

January 2004

EMPLOYMENT LAW UPDATE

by

**ROBERT B. FITZPATRICK, ESQ.
FITZPATRICK & ASSOCIATES**

Suite 660

Universal Building North

1875 Connecticut Avenue, N.W.

Washington, D.C. 20009-5728

(202) 588-5300 (telephone)

(202) 588-5023 (fax)

Fitzpatrick.law@verizon.net (e-mail)

<http://www.robertbfitzpatrick.com> (website)

Trout v. Sec'y of the Navy, 317 F.3d 286 (D.C. Cir. 2003)

In what Judge Rogers called “the most recent chapter of this extremely protracted litigation,” the D.C. Circuit reversed an award for prejudgment interest against the Navy for the time period before the Civil Rights Act of 1991 was passed. Section §114(2) of the Act provides that plaintiffs should receive the same prejudgment interest in cases against the federal government as they do in actions with private defendants. The District Court had held that Brown v. Sec’y of the Army, 78 F.3d 645 (D.C. Cir. 1996), which had barred § 114(2) interest prior to the promulgation of the act, only applied to cases where “the merits of the litigation had been completed before § 114(2) became effective.” The Court of Appeals rejected this argument, stating that “statutes waiving the sovereign immunity of the United States are subject to the rule of strict construction” and that Congress did not intend to apply the statute retroactively. The court further held that the trial court incorrectly applied Brown and that it was the discriminatory conduct itself and not the procedural posture of the case that was relevant to determining whether § 114(2) applied. There was no finding by the trial court that discrimination against the plaintiff class took place after 1979; as such, there should have been no prejudgment interest applied for the time period before 1991. The case was remanded for a final determination of the costs and fees owed to the plaintiff class.

Comments:

Stewart v. Ashcroft, 2003 U.S. App. LEXIS 26165 (D.C. Cir. 2003)

In an opinion by Judge Ginsburg, the United States Court of Appeals for the District of Columbia Circuit affirmed the District Court decision in an employment discrimination case to grant summary judgment to the government on the ground that the African-American plaintiff “failed to rebut the Government’s legitimate, nondiscriminatory reason for not selecting him,” even though the lower court had erred in refusing to find that his “non-selection” for a Chief position in the Environmental Crimes Section of the Department of Justice was an adverse employment action. The plaintiff had challenged two separate instances where another attorney was chosen over him for the position. The first challenge was time-barred as the appellate court found that the plaintiff failed to exhaust his remedies with the Equal Employment Opportunity Commission in a timely manner, even though the lower court had assumed without deciding that they had jurisdiction.

With respect to the second “non-selection,” the court cited to Brown v. Brody, 199 F.3d 446, 453 (D.C. Cir. 1999) for the proposition that the plaintiff had suffered an adverse employment action insofar as “the Government has denied him the opportunity to advance within the hierarchy” of his division and the Department of Justice generally. The court further stated that “failing to select an employee for a position with substantially greater supervisory authority is an adverse employment action,” citing Burke v. Gould, 286 F.3d 513 (D.C. Cir. 2002). Judge Henderson concurred in the judgment but dissented from this particular view, on the ground that the facts surrounding the plaintiff’s case “do not support a finding of objectively tangible harm.” The plaintiff did not lose any supervisory power through his non-selection and thus Burke was distinguishable.

All three judges agreed, however, that the plaintiff failed to demonstrate a pretext for discrimination after the government offered a valid reason for promoting another employee. With respect to the job qualifications that the plaintiff presented, “he was simply not discernibly better” than the attorney whom was promoted to the position. There was also a “complete lack of evidence in the record” with respect to any racial discrimination, with the only cited testimony being “unpersuasive and admittedly based on speculation.”

Comments:

The United States Court of Appeals for the District of Columbia Circuit, by Judge Tatel, granted the plaintiff non-profit organization's application for attorney's fees under the Equal Access to Justice Act (EAJA), but awarded substantially less than requested. The plaintiff had received a permanent injunction from the court against the Government's conveyance of its property sought by the plaintiff until the Government had remedied particular "procedural errors" in its method of such conveyance. The government argued that the plaintiff was not a prevailing party and that its position was substantially justified and that, if not, the fee awarded to the appellant was excessive. The court found that because the relief granted to the plaintiff was the "precise relief it sought," the plaintiff was a prevailing party. While the government's litigation position may have been substantially justified, but it failed to demonstrate the reasonableness of its agency's actions in the conduct that led to the permanent injunction, as the "regulations were so clear and the Secretary's failure to comply with them so obvious" that no reasonable person could conclude otherwise.

The total amount of fees requested by the plaintiff under the EAJA, however, was unreasonable. The EAJA provides a cap at \$125 per hour and the plaintiff failed to demonstrate that a "special-factor enhancement" was warranted in their particular case. The court cited to Pierce v. Underwood, 487 U.S. 552, 573, 108 S. Ct. 2541, 101 L.Ed.2d 490 (1988) for the proposition that acceptable special factors included "knowledge of a foreign language or expertise in 'an identifiable practice specialty such as patent law,'" but that novelty and difficulty of issues, undesirability of the case, counsel's labor and ability, and the case result did not qualify. The fact that the attorneys had to prepare the appeal in a relatively short time period did not count as a special factor, even though it was not specifically enumerated, as "Pierce made clear that an increase in the cap is justified only by work requiring specialized skills or knowledge beyond what lawyers use on a regular basis."

The court further held that the plaintiffs failed in the "burden of establishing the reasonableness of its fee request" as their time records did not adequately permit certainty as to time spent. Time records tend to "lump together multiple tasks" as well as lacking "adequate detail." Further, several attorneys "billed for time spent dealing with individuals whose roles in the case are never explained." There was also significant duplication of effort in the same tasks, inconsistencies where one lawyer claims to have met with another lawyer that in turn has no record of the meeting, and tasks that do not require reimbursement, such as conferences with the press. The court aggregated all of these deficiencies and claimed that the government only owed attorneys fees for fifty percent of the hours that the plaintiff's requested. The court did award full fees for paralegals' work as their timesheets provided "adequate detail" and evinced "that these employees performed suitable tasks."

Further, the plaintiff properly excluded messenger services and ground transportation from compensable expenses, but they failed to exclude overtime expenses for which the government was likewise not responsible. Where discrepancies existed between requested and billed amounts from Lexis and Westlaw, the lower amount was awarded to the plaintiffs.

Taylor v. Small, 350 F.3d 1286 (D.C. Cir. 2003)

The D.C. Circuit affirmed the District Court in holding that a plaintiff employee failed to establish a prima facie case of Title VII race discrimination, that Title VII did not contemplate a claim for “weight” discrimination, that a federal employee is not able to state a claim under § 504 of the Rehabilitation Act for employment discrimination, and that the district court’s procedural rulings did not constitute an abuse of discretion. Section § 504 applied specifically to “any program or activity receiving federal financial assistance or under any program or activity conducted by an Executive agency” and not to government employees. Since Congress had addressed government employees and specifically Smithsonian employees in § 501 of the Act, the court held that § 504 could not be read to “provide federal employees an ‘alternative route for relief under the *Rehabilitation Act*.’” Further, even if the plaintiff had pled under the correct statute, the court would not have had jurisdiction as she had failed to exhaust her administrative remedies.

The court further held that Title VII did not contemplate discrimination based upon excessive weight and therefore it only analyzed plaintiff’s race claims. Because the plaintiff offered “only indirect evidence of unlawful discrimination,” the court applied the three-part test articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) where (1) the employee must make a prima facie case for discrimination, (2) the employer must give a legitimate and nondiscriminatory reason for its actions, and (3) the plaintiff must then prove that the asserted reason for the adverse action was pretextual and that the reason was, in fact, discriminatory. The plaintiff failed in part one of that analysis as (i) the low performance evaluations given by her supervisor had been fully remedied; (ii) her claims of failure to promote were inapposite as she was not yet eligible for promotion at the time she requested it; and (iii) there could be no retaliation where there was no adverse employment action.

The court further dismissed the plaintiff’s various procedural objections, as none of them were at a level that “merits treatment in a published opinion.”

Comments:

The Fourth Circuit en banc vacated a prior panel decision, Ochletree v. Scollon Prods., Inc., 308 F.3d 351 (4th Cir. 2002), and held that there was evidence to support a jury verdict that (1) an employee had been subjected to sexual harassment by her employer, (2) the harassing conduct was so severe or pervasive as to alter the employee's work environment, (3) and that the conduct of employee's coworker was imputed to the employer under a negligence or constructive knowledge theory. The Court of Appeals specifically held that a reasonable jury could find unwelcome harassment on the basis of sex where a coworker sang a "disrespectful and degrading song that...by its words aimed at a woman" to the plaintiff and where the plaintiff was repeatedly singled out by male employees for laughter at the plaintiff's expense. The court further found that the totality of the evidence which included numerous incidents that "consistently painted women in a sexually subservient and demeaning light was sufficiently severe or pervasive to alter the conditions of Ochletree's employment and to create an abusive work environment," occurring on a daily basis, such that it would drive the plaintiff from the room and "surely made it more difficult for her to do her job." Finally, the court found that a jury could find that the company's sexual harassment policy "failed to provide reasonable avenues of complaint" as it failed to "place any duty on supervisors to report incidents of sexual harassment" and the "company's 'open door policy' was an illusion." The Court of Appeals did, however, reverse the punitive damages awarded by the District Court, as there was not enough evidence to show that the employer had the requisite knowledge for punitive liability.

Judge Niemeyer, who joined Judge Williams in the panel decision, actually concurred in the judgment of the en banc court. Judge Niemeyer disagreed with the court's analysis and actually agreed with the dissent insofar as the majority failed to explain how the "generally coarse conditions discriminated against one person or against one sex." However, the judge concurred in the judgment, stating that "the presence of the background conduct based on sexual perversion" led him to believe that the court could not "take the three incidents in isolation." Judge Niemeyer limited his concurrence to "the peculiar circumstances of this case."

Judge Williams, who had written the panel decision, dissented from the en banc decision. He could not agree that the jury verdict could be sustained "by simply recounting various types of vulgarity and then concluding *ipse dixit* that such behavior constituted gender-motivated discrimination." The dissenting opinion found specifically that the "vulgar talk and behavior was experienced by, and equally offensive to, all of the production shop workers, irrespective of gender" and that therefore discrimination on the basis of sex was not found. He further agrees with Judge Niemeyer that the three incidents in isolation were not "severe or pervasive as a matter of law," but found that there was mere vulgarity and not sexual discrimination in the background of these incidents.

Comments:

Hill v. Lockheed Martin Logistics Management, Inc., 314 F.3d 657 (4th Cir. 2003) (en banc)

The Fourth Circuit en banc reversed its panel opinion and upheld a district court decision granting summary judgment to defendant on claims of wrongful termination and retaliation under Title VII, the Age Discrimination Employment Act, and the New York Human Rights Law. Judge Traxler wrote an opinion that held that the subordinate employee who made discriminatory remarks with respect to plaintiff’s sex and age did not subject his employer to vicarious liability for mixed motive termination, as the discriminatory motivation must exist in individuals who, “perhaps not acting as formal decisionmakers,” must at base “act in a supervisory or managerial capacity as the agents of the employer.” While the court acknowledged that an employer cannot insulate itself from liability stemming from discrimination on the part of a supervisor or other decisionmaker through use of a “formal decisionmaker who merely rubber-stamped or acted as a cat’s paw for the supervisor’s decision,” the court refused to construe the anti-discrimination statutes as allowing a “biased subordinate who has no supervisory or disciplinary authority” to be considered as a decisionmaker.

The court further found that three reprimands against the plaintiff by the employer and a subsequent termination were not discriminatory simply because a subordinate employee who made discriminatory remarks against the plaintiff had brought certain, undisputed violations on the part of the plaintiff with respect to company rules to the company’s attention. The plaintiff had failed to show that any decisionmaker of the defendant had a discriminatory motivation and further failed to make a prima facie case of age or sex discrimination because she could not prove that she was meeting the defendant’s “legitimate expectations at the time of the adverse employment action.” The court further applied the same logic to the plaintiff’s retaliation claims.

In dissent, Judge Michael, joined by three other circuit judges, opined that the majority’s decision put the Fourth Circuit squarely “at odds with virtually every other circuit” and that the panel decision should have been upheld. The dissent further stated that the majority’s decision was wrong insofar as “an employer is off the hook for a discriminatory employment decision that is motivated by the bias of a subordinate who lacks decisionmaking authority.” Specifically, the majority decision failed to hold the facts in a light most favorable to the nonmoving party (the plaintiff) and also rendered “Title VII and the ADEA essentially toothless when it comes to protecting employees against unlawful employment decisions that are motivated by biased subordinates.”

Comments:

The plaintiff teacher sued a North Carolina county Board of Education and its superintendent for race discrimination and retaliation against her exercise of free speech. The Fourth Circuit vacated the District Court decision to grant summary judgment to the superintendent as an individual with respect to the federal retaliation claim under the First Amendment, but affirmed summary judgment on that claim with respect to that individual in his official capacity and to Board of Education. The court also affirmed summary judgment to both defendants on plaintiff's federal race discrimination claims and to state constitutional claims related to free speech and race discrimination.

The court articulated the rule that for retaliation to violate a public employee's right to free speech must (1) relate to a public concern, (2) be of the kind where the First Amendment rights involved outweigh "the employer's interest in efficient operation of the workplace" and (3) be causally related to the speech itself. The court held that race discrimination in the school system was of public concern as was "discriminatory discipline." Further, the plaintiff's "sincere and respectful" voicing of concerns regarding race discrimination in the school district "did not affect the ability of administrators and teachers at Lewisville to deliver their educational services" and further did not "diminish the quality of education being provided." As such, her free speech interests were not outweighed by the employer's interest. Finally, a rational jury could have found that the plaintiff's demotion was a direct result of retaliation, as her continued speech against discrimination was met with increasingly negative performance evaluations and the individual defendant's specific admonishments to "avoid making waves." As such, the plaintiff's race discrimination claim, with respect to the superintendent, survived summary judgment.

The plaintiff failed, however, to show sufficient evidence that the board's policy or custom caused the violation. As such, the Board could not be held liable. However, while "mid-level school administrators" enjoyed some qualified immunity from suit, such immunity "does not strip them of clearly established constitutional protections" and the suit could go forward against the individual defendant. The plaintiff was unable to show race discrimination on the part of either defendant as, even though she established a prima facie case for race discrimination, the defendant was able to establish sufficient evidence that shifted the burden back to the plaintiff to show pretext, which she could not sufficiently show. While she could show that she had been reassigned on the basis of speech regarding "race issues," she could not sufficiently show that she was reassigned because of her race itself. Finally, because claims brought under the North Carolina constitution "may be asserted only against state officials acting in their official capacities," the claims were properly dismissed against the superintendent in his individual capacity, and the state constitution claims could have brought only if there was "no other remedy under state law to redress the violation," which there was by North Carolina statute.

Judge Wilkinson dissented from the parts of the majority opinion where summary judgment was vacated on the ground that the majority's opinion "does public education too much harm," arguing that "a simple personality dispute" was "misleadingly cloaked in constitutional clothing." The plaintiff was speaking out of personal interest rather than public concern, the plaintiff "had proceeded in a confrontational manner disruptive" to the operation of the school where the plaintiff was constantly in shouting matches with members of the school board and other teachers. Further, the facts showed many other

aspects of the plaintiff’s behavior that led to her retaliation, besides her constitutionally protected speech. The dissent also rejected the majority’s stripping the individual defendant of “qualified immunity for his decision to reassign a pair of squabbling administrators,” which would school districts to “find their efforts at disciplinary involvement the subject of litigation.” The majority responded to the dissent in its opinion that they were “simply recognizing that the First Amendment allows a school administrator or teacher to debate issues of discipline” and that the “underprivileged fifth-grade student who is warehoused in a time-out room does not have the option of going to a private school or somewhere else” and that this “student has been abandoned at the end of the road unless someone...is able to speak up for him.”

Comments:

King v. Marriott, 337 F.3d 421 (4th Cir. 2003)

The Fourth Circuit reversed a District Court ruling that ERISA completely preempted a terminated employee's suit for wrongful discharge under the laws of Maryland. While ERISA completely preempts many state law claims, plaintiff's state claim was not preempted by ERISA's provision that provides for a cause of action stemming from termination based upon her testifying in "any inquiry or proceeding relating to" ERISA. An inquiry or proceeding for the purposes of ERISA does not extend to internal complaints filed with defendant employer's co-workers, supervisors, and attorneys. The Fourth Circuit declined to follow the Fifth and Ninth Circuits which had held intra-office complaints to fall within the ambit of ERISA. Further, plaintiff did not waive her right to object to removal by stating an ERISA claim as an alternative argument after her attempt to block removal was denied.

Comments:

Rowland v. American General Finance, Inc., 340 F.3d 187 (4th Cir. 2003)

In an opinion by Judge Motz, the Fourth Circuit vacated a District Court judgment on a failure to promote claim, holding that the lower court abused its discretion when it declined to provide a mixed-motive jury instruction where the plaintiff offered evidence that plaintiff's superior had authority to promote plaintiff to a particular position, knew that plaintiff had "undisputed qualifications for and interest" in the position, and allegedly said to plaintiff that he did not "need another woman" in the position, and where another witness gave evidence that the defendant employer had a history of sexual discrimination. The court applied the standards set forth in Desert Palace, Inc. v. Costa, 123 S. Ct. 2148 (2003) in holding that the evidence was sufficient for a mixed-motive instruction.

The appellate court also made certain evidentiary rulings for the case on remand. The court held that the trial court abused its discretion in admitting a letter from defendant's customer complaining about how the company, and particularly the plaintiff, treated him poorly with respect to a loan that he attempted to cancel. The letter was admitted over a hearsay objection solely to prove the matter asserted. The defendant claimed that the letter would have fallen under the business records exception to the hearsay rule, but the letter was not prepared by the defendant in the course of regular business activity. Even if it had been "considered part of a larger business record," the letter would be subject to double hearsay and would be required to fall under one of the exceptions or there would have to be "standard verification procedures for customer complaints" in place. None of this was the case. The letter was also not admissible under the "residual hearsay exception," as the defendant did not rely upon the exception at trial. However, the district court did not abuse its discretion in allowing witnesses and exhibits at trial that violated the "technical requirements" of the discovery rules, where the plaintiff still "had ample opportunity to prepare for the witnesses and exhibits put forth" by the defendant.

Comments:

Bryant v. Aiken Regional Medical Centers, Inc., 333 F.3d 536 (4th Cir. 2003)

The Fourth Circuit, in an opinion by Judge Wilkinson, affirmed a jury award for backpay and compensatory damages for emotional damages where the plaintiff nurse claimed that the defendant employer failed to promote her due to racial discrimination and retaliation against the plaintiff for her complaints regarding defendant's hiring policies, but the court reversed a punitive damage award. The court held that there was sufficient evidence for the court to find retaliation and unlawful discrimination in hiring.

The court further held that "a series of specific physical ailments" were sufficient to show emotional trauma to support an award for compensatory damages for emotional distress. The fact that "she did not seek medical attention" for these symptoms did not disprove the validity of such ailments, as prayer and conversations with family were "an understandable way" for the plaintiff "to respond to the situation in which she found herself." The fact that she was a medical professional herself could further be considered by the jury. Further, the degree of the plaintiff's distress was "a reasonable reaction to this mystifying frustration of her professional career." Further, \$50,000 was not an excessive award, given the nature of the plaintiff's physical symptoms.

However, the court reversed the punitive damage award, citing Kolstad v. Am. Dental Assoc., 527 U.S. 526, 545 (1999) for the position that "an employer may not be vicariously liable for the discriminatory decisions of managerial agents where these decisions are contrary to the employer's good faith efforts to comply with Title VII." The fact that the defendant had an "extensively implemented organization-wide Equal Employment Opportunity Policy," a grievance policy, a diversity training program, and voluntary monitoring of demographics in the area served as "widespread anti-discrimination efforts" that precluded punitive damages.

The Fourth Circuit also held that the trial court did not abuse its discretion in refusing to offset the tax burden resulting from a lump-sum award, citing Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336, 356 (4th Cir. 1994) as granting the court broad discretion in the fashioning of remedies.

Comments:

McLean v. Patten Communities, Inc., 332 F.3d 714 (4th Cir. 2003)

The Court of Appeals vacated in part and affirmed in part a District Court decision in North Carolina granting summary judgment to a defendant employer where the plaintiff employee sued for wrongful termination and negligent retention or supervision with respect to race and sex discrimination. The court affirmed the summary judgment in favor of defendants on the negligent retention and supervision claims, as such a claim would have to be based on sexual harassment or retaliation against the employee, and there was no private right of action for retaliation under N.C. Gen. Stat § 143-422.2, which articulates a public policy against discrimination.

However, the court held that the employee could proceed on a claim under 42 U.S.C. § 1981 as, under Spriggs v. Diamond Auto Glass, 165 F.3d 1015, 1018-19 (4th Cir. 1999), a contractual relationship existed with the employer even though she was an at-will employee. Further, the appellate court vacated the summary judgment with respect to wrongful discharge, holding that such a cause of action could be maintained with respect to race and sex discrimination under the public policy against such discrimination contemplated in N.C. Gen. Stat § 143-422.2. The court held specifically that sex discrimination could be found where “an employee is discharged because she had refused to accede to the sexual advances of a supervisor” and that where race could have caused her termination, race discrimination could also be found. Summary judgment was vacated and the case was remanded to the lower court.

Judge Traxler concurred with allowing the plaintiff to proceed on § 1981 claims and wrongful discharge claims, but dissented from the affirmation of summary judgment with respect to negligent retention and supervision. In his dissent, Judge Traxler could “see no reason why North Carolina would believe it proper to hold an employer responsible for retaining an employee who committed a common-law tort but not for retaining an employee who committed a statutory tort.”

Comments:

Dixon v. Coburg Dairy, Inc., 330 F.3d 250 (4th Cir. 2003)

An employee of a private corporation sued his employer in state court after being discharged when he refused to remove Confederate flags from his toolbox, even though his employer offered to provide him with another toolbox, so long as he kept the Confederate flag-adorned toolbox out of the workplace. The case was removed to federal court, where summary judgment was granted on both federal and state claims. The Fourth Circuit, by Judge Gregory, affirmed that removal was proper, as the federal courts had subject-matter jurisdiction over claims of wrongful discharge and retaliation under a South Carolina statute that provided a cause of action where the plaintiff was discharged on the basis of a political right contemplated under the United States Constitution. The Court of Appeals also held that the District Court had no jurisdiction over constitutional objections to a discharge where the employer was not a state actor and there was no allegation that the plaintiff was treated differently because of his race.

The Fourth Circuit, upon finding federal subject matter jurisdiction, affirmed summary judgment for the defendant on the wrongful discharge and retaliation claims. The employer did not infringe upon the plaintiff's right to exercise free speech under the First Amendment, as the right to fly the Confederate flag is "not unlimited." While the South Carolina law contemplated a private employer cannot fire its employee because of the employee's exercise of Constitutionally-protected free speech outside of the office, a private employer is not constitutionally required to allow boundless expression in the workplace. A contrary finding "would lead to the absurd result of making every private workplace a constitutionally protected forum for political discourse."

The court also upheld summary judgment on pendent state claims for breach of contract, defamation, intentional infliction of emotional distress and conspiracy, where the plaintiff failed to allege any material facts relating to these state causes of action.

Judge Goodwin concurred in part, but dissented with respect to the court's finding that federal question jurisdiction existed over the wrongful discharge and retaliation claims. The South Carolina legislature had contemplated a "solely private action" relating to the "exercise of First Amendment rights" that did not exist in federal law. While the exercise of free speech may have "no content under federal law, it is an entirely different question whether it might have some content under *state law*." Judge Goodwin further stated that even if there was some federal question, it was not "substantial" enough to be within the purview of federal subject matter jurisdiction.

Comments:

Booth v. Maryland, 327 F.3d 377 (4th Cir. 2003)

The Fourth Circuit affirmed in part and reversed in part summary judgment for the defendant employer on discrimination claims brought by a corrections officer who was disciplined under a policy against wearing hair in dreadlocks. The officer wore dreadlocks as a part of his Rastafarian religion, which considers “the growing and wearing of dreadlocks as a tenet.” The District Court correctly held that there was no facial discrimination in the policy, but erred in not acknowledging that “the legitimate secular purposes underlying the policy have been abandoned in a manner that favors other religions over his religion.”

The District Court also, according to the Court of Appeals, erred in that it “implicitly ruled” that the plaintiff could only bring a challenge as to how the policy was applied under Title VII and that such a claim could not be brought under the First Amendment. The appellate court stated that several district courts had “erroneously” concluded that they must follow a footnote in Hughes v. Bedsole, 48 F3d 1376, 1383.n6 (4th Cir. 1995), which stated that a plaintiff could not bring an action under § 1983 for violation of Fourteenth Amendment rights, even though the panel there failed to cite to two previous panel decisions that stood for the proposition that Title VII “does not preclude a public sector employee from bring a § 1983 action based on alleged violations of the *Equal Protection Clause*.” The court held that § 1983 actions and Title VII actions remain distinct from one another and therefore it reversed summary judgment against the plaintiff with respect to First Amendment claims related to the free exercise of religion and the related state constitutional claims. The court affirmed summary judgment with respect to claims of racial discrimination under 42 U.S.C. § 1981 and defamation under Maryland law, as the facts could neither prove that the defendants enforced the grooming policy because of his race nor show that any statement disseminated regarding his violation of the policy was false, because he had facially violated the policy.

Comments:

Peters v. Jenney, 327 F.3d 307 (4th Cir. 2003)

A Caucasian director of a gifted education program sued a school board for retaliation under Title VI and the First Amendment pursuant to 42 U.S.C. § 1983 and also for defamation when her contract was not renewed by the School Board. The plaintiff argued that the failure to renew the contract was based on her attempts to augment the level of participation by minority students in the gifted program and not on poor performance at work. The district court granted summary judgment on all the claims and the plaintiff appealed the judgment on the retaliation claims only.

The Court of Appeals reversed the district court decision, stating that a private cause of action for retaliation existed under Title VI. The court held that 34 C.F.R. § 100.7(e), promulgated by the Department of Education, is a valid interpretation of § 601 of the Civil Rights Act of 1964 and therefore provides a private right of action under the terms of Chevron USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984), which gives deference to an administrative agency's regulation pursuant to federal law, where Congress has not evinced with clarity its precise intent. The court stated that "an agency quite reasonably could construe § 601 to forbid purposeful retaliation based upon opposition to practices made unlawful by § 601." Because the Supreme Court in Alexander v. Sandoval, 532 U.S. 275, 149 L. Ed. 2d 517, 121 S. Ct. 1511 (2001) made it clear that § 601 did not "forbid unintentional disparate impact practices but merely forbade intentional discrimination," the retaliation regulations were enforceable through a private action only to the extent that intentional discrimination was involved. Thus, on remand, the plaintiff had to show evidence that she had engaged in activity that was protected, that an employment action had been taken against her, and that there was a causal connection between the two.

The court further reversed the summary judgment for the defendants of the First Amendment claim. The plaintiff had "fully, if inartfully, pleaded the factual predicate for her First Amendment claim," where she "alleged in her complaint that she was terminated because of her advocacy of changes to the gifted program, in violation of the Fourteenth Amendment." The facts that the defendant had addressed the claim as related to the first amendment in their submissions, the oral argument and summary judgment "extensively explored" the First Amendment claims, and the district court ruled on the merits of the claim, militated against any argument that the plaintiff had waived the claim. As to the merits, the only point of contention raised by the defendant was the "necessary causal connection between any protected expression and the non-renewal of her contract." The appellate court found that a reasonable fact-finder could conclude that the plaintiff's advocating for policy changes was a but-for cause of her termination.

Judge Widener dissented as to both arguments. The dissent cited to Jackson v. Birmingham Bd. Of Educ., 309 F.3d 1333 (11th Cir. 2002), which held that a private action did not exist under Title IX under Sandoval. Reading Title IX and VI as "*in pari materia*," the dissent would have held that Title VI contemplated no cause of action for retaliation. Judge Widener also took exception to the majority's finding with respect to the First Amendment claim, finding that the plaintiff "failed to develop her argument to the court to clarify that she was asserting a *first amendment* claim" and that "liberal pleading rules do not require a defendant or the court to hypothesize as to the constitutional protection a plaintiff seeks to vindicate when plaintiff continues to provide unresponsive and contradictory arguments."

Comments:

Thompson v. United States Dep't of Hous. and Urban Dev., 219 F.R.D. 93 (D. Md. 2003)

Where defendants failed to provide affidavits, excerpts from depositions or other “similarly detailed information in opposition” to Plaintiff’s motions to discover electronic records and motions for sanctions when defendant did not comply orders to produce such evidence, Magistrate Judge Paul Grimm held that the defendant failed to provide adequately particularized objections to the plaintiff’s motions, thereby rendering the Plaintiff’s motions “meritorious.” The court also discussed the duty to preserve certain documents and to suspend regular policies of retaining and destroying documents, articulated in Zubulake v. UBS Warburg LLC, 2003 WL 22410619 (S.D.N.Y. October 22, 2003), holding that the defendants had a specific duty to maintain records generated by “‘key players’ in the case.”

In imposing sanctions against the defendant, the court employed a five-factor test articulated in Southern States Rack and Fixture, Inc. v. Sherwin Williams, 318 F.3d 592 (4th Cir. 2003), all five of which militated against the defendant. The five factors articulated in Southern States were: (1) surprise to the party against whom evidence would be offered; (2) ability of the party to cure that surprise; (3) extent to which allowing evidence would disrupt the trial; (4) the importance of the discovery; and (5) the non-disclosing party’s explanation. The sanctions specifically precluded the defendants from introducing any electronic records that were not timely disclosed to plaintiff during discovery and from using such records to refresh witness recollections, permitted the defendants to use those same records, awarded attorney’s fees from defendant to plaintiff for any additional expense incurred in reviewing and analyzing such records, and allowed the plaintiff to file a motion to hold the defendant in contempt of court if there was additional information regarding non-production.

Comments:

Magistrate Judge Paul Grimm granted in part and denied in part an interim award for attorney's fees requested by plaintiffs to be paid by both federal and local defendants pursuant to 42 U.S.C. § 1988. Judge Garbis in a prior proceeding in the same litigation had denied the federal defendants' motion to dismiss Title VI and § 1982 claims, and therefore the Plaintiffs would be entitled to reasonable market rate attorneys fees rather than substantially lower rates contemplated by the Equal Access to Justice Act. In order to qualify for attorneys' fees, the plaintiffs would first need to meet the threshold of "prevailing party" under § 1988, which the plaintiffs met on the basis of relief in the form of a consent decree. The local defendants' argument that the decree was only partial was inapposite, as the decree made certain actions "legally enforceable and gave the Plaintiffs the right to enforce them in the event that...the Local Defendants subsequently took actions contrary to what was agreed...." Magistrate Judge Grimm also held that a prevailing party may obtain attorneys' fees for the time spent appropriately monitoring and enforcing the decree, which "is fundamentally logical" based on the fact that "discrimination-free housing placement for the residents of public housing is nothing more than a dream without the aid of enforcement...."

With respect to the timeliness of the motion at question in Magistrate Judge Grimm's opinion, the local and federal defendants argued respectively that the motion was brought prematurely and that it was brought too late. Both arguments were wrong. Plaintiffs were not required to wait until a case was concluded in its entirety before receiving attorney's fees and thus the motion was not premature. Further, Fed. R. Civ. P. 54(d)(2)(B), which requires attorney's fee claims to be made within fourteen days of entry of the judgment, was irrelevant as a "partial consent decree...is not a judgment that is appealable." Having found that attorney's fees were available, the court then applied the lodestar approach to calculating reasonable attorneys fees, by applying the twelve-factors stated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). Applying these factors to the litigation, the court found that the fees requested by the defendant were reasonable with respect to the time and labor required, the novelty and difficulty of the issues, and the skill needed in the litigation, and that the experience, reputation, and ability of the attorneys and general undesirability of the case strongly supported a fee award. Further, the hourly rate requested by the plaintiff was "customary" and in accordance with the Laffey Matrix, even if the Matrix may not have applied to the plaintiffs.

The plaintiffs were "under a primary duty to provide sufficient detail to justify a requested attorney's fee award" and the defendants had a "concomitant duty to specify with particularity the basis for their objections." While the court found that the bills were generally "sufficiently detailed to permit reasonable review," the court did not hesitate "to reduce the fees to adjust for insufficient detail." By the same token, "what is sauce for the goose...is sauce for the gander" and the court admonished the defendants for imposing too much investigative work on the court, warning that it would not "review any challenged entry in the bill unless the challenging party has identified it specifically and given an adequate explanation for the basis of the challenge." The defendants were further unsuccessful in showing that the plaintiffs failed to exercise billing judgment, as the plaintiffs excluded entries in a manner that demonstrated sufficient judgment.

With respect to the reasonableness of the rate itself, the court was authorized to award fees in accordance with current rates rather than historic ones for a case that had been in litigation for many years. It could do so, however, only with respect to the local defendants as the federal defendants sued in a non-individual were entitled to calculation at historic rather than current rates. The plaintiffs were to receive fees from plaintiffs in accordance with the District of Maryland's fee guidelines with respect to claims brought by the ACLU. However, the "locality rule" which causes the court to look first at the market rate in the forum in determining reasonable attorney's fee, did not force the plaintiff to collect at Baltimore's lower rates than those of Washington, D.C., as the plaintiff was justified in using a D.C. firm when it was difficult to locate a Baltimore firm. Since Washington D.C. rates were appropriate for these fees, the Laffey Matrix was appropriate as D.C. courts tend to apply this system for determining reasonable attorneys fees. The court did reduce some of these fee awards where the amount of time spent in completing certain legal tasks was unreasonable.

Finally, the court held that holding the defendants jointly and severally liable would have been unjust and the court, rather than apportioning fees equally, chose a fee apportionment that distributed liability in accordance with "each defendant's percentage of culpability and other objective factors." The court cited to Grendel's Den v. Larkin, 749 F.2d 945, 960 (5th Cir. 1984) for the factors by which to apportion liability fairly: the nature of the injury, whether it was "singular in nature," who caused the injury, the amount of time spent litigating against each defendant, and least of all, the defendant's "ability to pay." The court then apportioned the liability between the federal and local defendants in accordance with these factors.

Comments:

The District of Columbia Court of Appeals upheld the compensatory damages awarded to a plaintiff who prevailed on claims of negligent supervision and unlawful retaliation against an employer corporation for its actions with respect to the sexual harassment of the plaintiff by one of its employees. With respect to negligent supervision, the appellate court held that where plaintiff provided, over several months, evidence to his employer of his subjection to sexual harassment, there was sufficient evidence for a jury that the employer had either actual or constructive knowledge of the sexual harassment. The court also upheld the retaliation claim, holding that a transfer from a position as a banquet chef to working in a cafeteria line, where the employee had no responsibility, no potential for overtime, and “a diminution of job title that adversely affected his employability” constituted an adverse employment action and that the jury could reasonably infer retaliation. The lower court had also issued a “missing witness instruction” with respect to two supervisors who did not testify, which allowed “the jury to infer that their testimony would not have favored” the employer. The appellants did not challenge that instruction.

The employer further argued that they employee could not recover emotional distress damages because he could not establish a “zone of danger,” but the court refused to apply a “zone of physical danger test” to a negligent supervision tort, especially where the unsupervised tortious conduct was intentional. The court further held that the plaintiff’s evidence of humiliation, anxiety, and physical symptoms stemming from the transfer and the wrongful termination was sufficient to support a causal relationship between emotional distress and the wrongful conduct.

The employer also argued for a new trial, averring that “negligent supervision, while an independent tort directed to the conduct of the employer, requires logically antecedent proof of a tort committed by the supervised employee” and that therefore the employee had failed to prove an essential element of the tort. The court agreed with this logic, but held that the employer failed to adequately preserve the argument for appeal, because its objection at trial had been generally to “*any* instruction on negligent supervision,” which presented a significant different question of law than the specific “*form* of the instruction.”

However, the court did vacate and remand the nearly \$5 million dollar punitive damages award. While the court held that “the evidence of malice or reckless indifference on Daka’s part was fully sufficient to sustain an award of punitive damages,” the court did acknowledge that financial statements of themselves were insufficient to prove the employer’s net worth. Nevertheless, the court held that because there was evidence that the employer had some ability to pay, judgment as a matter of law on punitive damages was inappropriate. The court did, however, vacate the damage award, remanding the case to the trial court with instructions to reduce the punitive damages award to an amount consistent with State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513 (2003). The court focused specifically on the ratio between punitive and compensatory damages of 26:1, quoting language from State Farm and BMW v. Gore, 517 U.S. 559 (1996) indicating that single-digit ratios were generally more appropriate and an award of greater than 5:1 would “bear a very heavy burden of justification.” The court specifically allowed for the trial judge to award “the constitutional maximum which the jury could properly award,” thereby obviating the need for a new trial on punitive damages.

Howard University v. Lacy, 828 A.2d 733 (D.C. 2003)

The District of Columbia Court of Appeals held that the trial court erroneously invoked offensive collateral estoppel in a case where an Employee Handbook for the defendant university had been treated as an enforceable contract in prior cases involving other plaintiffs, because the issue as to whether the handbook was, in fact, a contract was not contested or litigated in the prior cases. Further, evidence of the subjective intent of parties is necessary to determine whether a handbook is a contract where an ambiguity exists between the parties and such evidence is not provided by prior cases involving other parties, especially when the cases are “quite distinguishable.” In dicta, the court stated that front and back pay damages awarded by the jury were not excessive, but it did set aside a tuition remission award as speculative, because it supposed that the plaintiff’s daughter would inevitably choose to attend defendant university eleven years after the termination and that the plaintiff would have remained with the university for that time but for the termination.

Comments:

Lively v. Flexible Packaging Ass'n, 830 A.2d 874 (D.C. 2003) (en banc)

The District of Columbia Court of Appeals after rehearing a case en banc, *inter alia*, reversed a trial court judgment for defendant notwithstanding the jury verdict in favor of the plaintiff on a hostile work environment claim. The trial court had ruled that the statute of limitations had run on the employee's hostile work environment claim and the appellate court had affirmed this ruling originally in a panel decision. The case was reheard en banc and then held in abeyance for nearly two years while awaiting the Supreme Court's decision in AMTRAK v. Morgan, 536 U.S. 101 (2002) to guide the appellate court in its decision.

The court adopted the approach set forth in Morgan, which "highlights the fundamental difference between a discrete discriminatory act and a hostile work environment claim by emphasizing both the cumulative effect of incidents comprising that claim, and its unitary nature." The appellate court adopted an "entire mosaic" analysis pursuant to Morgan that focused on (1) the frequency of conduct that it is discriminatory, (2) the severity of the conduct, (3) whether the conduct is "physically threatening or humiliating" or a "mere offensive utterance" and (4) whether there is interference with the employee's performance at work. The court then held, reviewing the claim in the light most favorable to the plaintiff, that the one-year statute of limitations had not run as a matter of law, because "a hostile work environment claim concerns a single unlawful practice which is treated as an indivisible whole for purposes of the limitation period, even if the an initial portion of that claim accrued outside the limitations period." The court further held that reasonable jurors could find for the plaintiff on a hostile work environment claim, where there existed a series of related acts involving offensive language to describe female employees and women generally, offensive treatment of women, an employer's "tendency to demean women by criticizing their communication skills when they complained about the harassing, hostile, and humiliating work environment."

The court reaffirmed the panel decisions to affirm judgments for the defendant notwithstanding the verdicts on claims for unequal pay, retaliation, and intentional infliction of emotional distress. The court remanded the case with respect to the punitive damages award, as they should have been related only to the hostile work environment claim that was reinstated by the appellate court.

Comments:

Friolo v. Frankel, 373 Md. 501, 819 A.2d 354 (Md. 2003)

The Maryland Court of Appeals, in an opinion that chronicles federal and state jurisprudence with respect to the development of the “lodestar” approach to fee calculation, held that such an approach is appropriate for calculating fee awards in actions brought under Maryland Code §§ 3-427 and 3.507.1 of the Labor and Employment Article. The “lodestar” approach is the method by which the court multiplies the reasonable number of hours expended by an attorney in litigation by a reasonable rate and then adjusts an attorney fee award to that particular calculation. The court qualified its own holding, however, by stating that such calculation must also include “careful consideration of appropriate adjustments” to their calculation “which, in almost all instances, will be case-specific.” The court specifically found that the trial judge’s award of attorney’s fees to appellant, equivalent to 40% of her total recovery was an abuse of discretion, because the judge did not adequately indicate whether the lodestar approach had been used in determining that figure. The court further indicated that because the Maryland statutes allow specifically for reasonable ‘counsel fees,’ charges for paralegals and legal interns must be subsumed within the calculation of attorney’s fees. Thus, the case was remanded to the trial court to recalculate attorneys’ fees in accordance with the Court of Appeals decision.

Comments:

H.P. White Laboratory, Inc. v. James L. Blackburn, 372 Md. 160, 812 A.2d 305 (Md. 2002).

The Maryland Court of Appeals held that a Harford County code providing for a cause of action for retaliation was unconstitutional, as it did not constitute a *local* law but rather encroached on the authority of the Court of Appeals or the General Assembly of the state to create either statutory or common law causes of action. In reaching its decision, the court invoked its opinions in McCrorry Corp. v. Fowler, 570 A.2d 934 (Md. 1990) and Sweeney v. Hartz Mountain Corp., 73 A.2d 32 (Md. 1990), where the court invalidated local ordinances that unconstitutionally governed issues that mattered to the entire state. The court reversed all awards stemming from claims based entirely on the county retaliation provision.

Comments:

Lizzi v. WMATA, 2003 Md. App. LEXIS 178 (Md. App. 2003)

The Maryland Court of Special Appeals affirmed the trial court dismissal of all three claims against of a defendant state agency and seven other individuals brought by plaintiff for unlawful termination. The claims were dismissed under the principle of *res judicata* and the third claim, which was brought for the first time in an amended complaint, was also dismissed on the ground of state sovereign immunity. The case had originally been brought in federal court, but dismissed for lack of subject matter jurisdiction and on the basis of Eleventh Amendment immunity for the defendant state agency. The plaintiff argued that dismissal for lack of subject matter jurisdiction without prejudice is not a judgment on the merits and that Eleventh Amendment immunity only barred suit in federal court. The court held that it did not need to decide the *res judicata* question with respect to the state agency defendant. State law provided the defendant with sovereign immunity under Section 80 of the WMATA Compact, which was signed by Maryland, as well as Virginia and the District of Columbia. The plaintiff's reliance on Robinson v. Bunch, 367 Md. 432, where the Court of Appeals held that the FLSA preempted certain Maryland statutory administrative and judicial relief, was of no help, as that court explicitly precluded damages against the state of Maryland without legislation that waived sovereign immunity. The court further held that the individual defendants were shielded from state claims in the same manner that Eleventh Amendment immunity shielded them because they were sued in their official capacities.

Comments:
