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LABOR AND EMPLOYMENT

This issue of Take 5 *was written by* ***Susan Gross Sholinsky,*** *a Member of the Firm in Epstein Becker Green's New York office.**

Susan Gross Sholinsky
Member of the Firm
New York
sgross@ebglaw.com
212/351-4789

The U.S. Equal Employment Opportunity Commission ("EEOC") has been active this year! This month's *Take 5* will summarize the goings on at this busy federal agency.

1. The EEOC Issues New Guidance on Employment-Related Background Checks

The EEOC has issued new guidance on the use of arrest and conviction records in employment decisions ("Guidance"). The Guidance describes the difference between (i) "disparate treatment" discrimination—treating job applicants with the same criminal records differently because of their race, color, religion, sex, or national origin—and (ii) "disparate impact" discrimination—a neutral policy utilizing criminal records that has a disproportionate negative impact on a particular group based on a legally protected category. If an employer cannot demonstrate that the exclusionary criteria that it utilizes (e.g., not hiring anyone with drug-related convictions) are "job related and consistent with business necessity" for the position in question, the criteria will be deemed unlawful under Title VII of the Civil Rights Act of 1964 ("Title VII"). The Guidance also reaffirms the EEOC's long-standing position that employers may violate Title VII if they use criminal background information improperly.

The Guidance also discusses the difference between arrest and conviction records. Excluding an applicant on the basis of an arrest is unlawful, unless the conduct underlying the arrest would make the applicant unfit for the position in question. For example, an elementary school may terminate the employment of its assistant principal when he or she is arrested for inappropriately touching young children if the school has a reasonable belief that the assistant principal actually engaged in the inappropriate behavior. In contrast, a conviction record is sufficient to make an inference that the applicant engaged in such behavior. However, the Guidance warns employers that exclusionary policies based on convictions must also be "job related and consistent with business necessity." To assess whether an exclusion criterion is job related and consistent with business necessity, the Guidance points to the three factors found in a case decided by the U.S. Court of Appeals for the Eighth Circuit, *Green v. Missouri Pacific Railroad*: (1) the nature and gravity of the offense or conduct; (2) the time passed since the offense, conduct, and/or completion of the sentence; and (3) the nature of the job held or sought.

As stated in the Epstein Becker Green *Act Now* Advisory "EEOC Propounds Guidance on Use of Arrest and Conviction Records in Employment Decisions," these factors are similar to those required by New York law. For additional information, see that advisory or the Guidance itself.

2. Termination Based on Breastfeeding Does Not Constitute Sex Discrimination Under Title VII

The U.S. District Court for the Southern District of Texas ruled that terminating an employee's employment after she advised her employer of the need to express breast milk does not constitute sex discrimination in violation of Title VII. On June 29, 2011, the EEOC had filed suit on behalf of Donnicia Venters against Houston Funding II, Ltd. ("Houston Funding"). According to the EEOC's complaint, Houston Funding terminated Venters after she advised upper management of her intent to express breast milk in a back office upon her return to work from maternity leave. Arguing that the termination violated Title VII, the EEOC sought a permanent injunction prohibiting any future prohibited practice, as well as personal and punitive damages, back pay, and other relief on behalf of Venters.

In granting summary judgment, the court found that "the law does not punish lactation discrimination." In the short opinion, the judge drew a sharp distinction between lactation and medical conditions related to pregnancy, stating that Venters had given birth on December 11, 2008, and "[a]fter that day, she was no longer pregnant, and her pregnancy-related conditions had ended." The decision concluded with this sentence: "[f]iring someone because of lactation or breast-pumping is not sex discrimination." The EEOC has appealed the decision to the U.S. Court of Appeals for the Fifth Circuit.

For additional information, see the blog post on Epstein Becker Green's *Employer Defense Law Blog* entitled "Is Breastfeeding Bias the EEOC's Next Battleground?"

3. EEOC Finds That Title VII Protects Transgender Status

In an April 20, 2012, decision, the EEOC ruled that discrimination on the basis of transgender status was covered under Title VII. Mia Macy, a transgender woman, claimed that she was denied employment with the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("Agency") because she informed the Director of the Agency that she was in the process of transitioning from male to female after allegedly being assured a position with the Agency pending her background check. Macy filed a formal complaint with the equal employment opportunity officer at the Agency, claiming discrimination based on gender identity stereotyping and sex.

The Agency responded that her complaint of gender identity could not be adjudicated by the EEOC because gender identity was not a recognized protected category under Title VII. Therefore, the complaint would be processed under a U.S. Department of Justice ("DOJ") procedure. The DOJ processed the claim through a procedure that allows for fewer remedies than Title VII and does not include the right to request a hearing before an EEOC administrative law judge or the right to appeal the final DOJ decision.

Macy appealed to the EEOC, requesting that the EEOC adjudicate her gender identity claim along with the sex discrimination claim that she had also brought. In her appeal, she claimed that "sex stereotyping, sex discrimination based gender transition/change of sex, and sex discrimination based gender identity" all constituted sex discrimination.

In its decision, the EEOC held that discrimination based on transgender status is included under Title VII. The EEOC noted that the U.S. Supreme Court's ruling in *Price Waterhouse v. Hopkins* held that Title VII covered not only biological sex discrimination but also gender stereotyping. The EEOC found that discrimination based on transgender status is congruent with discrimination on the basis of gender-based behavioral norms. Thus, if Macy could establish that the Agency had denied her employment because of her failure to conform to gender-based behavioral norms due to her transgender status, such claims would be covered under Title VII and would be under the jurisdiction of the EEOC. Accordingly, transgender employees who experience workplace discrimination will be able to file discrimination charges at any of the EEOC's 53 field offices.

For additional information, see the blog post on Epstein Becker Green's *Employer Defense Law Blog* entitled "EEOC Confirms That Title VII Protects Transgender Employees."

4. EEOC Propounds Final Rule Concerning the "Reasonable Factors Other than Age" Defense

On March 30, 2012, the EEOC issued a final rule ("Final Rule") that amends the regulation on the "reasonable factors other than age" ("RFOA") defense available under the Age Discrimination in Employment Act ("ADEA"). The regulation imposes stricter standards on employers seeking to raise an RFOA defense in cases of alleged "disparate impact" discrimination—i.e., practices and procedures that tend to impact older individuals more severely, regardless of employer intent. Employers must now show that the challenged employment policy was reasonably designed and implemented to further a legitimate business purpose. To assist in gauging the reasonableness of a non-age business purpose, the Final Rule lists five considerations that underscore the EEOC's expectation that the "reasonable" employer be fully cognizant of the potential for any of its policies or practices to have an adverse impact based on age, and to minimize those impacts if possible.

The five considerations relevant to assessing reasonableness are:

1) the precision that the employer used in achieving its business goals,

2) any anti-discrimination training that the employer provided to its managers,

3) the extent that the employer limited supervisors' discretion to assess employees subjectively (particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes),

4) the extent that the employer prospectively gauged any adverse impact of its practice, and

5) the extent that the employer sought to ameliorate any foreseen adverse impact.

To guard against age discrimination claims, employers should clearly document any foreseen adverse impacts, alternatives that were considered, and reasons for rejecting the alternatives. Employers should also provide managers with additional training and information on the employers' requirements under the ADEA and methods for fairly and objectively evaluating traits necessary for a particular position. Finally, employers should consider conducting statistical analyses concerning employment policies and practices that could have a disparate impact on older workers. If a policy may have disparate impact on older employees but cannot be changed or eliminated, the employer should be able to clearly define the business goals behind the policy, demonstrate how the business goals are

achieved by the policy, and justify the policy choice among other potential alternatives that were considered.

For more details, see the Epstein Becker Green *Act Now* Advisory "EEOC's Amended ADEA Regulation Raises the Bar for Employers' RFOA Defense."

5. EEOC Settles with Kelley Drye & Warren, LLP

On April 10, 2012, the U.S. District Court for the Southern District of New York issued a consent decree concerning Kelley Drye & Warren, LLP ("Kelley Drye"), and the EEOC on behalf of Eugene T. D'Ablemont, Esq., in a case where D'Ablemont argued that the ADEA applied to him as an employee of Kelley Drye, even though he was a "partner" of the firm. The EEOC alleged that Kelley Drye had implemented and maintained a discriminatory policy that forced partners age 70 and over to relinquish their interests and authority in the firm and be compensated solely through a discretionary and discriminatorily low annual bonus. A similar case was brought seven years ago by the EEOC on behalf of 32 former partners at Sidley Austin LLP and resulted in a significant settlement. The EEOC further claimed that Kelley Drye had retaliated against D'Ablemont by lowering his discretionary compensation when he filed a discrimination charge with the EEOC. Kelley Drye denied all allegations and claimed that none of its partners and/or life partners—partners over 70 years of age—were "employees" as the term is used in the ADEA and other anti-discrimination laws.

As part of the consent decree, Kelley Drye agreed to pay D'Ablemont $124,000 for his 2011 compensation and $450,000 in back pay. Going forward, D'Ablemont is permitted to retain his status as a life partner and is entitled to 12 percent of the fees collected in connection with certain matters. Kelley Drye also agreed to provide a mandatory, two-hour training session for all partners—current and future—on the various anti-discrimination laws. Members of the Kelley Drye's Executive Committee are also required to get additional training with a special emphasis on the ADEA. The EEOC will continue to monitor Kelley Drye for compliance with the training programs and any future complaints of age discrimination. Unfortunately, the consent decree did not provide any guidance to other law firms or other organizations with "partners" on whether such partners are "employees," as defined in the ADEA (and other anti-discrimination statutes), and therefore subject to those laws' protections.

*__Eugene Baek,__ a Summer Associate (not admitted to the practice of law) in Epstein Becker Green's New York office, contributed significantly to the preparation of this *Take 5.*

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