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LABOR & EMPLOYMENT REPORT
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BIG CHANGE TO MINNESOTA'S UNEMPLOYMENT LAW HAS LITTLE APPEAL

The Minnesota Unemployment Compensation Act has been amended to eliminate one of the two appeals that have been available to the parties. This means that once a decision has been appealed and heard by the Unemployment Law Judge, there is virtually no opportunity to seek reversal of that decision without going to the trouble and expense of going to the Minnesota Court of Appeals.

Up Until Now...

For years, the procedure for determining a former employee's right to unemployment compensation benefits involved two appeal hearings after the initial decision was made. The first appeal hearing was a mini-trial where the witnesses testified, documents were submitted and an Unemployment Law Judge issued a decision based on the credibility of the witnesses and the record that was established at this hearing. The second appeal hearing was conducted by a Senior Unemployment Review Judge (formerly known as the Commissioner's Representative,) typically a long term departmental employee who had risen from the ranks of the Law Judges. These sessions reviewed what occurred at the previous hearing but typically did not allow more evidence to be presented.

This system seemed to help everyone feel as if their concerns had been heard adequately. If a party felt that a particular judge was biased against them, did not understand the case or simply got it wrong, they knew that they could have another shot at making their point. It also allowed everyone to have access to some of the most senior and experienced practitioners of unemployment compensation issues in the state.

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From Now On...

The new amendment changes this set-up by eliminating the second hearing before the Senior Unemployment Review Judge. Now, the Unemployment Law Judge conducts the only hearing that the law authorizes. If a party is not satisfied with the decision, they can request reconsideration from that very same Unemployment Law Judge, but of course the likelihood of anything coming of that request seems rather remote. If reconsideration fails to bring relief to the losing side, the only recourse is to the Minnesota Court of Appeals for a formal oral argument before a panel of the appeals judges.

> For employers, this means incurring the expense of hiring a lawyer, filing formal papers and becoming enmeshed in the formality of the court system.

Employees face the same prospect, but the availability of legal aid lawyers, law school clinics and other similar resources means that they are unlikely to bear much expense or risk in pursuing their concerns to the Minnesota Court of Appeals.

The State will claim that this new procedure saves taxpayer money by eliminating a layer of bureaucracy.

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SUPREME COURT EXPANDS AGE PROTECTIONS

The United States Supreme Court recently ruled that persons covered under the Age Discrimination in Employment Act (ADEA), namely those age 40 and above, can sue their employers for age discrimination when seemingly neutral policies, practices or decisions end up having a discriminatory impact on older workers. Although this decision has been reported as a ground breaking expansion of workers' rights, the actual effect of the case may be rather minimal. Here's why.

Does Seniority Equal Age?

The City of Jackson, Mississippi decided to boost the pay of its police officers in order to remain competitive within the geographic region. The new pay plan was especially generous to police officers with tenures of five years or less, since they received a proportionately higher raise than their more senior colleagues. City officials attributed this differential to the need to boost starting salaries in order to attract qualified applicants.

A group of police officers age 40 and above banded together to sue the city, claiming that the new pay policy providing bigger raises to the lowest senior employees was illegal age discrimination under the ADEA.

> Their claim had two components:
> (1) That the city intentionally harmed them because of their age.
> (2) That this seemingly neutral policy, though not intentionally directed at older officers, nevertheless had an unlawfully adverse effect upon them.

Disparate Impact

Typically, workers suing their employers for discrimination pursue the theory of "disparate treatment," e.g. that the employer intentionally singled them out for adverse treatment because of their protected classification, such as race, gender or national origin. However, Intent can be difficult to prove, especially when a decision or policy impacts upon an entire group of people rather than just a single worker. In such cases, the courts have allowed employees to prove violations of Title VII through the use of the "disparate impact" theory, where policies or practices that appear neutral on their face may nevertheless be challenged if they have a discriminatory effect on a particular protected class. The theory here is that unless there is a true necessity for the challenged policy or practice, an employer's intent to discriminate can be inferred from the fact that they continue to maintain a policy or practice that burdens a protected class rather than seek an alternative, nondiscriminatory means of achieving the same business goal. Height and weight requirements, excessive educational criteria and some physical standards that are not job related are some of the more common practices that have been challenged in this way.

Although the disparate impact theory of discrimination has been around for almost as long as the law itself, the ADEA has been interpreted differently because it contains language stating that actions "otherwise prohibited" are nevertheless permissible if they are "based on reasonable factors other than age." Some have argued that since Congress already stated that employers may use policies that have a disparate impact, there was no basis for permitting claims on this theory. Others concluded, however, that the "reasonable factors" language did not rule out such claims; it simply provided the standard by which such claims should be evaluated.

Good News, Bad News

After losing their case in the trial and appeals courts, the 40-and-over police officers took their case to the United States Supreme Court, who accepted the appeal solely to decide the issue once and for all of whether the use of the disparate impact theory of discrimination should be permitted under the ADEA. After reviewing legislative history, previous cases and the language itself, the Court ruled that the officers could proceed with their claim of disparate impact. They reasoned that the "reasonable factors" language could not apply to claims of disparate treatment since

any employment action that singles out an older worker for reasons other than age would not be "otherwise prohibited" in the first place. On the other hand, the judges concluded that employment decisions that place greater burdens on people because of their age would seem to be exactly the type of actions that would be considered as "otherwise prohibited." As such, Congress apparently decided that such claims should be permitted unless the employer could show this otherwise prohibited action was "based on reasonable factors other than age."

That was the good news for the senior officers. The bad news was that even though disparate impact claims will be allowed in general, their specific claim was deemed insufficient to establish a violation of the law. The judges observed that the city had proven their desire to make their junior officers' pay competitive in the market, and that reliance on such matters as seniority and rank was "unquestionably reasonable" even if it did burden the older officers. *Smith, et. al. v. City of Jackson,* (US Sup. Ct. No. 03-1160 March 30, 2005).

Impact Of This Case

The Supreme Court's decision recognizing disparate impact claims under the ADEA is not terribly surprising, nor does it pose many challenges for the prudent Minnesota employer. Indeed, most employers probably have assumed that this theory might already affect them, which is one of the main reasons why care is routinely exercised during restructurings and downsizings so as not to create an adverse impact based on age. Confirmation of the viability of such claims really should not change anything done in this regard.

> One interesting sidelight of this case is the Supreme Court's recognition that employers face a lesser burden defending disparate impact cases under the ADEA than they do under Title VII.

Title VII cases require proof of business necessity, which means that employers must prove that there are no other methods of achieving their goals that do not result in a disparate impact on a protected class. Under the ADEA, the employer need only establish that their chosen method is reasonable, regardless of whether other methods might have led to the same result. Therefore, while it might be said that this decision expanded employee rights, it can also be viewed as one that merely confirmed those rights, but established a lower threshold of proof necessary for the employer to defend their actions. Overall, not a bad tradeoff!

For more information, contact Brian Benkstein at our Minneapolis office.

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MEET RICH VOELBEL

We are pleased to announce that Rich Voelbel has joined our law firm as a summer associate. Mr. Voelbel graduated with a Bachelor of Arts in Political Science from DePauw University of Greencastle, Indiana in May of 2001, and was on the Dean's list. He is expected to receive his J.D. from William Mitchell College of Law in St. Paul, Minnesota in May of 2006.

Mr. Voelbel will be working out of both the Minneapolis and St. Paul offices.

Rich Voelbel
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MARK YOUR CALENDARS!

LABOR & EMPLOYMENT SEMINAR

Friday, November 4, 2005
Marriott Hotel
Mall of America Location
Bloomington, Minnesota

Join us for the upcoming Labor & Employment Seminar, covering a variety of timely legal topics. The seminar presenters include our firm attorneys who have expertise in the seminar subject matter. Invitations will be sent out to everyone on this newsletter mailing list. To be added to this mailing list, please forward your contact information to kdyck@felhaber.com. Last year over 200 people attended the annual L&E event. **Don't miss out on this complimentary seminar.**

COURT SAYS "NO HARM, NO FOUL"
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You can't lose what you never had

The appeals judges agreed with Storage Technology's theory that wrongdoers should not be allowed to profit from their own misdeeds. However, they disagreed on the issue of how much, if at all, NuSpeed actually profited by inducing the employees away. First, the judges pointed out that NuSpeed had significant assets and numerous employees that had never been associated with Storage Technology, and that there was no evidence as to how much of the purchase price accounted for such unrelated people and property.

Even more significant was the fact that the very product that generated Cisco's interest in NuSpeed was based on a technology that did not even exist at the time that NuSpeed supposedly raided Storage Technology. Storage Technology admitted they never did produce any software or products based on the knowledge that NuSpeed supposedly stole from them in hiring their engineers.

Claims such as this can only succeed if there is a showing that the innocent party was harmed by the wrongful conduct. Since Storage Technology could not prove either that they themselves lost profits as a result of NuSpeed's conduct, or that NuSpeed benefited improperly from that conduct, the court was compelled to dismiss their claims. *Storage Technology v. Cisco Systems, Inc.*, No. 03-3673 (8th Cir. Court of Appeals January 26, 2005).

Today's lesson

The moral of this story is simple - if you are going to make a claim of wrongful conduct, you have to be able to show that you were actually injured by the conduct. The law is not concerned with speculative or imaginary harm.

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COURT SAYS "NO HARM, NO FOUL" ON INDUCED BREACH OF CONTRACT CLAIM

Resentment, anger, betrayal - these are just some of the emotions that employers feel when employees whom they recruited, trained and placed in key positions leave to work for another company in the industry.

However, as the following case shows, if you decide to sue when this happens, you better be prepared to prove more than hurt feelings. You have to show a tangible loss before the court will take you seriously.

An offer they couldn't refuse

NuSpeed Internet Systems, Inc. was a new company created in 1999 to develop a product that would link computers at one location to data storage networks at various other locations via the internet or other networking structures. One of their key new hires was Mark Schrandt, an engineer at Storage Technology, which developed data storage networking products. Schrandt gave proper notice of his resignation to Storage Technology, and told his co-workers that he would be leaving in January, 2000, to work for NuSpeed. When four of his colleagues mentioned that they might like to join him, Schrandt met with them outside of work to discuss his new employer. These four individuals eventually signed on with NuSpeed, as did more than twenty other current or former Storage Technology engineers within the next year.

In February, 2000, NuSpeed jumped on the bandwagon of a brand new internet protocol for its networking product, hoping to be the first to market such a product using this new protocol. After announcing their intent to develop this product, they were acquired by Cisco Systems, Inc. in a transaction that transferred $450 million dollars in Cisco stock to NuSpeed's shareholders. Unfortunately for Cisco, the new product was not profitable, generating approximately $50 million in operating losses.

Hey, that's my $450 million

Smarting from the loss of so many of its engineers, Storage Technology sued Cisco, alleging that NuSpeed had "raided" their work force for engineers who had been working on a similar computer linking product with Storage Technology, and that NuSpeed had improperly used their knowledge to develop a similar product. The lawsuit also claimed that NuSpeed had improperly interfered with the employment contracts between these employees and Storage Technology, and had encouraged those employees to breach their fiduciary duties and improperly divulge trade secrets. Cisco denied all of the claims and moved promptly for early dismissal, which the trial court granted. The matter was then appealed to the United States Court of Appeals for the Eighth Circuit, which rules on Minnesota cases.

Claims relating to breach of contract generally seek payment for whatever might have been lost by the premature termination of the contract. Businesses usually look to recover profits that were lost because a relationship ended or obligations were not upheld. In this case, however, Storage Technology could not easily show that they suffered lost profits when their engineers left the company, especially since the product that they eventually developed for NuSpeed lost money.

However, Storage Technology had a different idea of how their claim should be valued. Since NuSpeed induced the subject individuals to breach their fiduciary and non-compete obligations to Storage Technology, it would be unjust to allow NuSpeed to profit by such wrongdoing in the receipt of the $450 million purchase price. Therefore, Storage Technology asked the court to strip the purchase price from NuSpeed's shareholders and pay it over to them.

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However, the Unemployment Law Judges will be spending a greatly increased amount of time on each case because so many of them will generate requests for reconsideration. Add in the likely upsurge in bad decisions, the increased burden on the Minnesota Court of Appeals judges and court employees to process so many more appeals, and the loss of many of the Unemployment Office's most competent and experienced personnel, and the projected savings from this new procedure seem dubious at best. The bottom line is that employers now get just one shot at an appeal within the Department before having to go to the trouble and expense of hiring legal counsel to bring the matter before the Minnesota Court of Appeals. It is hard to view this as a positive development.

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Labor & Employment Report

The Labor & Employment Report is an update on legal developments. It is not intended to be legal advice and should not be relied upon without consulting counsel.

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