Legal Alert: Election of Remedies Provision Does not Violate Title VII

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Creating a split among the federal appeals courts, the Second Circuit recently held that including an election of remedies provision in a collective bargaining agreement (CBA) is not unlawful retaliation in violation of Title VII. *See Richardson v. Commission on Human Rights and Opportunities* (July 7, 2008). The clause at issue in this case provided that disputes over unlawful discrimination would be subject to the CBA's grievance procedure but would not be arbitrable if the employee filed a discrimination charge with the Commission on Human Rights and Opportunities (CHRO) (the state civil rights agency, who was also the employer in this case).

In this case, Richardson filed several grievances while she was employed by CHRO and also filed a discrimination charge. After she was terminated, Richardson requested her union grieve the discharge. She also amended her CHRO charge to allege that her termination was discriminatory and retaliatory. When the union learned she had amended her CHRO charge to include allegations regarding her termination, it withdrew its grievance of her termination, in accordance with the election of remedies provision in the CBA. Richardson subsequently sued the CHRO and the union in federal court, claiming discrimination and retaliation.

In finding that the election of remedies provision does not violate Title VII, the Second Circuit distinguished between the anti-retaliation provisions of Title VII and the requirements set forth in the U.S. Supreme Court's decision in *Alexander v. Gardner-Denver Co.,* governing releases or waivers of Title VII claims. According to the court, the anti-retaliation provisions of Title VII are directed at particular acts of discrimination, while the *Gardner-Denver* doctrine is directed at employer policies that violate Title VII. The court determined that the election of remedies provision is not retaliatory under either analysis.

The court held that the *Gardner-Denver* doctrine does not preclude a union and an employer from agreeing that employees must forego their right to arbitrate a grievance if they bring a lawsuit in federal court arising out of the same facts. "Richardson remained free to file a charge with the EEOC, as she did, and to pursue a Title VII action in federal court, as she has. She did not prospectively waive any of her Title VII rights, nor did her union do so on her behalf."

Further, the court held that the election of remedies provision is a sensible outcome of the bargaining process, because an employer likely will not want to retain legal counsel and prepare for the defense of a lawsuit while simultaneously preparing for an arbitration hearing on the same issue.

Additionally, a union likely would want to use its resources selectively.

The court also found that the CBA's election of remedies provision does not violate the anti-retaliation provision of Title VII. According to the court, the employee's claim failed because she did not show that either agreeing to or adhering to the election of remedies provision constituted an adverse employment action by either the employer or the union. The court held that the election of remedies provision merely sought to avoid duplicative proceedings in resolving discrimination claims. The employee was not deprived of her right to file a lawsuit in federal court or to pursue claims before the EEOC or state human rights organization. The provision "only requires that the employee make a concrete choice, at a specific time, between filing a state claim with the CHRO and having the union pursue his or her grievance in arbitration."

Thus, the court found that the election of remedies provision was a "reasonable defensive measure" utilized by the employer to litigate discrimination claims brought against it. Because the election of remedies provision is not an adverse employment action, the employee's retaliation claim failed.

The court acknowledged that the Seventh Circuit reached a different conclusion in *EEOC v. Board of Governors,* 927 F.2d 424 (7th Cir. 1992), but rejected the Seventh Circuit's determination that an employer's decision to withdraw from arbitration constitutes an adverse employment action.

Employers' Bottom Line:

This decision is good news for employers in the Second Circuit (which covers Connecticut, New York and Vermont) because it provides support for employers who are negotiating for the inclusion of an election of remedies provision in a CBA, as well as for employers who include election of remedies provisions in mandatory arbitration policies. As recognized by the Second Circuit, such provisions are a sensible method of reducing costs by eliminating duplicative proceedings for resolving discrimination allegations.

If you have any questions regarding this decision or other labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work.