SPRING 2015 NEWSLETTER

FEDERAL EMPLOYMENT LAW UPDATE

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U.S. SUPREME COURT

***Mach Mining, L.L.C. v. EEOC*, 135 S.Ct. 1645 (April 29, 2015)**

Considering issues of first impression for the Court, it unanimously held that federal courts may exercise judicial review over whether the EEOC fulfills its legal duty to conciliate claims prior to filing litigation, but the scope of that review is narrow.

In this case, the EEOC investigated a charge of discrimination against Mach Mining and issued a determination that there was reason to believe that discrimination had taken place. In that same letter, the EEOC invited the parties to participate in informal methods of dispute resolution and promised that an EEOC representative would "soon 'contact [them] to begin the conciliation process.'" It appears that about a year later the EEOC sent a letter to Mach Mining that "'such conciliation efforts as are required by law have occurred and have been unsuccessful' and that any further efforts would be 'futile.'" The EEOC filed suit and Mach Mining contested the EEOC's claim that the conciliation requirement had been fulfilled and argued that the EEOC did not conciliate in good faith.

The Supreme Court began by considering whether it had the legal authority to review whether the EEOC met the conciliation prerequisite for suit. The Court concluded that federal courts do have judicial review authority over whether the EEOC met the prerequisite. The Court then took up the question as to the scope of the judicial review and held that the scope should be narrow.

The Court held that, in order for the EEOC to comply with the conciliation prerequisite, the it must: notify the employer about the allegedly unlawful employment practice for which it has found reasonable cause; and the EEOC must "try to engage the employer" in written or oral discussion to give the employer an opportunity to remedy the practice. Ensuring that these steps took place is essentially the scope of the permissible judicial review.

The Court noted that a sworn affidavit by the EEOC that it has complied with the requirements but conciliation has been unsuccessful will normally suffice, unless the employer provides credible evidence indicating that the EEOC did not provide "the requisite information about the charge or attempt to engage in a discussion about conciliating the claim." If the employer provides such evidence, a court would then have to conduct factfinding to decide that limited dispute. If the factfinding court were to find for the employer, the proper remedy is to order the EEOC "to undertake the mandated efforts to obtain voluntary compliance," imposing a stay of the case if appropriate.

***Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (March 25, 2015)**

Under the Pregnancy Discrimination Act's second clause, a pregnant worker may show disparate treatment through indirect evidence using the *McDonnnell Douglas* framework.

The PDA's second clause reads,

> women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes ... *as other persons not so affected but similar in their ability or inability to work....*

At issue was the interpretation of the italicized portion of the clause.

The Court held that the *McDonnell Douglas* framework could be used when making disparate treatment claims under this portion of the PDA. Specifically, a plaintiff asserting a claim would have to show that she belongs to a protected class, that she sought an accommodation, that her employer did not accommodate her, and that the employer did accommodate others "similar in their ability or inability to work."

The employer can counter by showing legitimate, non-discriminatory reasons for denying the accommodation, though the reasons "normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those…whom the employer accommodates."

If the employer meets its burden, the plaintiff can show that the proffered reasons are pretextual. The plaintiff can reach a jury on this by showing that the "employer's policies impose a significant burden no pregnant workers, and that the employer's 'legitimate, non-discriminatory' reasons are not sufficiently strong to justify the burden, but rather--when considered along with the burden imposed--give rise to an inference of intentional discrimination. The plaintiff can show a significant burden by providing evidence "that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."

FIFTH CIRCUIT COURT OF APPEALS

Jenkins v. City of San Antonio Fire Dept., No. 14-50483, 2015 WL 1802133 (5th Cir. April 20, 2015)

Deciding the issue for the first time, the court held that where the date of receipt of a right-to-sue letter is unknown, courts should apply the presumption that the plaintiff received the notice three (3) days after the issuance date on the letter.

In this case, the EEOC issued a right-to-sue notice letter on May 16, 2012, allowing Jenkins to sue for discrimination and retaliation up to 90 days from the date of receipt of the notice. Jenkins filed suit on August 20, 2012, 96 days after the issuance date of the right-to-sue notice letter. The district court applied a three (3) day presumption of notice period.

The court of appeals considered the use of various presumptions concerning the computation of time within the Fifth Circuit itself, by the Federal Rules of Civil Procedure, and those used by other appellate circuits. Ultimately, the court concluded that, where the date of receipt of the right-to-sue notice letter is unknown, courts should presume receipt three (3) days after its issuance by the EEOC. The court noted that such a presumption is unnecessary and inappropriate if there is evidence indicating the date of receipt, including testimony from the plaintiff or from other persons with knowledge, or evidence from the postal service.

***McKinney v. Creative Vision Resources, L.L.C.*, 783 F.3d 293 (5th Cir. April 13, 2015)**

In a National Labor Relations Act case, injunctive relief under § 10(j) is inappropriate where there is no showing of specific egregious or exceptional NLRA violations.

In this case, in July 2012, the NLRB filed a petition for injunctive relief with a federal district court. That petition lingered for almost two years. During that period of time, the administrative law judge issued a decision which was inserted into the district court's record, exceptions to the administrative ruling were filed by both Creative Vision and the NLRB, and the ruling on the exceptions was apparently still pending before the NLRB at the time of the Fifth Circuit's decision. On July 2014, the district court granted the NLRB's petition for injunctive relief.

In the Fifth Circuit, a two-part test has been adopted for reviewing § 10(j) petitions: (1) whether the NLRB's Regional Director has reasonable cause to believe that unfair labor practices have occurred, and (2) whether injunctive relief is equitably necessary, or, "just and proper." Creative Vision challenged the two-part test, arguing that it had been overruled by the Supreme Court in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008). The court reasoned that its test had not been overruled, underscoring that the "principles of equity inform an evaluation for § 10(j) relief." The court also noted that it was cognizant of the Supreme Court's admonition in *Winter*, however, that "a preliminary injunction is an extraordinary remedy *never* awarded as of right," and, therefore, the court emphasized that "the NLRB must establish both prongs of [the] two-part test with reasonable clarity in order to obtain injunctive relief."

At issue in the appeal was the second prong of the test. The court found that the district court wrongly rested its decision "on the broad and general assumption that injunctive relief may issue whenever the unfair labor practice at issue causes harm, without considering the specific impact on the union or its employees in *this* case." The court of appeals noted that there was no evidence of egregious or otherwise exceptional conduct by Creative Vision warranting an injunction, especially when the injunction issued several years after the allegedly wrongful conduct.

The court further noted that § 10(j) injunctive relief should issue when (1) the alleged NLRA violation and the harm to employees are concrete and egregious or otherwise exceptional, and (2) those harms, practically, have not yet taken their adverse toll, "such that injunctive relief could meaningfully preserve the status quo" that existed before the alleged wrongful acts. The first principle has been interpreted to mean that an injunction is an extraordinary remedy to be

used only to address egregious unfair labor practices, leading to exceptional injury. As to the second prong, courts have interpreted it to mean that injunctive relief should issue for harms that are on-going and incomplete and likely to continue to harm. The court found that, in this context, the district court had abused its discretion by granting the injunction.