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EMPLOYMENT DISCRIMINATION

Wilder v. Prokop, 846 F.2d 613

Wilder, a federal employee, appeals the dismissal of a complaint concerning his removal. The court of appeals held (1) that jurisdiction was proper in the district court, and (2) agency refusal to waive filing deadline for appeals of personnel decisions was within its discretion, and not arbitrary nor capricious, in the absence of a special showing of good cause for the filing delay.

Equal Employment Opportunity Commission v. United Parcel Service, 860 F.2d 372

The Equal Employment Opportunity Commission (EEOC) sued appellee, United Parcel Service (UPS), on behalf of Jerome Patterson and similarly situated black males who suffer a disfiguring skin condition whose sole treatment is to refrain from shaving. Pursuant to UPS's "no beard" policy, Patterson, a UPS employee, was told to shave. After the EEOC filed suit, Patterson settled with UPS. The district court granted summary judgment for UPS holding that the EEOC lacked standing because it no longer represented an actual injured party.

The court of appeals reversed, ruling that the district court erroneously concluded that the EEOC must proceed on behalf of an actual injured party when challenging a discriminatory policy under Title VII of the Civil Rights Act of 1964. The EEOC is not required to act through an individual in order to vindicate the public interest. The EEOC's right to proceed endures until the alleged discrimination is eradicated.

Brown v. Ford, Bacon & Davis, Utah, Inc., 850 F.2d 631

Claimant alleges that her former employer discharged her from her position because of her gender and her complaint of discriminatory treatment. In addition, she claims the appellees breached her employment contract by failing to comply with termination procedures pursuant to their personnel manual.

The panel affirmed the trial court's finding that appellees did not discharge claimant for discriminatory or retaliatory reasons but had breached the contract. However, the panel concluded that damages were improperly calculated. The panel stated that if claimant's discharge resulted from unsatisfactory job performance, she was entitled to back pay and reasonable front pay. However, if the lack of work claimant was qualified to perform was the determinative factor in her discharge, the appellee's breach did not damage claimant. Thus, the panel remanded to determine whether claimant is entitled to damages.

Summers v. State Farm, 864 F.2d 700

Appellant Summers appeals the district court's decision to grant State Farm's motion for summary judgment on his claims of wrongful termination because of age and religion. Affirmed.

Summers worked for State Farm as a field claims representative until 1982, when he was fired on the stated grounds of poor job performance and the falsification of company records. Summers, however, claimed that he had already been disciplined for these problems prior to his discharge, and that State Farm's stated grounds for firing him were merely a pretext.

State Farm admitted to the prior disciplining of Summers, but responded by saying that *after* Summers was fired, more instances of Summers' misconduct were found, and that even if Summers was still employed by State Farm then, he would have been discharged when these instances were discovered. The court of appeals approved of this use of "after-acquired evidence," and said that post-termination discoveries of misconduct by an employee can be used to deny relief in certain wrongful termination cases.

Pitre v. Western Electric, 843 F.2d 1262

Janice Pitre brought an action individually, and on behalf of a class, against appellant Western Electric, alleging gender-based discrimination in violation of Title VII, 42 U.S.C. § 2000(e), after she was demoted from section chief. She alleged that Western's all-male management personnel held discriminatory attitudes which resulted in a clustering of women in lower salary grades. The district court ruled in favor of Pitre and the class, and enjoined Western from continuing to discriminate. The court also awarded damages which included some back and front pay.

The court of appeals held that the district court properly considered past discrimination as evidence of Western's intent to discriminate, since the decision-making process at Western had undergone no change before the case began. The court further ruled that Pitre had presented ample evidence of discrimination despite the fact that the small sample sizes in the case impaired the effective use of statistics.

The damage award was calculated incorrectly. The district court unintentionally disregarded earnings lost due to the lingering effects of past discrimination. Front pay is intended to compensate victims of discrimination for the continuing future effects of discrimination until the victim can be made whole, and is not a substitute for back pay. Further, the court did not sufficiently consider the effect of past discrimination in determining how to distribute back pay. Remedy reversed and remanded. Liability findings affirmed.

Richardson v. The City of Albuquerque, 857 F.2d 727

Appellant appeals denial of a new trial following: (1) a jury verdict

for the defendants on Richardson's allegations of wrongful discharge, breach of contract, intentional infliction of emotional distress, outrageous conduct, defamation, and 42 U.S.C. § 1983 sex, age, and handicap discrimination; and (2) a directed verdict for the defense on her fourteenth amendment due process claims. Affirmed.

Richardson was a thirty-nine year old female who was admitted into the Albuquerque police cadet academy in late 1982. A month into the training program, Richardson was removed from the academy class and terminated. The stated grounds for this termination were Richardson's failure to pass certain physical requirements.

Richardson claimed the instructors at the police academy subjected her to verbal abuse and discriminated against her. Defendants insisted that verbal harassment was a part of a high stress, military-type training program, and that women were not treated differently than men because both had to perform the same job in the field.

Following the jury and directed verdicts, Richardson made a motion for a new trial on the basis that the jury verdict was against the weight of evidence. The Tenth Circuit noted this decision was a factual one for the trial court to make, and that there was no showing of manifest abuse of discretion in this case. Regarding the directed verdict on the due process claims, the Tenth Circuit stated that the trial court was corrected in holding that Richardson had no protected property interest in her probationary position as a police cadet.

Equal Employment Opportunity Commission v. Sperry Corp., 852 F.2d 503

The Equal Employment Opportunity Commission (EEOC) brought this action against Sperry Corporation (Sperry), alleging that Sperry improperly discharged and then failed to rehire Elizabeth Koyen, in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* The jury found for EEOC and Koyen at trial, and both parties appealed. The only issue addressed on appeal was whether the district court improperly denied Sperry's motions for a directed verdict and judgment n.o.v.

Koyen, then 54 years of age, took a five-month leave of absence. Shortly before the end of her leave, she tried to regain her former position. When told that the position was filled, she unsuccessfully applied for other openings at Sperry.

In reviewing the district court's denial of the motion for judgment n.o.v., the Tenth Circuit instructed that there must be evidence upon which the jury could properly find a verdict for the nonmovant. Moreover, the panel noted that under the ADEA, plaintiff must prove that age was a determining factor in defendant's treatment of the complaining employee. Upon evaluating EEOC's four theories of age discrimination, weighing every reasonable inference from the facts in evidence in favor of EEOC, the Tenth Circuit concluded that EEOC did not present sufficient evidence to prove discrimination on any of the theories.

Accordingly, the Tenth Circuit reversed the district court's order denying Sperry's motion for a judgment n.o.v. and remanded with instructions to dismiss the action.

Cooper v. Asplundh, 836 F.2d 1544

Appellee Cooper worked as a foreman for Asplundh from 1966 until he was discharged in 1984. He was 49 years old and replaced by a 32 or 33 year old. He brought this suit alleging Asplundh willfully discriminated against him in firing him. The jury found for Cooper and the court entered a judgement for back pay, liquidated damages, front pay, and attorney's fees. Both parties appealed.

The issue upon appeal was double damages for willful violation as opposed to intentional violations. To find willful violation, a factfinder must find that age was the *predominant* factor in the employer's decision. The jury instruction failed to refer to the predominate factor requirement so the "willfulness" issues was remanded. Front pay was held reasonable given the animosity between the parties. Reinstatement terms offered were precluded here. The arbitral award should only be subtracted once, not twice as respondent argued, from the overall award.

Gray v. Phillips Petroleum Company, 858 F.2d 610

Petitioner Phillips appeals from the district court's denial of summary judgment in this age discrimination suit. Affirmed in part, reversed in part.

In March 1982, Phillips announced its plans to close its Kansas City refinery in six months. As part of its agreement with the employee union, Phillips agreed to consider Kansas City employees for employment at Phillips' other facilities where openings existed during the six month closing period ending on September 9, 1982. The agreement also stated that the refinery would cease all operations on August 31, 1982 whereupon all remaining employees would be terminated.

On August 31, 1982, Plaintiff Gray filed a charge of age discrimination against Phillips, as did Plaintiff Walsh on October 15, 1982, claiming that Phillips had denied them an employment transfer due to their ages. On March 2, 1983, a class action was filed on behalf of all former employees of the refinery similarly situated. The actions were consolidated.

Under the Age Discrimination in Employment Act (ADEA), charges of discrimination must be filed with the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged wrongful termination date. According to the district court, as affirmed by this court, that date is August 31, 1982. Consequently, the district court held that only plaintiffs Gray and Walsh had complied with the limitations period, and that the other plaintiffs had not raised facts sufficient to establish equitable tolling of the 180-day period. However, the district court denied Phillips' motion for summary judgement on the ground that plaintiffs

Gray and Walsh were representative of the plaintiffs who had not met the 180-day limit.

This court reversed, ruling against equitable tolling on the ground that the EEOC actively misled plaintiffs into a late filing and that equitable considerations mandate that plaintiffs be permitted to proceed with their claim. As a result, the district court's denial of Phillips motion for summary judgment is affirmed on the basis of equitable tolling.

Graham v. City of Oklahoma City, 859 F.2d 142

Appellant was terminated from his position as a police officer with the appellee city because he allegedly falsified a police report. Appellant sued alleging that his termination violated due process. The lower court granted summary judgment to the city.

The Tenth Circuit affirmed in part, holding that the appellant did not possess a property interest under Oklahoma law and, consequently, could not invoke the protections of the fourteenth amendment. This was because removal from office was conditioned, by the city charter, solely upon the good of the service. The court held this standard does not create a legitimate expectation of entitlement to continued employment with cause for discharge.

Grandchamp v. United Airlines, Inc., 854 F.2d 381

Appellees were employees of appellant airline until they were eliminated from their jobs due to a company reorganization that did not include their continued services. Both appellees sued for violations of the Age Discrimination in Employment Act (ADEA) and for damages resulting from alleged intentional infliction of emotional distress. The lower court found for the airline with regard to the ADEA claim but found for the plaintiffs as to the tort claim. The airline appealed the tort claim judgment.

The Tenth Circuit reversed the tort claim judgment, holding that under Colorado law, the plaintiffs must show outrageous conduct on the part of the defendant to support a claim for intentional infliction of emotional distress. The plaintiffs, however, showed nothing more than that they had not been given new positions based on their age. Although such conduct is unlawful under the ADEA, the appellees failed to appeal their ADEA claim. Consequently, their bare age discrimination claims without any showing of outrageous conduct failed to support the tort claim.

Branson, et. al. v. Price River Coal Co., 853 F.2d 768

Appellants Branson and Saccomanno claimed they were discriminatorily discharged by appellee Coal Co. because of their age in violation of the Age Discrimination in Employment Act (ADEA). The district court granted the Coal Co.'s motion for summary judgment. Judgment affirmed.

The Tenth Circuit found that the employees had established a *prima facie* case of age discrimination in connection with the employer's reduction-in-force by showing that the employer fired qualified older employees, but retaining younger ones in similar positions. The court agreed with the district court's determination that the appellants failed to raise a genuine issue of fact about whether the employer's articulated reasons for the layoffs were a mere pretext for discrimination. Appellants' mere conjecture that their employer's explanation was a pretext for intentional discrimination was an insufficient basis for denial of summary judgment.

Wyoming Laborers Health and Welfare v. Morgen & Oswood, 850 F.2d 613

Trustees of an employee benefit pension and insurance fund sued employer to recover delinquent contributions. The district court held that the employer owed a portion of the delinquent contributions claimed by the trustee, and awarded a double interest penalty on that amount, auditor's fees, attorney's fees, and costs to the trustees. Affirmed.

The Tenth Circuit held that the Wyoming ten year statute of limitations for actions based on a written contract was applicable to an action brought under the Employment Retirement Income Security Act by trustees of a pension plan to recover delinquent contributions, and that the doctrine of laches did not bar the action.

Norton v. Worthen Van Service, Inc., 839 F.2d 653

Appellants were and are employees of appellee Worthen Van Service, Inc. The employees were required to be on call and available to drive within fifteen to twenty minutes of notice. Appellants brought this suit under the Fair Labor and Standards Act (FLSA) seeking unpaid wages for this waiting time. The district court denied recovery by finding that this waiting time was in accordance with the provisions of the FLSA, and did not constitute "working time." Affirmed.

Barnard v. Commercial Carriers, Inc., 863 F.2d 694

Appellant Barnard appeals a district court's decision to grant summary judgment in favor of the appellees, Commercial Carriers, Inc. (CCI), and Teamsters, Chauffers, Warehousemen and Helpers of America, Local No. 222 (Local 222). Reversed.

Appellees are bound by a multi-employer collective bargaining agreement. CCI hired appellant Barnard as a yardman in 1980. Later, he was laid off as a yardman, but was later rehired as a driver. His seniority date of 1980 was retained in spite of his rehiring into a different position. Grievances were filed by other employees at CCI who protested Barnard's seniority date. A special subcommittee heard the grievances, in spite of the fact they were not filed within the 30 day period specified by the collective bargaining agreement. Following a hearing of

which Barnard was given no notice, the subcommittee decided to change Barnard's seniority date to a later date.

Barnard filed a grievance with Local 222. The union refused to hear the grievance, and Barnard subsequently filed this action against the appellees.

The court of appeals held that the processing of untimely grievances did violate the express terms of the collective bargaining agreement and that Local 222 breached its duty of fair representation to Barnard in failing to protest the untimeliness of the grievances. Since the 30 day time limit had expired, the court held that the subcommittee lacked the jurisdiction necessary to change Barnard's seniority date. In addition, the lack of notice to Barnard violated his due process rights.

