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LABOR AND EMPLOYMENT NOTES
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HOW SPECIFIC DO EMPLOYERS NEED TO BE?

A recent decision of the Court of Appeals for the Fifth Circuit, *Clara Patrick versus Tom Ridge, Secretary, Department of Homeland Security*, No. 04-10194 (December 2004) shows how a lack of "sufficient clarity" in articulating a reason for an employment decision can sometimes negatively impact an employer.

The employee in this case advanced charges of age discrimination and retaliation arising out of the employer's refusal to promote her to a supervisory position for which she had applied. The district court had earlier dismissed the claims pursuant to a motion for summary judgment filed by the defendants. The Court of Appeals, however, reversed the dismissal and at the same time provided employers with a good reminder about the need to be able to articulate "specifics" in certain situations.

The district court ruled (and the defendants did not challenge on appeal) that the employee succeeded in making out a prima facie case for both age discrimination and retaliation. The Court of Appeals indicated that "an employee's establishment of a prima facie case creates a rebuttable presumption that the employer unlawfully discriminated against the employee" and that "[t]o rebut the presumption of discrimination created by the employee's prima facie case, the employer must articulate a legitimate, nondiscriminatory reason for its decision." The Court of Appeals went on to state that if the employer succeeds in this regard, "the presumption of discrimination created by the plaintiff's prima facie case falls away and the factual inquiry becomes more specific" and that to "avoid dismissal on the employer's motion for summary judgment, the employee must show that the employer's putative legitimate, nondiscriminatory reason was not its real reason, but was merely a pretext for discrimination."

One of the reasons offered by the defendants in this case was that the employee was "not sufficiently suited" for the position. The Court of Appeals, however, stated that "to meet its burden of production under McDonnell Douglas, an employer must articulate a nondiscriminatory reason with 'sufficient clarity' to afford the employee a realistic opportunity to show that the reason is pretextual" and that "to rebut an employee's prima facie case, a defendant employer must articulate in some detail a more specific reason than its own vague and conclusional feeling about the employee." The Court went on to state that:

> We hold as a matter of law that justifying an adverse employment decision by offering a content-less and nonspecific statement, such as that a candidate is not "sufficiently suited" for the position, is not specific enough to meet a defendant employer's burden of production under McDonnell Douglas. It is, at bottom, a non-reason.

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UNLAWFUL EMPLOYMENT DISCRIMINATION

In 1997, the Louisiana Legislature passed the Louisiana Employment Discrimination Law, La. R.S. 23:301, et seq., "LEDL." Prior to 1997, Louisiana's various discrimination statutes were non-uniform and scattered throughout the revised statutes. The LEDL repealed and reenacted many of Louisiana's employment discrimination statutes as part of a single, comprehensive piece of legislation found in one Title of the Revised Statutes. The LDEL left in place, however, some of the statutes passed as part of Louisiana's Commission on Human Rights Act, La. R.S. 51:2256, "LCHRA." Thus, one question left unanswered by the Legislature was whether employment discrimination remained an unlawful practice under the LCHRA. This is a significant issue because the LEDL, like its federal law counterpart - Title VII of the Civil Rights Act - prohibits employment discrimination by "employers." In contrast, the LCHRA refers to "person" and "persons," not "employers." Thus, under the LCHRA individuals could potentially be held liable for unlawful employment discrimination.

The leading scholarly article on the 1997 creation of the LEDL is The New Louisiana Employment Statues: What Hath the Legislature Wrought, 58 La. Law Rev 1033 (1988), Gerald J. "Jerry" Huffman, Jr. The article is a lengthy analysis of pre- and post-1997 law. With regard to individual liability, Mr. Huffman concluded that only employers, not individuals, could be sued for employment discrimination under Louisiana's laws.

In *Smith v. Parish of Washington, c/w Dufrene v. Town of Franklinton, C.A.* Nos. 02-3385 and 02-3392, 318 F.Supp. 2d 366 (E.D. La. 2004), Judge Eldon Fallon of the U.S. District Court, Eastern District of Louisiana, reached the same conclusion as Mr. Huffman. Judge Fallon held that as a matter of law, La. R.S. 51:2256 did not provide a cause of action for unlawful employment discrimination. Judge Fallon's ruling is significant because it recognizes the legislative changes to the LCHRA and eliminates a procedural vehicle for asserting a cause of action against an individual defendant for unlawful employment discrimination. Judge Fallon's ruling is also significant because there are very few cases that address the issue.

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