New Jersey Employers Should Not be Lulled Into a False Sense of Security by Recent Federal Decisions

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June was a very significant month for employment related decisions in the federal appellate courts. Three major decisions were reached - two by the United States Supreme Court and one by the Third Circuit Court of Appeals (the Appellate Court governing federal claims in New Jersey federal courts). However, these federal court decisions addressing discrimination and harassment in the workplace are not as significant of a victory for New Jersey employers as some publications and reviews have led the public to believe. All three cases interpret federal law and none of them address the New Jersey Law Against Discrimination (the "LAD"), which provides broad protections to employees. However, employers are still well advised to be aware of these decisions as they do impact certain workplace policies and as they may, in certain respects, be followed by New Jersey state courts.

In *Priscilla Huston v. The Procter & Gamble Paper Products Corporation*, decided June 12, 2009, the Third Circuit held that for an employer to be liable for hostile work environment harassment, the harassment complaint(s) must be brought to the attention of a "management level employee" who has the responsibility to report and respond to the harassment claims. The court held that an employee is of "management level" in two circumstances: 1) when the employee is sufficiently senior in the employer's hierarchy or receipt of harassment complaints is important to the employee's general managerial duties; or 2) when the employee is specifically employed to deal with harassment.

Therefore, an employee's knowledge of hostile work environment harassment will be imputed to the employer for purposes of liability only if that knowledge is important to the job functions of the employee. Mere supervisory authority over work assignments is not sufficient to qualify an employee as "management level for purposes of harassment reporting." Huston had brought suit under Title VII, federal anti-discrimination law, and the court ultimately found that the employer's remedial actions were appropriate and timely once a "management level employee" gained knowledge of the workplace harassment.

In *Gross v. FBL Financial Services, Inc.,* decided June 18, 2009, the U.S. Supreme Court held that a plaintiff bringing a disparate treatment claim pursuant to the federal Age Discrimination in Employment Act ("ADEA") must prove that the challenged adverse employment action would not have occurred "but for" the employee's age. The Court reversed the Eighth Circuit Court of Appeals' decision that held that an employee could prevail on an ADEA claim if the employee presents direct evidence that age was one of the motivating factors for the adverse employment action but not the only motivating factor. In such a "mixed-motive" case, courts had generally held that the employer must prove that the same decision

would have been made regardless of the employee's age. "Mixed motive" discrimination claims are viable under Title VII, and many courts have relied upon Title VII case law in sustaining such claims under the ADEA. However, the Supreme Court's decision in Gross plainly rejects this approach, and clarifies that in order for an employee to prevail under an ADEA claim, age must be the only motivating cause of the alleged adverse employment action, and the plaintiff, at all times, retain the burden of proving this causal effect.

Most recently, in ***Ricci et al. v. DeStefano et al.,*** decided on June 29, 2009, the U.S. Supreme Court held that the City of New Haven's decision to disregard a promotional test because of the statistical racial disparity of the results was a violation of Title VII. The Supreme Court found that the City's fear of suit by racial minorities did not justify the City's decision to rely on the racial impact of the test to discard the test results. All of the evidence showed that the City's sole reason for rejecting the test scores was based upon the white candidates scoring higher and being eligible for promotion, and this decision was, therefore, race based and prohibited under Title VII. The Supreme Court adopted the "strong basis in evidence" test, which requires that in order for a race-based remedy to be valid there must be strong evidentiary support concluding that the remedial action was necessary. A bona fide promotional test is therefore protected under Title VII, as long as there is no equally valid, less discriminatory alternative that would serve an employer's needs. No such alternative test was shown to exist in this case, and the evidence demonstrated that the City took detailed steps to develop and administer the promotional test, which contained only job related questions.

Recommendation: The LAD continues to give New Jersey employees broad protections, and employers must ensure that their anti-harassment and anti-discrimination policies are in compliance with the LAD to avoid liability. However, based on the Third Circuit ruling, it is also important that employers establish clear procedures for employees to report harassment, including information as to the identity of the "management level" employees who are empowered to accept harassment complaints. While these actions will probably not limit employee's claims under the LAD, they will preclude employees who did not comply with these procedures from bringing claims under Title VII. In addition, employers should clearly define job responsibilities to avoid the type of confusion that was apparent in the ***Huston*** case. New Jersey employers should also be mindful that, while they are insulated from liability under the ADEA unless an adverse employment decision is based **solely** upon an employee's age, an employment decision that was partially motivated by age and also motivated by other considerations could still be actionable under the LAD. Finally, employers should ensure that all promotional exams are bona fide and job related, and should consult with counsel before discarding the results of such exams based upon racial disparity.

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