JARDINE LOGAN & O'BRIEN P.L.L.P.
ATTORNEYS AT LAW

651.290.6500

8519 Eagle Point Boulevard, Suite 100
Lake Elmo, Minnesota 55042
info@jlolaw.com

JLO Newsletter January 2016

Employment Law Update

By Vicki A. Hruby

The U.S. Supreme Court issued three key employment decisions in 2015. Collectively, the decisions expand employee's rights in hiring and when pregnant. Accordingly, employers must be cautious as they navigate this new territory.

***EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015)**

The U.S. Supreme Court held that, to prevail in a disparate-treatment claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), an applicant need only show that the employer perceived a need for accommodations which was a motivating factor in the employer's hiring decision, not that the employer actually knew the applicant needed accommodations.

EEOC v. Abercrombie & Fitch involved a Muslim applicant, who wore a headscarf for religious reasons. The applicant wore the headscarf to her interview and the manager interviewing her believed she wore the headscarf because of her faith. However, Abercrombie's Look Policy prohibited all "caps" and the manager determined that the headscarf would violate the policy. Despite this determination, the manager did not ask the applicant about her ability to comply with the Look Policy or need for accommodation. Rather, the manager decided to forego hiring the otherwise qualified applicant.

The Court held that, although Abercrombie did not have actual knowledge of the applicant's need for religious accommodation, its motives in refusing to hire the applicant were discriminatory and the refusal was done in a way to avoid its obligation to accommodate under Title VII.

This case is a cautionary example for employers. During the course of the hiring process, if it becomes apparent that an employer may need an accommodation due to a religious practice or disability, employers have a duty to engage in the interactive process, i.e., ask about what accommodation is needed and determine if an accommodation is feasible. Following *Abercrombie & Fitch*, lack of actual knowledge of the need for an accommodation (when otherwise apparent), will not be a defense. Thus, employers should initiate the interactive process if they reasonably believe an accommodation may be necessary. However, it is important to remember that this conversation should occur *after* a conditional offer of employment is made to reduce the likelihood that an employer's hiring process can be viewed as discriminatory.

***Young v. UPS*, 135 S. Ct. 1338 (2015)**

The Supreme Court considered the interplay of the Americans with Disabilities Act (ADA) and the Pregnancy Discrimination Act (PDA) in *Young v. UPS*. The Court found a pregnant employee alleging disparate treatment in violation of the PDA may do so by providing evidence that the employer accommodates a large percentage of non-pregnant workers, while failing to accommodate pregnant workers.

Young, a UPS driver, was placed on lifting restrictions while pregnant. UPS advised that she could not work while

(Continued on page 3)

Employment Newsflash

On January 20, 2106, the Minnesota Supreme Court determined that the statute of limitations for whistleblower claims, based on a good faith report of a violation of law, asserted under the Minnesota Whistleblower Act (MWA), Minn. Stat. § 181.932, subd. 1(1), is six years. Previously, Minnesota courts required whistleblower claims to be asserted within two years of the allegedly retaliatory action. The Court held that, since alleged employment discrimination claims are statutory, and not created by common law, the six year period in Minn. Stat. § 541.05, subd. 1(2) governs. *See Ford v. Minneapolis Public Schools*, A13-1072 (Minn. Jan. 20, 2016).

In *Ford*, the Court explained that it has never recognized a common law cause of action for wrongful discharge for an employee reporting a violation of the law, and clarified that the *Phipps* decision only created a narrow public policy exception to the employment-at-will rule; thus, limiting that common law cause of action to discharges caused by an employee's good-faith refusal to violate the law. *Phipps v. Clark Oil & Ref. Corp.*, 408 N.W. 2d 569, 571 (Minn. 1987).

Based on the *Ford* decision, it is now of increased importance to promptly investigate employees' claims of unlawful activity, particularly if an adverse employment action is taken close in time to the employee's report. A prompt and thorough investigation is necessary to reduce the likelihood that evidence will become stale, inadvertently destroyed, or witnesses overlooked during the six year period an employee is provided to pursue a claim.

Recent Minnesota Supreme Court ruling appears to narrow the application of the two year statute of limitations for improvements to real property

Minnesota Statute § 541.051, subd. 1(a) provides, in part, that "no action by any person in contract, tort, or otherwise to recover damages for any injury to property . . . arising out of the defective and unsafe condition of an improvement to real property, shall be brought . . . more than two years after discovery of the injury." Minn. Stat. § 541.051, subd. 1(a). In the recent Minnesota Supreme Court decision *328 Barry Ave., LLC v. Nolan Properties Group, LLC*, -- N.W.2d --, 2015 WL 7566613 (Minn. Nov. 25, 2015), the Court addressed whether the two-year statute of limitations in Section 541.051, subd. 1(a) can begin to run during the construction of a building before substantial completion is done.

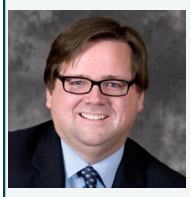
In *328 Barry Ave.*, the Plaintiff hired the Defendant as the general contractor on a building construction project. Plaintiff and Defendant were each solely owned by the same individual. In October 2009, during the "punch list" phase of construction, the general contractor contacted a stucco subcontractor about a leak at one of the windows at the building. A representative of the stucco subcontractor returned to the property and applied small amounts of silicone sealant, but warned the general contractor that sealant would not correct the issue. Throughout October and early November 2009, the general contractor and stucco subcontractor had discussions and did testing of the leak at the window. Although the record reveals no work was done during the stucco subcontractor's last visit to the property, there was no evidence of any water leaks at the building between November 2009 and August 2010.

The City of Wayzata issued a certificate of occupancy in January 2010, construction was substantially completed by May 2010, and plaintiff began to occupy the building in May 2010. In August 2010, plaintiff noticed water on the floor of the building. Throughout 2011 and 2012, plaintiff and the general contractor hired experts to investigate the extent and cause of the water damage. Plaintiff brought suit against the general contractor on June 14, 2012.

The District Court and the Court of Appeals both agreed that plaintiff's claims were barred under Section 541.051, subd. 1(a) because plaintiff discovered the injury – the leak near the window – in the fall of 2009, more than two years before a complaint was filed on June 14, 2012. On appeal to the Minnesota Supreme Court, plaintiff argued that the statute of limitations "cannot be triggered prior to substantial completion of a construction project" because any defects found, such as the leak near a window in this case, are "merely circumstance[s] whereby some piece of work ha[s] yet to be completed." *328 Barry Ave.*, 2015 WL 7566613, at *4 (alterations in original). The Court rejected this interpretation and found that Section 541.051, subd. 1(a) "does not require that construction be substantially complete before defective construction claims accrue." *Id.* at *5. Instead, as the plain language of the statute indicates, the statute of limitations begins to run "upon discovery of the injury" – regardless of the status of the construction project. *Id.*

Nonetheless, the Court found a genuine issue of material fact regarding whether plaintiff discovered an "actionable injury" when it first discovered a leak in a window in October 2009. The Court reasoned:, "Given the lack of evidence of any leaks in the building for 10 months and the fact that construction activities were still being performed in the fall of 2009," the Court refused to conclude "that reasonable minds could arrive at only one conclusion regarding when [plaintiff] was aware, or should have been aware, of its injury." *Id.* at *6-7 ("The discovery of an injury is a question of fact that is not appropriate for resolution on summary judgment when reasonable minds can differ about the timing of the discovery of the injury"). Thus, the Court reversed the District Court's grant of summary judgment and remanded the matter for trial to resolve this and all other factual issues. ●

The Firm welcomes Gregory F. Kelly as a Senior Associate.



During his career, Greg has represented elevator companies and similar clients, defending personal injury and property damage claims in products liability cases and other negligence cases, consistently getting excellent results for his clients.

Greg began his legal career defending insurance companies in first party and third party cases, and was co-author of "Defenses and Contemporary Legal Issues," for the 1999 National Arson Investigation Training Seminar, Insurance Committee for Arson Control, Savannah, Georgia. He also has extensive trial experience, having conducted well over twenty jury trials.

Referrals & Inquiries

A ***referral*** is the best compliment you can give an attorney. If you know of anyone who may be interested in receiving this newsletter, please email the following information to info@jlolaw.com: Name, Company, Phone Number, and Email.

To opt out of receiving this newsletter, please reply with ***Newsletter Opt Out*** in the subject line.

This and all past newsletters are available on the Resources Page under Newsletters.
Visit our site by pointing your favorite browser to www.jlolaw.com
You can also stay connected with us at Twitter and LinkedIn

(Continued from page 1)

under lifting restrictions. However, UPS had allowed other workers with workers' compensation injuries, disabilities, or other illnesses to work light duty while recovering. The Court found that providing light duty work to other employees that were similar to pregnant employees in their ability or inability to work, but not providing similar light duty to pregnant employees, was prima facie evidence of pregnancy discrimination. The Court explained that PDA claims are subject to the *McDonnell Douglas* framework, and once a prima facie case of pregnancy discrimination has been made, an employer may rebut the claim by offering a legitimate, non-discriminatory reason for its employment decision. If a business reason has been offered by the employer, the employee may nonetheless create a fact issue for the jury by showing that the employer's business reason is pretextual.

The *Young* decision, in conjunction with the ADA Amendments Act of 2008, places an increased burden on employers to accommodate pregnant workers. Further, the EEOC's ADA and PDA guidance cautions employers that: "Disabilities caused or contributed to by pregnancy . . . for all job-related purposes, shall be treated the same as disabilities cause or contributed to by other medical conditions." *See* 29 C.F.R. § 1604.10 (b). Thus, like employees with disabilities, if a woman has pregnancy-related restrictions, an employer must engage in the interactive process and determine if an accommodation is available.

***Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015)**

The EEOC failure to conciliate a Charge of Discrimination prior to commencement of litigation is an affirmative defense available to employers. In *Mach Mining v. EEOC*, the U.S. Supreme Court considered the parameters of judicial review of the EEOC's conciliation efforts when this defense is asserted. The Court ruled that, while a court may review whether the EEOC satisfied its conciliation obligation, the scope of review is narrow.

The Court found Title VII gave the EEOC wide latitude to choose which "informal methods" to use to conciliate a matter, but did not deprive courts of reviewing whether this prerequisite for suit was met. The U.S. Supreme Court held that a court's review should be limited to confirming that the employer was: (1) provided with notice of the specific discrimination allegation and (2) given the opportunity to achieve voluntary compliance with the claimed violation.

To prevent litigation of the EEOC's conciliation efforts, the Court explained that a sworn affidavit from the EEOC stating it conciliated the matter is sufficient evidence that it met its statutory duty. Should an employer dispute the EEOC's conciliation efforts, it must present "concrete evidence" that the EEOC did not provide the appropriate information about the charge or attempt to engage in conciliation. If the employer provides such information, the court must resolve this limited dispute. However, even if the employer wins and a court finds the EEOC did not meet its conciliation obligations, the remedy is conciliation, rather than dismissal with prejudice.

As a practical matter, *Mach Mining* removes the "bite" from a failure to conciliate affirmative defense. While employers may continue to raise this affirmative defense, a finding that the EEOC failed to meet its obligation results in renewed conciliation efforts and does not bar future litigation. Thus, unless an employer would like to resolve the claim in pre-suit conciliation, there is now little benefit to raising this affirmative defense. ●

About the Author

Vicki A. Hruby
Senior Associate
VHruby@jlolaw.com
651.290.7411

Vicki A. Hruby is a Senior Associate at Jardine, Logan & O'Brien, P.L.L.P. and practices civil litigation in the areas of construction, employment, health, and workers' compensation.

Vicki received her J.D. Degree, *magna cum laude*, from the University of Miami School of Law, Coral Gables, Florida in 2010.

About the Firm

Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa, our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients. View our website at www.jlolaw.com to obtain additional information. Please call us to discuss a specific topic.

Disclaimer