Labor and Employment Bulletin

1999-11-01

The Developing Continuing Violations Theory

Over the years, several theories of law have developed which toll the statute of limitations for filing a charge of discrimination. One, the continuing violations theory, most commonly refers to a series of acts by a defendant which are alleged to constitute a pattern of discriminatory conduct. Normally, only those acts occurring within the limitations period prior to filing are actionable. However, under the continuing violations theory, a charge may encompass unlawful conduct outside the limitations period, as long as at least one incident of unlawful conduct occurs within the requisite period.

A recently-decided case in Massachusetts begs another look at this theory. In *Janovich-Earle v. Integrity Int'l Security Services, Inc.*, the plaintiff, security officer Susan Janovich-Earle, filed a claim on January 29, 1997 at the Massachusetts Commission Against Discrimination (MCAD) against her supervisor alleging sexual harassment. Under normal statutory filing rules, only acts occurring between July 29, 1996 and January 29, 1997 would be actionable. In this case, the plaintiff alleged numerous instances of unwelcome sexual advances occurring between May and October of 1995, well outside of the six-month filing period. The plaintiff alleged only three instances of improper conduct post-July 29, 1996. Specifically, she charged that her supervisor called her "fat," yelled at her without justification and commented on her personal relationship with another co-worker to other Integrity employees. While offensive, none of these incidents alone would seem to rise to the level of sexual harassment discrimination. The court ruled that Janovich-Earle could sue Integrity for sexual harassment even though she did not file her complaint with the MCAD until more than six months after "actionable" harassment occurred. Judge Kottmyer wrote in her opinion that while the sporadic

acts occurring after July 29, 1996, alone were not severe enough to create a sexually hostile work environment, it was "the cumulative effect of the acts taken together which created a hostile work environment."

This case may signify an important development in the theory, at least at the state level. A timely incident may not be examined in isolation but may take on the character of any previous, though untimely, history. If this reasoning is followed, claims that might otherwise be barred by the statute of limitations will survive. In the *Integrity* case, there was a significant time lapse - nine months - between the unlawful and otherwise unactionable conduct, essentially providing the plaintiff a much longer statute of limitations period. This seems at odds with the basic purpose behind a short filing period which is to provide the government an opportunity to conciliate while the complaint is fresh and to give early notice to employers of possible litigation. The continuing violations theory may give strength to otherwise weak sexual harassment claims and bolster the defense bar's contention that Massachusetts is biased unfairly in favor of the plaintiff.

The Changing Definition of Disability Under the Americans with Disabilities Act

On June 22, 1999, the United States Supreme Court decided *Sutton v. United Airlines, Inc.*, 527 U.S. __, 67 U.S.L.W. 4537 (June 22, 1999) and severely altered the way we understand what it means to be "disabled" under the Americans with Disabilities Act promulgated in 1990 (ADA). In *Sutton*, two twin sisters, both severely myopic applied for employment as commercial airline pilots. The airline rejected their applications because they did not meet the airline's minimum requirement of uncorrected visual acuity of 20/100 or better. Consequently, the sisters brought a disability discrimination action challenging the airline's minimum vision requirements for global pilots. The Supreme Court held that the sisters were not disabled within the ADA meaning.

The ADA requires that an employer provide qualified employees or applicants with disabilities a reasonable accommodation, provided that such accommodation will not cause the employer undue hardship. Under the Act, a person is "disabled" if they possess a physical impairment that substantially limits them in one or more major life activity. In *Sutton*, the Court stated that the effect of measures taken to correct a condition, such as eyeglasses and contact lenses,

must be taken into account when judging whether the person is substantially limited in a major life activity and thus disabled. In so doing, the Court rejected the Equal Employment Opportunity Commission's (EEOC) Guidelines -- that persons are to be evaluated in their hypothetical uncorrected state -- as an impermissible interpretation of the ADA.

This view opens a wide rift between the state and federal forums. In response to *Sutton*, Douglas T. Schwarz, a Commissioner of the Massachusetts Commission Against Discrimination (MCAD), wrote in an editorial in *The Boston Globe* that the MCAD would continue to view as disabled individuals who can control or correct the symptoms of their disabilities. Commissioner Schwarz reasoned that nothing in the MCAD's interpretation alters the likelihood of success at hearing because the complainant must still show that she was qualified to perform the essential functions of the job with or without a reasonable accommodation.

Interestingly, several federal circuits have declined, at least in part, to follow *Sutton* . The Court of Appeals for the Third Circuit held that a school secretary who took lithium to control her bipolar disorder presented enough evidence that she was disabled to proceed with her claim. The Court reasoned that the side effects of the lithium impaired her ability to think. Though the Court acknowledged *Sutton*, admitting that disabilities must be evaluated in the treated state, the Court accepted the argument that even in the treated state the drug did not perfectly control the plaintiff's symptoms. In the Court of Appeals for the Eighth Circuit, a restaurant manager severely injured in a car accident with 30% permanent impairment to her right arm filed suit under the ADA alleging that her employer failed to make a reasonable accommodation. As in the Third Circuit, the Court acknowledged the Supreme Court's reasoning that to be substantially limited in the major life activity of working, one must be precluded from more than one type of job. However, the Eighth Circuit circumvented the *Sutton* ruling by focusing on the manager's inability to get work in her area of expertise and training as well as the rural surroundings in which she lived. Under these circumstances, the Court found that the case could proceed.

In light of these developments, the EEOC issued new guidelines for analyzing ADA charges which may reconcile *Sutton* with cases that have followed. Downplaying the Supreme Court's rejection of the EEOC's previous guidelines, the EEOC emphasized the Supreme Court's ruling that the determination as to whether a person is disabled must be made on a case-by-

case basis. In the new guidelines, the EEOC instructs its field investigators to ask the following questions: (1) identify the complainant's physical or mental impairment; (2) ask whether the complainant uses a mitigating measure to control or eliminate symptoms or limitations of the impairment; (3) ask whether the mitigating measure or compensating behavior fully or only partially controls the symptoms or limitations of the impairment and (4) ask whether the mitigating measure itself causes any limitations in performing a major life activity. These questions identify all the major areas of review articulated by *Sutton* .

While the foregoing questions are helpful, the fact remains that the road to define disability diverges at the state and federal forums. Clearly, the tumult of *Sutton* has yet to settle as the various circuits and agencies struggle to define what it means to be disabled.

Individual Liability Under Anti-Discrimination

The status of individual liability in discrimination cases in Massachusetts is in flux, leaving employers and employees alike confused about the potential risks they face at the workplace. To put this issue in perspective, there are two laws with which we need to be concerned: Title VII, the federal Civil Rights Act, and Chapter 151B, the Massachusetts anti-discrimination statute. While the two share much in common, they are distinct in a few but important ways. Most significantly to the issue at hand, Title VII and Chapter 151B use different language to proscribe discriminatory acts. It is this difference in language which lies at the heart of the confusion.

Title VII

The statute provides in relevant part that it is unlawful for an employer:

- to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin...

- An "employer" includes a "person engaged in an industry... and any agent of such person" 42 U.S.C. § 2000e(b). The phrase "and any agent" might appear to suggest that any employee/agent of the employer can have separate liability under Title VII.

Read in conjunction with Title VII's other provisions, the language is far from clear. Ten of the eleven circuits which have considered the issue have held that individual supervisors are not covered under Title VII. The First Circuit Court of Appeals has declined to address the issue of personal liability. Within the circuit, district courts have taken contrary views and within Massachusetts itself, only one federal district court judge, Judge Gertner, recognized individual liability of both non-supervisory and supervisory personnel under Title VII. *Ruffino v. State Street Bank and Trust Company,* 908 F. Supp. 1019 (D. Mass. 1995). Judge Gertner wrote that to read Title VII in any other way was to reduce the inclusion of the term "agents" as verbal surplusage *Id.* at 1047. Looking to the legislative intent underlying the statute, many of the district courts have reasoned that Congress was concerned with the cost to small employers of litigating discrimination claims. It would be inconceivable, the reasoning follows, that Congress would simultaneously allow civil liability to run against individual employees. Moreover, the legislative history suggests that Congress intended to place the responsibility of remedying discrimination in employment with employers, not with their individual employees.

Chapter 151B

By its terms, Chapter 151B provides that covered employers will be vicariously liable for the discriminatory acts of their agents. Plaintiffs have secured individual liability under section 4(4A) which prohibits "any person" from interfering "with another person in the exercise of enjoyment of any right granted by this chapter" and Section 4(5) which prohibits "any person, whether an employer or employee or not, to aid, incite, compel, coerce the doing of any of the acts forbidden under this chapter..." Both state and federal courts applying this law have held almost unanimously that this language contemplates individual liability.

Interestingly, it is the Massachusetts Commission Against Discrimination (MCAD), the administrative body charged with the enforcement of Chapter 151B, which is reluctant to impose liability upon individual employees and supervisors. In *Harmon v. Malden Hospital*, 10 MDLR 157 (1997), which contains the most significant discussion of this issue to date, Commissioner Charles Walker opined that to prevail on a claim of individual liability, a complainant must demonstrate that a wholly individual and distinct wrong was committed by the named respondent. This wrong must be separate and distinct from the main allegation.

Mere negligence, such as failure to investigate a claim, would not in and of itself expose the individual. The requirements set out by *Harmon* are consistent with the principle of vicarious liability and limit the use of sections 4(4), 4(4A) and 4(5) to reach entities which would otherwise be omitted from coverage. While both state and federal courts generally defer to the MCAD in matters of interpretation, they have not as yet adopted the MCAD's analysis.

Sexual Harassment Policy

It only takes 6 employees to fall under the purview of Chapter 151B and 15 to fall under Title VII. It is critical for both employers and their individual supervisors to have a well developed harassment policy to provide some protection from liability. Even the smallest companies are well advised to think through carefully a system of how to investigate claims of discrimination. Companies that do not have a structured human resources department should designate an individual in the company to deal with claims of harassment. Companies are required to have and disseminate sexual harassment policies as well as maintain MCAD posters in prominent areas. Should an employee make a claim of discrimination, the company must take prompt and effective remedial action. Therefore, it is helpful to maintain a relationship with outside labor counsel who can advise a company through difficult situations and minimize the possibility of legal action. Since Massachusetts law imposes strict liability on a company for the discriminatory acts of its supervisors, educational training on anti-discrimination law is imperative from both the employer and employee perspective.

The Dangers of Personality Testing

A recent decision out of the federal district court in Connecticut garnered much attention both in the newspaper and television media last month. Robert Jordan applied to the New London Police Department and was rejected for being too intelligent. During the application process, Jordan took an examination to test his cognitive ability and apparently performed too well. Upon his rejection, he filed a claim in federal court alleging that the police department violated his right to Equal Protection under the United States Constitution. The Court ruled in favor of the police department, a decision which to many seemed to fly in the face of common sense.

Depending on what article you read, up to 50% of employers in the United States are using personality and psychological tests to assist in the hiring selection process. How are these tests used and what legal land mines lurk just beneath a seemingly innocuous test? In the

Connecticut case, the New London Police Department required all applicants to sit for the Wonderlic test, a cognitive examination. The test boasts objective criteria by which an employer could determine that an applicant is overqualified, will become dissatisfied and ultimately leave the position. It provides a table of recommended scores for various occupations. The recommended range for police officers is between 18 and 30. Jordan scored a 33. The police department admitted that his superior cognitive ability prevented him from obtaining the job. Under a constitutional analysis, the Court found that Jordan is not a member of a suspect class and that there is no fundamental right to employment as a police officer. Therefore, the city had to show only that their action was rationally related to some legitimate government purpose -- that employing the exam could be beneficial to their stated goal of increasing employee longevity.

The legal obstacles to administering personality tests may not always be so easy to overcome as in the Connecticut case. An employer's use of personality tests may implicate a number of legal issues. For example, the federal anti-discrimination statute, Title VII, specifically allows for use of personality testing, but it does so only so long as the test is professionally developed and not designed, intended or used to discriminate. The Supreme Court and the Equal Employment Opportunity Commission (EEOC) have interpreted this to mean that only job related tests may be used and they may not adversely impact any minority or other protected group. Therefore, employers who make use of these tests should monitor the ultimate selection outcome to ensure that no one group's success is affected disproportionately to another.

Personality tests may run afoul of the Americans with Disabilities Act (ADA) as well. Medical inquiries may only be made upon receipt of a conditional offer. The EEOC has stated in its guidelines that a psychological examination is a medical examination for purposes of the ADA if it provides evidence that would lead to the discovery of a mental impairment or disorder. The ADA may also be implicated where an applicant is not selected for a position because of a test and alleges that the employer discriminated on the basis of a perceived disability. Employers should take care to review the tests for content to ensure that all the questions posed are job related and do not gather information that could inadvertently expose the company to liability.

Finally, personality tests may violate an individual's right to privacy. Personality tests which

delve into sexual practices and religious beliefs have been deemed too intrusive and violative of both state constitutional and anti-discrimination laws. A test which seeks to obtain information which constitutes an unreasonable, substantial or serious interference with the employee's privacy, might contravene public policy and warrant the imposition of liability on the employer.

Massachusetts has not forbidden the gathering of information about an employee's character entirely, but the Legislature has imposed restrictions on employers seeking certain information from an employee or prospective employee, such as polygraph testing for honesty. Personality tests which test for the veracity of the applicant may constitute a violation of the Massachusetts "lie detector" statute which defines "lie detector test" to include a written examination which is used to render a diagnostic opinion regarding the honesty of an individual. *Mass. Gen. Laws Ch. 149, §19B* . Conceivably, an examination which tests for other legitimate personality types could impose liability on an employer if one of its purposes is to verify the truthfulness of an employee or applicant.

When giving personality tests employers should do the following to minimize potential risk:

- Ask why they are using a personality test and what information they are hoping to gather from it. Is this information related to a specific attribute or skill required for the job?
- Only utilize tests that can be shown to be job-related and whose validity has been verified by credible data.
- Never base a hiring decision solely on a personality test result.
- Obtain an applicant's written consent prior to giving the examination.
- Administer tests consistently across the board.
- Maintain confidential test results and monitor the impact on protected groups.
- Consult labor counsel when using tests in hiring process.

Authors

Neil Jacobs

RETIRED PARTNER

+1 617 526 6000

Jonathan Rosenfeld

RETIRED PARTNER

jonathan.rosenfeld@wilmerhale.com

+1 617 526 6000