



## **SUPREME COURT SAYS** Unintentional Age Discrimination Illegal

Older workers can now sue over employment policies that favor younger workers, even if no evidence of deliberate age discrimination exists, the U.S. Supreme Court rules in a major decision in March. Smith v. Jackson, Miss., 95 FEP Cases 641 (3/30/05).



**Bill Scale**

*...the Supreme Court rules that the Age Discrimination in Employment Act (ADEA) covers workplace practices that appear neutral, but that disproportionately affect workers age 40 and over.*

The case arose when a group of senior police officers in Jackson, Mississippi, challenged the city's decision to give proportionately more generous raises to officers with less than 5 years on the force, most of them younger. By a 5-3 vote, the Supreme Court rules that the Age Discrimination in Employment Act (ADEA) covers workplace practices that appear neutral, but that disproportionately affect workers age 40 and over. The new ruling allows age discrimination cases based on statistics brought in a similar manner as has existed for race and sex discrimination cases under Title VII of the Civil Rights Act of 1964. The Supreme Court ruled back in 1971 in the case of Griggs v. Duke Power Co., that Title VII covered not only intentionally based discrimination but also practices that appear objective and neutral, but had discriminatory effects.

In spite of the rationale, the Court upheld a ruling for the defense, finding that an employer could defend itself from an adverse impact case by proving that the challenged policy was based on reasonable factors other than age.

The city said that it needed to raise pay in the junior ranks to become more competitive with other police departments in the region. The Court found the city's rationale for the differential raises to be unquestionably

reasonable and thus not in violation of the law.

**Editor's Note:** There is some question as to who actually won the case. Most commentators agree that the decision is a very pro-worker interpretation of the federal age discrimination law. Plaintiffs will have a whole new theory to use in age discrimination cases, known as adverse impact, when an employment practice, although objective and neutral, nevertheless statistically adversely affects workers age 40 and over. For example, suppose an employer implements a requirement that employees have some type of degree or course work in computers, because they operate computers on their job. The plaintiff shows that statistically workers age 40 and over are more likely not to meet these job requirements, and a worker over age 40 brings a class action alleging adverse impact age discrimination.

Therefore, experts generally agree that there will be an increase in adverse impact-type age discrimination cases, although some experts emphasize that the employer's burden of proof in defending such cases is not very hard to meet, because the employer can win the case by showing that its policy is reasonable, even if it has an adverse impact on older employees. Statistics indicate that there are almost 73 million workers age 40 and over, according to the Bureau of Labor statistics, in the U.S.

The bottom line for employers in light of this ruling, is that they should more seriously review the possible statistical consequences of their policies, determining not only how their policies might adversely affect older workers, but also whether they have a good reason for making the policies. In other words, employers may have to justify their policies as based on reasonable factors other than age, if policies have a different impact on workers of different ages. ▶▶

## KNOW YOUR ATTORNEY

Fredrick R. Baker



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## SUPREME COURT continued from front

It should be noted that the defense available to employers in defending adverse impact age discrimination cases, is not as burdensome as that to employers defending adverse impact sex and race discrimination cases. In the latter type of cases, the employer may have to show that its policy adversely impacting minorities, is based on a business necessity.

In contrast, in defending age discrimination statistical cases, the employer need only show that its neutral policy is reasonable.

The Supreme Court stated that the age discrimination law... is consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment.

The Court found it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group.

## "DISORGANIZED" LABOR

Makes Plans After Continuing Membership Declines



The share of U.S. workers who are members of a labor union fell to 12.5% in 2004, down from 12.9% in 2003, continuing the trend of declining union membership over the last 20 years or so. In the private sector, union membership was just 7.9% in 2004, down from 8.2% a year earlier. Last

**Gary Wright**.....

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Dramatic changes are being discussed at the highest levels of organized labor. Perhaps the most controversial measure is that proposed by a union group led by Andrew Stern, President of the Service

Employees International Union, to consolidate

the 58 unions affiliated with the AFL-CIO into 20 or fewer large industrial section unions through mergers. Although this proposal has little chance of being adopted, the trend toward union mergers is continuing, and the AFL-CIO Executive Council has already decided that the Federation functions will be cut back to only do political and legislative work and leave organizing to the affiliated international unions.

Another extremely bold measure being considered by the Federation, is to expand organized labor's lucrative financial-services businesses. Union-owned companies already sell union members everything from life insurance to credit cards, but there is no single entity that has tried to reach out to all of the country's 16 million union households. Thus, AFL-CIO President John Sweeney, has appointed a working group to look at consolidating labor's profit-making financial entities into one holding company. The goal is to capture hundreds of millions of dollars a year, that now go to traditional providers such as insurers, credit-card companies, and investment managers. If successful, the AFL-CIO's \$120 million annual budget would be increased enormously, perhaps even quadrupled. In addition, the union movement would have greater influence on proxy votes on corporate America. For example, various union-owned companies currently administer only about \$20 billion of the \$400 billion-plus of multi-employer pension funds. Union leaders think the AFL-CIO can sell everything from health insurance to home mortgages.

A union-owned company called ULLICO currently covers 1.1 million union members with a variety of health insurance products. However, ULLICO has had its own set of problems, including allegations of corruption and insider trading. In fact, former ULLICO Chief, Robert Georgine, refused to testify in 2003 for Congressional committees, pleading the fifth amendment protection against self-incrimination, and the appointed investigator stated that there was no question that Georgine and other directors violated their fiduciary duty by insider stock deals disproportionately structured to favor them even as the company finished 2002 in debt, and saw its insurance rating downgraded twice during 2003. Many will remember the situation many years ago when some Teamsters leaders helped mobsters loot their union's pension funds. More recently, the former leaders of the Plumbers Union made a disastrous investment in a South Florida hotel that lost several hundred million dollars of the union's pension and other funds.

## BOEING CEO'S RESIGNATION

Raises Workplace Romance Issues



In March, the CEO of Boeing Co., Harry Stonecipher, resigned at the Board of Directors' request for improper behavior related to carrying out a consensual romantic relationship with another company executive. Reportedly the affair had been

**Jeff Jones**

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discovered by a romantic e-mail to the female executive from Stone-cipher, and after another company employee had anonymously reported the affair through an ethics complaint process that was chiefly for reporting financial issues pursuant to the Sarbanes-Oxley

Act. Although the affair by itself did not directly violate the code of business conduct at the company, an internal investigation included that the matter involved some issues of poor judgment involving the CEO, who is married. The company concluded that his behavior violated the code which said Boeing employees will not engage in conduct or activity that might raise questions about its honesty, impartiality or integrity.

This front page news development raises numerous implications for employers. Some reporters called the Boeing case the first public result of the Sarbanes-Oxley Act as companies push for greater integrity. The company apparently decided to take a zero tolerance approach with respect to its CEO, concluding that a chief executive is obligated to set the proper tone as part of his leadership.

Thus, Boeing's situation raises important questions dealing with leadership, ethics, internal complaint procedures, e-mail policies, and of course, romance in the workplace. With greater numbers of men and women working more closely together, romantic issues are likely to increasingly occur. Reportedly, about 75% of workers believe that they should be able to date a co-worker without interference from management, and many workers meet their spouses as a result of a work situation. On the other hand, companies fear actual and perceived favoritism, adverse publicity, sexual harassment cases, and the like. Where to draw the line is a most difficult issue.

Company policies usually allow relationships among co-workers, but prohibit them between managers and subordinates. One lesson to be learned, therefore, is the desirability of having a clear company policy, regarding the type relationships that are prohibited. In some instances, executives and subordinates have entered into so-called love contracts, which is basically recognition of a consensual relationship, and a commitment to notify a third party should the relationship no longer be welcomed.

## WHAT IS THE "CAT'S PAW"

Theory Of Employment Discrimination?



Questions often arise in discrimination cases as to liability for actions of biased and influential non-management co-workers, but in which the ultimate

**Ron Daves**

*Employers that rely on the opinions of biased non-decision makers can be held liable for discrimination in mixed-motive employment cases.*

decision makers have no bias. For example, what happens when a co-worker or even a low level supervisor, reports on alleged

deficiencies of another worker for discriminatory reasons, but the managers investigating and disciplining the reported employee have no bias and act for what in their view are for legitimate and non-discriminatory reasons. This has often been called the cat's paw theory of discrimination, as under this theory the employer is being duped by the reporting employee into making a decision, much like the fable in which the monkey convinces the cat to stick its paw into a hot fire to retrieve roasting chestnuts.

In a recent case, one court found that the employer is not liable for an employment decision influenced by a biased co-worker absent a showing that the co-worker exerted supervisory or decision-making authority. Hill v. Lockheed Martin Logistics Management, Inc., 354 F.3rd 277, petition for certiorari dismissed pursuant to stipulation No. 03-1443, 1/25/05. The courts in the Second, Third, Sixth, Eighth, and Ninth Circuits have found that employers that rely on the opinions of biased non-decision makers can be held liable for discrimination in mixed-motive employment cases. However, the recent 7-4 en banc ruling of the Fourth Circuit Court of Appeals, created a circuit split. The Lockheed Martin case had appeared headed to U.S. Supreme Court review, but has now been withdrawn by the parties, leaving untouched the Fourth Circuit decision finding that Lockheed Martin Logistics was not liable for discrimination, in spite of the involvement of a biased influential non-decision maker.

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## EMPLOYERS NEED TO WORRY About Wage-Hour Laws



**Mark Travis**.....  
**At least four states have state wage-hours laws that are significantly different than the federal law in many of their provisions...**

Employers must be knowledgeable about state wage-hour requirements that go beyond the federal law. At least four states have state wage-hours laws that are significantly different than

the federal law in many of their provisions, including California, Colorado, Hawaii, and Oregon.

Fourteen other states have state wage-hour laws that are similar to the federal law, but have exemption

standards that differ from the federal standards. These states include Alaska, Arkansas, California, Connecticut, Colorado, Hawaii, Illinois, Kentucky, Maryland, Minnesota, Montana, New Jersey, North Dakota, Oregon, Pennsylvania, Washington, West Virginia, and

Wisconsin. Further, differences between federal and state hourly minimum wage rates occur in some fifteen states. These states include Washington (\$7.16); Alaska (\$7.15); Connecticut (\$7.10); Oregon (\$7.05); California (\$6.75); Massachusetts (\$6.75); Rhode Island (\$6.75); Vermont (\$7.00); Hawaii (\$6.25); Maine (\$6.25); Delaware (\$6.15); Florida (\$6.15); Illinois (\$6.50); District of Columbia (\$6.60); and New York (\$6.00). Further, in Florida, Oregon, and Washington, minimum wage rates are indexed to inflation.

A source of information on federal, and all fifty states and U.S. territories, and other jurisdictions, as to the applicable minimum wage, is the U.S. Department of Labor's web site, at <http://www.dol.gov/dol/topics/wages/minimumwage.htm>.