



EEOC Scrutiny of Employers' Promotion Policies and Procedures Is Heightened With Release of Recent Consent Decree

By: Joycelyn A. Stevenson

Outback Steakhouse of Florida, Inc. has entered into a consent decree with the Equal Employment Opportunity Commission ("EEOC") in settlement of a lawsuit arising from allegations of sex discrimination raised by female employees of the company. The consent decree requires not only a large settlement payment from Outback, but also a strong commitment from the company to revise its current promotion policies and procedures. The EEOC filed the lawsuit in September 2006 on behalf of two former employees and other individuals claiming that Outback failed to hire or promote women for management positions, assigned them less favorable jobs and provided inadequate opportunities for job advancement in violation of Title VII of the Civil Rights Act of 1964. The EEOC alleged that only 3 out of the 64 management positions within the company were held by women. A settlement fund in the amount of 19 million dollars will be distributed among members of two classes of female workers of Outback who have been employed since 2002 and who have at least three years of tenure. Outback is now required to implement an online application system for employees interested in supervisory positions. This web-based "Registry of Interest" will be a tool for Outback employees to express interest in promotions, to submit applications and to complete testing. The company is also required to employ a human resource executive in the newly created position of "Vice President of People." Outback has agreed to employ an outside consultant to analyze data from the online application system to determine whether women are receiving equal opportunities for promotion within the company. Outback will report its progress in carrying out the terms of the consent decree to the EEOC every six months.

The Outback consent decree is one in a series of many recently announced by the EEOC and is an example of the heightened level of scrutiny provided by the EEOC in cases involving multiple plaintiffs and allegations of pervasive discrimination. The details of the consent decree underscore the importance of having very clear procedures in place for determining promotions and ensuring that all employees are given an equal chance to take advantage of those promotion opportunities as they arise. The consent decree also provides insight into the areas of training deemed important by the EEOC as well as the selection principles and/or considerations that have been deemed relevant by the EEOC with respect to the promotion of employees. These principles include making gender-neutral decisions, conducting standardized interviews and reviewing personnel files of candidates prior to making promotion decisions.

Employers with no formal or informal procedures for promotion within a company should consider the foregoing guidance and principles in crafting any policies and procedures as this guidance will likely prove beneficial in combating charges of discrimination filed with the EEOC as well as lawsuits arising from those charges. Employers looking to draft or revise

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policies related to promotion of employees should carefully review the EEOC regulations and guidelines as well as seek appropriate advice of legal counsel when necessary to ensure compliance with relevant anti-discrimination laws.



Mixed-Motive Analysis Does Not Apply To ADA Claims

By: Matthew C. Lonergan

Traditionally speaking, the mixed-motive analysis from Title VII of The Civil Rights Act of 1964, has been utilized by the Courts to determine whether an individual's adverse employment action was, in fact, discriminatory even if the discriminatory motive was not the sole reason for the action. The mixed-motive analysis was first accepted by the Supreme Court in Price Waterhouse v. Hopkins, (490 U.S. 228)(1989), which held that an employer violated Title VII even though its motivations were a combination of discrimination and legitimate business reasons. Federal courts have since applied the mixed-motive analysis from Price Waterhouse to discrimination claims all types.

Under The Civil Rights Act of 1991, Congress codified the mixed-motive holding from Price Waterhouse, but limited the amount of damages a plaintiff could recover to under a mixed-motive claim to declaratory and injunctive relief, along with attorney's fees and costs.

In 2009, the U.S. Supreme Court decided Gross v. FBL Fin. Servs., Inc., 77 U.S.L.W. 4531, (U.S. 2009), which held that because the Age Discrimination in Employment Act ("ADEA") did not contain the same language as Title VII, the ADEA did not authorize mixed-motive claims. The ADEA states an employer may not make an employment decision "because of" an employee's age. Thus, in order to prevail under the ADEA claim, the employee must prove that age was the "but for" cause of the employer's adverse action.

Now, the Seventh Circuit Court of Appeals has held that the mixed-motive analysis from Title VII does not apply to claims brought under the Americans with Disabilities Act ("ADA"). Serwatka v. Rockwell Automation, Inc., 7th Cir., No. 08-4010 (1/15/10). In reviewing the Gross decision, the Seventh Circuit noted the importance that the Supreme

Court placed on the mixed-motive framework that was included in Title VII, and reasoned that if that another anti-discrimination statute did not have comparable language, then the mixed-motive claim would not be available under that statute; in this case, the ADA. Reviewing the ADA language that a covered individual should not be discriminated against "because of" their disability, the Seventh Circuit said the Supreme Court's decision in Gross made it clear that in the absence of any additional statutory language bringing mixed-motive claims within the purview of the statute, there was no basis to bring a mixed-motive claim under the ADA. The Seventh Circuit explained that the ADA, like the ADEA, makes employers liable for decisions that are made because of the individual's disability and that the "because of" language requires a showing of but-for causation. As such, an individual complaining of discriminatory action under the ADA must show that his employer would not have fired him but for his disability or the perceived disability, and that proof of a mixed-motive discharge is insufficient.

While both the Gross and Seventh Circuit decisions appear to have significant importance, they may have a limited shelf life as a bill is currently pending in Congress (H.R. 3721/S.1756) that would override the Supreme Court decision making the mixed-motive analysis applicable in all federal anti-discrimination laws, including the ADEA and the ADA.

SAVE THE DATE

Bradley Arant Boult Cummings will hold a *Breakfast with Bradley* Tuesday, March 9th. The topic for discussion will be "Employment Contracts: Those You Need and Those You Didn't Know You Had".

The *Breakfast with Bradley* will be held via Video-Conference in Birmingham, Huntsville, and Montgomery, Alabama; Jackson, Mississippi; and Nashville, Tennessee

Speakers are John Hargrove and Craig Oliver

Tuesday, March 9
7:30 -8:00 a.m. Breakfast
8:00 -10:30 a.m. Program

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No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers. Contact: John B. Grenier, Esq., 1819 Fifth Avenue North, Birmingham, Alabama 35203.

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