Employers Beware: Be careful what you ask for — you might just get it!

Most employers recognize the importance of having their employment handbook policies periodically reviewed and updated by experienced employment counsel to assure compliance with ever-changing state and federal law — and for good reason. Recent court decisions demonstrate how the failure to do so can lead to unintended and potentially costly consequences.

In ***Peters v. Gilead Sciences, Inc.,*** 533 F3d 594 (7th Cir. 2008), the employee took a medical leave of absence after suffering a shoulder injury. After returning to work, his condition did not improve so he took another leave of absence. During the second leave of absence, the employer filled his position with another worker.

It was undisputed that the employer employed less than 50 employees within 75 miles of the employee's worksite, thereby rendering the employee ineligible under the ***Family and Medical Leave Act*** ("FMLA") for twelve weeks of job-protected leave.

Although the FMLA's "50/75" "employer" coverage threshold was not met, the employer's Employee Handbook nonetheless stated that a medical leave of absence would be provided to all employees who meet the FMLA's 12 month/1250 hour "employee" coverage threshold. The court held that the medical-leave representations contained in the Employee Handbook could create an enforceable contractual right to the equivalent of 12 weeks of FMLA leave — despite the fact that the employee was otherwise ineligible for FMLA leave under the FMLA's statutory requirements. In other words, the employer could be saddled with the obligation to provide the employee the equivalent of FMLA protection, even though it may not have intended to do so.

In ***Dobrowski v. Jay Dee Contractors***, 571 F.3d 551 (6th Cir. 2009), the employee notified his employer of a need for a medical leave of absence to undergo a surgical procedure. The employer gave the employee a form entitled "Application for Leave of Absence under the FMLA", which the employee filled out and returned to the employer. Subsequently, the employer represented to the employee that "[p]ursuant to the Family and Medical Leave Act, [The employer] will leave [Employee's] position open for at least twelve (12) weeks…" The employer also provided the employee a U.S. Department of Labor "Employer Response to Employee Request for Family and Medical Leave" form which indicated that the employee was eligible for FMLA leave and confirmed that the company was providing it to him.

When the employee attempted to return to work four weeks later, he was informed that his employment was terminated because his services were no longer needed due to a shortage of available work. The employee brought a claim under the FMLA and the employer moved for summary dismissal arguing, among other things, that the employee was not eligible for FMLA job protected leave because the company did not meet the "50/75" employee coverage threshold. The employee argued that his employer should be "equitably estopped" from denying him FMLA eligibility because the employer represented, before he took leave, that he was eligible for FMLA protection.

The court held that under certain circumstances, an employee may be able to prevent his or her employer from denying FMLA eligibility under an "equitable estoppel" theory. To prevail on an equitable estoppel claim, an employee must be able to prove that he or she relied on the employer's conduct in misrepresenting the employee's FMLA eligibility, to his or her detriment — and the reliance must have been reasonable.

The lesson for employers is clear: Have your Employee Handbooks and policies reviewed and updated periodically by experienced employment counsel to assure that your company is not unwittingly obligating itself to provide employee job benefits and legal protections that you do not intend. For more information, contact Robert K. Firsten at (313) 566-2500 or rkfirsten@abbottnicholson.com.

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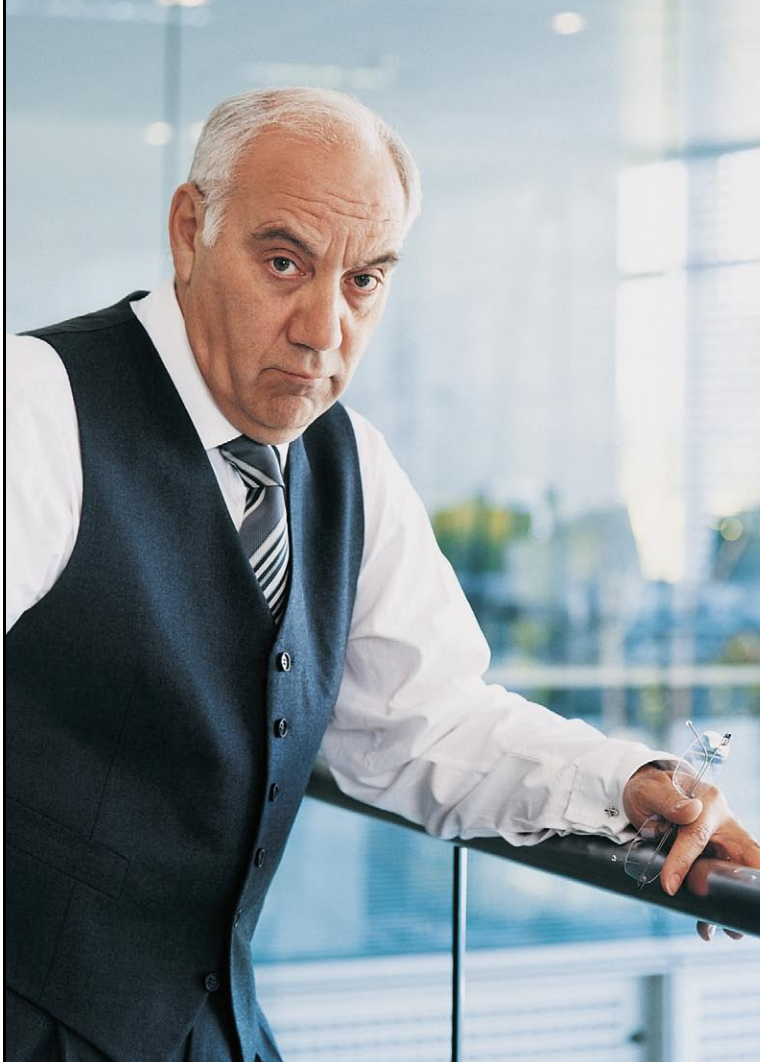

2
The Age Discrimination in Employment Act
Supreme Court rules on age as key factor

3
At issue: Allegedly discriminatory hiring procedures

5
Do salary deductions negate overtime exemption?

7
Employer terminates worker *before* end of FMLA leave

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The Age Discrimination in Employment Act

Supreme Court rules on age as key factor

In many age discrimination lawsuits, the age in question naturally plays a starring role in the case. But when age plays only a supporting role, the complexity of the decision deepens. The U.S. Supreme Court recently reviewed this issue in *Gross v. FBL Financial Services, Inc.*

Loss of responsibility

Jack Gross began working for FBL Financial Group Inc. (FBL) in 1971. As of 2001, Gross held the position of claims administration director. But, in 2003, when he was 54 years old, Gross was reassigned to the position of claims project coordinator and many of his responsibilities were transferred to a newly created position: claims administration manager.

That position was given to Lisa Kneeskern, whom Gross had previously supervised and who was then in her early forties. Although Gross and Kneeskern received the same compensation, Gross considered the reassignment a demotion because of the loss of responsibilities.

District and appellate decisions

In April 2004, Gross filed suit in district court, alleging that his reassignment to the position of claims project coordinator violated the Age Discrimination in Employment Act (ADEA). This law makes it unlawful for an employer to take adverse action against an employee "because of such individual's age."

At trial, Gross introduced evidence suggesting that his reassignment was based, at least in part, on his age. The district court instructed the jury that it must return a verdict for Gross if he proved, by a preponderance of the evidence, that his "age was a motivating factor" in FBL's decision to demote him. The jury returned a verdict for Gross.

FBL challenged the jury instructions on appeal, arguing that the jury had been incorrectly instructed under the standard established by the Supreme Court in *Price Waterhouse v. Hopkins*. In *Price Waterhouse*, the Supreme Court held that, under Title VII of the Civil Rights Act of 1964 (which doesn't cover age discrimination), where a plaintiff suffers an adverse action because of both

permissible and impermissible reasons (also known as a "mixed-motives case"), if the plaintiff shows direct evidence that discrimination was a "motivating" factor in the employer's action, the burden of persuasion shifts to the employer to show that it would have taken the same action regardless of that impermissible consideration. Conversely, in non–mixed-motives claims, the burden remains on the plaintiff to show that the impermissible motivation was the determining factor in the employment action.

The U.S. Court of Appeals for the Eighth Circuit concluded that the district court's jury instructions were flawed because they allowed the burden to shift to FBL upon a presentation of a preponderance of any evidence showing that age was a motivating factor. Because Gross conceded that he hadn't presented direct evidence of discrimination, the appellate court held that the district court shouldn't have given the mixed-motives instruction and remanded the matter for a new trial.

The Supreme Court's review

When the case reached the Supreme Court, the question was whether a plaintiff must "present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case." The Court, however, noted that, before reaching this question, it had to first determine whether the burden of persuasion ever shifts to

Employer terminates worker *before* end of FMLA leave

In *Roberts v. The Health Association*, the U.S. Court of Appeals for the Second Circuit examined whether an employer had violated the Family and Medical Leave Act (FMLA) when it terminated an employee before she'd exhausted her 12 weeks of FMLA leave. The twist: Her doctor had already concluded that she'd have been medically unable to return to work until after the leave ended.

Multiple extensions

Laura Roberts was employed by The Health Association beginning in September 1999. On March 25, 2004, Roberts requested time off for medical reasons and provided a doctor's note stating that she'd be unable to work until April 1. Before returning to work, Roberts provided another doctor's note extending her return date to April 5.

On April 1, The Health Association sent a notice to Roberts informing her of its medical leave policy, New York State's disability benefits and the FMLA. It also provided her with a disability benefits form from its insurance carrier, Aetna.

On April 9, Roberts submitted a third doctor's note stating retroactively that she was unable to work from April 5 through April 19. On April 19, Roberts returned to work for three days but then presented a fourth doctor's note stating that she'd be unable to work through June 1.

On May 25, Roberts submitted a fifth doctor's note extending her disability period from June 1 to June 14. Yet, on June 2, Roberts asked The Health Association's benefits coordinator about taking FMLA leave. The benefits coordinator advised Roberts that FMLA leave ran concurrently with her medical absence, and that Roberts had already used nine weeks of leave.

Finally, on June 8, Roberts submitted a sixth doctor's note extending her disability period from June 14 through July 19. At that time, she was still eligible for two more weeks of FMLA leave. Nonetheless, The Health Association terminated her employment.

The end of protection

Roberts filed a lawsuit in the Western District of New York, alleging that she'd been denied her substantive rights under the FMLA and had been retaliated against for asserting those rights. The District Court granted The Health Association's motion for summary judgment, and Roberts appealed.

The FMLA provides that an eligible employee suffering from a serious health condition is entitled to 12 workweeks of leave during any 12-month period. At that leave's end, the employee is entitled to be reinstated to the same or an equivalent position. If, after 12 weeks of leave, an employee is unable to return to work, the employee no longer has FMLA protection.

The appeals court noted that, when Roberts was terminated, she'd been out of work for only 10 weeks. Her doctor, however, had concluded that she was medically unable to work until at least July 19, which was after the end of her statutorily entitled 12-week period. Thus, the court concluded that her early termination had neither negatively impacted Roberts nor violated the FMLA.

Possibly avoidable

The employer won this case. But it could be argued that, had The Health Association waited until after the conclusion of the 12-week period to terminate the employee, it might have avoided the expense of litigation. ♦

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violated the salary-basis test because employees' pay was subject to reduction "because of variations in the quality or quantity" of their work. The district court granted the plaintiffs' motion for summary judgment but limited recovery to overtime pay for the pay periods in which Life Time actually took salary deductions. Both parties appealed.

The appeal

The appeals court explained that the salary-basis test had two interpretations of the phrase "subject to." In *Auer v. Robbins*, the U.S. Supreme Court held that an employee is not paid on a salary basis if: 1) there is an actual practice of salary deductions, or 2) an employee is compensated under a policy that clearly communicates a significant likelihood of deductions.

Following *Auer*, the Department of Labor published new FLSA regulations providing that only "[a]n actual practice of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis." The appeals court thus found that *Auer's* salary-basis test applied to pay periods occurring *before* the new regulations went into effect on Aug. 23, 2004, and that the revised FLSA regulation applied to pay periods *after* Aug. 23, 2004. So they ruled on the periods as follows:

Before the revised regs. It was undisputed that Life Time had made no actual deductions before Aug. 23, 2004. But the appeals court found that Life Time's pre-Aug. 23, 2004, compensation plan plainly laid out a policy under which Life Time would make future deductions by:

- Targeting specific members of management,
- Devising a formula whereby plaintiffs' pay would be in jeopardy, and
- Taking affirmative steps to demonstrate that it would enforce the pay-deduction plan.

Moreover, at least one company official testified that Life Time employees were aware that the plan would take deductions from their guaranteed pay if an employee's performance dropped below certain benchmarks. So it was clear to the plaintiffs and those in charge of compensation that pay was subject to deduction.

Therefore, the court of appeals concluded that, for the pre-Aug. 23, 2004 time period, the plaintiffs hadn't been exempt from FLSA overtime requirements.

After the revised regs. Life Time conceded that it had taken deductions from guaranteed pay in November and December of 2005. But it argued that it had done so to recoup overpayment, not because of the quality or quantity of the plaintiffs' work. Yet, in doing so, it had impermissibly dipped into plaintiffs' guaranteed salaries.

The appeals court explained that nothing in the FLSA allows for the reduction of guaranteed pay under a purposeful, incentive-driven bonus compensation plan. Thus, the appeals court found that the actual deductions were improper.

But the appeals court also noted that the revised FLSA regulations explain that "the exemption is lost *during the time period* in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions."

Therefore, the appeals court concluded that only plaintiffs who had worked in the appropriate job classification during the relevant deduction period were entitled to overtime compensation after Aug. 23, 2004.

Determining eligibility

This case demonstrates the importance of the salary-basis test in determining employee eligibility for exemption from overtime requirements. Even if an employee meets all the other criteria, he or she must be paid on a salary basis to be exempt. ♦

the party defending an alleged mixed-motives discrimination claim brought under the ADEA. In *Price Waterhouse*, the Supreme Court had determined that

> … [once a] plaintiff in a Title VII case proves that [the plaintiff's membership in a protected class] played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken [that factor] into account.

The Supreme Court had to first determine whether the burden of persuasion ever shifts to the party defending an alleged ADEA mixed-motives discrimination claim.

Congress subsequently amended Title VII by explicitly authorizing discrimination claims in which an improper consideration was "a motivating factor" for an adverse employment decision — even though other factors also motivated the practice.

But the Supreme Court noted that it had never held that this burden-shifting framework applied to ADEA claims. Unlike Title VII, the ADEA's text doesn't provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress had neglected to add such a provision to the ADEA when it amended Title VII, though it contemporaneously amended the ADEA in several other ways. Thus, the Supreme Court found that its interpretation of the ADEA wasn't controlled by *Price Waterhouse*.

The Supreme Court then turned its attention to the text of the ADEA to decide whether it authorized a mixed-motives discrimination claim. The ADEA provides that "it shall be unlawful for an employer … to discriminate against any individual … because of such individual's age." The Supreme Court explained that the ordinary meaning of the ADEA's requirement that an employer took adverse action "because of" age is that age was the "reason" that the employer decided to act.

Thus, the Supreme Court concluded that, to establish a disparate-treatment claim under the plain language of the ADEA, a plaintiff must prove that age was the "but-for" cause of the employer's adverse decision. Therefore, the burden of persuasion doesn't shift to the employer to show that it would have taken the action regardless of age — even when a plaintiff has produced some evidence that age was one motivating factor in that decision.

Bad news for plaintiffs

This decision makes it more difficult for plaintiffs to successfully pursue ADEA cases. It is possible, however, that Congress will take action to nullify the impact of this decision. ♦

At issue: Allegedly discriminatory hiring procedures

Few people would describe a job interview as being an easy experience. But what if the interview process was so difficult it appeared discriminatory? That was the contention of the plaintiff in *Turner v. Public Service Company of Colorado*.

The interview process

In 2004, Susan Turner applied for an entry-level job at the Public Service Company of Colorado (PSCo). To evaluate applicants, the company used a three-step process that

included a written test, a resumé screening and a job interview with a four-person panel in which each applicant was asked an identical set of preselected questions derived from a human resources document called the *Interview Guide*.

For the six vacant positions, 17 applicants reached the interview step. Of the 17, 15 were male and two — Turner and another applicant — were female. Turner received the second-lowest rating of any interviewee. The other female applicant, however, received the second-highest overall rating.

Could the employer show that it had a legitimate, nondiscriminatory reason for refusing to hire the plaintiff?

With one exception (a candidate who displayed a fear of heights during a tour of the PSCo plant's upper reaches), the company extended offers to the six highest-scoring candidates, including the other female applicant. It didn't offer Turner a job.

In response, Turner filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC). She received a right-to-sue letter from the EEOC and subsequently filed the action. The district court granted PSCo's motion for summary judgment, and Turner appealed.

The appeals process

The U.S. Court of Appeals for the Tenth Circuit applied a burden-shifting analysis. First, Turner established a prima facie case. Next, PSCo showed it had a legitimate, nondiscriminatory reason for refusing to hire: Turner ranked second-to-last among the interviewees — only the top interviewees received job offers. Also, the principal decision-maker on the interview panel testified that his decision not to hire Turner was based on her poor job interview.

The burden then shifted back to Turner to show that PSCo's reason was merely a pretext for discrimination. Turner argued that the interview process was subjective and designed to exclude women and that various statistics regarding PSCo's workforce and hiring practices created the inference she wasn't hired because of her gender. The appeals court rejected both of these arguments.

First, the appeals court explained that, though "the presence of subjective decision-making can create a strong inference of discrimination," the use of subjective considerations by employers is "not unlawful per se." The court went on to say that, while there is some degree of subjectivity in any interview-based selection process, pretext should be inferred only when criteria are entirely subjective. Here, each applicant answered the same questions, and their answers were ranked using predetermined criteria.

Statistics also play key role in case

Another key factor in *Turner v. Public Service Company of Colorado* (see main article) was the use of statistics. Specifically, the plaintiff, Susan Turner, stated that only one of 115 production workers was female and that, from 1992 to 2005, no women were hired for entry-level positions but 20 men were.

The appeals court rejected this argument, explaining that, for statistical evidence to create an inference of discrimination, the data must show a significant disparity and eliminate nondiscriminatory explanations for the disparity. The court noted that Turner failed to account for the fact that another woman had participated in the same 2004 application process as Turner and received a job offer.

Turner also distorted the statistics: The Public Service Company of Colorado (PSCo) experienced a hiring freeze from 1992 to 1999 and, from 1999 to 2005, the hiring pool included only two women (Turner and the successful 2004 applicant). In addition, PSCo hired three more women in 2006.

Finally, the appeals court concluded that none of Turner's statistics eliminated PSCo's *nondiscriminatory* reason for refusing to hire her: Turner received the second-to-lowest overall interview rating and, like other applicants who performed poorly on the interview, wasn't offered a job.

Moreover, the questions inquired into job-related areas and required the applicants to think on their feet, thereby offering insight into their adaptability and trainability. The appeals court also noted that, while Turner's panel consisted of four men, she proffered no evidence that any of the interviewers held discriminatory attitudes or had participated in past discrimination. Thus, the appeals court concluded that the interview process wasn't subjective nor was it designed to exclude women.

Legitimacy is key

This case illustrates that, whenever tests are used to make employment decisions, employers must ensure that the tests legitimately determine job qualifications. Although it wasn't the result here, if an employer is unable to validate a test, the test's disparate impact can result in an unlawful discrimination finding. ♦

Do salary deductions negate overtime exemption?

Employers have long struggled with the exempt vs. nonexempt quandary. In *Baden-Winterwood v. Life Time Fitness, Inc.*, the U.S. Court of Appeals for the Sixth Circuit examined whether an employer's policy of making deductions from plaintiffs' wages caused those plaintiffs to lose their exempt status from required overtime payments because they failed the test for salaried status.

Executing a plan

Life Time Fitness owned and operated about 60 health and fitness centers throughout the United States. Employees of Life Time were generally paid a predetermined amount of compensation semimonthly, identified by Life Time Fitness as "base salary." In addition to receiving a base salary, employees were eligible for monthly bonus payments based on year-to-date performance under guidelines set forth in Life Time's bonus plan.

Under that plan, Life Time was able to make deductions from employees' base salaries to recover for earlier bonus overpayments on a year-to-date basis beginning Jan. 1, 2004. In February 2006, employee Amy Baden-Winterwood filed a lawsuit on behalf of herself and as a putative class representative alleging that she'd not been paid overtime pursuant to the Fair Labor Standards Act (FLSA).

The appeals court explained that the salary-basis test had two interpretations of the phrase "subject to."

Visiting the district court

Under the FLSA, one of the requirements for an employee to be exempt from overtime pay is that he or she must satisfy the salary-basis test. It requires that the employee regularly receive each pay period "a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reductions because of variations in the quality or quantity of the work performed."

The plaintiffs filed a motion for summary judgment in which they maintained that Life Time's payment plans