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Adverse Employment Actions Taken After Termination Can Lead To Liability Under Title VII

By Okechi C. Ogbuokiri, Esq.

In a recent opinion, the Fourth Circuit Court of Appeals held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 ("Title VII"), allows former employees to bring a claim against a former employer pursuant to this statute based, in part, on post-employment actions by the employer. This decision, *Gerner v. County of Chesterfield*, No. 11-1218 (4th Cir. Mar. 16, 2012), is consistent with other federal court decisions, which have asserted that former employees may bring claims regarding alleged discriminatory actions taken after their termination. The controlling language in Title VII provides that it is unlawful for employers to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a)(1). A claim of gender discrimination under Title VII requires a plaintiff to establish four elements: "(1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action . . .; and (4) that similarly-situated employees outside the protected class received more favorable treatment." *White v. BFI Waste Servs., LLC*, 375 F.3d 288, 295 (4th Cir. 2004).

THE FACTS

The plaintiff, Karla Gerner, worked for the defendant, the County of Chesterfield (the "County"), for over 25 years, and during that time Gerner served as the Director of Human Resources and Management for approximately 12 years. After deciding to reorganize its workforce, on December 15, 2009, the County notified Gerner that her position was being eliminated. The County offered Gerner a severance package that included three months pay and health benefits in exchange for a waiver of all legal claims against the County and her voluntary resignation. After considering the offer, Gerner declined and the County terminated her employment effective the date of the offer, December 15.

THE DISTRICT COURT

Gerner brought suit against the County alleging that it unlawfully discriminated against her by not offering her the same "sweetheart" severance package it offered to similarly-situated male directors. In her complaint, Gerner cited to four male counterparts who received either a transfer to a position with less responsibility but with the

same pay and benefits or were kept on the payroll for six months. In addition, Gerner alleged that some of her counterparts received these offers despite not meeting performance expectations, whereas Gerner received positive performance evaluations throughout her employment.

In response, the County filed a motion to dismiss Gerner's complaint on the grounds that "the terms and conditions of the severance package [did] not constitute an actionable adverse employment action under Title VII" and the complaint did not sufficiently describe the similarly-situated male directors to support a disparate treatment claim. The district court granted the County's motion and dismissed Gerner's complaint without prejudice, holding that she failed to establish the third element of her gender discrimination claim. The district court asserted two reasons for its decision: (1) that an actionable adverse employment action requires that the employment benefit "must be a contractual entitlement," and (2) that because the County offered Gerner the severance package after her termination, it cannot be considered an adverse employment action under Title VII.

THE FOURTH CIRCUIT

The Fourth Circuit rejected the district court's rationale and reversed and remanded this case for further proceedings. First, the Fourth Circuit held that the district court erred in ruling that non-contractual employment benefits cannot constitute an adverse employment action. Relying on *Hishon v. King & Spalding,* 467 U.S. 69 (1984), the Fourth Circuit asserted that there is no requirement for an employment benefit to be a contractual right in order for the denial of the benefit to give rise to a Title VII cause of action. In *Hishon*, the United States Supreme Court stated that any "benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all." 467 U.S. at 75. The Fourth Circuit opined that, because Gerner did not volunteer to participate in a reduction-in-force plan, nor did she have the option to retain her job in lieu of the offer of severance benefits, the County's decision to terminate Gerner was "part and parcel" of the employment relationship between the parties. In addition, the Fourth Circuit stated that courts have consistently held that the "discriminatory denial of a non-contractual employment benefit constitutes an adverse employment action." See *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 120-21 (1985); *Leibowitz v. Cornell Univ.,* 584 F.3d 487, 501 (2d Cir. 2009); *Paquin v. Fed. Nat'l Mortg. Ass'n,* 119 F.3d 23, 32 (D.C. Cir. 1997); *DiBiase v. SmithKline Beecham Corp.,* 48 F.3d 719, 725 (3d Cir. 1995); *Cunico v. Pueblo Sch. Dist. No. 60,* 917 F.2d 431, 442 (10th Cir. 1990); *Judie v. Hamilton,* 872 F.2d 919, 921-22 (9th Cir. 1989).

Second, the Fourth Circuit noted that Title VII specifically states that employers cannot "discriminate against *any individual*" due to his or her membership in a protected class. The Court stated that the term "individual" has a broad definition and, as a result, Title VII protects current, past, and prospective employees from employment discrimination. The Court opined that holding that only adverse employment actions that take place during an employment relationship are actionable would conflict with the primary goal of Title VII - to eliminate employment discrimination. Although Gerner received the offer after her termination, the Fourth Circuit held that she was not prohibited from asserting a gender discrimination claim against the County.

BOTTOM LINE

Former employees may bring suit against employers for allegedly discriminatory acts relating to their separation. As such, employers must be mindful when providing employees with any employment benefit either expressed or implied in the employment contract, or issued during or after the employment relationship. As seen above, non-contractual benefits such as severance packages can amount to an actionable adverse employment action if an employee can establish the requisite disparities. To avoid liability, employers should offer uniform severance agreements or, when this is not possible, maintain rational distributions based upon seniority or documented performances, with severance packages which are comparable across gender, race, age, and other protected characteristics.

Legislative Update

Protecting Older Workers Against Discrimination Act

A group of bipartisan U.S. Senators joined together to introduce legislation that would amend the Age Discrimination in Employment Act of 1967 (the "ADEA"). If passed, the Protecting Older Workers Against Discrimination Act, S. 1756, would amend the standard of proof of age discrimination claims under the ADEA and all other anti-discrimination or anti-retaliation laws. The Senators opined that the United States Supreme Court's decision in *Gross v. FBL Fin. Servs., Inc.,* 557 U.S. 167 (2009), created an inconsistent interpretation of the standard of proof under the ADEA and similar laws. In *Gross*, the Supreme Court held that to establish a claim under the ADEA, plaintiffs must show that they would not have been discriminated against "but for" their age. In contrast, under Title VII, plaintiffs are required to show only that a protected characteristic was a motivating factor for the adverse employment action.

One of the purposes of the newly proposed legislation is to return some consistency in the interpretation of all anti-discrimination and anti-retaliation laws. The newly proposed ADEA provides that plaintiffs can establish an unlawful employment practice claim by demonstrating either a protected characteristic was a "motivating factor" for the practice or that the practice would not have occurred in the absence of the protected characteristic.

Ban on Pre-dispute Arbitration Agreements

Earlier this month, Congressman Robert Andrews (D-NJ) introduced H.R. 4181, which amends Title IX to invalidate pre-dispute arbitration agreements that require arbitration of an employment dispute, such as those increasingly found in many employment agreements. Arbitration provisions within collective bargaining agreements, however, would be exempt under this bill. The bill also prohibits an arbitration provision in a collective bargaining agreement that would effectively waive an employee's right to seek judicial recourse for claims arising under the United States Constitution, any state constitution, or any federal or state law. Currently, this bill is under review by the House Committee on the Judiciary.