

ALASKA PULP CORPORATION TO PAY IN EXCESS OF \$10 MILLION IN SETTLEMENT WITH NLRB

In March 2004, the National Labor Relations Board announced that it would distribute over \$10 million in backpay, severance pay, medical reimbursements, and other benefits to 95 former employees of the Alaska Pulp Corporation. The payments are the result of a May 2003 settlement, one of the largest ever reached by the NLRB. The settlement concluded nearly 16 years of litigation. The settlement resolves monetary obligations arising from a series of unfair labor practice charges filed by PACE and five individuals.

In an October 10, 1989 decision, *Alaska Pulp Corp.* (296 NLRB 1260), the NLRB found that Alaska Pulp violated the National Labor Relations Act when it failed to offer qualified strikers reinstatement to appropriate pre-strike positions at the conclusion of an economic strike in 1987. The NLRB specifically found that when returning strikers sought reinstatement, Alaska Pulp offered only entry-level positions, regardless of previous seniority. In the decision, the NLRB stated that the company unlawfully created a subordinate class of employees, strikers who opted to remain on strike for its duration. The NLRB also stated that the company punished strikers by ensuring that upon their return, they would be relegated to jobs that paid lower wages, were more onerous, and were more susceptible to layoff.

In its announcement, the NLRB reported that the company agreed to pay backpay, severance pay, medical reimbursement, and interest to the 95 claimants. In addition, the company agreed to pay its share of Social Security and Medicare taxes on all backpay and severance pay awarded; established an account in the company's 401(k) plan for each eligible claimant; made direct contributions to the 401(k) accounts of 42 eligible claimants; and granted each of 71 eligible claimants additional pension credits for the time they should have been employed by the company, but were not. In Addition, under the settlement, the company agreed to credit eligible claimants for all lost pension benefits, and the company assumed responsibility for any pension plan shortfall that may have resulted from the granting of such additional credits.

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THE 5th CIRCUIT – “MIXED-MOTIVE” ANALYSIS AND THE ADEA

The U.S. Court of Appeals for the Fifth Circuit (“the Fifth Circuit”) dealt with burden of proof issues and the federal Age Discrimination in Employment Act (“the ADEA”) in an opinion filed on June 25, 2004 in *Ahmed P. Rachid versus Jack in the Box, Inc.* (No. 03-10803). The plaintiff, who had worked in a managerial position, sued claiming his termination violated the ADEA. He contended, for example, that his supervisor repeatedly criticized him and made disparaging comments about his age. The employer, on the other hand, asserted that the plaintiff was terminated for failing to follow policies relating to recording employee time. Although the district court dismissed the case on a pretrial motion, the Fifth Circuit reversed the dismissal and remanded the case for further proceedings.

The Fifth Circuit stated that in “disparate treatment” cases “liability depends on whether the protected trait (under the ADEA, age), actually motivated the employer’s decision” and that to demonstrate age discrimination a plaintiff must show that he/she was: (1) discharged; (2) qualified for the position; (3) within the protected class at the time of the discharge; and (4) was i) replaced by someone outside the protected class ii), replaced by someone younger, or iii) otherwise discharged because of his or her age. The Fifth Circuit also indicated that a plaintiff could demonstrate age discrimination in two ways- either through “direct evidence or by an indirect or inferential method of proof.”

The opinion also addressed what is sometimes referred to as a “mixed-motive” case. These cases can arise, for example, where there is evidence to allow a trier to find both forbidden and permissible motives. The Fifth Circuit stated that “under the mixed-motives framework the plaintiff can recover by demonstrating that the protected characteristic (under the ADEA, age) was a motivating factor in the employment decision.” This results in a situation where:

“If a plaintiff demonstrates that age was a motivating factor in the employment decision, it then falls to the defendant to prove ‘that the same adverse employment decision would have been made regardless of discriminatory animus. If the employer fails to carry this burden, plaintiff prevails.’”

The Fifth Circuit also addressed the issue of the evidence needed to proceed with the “mixed-motive analysis” and stated that “we hold that direct evidence of discrimination is not necessary to receive a mixed-motive analysis for an ADEA claim.”



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