BURR ALERT

2014's Hottest Employment Rulings Affecting Southeastern Employers

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2014 saw a wide range of employment issues presented before the 11th Circuit. This article seeks to highlight some of the more frequently cited 11th Circuit opinions from last year. The updates below, although not earth shattering to employment lawyers, serve as a reminder of the continued need for careful attention to detail in regards to HR issues.

Waiver of FMLA Rights?

FMLA

On April 8, 2014 the 11th Circuit decided ***Paylor v. Hartford Fire Ins. Co.,*** 748 F.3d 1117 (2014) holding that a severance agreement waiving an employee's claims under the Family Medical Leave Act ("**FMLA**"), barred the employee's right to bring suit for leave which was outstanding at the time she executed the waiver. Following a decline in the employee's performance, the employee was given an ultimatum to either accept a severance agreement featuring an FMLA waiver provision or agree to a performance improvement plan ("**PIP**"). The employee chose the severance package and subsequently brought suit against the employer claiming the ultimatum posed constituted FMLA retaliation. Plaintiff alleged that the waiver did not bar her claim because pursuant to 29 C.F.R. § 825.220(d) an employee cannot waive "prospective" FMLA rights. At the time that she signed the waiver, her FMLA leave request was outstanding. Consequently, she alleged that the waiver could not bar her outstanding request because it would constitute a prospective application. The Court defined "prospective rights" to mean those rights allowing an employee to invoke FMLA protections at some unspecified time in the future; a waiver of something that has not yet occurred (i.e. an employer cannot offer new employees a one-time cash payment in exchange for a waiver of any future FMLA claims). Thereafter, because the true act complained of was the ultimatum presented, and such ultimatum was posed the day before execution of the waiver, plaintiff's FMLA claim was barred. Additionally, the Court upheld the waiver because it was signed knowingly and voluntarily.

Employees Claiming "Me Too"?

Title VII - Discrimination

In the context of Title VII, one of the most horrendous allegations of racial discrimination to come out last year was in ***Adams v. Austal, U.S.A., L.L.C.***, 754 F.3d 1240 (2014). In *Adams*, 24 African American current and former employees filed suit against Austal, a custom aluminum supply company, based on allegations of racial discrimination. The case was initiated following reports that the men's restroom was frequently marred with graffiti spewing racial epithets (i.e. "see ------ travel in packs just like monkeys;" "white is right;" "KKK is getting bigger;" and "[h]ow do you starve a ----- to death? Hide his food stamp card in his work boots.") The bathroom graffiti became so prevalent that the employer eventually painted the bathroom walls black. Moreover, employees allegedly found eight nooses around the workplace and were allegedly subjected to an environment tolerating Confederate flag paraphernalia worn by white counterparts. As heinous as such allegations were, the 11th Circuit upheld dismissal of the case as to 6 of the plaintiffs, based in part on the legal principal that a reasonable person in the position of those 6

employees would not have found their environment abusive where they worked in different departments, for different supervisors, and either were not aware of the discrimination until after their employment ended or only became aware upon initiation of discovery. In evaluating whether the employees experienced an objectively hostile work environment, courts may not consider evidence of racial harassment affecting other employees of which plaintiffs are not aware but only learn subsequent thereto -- otherwise known as "me too" evidence.

Preventing Class Actions Under FLSA

FLSA

The question posed in ***Walthour v. Chipio Windshield Repair, LLC***, 745 F.3d 1326 (2014) was whether an arbitration provision waiving an employee's ability to bring a collective action under the Fair Labor Standards Act ("**FLSA**") was enforceable under the Federal Arbitration Act. Language in the employee's arbitration agreement stated that, "*By signing this agreement, employee and employer are each giving up his/her/its right to a jury trial and his/her/its right to participate in a class action because all claims will be resolved exclusively through arbitration. Employee and Employer agree that each may bring claims against the other only in his/her/its individual capacity and not as a plaintiff or class member in any purported class or representative proceeding. . .*." The Court held that the arbitration provision was enforceable and that accordingly, plaintiff could arbitrate an individual FLSA claim but not a collective action. Although the plaintiff argued that such requirement was in violation of the spirit of the FLSA, the Court determined that Congress had not intended for the collective action provision to be essential to the vindication of an employee's FLSA rights. Effectively, this theory has barred plaintiff from pursuing a collective action on behalf of similarly situated employees because the named plaintiff is compelled to arbitrate his/her claims under an arbitration agreement which does not allow that same employee to proceed with arbitration on behalf of other current or former employees.

Timeliness of Actions

ADEA, Title VII, and Retaliation

In Georgia, a charge of discrimination against an employer must be filed within 180 days after the alleged unlawful employment action. The 180-day clock starts ticking at the time the employee received notice of the adverse employment action. Relatedly, a discrimination charge is deemed filed upon receipt, and any amendments thereto alleging unlawful employment practices related to or growing out of the original charge, relate back to the date of the charge. It is based on these aforementioned principals, that the Court in ***Kelly v. Dun & Bradstreet, Inc.***, 557 F. App'x. 896 (2014) found that many of plaintiff's claims were barred. A plaintiff's suit is limited by the scope of the EEOC investigation and allegations of new acts are not appropriate absent prior EEOC consideration. Therefore, some of plaintiff's claims in *Bradstreet* could not be heard where many claims were untimely and/or did not relate back to or grow out of his EEOC charge, indicating plaintiff's failure to exhaust administrative remedies.

Relief of Specific Job Duties ≠ Adverse Employment Action

Title VII - Retaliation

In ***Grimes v. Miami Dade County***, 552 F. App'x. 902 (2014) an employee working for the Miami Dade Aviation Department made allegations of retaliation after being relieved of certain job responsibilities because she claimed such action was taken in retaliation to an EEOC charge she had previously filed against another county agency. She further contended that a reduction in job responsibilities constituted a demotion. The Court held that such adjustment to plaintiff's job responsibilities did not constitute an adverse employment action where it involved no material change in the terms and conditions or privileges of employment. Moreover, plaintiff retained the same job description, same work location and did not receive a reduced salary. Therefore, no adverse employment action existed and her retaliation claim failed.

Revoking Job Offers

ADA

The past year has also highlighted problems that can arise when an employer obtains information subsequent to extending a job offer, impacting its decision to hire and invoking a need to rescind the employer's offer.

In March 2014, the plaintiff in ***Samson v. Federal Express Corp.***, 746 F.3d 1196 (2014) brought suit against FedEx. FedEx offered plaintiff a job as a technician conditioned on passing a Department of Transportation ("**DOT**") medical exam required of certain commercial motor vehicle drivers. FedEx subsequently rescinded the offer after plaintiff failed to pass the exam. Plaintiff's failure was due to his diabetes. Samson contended that his application was for a mechanics position and not a commercial truck driving position. Consequently, plaintiff alleged that such requirement relating to the passage of a DOT medical exam was an imposition in violation of the ADA. Denying summary judgment, the Court found sufficient issue of fact regarding whether test-driving trucks was an essential function of plaintiff's job, substantiating the need to pass such exam.

Later in 2014, the Court decided ***Wetherbee v. Southern Co.***, 754 F.3d 901 (2014), another employment rescission case. In *Wetherbee* for the first time, the 11th Circuit determined that a bi-polar employee seeking relief under ADA Section 12112(d)(3)(C) prohibiting discrimination based on misuse of information obtained during a post-offer medical exam, was required to show that he was a qualified individual with a disability.

The "I'm Glad It Wasn't Me" Moment: Shotgun Pleadings Tick-Off the 11th Circuit

Attorney Lesson of the Day

Finally, there are lessons in-house counsel can learn from 2014's opinions. In one of the more amusing opinions published by the 11th Circuit, the Court in ***Paylor v. Hartford Fire Ins. Co.,*** 748 F.3d 1117 (2014), published a one and a half page diatribe admonishing counsel for failing to narrow the issues in an FMLA case and allowing a shotgun pleading to proceed. The Court admonished that counsel could have saved themselves, their clients, and the Court considerable time, expense, and heartache had they only paused to better identify the issues before diving into discovery. A shotgun pleading is one in which each count adopts the allegations of all preceding counts, resulting in the allegation of facts that may be material to one count but not to another. Nonetheless, because the latter counts adopt the former's allegations of fact, it is nearly impossible to know which allegations are intended to support the basis of each claim for relief, leaving the complaint virtually useless. Arguably, shotgun pleadings are not an uncommon occurrence amongst employment suits. In such situations, the Court noted that defense should make greater use of Rule 12(b)(6), motions to dismiss and Rule 12(e), requests for a more definitive statement. The Court in *Paylor* bemoaned, "[t]hat such a straightforward dispute metastasized into the years-long discovery *sinkhole* before us on appeal is just the latest instantiation of the 'shotgun pleading' problem." Nailing the coffin shut, the Court stated that the failure of the attorneys to refrain from, and defend against such pleadings resulted in a "discovery goat rodeo" and the delivery of "this mess to the District Court."

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