



# Recent Developments In Employment Law

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## SIXTH CIRCUIT APPROVES EMOTIONAL DISTRESS DAMAGES FOR FLSA RETALIATION VIOLATION

The Sixth Circuit has upheld a lower court’s ruling allowing damages for emotional distress for a Fair Labor Standards Act (“FLSA”) retaliation violation (*Moore v City of Chattanooga*, January 13, 2004).

The FLSA establishes minimum wage and overtime pay requirements. As amended by the Equal Pay Act, it also requires that men and women receive equal pay for equal work. The FLSA prohibits retaliation against an employee who complains about violations of the law.

The City of Chattanooga hired a white woman and an African American man to perform the same job, but paid the woman 29 percent more, allegedly due to her experience and training. When the man learned of the pay disparity, he complained to their supervisor. Shortly thereafter, the woman complained to the supervisor that her male co-worker was harassing her, creating a hostile environment. The supervisor decided to fire both, but before he did, the woman quit. The supervisor then fired the man. The male worker sued for violation of the equal pay provision and for retaliation. The jury agreed with his retaliation claim and awarded him emotional distress damages equivalent to approximately four times the amount of his lost wages.

The City appealed, arguing that the FLSA does not provide emotional distress damages. The Sixth Circuit disagreed, noting “[a]lthough the provision does not explicitly allow damages for emotional injuries . . . [t]he statutory scheme contemplates compensation in full for any

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retaliation employees suffer from reporting grievances, and there is no indication that it would not include compensation for demonstrable emotional injuries, as well as economic ones.”

### **THE “NO GOOD DEED GOES UNPUNISHED” DEPARTMENT**

Schwegemann Giant Supermarkets (“SGS”) of New Orleans, Louisiana instituted a “grocery voucher plan” in 1985 under which supervisory employees who retired after age 60 with 20 or more years of service received monthly vouchers worth \$216 redeemable in groceries and other products at SGS stores.

John Schwegemann was the majority owner and chief corporate officer of SGS in charge of its daily operations. He personally conceived of the voucher plan and implemented it through other corporate officers. There was no written plan document, although the SGS HR director produced an internal memo outlining the eligibility requirements for the voucher plan, and eligible employees were merely informed of the benefit upon retirement. The plan was funded from SGS’s general revenues. From the court’s description of the plan’s operations it is apparent that no one at SGS thought that the voucher plan was an employee benefit covered by ERISA.

In 1997 SGS was sold. Immediately before the sale Mr. Schwegemann notified the voucher recipients of the termination of the plan. He considered the plan to be gratuitous, and he made no provision for continuation of the plan after the sale. Both SGS retirees and active employees who were eligible for the vouchers upon retirement brought a class action under ERISA.

The Fifth Circuit Court of Appeals (*Musmeci v Schwegemann Giant Stores, Inc.*, August 15, 2003) decided that the grocery voucher plan was an “employee pension benefit plan” as

defined in ERISA in that it “provided retirement income to employees.” The court adopted a definition of “income” to include any benefit which could be valued in terms of currency, and it explicitly rejected the argument that benefits paid in kind could not be ERISA pension benefits. The court noted that SGS had reported the vouchers as retirement income to the retirees on form 1099R as strong evidence that the vouchers were income as that term is commonly used.

Next the court found that John Schwegemann was a fiduciary under the voucher plan, and he was personally liable for the many violations of ERISA fiduciary duties, including, most importantly, the failure of SGS to create and fund a trust dedicated to the payment of benefits under the voucher plan.

Finally the court determined that SGS’s insurer was liable only to the extent that each plan participant’s claim exceeded the \$250,000 deductible under the policy, leaving Mr. Schwegemann personally liable for the balance of each claimant’s damages.

The court refused to hear arguments concerning the liability of the Pension Benefit Guarantee Corporation (“PBGC”) because the issue was not raised at trial. While it seems possible that the PBGC could be liable to provide benefits under the voucher plan, Mr. Schwegemann could also face liability for failing to have SGS pay the annual PBGC premiums.

Generosity may have unintended legal consequences, as Mr. Schwegemann has painfully learned.

### **HELPFUL AMENDMENT TO THE FAIR CREDIT REPORTING ACT**

The Fair Credit Reporting Act (“FCRA”) applies to employers when they use consumer

reports and investigative reports for employment purposes. A consumer report for FCRA purposes is a written or oral report containing information about an individual's character, general reputation, personal characteristics or mode of living which is used or expected to be used as a factor establishing the individual's eligibility for employment. An investigative report is a consumer report based on personal interviews with the subject's neighbors, friends or associates.

The Federal Trade Commission previously issued an advisory opinion concluding that investigations of employees by outside investigators are consumer reports subject to the FCRA. This opinion caused consternation among employers, as investigations of harassment, discrimination and misconduct would be subject to disclosure under the FCRA. A recent statutory amendment to the FCRA alleviates this problem.

The amendment excludes communications regarding employee investigations from the definition of "consumer report." To be excluded, the communication must be made to an employer in connection with an investigation of: 1) suspected employee misconduct or 2) compliance with a law, regulation, pre-existing written employment policy or a self-regulatory organization's rules.

For purposes of the amendment, a "self-regulatory organization" includes any SEC self-regulatory organization, any organization established under the Sarbanes-Oxley Act, any board of trade designated by the Commodity Futures Trading Commission and any further association registered with the SEC. To be excluded, a communication regarding an employee investigation cannot be made for the purpose of investigating an individual's credit. Excluded communications may be made only to

the employer, a government official, a self-regulatory organization or as otherwise required by law.

While the amendment relieves employers of many of the FCRA requirements applicable to obtaining and using consumer reports (*e.g.* disclosure, authorization, pre-adverse action notice and adverse action notice), it creates a new requirement for communications that would be a consumer report except for this new exclusion. If an employer bases an adverse action (*i.e.*, demotion, termination, *etc.*) on such a communication, then the employer must provide the employee who is the subject of the investigation with a summary of the nature and substance of the communication. The employer need not, however, provide an actual copy of the communication. If the communication would otherwise be an investigative consumer report, the summary does not need to include the sources of information acquired solely for use in preparing the communication.

### **SUPREME COURT UPHOLDS REJECTION OF APPLICANT BASED ON NO RE-HIRE POLICY**

The U.S. Supreme Court agreed in *Raytheon Co v Hernandez* (December 2, 2003) to decide whether an employer's facially neutral policy of not rehiring former employees who were separated from previous employment for misconduct has an adverse impact on ADA-protected recovering drug users. However, the court decided this case on other grounds.

In *Raytheon*, the employer asked a long term employee to submit to a drug and alcohol screen pursuant to its drug testing policy because the employee's appearance and behavior at work provided reasonable cause to suspect he was under the influence of alcohol or drugs. He tested positive for cocaine and was "forced to resign" after admitting to using cocaine and

drinking beer the previous evening. Two and one-half years later, the individual applied for rehire, indicating that he was in recovery and regularly attended Alcoholics Anonymous meetings. A human resources employee rejected the application after reviewing his work record based on an unwritten policy of not rehiring employees who had been separated for misconduct.

The individual filed an EEOC charge, claiming disability discrimination, *i.e.*, that he was rejected for past drug addiction. A manager responded to the charge, asserting that the application had been properly rejected based on demonstrated drug and alcohol use during previous employment with no evidence of successful rehabilitation.

The individual filed suit. The district court dismissed the case, finding the no-rehire policy was a legitimate, nondiscriminatory reason for rejecting the application. The Ninth Circuit reversed, ruling that although the no-rehire policy was a legitimate reason for rejection, the policy might have an "adverse impact" on a protected class, *e.g.*, rehabilitated drug users whose misconduct was a positive drug test.

The U.S. Supreme Court agreed to review this case. The court stated the issue as whether a no-rehire policy had a disparate impact on recovering drug addicts, but did not reach the issue. Rather, it agreed with both lower courts that the policy provided a legitimate, nondiscriminatory reason for rejecting the former employee. It ended its inquiry there as the individual's theory all along had been that he had been treated adversely, not that the no-rehire policy adversely impacted a protected class of recovering drug addicts, such as himself. Thus, the issue had not been properly preserved for review.

It is important to note two things in this case. First, the court only decides issues that

are properly preserved and necessary to decide a case. Second, employer responses to civil rights claims should respond only to issues clearly presented and focus on employee performance or conduct, not status, as reasons for its actions. In this case, the manager's response to the EEOC charge referred to the individual's past drug use and unsatisfactory evidence of successful rehabilitation as the reason for rejecting the application, not the no-rehire policy.

This EEOC response provided the employee with his theory for suit: that he was rejected based on his status as a former drug user, not his previous discharge for misconduct.

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