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EMPLOYMENT LAW QUARTERLY

REVIEWING RECENT DEVELOPMENTS IN THE EMPLOYER-EMPLOYEE RELATIONSHIP

TO ARBITRATE, OR NOT TO ARBITRATE: Is ADR Right for Your Company?

by *Stephen S. Zashin**

Arbitration has just about reached buzzword status these days—in employment agreements, legal commentary, litigation, and yes, the Employment Law Quarterly.

Arbitration is a form of alternative dispute resolution (ADR). Parties who agree to arbitrate put their dispute before a neutral third party they choose to hear the dispute, instead of going to court, and they agree to be bound by that decision. In the past several years, many employers have adopted mandatory arbitration agreements that oblige employees to arbitrate their claims in lieu of filing a lawsuit should they have a disagreement with the company.

There are pros and cons to arbitration. It can be cheaper, shorter, faster, and more private than a lawsuit. Also, the process does not typically involve huge damage awards. Arbitration is less formal than litigation, so the process is generally shorter, decisions are made faster and the proceedings are not typically public knowledge.

Some of the positive aspects of arbitration, such as informality, may become negatives, however, depending on the party and the situation. For example, some arbitration proceedings provide for little or no discovery and may disregard the rules of evidence. Further, judicial review of an arbitrator's decision is seriously limited. Arbitrators have a great deal of discretion. If a court will review an arbitrator's decision at all, a judge generally will not reverse such a decision unless there is evidence of corruption, personal bias, or fraud.

There have been plenty of disagreements between employers and employees, courts and commentators throughout the years as to the legality of mandatory arbitration agreements in the employment context. The Supreme Court decided just last year that such agreements are valid. Questions remain, however, as to the requirements of such agreements that will withstand judicial scrutiny.

That said—Zashin & Rich recently scored another victory for employers in *Maples v. Sterling Jewelers, Inc.*, pending in the United States District Court for the Western District of Tennessee, Eastern Division. In *Maples*, the employee signed a written agreement in which she agreed to submit all claims to the employer's alternative dispute resolution program. The

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employee later brought suit, claiming the employer discriminated against her and terminated her employment in violation of the Tennessee Human Rights Act. Although the employee did not dispute the fact that she signed the agreement, she argued that it was unenforceable for a host of reasons. The Court summarily dismissed the employee's arguments. The Court found that the employee did not carry her burden of proving that her claims were unsuitable for arbitration and stayed the action pending arbitration.

Decisions like *Maples* suggest that all employers should consider mandatory arbitration. Like any contract, however, the devil is in the details. Employers must ensure that arbitration agreements contain the proper language to avoiding enforcement disputes. But there are many other considerations, including: What claims will the arbitration agreement cover? What are the procedures that the arbitration program will follow? Who will pay the costs of the program? What employees will be bound by the agreement? Employers should consider these issues well in advance of implementation to ensure that a mandatory arbitration program is compatible with your company's needs. If you have questions about arbitration and what it can do for your company, please contact Stephen Zashin at (216)696-4441.

***Stephen S. Zashin**, a member of Z&R's Employment & Labor Department and an Ohio State Bar Association Certified Specialist in Labor & Employment Law, has extensive experience in all aspects of workplace harassment, employment discrimination and wrongful discharge issues.*

SUDDEN IMPACT: U.S. Supreme Court Passes on Disparate Impact Claims Under the ADEA

by *Robert C. Hicks**

Recently, the United States Supreme Court agreed to determine whether disparate impact claims exist under the Age Discrimination in Employment Act ("ADEA"). The Court heard oral argument last month in *Adams v. Florida Power Corp.*

In a surprise move, the Supreme Court dismissed the case on April 1, 2002. The Supreme Court decided that it had "improvidently allowed" review in this case. In so doing, the Court let stand the Eleventh Circuit Court of Appeals' decision that disparate impact claims do not exist under the ADEA.

A disparate impact claim alleges that a facially neutral employment practice actually *impacts* a protected classification more harshly than another. In such cases, an employee need not show that an employer had any discriminatory intent. Rather, an

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employee must establish only a correlation between the determining factor in the employment decision and the protected class of the employees harmed by that decision.

In *Adams*, the plaintiffs alleged that their former employer's seemingly neutral selection process for a reduction-in-force ("RIF") unjustly impacted employees over the age of 40. Specifically, the plaintiffs noted that more than 70% of the workers selected for discharge were over the age of 40. Under a disparate impact theory, the plaintiffs did not need to establish that their former employer had any discriminatory intent.

The Eleventh Circuit Court of Appeals determined that such a disparate impact claim did not exist under the ADEA. The Eleventh Circuit differentiated Title VII, which permits disparate impact claims, from the ADEA because the latter explicitly permits employers to "take any action otherwise prohibited...where the differentiation is based upon reasonable factors other than age." According to the Eleventh Circuit, this language is similar to language in the Equal Pay Act ("EPA") which provides that "wage discrimination on the basis of gender is prohibited unless the wage differential is based upon any other factor other than sex." The U.S. Supreme Court has interpreted the EPA's language to preclude disparate impact claims.

The Eleventh Circuit now joins the First, Third, Sixth, Seventh and Tenth Circuits that do not recognize disparate impact claims under the ADEA. Currently, the Second, Eighth and Ninth Circuits do recognize a disparate impact theory under the ADEA. As a result, employers, especially those with multi-state operations, must remain wary of seemingly benign employment practices that affect employees over 40 more harshly than others.

For more information about the ADEA or disparate impact claims, please contact Rob Hicks at (216)696-4441 or rch@zrlaw.com.

***Robert C. Hicks** *practices in the areas of employment discrimination, wrongful discharge, unfair competition and occupational health and safety.*

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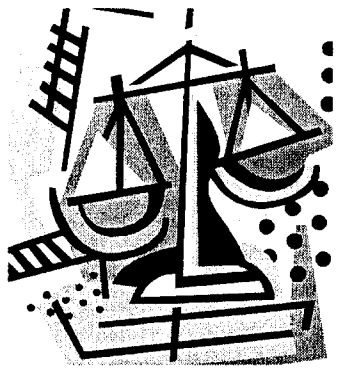

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SAY WHAT? U.S. Supreme Court Fails to Clarify FMLA Notice Regulations by *Lois A. Gruhin**

The U.S. Supreme Court recently decided its first case under the Family & Medical Leave Act of 1993 ("FMLA"). In *Ragsdale v. Wolverine World Wide, Inc.*, the Supreme Court reviewed the validity of a Department of Labor ("DOL") Regulation concerning FMLA notification requirements.

The Regulation established a penalty for an employer's failure to notify an employee that a leave would count against the employee's FMLA leave entitlement. The Regulation stated: "If the employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29 CFR § 825.700(a).

In *Ragsdale*, the employer granted the employee 30 weeks of leave under its sick leave policy. The employer did not, however, notify the employee that the absence would count against her 12-week FMLA entitlement. When the employee's 30 weeks of leave expired, she requested additional leave or permission to work part-time. The employer refused and terminated the employee when she failed to return to work. The employee filed suit, arguing that the Regulation guaranteed her an additional 12 weeks because the employer had not designated part of the 30- week absence as FMLA leave.

The Supreme Court, in a 5-4 decision, determined that the Regulation was invalid because it "relieves employees of the burden of proving any real impairment of their rights and resulting prejudice." In light of the employer's more generous leave policy, the Court found no connection between the penalty imposed by the Regulation and any harm suffered by the employee from the employer's failure to notify. The Court concluded that to hold otherwise, the employer would have to grant the employee an extra 12 weeks of leave even if the employee had full knowledge of the FMLA and expected the absence to count against the FMLA entitlement.

The Court reasoned that the Regulation subverted the careful balance struck by the FMLA (i.e., the balance between the needs of families and the needs of employers). The Court also found the Regulation inconsistent with Congress' intent. The FMLA has a *general* notice provision within the Act itself that requires employers to post a notice informing all employees of their FMLA rights. Further, Congress did not intend the Act to discourage employers from adopting *more* generous leave policies than that required by the Act. Clearly, the Supreme Court's decision suggests that an employer need not provide individual notice to an employee that his or her FMLA leave time will run concurrently with an employer's leave of absence policy.

Well, not exactly.

Notwithstanding its holding, the Court failed to rule on the validity of the FMLA's notice and designation requirements. The Court specifically left

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open the question as to whether employers should provide individualized notice of the FMLA. As a result, employers should provide individual notice in every case possible. That notice should include an FMLA leave designation and whether such leave will run concurrently with any other form of leave.

Essentially, the Supreme Court has suggested that liability under the DOL Regulations requires a case by case analysis. While that may have provided a benefit to the employer in *Ragsdale*, the Court has further complicated this intricate law. Nonetheless, the Court's decision strongly suggests that employers should provide general notice of FMLA rights in employee handbooks and collective bargaining agreements. Such notification may absolve an employer from liability if it fails to provide individualized notice at the inception of an FMLA qualified leave of absence. If you have questions about the FMLA's notification requirements, please contact Lois Gruhin at (614)861-5550 or lag@zrlaw.com.

***Lois Gruhin**, a member of Z&R's Columbus Office, is a former general counsel for Schottenstein Stores Corporation and has extensive experience in corporate compliance and employment law matters.*

GROWING PAINS--Ohio Supreme Court Expands the Time to File Violation of Public Policy Claims

by *Michele L. Jakubs**

The Ohio Supreme Court recently held that a four (4) year statute of limitations applied to a cause of action for wrongful discharge in violation of public policy. In *Pytlinksi v. Brocar Products,* the employee complained on several occasions that working conditions jeopardized employee health and safety. The employer subsequently demoted him. The employee then wrote a memorandum identifying conditions that he believed violated the Occupational Safety and Health Act ("OSHA"). The employer terminated him the next day.

The employee filed suit against the employer approximately one (1) year after his termination. In his Complaint, the employee claimed that his employer terminated his employment in violation of Ohio's public policy regarding workplace safety. The employer argued that the employee's lawsuit was time-barred under the 180-day statute of limitations set forth in Ohio's Whistleblower Statute (O.R.C. § 4113.52). The employer contended that the employee sought whistleblower protection even though he did not file his complaint based upon that statute. According to the employer, the employee had to strictly comply with the time requirements set forth in Ohio's Whisteblower Statute.

The Court reasoned that retaliation by an employer against an employee for filing a complaint regarding workplace

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safety violated the public policy of Ohio. The public policy favoring workplace safety creates a cause of action *independent* of Ohio's Whistleblower Statute. Therefore, the Ohio Supreme Court concluded that an employee alleging wrongful discharge in violation of public policy is not bound by the 180 day statute of limitations set forth in Ohio's Whistleblower Statute.

To determine the appropriate statute of limitations, the Court looked to the Ohio Revised Code for torts not covered by other statutory provisions. The Court concluded that a four (4) year statute of limitations applied to common law claims for wrongful discharge in violation of the public policy.

The implications of *Pytlinski* are clear. Employees can utilize Ohio's Whistleblower Statute if they strictly comply with its requirements. In addition, Ohio's Supreme Court has provided employees with a common law claim for wrongful discharge in violation of public policy. According to the Ohio Supreme Court, employees can utilize that tort even if they have not complied with the requirements of Ohio's Whistleblower Statute.

If you have questions concerning Ohio's Whistleblower Statute or wrongful discharge issues, please contact Michele Jakubs at (216)696-4441 or mlj@zrlaw.com.

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