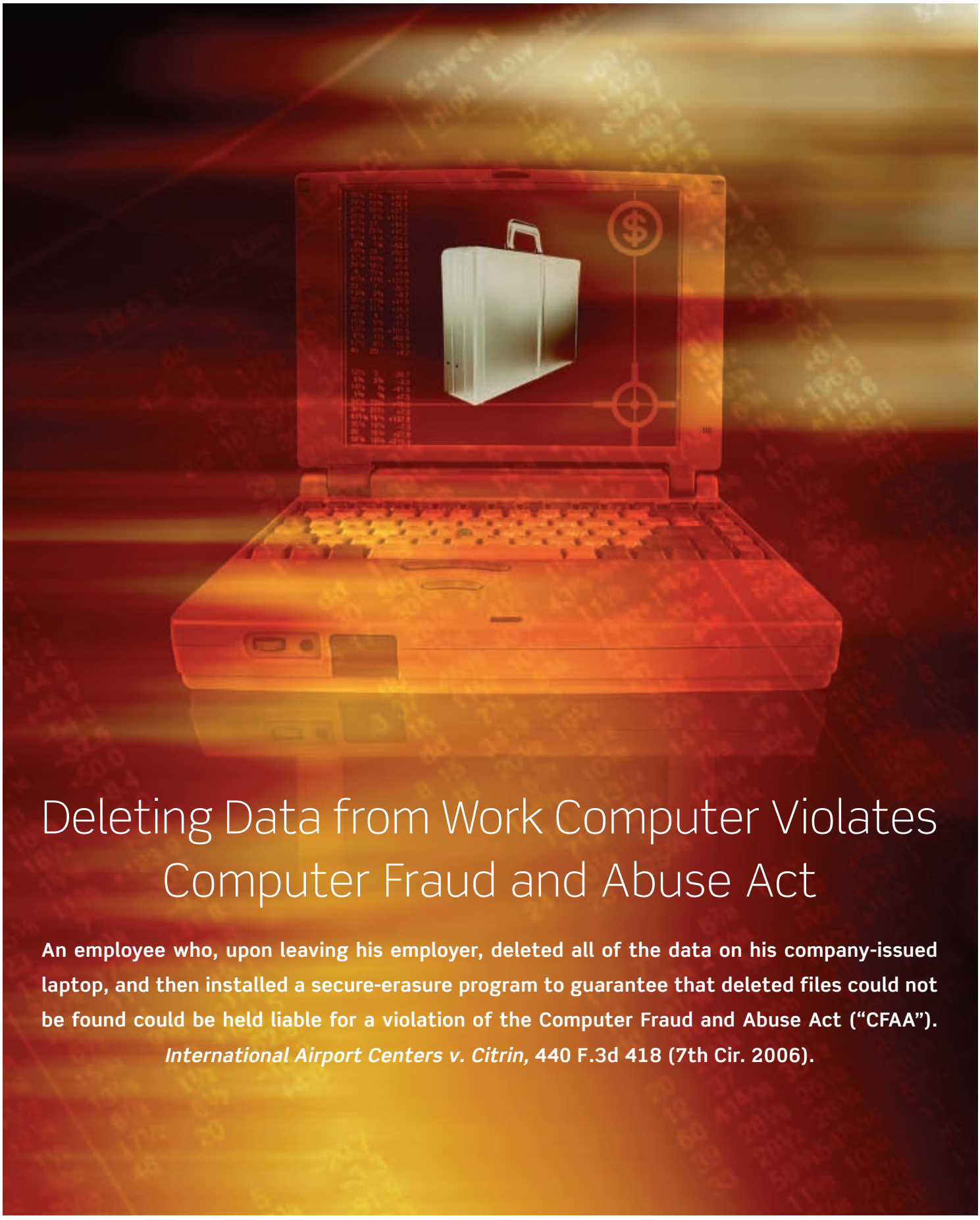
Plaintiff, Lilly Ledbetter, one of a few female managers who oversaw production of tires at Goodyear's plant in Alabama, filed a sex discrimination charge with the EEOC in March 1998 based on disparate pay, took early retirement later that year to avoid a layoff, and then sued Goodyear in federal district court in 1999 for several claims, including disparate pay based on gender. A jury awarded Ledbetter approximately $3.5 million for her claims.

Goodyear appealed the verdict on the grounds that "the way [Ledbetter] had been permitted to prove her pay claim was barred by Title VII's requirement that the conduct complained of in a Title VII action must have been the focus of an EEOC charge filed within 180 days of the occurrence of the conduct." *Id.* at 1176. Goodyear also asserted that "no reasonable fact finder could conclude that Ledbetter's sex was a motivating factor in a salary decision made during the period covered by the EEOC charge" that she filed in 1998. *Id.* The district court rejected Goodyear's challenge, but reduced the verdict to $360,000 based on the statutory maximum for compensatory and punitive damages in Title VII actions against employers with more than five-hundred employees.

The United States Court of Appeals for the Eleventh Circuit reversed the district court's verdict and held that: (a) because Ledbetter's salary level was annually reviewed and re-established by Goodyear, she "could recover on her disparate pay claim only to the extent she proved intentional discrimination in the one decision affecting her pay made within the [180-day] limitations period created by her EEOC charge, or at most, the last such decision made immediately preceding the limitations period"; and (b) decisions not to raise Ledbetter's pay in the 1997 and 1998 time periods were not shown to be motivated by her sex. *Id.* at 1169, 1189.

Ledbetter petitioned the Supreme Court to review the case on the grounds that the federal appeals courts are split over the analysis and resolution of disparate pay claims in light of two Supreme Court decisions: *National Railroad Passenger Corp. v. Morgan,* 536 U.S. 101 (2002) (holding that only those acts occurring within 300 days of the date that the employee filed his charge with the EEOC were actionable under Title VII), and *Bazemore v. Friday,* 478 U.S. 385 (1986) (holding that each payment of discriminatory compensation is actionable under Title VII, regardless of whether the pattern of discrimination began prior to the effective date of Title VII). The appellate courts are split over whether "an employee may challenge disparate paychecks received during the limitations period *if* the paycheck implements and carries forward into the limitations period discriminatory decisions made by her employer at any point in the past" (emphasis added) — or *if* "the disparity arises from independently illegal decisions made during the limitations period itself, or at most, from the employer's most recent pay decision." Petition at *9.

In light of the more than 55,000 charges filed with the EEOC under Title VII in FY 2005, there is considerable interest in resolving this circuit split to give clear guidance on "what constitutes an 'unlawful employment practice' and when has that practice 'occurred'." *Id. citing Morgan*, 536 U.S. at 110.



Deleting Data from Work Computer Violates Computer Fraud and Abuse Act

An employee who, upon leaving his employer, deleted all of the data on his company-issued laptop, and then installed a secure-erasure program to guarantee that deleted files could not be found could be held liable for a violation of the Computer Fraud and Abuse Act ("CFAA").

***International Airport Centers v. Citrin*, 440 F.3d 418 (7th Cir. 2006).**

International Airport Centers ("IAC"), a corporate real estate company, brought suit against its former managing director, alleging a claim under the CFAA, as well as various other state law tort and contract claims. IAC gave the defendant-employee a laptop computer to record data that he collected in the course of his work in identifying potential acquisition targets. After deciding to leave the company, the defendant deleted all of the data on his computer, including not only data that he had collected as part of his job, but also data that could have revealed improper conduct in which he had engaged before leaving the company. The defendant also took the additional step of loading a secure-erasure program onto the laptop in order to write over the deleted files and prevent their recovery.

Under the CFAA, an anti-hacking law, anyone who "causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization to a protected computer," violates the law. A "protected computer" is defined as a computer "which is used in interstate or foreign commerce or communications, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States."

Anyone who "causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization to a protected computer," violates the law.

While the district court rejected IAC's claims against the defendant, the Court of Appeals for the Seventh Circuit reversed and remanded the case for further proceedings. The court determined that the defendant was not authorized to delete the files from the laptop even though his employment contract specifically said that deletions were permitted. It reasoned that the defendant's "authorization to access the laptop terminated when, having already engaged in misconduct and decided to quit IAC in violation of his employment contract, he resolved to destroy files that incriminated himself and other files that were also the property of his employer, in violation of the duty of loyalty that agency law imposes on an employee."

The defendant argued that he had only pressed the "delete" button, and that he had not actually transmitted anything as required by the CFAA. However, the Seventh Circuit found that loading the secure-erasure program satisfied the "transmission" requirement and fulfilled the congressional intent to go after both computer viruses and disgruntled internal programmers. The court also made clear that the law was not limited to internet-based transmissions only, explaining that "[i]f a statute is to reach the disgruntled programmer, which Congress intended…it can't make any difference that the destructive program comes on a physical medium, such as a floppy disk or CD."

The CFAA provides employers with a broad opportunity to remedy employee misconduct related to the improper destruction of computer files. As the *Citrin* case makes clear, this opportunity is potentially available even where an employee has been previously informed that such destruction is allowed, whether the destruction is completed by programs available over the internet or software available on more traditional physical media.

New Antidiscrimination Law to Impact Employment Relationships in Germany

On June 29, 2006 the German Parliament adopted the General Act on Equal Treatment (Allgeme-ines Gleichbehandlungsgesetz – "AGG"). The AGG came into effect on August 18, 2006. The Act profoundly changes the legal framework for employment relationships in Germany. Employers need to act now in order to avoid damage claims.

Scope of the AGG

The scope of the AGG refers to job applicants and includes employees and apprentices. With regard to job access and promotion, the provisions of the AGG apply to the self-employed, managing directors and board members respectively.

The AGG affects all stages of an employment relationship, from job recruitment through termination. However, dismissal protection will be excluded from the scope of the AGG, as this subject continues to be governed by general German dismissal protection law, in particular the German Act Against Unfair Dismissal.

What is prohibited under the AGG?

As a general rule, discrimination based on any of the following criteria is statutorily prohibited under the AGG: race or ethnic background, gender, religion or philosophy of life, disability, age and sexual identity.

The AGG expressly prohibits both direct and indirect discrimination. Indirect discrimination refers to "hidden" unequal treatment and can often be found in company policies or agreements between the employer and the work's council (labor union). Such policies or agreements may contain provisions that seem to affect all employees equally and therefore appear to be neutral at first glance. On closer inspection, however, these provisions may have a unique impact on individual employees or a certain group of employees. For instance, a spelling test for all applicants can discriminate against foreigners because of their origin. As German is not their native tongue, they are more likely to fail the test. Any such provision, which violates the rules contained in the AGG, is considered invalid.

Does any unequal treatment constitute prohibited discrimination?

Not all unequal treatment will be a violation of the AGG. In fact, unequal treatment because of the aforementioned criteria may be justified if the relevant criteria are crucial for the employment relationship owing to the working conditions or the type of work to be performed. Thus, the spelling test in the example above could be admissible if the posted job requires a good command of German language (e.g., a secretarial position). Moreover, the AGG contains express provisions whereby unequal treatment because of age, religion or philosophy of life can be justified in individual cases.

What are the employees' rights in case of discrimination?

In case of unlawful discrimination, the individual employee concerned may be entitled to damages under the AGG. If the discriminated individual suffers pecuniary loss (e.g. if a job application is turned down because of discriminatory criteria) the AGG does not limit the level of damages that may be awarded. A victim of discrimination may also claim compensation for certain non-pecuniary damages, albeit within statutory limits.

Employees may be entitled to refuse to perform their employment duties, should the employer fail to launch measures that thwart molestation or sexual harassment in the workplace. Furthermore, the AGG codifies employees' rights to file an internal complaint if they believe they are subjected to discrimination.

> Employees may be entitled to refuse to perform their employment duties, should the employer fail to launch measures that thwart molestation or sexual harassment in the workplace.

What measures are to be taken by employers?

The AGG imposes numerous obligations upon employers, in particular regarding information and organization. For example, employers are obliged to take all "reasonable and necessary" measures to avoid discrimination.

This also includes preventive measures. Employers must inform their staff about the new anti-discrimination provisions of the AGG and work towards achieving compliance with these rules.

However, the AGG also provides a rather straightforward option to comply with the organizational re-quirements imposed by the new law and to substantially reduce the employers' risk of being exposed to damage claims. For this purpose, employers must provide comprehensive occupational training on the subject of how to avoid discrimination or discriminatory conduct (for instance, training courses, online training or similar measures).

Employers are also obliged to protect their staff from discrimination by colleagues or third parties such as customers or agents. Apart from these statutory obligations, employers should take additional steps to prepare for and react to the changing legislation and to avoid legal action by employees. Among other things, employers should review employment agreements, work agreements, collective bargaining agreements as well as occupational pension plans with respect to hidden discrimination. If there are any discriminatory provisions, the respective agreements should be amended without undue delay. Employers should also conduct a review of their personnel files and employment-related documents to detect possible risks resulting from hidden discrimination.

Furthermore, employers are required to consider possible violations of the AGG when communicating with employees. They should be prepared to give sound reasons for their decisions regarding recruitment, promotion and termination of employment to avoid accusations that such decisions were based on discriminatory considerations. In any case, the decision making process should be documented thoroughly. For these purposes, application documents, minutes of job interviews, correspondence, etc. should be kept on file, at least until the expiration of applicable preclusion periods.

Conclusion

The AGG will substantially influence human resources management in Germany. Employers are well advised to adapt their businesses to the new legislation as soon as possible. Training of staff as well as a thorough review of the organization in order to avoid discrimination is crucial.

a materially adverse action, but rather, subjective feelings of disappointment. *Billings v. Town of Grafton,* 441 F. Supp.2d 227 (Mass. 2006). In *Gatsas v. Manchester School District,* 2006 U.S. Dist. LEXIS 81890 (November 7, 2006), a New Hampshire district court characterized a teacher's reassignment to an "undesirable" classroom and subject matter as mere annoyances. The court reasoned that the employee had been reassigned to teach different subjects several times in the past, and that while the classroom may be undesirable, it had to be assigned to someone. The court also held that being jostled in the hallways, the threat of furniture removal and a lack of supplies were "all relatively trivial vicissitudes of work life that the Burlington court sought to omit from retaliation claims."

Indeed, only when the facts suggested significant adverse actions have the courts applied the "materially adverse" standard to deny summary judgment. Thus, the Second Circuit held that an employee who was transferred to an outlying office where he no longer had supervisory or departmental responsibilities and was assigned menial tasks could objectively demonstrate that he suffered materially adverse action. *Kessler v. Westchester County Department of Social Services,* 461 F.3d 199 (2d Cir. 2006).

Retaliation cases throughout the federal court system are being remanded for reconsideration in light of the Burlington decision. Time will tell how the courts will interpret the standard set forth in Burlington, but so far the cases suggest that the objective standard will be strictly enforced.

A more detailed discussion of *Burlington* was written by Mayer, Brown, Rowe & Maw lawyers Gary D. Friedman and Jonathan A. Shiffman and published in the New York Law Journal on August 4, 2006. *See* Gary D. Friedman and Jonathan A. Shiffman, 'Burlington': *Setting Standard to Cut Out Weak Retaliation Claims*, 8/4/2006 N.Y.L.J. 4, (col. 4).

French Court Finds Employer Liable for Manager's Moral Harassment of an Employee

"The employer is liable to its employees for an undertaking to ensure the protection of their health and safety on the workplace, specifically with regard to moral harassment and (...) the absence of employer misconduct shall not exempt it from liability."

This rule was stated for the first time by the Labor Division of the French Supreme Court by a decision rendered on June 21, 2006 (Cass. Soc., June 21, 2006, no. 05-43.914).

By this decision, the French Supreme Court's jurisdiction extends to moral harassment the risk of employer's non-fault liability that already exists about work accidents and smoking at the workplace, in order to protect employees' health and safety.

In the present case, several employees of a non-profit organization complained of brutal, rude, humiliating and insulting behavior from their manager, and they therefore accused him of denigration, intimidation and unjustified punishment during working hours.

In addition, a report from the labor inspector found a "generalized practice of moral harassment," and a mediator was appointed without success.

As a result, the employees affected by this behavior sued the manager as well as the employer for damages.

The first instance court condemned only the manager to pay damages to the victims of moral harassment.

Although the Supreme Court upheld the decision against the manager who intentionally committed repeated acts of moral harassment against the employees, it also found the employer liable under Article L.230-2 of the French Labor Code.

Given this decision, employers in France must be particularly vigilant as they could be held liable, even though they already sanctioned the employee guilty of this type of behavior.

In such a context, it appears necessary to reinforce prevention against the risks of any harassment in the workplace, specifically by training each employee, and particularly managers, to be sensitive to this issue and end as soon as possible all repeated behavior that may qualify as moral harassment, such as repeated, aggressive e-mails. For this purpose, it is reminded that moral harassment may come from a manager, but also from colleagues.

In addition, employees representatives, as well as the hygiene and safety committee, must take part in these prevention efforts.

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