

Labor and Employment Law Weekly Update (Week of February 6, 2012)

Ruling Confirms EEOC's Authority to Seek Court Supervision for Settlements

Written by: Christina Kennedy

Dennis Anderson was terminated for violating his employer's policy requiring employees to report their use of prescription drugs, even legal ones, that could cause dizziness or otherwise impair employees. The EEOC alleged that under the drug policy, Product Fabricators made unlawful medical inquiries of employees, failed to keep employees' medical information confidential, and discharged the claimant because of an unlawful application of the drug policy when the claimant reported an injury while working under the influence of legal prescription drugs.

The federal court of appeals for the Eighth Circuit issued an opinion in *EEOC v. Product Fabricators, Inc.* (<http://tinyurl.com/6sfqtt7>), ruling that a district court judge abused his discretion when rejecting a consent decree settling an ADA lawsuit brought by the EEOC. The district court had previously rejected the proposed consent decree on the basis that the EEOC had failed to identify a basis for the court to retain jurisdiction over the case for the following two years.

The EEOC and the company presented a consent decree to the court, but the court refused to approve the decree. A consent decree is a special type of settlement agreement where the court retains continuing jurisdiction, often through a number of years, in order to ensure the parties adhere to the terms of the settlement. They are typically used when a governmental agency, in this case the EEOC, brings the lawsuit, as opposed to a private party plaintiff. In reviewing this consent decree, the court agreed with Product Fabricators that the EEOC's allegations reflected isolated incidents of discrimination. The court held that under these circumstances, the continuing supervision of the settlement that an EEOC consent decree brings was not warranted. The EEOC then took an appeal. The appeals court rejected the reasoning of the lower court and recognized the strong preference for settlement agreements and also recognized the fact that continuing jurisdiction is a usual component of consent decrees that are designed, in part, to have a deterrent effect on the employer community. John Hendrickson, the EEOC's regional attorney in Chicago, commented, "Once the EEOC has reached a settlement with an employer accused of discrimination, continuing jurisdiction provisions enable the EEOC to ensure that defendants will comply with civil rights laws for years to come."

This ruling reinforces the power of the EEOC to ensure compliance with its settlements by having continued district court supervision over the terms of the settlement, even when the claims may be isolated in nature. Employers who enter into consent decrees with the EEOC will likely have a district court waiting patiently in the background ready and willing to enforce the decrees.

The DOL Gets Creative in Its Efforts to Address the Wage Gap

Written by: Jennifer L. Neumann

Did *you* know the DOL was in the application development business?

In May 2011, the U.S. Department of Labor launched its first [smartphone application](http://tinyurl.com/3kyodl8) (<http://tinyurl.com/3kyodl8>), designed to help employees track their hours worked and wages owed. Continuing this trend of embracing the use of novel technology to help in its enforcement efforts, on January 31, 2012, the DOL, along with its partners on the National Equal Pay Task Force, announced a contest for creating software applications for use to promote pay equality — the [Equal Pay App Challenge](http://tinyurl.com/6scw5l4) (<http://tinyurl.com/6scw5l4>).

Secretary of Labor Hilda L. Solis, in announcing the Equal Pay App Challenge, noted, "Women make up nearly half of the U.S. labor force and play a vital role in the nation's economy. While progress has been made in recent decades, the pay gap continues to disadvantage many women, with consequences not only for them, but for their families and the economy as a whole."

According to the terms of the contest, developers are asked to use publicly available data and resources to create innovative, user-friendly applications that educate users about the pay gap and offer tools to combat it. The applications should improve access to pay data and provide coaching on early career pay, pay negotiation, and career mentorship. Prizes will be awarded to the winners, and the contest remains open until March 31, 2012.

Contestants will be well armed with data in creating this application. [Salary.com](http://salary.com/) (<http://salary.com/>), which maintains salary data for myriad jobs, [announced its commitment](http://tinyurl.com/83ry3x2) (<http://tinyurl.com/83ry3x2>) to the National Task Force on January 31, 2012. Salary.com has agreed, for the first time in its history, to turn over its collection of salary data for use by contestants in the Equal Pay App Challenge.

The National Task Force, consisting of the DOL, the EEOC, the Department of Justice, and the Office of Personnel Management, was created in January 2010 in direct response to President Obama's commitment to focus on and stop equal pay law violations. [Just last week](http://tinyurl.com/6vp8q39) (<http://tinyurl.com/6vp8q39>), we summarized the EEOC's enforcement statistics and priorities and mentioned that, given President Obama's focus on equal pay, pay disparity could become an area the EEOC zeros in on with respect to its systemic enforcement efforts. It is hoped that the winning application, once developed, will assist in those efforts and, perhaps, bring more equal pay claims to light.

Now is the time to take a careful look at your pay practices and make sure that you do not have a gender pay gap that would expose your company to liability for Equal Pay Act violations. Some, but not all, pay differences may result from legitimate factors having nothing to do with gender. However, many employees may take a more careful look at their pay as compared to their peers and/or industry averages once armed with an equal pay application, especially one that has been buoyed by salary.com data.

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