

PELA POINTERS – June 2010
Plaintiff Employment Lawyers Association
Colorado Chapter of the National Employment Lawyers Association
with Case Summary

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ANNOUNCEMENTS

2010 Twenty-First Annual NELA Convention

- June 23 - June 26, 2010
The Omni Shoreham Hotel
Washington D.C.

Annual PELA Retreat

- Thursday, August 19, 2010
The Pines at Genesee
633 Park Point Drive
Golden, Colorado 80401
- 8:00-5:00 p.m.
(breakfast and lunch included)
- 4:00-5:00 p.m.
The Honorable Christine Arguello District
Court Judge for the District of Colorado
- 5:00 – 6:30 p.m. Reception and Silent Auction
- \$75 for the entire day, including two meals and
hors d'oeuvres at the reception.

2010 SAVE THE DATES

Brown Bag Luncheons

- Friday, October 29, 2010

Annual Holiday Luncheon

- Friday, December 10, 2010
- Location TBD

CASE SUMMARIES

Lewis v. Chicago, No. 08-974 (U.S. S. Ct. May 24, 2010) The plaintiff class of minority applicants for firefighter positions alleged that a pen-and-paper exam had a disparate impact against them. The city announced in January 1996 that it would hire randomly-selected applicants who scored 89 out of 100 on the test, and would retain those who scored 65 and above on the eligibility list, but advised the lower-scoring “qualifieds” that they probably would

not be hired. In May 2006 hiring commenced, and in March 1997 minority “qualifieds” filed a charge of discrimination with the EEOC.

The class prevailed at trial on the merits: “After an 8-day bench trial, the District Court ruled for petitioners, rejecting the City’s business-necessity defense. It ordered the City to hire 132 randomly selected members of the class (reflecting the number of African-Americans the Court found would have been hired but for the City’s practices) and awarded backpay to be divided among the remaining class members.” But in an interlocutory appeal, the Seventh Circuit reversed, holding (in an opinion signed by Judge Richard Posner) that the Title VII claim commenced no later than the city’s initial announcement that it would hire off of the disputed list.

The Supreme Court unanimously reverses, in an opinion signed by Justice Scalia. While a disparate *treatment* claim may accrue when the employee knew or should have known about an impending “unlawful employment practice,” the accrual date of a disparate *impact* claim is governed by different language, i.e., when “a complaining party demonstrates that a respondent *uses* a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin” (42 U. S. C. §2000e-2(k), emphasis added).

Here, the Court holds, the hiring list was “use[d]” not when it was announced, but (rather) each time that the city resorted to it to fill vacancies:

“Title VII does not define ‘employment practice,’ but we think it clear that the term encompasses the conduct of which

petitioners complain: the exclusion of passing applicants who scored below 89 (until the supply of scores 89 or above was exhausted) when selecting those who would advance. The City ‘use[d]’ that practice in each round of selection. Although the City had adopted the eligibility list (embodying the score cutoffs) earlier and announced its intention to draw from that list, it made use of the practice of excluding those who scored 88 or below each time it filled a new class of firefighters. Petitioners alleged that this exclusion caused a disparate impact. Whether they adequately proved that is not before us. What matters is that their allegations, based on the City’s actual implementation of its policy, stated a cognizable claim.”

The Court resisted any analogy to the disparate treatment line of cases:

“The Seventh Circuit . . . reason[ed] that the difference between disparate-treatment and disparate-impact claims is only superficial. Both take aim at the same evil-discrimination on a prohibited basis-but simply seek to establish it by different means. 528 F.3d, at 491-492. Disparate-impact liability, the Court of Appeals explained, ‘is primarily intended to lighten the plaintiff’s heavy burden of proving intentional discrimination after employers learned to cover their tracks.’ *Id.*, at 492 (quoting *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1164 (CA7 1992)). But even if the two theories were directed at the same evil, it would not follow that their reach is therefore coextensive. If the effect of applying Title VII’s text is that some claims that would be doomed under one theory will survive under the other, that is the product of the law Congress has written. It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.

* * * *

“By enacting §2000e-2(k)(1)(A)(i), Congress allowed claims to be brought against an employer who uses a practice that causes disparate impact, whatever the

employer’s motives and whether or not he has employed the same practice in the past.”

The case is remanded to consider whether the first round of non-hires were time-barred.

Reinhardt v. Albuquerque Public Schools Bd. of Ed., 595 F.3d 1126, 22 A.D. Cases 1625 (10th Cir. 2010)). Teacher’s filing of Individuals with Disabilities Education Act (IDEA) complaint on behalf of students a protected activity under the Rehabilitation Act § 504. Being assigned to work only with ninth graders arguably constituted a “materially adverse action”; record shows that being assigned to serve only ninth grade students was not merely an alteration in job responsibilities; the changed assignment directly led to a reduction in compensation because she longer qualified for an extended contract. When her caseload increased, school did not grant her an extended contract, and this also affected her salary. Adverse actions taken even months after the employee complains may still be held casually related, where there is an intervening event that delays the employer from acting, such as here where a summer-vacation period delayed implementation of the school’s decision. Genuine issue of material fact about whether school district in proffering a supposedly legitimate, non-discriminatory reason for its action - - “that it assigned Ms. Reinhardt only 9th grade students for the 2004-2005 school year because she had experience transitioning middle school” -- where there were two other teachers with equally relevant experience, but neither was limited to work only with ninth graders, and the school district could not explain the difference in treatment.

Bonidy v. Vail Valley Center for Aesthetic Dentistry, P.C., No. 09-CA-0602
<http://www.cobar.org/opinions/opinion.cfm?opinionid=7554&courtid=1>

Plaintiff Debbie Bonidy appealed the aspects of the trial court’s judgment calculating her back-pay damages and denying her claim for exemplary damages. Defendants cross-appealed the trial court’s denial of a directed verdict and its conclusion that Bonidy was wrongfully terminated in violation of public policy. The Court of Appeals affirmed in part and reversed in part.

This is the second appeal in a dispute involving the termination of Debbie Bonidy from Dr. Harding’s

dental practice. In *Bonidy I*, a division of the Court held that working conditions violating Colorado Wage Order No. 22 may constitute a violation of public policy, and remanded for reinstatement of Bonidy's claim for wrongful termination in violation of public policy and a new trial.

Bonidy worked for Dr. Harding as a dental assistant from October 1998 until she was terminated in August 2004. A year after she was hired, Dr. Harding implemented an office policy preventing employees from taking meal or rest breaks unless a patient cancelled an appointment. On July 28, 2004, the policy was amended to prevent employees from leaving the office except to use the restroom, even if a patient cancelled an appointment.

Bonidy's husband -- advised by an attorney that the work schedule violated Colorado wage laws -- e-mailed Dr. Harding advising him of the same. Dr. Harding then fired Bonidy. She was earning \$28 an hour when terminated.

Dr. Harding asked Bonidy to work three additional days and she agreed. He then discovered \$240 missing from the office. Dr. Harding assured Bonidy he did not suspect her of theft. On her last day of employment, Dr. Harding told Bonidy he would pay her for a week of accrued vacation the following week. He subsequently changed his mind.

In October 2008, Bonidy's counsel sent Dr. Harding a demand letter accusing him of violating Colorado Wage Order No. 22. The next day, Dr. Harding contacted the police and accused Bonidy of stealing \$240 from his office.

The first trial ended in a directed verdict for Dr. Harding and, in *Bonidy I*, the case was remanded for a new trial. In the second trial, the court held Bonidy had been wrongfully terminated in violation of public policy, and awarded \$21,040 in damages, consisting of lost wages in the amount of \$17,920, accrued from the date of her termination in July 2004 until she opened her new business in November 2004. She also was awarded one week of vacation pay in the amount of \$1,120 and reimbursement of a health insurance premium in the amount of \$2,000.

On cross-appeal, Dr. Harding contended that Bonidy did not establish the necessary elements for her claim of wrongful discharge. He argued that because Bonidy did not refuse to work or object to

the work schedule, her claim should have failed. The Court disagreed. The record established that Bonidy objected to the work schedules and that any formal complaint by her would have been futile. In fact, she was fired before she had a chance to refuse to follow the new work schedule.

On appeal, Bonidy argued it was error for the trial court to terminate her back-pay damages on the date she started her new business rather than on the date of the first trial. The Court agreed. Back pay is a "make whole" remedy intended to restore the employee to the financial situation that would have existed but for the employer's wrongful conduct. The proper formula for calculating the amount is a matter of first impression in Colorado. The Court adopted the general formula for calculating back pay as the amount the employee reasonably could have expected to earn absent the wrongful termination, reduced by either (a) the employee's actual earnings in an effort to mitigate damages or (b) the amount the employee failed to earn by not properly mitigating his or her damages. Here, the Court held Bonidy's back-pay period should not have terminated on the date she became self-employed because it was a reasonable effort to mitigate her damages when she couldn't find other employment. The case was remanded for a calculation of back pay measured by the amount of Bonidy's lost wages from the date of her termination to the date of her first trial, less the \$3,000 she earned from her good-faith effort to start a business.

Bonidy also argued that the trial court erred in concluding she failed to meet her burden of proof for exemplary damages after the court found Dr. Harding engaged in retaliatory and vindictive conduct. The Court agreed. The case was remanded to the trial court for reconsideration of the apparent inconsistency with that finding and the decision not to award exemplary damages.