Holland and Holland L.L.C.

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EMPLOYMENT LAW DIGEST

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PUNITIVE DAMAGES SURVIVE IN ADA CLAIM

The United States Court of Appeals for the Fifth Circuit recently decided a case against chemical giant DuPont, finding that the company had violated the Americans with Disabilities Act (ADA) and awarding the plaintiff punitive damages.

In the case, Laura Barrios had worked as a lab operator at a Dupont chemical facility since 1981. In 1986, she was diagnosed with certain medical conditions that made it increasingly difficult for her to walk. Barrios's position required her to obtain annual physical examinations by DuPont plant physicians. These examinations culminated in a 1999 functional capacity evaluation ("FCE") because of concerns about Barrios's ability to safely walk at the plant. The FCE was intended to evaluate Barrios's ability to perform the basic functions of her job and to meet certain qualification standards, including the ability to evacuate in the event of an emergency. Because of the hazardous nature of the chemical manufacturing process at the plant, DuPont was concerned about Barrios's ability to evacuate safely. DuPont contends that the ability to evacuate during an emergency is required of all employees, and DuPont routinely conducts emergency response drills.

After the FCE confirmed Barrios's walking impairment, DuPont physicians concluded that she should be medically restricted from walking anywhere at the plant. DuPont believed this restriction left her unable to evacuate in event of an emergency. The company placed Barrios on temporary disability for six months and total and permanent disability thereafter. Barrios sought to return to work, but DuPont would not allow it, even though she demonstrated in 2003 that she could walk an evacuation route without assistance.

WHAT'S INSIDE...

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At that point, Barrios filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC). After finding a violation of the ADA and after settlement negotiations failed, the EEOC then brought suit on her behalf. At trial, the judge granted partial summary judgment in favor of the EEOC on the issue of whether DuPont regarded Barrios as disabled. The judge reasoned that because every job at DuPont requires walking, Dupont regarded Barrios as restricted from *all* jobs at the plant. Essentially, DuPont regarded her as substantially limited in the major life activity of walking. The ADA's definition of "disability" includes individuals who are regarded as having such an impairment

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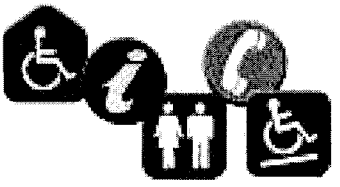
that substantially limits one or more of the major life activities. A plaintiff is "regarded as" being disabled if he (1) has an impairment that is not substantially limiting but which the employer perceives as substantially limiting, (2) has an impairment that is substantially limiting only because of the attitudes of others, or (3) has no impairment but is perceived by the employer as having a substantially limiting impairment.

Moreover, DuPont argued that Barrios was a threat to herself and to others in the event of an emergency evacuation. While safety can serve as a legitimate argument, after Barrios submitted evidence of her ability to safely walk the evacuation route without assistance in 2003 the jury found the safety argument to be invalid. The jurors awarded Barrios $91,000 in back pay, $200,000 in front pay (from trial until retirement), and $1 million in punitive damages. The trial court reduced the $1 million punitive damages award to $300,000 in compliance with statutory caps.

The most surprising element of this case is the appellate court's decision that the award of the punitive damages should stick. Judge Edith Jones, the judge who authored the appellate decision, is one of the most conservative judges on the Federal Court of Appeals covering Texas and when she says punitive damages survive, it deserves attention.

At this point, it is helpful to know a little of the basics of punitive damages. An employee may recover punitive damages if her employer acts with malice or reckless indifference toward her federally protected rights. The availability of punitive damages turns on the defendant's state of mind—how it views the employee— not the nature of the defendant's egregious conduct. Stated another way, there must be evidence that the employer knew about the ADA and decided to violate it anyway.

Judge Jones found sufficient evidence to support the jury finding that DuPont intentionally discriminated against Barrios with malice or with reckless disregard for her rights and that DuPont was aware of its responsibilities under the ADA. For instance, evidence showed that the company made Barrios's job more difficult by placing her printer over one hundred feet from her desk in spite of her walking difficulties, whereas other lab clerks' printers were adjacent to their desks. DuPont's refusal to allow Barrios to demonstrate her ability to evacuate before it fired her



was another forceful blow to the company. The crowning evidentiary blow to DuPont came in the form of evidence which showed that when Barrios attempted to get her job back, a supervisor said that he no longer wanted to see her "crippled, crooked self going down the hallway, hugging the walls."

This case is disturbing for a number of reasons. First of all, the appellate court in this case is the United States Court of Appeals for the Fifth Federal Circuit which is known as one of the most conservative – employer friendly courts in the country. Also, it is well known that it is very difficult to establish a "disability" under the ADA such that many claims have been dismissed by federal district and appellate courts throughout the country. With this backdrop, it is disturbing that our federal appellate court not only found in favor of this employee but upheld an award of punitive damages in this case.

This case follows a trend which this firm has been watching for several years now. Although it is difficult for an employee to establish an actual impairment, it is not as difficult for an employee to establish a disability claim by arguing they were "regarded as" or were perceived as "suffering from a disability" by their employer. Remember, in our business, "no good deed goes unpunished." If an employee is not disabled but you treat them as being disabled, they will have a viable discrimination claim under the ADA as if they had an actual impairment which substantially limited one or more major life activities.

In this case, the employee got to keep her $300,000.00 in punitive damages for several reasons. First of all, DuPont refused Barrios' request that she be able to prove her ability to walk the evacuation route. Secondly, the company's decision to deliberately move Barrios' printer further away from her desk as compared to any of her peers could not have helped their case. Finally, the supervisor's ugly comments referring to Barrios as "crippled" and "crooked" undoubtedly got the jurors' attention.

Any time an employee is arguably having difficulty doing the essential functions of their job and they wish to demonstrate how they can do those job duties with even the slightest accommodation, management is strongly urged to allow the employees to make such a demonstration. Obviously, instead of making a job more difficult for an employee who is struggling medically (whether or not they are disabled) the employer is well advised to treat that employee the same way they are treating all other employees unless or until an employee requests a reasonable accommodation. *E.E.O.C. v. E.I. DuPont de Nemours & Co., 480 Fc3d 724 (5th Cir. 2007).*

RACIAL DISCRIMINATION CANNOT BE DISGUISED AS "DIVERSIFICATION"

A black vice president's goal of "diversifying" his company's personnel backfired when he deliberately demoted a white maintenance manager and tried to get him to quit, while at the same time promoting allegedly less qualified black employees. In *EEOC v. Great Atlantic & Pacific Tea Co.*, John Sullivan, who worked for Great Atlantic & Pacific Tea Company's Eight O'Clock Coffee production plant in Landover, Maryland, was awarded approximately $85,000 by a jury after he sued his former employer for discriminating against him on the basis of race, pursuant to Title VII of the Civil Rights Act of 1964. Sullivan filed an initial complaint in 2001 because two subordinate black employees were allegedly hired in positions above his. The matter was settled during arbitration in 2002, but Sullivan was subsequently fired.

A layoff of one employee is never a good thing. Discharge for misconduct is the better course of action.

In Sullivan's second action, which he filed with the U.S. District Court in Maryland, he claimed he had been demoted because of his race by the aforementioned black vice president of operations, who verbally threatened to "get rid of all the white boys" in order to achieve his vision of diversification of the company. Testimony indicated that the tactic used was to systematically demote undesirable employees, by requiring them to work night shifts in the hope that they would quit. In its defense, A&P argued Sullivan was a "mediocre employee" and that they were conducting corporate-wide lay-offs. However, evidence indicates he was the only one fired.

At trial, the jury agreed with Sullivan and awarded him $24,000 in damages, and one year's back pay of approximately $61,000 plus his attorney's fees. This case illustrates two basic but important points: first of all, discrimination is discrimination whether it is allegedly whites discriminating against blacks or blacks discriminating against whites. Secondly, a layoff of one person is never a good thing. If someone is performing poorly, discharge them for their performance and not as part of a supposed reduction in force. Layoffs generally involve more than just a handful of employees and layoffs are generally based on seniority as opposed to poor performance.

HIGH COURT PUNTS ON ISSUE OF WHETHER "ME TO" EVIDENCE IS ADMISSIBLE IN DISCRIMINATION CASES

When an employee claims she has been fired as a result of age discrimination, should she be allowed to call her fellow employees to the witness stand if they feel they have also been dismissed on the basis of age, but by different supervisors? This was the question before the U.S. Supreme Court in late February, in *Sprint/United Management Co. v. Mendelsohn.* However, the Court's answer...was not really an answer. It held that such evidence is not admissible in *all* cases, but that it is also not inadmissible in all cases. This essentially leaves the determination to district courts, who must use a fact-based approach in deciding whether to allow the testimony. In this particular case, the district court judge did not permit five fellow employees to testify because they were not "similarly situated," i.e. they were not under control of the same decision-maker in any adverse employment action, nor were the respective firings of the employees close enough in time to be relevant.

This is an extremely important case as the Supreme Court had the opportunity to clear up a very confusing and dangerous area of employment trial law. Often, plaintiffs drag up disgruntled former employees of the defendant employer who would love nothing more than to punish the employer for firing them usually under completely different circumstances than those of the plaintiff employee. This type of "me to" evidence can be extremely damaging and prejudicial to the employer's defenses.

Unfortunately, there are no clear or bright line rules on when or how courts will allow this type of evidence to be heard by the jury. It was this commentator's hope that the Supreme Court would outline factors to be followed by the Courts when considering whether to allow other employees to testify that they were treated similarly by the company as compared to the plaintiff employee. This the court failed to do and it is possible now that employees may have an easier time getting other former disgruntled workers to testify on their behalf even if the other employees' situations are not similar to the circumstances surrounding the plaintiff employee's discharge. This is very unfortunate and we will have to wait and see how courts interpret this disappointing decision.

CAUTION: UNDERSTATING STRONG GROUNDS FOR TERMINATION COULD BE COSTLY

When dismissing an employee, an employer might be tempted to understate the grounds for termination in order the give the employee a chance to start over at another job with a "clean slate." That is exactly what occurred in the events leading up to the case of *Holland v. Washington Homes*, heard by the Fourth Circuit Federal Court of Appeals. In October 2003, Washington Homes decided to discharge Dorn Holland, a black employee who had sold homes for the company for four years. The dismissal came after an investigation of Holland ordered by the vice president of the company, in which the company learned Holland had expressed hatred for his supervisor, a white female. Examining the history of Holland's time as an employee showed that while his commissions had fluctuated somewhat, he was earning significantly more money in his fifth year than in his first. Despite this fact, Holland had lodged numerous internal complaints of discrimination on the basis of his race, such as being assigned to a primarily black neighborhood where he alleged sales were lower. Perhaps because the company knew it might face a racial discrimination suit, Washington Homes cited "lack of work" as the reason for discharge, instead of "gross misconduct" for fear of violence, which it later stated was the *true* reason. The company probably hoped Holland would find a new job and decide not to sue.

In addition to misstating the reason for dismissal, Washington Homes decided to delay the official date of termination from October 30 to November 3, allowing Holland's 401(k) to vest, or reach five-year maturity. According to the company, it did not want to deprive Holland of future compensation, as not allowing the account to vest would have affected his retirement benefits.

After he was fired, Holland sued Washington Homes for discriminating against him on the basis of race. He used the act of delaying the date of termination against the company, claiming it was a pretext for discrimination. Ironically, if Washington Homes had *not* waited a few extra days to allow the 401(k) to vest, Holland could have claimed this was an act of discrimination as well.

Trying to help a soon-to-be terminated employee is generally good personnel management– it may make the discharge less painful for the employee and it may make the employer look better before the EEOC or in Court. However even the best of intentions can backfire as this case illustrates the old human resources adage: "no good deed goes unpunished..."

In the trial that followed, the district court sided with Washington Homes and found that "unfortunately for Holland, he has not put forth sufficient evidence showing that Washington Homes' proffered legitimate explanation was false." Even though Holland denied making threats against his White female supervisor, "nothing in the record supports an inference that [the vice president's] explanation was pretextual." The court of appeals affirmed the court's decision.

This case illustrates (once again) the old adage: "no good deed goes unpunished." The employer in this case actually tried to help the plaintiff employee by delaying the termination date so the employee could receive vested retirement benefits. The employer also tried to help the employee find another job by citing "lack of work" as the reason for discharge instead of misconduct which was apparently the true reason. Unfortunately, in this day and age, even the best of intentions can go seriously wrong and in this case, obviously, the employer should have discharged the employee for misconduct. The employer also should have discharged the employee whenever it determined the misconduct occurred. Accuracy and consistency in human resource management can be critical in defending and prevailing in the court room.

NEW LEGISLATION

SENATOR KENNEDY INTRODUCES THE FAIR PAY RESTORATION ACT

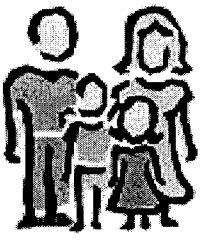
New legislation has been introduced in response to the Supreme Court's holding in *Ledbetter v. Goodyear Tire & Rubber Co.* on May 29, 2007, that an employee pursuing an EEOC discrimination claim must timely file claims for each separate intentional discriminatory act. The Fair Pay Restoration Act, introduced by Senator Edward Kennedy (D-Mass.), is a bill that would amend Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 "to clarify that an unlawful practice occurs each time compensation is paid pursuant to a discriminatory compensation decision or other practice, and for other purposes."

In the case mentioned above, Ledbetter attempted to "shift forward the intent associated with prior discriminatory acts" by claiming that sexually discriminatory evaluations by supervisors in the past had contributed to her lower pay rate while working at Goodyear. Because the Court found that the "later effects of past discrimination do not restart the clock for filing an EEOC charge," her claim that the charge should include paychecks prior to the 180-day filing period was denied as being untimely. The issue came before the Court after a jury found in favor of Ledbetter, awarding her back pay and damages, and the Court of Appeals for the Eleventh Circuit subsequently reversed the district court's decision.

According to The National Women's Law Center, women are still paid only 77 cents on every dollar paid to white men performing similar work. The Center argues the *Ledbetter* decision now makes it virtually impossible for women to bring charges against their employers for past unequal pay claims. In addition, they point out that because pay information is often confidential, it is difficult for employees to realize they are receiving pay based on a discriminatory decision.

The *Ledbetter* case is really not that unusual as the Supreme Court was really following the intent of Congress with regard to the Equal Pay Act and in particular Title VII of the Civil Rights Acts of 1964. These laws do have statutory deadlines for filing complaints of discrimination and if the employee does not file a timely complaint, they are out of luck. This is exactly what happened to Ms. Ledbetter and the Fair Pay Restoration Act if passed, could lead to significant changes with respect to employees' deadlines for making discrimination claims. This Bill has not been received positively by most Republican Congressmen. Our firm will keep you apprised in this newsletter of how this bill proceeds through committees.

HEALTHY FAMILIES ACT HAS GOOD INTENTIONS BUT COULD BE VERY EXPENSIVE



Supporters of the Healthy Families Act, which was introduced to the House and Senate, are currently campaigning for its implementation in states all across the country. The bill proposes giving workers seven paid sick days per year, for use either when the employee, or a member of the employee's family, needs medical attention. Employers with 15 employees or more would be affected, but they would be allowed to retain existing policies if they are substantially in compliance with the Act.

The most prominent group backing the Bill is the National Partnership for Women & Families, which claims the Act makes good business sense for employers. Requiring employees to work when they are sick could actually cause the employer to *lose* money. An employee who is ill at work (dubbed "presenteeism") will probably not be as productive, is more likely to quit, and may pass along a disease or infection to coworkers. Ironically, those employees with the fewest paid sick days are food and service workers who have heavy contact with the public. According to the Institute for Women's Policy Research, allowing employees to go home when sick could result in a savings of $2.40 per worker per week. (Where the cost of paying the sick leave is $6.00 per week, and the savings to the employer $8.40.) On a national scale, proponents argue that the Act, and the subsequent savings, could have a significant positive impact on the economy. In 2006, San Francisco was the first city to pass a law giving sick days to all workers, and on March 4th, 2008, the District of Columbia became the second.

McBride Joins Firm

We are pleased to announce that Inez McBride is now of counsel with Holland & Holland, LLC.

Ms. McBride received her J.D. degree from St. Mary's University School of Law, magna cum laude, in 1991 and also became licensed by the State Bar of Texas in 1991. She has been Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization since 1998. She is experienced in defending employment-related claims and providing clients with assistance in a wide variety of matters relating to labor and employment issues.

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THE FIRM'S NEW WEBSITE

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Keeping Employers Out of the Courtroom for over 20 Years

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E-mail copies are also available

ABOUT THE FIRM

Holland & Holland L.L.C. Represents management in a wide variety of employment law matters. Our primary goal for clients will continue to be claims avoidance through timely advice and counsel before events occur which can lead to lawsuits. However our firm has significant experience in jury trial litigation in a wide variety of employment related claims in different venues throughout the great state of Texas.

Our expertise includes the following areas:

—**management counseling**

—review and preparation of **personnel policy** and procedures including employee handbooks;

—representation in administrative matters before the **Equal Employment Opportunity Commission**;

—**representation of management in state and federal court** for employment related claims involving Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Worker Adjustment and Retraining Notification Act, Consolidated Omnibus Budget Reconciliation Act, Polygraph Protection Act, and a variety state court causes of action such as retaliation, defamation, invasion of privacy, negligence, assault and battery;

—**protection of trade secrets** and other confidential information through the use of covenant not to compete and non-interference agreements;

—preparation of **arbitration agreements**, non-subscriber programs and waivers of jury trial agreements;

—**management training** on proper techniques on hiring, disciplining and discharging employees including seminars on recent Supreme Court decisions;

—general **human resource audits** to promote compliance with the myriad of legal and regulatory obstacles facing employers on a daily basis;

—**wage/hour compliance** audits and defense of FLSA collective actions.