

LABOR AND EMPLOYMENT NOTES

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JURY VERDICT FOR RETALIATORY REFERENCE UPHELD

It is not unusual for plaintiffs to assign multiple illegal reasons for an employment decision. For example, it is common for a plaintiff to allege that an adverse employment action was taken because of discrimination and to retaliate against the plaintiff for engaging in protected activity (e.g., filing an EEOC charge, making an internal complaint to HR, etc.) Sometimes, the plaintiff's discrimination claim will fail while the retaliation claim survives. This is what happened in a recent federal case, *Hillig v. Rumsfeld*, 381 F.3d 1028 (10th Cir. 2004).

In *Hillig*, the plaintiff worked for the Defense Finance Accounting Service. During her employment, she filed two EEOC charges alleging race discrimination. These complaints were settled. More than one year after the settlement, Hillig applied for a position with the Department of Justice (DOJ), but did not get the position. She alleged she did not get the job because of her employer's negative job references and brought a claim of race discrimination and retaliation under Title VII.

Evidence at trial included confirmation that Hillig's supervisors gave negative feedback. The jury found that these negative

comments were not motivated by race discrimination, but found that they were motivated by illegal retaliation and awarded Hillig \$25,000. Interestingly, in response to a special interrogatory, the jury also found that Hillig had not proved that but for the unlawful retaliation, she would have been offered the DOJ job. This finding sparked the district court's decision to disregard the jury verdict and enter judgment for the employer. Hillig appealed.

The Tenth Circuit found that the district court erred in requiring the plaintiff to prove that she would have gotten the DOJ job if it had not been for the employer's negative comments. Rather, it was sufficient for a finding of unlawful retaliation that Hillig proved that the negative references caused her harm in her future employment prospects.

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“REVERSE DISCRIMINATION” ADEA CLAIMS

In a very interesting case, a group of workers between the ages of 40 and 49 filed an age discrimination action against their employer, claiming that they were discriminated against because of their age, in favor of other workers aged 50 and older. Employees of General Dynamics Land Systems, Inc. brought suit against their employer after their labor union entered into a new collective bargaining agreement (CBA). Under the old CBA, all retired workers with 30 years or more seniority were entitled to full health benefits. Under the new CBA, the employer was no longer required to provide full health benefits to retirees, except those ages 50 or older as of the effective date of the new CBA. Plaintiffs sought, and obtained, a determination from the Equal Employment Opportunity Commission (EEOC) that the new CBA adversely affected General Dynamics employees between the ages of 40 and 49. Plaintiffs then filed suit under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§621-a634, alleging that the provision of health benefits solely to those over the age of 50 constituted illegal discrimination based on age.

The United States District Court for the Northern District of Ohio granted the employer's motion to dismiss, holding that “reverse discrimination” claims under the ADEA are not cognizable, i.e., the Act was designed to protect older workers (over age 40) from discrimination in favor of younger workers (under age 40), not from alleged discrimination in favor of workers older than plaintiffs in the same protected class. *Cline v. General Dynamics Land Systems, Inc.*, 98 F Supp.2d 846 (N.D. Ohio 2000). The district court holding agreed with similar decisions in the First, Second, and Seventh U.S. Courts of Appeal.

The Sixth Circuit U.S. Court of Appeal reversed and remanded, stating that the statutory language prohibiting discrimination based on age of “any individual” age 40 or older was clear and unambiguous. As such, plaintiffs stated a valid cause of action under the ADEA. The court additionally discounted the notion of “reverse discrimination,” stating that term had no ascertainable meaning in the law. *Cline v. General Dynamics Land Systems, Inc.*, 296 F.3d 466 (6th Cir. 2002).

The United States Supreme Court agreed to hear the case to resolve the split among the Circuit Courts. The Supreme Court, in a 6-3 decision, reversed the Sixth Circuit, finding that a reasonable interpretation of the Act's purpose was the protection of older workers from more favorable treatment of younger workers. This interpretation is reinforced by congressional intent incorporated into provisions of the ADEA, and the consistent holdings of other federal courts which have addressed this issue. *General Dynamics Land Systems, Inc. v. Cline*, 124 S.Ct. 1236 (2004).

Thus, workers 40 and older may only bring ADEA claims alleging discrimination in favor of workers younger than them, but not older than them.

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