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Doing Business in the Muslim World – Practical Issues for Employers and Employees

The Muslim World stretches through the countries of North West and North Africa (the Maghreb), North East Africa, Turkey, and across the Arabian Peninsula (the GCC Countries and Yemen) into Iraq and Iran and the substantial Muslim populations of the Indian subcontinent, Malaysia and Indonesia. The considerations affecting Western, and particularly US companies, doing business across this broad swathe of the world vary considerably from region to region. Although there are some common threads, there are major variations ranging from the more conservative Kingdom of Saudi Arabia to the much more liberal UAE. It is pertinent for employers and employees alike to recognize there are vast differences between countries and even cities when considering opportunities in the Middle East.

In the GCC, there is the common thread that the legal system is underpinned by Sharia law. Although this does not hugely affect day-to-day commercial transactions, it may impact employment in ways that need to be understood by expatriate employees sent to these regions and by their head offices seeking to operate a universal HR policy throughout the world.

A good example of the variations within one country, highlighting the need for a detailed specialist approach, is found in the UAE. The UAE is a federation of seven Emirates, each ruled by its own monarchy, but there are wide differences among the different Emirates, with Dubai being the most liberal and Sharjah the most conservative. Sharjah, for example, has enacted a Decency Law that prescribes appropriate standards of dress for both men and women so not to offend Muslim principles. Men wearing "bling" were recently warned that this was in breach of the law. They were instructed not to wear gold jewelry, or more than two small pieces of jewelry of any kind, including a watch and a non-gold ring.

Even in countries with a single centralized government, such as Saudi Arabia, there are great and obvious cultural differences from one city to the other. The capital city of Riyadh, which houses the main government ministries, is traditionally conservative with its residents being modest in their clothing and in their public interactions with the opposite sex. Meanwhile, the city of Jeddah, which is under the authority

of the centralized government, is consistently recognized by Saudis for its difference and favored by expatriates for its cosmopolitan lifestyle and liberal views.

These same differences exist in Yemen. The capital, Sana'a, in the North of Yemen, is quite conservative compared to Aden in the South. Overall, Yemen is not as conservative as Saudi Arabia and not as liberal as the UAE, with the exception of Sharjah. Yemeni law has no mandatory dress code. However, residents are expected to dress modestly. Although most local women wear the Abaya and veil (on the road and workplace), it is very common to see expatriate women wearing normal western clothes throughout the country.

The UAE is generally regarded as the more liberal end of the spectrum, with countries such as Oman being more conservative – although not to the extent of Saudi Arabia. An example of this conservatism can be found in the Omani penal code, which provides that anyone found guilty of insulting the dignity of another may be imprisoned for six months. A number of expatriates have found themselves prosecuted under this provision.

Egypt is a multicultural society. Besides being Islamic, it is proud of its long and unique history. Egyptians are quite accommodating, but firm in their beliefs. Egyptians do not like confrontation. The Egyptian bureaucracy respects authority but also has its own firm ways. They, therefore, lend themselves to easy misinterpretation and disappointments. It is important to be careful and listen to what your counterpart wants to say - frequently in hints rather than in plain words. Egyptians tend to be very religious, in a very softer manner than many other Islamic countries.

Situated in North Africa, the Kingdom of Morocco was a French protectorate from 1912 to 1956, and the legal system is heavily influenced by the French legal system. King Mohammed VI is the current ruler and is perceived to be very much in favor of modernization. King Mohammed VI has instituted some legal reforms, including economic liberalisation that has attracted foreign investment. Over the past decade, Morocco has embarked on an ambitious programme of structural reforms in several fields, aiming to further liberalise its markets and enhance the competitiveness of its economy.

While Malaysia has a predominantly Muslim population, it is a secular state. Islamic law is only applicable to Muslims and is mainly confined to matters relating to family law.

Although it has the world's largest Muslim population, Indonesia also recognizes Christianity, Buddhism and Hinduism as official religions. In recognizing these religions, Indonesia's constitution, under the human rights section, provides that everyone has the right to work with fair and reasonable compensation and treatment in employment. This right is confirmed in the Indonesian Labor Law which provides that discrimination based on gender, race, religion, politics and disability is prohibited. However, it should be noted that Aceh, which is considered a province with a unique history, has recently adopted Sharia law.

Conflicts with American Law

Against this backdrop, multi-national companies – particularly those based in the United States – have to balance a number of competing interests. While companies must ensure that their businesses in the Muslim world comply with all local law, at the same time, they have to determine where the line should be drawn on balancing local customs and mores against the company's corporate culture and code of conduct. For example, most U.S.-based multi-nationals have adopted a code of conduct prohibiting discrimination on the basis of sexual orientation. When operating in many of the Muslim-dominated countries, such as Malaysia, which ban homosexual acts, a company must determine whether its anti-discrimination policy will nevertheless apply. These companies straddle a fine line between not wanting to be seen as encouraging or condoning these activities – which might violate local criminal law – while at the same time, not tolerating intentional or subtle forms of discrimination.

On top of this, U.S.-based companies must comply with United States federal law which prohibits any form of illegal discrimination applied to U.S. citizens working overseas. The only exception is where local law actually prohibits certain activities. For example, an employer may avoid liability for violation of Title VII of the Civil Rights Act of 1964, which prohibits discrimination of race, color, religion, sex or national origin, by presenting proof that compliance with Title VII would cause a violation of the laws of the country where the employee works. The "foreign laws defense" was added to the Civil Rights Act of 1991 and does not include cultural preferences or biases. The protections of Title VII only cover U.S. citizens working abroad for an American company or a foreign entity controlled by an American company.

Finally, American companies should be mindful of the need to reasonably accommodate Muslim religious practices at work in Islamic countries in the same way in which they are used to doing so in America. For example, to an extent which there are Muslim holidays, if there is a need to fast, or wear certain religious attire, companies should make reasonable attempts to accommodate those activities so long as those activities do not unduly affect the workplace. In some cases, as indicated below, countries may mandate that certain Muslim holidays be observed or certain attire either be worn or prohibited.

Women

It is a common misconception that career opportunities for women in the Muslim world are limited. Throughout the GCC, there are many women, including expatriates, who play a prominent role in the business world.

In Saudi Arabia, the segregation of the sexes in the workplace across most industries creates extra impediments for

employers that hinder the employment of women. Companies must comply with Saudi regulations that require employers to provide offices and restroom facilities for females that are separated from those of their male counterparts. Although integration of the sexes is acceptable in common areas and meeting rooms, a lack of understanding of the regulations and their implementation may deter companies from employing women in key positions. This is not a matter of prejudice against women, but more to do with balancing conservative interpretation of the traditional role of women and their integration in the workplace. It continues to be a cultural norm for women in Saudi Arabia to wear a dress-like overgarment, called a "abaya", when in public and sometimes on the job.

Also, despite the government's effort to carry out reforms on the issue of female drivers, Saudi Arabia remains the only country in the world where females are not permitted to drive. Nevertheless, there are signs of change in the workplace as evidenced by the increasing number of female lawyers, bankers and other businesswomen, but companies should act with caution when placing female employees in senior positions and should always consult employment experts in the region.

Elsewhere in the Muslim world, there should be fewer concerns generally, with the most liberal jurisdiction being the UAE where there have been positive efforts to promote the role of women. For example, at the Federal Government level, there are now four female government ministers. Law firms operating in the UAE commonly have female partners and, in many businesses, employees are recruited purely on their qualifications and perceived ability with no sex discrimination and with the knowledge that clients throughout the region treat women in business the same as they do men, assuming they have the same responsibilities.

Although segregation is very common in social events in Yemen, there is no segregation between men and women in the workplace and sex-based discrimination in employment is not tolerated. More and more women are seen in business in Yemen nowadays, and are sometimes favored by employers due to a perception that they are more disciplined and committed to their work than their male counterparts. Women drive in Yemen and occupy many political and ministerial positions.

Similarly, in Malaysia there is no gender segregation in the workplace or in public places.

Harassment

Most multi-national companies have policies forbidding sexual and other forms of discriminatory harassment. Sexual harassment, in particular, continues to be a problem both in North America and throughout the world. While some Muslim countries may not have laws specifically prohibiting this type of behavior in the employment or workplace context, companies should not condone it. In fact, in the GCC, sexual harassment is a criminal offense. When problems arise, companies should hold wrongdoers accountable, not because they have violated a local law, but because they are acting in violation of company policy. From a preventative standpoint, sophisticated companies should consider conducting training on a local level that includes cultural norms, so that their employees understand what type of behavior will be considered unacceptable. In countries where the notion of harassment is a foreign concept, this would be particularly important to minimize the risk of problems.

As mentioned above, the Indonesian Labor Law prohibits discrimination in the workplace based on gender, religion, race and politics. Sex discrimination lawsuits are not common and there is no law regulating how women dress or mandating that the sexes be separated in the workplace. While Indonesia has no specific regulation on workplace sexual harassment, this would be considered a criminal offense. The best approach in Indonesia and elsewhere is for the employer's policy to define unacceptable behavior.

Throughout Morocco, there are plenty of women, including expatriates, who play a prominent role in business. There is no segregation between men and women in the work place and Morocco has increased its efforts to reduce discrimination against women and promote gender equality. However, the country remains divided between traditionalists and modernists, and the government is forced to straddle the line between these two competing ideologies.

Sexual Relations

Unlike jurisdictions that prohibit discrimination against homosexuality and even allow same-gender marriage, the practice of homosexual acts is a criminal offense punishable by fines, imprisonment and possible deportation in all the countries under discussion in this article. Indonesia has not criminalized homosexuals, except for the Aceh region, and imposing criminal sentences for such behavior are quite rare.

However in the GCC, even in the most liberal of the countries, all sexual relations, including adultery outside wedlock, constitute a criminal offense punishable by fines, imprisonment and even more severe punishments. This raises a number of issues for expatriates and their employers coming from jurisdictions where cohabitation and casual sexual encounters do not involve any criminal prosecutions. In Malaysia, sexual relations outside wedlock are only an offense for Muslims. Expatriates, however, are advised not to engage in such relations with Muslims since this could very well result in their deportation.

Premarital sex may result in the detainment of nationals and, in some instances, deportation of expatriates in Saudi Arabia. Recently, a 32-year old Saudi national was arrested after boasting about his private sex life on the television network of Lebanese Broadcast Corp. (LBC), a company

owned by a Saudi Prince Al-Waleed bin Talal. Both the Saudi national and LBC have been reprimanded for their role in the program. The government revoked the LBC's media license, prompting the closure of their Jeddah office. If convicted, the accused Saudi faces severe penalties for discussing this on television.

Even with these strict laws, there is no doubt many people in this geographical region are cohabiting, as well as indulging in casual sexual relations. The important issue for employers is that they cannot be involved in or condone any such activities. In most jurisdictions, it is a criminal offense not to report circumstances that a person is aware of and believes may constitute a criminal offense. Employers should certainly not make accommodations for cohabiting partners nor engage in fraudulent practices to secure a work visa for a "house spouse," including taking the person onto their books as an employee and clawing back his/her nominal salary by deducting from the real employee's salary. Such actions would involve an employer in both a criminal conspiracy in relation to sexual offense and fraud in relation to employment practice.

Drugs and Alcohol

Recreational use and possession of illegal drugs are strictly prohibited in all the aforementioned countries with the exception of Yemen, which permits the chewing of "Qat", a local narcotic leaf which is wide spread in Yemen and some neighboring countries such as Djibouti and Ethiopia. Even though it is very common to see people chewing Qat in Yemen, more and more companies nowadays are adopting policies that ban the chewing of Qat at all their sites during the workday.

Certain prescription drugs, especially narcotics, are illegal and should not be brought into these jurisdictions. Even in the most liberal state, there have been prosecutions for possession of prescription drugs brought from overseas by foreigners, although foreigners who can produce satisfactory evidence of their medical condition and the need for the particular medication or prescription are generally not prosecuted.

In addition, the merest trace of any illegal drugs found on any inhabitant of these states, or a visitor passing through, will result in prosecution and deportation for expatriates following any jail sentence. Also, there still are death penalties for the more serious drug offenses.

In light of the above, companies should formulate policies, which put their employees on notice of these drug laws and will hold them accountable for any violations.

The consumption of alcohol is permitted in Malaysia for non-Muslims and is readily available in bars and most restaurants and shops. During company functions, employers may serve alcohol but should always be sensitive to the feelings of their Muslim guests and employees, particularly if most of the attendees are Muslims.

There is zero tolerance of alcohol in Saudi Arabia and Kuwait whether for Muslims or expatriates and there are no clubs, bars or restaurants that serve alcoholic beverages. The UAE is again the most liberal in the GCC, except for Sharjah, which is dry, and alcohol permits are issued to allow non-Muslim expatriates to purchase alcohol for transportation to and consumption in their homes. The UAE, except Sharjah, is also host to a large number of bars, restaurants and clubs, which serve alcohol to non-Muslims. In Yemen, alcohol is only offered by five-star hotels.

Employers should ensure that their employees are aware of the applicable laws and if employees are going to consume alcohol at home in countries where that is allowed, their employer should encourage them to obtain the official permit. Otherwise, purchasing and transporting alcohol will be a criminal offense in licensed premises.

Not surprisingly, there is also zero tolerance of drinking and driving. Even a minor infringement, involving no damage to third-party property or injury or death is likely to result in the offender spending a month in prison upon conviction. The sentence increases up to seven years' of imprisonment for an accident involving the death of more than one person.

Indonesia adopted a death penalty for bringing and distributing narcotics in Indonesia. Consumption of drugs, if prescribed, is allowed in the workplace. However, if the employer suspects the employee of abusing prescription drugs, the employer can require the employee to take test. While alcohol consumption is more relaxed in Indonesia, it is still prohibited to consume alcohol during working hours and in the workplace. This behavior should be addressed in an employer's personnel policies and employees should be told that a violation may lead to discipline or termination. It is not unlawful, however, to serve alcohol at company parties and other work-related functions.

There is a real tolerance of alcohol in Morocco and there are a lot of clubs, bars or restaurants that serve alcoholic beverages. Alcohol can also be purchased in local supermarkets and Morocco even produces local wine. Legally, alcohol permits are issued to allow non-Muslim Moroccan, expatriates and tourists to purchase and drink alcohol. However, local citizens also drink alcohol and the Moroccan labor code stipulates that being drunk in the workplace can justify termination.

The issue of alcohol becomes more acute in the Holy Month of Ramadhan. During that month, alcohol permits are suspended, the mini bars in hotels are emptied and, although this varies from country to country, the bars in hotels are closed. In Oman, not even water may be consumed in public by expats during daylight hours.

Religion

Religion is probably the most delicate topic. Many parts of the Muslim world have high numbers of expatriates and Nationals who are non-Muslim. Although non-Muslims are not generally discriminated against based on religious grounds in terms of employment, there are laws in all the GCC countries that will impact the activities of "missionaries." It is an offense to try to convert a Muslim to another faith and it is also an offense to dishonour Islam. People have been arrested, prosecuted, imprisoned and then deported for giving away bibles on the street. Having said that, at the most liberal end of the spectrum, in the UAE and Dubai alone, is home to more than 30 churches of various Christian denominations and most, if not all, were given the land for the churches by the government. There are also places of worship for Hindus and Buddhists and there is generally a very high level of toleration. Iraq has always been home to a Christian minority and provides ample places of worship throughout the country. In Qatar, the first Christian church opened in 2008 on land provided by the government.

Although there remains an indigenous Jewish population in Yemen, any expatriate Jewish person considering moving to the region or a company considering moving Jewish personnel to the region, would need to consider that they will not be able to worship in public and, in some jurisdictions, there would be issues concerning residence visas. In general, worship in the home for any faith is a private matter that will rarely be subject to any intrusion. However, congregation in large groups may be illegal and prohibited.

Similarly, the Malaysian government prohibits any attempt to preach to or convert Muslims. A foreign national may be detained and/or deported if he is found engaged in such activities. It is an offense in Malaysia to insult or dishonour any religion.

Foreign companies will also have to comply with Muslim and national holidays, as well as different weekends (Thursday and Friday or Friday and Saturday) than those in most of the rest of world. However, in most of the jurisdictions there is nothing to prevent a company from granting additional holidays to staff that might coincide with religious holidays that they wish to take or simply allowing employees to be absent as part of their annual holiday entitlement or on certain days that are important to their religion. In Malaysia, except for 2 of its 14 states, Saturday and Sunday are recognized as the official weekend for the government and private offices.

For Muslim employees, there should be sufficient flexibility to allow them to pray when required by their religion, including during the working day. In all of the countries of the region, reduced working hours are provided by legislation during the Holy Month of Ramadan (the 9th month of the Islamic calendar), which this year (1430) occurred around the 20th of August in the Gregorian calendar.

Since Indonesia recognizes four major religions, the constitution guarantees the right to worship and adopts the major holidays of these religions. Indonesia requires employers to provide a religious holiday allowance, which is considered as the 13th month salary. It is usually provided to the employees two weeks before the Eid al-Fitr or Christmas. For those who practice Buddhism or Hinduism, their holiday allowances will be provided before their major holidays or they may elect to have their holiday allowance taken before Eid al-Fitr or Christmas.

The Moroccan constitution provides for the freedom to practice one's religion. Islam is the official state religion. Non-Muslim foreign communities openly practice their faiths. Even more, the government provides tax benefits, land and building grants, subsidies and customs exemptions for imports necessary for the religious activities of the major religious groups, including Muslims, Jews and Christians.

The following Islamic holy days are national holidays in Morocco: Eid al-Adha, Islamic New Year, the birth of the Prophet Muhammad, and Eid al-Fitr. Other religious groups observed religious holy days without interference from government authorities. There is generally an amicable relationship among religious groups in Morocco and non-Muslims and foreigners can attend their religious services without any restrictions.

Racial and Other Discrimination

In the GCC, there are affirmative action rules designed to secure local nationals a percentage of jobs in certain industries as there is a general duty to employ nationals before considering expatriate workers. Certain roles are also reserved for nationals by law and legislation has increasingly focused on knowledge transfer to locals by way of an obligation on private sector employers to provide vocational training to nationals. Care should also be taken when terminating a national's employment, particularly in Saudi Arabia and the UAE, where recent legislation obliges employers to follow a prescribed termination process when dismissing a national employee. This may result in a national having preference or being given special treatment. There are generally few "anti-discrimination" laws or protected classes and it is not unusual to find advertisements for jobs that specify age, sex, nationality, etc. Of course, a foreign company can follow its own policies as long as it does not breach local laws on employment of nationals or gender. Generally, however, the multi-cultural and multi-racial workforces in the region work well together.

Indonesia regulates the positions that expatriates can take and the term of such positions. Their law has taken the view that expatriates should transfer the knowledge to Indonesians so they can take over after the term of engagement expires. This is reflected in the fees paid by the expatriate and his/her employer, which are

contributed to funds for training Indonesians. One position that expatriates are not allowed to fill is that of a human resources manager or director because it is viewed as a delicate position for mediating between the employer and employees.

Morocco adopted strategies and measures to ensure that all citizens enjoy equal rights without discrimination. It initiated and implemented a national plan for gender equality and another plan for human rights education to bring awareness against racial discrimination, particularly against all forms of racial discrimination. It added programs to enhance protection of the Amazigh culture. Non-Moroccans are also fully protected against discrimination. However, any employer wishing to recruit a foreign worker must first obtain authorization from the employment governmental institution. This authorization is granted by a stamp on the employment contract and the contract is valid from the date of stamping. As a new requirement, foreign employees can only be hired following the delivery by the Agence Nationale de Promotion de l'emploi et des Compétences (ANAPEC), a certificate stating that no Moroccan nationals wish to apply for or are qualified for the position.

The System of Sponsorship

There has been, throughout the GCC, a system of sponsorship whereby any expat wishing to work in a country must be "sponsored" by a company or individual. This system has certain defects and in some cases has been abused. Bahrain and Kuwait are moving away from this system and the chief of police in Dubai has called for its abolition. It remains to be seen whether other GCC countries follow suit.

Indonesia still requires sponsorship by a company or individual for any expatriate to work in Indonesia.

Conclusion

Multi-national businesses doing business in the Muslim world face numerous challenges in the human resources and employment law arena. Great care must be taken to understand what is specifically prohibited by local law and how local customs and traditions affect the workplace. Sophisticated employers should anticipate that conflicts may arise between these laws and customs and a company's own code of conduct. The key is to act in a proactive way to determine – before operations are established – how these matters will be handled. There is no substitute for local knowledge. Care must be taken in retaining the services of experienced, local lawyers who understand and have experience dealing with these exact types of issues. In-house counsel and human resource executives should work with these individuals ahead of time so that when operations are established, the risk of human resource conflicts and legal problems are greatly minimized.

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Disability Discrimination

Seventh Circuit Holds Mixed-Motive Analysis not Authorized under the ADA

Serwatka v. Rockwell Automation, Inc., No. 08-4010, 2010 BL 9180 (7th Cir. Jan. 15, 2010)

The United States Court of Appeals for the Seventh Circuit vacated and remanded a district court's decision permitting a mixed-motive jury instruction, which resulted in a judgment for an employee under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.* In light of a recent Supreme Court decision, the Court held that the jury's mixed-motive finding did not entitle plaintiff to judgment in her favor as the ADA did not contain language recognizing mixed-motive claims.

Procedural History

Kathleen Serwatka filed suit against her former employer, Rockwell Automation, Inc. (Rockwell), under the ADA alleging that Rockwell discharged her because it regarded her as being disabled, despite her ability to perform the essential functions of her job. A jury found in favor of Serwatka, answering "Yes" to the question "Did defendant terminate plaintiff due to its

perception that she was substantially limited in her ability to walk or stand?" However, the jury also answered "Yes" to the question "Would defendant have discharged plaintiff if it did not believe she was substantially limited in her ability to walk or stand, but everything else remained the same?" The district court treated the verdict as a mixed-motive finding and awarded Serwatka declaratory relief as well as minimal attorneys fees and costs in its judgment. Rockwell appealed.

Mixed-Motive Cases and the ADA

On appeal, Rockwell claimed that pursuant to the Supreme Court's recent decision in *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343 (2009), the ADA, like the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, did not contain language allowing a mixed-motive analysis in disability claims and, as such, the district court erred in reading it into its framework and awarding judgment to Serwatka. In *Gross*, the Court held that because the ADEA lacked the language found in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et. seq.* (Title VII), expressly recognizing mixed-motive claims, such claims were not authorized by the ADEA. The *Gross* Court recognized that although such language was also missing from the pre-1991 version of Title VII that the Court applied in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), in the wake of its *Price Waterhouse* decision, Congress amended Title VII to explicitly authorize mixed-motive discrimination claims at § 2000e-2(m) and also specified a limited set of remedies for such mixed-motive claims at § 2000e-5(g)(2)(B).

Congress had not similarly amended the ADEA, which suggested that Congress decided not to authorize mixed-motive claims in age discrimination cases. Consequently, the burden-shifting framework that the Court set forth in *Price Waterhouse* did not apply in ADEA cases. The governing standard instead derived from the language of the ADEA, which forbids an employer from taking adverse action against any individual *because of* such individual's age. Thus, the ordinary meaning of the ADEA's requirement that an employer must take adverse action because of age was that age was the reason that the employer decided to act. As such, in order to prevail on a claim of disparate treatment under the ADEA, plaintiffs must prove that age was the but-for cause of the employer's adverse decision. The fact that age was a motivating, but not a determinative, factor in the employer's decision would not suffice to establish the employer's liability.

Although the *Gross* decision construed the ADEA, the weight given to the incorporation of the mixed-motive framework into Title VII suggested in the Court's view that when another anti-discrimination statute lacked comparable language, a mixed-motive claim would not be viable under that statute, and but-for causation would be part of the plaintiff's burden. Given that there was no provision in the ADA akin to Title VII's mixed-motive provision, except a provision in section 12117(a), which made available to ADA plaintiffs the same "powers, remedies, and procedures set forth" in some sections of Title VII, courts could not infer one as those sections did not cross-reference the provision of Title VII which renders employers *liable* for mixed-motive employment decisions. Like the ADEA, the ADA rendered employers liable for employment decisions made *because of* a person's disability, and *Gross* construed "because of" to require a showing of but-for causation. Thus, because the jury held that Rockwell would have terminated Serwatka despite its belief in her disability, she was not entitled to a mixed-motive judgment.

Conclusion

The *Serwatka* holding demonstrates the importance of explicit statutory language rendering an employer liable for employment decisions that were motivated in part by a forbidden consideration but which the employer still would have made in the absence of that proscribed motive. Without explicit language, the court may not apply the remedies that Title VII made available to plaintiffs unless they first prove that a forbidden criterion was a but-for cause of the adverse employment decision.

Eleventh Circuit Allows Non-Disabled Individuals to Bring Suit for Improper Medical Inquiry under the ADA

Harrison v. Benchmark Electronics Huntsville, Inc., No. 08-16656, 2010 BL 4481 (11th Cir. Jan. 11, 2010)

The Eleventh Circuit reversed a district court's decision granting summary judgment to Benchmark Electronics Huntsville, Inc. (BEHI) on John Harrison's claims that the company conducted an improper medical inquiry in violation of the Americans with Disabilities Act (ADA), 42 USC § 12101, et seq. In reversing the district court, the Court addressed an issue of first impression in the Eleventh Circuit and determined that individuals have a private right of action for an improper preemployment examination or inquiry under the ADA, which extends to both disabled and non-disabled individuals.

Facts and Procedural History

Harrison has suffered from epilepsy from the time he was two years old and takes barbiturates to control it (a condition which the Equal Employment Opportunity Commission found not to be a disability within the meaning of the ADA). With the help of a placement agency, Harrison began a temporary job as a "debug tech" at BEHI in 2005. A few months after he began working, Harrison's supervisor, Don Anthony, asked him to submit an application for permanent employment. As part of the application process, Harrison took a drug test, the results of which were reported to Human Resources, which came back positive for barbiturates. Human Resources asked Anthony to send Harrison to their offices, but did not tell Anthony why. Despite the fact that Human Resources did not tell Anthony why they wished to see Harrison, Anthony somehow found out and told Harrison about the results of the drug test. When Harrison explained that he took barbiturates

to control his epilepsy, Anthony asked to see the prescription. Anthony also called the Medical Review Officer (MRO) and remained in the room while Harrison answered questions regarding the length of time he had suffered from epilepsy, the type of medication he took to control it, and the dosage.

Later that month, the MRO informed Anthony that, based on the information Harrison had provided, Harrison had passed his drug test. Human Resources also told Anthony that the company had approved Harrison's application for a permanent position. Anthony, however, requested that Human Resources not make an offer of permanent employment to Harrison, and reported to Harrison's placement agency that, due to Harrison's poor performance and attitude, BEHI no longer wanted him as a temporary worker. The placement agency then terminated Harrison's employment with them.

Harrison brought suit in district court in Alabama alleging that BEHI had improperly inquired about his disability during his preemployment screening, that the company perceived him to be disabled, and that he was terminated as a result of his perceived disability. BEHI filed a summary judgment motion, which focused primarily on Harrison's perceived disability claim, but did argue that Harrison's improper medical inquiry claim should be dismissed because the Eleventh Circuit had not recognized that the ADA permits individuals to bring such suits under the ADA. The district court granted BEHI's motion, finding that Harrison had failed to sufficiently plead improper medical inquiry, but even if he had, it was unclear whether such a cause of action existed in this Circuit, and even if it did exist, Harrison could not make out a prima facie case. Harrison appealed.

Non-Disabled Individuals May Bring a Private Cause of Action for Improper Medical Inquiry

In considering Harrison's appeal, the Court first discussed whether the ADA permits individuals to bring suit for prohibited medical inquiry under the ADA and, if so, whether non-disabled individuals may bring suit in addition to those who are disabled. The Court noted that the other circuits to have already addressed this issue unanimously found that non-disabled people may bring suit for improper medical inquiry.

The ADA prohibits covered employers from "conduct[ing] a medical examination or mak[ing] inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability." The ADA regulations make clear that employers may, however, ask applicants about their "ability to perform job-related functions." In its analysis of this section of the ADA, the Eleventh Circuit highlighted the fact that though other sections of the statute reference "qualified individuals with disabilities," the improper medical inquiry section refers to the much broader term "applicants." The Court then examined the ADA as a whole and Congress' purpose in enacting it and determined that the improper medical inquiry section of the ADA does not require a plaintiff to demonstrate that he is disabled. Thus, the Court held that private individuals may bring improper medical inquiry suits under the ADA and that those individuals are not required to be disabled.

Harrison Met His Prima Facie Burden on Prohibited Medial Inquiry Claim

After rejecting the district court's finding that Harrison failed to properly plead improper medical inquiry in his complaint, the Eleventh Circuit considered whether Harrison had met his prima facie burden for such a claim. The district court found that Harrison had not made out a prima facie case because the questions BEHI asked based on the results of Harrison's drug test were permissible in that situation.

The Court again emphasized that the ADA allows employers to ask job applicants about their ability to perform job-related functions, but they may not "make targeted disability-related inquiries," which the EEOC defines as inquiries which are "'likely to elicit information about a disability.'" The Court explained that the ADA does not consider drug tests to be medical examinations and allows employers to ask limited follow-up questions to a drug test, but still prohibits employers from asking questions related to an applicant's disability. In applying these rules to Harrison's case, the Court found that based on the fact that Anthony was in the room during the MRO's questioning of Harrison and given the questions the MRO asked, a jury could find that BEHI had engaged in an improper medical inquiry under the ADA. Therefore, the district court improperly granted BEHI's motion for summary judgment.

Harrison Sufficiently Proved Damages

The Court rejected BEHI's argument that Harrison failed to show evidence of damages to support his claim of improper medical inquiry. The Eleventh Circuit explained that though Harrison was not required to demonstrate that he was disabled in order to make out a claim of improper medical inquiry, he was required to show some damages. The Court found that Harrison had presented enough evidence for a reasonable jury to find that he had suffered damages by creating an issue of fact as to whether BEHI decided not to hire him because of his responses to a potentially unlawful medical inquiry.

Conclusion

This case demonstrates the fine line that employers walk when conducting drug tests and how employers must understand not just the ADA, but also its regulations, and EEOC guidance in order to know what questions they may ask and which ones are prohibited. This case and similar cases from other circuits broaden the pool of potential plaintiffs in improper medical inquiry cases.

Employment Litigation

Tax Court Finds That Payment Made to Settle Employment Discrimination Suit and Compensate Plaintiff for Emotional Distress Damages Taxable

Wells v. Commissioner, No. 4407-09, 2010 BL 1889 (T.C. Jan. 5, 2010)

The United States Tax Court held that a payment made to Marion Wells to settle her gender discrimination and retaliation claims against her employer was not excluded from income under 26 U.S.C. § 104(a) of the Internal Revenue Code as damages received on account of personal physical injuries or sickness, even though the settlement agreement specified that the payment was being made to Wells as compensation for "damages for her emotional distress due to depression and other claims, not as wages or back pay."

Background

Wells sued her former employer alleging gender discrimination and retaliation under 42 U.S.C. §§ 1983 and 1988 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. Her complaint alleged, among other things, that the stress caused by an altercation with her manager and her employer's failure to respond to a complaint she lodged about the incident caused her to take leave, and her employment was improperly terminated when her leave expired. The district court granted summary judgment in the employer's favor, but the Tenth Circuit reversed on the retaliation claim and remanded for trial. *Wells v. Colorado Department of Transportation*, 325 F.3d 1205, 1210 (10th Cir. 2003). In 2005, the parties entered into a settlement agreement, which stated that $175,000 was to be paid to Wells "as damages for her emotional distress due to depression and other claims, not as wages or back pay," and that it "shall constitute a full and final settlement of all claims [Wells] asserted or might assert" against the defendants in the lawsuit. The settlement agreement also stated that a Form 1099-MISC, Miscellaneous Income, would be issued to Wells and reported to the Internal Revenue Service (IRS). Wells did not report the $175,000 as income on her 2005 income tax return. The IRS treated the payment as includable in gross income for 2005 and on that basis determined a deficiency of $48,003 in her 2005 income tax and an accuracy-related penalty of $9,601.

Settlement Payment for Emotional Distress Not Excludable from Income

The Court noted that, generally, gross income includes all income from whatever source derived. See 26 U.S.C. § 61(a). Further, Section 61(a) broadly applies to any accession to wealth, and statutory exclusions from gross income are narrowly construed. See *Commissioner v. Schleier*, 515 U.S. 323, 328 (1995). Thus, the burden was on Wells to bring herself within the clear scope of any statutory exclusion. *Id.* at 336–337. Wells claimed that she fell within the exemption of 26 U.S.C. § 104(a)(2), which provides that damages (other than punitive damages) received on account of personal physical injuries or physical sickness may generally be excluded from gross income. For the damages to be excludable under this provision, the underlying cause of action must: (1) be based in tort or tort-type rights; and (2) the proceeds must be damages received on account of personal physical injury or physical sickness. See *Schleier*, at 328, 337. Further, the Court noted that under 26 U.S.C. § 104(a)(5) damages for emotional distress resulting from nonphysical injury are not excludable from gross income, except for an amount of damages not in excess of the amount paid for medical care to treat the emotional distress. When damages are received pursuant to a settlement agreement, the nature of the claim that was the basis for settlement, and not the validity of the claim, controls whether such amount is excludable under Section 104(a)(2). *United States v. Burke*, 504 U.S. 229, 237 (1992). If the settlement agreement lacks express language stating what the settlement amount was paid to settle, courts look to the intent of the payor, based on all the facts and circumstances of the case, including the complaint that was filed and the details surrounding the litigation. *Knuckles v. Commissioner*, 349 F.2d 610, 613 (10th Cir. 1965). In this case, the settlement agreement specified that the money was paid "as damages for [Wells'] emotional distress due to depression and other claims, not as wages or back pay." Thus, because money paid for emotional distress not attributable to physical injury or physical sickness is includable in income, and any amounts paid in such circumstances for physical symptoms of emotional distress are similarly includable in income, the Court concluded that the settlement payment was attributable to a nonphysical injury (namely, her claims of suffering gender-based discrimination and unlawful retaliation) and therefore was not excludable from her gross income under Section 104(a)(2), except to the extent of any amounts she expended for medical care to treat her emotional distress.

Wells also argued that since depression is not specifically excluded as a physical injury under Section 104, it fell within the definition of a physical injury. The Court, however, rejected this argument because the burden was squarely on Wells to show that she fell within the clear scope of any statutory exclusion. See *Schleier*, at 336-337. Finally, Wells argued that she was advised that the characterization of the payment in the settlement agreement would result in the payment not being includable in income. The Court rejected this argument as well because a taxpayer is presumed to know the law and a mistake of law does not excuse liability. Further, although Wells' knowledge and any advice she received might have been relevant as to the penalty the IRS imposed, Wells did not challenge the amount of the penalty the IRS assessed.

Conclusion

The Court held that the settlement payment for emotional distress arising from an employment discrimination claim was not excludable under Section 104(a)(2) from Wells' gross income, except to the extent of any amount she paid for medical care to treat her emotional distress.

Government Contracts

Third Circuit Affirms Dismissal of Claims Relating to Revocation of Government Contractor Employee's Security Clearance

El-Ganayni v. U.S. Dept. of Energy, No. 08-4745, 2010 BL 4677 (3d Cir. Jan. 11, 2010)

The Third Circuit affirmed a district court's dismissal of Dr. Abdel Moniem Ali El-Ganayni's action against the United States Department of Energy (DOE) and its acting deputy secretary Jeffrey Kupfer, claiming that the revocation of his security clearance violated his First and Fifth Amendment rights under the United States Constitution and the Administrative Procedures Act (APA).

Factual Background

El-Ganayni, a native-born Egyptian, came to the United States in 1980 and became naturalized citizen in 1988. Holding a PhD in nuclear physics, he began working as a physicist at Bettis Laboratory in 1990. Bettis operated under contract with the DOE and was dedicated solely to a joint Navy-DOE program. El-Ganayni the received security clearance required for his job in May 1990. The clearance was renewed at least five times between 1990 and 2007.

El-Ganayni was an active Muslim and was involved in various Muslim-related causes outside of work. His activities including giving speeches and promoting prison outreach to Muslim prisoners. In July 2006, El-Ganayni gave a speech at the Islamic Center of Pittsburg condemning an FBI raid on another Pittsburg Mosque. In the speech, he also criticized United States foreign policy and especially the United States' involvement in Iraq. In June or July of 2007, El-Ganayni began serving as an Imam at a state prison. At some point during his prison work, he distributed to prisoners a book about Islam titled *The Miracle in the Ant*, which contained a depiction of a defense mechanism found in certain ants in which their bodies break open and spray deadly secretions on their attackers. The prison terminated his contract approximately two weeks later.

On October 24, 2007, the Bettis Laboratory Security Manager called El-Ganayni into a meeting where he was questioned at length regarding his political views, his speeches, and his contacts with other Muslims. Specifically, the interrogators asked whether he supported killing Americans and supported suicide bombings. They also asked whether he thought the *Miracle in the Ant*, could be construed as encouraging suicide bombings. At the end of the meeting, he was told his security clearance was being suspended and he was escorted from the building.

The DOE subsequently asked the FBI to determine whether El-Ganayni should retain his security clearance. El-Ganayni agreed to an interview by the FBI during which during which the agents asked him questions similar to those asked during the Bettis Laboratory interview. They also asked him about his views on the Koran and whether he was a member or knew any members of Hamas or al-Qaeda.

In January 2008, the DOE informed El-Ganayni by letter that it was continuing the suspension of his security clearance because it had "reliable information" that El-Ganayni was associated with an individual whose interests are "inimical" to the united states and that he had engaged in unusual conduct that tended to show that he was not trustworthy or that he might act contrary to the interests of national security. The language of the letter tracked that of the DOE regulations, *see* 10 C.F.R. § 710.8(b), (l), and provided no details regarding the "reliable information."

El-Ganayni requested a hearing to challenge the allegations against him, pursuant to the procedures explained in the January 2008 letter. However, the DOE terminated the proceedings after an initial status conference. The DOE officially revoked El-Ganayni's security clearance on May 19, 2008. The Secretary of Energy, certified under Executive Order 12968 that the usual procedures for review of security clearance revocation proceedings could not be made available in this case without damaging the interests of national security by revealing classified information. El-Ganayni lost his job at Bettis Laboratory due to his loss of security clearance.

Procedural Background

El-Ganayni filed the instant action in June 2008, alleging the following claims against the DOE and the acting secretary: (1) Count I: violation of his First Amendment Rights to freedom of speech and freedom of religion; (2) Count II: violation of his Fifth Amendment Right to equal protection; and Count III: violation of the APA by failing to follow DOE regulations when revoking his security clearance. He sought a declaratory relief and an order that the DOE provide him with a hearing and other procedures set forth in the regulations to contest his security clearance revocation. The district court dismissed his claims.

Courts have Jurisdiction to Review Constitutional Claims Relating to the Security Clearance Revocation Process

The government argued that Court and the district court could not hear the instant case because federal courts established under Article III of the Constitution lack jurisdiction to review security clearance cases. The government cited *Department*

of the Navy v. Egan, 484 U.S. 518 (1988), in support of its argument. In *Egan*, the Supreme Court held that the Merit Systems Protection Board lacked the authority to judge the merits of a security clearance decision. *Id.* at 523. The Third Circuit, as well as other courts, have extended the holding in *Egan*, to forbid judicial review of the merits of security clearance decisions. *See, e.g. Makky v. Chertoff*, 541 F.3d 205, 212 (3d Cir. 2008).

However, the Court pointed out that Article III Courts do have jurisdiction to hear "constitutional claims arising from the clearance revocation process." *See, Stehney v. Perry*, 101 F.3d 925, 932 (3d Cir. 1996). Thus, the Court found that the district court erred in dismissing Counts I and II of El-Ganayni's claims for lack of jurisdiction.

Court Could not Review El-Ganayni's Constitutional Claims Without Reviewing the Merits of the Security Clearance Revocation Decision

In Count I of his complaint, El-Ganayni alleged that the government violated his First Amendment rights to freedom of religion and freedom of speech by revoking his security clearance in retaliation for speeches he made criticizing the FBI, the war in Iraq and United States foreign policy. In Count II, El-Ganayni claimed the government violated his right to equal protection under the Fifth Amendment by terminating his security clearance on the basis of his religion and national origin.

The Court noted that to state a First Amendment retaliation claim, a plaintiff must show that his conduct was protected by the Constitution, and that the conduct was a substantial or motivating factor in the retaliation. *Ambrose v. Twp. of Robinson*, 303 F.3d 488, 493 (3d Cir. 2002). To analyze such a claim, however, the Court would have to review the merits of the DOE's decision, which is forbidden by *Egan*, *supra.* Similarly, to review El-Ganayni's Fifth Amendment claim, the Court would apply the *McDonnell Douglas* burden-shifting framework. *See, e.g.*, *Rode v. Dellaciprete*, 845 F.2d 1195, 1205 (3d Cir. 1988). Yet, both the prima facie case and the legitimate non-discriminatory reason phases of the analysis would require scrutiny of the merits of the DOE's decision.

Accordingly, the Court held that both Counts I and II should be dismissed because *Egan* presented an "insuperable bar to relief." *See Benton v. Merrill Lynch & Co.*, 524 F.3d 866, 870 (8th Cir. 2008).

El-Ganayni Also Failed to State a Claim under the APA

In Count III, El-Ganayni argued that the DOE violated the APA by failing to follow 10 C.F.R. §§ 710.1-710.36 (the "Regulations"), and Executive Order 12968, when it terminated his security clearance. The Court disagreed. It began by noting that courts give great deference to an agency's interpretation of Executive Orders it is charged with administering, as well as its interpretation of its own regulations. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). The Court then examined the Regulations, which implemented two Executive Orders.

The first Executive Order, entitled "Safeguarding Classified Information within Industry," describes certain minimum procedures required in proceedings to revoke security clearances. However, the Order, however, also preserves the authority of the head of an agency to bypass such procedures if he decides that "the procedures cannot be invoked consistently with the national security. Executive Order 10865 § 9.

The second Executive Order that the Regulations implemented granted certain procedural rights to individuals who are denied security clearances. Executive Order 12968. Once again, this Order preserves the right of the agency head to bypass these procedures when he determines the procedures would damage the interests of national security. It is undisputed that the DOE revoked El-Ganayni's clearance without affording him the procedural protections described in the Regulations. However, the Court ruled that the Secretary of Energy satisfied the requirements of Executive Order 12968 by: (1) certifying that that the usual security clearance procedures could not be invoked without damaging the interests of national security by revealing classified information; and (2) citing 42 U.S.C. § 2165 as proving him with the authority to revoke El-Ganayni's security clearance.

Accordingly, the Court held that Count III of El-Ganayani's Complaint failed to state a claim under the APA and was properly dismissed by the district court.

Military Leave

Eighth Circuit Affirms Summary Judgment for Employer in Employee's USERRA Discrimination Action

Reynolds v. RehabCare Group, East, Inc., No. 09-1144, 2010 BL 7514 (8th Cir. Jan. 14, 2010)

The United States Court of Appeals for the Eighth Circuit affirmed summary judgment for an employer in a physical therapist's action alleging that the employer discriminated against her based on her status as a military reserve officer and failed to rehire her upon her return from active military duty in violation of the Uniform Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301–4335. In affirming the ruling in favor of the employer, the court noted that the district court had applied the correct standard and properly rejected plaintiff's claim that the named defendant was a successor to her previous employer.

Factual and Procedural History

In May of 2004, Pamela Reynolds, a Captain in the United States Army Reserve, began working as a physical therapist for Progressive Rehabilitation Associates (Progressive) at Green Hills Retirement Community (Green Hills) in Ames, Iowa. Pursuant to the parties' arrangement, Reynolds, as a Progressive employee, provided services to Green Hill's residents under a contract between Progressive and Green Hills. In November 2005, the army ordered Reynolds to active duty and Progressive granted her a military leave of absence.

In May of 2007, Progressive notified Green Hills of its intent to terminate their contract. In July 2007, Green Hills entered into an agreement with Deerfield Retirement Community, which in turn entered into a subcontract with RehabCare Group East, Inc. (RehabCare) to provide rehabilitation services at Green Hills. In providing services to Green Hills under the agreement, RehabCare did not employ any former Progressive employees.

When Reynolds returned from active duty Progressive offered to reemploy her at its office in Iowa City but Reynolds refused. Instead, she sent a letter to Progressive and Green Hills' executive director requesting employment at Green Hills pursuant to USERRA and claiming that RehabCare was Progressive's successor-in-interest. A RehabCare representative informed Reynolds that the company would like to employ her at Green Hills but did not believe USERRA was applicable to RehabCare for Reynolds' employment. Reynolds declined to hear RehabCare's offer of employment, however, later stating that if RehabCare was "not going to honor the USERRA law and reinstate me into my job that I had prior to leaving, I didn't want to hear the offer."

Reynolds brought suit against RehabCare in the Southern District of Iowa, alleging (1) that the company discriminated against her based on her military status, in violation of 38 U.S.C. § 4311, and (2) that RehabCare, as a successor-in-interest to Progressive, refused to reemploy her in an equivalent position in violation of 38 U.S.C. §§ 4312 and 4313. The district court granted summary judgment to RehabCare on Reynolds' reemployment claim, concluding after analyzing the applicable factors that RehabCare was not Progressive's successor because Reynolds could not "demonstrate a continuity of business operations, a continuity of employees, or a similarity in supervisors and managers." As to Reynolds' discrimination claim, the district court found no evidence that RehabCare displayed any discriminatory animus toward Reynolds, noting that the company made significant efforts to employ her on mutually satisfactory terms, and granted summary judgment for RehabCare on that claim as well. Reynolds appealed to the Eighth Circuit.

Challenges to the District Court's Findings

In a brief review of Reynolds' arguments on appeal, the Eighth Circuit found no merit in her claim that the district court "improperly used factual determinations and legal conclusions [relating to] a previous ruling denying [Reynolds's] motion for a temporary injunction [which involved] different burdens of proof …. and compounded the error by drawing all favorable inferences in favor of [RehabCare]." Rejecting this contention, the court simply concluded that the district court applied the correct standard of review and assigned the burdens of proof accurately. The record contained no support, the court reasoned, for plaintiff's assertion that the district court improperly used facts or law from a previous ruling.

In addition, the court rejected Reynolds' claim that the district court had incorrectly held as a matter of law that service contracts were not covered by USERRA. As the court explained, the district court had merely determined, based on the record evidence and applying the appropriate legal standard, that RehabCare was not a successor-in-interest to Progressive. Having concluded that the district court's order did not set forth the far-reaching ruling that Reynolds claimed, the court dismissed her second argument and affirmed summary judgment for RehabCare on both counts of the complaint.

Conclusion

The *Reynolds* ruling demonstrates that employers may wish to consider attempting to accommodate employees returning from military duty if they have a need for their services even if the employer disputes the existence of a successor relationship or an obligation under USERRA. In this case, RehabCare's willingness to consider Reynolds for a position provided the company with a second avenue of defense in the event that Reynolds had prevailed on the successor issue.

Pregnancy Discrimination

Seventh Circuit Affirms Plaintiff Failed to Establish Prima Facie Case of Sex/ Pregnancy Discrimination

LaFary v. Rogers Group, Inc., No. 09-CV-1139, 2010 BL 6052 (7th Cir. Jan. 12, 2010)

The U.S. Court of Appeals for the Seventh Circuit affirmed the district court's grant of summary judgment to Rogers Group, Inc. on Angela LaFary's claims that Rogers discriminated against her because of her sex by (i) transferring her to a different office because she was pregnant in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.; and (ii) terminating her employment and failing to rehire her after she took leave to deal with pregnancy complications. The Court concluded that (i) whether or not LaFary's transfer was an adverse employment action, she could not establish a prima facie case because she failed to show that Rogers knew that she was pregnant before it decided to transfer her; and (ii) LaFary failed to raise a genuine issue of fact regarding whether Rogers's termination and failure to rehire her

constituted pregnancy discrimination or retaliation because Rogers had at least a de facto policy of automatic termination after 180 days and she failed to identify a similarly situated comparator.

Factual Background

In 1996, LaFary began working for Rogers, which produced crushed stone for road construction. In 2003, LaFary moved to Rogers's Martinsville, Indiana office to work as a field clerk, where her duties were mainly administrative but included some sales support. Her supervisor, Michael DeMartin, had informed her that the position would be a stepping stone to a full-time sales position. In February 2004, LaFary married an independent contractor who performed trucking jobs for the Martinsville office.

On March 15, 2004, LaFary learned that she was pregnant. On March 25, 2004, DeMartin sent an email to other Rogers employees proposing to transfer LaFary to the Bloomington office for business purposes, but noting that there was an appearance of a conflict of interest because her husband was an independent contractor. In late April, DeMartin notified LaFary that she was being transferred to Bloomington. Although it was unclear when DeMartin first learned of her pregnancy, he knew by this point because he responded to her objection by questioning whether she was "emotional" because of her pregnancy.

LaFary worked in Bloomington for fewer than two months because she experienced complications with her pregnancy. She was hospitalized then required to stay home for most of her pregnancy plus six to eight weeks thereafter. DeMartin expressed concern at such a long absence but approved her 12-week leave under the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 et seq., and 180 days of short-term disability leave. In Rogers's view, LaFary's leaves were to run concurrently and ended December 22. On January 10, 2005, LaFary, who believed that her leaves were to run consecutively, called the employee benefits administrator, Duchess Dukes, who indicated that she still had a job. The next day, however, DeMartin told LaFary that her employment had been terminated because Rogers's policy was to terminate an employee automatically for failing to return to work after approved leave expired. DeMartin said that Rogers, which had cut eight other positions around the same time, could not rehire her because of lack of business. He encouraged her to apply for other Rogers jobs as they became available.

Procedural History

LaFary sued Rogers in state court, alleging that Rogers discriminated against her on the basis of her sex by transferring her and terminating her employment. Rogers removed the case to the U.S. District Court for the Southern District of Indiana, which granted summary judgment to Rogers. *LaFary v. Rogers Group, Inc.*, No. 06-CV-1121 (S.D. Ind. Dec. 22, 2008). The district court found that DeMartin did not know that LaFary was pregnant when he decided to transfer her, that the transfer was not an adverse employment action, and she failed to identify a similarly situated comparator. LaFary appealed.

LaFary Failed to Establish a Prima Facie Case as to Her Transfer

To establish a prima facie case of gender discrimination, LaFary had to show that (i) she was in a protected class; (ii) she was subject to an adverse employment action; (iii) she was performing her job satisfactorily; and (iv) a similarly situated individual outside her protected class was treated more favorably. *See Clay v. Holy Cross Hosp.*, 253 F.3d 1000, 1005 (7th Cir. 2001). Since LaFary claimed pregnancy discrimination, she also had to show that Rogers knew she was pregnant. *Griffin v. Sisters of St. Francis, Inc.*, 489 F.3d 838, 844 (7th Cir. 2007). It was undisputed that LaFary was a member of a protected class and performed her job in a satisfactory manner and that the decision to terminate her employment or not rehire her was an adverse employment action.

The Seventh Circuit first discussed but did not decide whether Rogers's decision to transfer LaFary constituted an adverse employment action. The Court noted that a nominally lateral transfer may be adverse if it "significantly reduce[d] the employee's career prospects by preventing her from using her skills and experience, so that the skills are likely to atrophy and her career is likely to be stunted." *Nichols v. S. Ill. Univ.-Edwardsville*, 510 F.3d 772, 780 (7th Cir. 2007). LaFary asserted that her Martinsville job was supposed to be a stepping stone to a full-time sales job, but the Bloomington job involved mainly administrative tasks and would not permit her to use the skills she had developed. Rogers countered that the transfer was a promotion that involved a raise and increased responsibilities over time. The Court opined that it was a close question, but it was unnecessary to decide it. LaFary could not establish a prima facie case in any event because she failed to show that Rogers knew that she was pregnant when it decided to transfer her on March 25, 2004.

LaFary learned on March 15 that she was pregnant. She submitted a declaration stating that DeMartin knew of her pregnancy shortly after she became pregnant but failed to present specific evidence of a date or even whether it was before March 25, the date of his email proposing her transfer. Thus LaFary was unable to prove a key element of her case. The declaration also contradicted her deposition testimony in which she admitted that she did not know when DeMartin or others learned of her pregnancy. Noting that LaFary could not contradict her deposition testimony with later-filed contradictory affidavits, the Court concluded that LaFary "boxed herself into a corner" and failed to present evidence showing that DeMartin knew that she was pregnant when he decided her transfer her.

LaFary Failed to Raise a Genuine Issue Regarding Termination

As to Rogers's decisions to terminate her employment and not to rehire her, the Court concluded that LaFary's emails acknowledged Rogers's de facto policy of automatically terminating employment after 180 days. In addition, LaFary failed to identify a similarly situated person outside her protected class who received more favorable treatment.

Conclusion

The Seventh Circuit thus affirmed the district court's grant of summary judgment to Rogers on LaFary's sex/pregnancy discrimination claims.

Race & Color Discrimination

New York District Court Holds NYC Liable for Intentional Discrimination Against Black FDNY Applicants

United States of America v. City of New York, No. 07-CV-2067, 2010 BL 6583 (E.D.N.Y. Jan. 13, 2010)

Building on a July 2009 ruling that the City of New York used written examinations with a disparate impact on black and Hispanic firefighter applicants, the U.S. District Court for the Eastern District of New York held that the City's use of such examinations constituted a pattern and practice of intentional discrimination against black applicants in violation of the Equal Protection Clause, 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., the state Human Rights Law, N.Y. Exec. Law § 290 et seq., and city Human Rights Law, N.Y.C. Admin. Code § 8–101 et seq. The Court thus (i) granted summary judgment to the Vulcan Society, Inc., a black firefighters' organization, and three black firefighters (collectively, intervenors) on behalf of a certified class of black firefighters and applicants; and (ii) granted defendants' motions to dismiss all claims against the New York City Fire Department (FDNY) and the Department of Citywide Administrative Services (DCAS) as nonsuable entities and for summary judgment as to all claims against Mayor Michael Bloomberg and former FDNY Commissioner Nicholas Scoppetta.

Factual and Procedural Background

In May 2007, the United States sued the City claiming that its procedures for screening and choosing applicants for entry-level firefighter positions between 1999 and 2007 had a disparate impact on Hispanic and black candidates and were not related to the job in question or consistent with business necessity. The U.S. challenged (i) the use of Written Examinations (Exams) 7029 and 2043 as pass/fail screening devices to eliminate applicants who failed; and (ii) "rank-order processing," in which applicants were ranked on a list using combined written and physical test scores plus bonus points.

In September 2007, the Court allowed the intervenors to intervene and allege that the City, FDNY, DCAS, Bloomberg, and Scoppetta intentionally discriminated against them on the basis of their race by using the pass/fail and rank-ordering procedures. The Court certified a class of all black firefighters or firefighter applicants who took either Exam 7029 or 2043 and were harmed by defendants' use (i) of certain cutoff scores to eliminate candidates who failed; or (ii) of the Exams for rank-order processing. *United States v. City of New York*, 258 F.R.D. 47 (E.D.N.Y. 2009).

Disparate Impact Opinion

In July 2009, the Court granted summary judgment to the U.S. and intervenors, holding that the City was liable for disparate impact discrimination against black and Hispanic FDNY applicants under Title VII. *United States v. City of New York*, 637 F. Supp. 2d 77 (E.D.N.Y. 2009). *See also Bloomberg Law Reports, Labor & Employment*, *Vol. 3, No. 31, August 3, 2009* for article on the disparate impact ruling. The Court concluded that no triable issue of fact existed regarding whether the Exams had a statistically and practically significant disparate impact because black and Hispanic firefighter applicants disproportionately failed and those who passed were placed lower on lists resulting from their scores. The City also failed to satisfy its burden to show that the Exams were job-related pursuant to *Guardians Association of the New York City Police Department, Inc. v. Civil Service Commission*, 630 F.2d 79 (2d Cir. 1980).

Title VII Pattern-or-Practice Disparate Treatment

Applying the analytical framework set forth in *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), the Court held that the intervenors' uncontested statistical and anecdotal evidence showed that intentional discrimination was "standard operating procedure" in firefighter hiring and that intervenors established a prima facie case that the City's use of the Exams constituted a pattern and practice of intentional discrimination against black candidates in violation of Title VII. The pass rate for Exam 7029 was 89.9% for white candidates and 60.3% for black candidates, using a cutoff score with no relation to ability, and for Exam 2043 it was 97.2% of white candidates compared to 85.4% of black candidates. As a result, 607 to 684 black applicants who would not have failed the exams but for the disparity were excluded and 144 black candidates who would otherwise have been appointed were rejected. The "net effect" of the rank-ordering procedure was that the hiring of 112 black applicants was delayed and they were denied about 34 years' worth of wages and seniority that they otherwise would have received. The Court further concluded that the intervenors also presented substantial

historical, anecdotal, and testimonial evidence showing that the City's discriminatory testing of FDNY applicants was a decades-old problem and that the City, City agencies, and relevant decisionmakers were aware that the FDNY's hiring procedures discriminated against black candidates but failed to try to cure the discrimination.

The Court also held that the City failed to prove its defense and offer evidence showing that the intervenors' proof was "inaccurate or insignificant." The Court opined that the City unsuccessfully tried "to circumvent its burden of production entirely by arguing that the Intervenors have not proved that the City harbored a subjective intent to discriminate against black applicants."

Equal Protection and § 1981

Applying the same *Teamsters* analysis to the intervenors' § 1981 and equal protection claims, the Court concluded that the intervenors' disparate-impact evidence sufficed to establish a prima facie case of intentional discrimination. Among other things, the Court summarized the City's history of efforts to remedy FDNY hiring discrimination: "34 years of intransigence and deliberate indifference, bookended by identical judicial declarations that the City's hiring policies are illegal." In 1973, the Southern District of New York held that the City's practice of using non-validated written examinations to screen and rank firefighter applicants was unlawful because it had statistically and practically adverse effects on black candidates and was not justified by business necessity. *Vulcan Soc'y of New York City Fire Dep't, Inc. v. Civil Serv. Comm'n*, 360 F. Supp. 1265 (S.D.N.Y.), *aff'd in relevant part*, 490 F.2d 387 (2d Cir. 1973), essentially the same holding that the Court reached in July 2009. Through six mayoral administrations and the terms of ten FDNY Commissioners, the percentage of black firefighters remained static at about 3%. The Court rejected the City's assertion that such history was irrelevant, opining that "[t]he fact that the City was on notice after *Vulcan Society* . . . that exam policies with unjustified adverse effects on black applicants were presumptively illegal, and nonetheless continued to enforce such policies, is, at the very least, powerful evidence supporting an inference of intentional discrimination." The Court similarly concluded that the City failed to rebut the intervenors' prima facie case of intentional discrimination.

Claims Against Bloomberg and Scoppetta

Although the intervenors presented "copious evidence from which a reasonable fact-finder could infer that the Mayor and Commissioner harbored an intent to discriminate against black applicants," since there was no direct evidence that they acted with a discriminatory purpose, they were entitled to qualified immunity as to the § 1981 and Equal Protection claims and "official immunity" under state law.

Conclusion

The Court thus held that the City was liable under federal, state, and city law for intentionally discriminating against black firefighter applicants by using the challenged methods. The remedy phase is to follow.

Restrictive Covenants

Third Circuit Finds Restrictive Covenant Enforceable But Vacates Preliminary Injunction Because District Court Did Not Require That Employer Post Bond

Zambelli Fireworks Manufacturing Co. v. Wood, No. 09-1526, 2010 BL 8859 (3d Cir. Jan. 15, 2010)

The United States Court of Appeals for the Third Circuit vacated and remanded the district court's grant of a preliminary injunction in favor of Zambelli Fireworks Manufacturing Company, enforcing a covenant not to compete entered into by its former employee, Matthew Wood. Although the Court found that the restrictive covenant, as modified by the district court, was enforceable, it vacated the preliminary injunction because the district court failed to require that Zambelli post a bond in connection with the injunction.

Background

Zambelli was a fireworks company that was historically family-owned and operated. It was incorporated under the laws of Pennsylvania and had its principal place of business there. Zambelli hired Wood to work in its Florida office pursuant to the terms of an employment agreement containing a two-year non-compete provision. His responsibilities expanded over time as Zambelli provided Wood with valuable pyrotechnics training. Wood was privy to many of the inner workings of Zambelli's business, and a significant portion of his responsibilities required contact with Zambelli clients. As Wood's responsibilities increased, Zambelli asked him to sign an updated employment agreement (Agreement) that would ensure his continued commitment to the company. The Agreement contained the following provisions: (1) a clause prohibiting Wood from "engag[ing] in any manner in the pyrotechnic business" in the United States or working for a competitor for two years after leaving Zambelli; (2) a non-solicitation provision proscribing Wood from soliciting any former customers or clients of Zambelli as well as any Zambelli employees for two years after leaving Zambelli; (3) a confidentiality clause preventing the disclosure or use of trade secrets or any information regarding the operation of Zambelli's business; (4) a provision permitting a court to modify the terms of the Agreement to render it enforceable if the restrictive covenant was found to be unreasonable; and (5) a choice of law provision stating that Pennsylvania law would govern the interpretation of the Agreement. After Wood executed the

Agreement, a major sale of Zambelli's stock took place, after which the company was no longer wholly owned by Zambelli family members. The transaction was structured as a stock sale as opposed to an asset purchase. Wood subsequently was hired by Pyrotecnico F/X, LLC, a direct competitor of Zambelli. Wood and Pyrotecnico agreed that he would not take or use any Zambelli information or bring any trade secrets or proprietary information from Zambelli. Pyrotecnico was aware of the restrictive covenant in Wood's Agreement with Zambelli and agreed to pay Wood his salary for two years if the covenant were enforced and to indemnify Wood for his litigation expenses. Further, Wood and Pyrotecnico attempted to minimize any conduct that might constitute a breach of the Agreement with Zambelli.

Zambelli filed suit against Wood and Pyrotecnico, seeking, among other things, to enforce the terms of the restrictive covenant in Wood's Agreement. Zambelli then filed a motion for a preliminary injunction, which the district court granted in part without requiring Zambelli to post a bond. Specifically, the district court "blue penciled" the restrictive covenant to allow Wood to work in his chosen position without compromising Zambelli's legitimate business interests, and found that, as modified, the covenant was enforceable under Pennsylvania law.

Diversity Jurisdiction

As a preliminary matter, the Court noted that its jurisdiction was based on the diversity of the parties, but that Pyrotecnico was a limited liability company (LLC) whose citizenship was determined by the citizenship of each of its members, one of whom resided in Pennsylvania. Thus, because Zambelli was incorporated in Pennsylvania and had its principal place of business there, complete diversity did not exist. The Court, however, found that Pyrotecnico was not an indispensable party under Federal Rule of Civil Procedure 19(b) because the claims against Wood and Pyrotecnico jointly alleged theories of joint and several liability, which did not need to be tried together under state law, and the remaining claims against Pyrotecnico individually could be pursued in state court. Thus, because full relief was available from both parties, albeit in separate forums, the Court exercised its authority under Federal Rule of Civil Procedure 21 and dismissed Pyrotecnico from the action, thereby preserving its subject matter jurisdiction.

Effect of Stock Sale

Wood first argued that the injunction was improper because Zambelli was unable to enforce the non-compete clause due to its failure to specifically assign the Agreement when its stock sale took place. The Court noted that under Pennsylvania law an employment restrictive covenant "is not assignable to the purchasing business entity, in the absence of a specific assignability provision, where the covenant is included in a sale of assets." *Hess v. Gebhard & Co.*, 808 A.2d 912, 922 (Pa. 2002). The Court, however, found that a stock sale, unlike a sale of assets, does not alter the corporate entity. Accordingly, the Court held that the transfer of some or all of the stock of a corporation has no effect on its ability to enforce a non-compete agreement. Because Zambelli's corporate restructuring was a stock sale rather than an asset purchase, the Court concluded that Zambelli could still enforce Wood's restrictive covenant, despite the failure to assign his Agreement to the purchasers.

Enforceability of Non-Compete

Wood argued that the restrictive covenant was not enforceable because it was not necessary to protect a legitimate business interest of Zambelli. The Court explained that, although restrictive covenants are a disfavored restraint on trade under Pennsylvania law, they are enforceable in equity where they are "incident to an employment relationship between the parties; the restrictions imposed by the covenant are reasonably necessary for the protection of the employer; and the restrictions imposed are reasonably limited in duration and geographic extent." *Victaulic Co. v. Tieman*, 499 F.3d 227, 235 (3d Cir. 2007). To be "reasonably necessary for the protection of the employer," Pennsylvania law requires that the covenant be tailored to protect legitimate business interests. *Id.* The Court found that Wood had access to Zambelli's client list, pricing and business strategy, and had a longstanding relationship with Zambelli clients, who viewed him as a leader in the industry due, in part, to Zambelli's efforts to advertise Wood's specialized skills. Zambelli therefore had a legitimate business interest in ensuring that Wood did not transfer that goodwill to Pyrotecnico, its direct competitor. Further, Wood received specialized training paid for by Zambelli and acquired and developed unique skills that were specific to the pyrotechnic industry. The Court found that these were precisely the sort of specialized training and skills that constitute a legitimate business interest, appropriately subject to protection through the use of a restrictive covenant. *Id.* Thus, the Court held that the district court did not err in holding that Zambelli had a legitimate business interest in its customer goodwill and Wood's specialized training and skills.

Failure to Post Bond

Federal Rule of Civil Procedure 65(c) states that "[t]he court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." The Court found that the only exception it had recognized to this rule was where the district court makes a "specific finding[]" that "the balance of [the] equities weighs overwhelmingly in favor of the party seeking the injunction." *Elliott v. Kiesewetter*, 98 F.3d 47, 60 (3d Cir. 1996). In this case, however, the district court made no such specific finding in support of its waiver of the bond requirement. Further, the Court found that Pyrotecnico agreeing to indemnify Wood for his litigation expenses had no bearing on the equities of imposing a bond and did not excuse Zambelli's obligation to compensate Wood for his losses

should he ultimately prevail in the litigation. Thus, the Court found that the district court abused its discretion in failing to require Zambelli to post a bond.

Conclusion

The Court dismissed Pyrotecnico from the suit, affirmed the district court's holding that the restrictive covenant in the Agreement was enforceable under Pennsylvania law, vacated the preliminary injunction for failure to comply with the requirements of Rule 65(c), and remanded to the district court for further proceedings.

Preliminary Injunction Denied Where Evidence Did not Establish a Probable Right to Recovery or Imminent Harm

Sadler Clinic Assn. v. Hart, No. 09-09-00452-CV, 2010 BL 8364 (Tex. App. Jan. 14, 2010)

Nora Hart was employed as a physician with the Sadler Clinic until she resigned in March, 2009. Hart was subject to a non-competition agreement, which provided that she was not to compete in a medical practice within a twenty-two mile radius of the clinic. When Hart attempted to open a solo practice within twenty-two miles of the clinic, Sadler sought a temporary injunction.

After an evidentiary hearing that included testimony about the geographical area covered by the non-compete provision, the process by which the twenty-two mile radius had been determined and the effect of the twenty-two mile radius on Hart's ability to practice medicine, the trial court denied the motion, holding that Sadler failed to demonstrate that it had a probable right to the relief sought and probable, imminent and irreparable injury.

On appeal, the Texas Court of Appeal affirmed, holding that the trial court's determination was supported by the record. The court began by noting that a plaintiff seeking a temporary injunction must demonstrate a cause of action against the defendant; a probable right to the relief sought and probable, imminent harm and irreparable injury if the conduct were allowed to continue. According to the court, there was testimony in the evidentiary hearing that cast doubt on Sadler's ability to meet that standard.

As to the requirement of a probable right to relief, the court cited evidence that Sadler had imposed a twenty-two mile non-compete area in its agreements for nearly twenty years, despite the fact that there had been significant population growth over those twenty years. According to the court, this and other evidence cast doubt on the reasonableness of the non-compete provision and therefore, on Sadler's probably right to relief. Notably, the court declined to reform the geographic scope of the non-compete provision, holding that its role was not to determine the merits of a case on an interlocutory appeal.

As to the imminent, irreparable harm requirement, the court noted that despite its claim that its operations would "unravel" if Hart was permitted to open her office, Sadler offered no specific evidence that Hart had disseminated confidential information, that its revenues had declined after Hart's departure or that Hart had solicited other physicians to join her practice.

This decision suggests that evidence casting doubt on the reasonableness of the geographic restraint, and the absence of evidence regarding real or anticipated harm (for example, in the form of a confidentiality breaches or lost profits), may be sufficient bases on which to deny a temporary restraining order.

Retaliation

Retaliatory Act That Occurred Outside of the Limitations Period Could Not Be "Swept In" Under Continuing Violation Doctrine

Roa v. LAFE, No. A-72 September Term 2008, 2010 BL 8266 (N.J. Jan. 14, 2010)

In a decision published on January 14, 2010, the Supreme Court of New Jersey reversed in part the dismissal of retaliation claims brought under the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-12(d).

Factual and Procedural Background

In 2003, Fernando Roa and his wife Liliana became involved in a marital dispute between their supervisor and the supervisor's wife. After numerous threats over the course of six months, on August 24, 2003, the supervisor told Liliana to leave the premises and not return to work. Liliana learned in September, 2003 that her unemployment benefits had been denied because her employer had reported that she was terminated for misconduct. The determination was reversed on October. Fernando was terminated on October 3, 2003. He was advised by letter dated November 11, 2003 that his claim for benefits relating to his wife's surgery on October 2, 2003 was denied because his employee benefits had been terminated as of September 30, 2003. The cancellation was corrected in February, 2004.

In November, 2005, the Roas brought suit alleging retaliation, in Liliana's case, based on the termination and the delay in unemployment benefits, and in Fernando's case based on the termination and the cancellation of benefits. The trial judge dismissed the claims as being time-barred under the two-year NJLAD statute of limitations. The Appellate Division affirmed the dismissal of Liliana's claims, but reversed on Fernando's claim, holding that the continuing violation theory applied to "sweep in" the earlier alleged retaliatory act of termination, and further that Fernando's claims may have been viable under a discovery rule doctrine, depending on when he knew or should have known that the cancellation was retaliatory.

Analysis

On appeal, the Supreme Court of New Jersey reversed in part and affirmed in part. According to the court, the continuing violation theory operates to permit a plaintiff who has experienced continual pattern of conduct to litigate the series of acts as a single unlawful employment action that accrues on the date of the last act, but the theory cannot be used to "sweep in" acts that a plaintiff knew or should have known were retaliatory. Applying those guidelines, the court agreed that the continuing violation theory could not be applied to Liliana's claim because she knew, at the time she was fired, that her discharge was retaliatory and knew no later than September, 2003 that the denial of her unemployment benefits was retaliatory.

The court also disagreed about the applicability of the continuing violation theory in the case of Fernando's claim. According to the court, Fernando knew or should have known, on the date he was terminated, that his termination was retaliatory. His failure to commence an action within two years of that date therefore could not be remedied by alleging a continuing violation. However, the court held that Fernando's insurance cancellation claim may have been valid as a single discrete act under the "discovery rule." According to the court, if the evidence established that Fernando did not know (and should not have known) of the cancellation until November, 2003, his action was timely because it was brought within two years. The court went on to hold that the cancellation claim was actionable under the NJLAD even though it did not involve actual employment or proposed employment elsewhere, and that the emotional and financial harm allegedly suffered by the plaintiffs was sufficient to meet the threshold for an independent cause of action under the NJLAD.

Conclusion

This decision provides additional guidance on the applicability of the continuing violation doctrine in the New Jersey state courts. It clarifies that the doctrine cannot be applied to "sweep in" acts that occurred outside of the limitations period when the plaintiff knew of should have known that those acts were retaliatory.

Wage & Hour

Ninth Circuit Finds Class Representative Retained Interest in Class Action Despite Settling Individual Claims with Employer

Narouz v. Charter Communications, LLC, No. 07-56005, 2010 BL 8642 (9th Cir. Jan. 15, 2010).

On an issue of first impression for the United States Court of Appeals for the Ninth Circuit, the Court held that Hani Narouz, a class representative, retained the right to appeal the denial of class certification where, even though he settled his individual claims with his employer, Charter Communications, LLC, and voluntarily dismissed his individual claims, he still maintained a personal interest in the outcome, if any, of that class action.

Background

In April 2005, Narouz filed a complaint against Charter in state court on behalf of a putative class of non-exempt employees, alleging wrongful termination in violation of public policy, statutory violations of the California Labor Code based on failure to pay wages, failure to furnish meal periods, failure to maintain accurate itemized wage statements, unfair, unlawful, and fraudulent business acts and practices under California Business and Professions Code Section 17200, and seeking declaratory relief. The wrongful termination claim, however, was asserted by Narouz alone.

Procedural History

Charter removed the case from the Los Angeles Superior Court to the United States District Court for the Central District of California. After a year and a half of litigation, the parties mediated and in December 2006, agreed on general settlement terms. The actual settlement agreement contained a "Class Action Joint Stipulation of Settlement" providing that Charter would make a gross payment of $267,500 (including attorney's fees). A separate agreement stated Charter would pay Narouz $60,000 to release his wrongful termination claim, claims for any unpaid wages "aside from those related to Narouz's class allegation," claims for any emotional distress, pain and suffering, and penalties "aside from those related to Narouz's class allegation." It was also agreed that Narouz would receive an additional $20,000 if the district court approved the class settlement. If the Court, however, did not approve the class settlement, the $60,000 payment already made would be the consideration for any and all remaining "individual claims." By February 2007, the district court approved the settlement allowing for a full settlement and release of Narouz's individual claims.

By April 2007, Narouz filed a motion seeking certification of the class for settlement purposes only and preliminary approval of the class action settlement. Although Charter supported the motion, the district court refused to certify the case as a class action for settlement purposes, or to approve the settlement. The lower court made this decision without furnishing an analysis as to why the motion was denied, only offering in its written order that it could not "ascertain a class." After Narouz secured a dismissal of his individual claims, he appealed this district court decision rejecting class action certification.

Narouz's Appeal Was Not Moot

As the Ninth Circuit had not addressed this issue before, it looked to the Supreme Court's decision in *U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 404 n. 10 (1980) for guidance. The Supreme Court held in *Geraghty* that when a class representative's claims expire involuntarily, that

representative "retains a `personal stake' in obtaining class certification sufficient" to maintain jurisdiction to appeal a denial of class certification. Thus, the Supreme Court reasoned that the class representative maintained at least an interest in spreading litigation costs and shifting fees and expenses to the other litigants with similar claims. Although the instant case contained a class representative who voluntarily settled (as opposed to an involuntary settlement as in *Geraghty*), the Ninth Circuit held that as long as the representative specifically retained a personal stake, he or she retained jurisdiction to appeal the denial of class certification. In so holding, the Ninth Circuit joined several other circuits. The Court reasoned that in order for a class representative to retain a personal stake, a settlement agreement would have to specifically provide that the class representative was solely releasing individual claims, thus retaining a personal stake in the class claim.

Narouz's "Confidential Settlement and Release" limited the release to only Narouz's individual claims, stating that the settlement payment received was consideration for dismissal of Narouz's claims "*aside* from those related to Narouz's class allegation." The agreement also allowed Narouz to retain a continued financial interest in the outcome of the class claims where Narouz was supposed to receive an award enhancement fee of $20,000 if the court approved the class settlement. The agreement also provided that the claim for attorney's fees and costs would not been released if Narouz was not allowed to pursue an appeal of a denial of class certification. Accepting the plain language of the settlement agreement and Narouz's obvious financial interest in reversing the district court's decision, it was clear to the Court that Narouz maintained a sufficient personal stake in the class litigation to appeal the district court's denial of class certification and that the appeal was not moot.

Although the dissent argued that the voluntariness of the settlement should have absolved any interest Narouz had in the class certification claim, the Court rejected this theory, instead clarifying that voluntariness was not a reason for finding a lack of a personal stake in the outcome of the appeal. More importantly, the Court found that Narouz's decision to settle his individual claims were voluntary only in the sense that it was a knowing choice between (1) pursuing his individual claim to final judgment at the risk of spending large sums of money and possibly recovering nothing, or (2) settling the case to serve the interests of the class as well as his own. By maintaining an interest in the $20,000 conditioned upon the district court's approval of the class settlement, Narouz maintained a personal stake in the class action.

District Court's Decision was Inadequate

The Court opined that generally, class certification decisions are reviewed under an abuse of discretion standard. Where the district court, however, fails to make sufficient findings to support its application of the criteria in Rule 23 of the Federal Rules of Civil Procedure, the class certification decision is not entitled to the traditional deference given to such a determination. Here, the district court refused to certify the settlement class and offered a very scant, almost nonexistent, analysis supporting its decision. All the district court stated was that it did not "see how [it] can certify this matter for class action as a class action for settlement purposes . . . [t]here is some question in my mind. So the motion is denied." The court's written order stated, "The motion is denied since the court is unable to ascertain a class which can be certified." The Ninth Circuit ruled that this statement contained virtually no analysis and thus did not defer to the district court's decision on whether to grant class certification.

As such, the Court was forced to review the requirements of Rule 23(a) and (b) "designed to protect absentees by blocking unwarranted or overbroad class definitions," and "demand undiluted, even heightened, attention in the settlement context. To obtain class certification, a class plaintiff has the burden of showing that the requirements of Rule 23(a) are met and that the class is maintainable pursuant to Rule 23(b)." Since the district court failed to provide any findings or analysis of the Rule 23 factors, the Ninth Circuit found that meaningful appellate review was impossible. Thus the Court vacated and remanded the district court's decision (to a different district judge) for a reasoned determination of class action status.

Conclusion

Another judge concurred in part and dissented in part, and reasoned that Narouz's appeal should have been held moot due to the specific language of the settlement agreement and whether it specifically or conclusively released the employer from Narouz's individual claim or his claims in general (including the class action claims). Ultimately, this case highlights the importance of carefully drafted settlement agreements. Where a class representative settles individual claims with the employer voluntarily, the issue of retaining a class action interest should be discussed and the resolve plainly written into the agreement to avoid various interpretations of the parties' intent.

Second Circuit Holds Advertising Salesperson Not Exempt from FLSA as Administrative Employee

Reiseck v. Universal Communications of Miami, Inc., No. 09-CV-1632, 2010 BL 5745 (2d Cir. Jan. 11, 2010)

In a case of first impression, the U.S. Court of Appeals for the Second Circuit vacated and remanded a portion of the district court's grant of summary judgment to Universal Communications of Miami, Inc., its parent company, and four individual defendants (collectively, Universal), holding that the district court erred in concluding that Lynore Reiseck was ineligible for overtime pay under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq. Following a Third Circuit opinion, the Court concluded that, because Reiseck's primary duty was selling advertising space in a free magazine, which

was not "directly related to [Universal's] management policies or general business operations," she was a "salesperson" for FLSA purposes, not an exempt administrative employee. The Court thus concluded that the district court erred in finding that Reiseck fell under the administrative exemption to the FLSA and New York Labor Law, N.Y. Comp. Codes R. & Regs., tit. 12, § 142-3.2 (§ 142-3.2).

Factual Background

Universal employed Reiseck as a Regional Director of Sales from September 2002 until her termination in February 2004. Reiseck's job responsibilities were mainly to generate advertising sales in a particular region from travel and finance companies for *Elite Traveler* magazine, which Universal published. Most of Universal's revenue from *Elite Traveler* was derived from advertising sales because the magazine was distributed for free. Universal's *Elite Traveler* employees consisted of sales staff, including Reiseck, who sold advertising space, marketing staff, who created promotional materials for increasing advertising sales, and editorial staff, who developed the magazine's content.

Procedural History

In May 2004, Reiseck sued Universal in New York State Supreme Court claiming that Universal (i) withheld overtime pay in violation of FLSA, 29 U.S.C. § 207(a), and § 142-3.2; (ii) withheld earned commissions in violation of N.Y. Labor Law § 191-c(1); (iii) discriminated against her on the basis of her sex in violation of N.Y. Executive Law § 296(1)(a), and N.Y. City Admin. Code § 8-107; and (iv) discriminated against her on the basis of her recreational activities (leisure travel) in violation of N.Y. Labor Law § 201-d(2)(c). Universal removed the action to the U.S. District Court for the Southern District of New York, which granted summary judgment to Universal on all claims. *Reiseck v. Universal Communications of Miami, Inc.*, No. 06-CV-777, 2009 BL 63166 (S.D.N.Y. Mar. 25, 2009). Reiseck appealed to the Second Circuit, which issued a summary order separate from the instant opinion affirming the district court's grant of summary judgment on all of Reiseck's claims except her overtime claims. *Reiseck v. Universal Communications of Miami, Inc.*, No. 09-CV-1632, 2010 BL 5638 (2d Cir. Jan. 11, 2010).

FLSA Overtime Basics

FLSA imposes various wage and hour requirements, among other things. If an employee works more than 40 hours in a particular week, the employer must generally pay the employee overtime compensation, that is, at least one and one-half times the regular rate of pay. 29 U.S.C. § 207(a). FLSA provides for certain exemptions from such overtime compensation, however, including for "administrative" employees. 29 U.S.C. § 213(a)(1). The Court noted that New York law similarly requires overtime pay and incorporates FLSA's exemptions. *See* § 142-3.2.

The Second Circuit noted that, since FLSA is a remedial statute, its exemptions must be narrowly construed. *See, e.g.*, *Bilyou v. Dutchess Beer Distribs., Inc.*, 300 F.3d 217, 222 (2d Cir. 2002). In addition, if the employer invokes an exemption, it bears the burden of proving that the exemption applies. *See id.*

Reiseck Is Not Covered by the Administrative Exemption

Reiseck argued that the district court erred in granting summary judgment to Universal on her overtime claims. The district court concluded that Reiseck was not eligible for overtime pay because she fell within the "administrative" exemption to FLSA pursuant to 29 U.S.C. § 213(a)(1). The applicable 2002 Department of Labor regulations, amended after Reiseck left Universal's employ, required application of the "short test" to assess whether Reiseck was an administrative employee on the basis of her salary and job duties. It was uncontested that Reiseck met the salary portion of the test. 29 C.F.R. § 541.2(e)(2). As to the job duties, an employee was exempt as an administrative employee if the employee's "primary duty consist[ed] of . . . the performance of office or nonmanual work directly related to management policies or general business operations of his employer," *id.* § 541.2(a), and required "the exercise of discretion and independent judgment." *Id.* § 541.2(e)(2). It was undisputed that Reiseck's primary duty involved "the performance of office or non-manual work," so the Court had to assess whether her primary job duty was "directly related to [Universal's] management policies or general business operations."

The Second Circuit noted that interpretive regulations described "directly related to management policies or general business operations" in various ways, two of them conflicting. In one subsection, the regulations stated that the phrase applied to activities concerning administrative operations as opposed to production, or in a retail business, sales work. 29 C.F.R. § 541.205(a). They also stated, however, that administrative operations included "promoting sales," among other things. 29 C.F.R. § 541.205(b).

Although Universal was neither a retailer nor a manufacturer, the Court opined that advertising space could be considered Universal's "product," since *Elite Traveler* was distributed without charge and sales of advertising space constituted an important source of revenue. Accordingly, Reiseck could be considered a sales employee because she primarily sold that "product." The Court then addressed the part of the regulations that included "promoting sales" under administrative operations. Reiseck also seemed to fall within this description since she sold advertising space. The Court opined, however, that it would negate the administrative/sales distinction to consider each salesperson in a retail store, for example, to be promoting sales. Adopting the Third Circuit's logic in *Martin v. Cooper Electric Supply Co.*, 940 F.2d 896, 905 (3d Cir. 1991), the Court concluded that "an employee making specific sales to individual customers is a salesperson for

the purposes of the FLSA, while an employee encouraging an increase in sales generally among all customers is an administrative employee for the purposes of the FLSA." According to this definition, Reiseck was a salesperson, not an administrative employee. Although she developed new clients with a view towards increasing overall sales, her primary duty, which consumed more than 50% of her time, was to sell advertising space to particular clients. The Court noted that recent amendments to the regulations, while not applicable retroactively, supported its conclusion. *See, e.g.*, 29 C.F.R. § 541.203(b).

Conclusion

The Second Circuit thus held that the district court erred in concluding that Reiseck was an administrative employee exempt from FLSA and state law overtime requirements. The Court remanded for the district court to reconsider Reiseck's partial motion for summary judgment and whether Reiseck was exempt as an "outside salesperson" or a "commissioned salesperson."

Government Employees

Civil Service

Public Employee's Right to Representation during Questioning Governed by "Special" Law, Not State Civil Service Law

Town of Harrison Police Benevolent Assn., Inc. v. Town of Harrison Police Dept., 2010 NY Slip Op 00160, 2010 BL 4135 (N.Y. App. Div. Jan. 05, 2010)

In a decision published on January 5, 2010, the Appellate Division, Second Department, reversed in part a judgment in favor of an employee and his employee organization in a proceeding brought under Article 78 of the New York Civil Practice Laws and Rules, CPLR § 7801(1) et seq.

Factual and Procedural Background

In June, 2004, Steven Heisler, an officer with the Town of Harrison Police Department, was questioned by a supervisor regarding his job performance. During this meeting, Heisler requested attorney representation through the Police Benevolent Association (PBA), but his request was denied. After the meeting, Heisler and the PBA filed grievances claiming that the denial of Heisler's request violated the requirement in the collective bargaining agreement (CBA) that disciplinary matters be conducted in accordance with Article 75 of the Civil Service Law, and in particular, Civil Service Law §75(2), which provides that a state employee is entitled to representation by an employee organization if questioning appears to be a potential subject of disciplinary action. After the town brought administrative charges against Heisler based on information learned during the questioning, the PBA filed a demand for arbitration with the New York State Public Relations.

When the town still failed to review the grievances, the PBA commenced a proceeding in state court seeking to compel the town to review Heisler's entitlement to representation under Section 75(2). The court granted the petition and directed the town to determine whether Heisler was entitled to representation during questioning, and if he was so entitled, to strike Heisler's statements from that questioning from the disciplinary proceeding record. The town and the police department appealed.

Analysis

The Appellate Division reversed the lower court decision insofar as the judgment directed the town to determine whether Heisler was entitled to representation during the questioning. According to the court, although the state Civil Service Law established a set of general rights for government employees subject to disciplinary action, the Civil Service law also provided in section 76(4) that such rights "shall not be construed to repeal or modify any general or special law." Because the Westchester County Police Act, New York Unconsolidated Laws §5711-q, provided that disciplinary proceedings against police officers were to be conducted by the boards of police commissioners of the towns, the court concluded that the Westchester law was a "special law" contemplated by section 76(4) that trumped the state Civil Service Law on this issue. As a result, disciplinary matters were not a proper subject of collective bargaining and therefore, the lower court erred in directing the Town to review the attorney representation issue under section 75(2) of the Civil Service Law.

Conclusion

This decision highlights the need for those litigating disciplinary proceedings involving public employees to consider the applicability of "special" laws. In this case, although the parties contemplated review under the New York Civil Service Law, it was in fact "special" law that governed.

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