

Intersectional Discrimination – The Trifecta – Boxed!

By Byrona J. Maule, Phillips Murrah P.C.

On September 30th, the Equal Employment Opportunity Commission filed suit against a national department store,¹ alleging it discriminated against a 51-year-old, African American woman on the basis of her age, race and sex.

The Allegations: The lawsuit claims that younger, less-experienced, white males were promoted instead of the plaintiff. Adding insult to injury, the plaintiff was terminated in 2010, three years after filing the charge of discrimination, which the EEOC alleges was unlawful retaliation.

The Theory of Recovery: The EEOC filed suit under Title VII, for sex and race discrimination and retaliation, and under the Age Discrimination in Employment Act, for age discrimination and retaliation. The trifecta – boxed! No matter what the combination, if the jury finds discrimination

under any one of the protected classes – or any combination thereof – the plaintiff wins.

The Relief Sought: The EEOC seeks permanent injunctive relief, including an order that the department store “institute and carry out policies, practices and programs, which provide equal employment opportunities for women, racial minorities and persons age 40 and over...” The suit also seeks back pay, front pay, compensatory, punitive and liquidated damages.

The Intersectional Discrimination: The EEOC is focusing on intersectional discrimination. In 2006 at a Commission meeting, intersectional discrimination was highlighted, “The EEOC should also be a leader in the discussion of intersectional discrimination. Because employees are multi-dimensional persons, it is sometimes difficult to pinpoint the motivation for discrimina-

tory behavior... The requirement to show that unlawful discrimination occurred ‘because of’ race, gender, color, religion, or national

origin, complicates the pursuit of justice of these plaintiffs.’... As the agency charged with the enforcement of Title VII, the EEOC must begin a dialogue with employers so that they... will take affirmative steps to combat intersectional discrimination.”² In 2007 at a Commission meeting intersectional discrimination was again the topic of discussion, “As a Commission, we recognize also that the issue of dual or intersectional discrimination is an important part of our Title VII enforcement...”³ And in May 2010, Jacqueline A. Berrien, Chair of the EEOC, opined that the “but for” reasoning required under the Age Discrimination in Employment Act, “would appear to preclude ‘intersectional discrimination claims (e.g. those alleging that discrimination occurred because of a combination of two or more protected traits). This doctrinal development would upend decades of settled law allowing for such claims, and represent[s] an alarming restriction on longstanding civil rights protections.”⁴

The Nationwide Phenomena: Intersectional discrimination cases are nationwide phenomena. In June 2010, the EEOC entered into a consent decree with a nationwide leasing company – the basis of the case was reverse race and age discrimination and retaliation. The older white employee was treated less favorably by her young, African American

supervisor, and ultimately terminated when she complained of the discrimination.⁵

Employers Be Warned: Many of these cases are filed by the EEOC, which means the EEOC brings all of the resources of the federal government to the lawsuit. While these cases can frequently be resolved at mediation or conciliation, once the EEOC files suit – an out-of-court settlement is a virtual impossibility. The EEOC is seeking injunctive relief, which once obtained, gives the EEOC the right to enforce the injunction, in court, if necessary.

Best Advice: Evaluate your company’s employment decisions carefully – including hiring, raises, training, promotions, discipline and termination. Management should be able to clearly enunciate the reasons for each employment decision. Make sure the decisions are always based on legitimate, non-discriminatory business reasons.

About the Author... Byrona J. Maule is a successful labor and employment attorney with over 20 years of experience representing employers - from the courtroom to the boardroom - in H.R. matters. A director at Phillips Murrah P.C., Oklahoma City’s third-largest law firm, Maule provides her clients with the power of a strategic partner. You may contact Maule at bjmaule@phillipsmurrah.com or (405) 235-4100.



¹Equal Employment Opportunity Commission v. Sears Roebuck and Company, 10-CV-01608-R (USDC WD Okla., Sept. 30, 2010).

²Commission Meeting of Race and Color Discrimination of April 19, 2006, Statement of Barbara R. Arnwine, Executive Director Lawyers’ Committee for Civil Rights Under Law.

³Commission Meeting of February 28, 2007, opening statement of Commissioner Christine M. Griffin.

⁴Statement of Jacqueline A. Berrien, Chair U.S. Equal Employment Opportunity Commission Before the Committee On Health, Education, Labor and Pensions United States Senate, May 6, 2010.

⁵EEOC v. Spencer Reed Group, No. 1:09-CV-2228 (N.C. Ga. consent decree approved June 8, 2010.)