

H.R. ALERT*

SEPTEMBER - DECEMBER 2007

As 2007 draws to a close, employers should take note of some key federal and state developments at both the legislative and judicial levels.

NEW I-9 FORM MUST BE USED STARTING DECEMBER 26TH

On November 7, 2007, the United States Citizenship and Immigration Services (“USCIS”), issued a revised form I-9 employment eligibility verification form as well as a companion employer handbook (M-274) which provides instructions for completing the Form I-9. Both the new form I-9 as well as the employer handbook are downloadable PDFs available on www.uscis.gov. Employers without computer access can order the USCIS Forms by calling the toll-free number at 1-800-870-3676. Individuals can also request the forms and information on the new rules and regulations by calling the National Customer Service Center toll-free at 1-800-375-5283.

Employers are encouraged to view the forms as soon as possible in light of the effective date of use of December 26. The key difference between the revised Form I-9 and the old one is that five documents have now been removed from List A of Acceptable Documents. Specifically, Certificate of U.S. Citizenship, Certificate of Naturalization, Alien Registration Receipt Card, Unexpired Re-entry Permit and Unexpired Refugee Travel Documents have all been removed from List A of Acceptable Documents. Moreover, one document was added to List A which is Unexpired Employment Authorization document. Moreover, all of the employment authorization

documents with photographs and circulation are now included as one item on List A. There are other instructions on the form which note other changes; the objective of the government is to make the form more readable and user friendly.

The Form I-9 is available in both English and Spanish; however, only employers in Puerto Rico may have employees complete the Spanish version for their records. Employers in the 50 states and other U.S. territories may use the Spanish version simply as a translation guide for Spanish speaking employees, but must complete the English version and keep it in the employer’s records. Employees may also use or ask for a translator to assist them in completing the form. Employers only need to complete the 2007 Form I-9 for new employees effective as of December 26. Employers do not need to complete new forms for existing employees. However, employers must use the new form when employees require re-verification.

As noted, the Department of Homeland Security (“DHS”) announced that use of the new form which was issued on November 7 would become mandatory on December 26. If you have any questions concerning the new I-9 Form, please do not hesitate to e-mail Brandon Davis at brandon.davis@phelpsdunbar.com.

We welcome your comments and inquiries.

As the year 2007 closes, we wish each of our readers a very *Happy Holiday* and a *Happy New Year*.

UNITED STATES SUPREME COURT CONSIDERS FOUR KEY EMPLOYMENT CASES IN ITS NEW TERM

The United States Supreme Court commenced its October 2007 with four key employment cases on its docket. Although two of the cases were granted review at the end of the last term, the remaining three cases were granted review just a few months ago, on September 25, 2007. The four cases cover a range of employment issues which will affect all employers, both small and large. The following key issues are pending before the Court.

- 1) Is an intake questionnaire submitted to the EEOC sufficient as an EEOC charge? In *Federal Express Corp. v. Holowecki*, 127 S.Ct. 2914 (2007), the Court will address this key issue of whether an employee's timely filed intake questionnaire with the EEOC constitutes an EEOC charge sufficient for filing purposes under federal law, namely, the Age Discrimination in Employment Act, 29 U.S.C. §621, *et seq.*
- 2) The second key employment case involves the admissibility of fellow employees' "me too" testimony. Specifically, in *Sprint/United Management Company v. Mendelsohn*, 128 S.Ct. 435 (2007), the United States Supreme Court will decide whether a plaintiff can present, as evidence of employment discrimination in his own suit, testimony by employees who allegedly suffered the same adverse employment action as the plaintiff, but who are not parties to the litigation and who did not have the same supervisor. In this case, the Supreme Court will answer conclusively
- whether a district court must admit the so-called "me too" evidence testimony by non-parties who allege discrimination at the hands of persons in the company who played no role in the adverse employment decision being challenged by the plaintiff.
- 3) In the third key employment case pending before the United States Supreme Court, the Court will consider whether the use of age as a factor in a retirement plan is arbitrary so as to render the plan facially discriminatory in violation of the Age Discrimination In Employment Act, 29 U.S.C. §621 *et seq.* The legal repercussions stemming from this case are huge, since it will impact the legitimacy and validity of many retirement plans which use age as a factor.
- 4) The fourth key employment case pending before the United States Supreme Court involves 42 U.S.C. §1981. Specifically, the Court will address whether race retaliation claims are cognizable under 42 U.S.C. §1981. This case has significant legal repercussions, since §1981 provides for unlimited compensatory and punitive damages and is not subject to the statutory cap for damages which applies to Title VII claims.

We will be monitoring each of these seminal decisions and will advise our readers of any developments via our electronic communications *eLABORate*.

SOME NOTEWORTHY FIFTH CIRCUIT DECISIONS

Over the past few months, the United States Fifth Circuit Court of Appeals, which reviews appeals of federal district court cases in Louisiana, Texas and Mississippi, addressed a seminal issue which crops up repeatedly in lawsuits – when is a parent corporation deemed to be the employer of the subsidiary’s employees for purposes of a discrimination suit. In *Tipton v. Northrup Grumman Corp.*, 2007 WL 2188190 (5th Cir. 2007), the Court was faced with a discrimination suit brought by current and former employees of Northrup Grumman Ship Services, Inc.; the plaintiffs’ current and former employer was a subsidiary of the defendant who had been sued by the plaintiffs. In this lawsuit, plaintiffs alleged that the parent had discriminated against them under various federal statutes. The corporate entity sued, *Tipton v. Northrup Grumman Corp.*, (“NGC”) moved to dismiss on the basis that it was not the plaintiffs’ employer and was, therefore, not the proper party defendant. NGC also moved for dismissal based on a host of other grounds as well. The district court granted NGC’s motion for summary judgment, on the basis that NGC was not a proper party defendant, since it was not a plaintiffs’ employer.

In the course of its opinion, the Fifth Circuit reiterated the long-standing rule that the doctrine of limited liability creates a strong presumption that a parent corporation is not the employer of its subsidiary’s employees. However, the Court noted that in a civil rights action such as a discrimination lawsuit, superficially distinct enterprises may be exposed to liability upon a finding that they represent a single integrated enterprise – a single employer. To determine whether a parent corporation and its subsidiary may be regarded as a “single employer” in the context of a civil rights case, the Court reiterated the four part test which reviews the following factors:

- 1) interrelation of operations,
- 2) centralized control of labor relations,
- 3) common management, and
- 4) common ownership or financial control.

The Court noted that the second factor concerning centralized control of labor is deemed most important, with courts refining their analysis to the distinct question of what entity made the final decision regarding the challenged employment action. In other words, was the parent corporation ultimately the final decision maker in connection with the employment issues underlying the litigation?

In the case involving NGC, the Court noted that it was persuaded by NGC’s evidence indicating that there was no interrelation of operations, no centralized control of labor, no common management, and no common ownership or financial control between NGSS; the plaintiff’s actual employer and NGC, the corporate entity sued. Although plaintiffs contended that they had been lead to believe that their employment extended through to the parent, the Court stated that such conclusory allegations could in no way refute the sworn evidence submitted by the parent which indicated to the contrary.

Employers who assess their business operations should be very mindful that while it may convenient to consolidate certain business functions such as operations, labor relations management and financial control, these factors can be used to impute liability to a parent corporation based on the acts of a subsidiary if the four part test is satisfied by plaintiffs in civil rights litigation.

TWO RECENT CASES UNDERSCORE THAT STRAY REMARKS OF DISCRIMINATION CAN LEAD TO HUGE JURY VERDICTS AGAINST EMPLOYERS

Two recent Fifth Circuit cases make clear that stray remarks of a supervisor and/or corporate officer can lead to exorbitant jury verdicts in favor of employees alleging discrimination. In *Arismendez v. Nightingale Home Healthcare Inc.*, 493 F.3d 602 (5th Cir. 2007) the Fifth Circuit reversed a district court's judgment notwithstanding the verdict in favor of the employer on appeal. Although the jury had awarded a female plaintiff alleging pregnancy discrimination back pay, compensatory damages and a million dollars in punitive damages, the district court granted the employer's motion for judgment of a matter of law, finding insufficient evidence to sustain the jury verdict. On appeal, the Fifth Circuit reversed by reinstating the jury verdict. The Court also remanded the case to the district court to reduce punitive damages to \$200,000 in accordance with the statutory cap under Texas law.

In reinstating the jury verdict, the Fifth Circuit gave great weight to the plaintiff's testimony that her female branch manager, in response to her request for maternity leave, stated that plaintiff had to be terminated because there was no way that the manager could have a pregnant woman in the office as there was a "business to run." The employer tried to argue that the supervisor who made the remark had no authority over the Company's decision to terminate plaintiff and therefore, the remarks amounted to stray remarks. The circuit court disagreed, noting that stray remarks may serve as sufficient evidence of discrimination if they are comments of discrimination, approximate in time to the termination, made by an individual with authority over the employment decision at issue and related to the employment decision at issue. The Fifth Circuit stated that in reviewing the evidence, the court looks not just to those who had the official authority to make a decision, but also to those who exerted influence or leverage over the titular decision maker. In this case,

the Court concluded that the female supervisor who allegedly made the discriminatory remarks was the plaintiff's direct supervisor, had signed the papers to terminate, and the employer conducted no independent investigation after the female supervisor provided a recommendation on termination. Accordingly, the Court concluded that the discriminatory stray remarks made by the female supervisor contributed significantly to the termination decision officially made by the employer. More importantly, the Fifth Circuit concluded that these discriminatory remarks sufficed as "direct evidence of pregnancy discrimination."

Similarly, in the case of *Palasota v. Hagggar Clothing Co.*, 499 F.3d 474 (5th Cir. 2007), the Fifth Circuit revisited the second round of appeals in this age discrimination case. The jury had rendered a verdict in favor of the plaintiff against Hagggar, awarding \$842,000 in back pay and \$842,000 in liquidated damages. The district court awarded front pay of \$524,000 and interim front pay of \$14,000 per month, commencing on the date of judgment until the plaintiff was reinstated. The employer subsequently sought an appeal seeking the overturn of the jury's verdict.

On appeal, the circuit court affirmed the district court's judgment denying the employer's motion for a judgment as a matter of law and remanded only on the issue of the lump sum front pay amount. In the course of its opinion affirming the jury's verdict, the Court noted that the jury relied heavily on the stray remarks and comments made by Hagggar Clothing's President. The evidence reflected that the President stated that he wanted "race horses" not "plow horses" and told the plaintiff that he was out of the old school of selling. Moreover, the President announced at a sales meeting that he was concerned about the significant graying of the sales force." Based on such comments, which were

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bolstered by e-mails among executive management on encouraging more senior employees to retire, the Court concluded that a reasonable juror could have concluded that the plaintiff had been terminated as part of the employer's plan to turn the existing sales force over to younger employees. The Fifth Circuit pointed to an internal company memorandum indicating that in eliminating employees over fifty, the company would have the flexibility to bring on some new players that could achieve growth plans. According to the Court, the memo clearly discussed the broad plan of the company to thin the ranks of older sales associates as

part of a transition away from a graying sales force to a younger group of employees. This case underscores that stray comments, whether made orally or in writing, can literally sink a company at trial. Both of these recent decisions with from the Fifth Circuit underscore the need for thorough training at every level of management, beginning primarily with supervisors and continuing up through the corporate ranks. Potentially discriminatory comments and communications should not infect any employer's corporate culture.

THE LOUISIANA LEGISLATURE PASSES THE "LOST WAGE BENEFITS FOR DOMESTIC VIOLENCE VICTIMS ACT"

Employers in Louisiana should take note of recent legislation passed in the last regular session of the Louisiana Legislature in August. The Legislature passed the "Lost Wage Benefits for the Domestic Violence Victims Act." Under this Act, an employee will be eligible to receive lost wage benefits if the employee leaves his or her employment because he/she is unable to continue working due to "domestic abuse," as defined under state law, La. Rev. Stat. 46:2132, for any of the following reasons:

- 1) The individual's reasonable fear of future domestic abuse at or traveling to or from the individual's place of employment;
- 2) The individual's need to relocate to another geographic area in order to avoid future domestic abuse;
- 3) The individual's need to address the physical, emotional, psychological or legal aspects of domestic abuse; or

- 4) The individual's reasonable belief that separation from employment is necessary for the present or future safety of the individual or the individual's family because of domestic abuse.

The Act provides that an employee shall only be eligible to recover benefits pursuant to this program, one time per calendar year. The Act also provides for the reporting requirements which must be met as evidence of domestic abuse, which include court rulings, law enforcement records, past convictions involving the alleged abuser, medical documentation by a licensed medical provider who has examined the individual and/or an affidavit from designated individuals listed in the statute.

It is important to note that any amounts paid under this Act come from federal and state agencies and are not charged either to the experienced rating – on account of an employer or to the Unemployment Compensation Fund.

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Your comments, questions, and suggestions are encouraged.

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