

Employment Law Updates at the Eighth Circuit

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The Eighth Circuit Court of Appeals has addressed or clarified a variety of employment law issues so far in 2023. The Eighth Circuit is the federal appellate court that hears and decides appeals of federal trial court decisions in Missouri, Arkansas, Iowa, Minnesota, Nebraska, North Dakota, and South Dakota. Such appellate decisions are legally binding on employers within those states, so it is important for employers with workers in these states to take note of them.

Two recent decisions are noteworthy, in that they stress (under two separate employment related laws) the overarching principle that, in the absence of evidence of intentional discrimination, courts do not sit as super-personnel departments scrutinizing retrospectively the wisdom or fairness of business decisions:

Tamara O'Reilly v. Daugherty Systems, Inc.

In this case, the Eighth Circuit affirmed the trial court's decision to award the defendant employer, Daugherty Systems, Inc. ("Daugherty"), summary judgment on a former employee's claim that Daugherty engaged in wage discrimination under the Equal Pay Act ("EPA") by paying a higher salary to another male co-worker who held the same position as her.

The EPA generally prohibits discrimination against "employees on the basis of sex by paying wages to employees...[that are] less than the...wages [of] employees of the opposite sex in [the same] establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." One potential defense to an EPA claim involves proving that a pay differential results from a recognized factor other than sex (e.g., seniority, merit, performance evaluation, etc.).

In this case, the former employee—Tamara O'Reilly ("O'Reilly")—served as a Director/Client Partner and earned a salary of \$200,000 per year, with additional incentive and overtime compensation available. Daugherty hired another male Director/Client Partner, who it paid a \$275,000 salary per year, along with additional bonus amounts (but not the same incentive and overtime pay available to O'Reilly). Six months later, O'Reilly resigned.

O'Reilly claimed this pay disparity constituted unlawful wage discrimination under the EPA. Daugherty countered that the pay structures varied between the two employees primarily due to differences in their prior work experience (*i.e.*, the male comparator had prior client partner experience, while O'Reilly did not). Daugherty contended it provided more incentivized compensation to O'Reilly to encourage her growth in the new position for her.

After losing at the trial court, O'Reilly appealed. And the Equal Employment Opportunity Commission ("EEOC") filed an amicus brief in support of her claim. On appeal, Eighth Circuit assumed O'Reilly made a *prima facie* (preliminary) case of wage discrimination but focused its analysis on Daugherty's affirmative defense that a factor other than sex determined their pay differences.

Emphasizing that "[e]ducation or experience is a permissible factor recognized by the Equal Pay Act," the Eighth Circuit affirmed the trial court. It found the differing skillsets and experience between O'Reilly and her male counterpart to constitute "a factor other than sex" that accounts for the pay disparity between the two workers (a disparity which the Court implicitly found to be "marginal" when all compensation was considered) and that "no reasonable jury" could find otherwise.

In doing so, the Court rejected O'Reilly's attempt to bolster her wage discrimination claim by arguing that she had skills that her male counterpart did not have. The Court noted that wading into such an analysis "is exactly the kind of 'wisdom or fairness' assessment of salary decisions that the Court may not engage in."

Jeff Bonomo v. The Boeing Company

In this case, the Eighth Circuit affirmed the trial court's decision to award the defendant employer, The Boeing Company ("Boeing"), summary judgment on a former employee's claim that he suffered age discrimination under the Missouri Human Rights Act ("MHRA") in unsuccessfully applying for internal promotions.

The former employee—Jeff Bonomo ("Bonomo")—had worked for Boeing for decades before, at age 62, he applied and interviewed for internal promotions in 2017 and 2018. In 2017, his interviewers were all in their 50's. Four other individuals interviewed. Bonomo did not have one of the preferred qualifications (*i.e.*, master's degree) and scored the lowest of the interviewees. His assessment indicated that his interview responses were "poor, that he seemed arrogant and entitled, and that they believed he was a less capable leader than Boswell," the 33-year-old employee who received the promotion.

In 2018, Bonomo applied for a similar opening with identical requirements and preferred qualifications. His interviewers were all in their 30's. Two other individuals interviewed, one of whom was a 34-year-old employee who was already serving in the position at issue on an interim basis. That employee had also unsuccessfully applied for the same position as Bonomo in 2017, but, unlike Bonomo, he did not get an interview invitation. Bonomo again scored the lowest of the interviewees. Based on the strength of the 34-year-old's interview, that employee was selected to permanently fill the position.

At the end of 2019, Bonomo filed suit for age discrimination and then resigned and retired from Boeing. The federal trial court then granted summary judgment against Bonomo. Bonomo then appealed to the Eighth Circuit.

On appeal, the Eighth Circuit started its analysis by noting Bonomo had no direct evidence of discrimination. So it proceeded to apply the burden-shifting framework of *McDonnell Douglas*. Under this framework, once a plaintiff proves a prima facie case of age discrimination, the defendant must come forward with a legitimate, non-discriminatory reason for its hiring decision. Once a defendant does so, the plaintiff must show the proffered reason is mere pretext for intentional discrimination.

In reiterating this common framework in discrimination cases, the Eighth Circuit emphasized an oft-overlooked point: “the plaintiff must do more than simply create a factual dispute as to the issue of pretext; he must offer sufficient evidence for a reasonable trier of fact to infer discrimination.” In other words, it is not enough to disbelieve the employer: “the factfinder must *believe* the plaintiff’s explanation of intentional discrimination.” (emphasis original).

The Court then proceeded to address, and reject, all arguments advanced by Bonomo. One such argument involved the claim that the use of an interview alone evidences pretext. But, as the Court noted, this is incorrect under applicable Eighth Circuit case law, which observes that the “presence of subjectivity in employee evaluations is *itself* not a grounds for challenging those evaluations as discriminatory.”

Another argument entailed Bonomo claiming the ages of 2018 panel could lead the Court to infer they discriminated against him based on his age. But, again citing to other law, the Eighth Circuit rejected this claim: “the age of the panelists alone is insufficient to show age animus.”

The Court also rejected Bonomo’s argument that he was objectively more qualified than the 34-year-old employee for the 2018 position because that employee was unqualified to interview for the 2017 position. The Court concluded the factual record did not support such a claim. In rejecting this argument, the Court stressed the important overarching principle in all employment discrimination cases: “the role of the court is only to ensure that Bonomo was not discriminated against on account of his age; we do not ‘sit as [a] super-personnel department[] reviewing the wisdom or fairness of the business judgments made by [Boeing].’”

As always, do not hesitate to contact a member of Labor & Employment Team at Sandberg Phoenix with any of your workplace questions or concerns.