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2013 VIRGINIA EMPLOYMENT LAW IN REVIEW

BY RACHELLE HILL

In anticipation of a new year, the following is a brief overview of selected notable employment-related cases in Virginia from 2013. These cases involve non-competition agreements, discrimination claims and bankruptcy issues. Each case has components to keep in mind when dealing with employment matters in Virginia.

Demurrer Not Proper Challenge Non-Compete
Assurance Data, Inc. v. Malyevac, 286 Va. 137 (2013)

This appeal arises from a Fairfax Circuit Court case where the judge granted a demurrer to the employee on the issue of the enforceability of a non-compete in the employment contract. The Virginia Supreme Court reversed the judgment, finding that the purpose of a demurrer was to determine whether a cause of action states a claim upon which relief can be granted, not to decide the merits of the case (i.e. whether the non-complete was enforceable). The court emphasized that the enforceability of a non-compete must be decided on the merits of the case on a case-by-case basis. Thus, going forward, the proper method for challenging a non-compete is a plea in bar or summary judgment motion that would allow the court to "evaluate and decide the merits of a case."

Bankruptcy Chapter 13 Debtor has Standing to Sue on Discrimination Claim
Royal v. R&L Carriers Shared Servs., L.L.C., 2013 U.S. Dist. LEXIS 57416 (E.D. Va. Apr. 22, 2013)

An employee had a pending Chapter 13 bankruptcy case he had filed several years, prior to when he filed the discrimination lawsuit in the Eastern District of Virginia. The employee failed to disclose to the bankruptcy court that he had filed a discrimination charge with the EEOC and that he had filed the lawsuit. The employer moved to dismiss arguing that the bankruptcy trustee had exclusive standing to sue on the employer's claim. Additionally, employer argued that the employee was judicially estopped from pursuing its claim due to his earlier nondisclosure in the bankruptcy matter where he failed to disclose any possible claim against the employer. The court denied the motion, finding that a debtor in a Chapter 13 case had standing to bring civil actions in court even though the pre-petition cause of action belongs to the bankruptcy estate. This differs from a Chapter 7 debtor, where solely the trustee can bring suit on behalf of the bankruptcy estate. The court also found that judicial estoppel did not apply because the bankruptcy court had yet to rule on plaintiff's requested relief.

Bankruptcy Chapter 7 Debtor has No Standing to Sue on Discrimination Claim
Vanderheyden v. Peninsula Airport Comm'n, 2013 U.S. Dist. LEXIS 399 (E.D. Va. Jan. 2, 2013)

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An employee filed a charge with the EEOC after being terminated and subsequently, eight months later, filed a Chapter 7 bankruptcy. The employee failed to disclose the EEOC charge or potential claims against her employer in her bankruptcy petition or to the court. The court granted the discharge and closed the matter. The employee then received a right to sue letter from the EEOC and filed a lawsuit six months after the bankruptcy case was closed. The employer moved to dismiss claiming that the employee lacked standing, and she was judicially estopped due to her non-disclosure in the bankruptcy matter. The court dismissed the matter, finding that only the bankruptcy trustee had standing in a Chapter 7 estate, and further that her failure to disclose the claim to the bankruptcy court "constituted a representation that no actual or potential claim existed;" therefore, the trustee would be judicially estopped from bringing a claim.

Individual Employees Not Liable under Age Discrimination in Employment Act (ADEA) or Title VII
Ferrell v. Babcock & Wilcox Co., 2013 U.S. Dist. LEXIS 19505 (W.D. Va. Feb. 13, 2013)

An employee filed a lawsuit for age discrimination and retaliation against the company and six of its employees. The court dismissed the individual employees stating that employees, even supervising employees, are not proper defendants under the ADEA or Title VII, only employers.

"European" is a Constitutionally Protected Class; No Enhanced Burden for Reverse Discrimination Claim
McNaught v. Va. Cmty. College Sys., 933 F. Supp. 2d 804, 817 (E.D. Va. 2013)

A professor, born in the United States who identified his ethnicity as being from the United States and Europe, claimed reverse discrimination where he was not selected for certain positions in which individuals of Indian and Korean ethnicity were hired. The court ultimately dismissed the case finding that the employer had shown a legitimate non-discriminatory reason for failure to select him but not before making two important rulings. First, the court found that the professor had established a prima facie case of national origin discrimination by showing he was of European descent. Second, the court considered whether in a reverse discrimination claim a party of a majority class must set out "background circumstances to support the suspicion that the Defendant is the unusual employer who discriminates against the majority."

The 3rd, 5th and 11th Circuits do not require a showing of background circumstances, while the 6th, 7th, 8th, 10th and D.C. Circuits require it. After determining the 4th Circuit had not taken a position on whether there was an additional requirement in a reverse discrimination case, the court found that it would follow the 3rd, 5th and 11th Circuits and apply the same standard in both ordinary and reverse discrimination cases. Whether or not the 4th Circuit will adopt this line of reasoning is unclear.

Costs Awarded to Employer in Employment Discrimination Case
Arthur v. Pet Dairy, 2013 U.S. Dist. LEXIS 169768 (W.D. Va. Dec. 2, 2013)

An employer moved under Rule 54 of the Federal Rules of Civil Procedure for the Court to enter an order compelling the employee to pay the defendant's bill of costs totaling $3,131.87. Under Rule 54, "[u]nless a federal statute, these rules, or a court order provides otherwise, costs-other than attorney's fees-should be allowed to the prevailing party." There is a presumption that costs should be awarded to the prevailing party. Therefore, while the court may deny an award of costs, it needs to articulate the reasons for doing so.

The rare circumstances that justify a denial of costs include:
(1) "misconduct by the prevailing party worthy of a penalty";
(2) "the losing party's inability to pay";
(3) the "excessiveness [of the costs] in a particular case";
(4) the "limited value of the prevailing party's victory"; or
(5) "the closeness and difficulty of the issues decided."

Cherry v. Champion Int'l Corp., 186 F.3d 442, 446 (4th Cir. 1999) (citation omitted).

While the employee argued he was unable to pay, the court found that the employee's claims were too tenuous and were rebutted by the record.

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AVOIDING PITFALLS OF SEVERANCE AGREEMENTS

BY RACHELLE HILL

As a business owner, it is inevitable that there will come a time when, for some reason or another, you will need to terminate an employee. In many circumstances an employer will use a severance agreement to obtain a release for any potential liability under which a severance amount will be paid. As with many employee-employer issues, there are certain potential pitfalls that surround severance agreements that an employer needs to take into consideration when offering severance.

Potential Pitfalls When Offering Severance Agreements

Put the Agreement in Writing: This first issue seems like an obvious requirement, but in the event an employer is offering severance payment it is the best business practice to put it in writing that contains a release for the employer. Unless agreed to otherwise, an employer is under no obligation to offer severance pay. In the event the employer wants to pay such amounts, it needs to get the agreement memorialized in writing.

Avoid Waiver of Future Claims: An employee cannot effectively waive a future claim under a severance agreement. Therefore, if the agreement is provided when the employee is still employed, it is important the employee signs the agreement on the last day of the employment. Otherwise an employee could sign the agreement and release all claims and then a claim could arise following the release. The release is only effective for claims existing at the time the agreement is signed and will not prevent a lawsuit for a future act.

Avoid Overly Broad Language: While employers hope to obtain a broad release of any future legal action, there are certain rights an employee cannot waive, such as the right to file a charge of discrimination with the EEOC or to testify in any hearing conducted by the EEOC. Employers must be careful to not include overly broad releases in their severance agreements that may be construed as impairing an employee's right to file an EEOC charge post-separation.

Recently, the EEOC has become more proactive and has initiated suits to combat what it believes are overly broad release and non-disparagement language that may lead the employee to think he or she could not file an administrative action. In *EEOC v. Baker & Taylor* the EEOC filed suit in the United States District Court of Illinois claiming that the release violated federal law by "conditioning the receipt of severance benefits on employees' agreement to a severance agreement that deterred the filing of charges and interfered with their ability to communicate voluntarily with the EEOC. . ." The case was resolved by a consent decree entered on July 10, 2013, under which Baker and Taylor agreed to revise its agreements to remove language barring the initiation of a suit with an administrative agency of the United States and from discussing or commenting on the company in a manner that would "reflect negatively on the company." In addition, Baker & Taylor agreed to use the following language in all severance agreements that sought a release:

> Nothing in this Agreement is intended to limit in any way an Employee's right or ability to file a charge or claim of discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC") or comparable state or local agencies. These agencies have the authority to carry out their statutory duties by investigating the charge, issuing a determination, filing a lawsuit in Federal or state court in their own name, or taking any other action authorized under these statutes. Employees retain the right to participate in such any action and to recover any appropriate relief. Employees retain the right to communicate with the EEOC and comparable state or local agencies and such communication can be initiated by the employee or in response to the government and is not limited by any non-disparagement obligation under this agreement.

Employees Over 40

Comply with the Older Workers Benefit Protection Act (OWBA): Employers with 20 or more employees need to be aware of the OWBA when terminating an employee who is 40 years and older. The OWBA is a section within the Age Discrimination in Employment Act (ADEA) that establishes strict requirements for an employer to "knowingly and voluntarily" release ADEA claims. Among other requirements, to be considered a valid ADEA waiver, a severance agreement must at a minimum include the following:

- be in writing and be understandable;
- specifically refer to ADEA rights or claims;
- not waive rights or claims that may arise in the future;
- be in exchange for valuable consideration in addition to that which the employee is already entitled; and
- advise the individual in writing to consult an attorney before signing the waiver.

Additionally, it is imperative that an employer provide the employee at least 21 days to review the agreement and an additional 7 days to revoke the agreement after signing it.

Termination of Multiple Employees: There are additional requirements when an employer is terminating the employee as part of a group. This applies in both voluntary situations, such as an exit incentive program where an employee is provided additional consideration to voluntary resign and sign a waiver, and in an involuntary termination. Specifically an employer must provide at least 45 days for an employee to consider the waiver and give written notice of information on the "decisional unit" – the group under which the employer selected the layoffs – that identifies the employees to be

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terminated and those who were not, along with job titles and ages. This requirement is directed at illustrating any potential disparate effect a layoff may have on an older employee in order for the employee to "knowingly" release a potential claim.

Conclusion

This article does not cover all issues that can occur in severance agreement and is only meant to highlight certain pitfalls. We encourage all business owners to utilize legal counsel when negotiating severance agreements. At a minimum, a company should have its standard severance agreement form reviewed to ensure there are no major issues with the boilerplate language and its own customary policy for offering and negotiating severance amounts. Employers are under no obligation to provide severance pay; therefore, it is important to ensure that in reality the agreement does what the employer believes it does instead of paying significant sums to find the agreement is unenforceable.

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