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Court Confirms Requirements for Release and Waiver of Title VII Claims

In its recent decision *Caban Hernandez v. Philip Morris USA, Inc*., the U.S. Court of Appeals for the First Circuit provided clear guidance to employers concerning when courts will deem an employee's release of claims "knowing and voluntary." In *Caban*, the Plaintiffs sued Phillip Morris, alleging that the Company had discriminated against them on the basis of their national origin in violation of Title VII when the Company terminated their employment during a restructuring without offering them suitable alternative positions. The employees also alleged that they had been subjected to a hostile work environment, and that recently imposed English speaking requirements violated Title VII. In connection with their separations, the Plaintiffs signed releases in exchange for enhanced severance benefits. When the Plaintiffs sued, Philip Morris moved for summary judgment, arguing that the signed releases were an affirmative defense to the Plaintiffs' claims.

The First Circuit explained that when considering whether a release of claims is valid, it will evaluate the totality of the circumstances under which it was signed, and consider the following factors set forth in *Smart v. Gillette Co. Long-Term Disability Plan*: (1) the plaintiff's education, business experience, and sophistication; (2) the parties' respective roles in deciding the final terms of the arrangements; (3) the agreement's clarity; (4) the amount of time available for the plaintiff to review the agreement before acting; (5) whether the plaintiff had independent advice when signing the agreement; and (6) the nature of the consideration offered in exchange for the waiver. In sum, the Court stated that it would find a release valid if the employer demonstrated that when viewed in the aggregate, the factors suggested that the employee's waiver was knowing and voluntary.

See "Waiver of Claims," page 2

ADA Accommodation Requests Must be "Sufficiently Direct and Specific"

In *Freadman v. Metropolitan Property and Casualty Insurance Co*., the First Circuit recently confirmed that an employer's obligation to provide an accommodation for a disability is not triggered unless the employee's request is sufficiently direct and specific, and the employee explains how the accommodation addresses his or her disability.

Michele Freadman, an employee of Metropolitan Property and Casualty Insurance Company, took a leave of absence from March to July 1999 due to her ulcerative colitis. Her manager, Robert Smith, gave her several accommodations upon her return to work. Almost a year later, in May 2000, the Company's chief executive asked Freadman to give a "high profile presentation" for officers of the Company at a meeting on June 9, 2000. Smith's manager, Chris Cawley, supervised Freadman on this important assignment.

While working on the project, Freadman's ulcerative colitis flared up, and on June 2, 2000, she told Smith that she was working too hard and "needed to take some time off because [she was] starting not to feel well." She also stated that "some of [her] symptoms may be returning." Smith told her to get through the June 9 presentation and then take some time off. Freadman did not challenge, and, indeed, acquiesced to, this suggestion.

During a June 7, 2000, meeting, Cawley criticized Freadman's draft presentation and directed her to make changes. Despite this input, Freadman ignored Cawley's specific instructions. Ultimately, Cawley found Freadman's June 9, 2000, presentation inadequate and too long. As a result, on June 12, 2000, Cawley told Smith that he could not rely on Freadman and instructed him to rotate her into another position.

See "ADA Accommodation," page 2

"Waiver of Claims," cont'd from page 1

The Court ruled in favor of Philip Morris, relying in particular on the fact that each Plaintiff had a high school diploma, held a supervisory position at the Company, spoke with counsel prior to signing the release, and received a substantial severance package in exchange for signing the release. The Court also pointed out that the release at issue was "crystal clear" in expressly stating that the signer was waiving "any claims, known or unknown promises, causes of action, or similar rights." The Court added that the Company had provided the Plaintiffs ample time to consider the release before signing it, as well as seven days within which to revoke their acceptance.

Employers often request that terminated employees sign a release of claims in exchange for additional consideration. The *Caban* decision reiterates that when asking a departing employee to execute a release of claims, the employer should take steps to ensure a release will be found valid. Employers should (i) provide adequate consideration for the release; (ii) ensure the language in the release is clear and unambiguous; (iii) provide the employee sufficient time to consider the release and to consult with counsel; and (iv) consider whether any additional requirements are imposed for statutory claims for which they seek a release. Employers who follow these guidelines are likely to be able to enforce the release and avoid unnecessary litigation.

"ADA Accommodation," cont'd from page 1

Following the presentation, Freadman worked from home. On June 26, Freadman called Smith to say she planned to work from home again because she was still feeling sick. He told Freadman that she needed to return to work or take a disability leave of absence. Freadman was hospitalized on June 29, 2000, and never returned to work at Metropolitan. She sued alleging that Metropolitan had failed to accommodate her disability pursuant to the Americans with Disabilities Act (ADA) and Rhode Island state law.

The U.S. District Court for the District of Massachusetts granted the Company's motion for summary judgment, holding that Freadman's June 2, 2000, and June 26, 2000, conversations with Smith did not constitute requests for reasonable accommodation because (1) they were not sufficiently direct or specific; and (2) she failed to explain how the accommodation requests were linked to her disability. The First Circuit affirmed the decision.

The Court found that while there was evidence that Metropolitan knew or should have known that Freadman's June 2 request for time off was linked to her ulcerative colitis, Freadman had not put Metropolitan on notice of a "sufficiently direct and specific" request for an accommodation. The Court explained that Freadman had merely expressed a need to take "some time off" without clearly expressing when she needed that time off. Smith properly engaged in the interactive process when he suggested that Freadman get through the presentation and then take time off. Freadman, however, failed to specify when she needed the time off. Finally, the Court held that Freadman's June 26 request for leave because she "was feeling sick" was not sufficiently linked to her ulcerative colitis and, as such, was not specific enough to impose on the Company an obligation to accommodate. The Court held that an employer has "no duty to divine the need for a special accommodation" where the employee fails to make an adequate request.

Employee requests for accommodations present substantial challenges for employers who must always be cognizant of their obligation to engage in the interactive process. This decision highlights that when employees fail to provide sufficient information and details about their limitations and needs, the employer may not be held to an unreasonable standard in providing accommodations.

First Circuit Finds Separate Subsidiaries May be a Single Employer

In *Torres-Negrón v. Merck & Company, Inc.,* the First Circuit recently held that a company that transferred an employee to a foreign subsidiary could be held directly liable for discrimination allegedly committed by the subsidiary, and remanded a retaliation claim based on post-termination conduct. Plaintiff Kathleen Torres-Negrón worked for Merck-Puerto Rico as a sales representative from 1998 until her termination in 2001. In 1999, the Company transferred her to Merck-Mexico on a special assignment. During her Mexico tenure, Torres remained an employee of the Puerto Rico office, received her pay in U.S. currency, and retained her U.S. employee benefits.

While at Merck-Mexico, Torres allegedly endured harassment and discrimination from her co-workers and supervisors, who made derogatory comments about her gender, citizenship, and Puerto Rican accent. One supervisor made a negative comment about her status as a Puerto Rican woman. When she complained of harassment to that supervisor, he allegedly threatened negative consequences if she reported the conduct to Merck headquarters, and Torres never reported the harassment either to headquarters or Merck-Puerto Rico.

After Torres complained to the supervisor, Merck-Mexico discovered that she had misused company resources by making personal use of the Company's courier services. Merck terminated her employment shortly thereafter. One month later, Torres filed a charge of discrimination and later brought suit. Among other things, Torres alleged that Merck failed to send her final paycheck or W-2 form to her after she filed her charge.

The District Court granted Merck's motion for summary judgment, dismissing all claims. First, relying on its conclusions that Merck-Mexico and Merck-Puerto Rico were separate entities and that Merck-Puerto Rico was not Torres's employer, the Court found that any harassment had not been committed by Torres's employer, but by a third party. As a result, the Court found Merck could only be liable if it was negligent and determined that Torres could not satisfy that standard. On appeal, the First Circuit rejected that holding and found that the District Court should have analyzed whether Merck-Puerto Rico and Merck-Mexico could be liable under a single-employer theory. The First Circuit found that Torres presented sufficient evidence of centralized control, common management, and interrelation of operations to permit a jury to decide whether Merck-Puerto Rico could be liable for harassment that occurred at Merck-Mexico.

The District Court also found the failure to send Torres her final paycheck and her W-2 form were not adverse employment actions under Title VII because they occurred post-termination. During the pendency of Torres's appeal, the Supreme Court decided *Burlington Northern & Santa Fe Railway Co. v. White*, altering the legal standard applicable to Title VII retaliation claims. The First Circuit remanded her retaliation claim and instructed the District Court to consider the viability of that claim in light of *Burlington Northern*.

This decision highlights for employers the fact that separate subsidiaries may constitute a single employer. As a result, large employers may be subject to discovery seeking information on related corporate entities. Further, the outcome of Torres's retaliation claim may provide useful guidance on the extent to which conduct that occurs post-termination may constitute retaliation under Title VII.

DOL Addresses Deductions from Salary for Leave Under Small Necessities Leave Act

The U.S. Department of Labor (DOL) recently issued an opinion letter taking the position that an employer destroys the exempt status of an employee under the Fair Labor Standards Act (FLSA) if the employer makes a partial-day deduction from that employee's salary for leave taken pursuant to the Massachusetts Small Necessities Leave Act (SNLA), or any similar state leave act.

In the opinion letter, issued on February 8, 2007, the DOL notes that the FLSA lists several specific deductions that an employer may take from an exempt employee's salary without affecting that employee's exempt status. These deductions include full-day deductions from pay for absences due to personal reasons, other than sickness and disability, and partial or full-day deductions for leave taken under the Family and Medical Leave Act (FMLA).

According to the DOL, an employer may only take a partial-day deduction from an exempt employee's salary for unpaid leave if the leave would qualify under the FMLA, and the type of leave allowed by the SNLA does not meet this requirement. As an example, the DOL notes that the SNLA includes provisions for an employee to participate in his or her child's school activities or to take a child or parent to a routine medical or dental exam. Such activities do not qualify for FMLA leave.

The DOL concludes that the SNLA authorizes leave for personal reasons other than sickness and disability. Accordingly, employers may make deductions from an exempt employee's salary for leave taken pursuant to the SNLA only for full-day absences. However, the DOL further opines that partial-day deductions from an employee's accrued leave balance for leave taken under the SNLA do not affect the employee's exempt status as long as the employee receives his or her guaranteed salary.

In order to comply with federal and state law, employers should avoid taking partial-day deductions from exempt employees' pay except under very limited circumstances. Because the DOL does not believe that leave taken under the SNLA is one of those exceptions, employers should not take a partial-day deduction from an exempt employee's pay for such leave or they will risk destroying the exempt status of the employee.

Judge Not Jury Determines Whether Treble Damages are Warranted

When an Essex County jury found in favor of a class of servers on their claims that Hilltop Steak House violated Massachusetts wage and hour laws, many observers believed that the Court had permitted the jury to determine whether multiple damages were warranted. In fact, even though the Court submitted to the jury the question of whether Hilltop's conduct was willful, the trial judge ultimately determined that the Court, not the jury, must decide this issue.

The plaintiffs in *Calcagno v. High Country Investors, Inc. d/b/a Hilltop Steak House and Marketplace*, were servers who worked at special functions held at Hilltop Steak House. The named plaintiffs, on behalf of themselves and members of a class certified by the Court, alleged that Hilltop had violated Massachusetts General Laws c. 149, § 152A (the Tip Statute) by distributing the proceeds of service charges added to customer bills not only to the function servers but also to other employees, whom the plaintiffs claimed did not serve food and beverage. The named plaintiffs also alleged that Hilltop had terminated their employment in retaliation for complaining about this practice, in violation of c. 149, § 148A.

After trial, the jury found for the named plaintiffs on their retaliation claims, and in favor of the class on the Tip Statute claim. In response to a question from the Court, the jury found that the employer's conduct had been willful. An employer found to have violated § 148A or the Tip Statute may be subject to treble damages if the employer's conduct is willful. Based on the jury's finding, many assumed that the entire verdict would be trebled. Addressing post-trial motions, however, the trial judge determined that under the Supreme Judicial Court's decision in *Wiedmann v. The Bradford Group, Inc*., it was the Court's responsibility to decide whether the employer's conduct warranted an award of multiple damages. Applying the standard articulated in *Wiedmann* – whether conduct was egregious or exhibited a gross indifference to the rights of others – the Court found that Hilltop's failure to pay all of the service charges to its function wait staff did not meet this standard other than during a period of time when the restaurant reduced the percent of service charges it had previously promised to pay to the servers. Supporting its conclusion that some of the conduct was not willful, the Court noted that, at the time, the law was unclear as to who could participate in service charge distributions. Hilltop's legal obligations in that regard, therefore, were not clear.

Addressing the retaliation claims, the Court assessed treble damages against Hilltop based on the jury's finding that Hilltop fired each named plaintiff only after he or she had complained about Hilltop's practice in distributing service charges. The Court noted that such retaliation demonstrated a gross indifference to the rights of the employees and the application of treble damages should discourage such behavior in the future.

The *Calcagno* case highlights the need for employers to assess their compliance with wage and hour laws. Where an employer's legal obligations are not clear, treble damages will not likely be applied, but an employer's failure to appreciate its legal obligations fully will not necessarily shield it from this type of liability.

Appeals Court Finds Taxi Drivers Are Independent Contractors

In *Commissioner of the Division of Unemployment Assistance v. Town Taxi of Cape Cod*, the Massachusetts Appeals Court considered whether taxi drivers are employees for whom Town Taxi was required to make contributions to the unemployment compensation fund, pursuant to Massachusetts General Laws c. 151A (Chapter 151A). Town Taxi argued that their taxi drivers are independent contractors.

Pursuant to Chapter 151A, covered employers must contribute to the unemployment compensation fund for each employee "unless it can be demonstrated that the services at issue are performed (a) free from control or direction of the employing enterprise; (b) outside of the usual course of business, or outside of all the places of business, of the enterprise; and (c) as part of an independently established trade, occupation, profession, or business of the worker." This test is commonly known as the A-B-C test.

The Court reviewed each prong of the statutory test in reaching its conclusion. With respect to the first prong, Town Taxi proffered evidence that each driver had the discretion to choose his fares and could ignore those referred by Town Taxi's dispatcher. Town Taxi also argued that the drivers were able to conduct business on the side. The Court weighed these facts against the fact that each driver drove cars that Town Taxi owned, maintained, fueled, and insured, and the Company designated each driver's shifts. In the end, the Court found most compelling the fact that the drivers had the ultimate discretion to pick and choose their passengers.

With respect to the second prong of the test, the Court held that the service the drivers performed occurred "outside the business premises of the employer." The Court relied on the fact that the drivers did not transport passengers to the Company's property.

Finally, with respect to the third prong of the test, the Court reviewed whether the drivers could provide their services to customers independent of the Company, or whether the drivers were dependent upon the Company for continued employment in their field. The Court held that the taxi drivers exemplified the "entrepreneurial spirit" of an independent contractor. In reaching this decision, the Court was persuaded by the fact that the drivers are independently licensed by the town, are free to open their own taxi services, and can freely disregard the Company's dispatch and choose their own passengers.

It is clear from the *Town Taxi* case that the application of the A-B-C test is very fact-intensive. Employers must consider all three prongs of this test when examining their employment relationships to determine whether an individual is an employee for purposes of the unemployment compensation statute.

Appeals Court Affirms Dismissal of Untimely Discrimination Claims

The Massachusetts Appeals Court, in an unpublished decision, recently affirmed the lower court's decision to dismiss gender discrimination and retaliation claims against Harvard College. The decision addressed some interesting issues regarding the application of Massachusetts General Laws c. 151B's statute of limitations. In *Awerbuch-Friedlander v. President & Fellows of Harvard College*, the Appeals Court rejected the Plaintiff's claim that her inability to obtain a tenure-track position, after three job applications between 1989 and 1994, constituted a "continuing violation" for statute of limitations purposes. The Court deemed her discrimination claim based on a 1989 job application to be outside the statute of limitations, and therefore untimely. The Court also rejected the Plaintiff's argument that the College should be prevented from asserting the statute of limitations defense because of the conduct of a College ombudsperson, to whom she complained about discrimination.

While working as a lecturer at the Harvard School of Public Health (HSPH), the Plaintiff sought and was denied several tenure-track positions, in three different departments in 1989, 1990, and 1994. She complained to the Dean and to a College ombudsperson that she believed HSPH was discriminating against her based on her gender. In 1997, she filed a lawsuit against Harvard, claiming gender discrimination and retaliation. After trial, the jury found that Harvard did not discriminate against her in refusing to hire her in 1990 and 1994, but found that Harvard did retaliate against her for making the complaints, and did discriminate in refusing to hire her for the position she sought in 1989. After trial, the judge later ruled that both the retaliation and 1989 discrimination claim were untimely, because Awerbuch-Friedlander failed to pursue her claims within the applicable statute of limitations period, and entered a verdict for Harvard on both claims.

The Plaintiff appealed, arguing that Harvard should be estopped from asserting a statute of limitations defense because the College ombudsperson dissuaded her from timely filing her lawsuit. The Appeals Court rejected the Plaintiff's estoppel argument, finding that she had failed to meet her burden of showing that the ombudsperson had done anything to discourage her from filing suit.

The Court also held that the Plaintiff could not establish a "continuing violation" with respect to the retaliation and 1989 discrimination claims. The "continuing violation" theory allows plaintiffs to link together alleged discriminatory conduct and pursue claims that would otherwise be untimely. To show a continuing violation, a plaintiff must show that any earlier violations did not trigger "awareness" of her claims. Awerbuch-Friedlander could not make that showing because a pre-suit letter from her lawyer to HSPH complaining about discrimination clearly indicated that the Plaintiff was aware of her discrimination claims before the statute of limitations period expired.

This decision underscores the importance of the statute of limitations period. Employers confronted with an internal discrimination complaint should carefully document such complaints, making note of the date received. Similarly, agency and court complaints should be reviewed for timeliness. Always consider whether a statute of limitations defense might eliminate some or all claims in an employment lawsuit.

Conducting Effective Internal Investigations

On Tuesday, June 26, Seyfarth Shaw is hosting a breakfast briefing from 8:00 a.m. - 10:00 a.m., on internal investigations that focuses on how to conduct thorough internal investigations of discrimination and harassment complaints and give your company the best chance to win, or even avoid, subsequent lawsuits.

Registration

To learn more or register visit www.seyfarth.com/events.

Please contact Tracy Dane-Deeney at tdanedeeney@seyfarth.com or (617) 946-4872 if you have any questions.

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