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A Littler Mendelson **Time Sensitive** Newsletter

in this issue:

MARCH 2006

In the wake of the U.S. Supreme Court's ruling that Title VII's employee-numerosity requirement is not jurisdictional but rather an element of a plaintiff's claim for relief, it is critical for small employers to assert the defense as early as possible.

Small Employers Beware: The U.S. Supreme Court Has Ruled that Title VII's Employee-Numerosity Requirement Does Not Determine Jurisdiction

By David S. Warner and Kristine A. Sova

Small employers should take special care to advise their counsel of the total number of their employees as early as possible as it may help avoid unnecessary litigation. On February 22, 2006, the United States Supreme Court unanimously ruled in *Arbaugh v. Y & H Corp., dba The Moonlight Cafe,* 546 U.S. ___, that the 15-employee threshold for determining whether an employer is covered by Title VII of the Civil Rights Act of 1964 ("Title VII") is an element of a plaintiff's claim for relief and does not affect a federal court's jurisdiction to adjudicate the case. This decision is significant to small employers throughout the nation because those who are too small to be subject to Title VII may nevertheless be held to the requirements of that statute if they wait too long to assert their size as a defense.

The Arbaugh Decision

Jenifer Arbaugh ("Arbaugh") worked for The Moonlight Cafe, a New Orleans restaurant owned and operated by Y & H Corp. ("Y & H"), as a bartender and waitress from May 2000 to February 2001. In November 2001, she sued Y & H, alleging that one of the owners sexually harassed and then constructively discharged her in violation of Title VII and Louisiana state law.

Arbaugh filed her lawsuit in the federal district court in New Orleans, Louisiana, asserting that the federal court had jurisdiction based on her Title VII claim. Y & H responded to her complaint by admitting her "jurisdictional" allegations but denying that her claims had any merit. Y & H then proceeded through trial without challenging her claim that it was subject to the requirements of Title VII. After a two-day trial, the jury found that Arbaugh had been sexually harassed and constructively discharged in violation of Title VII and Louisiana state law. It awarded her $5,000 in back pay, $5,000 in compensatory damages, and $30,000 in punitive damages.

Two weeks later, Y & H moved to overturn the jury's verdict and dismiss the case. For the first time, it claimed that the court did not have subject-matter jurisdiction because Y & H had fewer than 15 employees during the relevant time period and thus did not meet Title VII's definition of "employer."

Although the trial court said it was "unfair and a waste of judicial resources" to allow Y & H to raise the issue so late in the case, it agreed that Y & H had too few employees to be covered by Title VII. It therefore vacated the judgment in Arbaugh's favor and dismissed the lawsuit. The United States Court of Appeals for the Fifth Circuit agreed with the dismissal, holding that the federal courts did not have subject-matter

jurisdiction over the case if Y & H did not qualify as an "employer" under Title VII.

On February 22, 2006, the Supreme Court reversed the Fifth Circuit's decision. It held that Title VII's employee-numerosity requirement does not determine a federal court's jurisdiction. Because Congress included the size requirement in a provision of the law that makes no reference to jurisdiction, the Supreme Court concluded that it was merely an element of a plaintiff's claim for relief. In doing so, the Supreme Court adopted a bright line rule that "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."

How The *Arbaugh* Decision Affects Small Employers

The Supreme Court's decision in Arbaugh has at least three practical consequences for small employers.

1. Employers with fewer than 15 employees should assert as soon as possible their defense that they are not subject to suit under Title VII because of their size. Failure to timely assert this defense may result in a finding that the employer waived it.

2. When the parties dispute whether or not the employer had enough employees to be subject to suit under Title VII, it is important to try to have the judge decide that issue as early as possible. Not only will that potentially spare the employer the costs of taking the case to trial but it will also minimize the risk that the jury's consideration of the issue will be clouded by its view of the merits of the case.

3. A federal court's dismissal of a plaintiff's Title VII claim because the employer did not have enough employees to be subject to Title VII will not necessarily result in dismissal of the entire case. Despite the inapplicability of the federal law on which the court's jurisdiction was initially premised, in some situations, a federal court may still proceed to adjudicate the plaintiff's concurrently asserted state law claims.

The Supreme Court's holding in *Arbaugh* will likely subject small employers to extensive litigation and discovery costs before they can obtain a dismissal on the simple ground that Title VII does not apply to them. In an effort to avoid this result, small employers should take care upon receipt of a court complaint to retain counsel that is sufficiently familiar with the employment laws at issue to help ensure that all applicable defenses are raised as early as possible. Failure to timely assert all applicable defenses may cause the employer to be subject to laws from which it was meant to be exempt.

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