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H.R. ALERT*

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Does an Employer's Filing of a Counterclaim in an Employment-Related Action Support an Employment Retaliation Claim? — The United States Court of Appeals for the Fifth Circuit Says No

Just last month, the United States Fifth Circuit Court of Appeals (which governs federal cases in Texas, Louisiana and Mississippi) decided a case of first impression. Specifically, the court was faced with the issue of whether an employer's filing of a counterclaim in an employment-related action supports an employment retaliation claim. After a thorough review of the retaliation provisions under both Title VII and the Age Discrimination in Employment Act ("ADEA"), the court concluded it could not. *See, Hernandez v. Crawford Building Material Co.*, ___ F.3d ___, 91 FEP Cases 97, 5th Cir., 2/21/2003.

Factual Background/Procedural History

Plaintiff, Juan Hernandez, was a Mexican immigrant who had been employed as a laborer in the lumberyard for the Crawford Building Material Company since 1975. Subsequently, he was transferred to the company's carpet warehouse with increased responsibilities and an increase in pay. After making a mistake at work and failing to report it, his performance was deemed unsatisfactory and he was fired in June of 1999. Hernandez then sued his employer, alleging violations of Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, and 42 U.S.C. § 1981.

After he filed suit, the employer received information that Hernandez had allegedly stolen and resold the company's building materials. Most of these allegations, however, concerned property taken at least six years earlier. Hence, the company was unable to conduct a timely investigation. In answering the plaintiff's discrimination claims, the employer also asserted a counterclaim for theft against Hernandez in its answer. The plaintiff denied the theft charges and amended his complaint to include a retaliation claim as well. At trial, the lower court awarded summary judgment in favor of the plaintiff in his retaliation claim on the grounds that the employer simply could not prove the theft claim.

At jury trial, the jury ruled for the company on the discrimination claim, but against the company on the retaliation claim, awarding the plaintiff $20,000.00 in compensatory and $55,000.00 in punitive damages. In instructing the jury, the trial judge had specifically informed the jury that the employer's counterclaim for theft could support a finding of unlawful retaliation.

The Fifth Circuit's Rationale

On appeal, the Fifth Circuit reversed the jury verdict on the retaliation claim. According to the court, the trial judge erred in his jury instructions. The Fifth Circuit panel noted that in order to prove retaliation, it is incumbent upon an employee to show that he was engaged in a protected activity, that the employer took an adverse employment action, and that a causal connection existed between the protected activity and the adverse action.

In reaching its determination, the Fifth Circuit noted that there were no reported decisions on this issue, but that it was guided by its strict interpretation of retaliation claims to conclude that an employer's filing of a counterclaim urged after the employee has already been discharged cannot support a retaliation claim. Obviously, this is good news for employers.

Are No Rehire Policies Valid under the ADA? — The United States Supreme Court Agrees to Consider this Key Issue

Just last month, the United States Supreme Court agreed to consider whether Raytheon Company violated the Americans With Disabilities Act ("ADA") by refusing to rehire a rehabilitated former substance abuser pursuant to an unwritten policy against rehiring employees who were fired for misconduct. *See, Raytheon Company v. Hernandez*, No. 02-749, *cert. granted*, — S.Ct. —, 2003WL396696 (Feb. 24, 2003).

* H.R. ALERT *is intended to provide late-breaking news in the employment arena.*

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Procedural History

In its Petition for review to the Supreme Court, Raytheon is challenging the validity of the determination by the United State Court of Appeals for the Ninth Circuit that the company's no rehire policy may violate the ADA as applied to former employees, such as the plaintiff in this case. The plaintiff, Joel Hernandez, was fired for testing positive for cocaine and later successfully participated in a treatment program. In an opinion issued last year, the Ninth Circuit reversed summary judgment for Hughes Aircraft Systems Company, which Raytheon has since acquired, and allowed Hernandez to proceed with his ADA claim that the company refused to rehire him, either because it regards him as disabled or, he has a history of disability, namely, his drug addiction.

As many of our readers are aware, although the ADA does not cover employees who are currently using drugs, it does protect those who have been successfully rehabilitated. *See*, 42 U.S.C. § 12114(b). Additionally, EEOC guidance states that, "An employer may not discriminate against a drug addict, who is not currently using drugs and who has been rehabilitated, because of a history of drug addiction." *See*, EEOC Technical Assistance Manual on the Employment Provisions (Title I) of the ADA, §§ 8.2, 8.5 (1992).

In its Petition to the United States Supreme Court, Raytheon compellingly argued that the Ninth Circuit's decision improperly provided preferential treatment to those individuals who were fired for drug-related misconduct as opposed to those who are not. Raytheon also appropriately noted that the decision draws into question the viability of no rehire rules, which help ensure that former employees who were discharged for misconduct do not come back into the organization simply because hiring personnel do not know or have forgotten why former employees left earlier.

This case will have enormous impact on no rehire policies that exist across the country. We are monitoring this decision and will keep our readers advised. Stay tuned.

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