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Question 1

Because Plaintiff Debbie Determined ("DD") states a claim under either Title VII and FEHA for sex discrimination, she has the burden of proof of those claims. To survive a defense Motion for Summary Judgment, DD must allege a prima facie case, and there must be disputed material facts for the trier of fact to decide at trial.

Prima Facie Case

A prima facie case, means that "on its face", or as alleged, if the allegations were found to be true then DD would prevail at trial. DD has alleged several instances of possible sex discrimination. Sex discrimination, as defined, is the treatment of similarly situated employees differently on account of the employee's sex.

Need to cite "intentional discrimination"

DD has alleged facts that show disparate treatment of her based on her sex. Disparate treatment is when a company treats someone in a "protected class" differently than someone who is not in that class based on that protected status, in this case DD's sex. She was passed over for transfer twice in favor of a less qualified man. Under *McDonnell Douglas*, the plaintiff must show that they applied for an open job, that they were qualified, that they were not hired and the position remained open, then the position was filled by a same or less qualified male [in this case]. DD applied for the P&D job in 2008, but Howard lied to her about not being able to hire her, then turned around and hired a less experienced male driver. The same situation occurred again in May 2009 when she was again passed over for a less experienced male.

DD was also told by Howard that "...they could not let a woman have that position." Here we have a direct statement in support of her allegations made by a supervisor in the company.

DD could also allege disparate impact by her showing that there were only 6 female drivers out of 3100. Disparate impact claims were allowed in *Griggs*, when the court found institutionalized discrimination, are proved by inference from statistical analysis of the workforce. The court can infer from the extremely low amount of female drivers that there is discrimination. This could be bolstered by evidence, that we don't have in front of us for this case, of industry averages, the percentage of female applicants hired vs. the percentage of male applicants hired, etc.

no, disparate impact = neutral employment practice which adversely affect a protected group

DD's claim also includes evidence of a required medical exam. Under the ADA, a medical exam can only be required post-offer of employment and pre-hiring unless required by some other rule or regulation and only if given to all applicants for the job. In this case, the company VP, Stoddard admitted that the test was not given to all applicants. An issue of fact for the court is also presented in the exam itself: is the test fairly designed to mimic actual job requirements. DD has shown by her performance that she could handle the actual job. In this case, she was failed because of not being tall enough which would have to be shown to be an actual job requirement (doubtful.) Finally, DD's workers comp Doctor had the day before cleared her medically to return to duty.

good lawyer

Since DD has clearly shown a prima facie case, the case can proceed.

Legitimate Reason for Firing

Under *McDonnell Douglas*, if the plaintiff shows a prima facie case, the Defendant can

rebut with a valid reason for firing.

Farout claims that DD failed a required fitness test and therefore has an "inability to perform the job."

Pretext

Once Farout offers a legitimate reason for firing, DD must show that it is pretextual. For the reasons stated above that the test is inappropriately timed, and not reflective of the actual job requirements, DD has shown that the reason given by Farout is pretextual and the real reason that she was fired was because she is a woman. *Has been doing job!*

At Summary Judgment, the court looks to the facts as alleged, in light favorable to the plaintiff. DD has alleged sufficient facts to support her legal claims of sex discrimination and rebutted the allegations of Farout. As there are factual matters that are in dispute, the Summary Judgment motion must fail and the case proceed to trial.

2)

Question II

Choice of Forum

In order for Chapman to pursue a claim in Federal Court under the Age Discrimination in Employment Act, he is required to file a claim with the EEOC first and within ³⁰⁰180 days of the alleged discriminatory act. As the information we have on the exact date of the demotion is unclear, Chapman may be precluded from a federal claim. He tells us that a month after his performance improvement plan of December 2009 was implemented that he was demoted by Ruthless. Best case scenario, the demotion happened in February sometime after the 15th, as Chapman states in his letter "as discussed on 2/15/10 ... I will be stepping down..." Given that phrasing, Chapman can argue that he stepped down after 2/15/10, which means he might squeak in if he gets his complaint in immediately to the EEOC. ✓

State Court Jurisdiction

Chapman can still sue in state court, under California's Fair Employment and Housing Act. This would be better for several reasons anyway, as CA state courts are generally regarded as more favorable to Plaintiff's in these cases. CA law also allows for Ruthless to be named as an individual and to be subject to monetary damages for his actions as well as for the employer to be liable. While we don't have info as to the size of the company, so we don't know what the limits of liability imposed by federal law, there is no corresponding limit on liability under CA law. Therefore, Chapman's damage award could be higher under State rules. ✓

Chapman still needs to file a complaint with the Fair Employment and Housing Authority and obtain a right to sue letter from them prior to commencement of the action. ✓

In State court, Chapman may also have a tort claim for wrongful termination under a Good Faith and Fair Dealing cause. While Chapman is an at-will employee, and can be fired for any reason, or for no reason, the courts have limited that freedom when a company uses a wrong reason to fire someone. Some states have recognized that, especially with long term employees, there exists a relationship that can not be terminated for a bad cause. The employee has invested a career with the employer and has a right to be dealt with on a good faith and fair dealing basis. Foodco's actions as alleged would certainly violate that standard.

Need more than just length of service

Defendants

Under Federal and CA law, the employer is a potential defendant to Age discrimination complaints, even if the acts were done by an employee of the company. Chapman's allegations allege a company policy, at least in his region, of systematic age and seniority discrimination so the company is properly a defendant.

As stated above, in CA an employee can also be personally liable for any act of discrimination or harassment that "is perpetrated by the employee." In the facts here, Ruthless took the discriminatory actions against Chapman, so he should be named as a defendant.

for a harassment or tort claim only.

Chapman's Cause of Action

The heart of the evidence presented by Chapman, that of cutting hours of senior employees, demotion of older store managers, etc. goes to age discrimination. As Chapman is 56 and a highly paid employee, and the company replaced him with a younger employee without out good cause, age discrimination is alleged.

Burden of proof

Under the Age Discrimination in Employment Act (Federal) and under CA law, the plaintiff has the burden of proof of his claims. Chapman would therefore have to show that the decision to fire or demote him was based on his age. Chapman can do this by showing a pattern of treatment of older workers, as he has outlined in the interview.

Facts in support:

the company policy of cutting hours of tier 1 employees and putting pressure on older tier 1 employees to retire or quit as outlined in his account of the June 2008 meeting.

The other store managers testimony of the company derogatory nickname "darksiders" used for older workers, and the policy to "weed out the darksiders."

The managers testimony that they were targeted because of age, which shows a company pattern.

Food

The facts in support and Chapman's statements all point to disparate treatment of older workers by FoodCo. Disparate treatment is when a company treats someone in a "protected class" differently than someone who is not in that class based on that protected status, in this case age.

Potential Defenses of Ruthless and FoodCo

Essentially the defenses of the two are the same. FoodCo could try to distance itself from the acts of Ruthless, but as alleged, the facts show a company policy of discrimination. Also, Federal and CA law holds the employer responsible for acts of supervisory personnel in

discrimination claims.

FoodCo can argue that Chapman was fired for a valid business reason. Here we have Ruthless asking Chapman to write his own performance improvement plan. Chapman did not take administrative steps within the company to dispute the plan or the need for it. Instead, he participated in drafting the plan, which the company would argue shows his acceptance of the plan. Also, the company has 2 written performance reviews in 2009 that show a trend of downward performance. Foodco would argue that a manager who receives a bad audit or review of course needs to be reinspected and reviewed more often, so the multiple inspections were warranted by Chapman's poor performance. ✓

Foodco can also argue that Chapman was replaced by a person also in the protected class. If age is really the issue, why would they replace him with someone who was only a few (8) years younger. In fact, they can also show that it wasn't a cost savings move at all, they had to pay her more, which they could argue was because of her higher qualifications and performance. ✓

Finally, and most ~~ing~~-damning to Chapman, is the letter that he wrote, saying that he is stepping down. The letter could be read to imply that it is voluntary and his own decision to step down. ✓

Evidence issues

As in any trial, the case will hinge on the credibility of the witnesses. If the other store managers are willing and available to testify it will bolster Chapman's case. He should also have evidence of his claims about tier 1 workers getting fired.

is "me too" evidence admissible?

It will not be looked kindly on by the court, and could expose him to liability if he participated in age discrimination against other workers !

Potential Damages

The CA court can award compensatory damages. Compensatory damages are those actual monetary losses experienced by the plaintiff. In this case, the salary and benefits difference between his previous salary and his new salary. This can be awarded as back pay, from the time of the filing of the lawsuit back to the demotion. Chapman can also receive frontpay, or pay from the time of the lawsuit until either he is reinstated in a comparable position or finds new employment at a comparable position or until the court determines that he should have accepted a comparable position. ✓

Punitive damages can be awarded by the court upon a finding of outrageous or shocking conduct by the defendant. ✓

Attorneys fees. As a matter of public policy, the statutes (Federal and CA), allow for a plaintiff's attorney's fees to be awarded by the court upon a finding of discrimination by the court. This is so that even cases with a small monetary potential will still be prosecuted and encourages companies not to discriminate and to settle cases early on if there is a chance of the case being successful. ✓

On the face of it, the case looks pretty strong. I think Chapman has credibility in refuted the company's defenses about his letter and performance reviews. Chapman can testify for his desperate need to keep a job, and not wanting to be fired as reasons for cooperating in his ✓
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demotion, and in any discrimination he personally assisted in. given that, and the court awarded fees will offset the likely small compensatory damages to make the case worthwhile for the firm. Punitive damages are to speculative in my opinion on this case, so the firm should not count on them in figuring a potential recovery for a contingent fee at this point. ✓

3)

Question III

Causes of Action

Mac Driver ("MD") can allege several causes of action in wrongful termination. According to the account, MD was told to participate in fraud or theft on his customers and he refused and complained to management. MD was then fired "for cause", in that he improperly billed his customers.

CA is an "at-will" employment state. That is, any employee can be fired at any time for any reason, or no reason at all. Employees are also free to quit with the same freedom.

Retaliation

CA recognizes a claim for retaliatory discharge. It would be contrary to the public interest to let an employer fire someone reported the occurrence of a crime. Here, MD refused to overbill his customers and complained to the owner Rite about the practice. The practice would have exposed him to criminal liability as well as being morally wrong. Rite did not fully investigate the matter, he left it with MD's supervisor to handle, who was the one encouraging the practice. The supervisor then made up a pretextual reason and fired MD since he complained to management. ✓

CA recognizes a claim of wrongful discharge for refusing to commit or participate in a crime. Similar to the retaliation situation above, but applies even if the discharged employee doesn't complain to supervisors about the unlawful practice. It would be contrary to public policy to force employees to commit crimes in order to keep their jobs. ✓

Peterson + Foley

MD would might have a claim for Defamation. If the company as part of its practice informed the union about the reason for MD's termination, and MD proved that it was a fabrication, then he would have a claim for Defamation, or the publishing to a third person an untrue fact about another. (maybe - usually qualified privilege)

w/i employment context might not be defamation

A minority of states, and unclear in CA, is that forced self publication can be enough. In this case, if MD had to tell the union, or a potential employer the stated reason for his discharge and the company reasonably knew he would have to do that, then the company can be liable for Defamation even though it did not directly divulge the information. ✓

Defenses

The company's best defense would be if it could prove that MD had participated in improper billing of customers and that the stated reason for firing was accurate.

Secondarily, if investigation showed that MD's allegations were unfounded, that would remove credibility from his claim of retaliation.

Thirdly, if MD's claims were found to be valid, the company should take disciplinary action against all of those persons involved and fire managers who were aware or encouraged such acts. This would distance the company from the actions of a single manager.

under this strategy, although the company might have some liability for the acts of its employee/supervisor, it would lessen the likelihood and amount of punitive damages if it were shown not to be a company policy but the act of a rogue manager. Punitive damages are awarded for especially egregious and purposeful behavior and/or for grossly negligent acts.

State wrongful discharge claim preempted by collective bargaining agreement.

Advice to Rite

good
Rite should immediately hire us to independently investigate MD's claims as that would be confidential work product. If the investigation showed merit to MD's claims, then a settlement and reinstatement of MD would be appropriate. Any fraudulent business practices should be immediately uncovered and corrected, and company wide training to prevent future such acts as well as disseminate the understanding that the ownership will not tolerate it.

worst
Part II

Sally Slave

We don't have information as to Sally's salary, which could be determinative under FLSA.

However, several facts support the need to pay her overtime:

Sally is being called a manager, but really has no management duties that we are told of. Merely taking an clerical employee and calling them a manager does not excuse overtime. Managers to be exempt, must supervise employees, have the ability to hire and fire and other supervisory matters.

Certain professional, executive, ~~professional~~ and administrative groups do not require overtime payments, but they are generally higher paid employees with specialized skills or training and would have to have a certain minimum salary to qualify.

Overtime should be Federal, all hours over 40 per week are paid at 1.5 times base wage.

Overtime in CA is any hours past 8 per day are 1.5 times base wage. Over 12 hours is 2x base wage.

There would be penalties for an hourly employee not being given proper rest breaks and meal periods as well. one 10 minute rest break every 4 hours, a 30 minute meal break within 5 hours if working more than 6 hours.

END OF EXAM