Fenwick Employment Brief

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EEOC POSITION STATEMENT COMES BACK TO BITE EMPLOYER IN CIVIL LAWSUIT

In *Kwan v. Andalex Group, LLC*, the Second Circuit (covering New York, Connecticut and Vermont) considered the impact of prior inconsistent statements made in the employer's Equal Employment Opportunity Commission ("EEOC") position statement on pending civil litigation.

Kwan worked at Andalex from April 2007 to September 2008. During her employment, she was told that her work product was good and she received a bonus at the end of 2007. On September 3, 2008, she allegedly complained to a company executive that she felt she was being discriminated against based on her gender, as evidenced by the higher compensation of her male peers. Three weeks later, she was terminated for leaving work early without permission.

Kwan filed a complaint with the EEOC. In its position statement responding to her complaint, Andalex claimed it terminated her because of a shift in business focus such that her skill set no longer matched its business needs. Andalex also stated that a male employee was terminated around the same time as Kwan for the same reason. Although Andalex acknowledged that her performance was "acceptable," it mentioned that she made significant errors on multiple occasions and that such errors had negatively impacted a transaction on at least one occasion. Further, Andalex claimed that Kwan behaved inappropriately on two occasions and did not respect normal working hours (i.e., took long lunches, arrived late, and left early). Despite these ancillary issues, however, the focus of the position statement was that Andalex terminated Kwan because of a shift in business focus.

Yet, in discovery in the subsequent civil action, Andalex shifted its explanation for terminating Kwan. Instead of a change in business focus, Andalex emphasized Kwan's poor performance and behavior. Indeed, Kwan's supervisor testified that the business focus had already shifted by the time Kwan joined the company. The supervisor also confirmed that although the other male employee who was terminated around the same time as Kwan was fired because of the shifting business model, Kwan was not. A different executive testified that Kwan was terminated for poor performance *and* the change in the business model.

In litigation and motion practice, Andalex alleged that the main reason Kwan was terminated was poor performance based on three specific incidents, all involving delay in preparing and/or errors in financial models, only one of which was mentioned at all in its EEOC position statement. Andalex also claimed that Kwan's behavior—acting inappropriately at business meetings and failing to maintain standard work hours—contributed to the termination decision. The trial court ultimately granted summary judgment in favor of Andalex on Kwan's retaliation claim.

The Second Circuit, however, reversed summary judgment, holding that Andalex's inconsistent statements about Kwan's termination (in its EEOC

position statement and in litigation) and the three-week timeframe between her alleged discrimination complaint and termination were enough to survive summary judgment. This case demonstrates the importance of administrative agency investigations and submissions, and the need for such submissions to be carefully prepared and consistent over time.

FAILURE TO COMPLY WITH ADEA/OWBPA DOES NOT ENTIRELY INVALIDATE RELEASE

A Ninth Circuit opinion, *Harmon v. Johnson & Johnson*, held that a release of claims that did not comply with the Age Discrimination in Employment Act ("ADEA"), as amended by the Older Workers Benefit Protection Act ("OWBPA"), was still effective as to all claims *except* federal age claims under the ADEA.

The employee was terminated in connection with a reduction in force and was offered a severance package in exchange for signing a release of claims. The release did not comply with the ADEA/OWBPA, and, after signing, she sued for age discrimination under the ADEA and state law. The court upheld summary judgment in favor of the employer on the state-law age claim because the release was still valid as to that claim. It also found in favor of the employer as to the ADEA claim because the employer provided a legitimate, non-discriminatory reason for the termination — a reduction in force.

This case follows the U.S. Supreme Court decision of *Oubre v. Entergy Operations, Inc.* and other federal court decisions. These courts have held that the purpose of the OWBPA is to protect older workers by making sure that waivers of age claims under the federal ADEA are knowing and voluntary. For a waiver to be valid under the ADEA/OWBPA, it must (among other requirements) (a) provide at least twenty-one or, in the case of a reduction in force, forty-five days for employees age forty or older to consider the release and seven days to revoke the agreement once signed and (b) explicitly mention the ADEA in the release. Thus, although it is important to comply with the ADEA/OWBPA when drafting separation agreements and releases, it is likely only the employee's ADEA claim (if any) will survive if the employer fails to comply.

NEWS BITES

One-Sided Discrimination Investigation Inadmissible in Court

In *Castelluccio v. International Business Machines*, a federal district court in Connecticut held that IBM could not introduce evidence of its investigation into an employee's age discrimination claim due to the one-sided nature of the investigation.

Employee Castelluccio worked for IBM from 1968 to June 2008. In November 2007, IBM notified him that he would be removed from his position and put "on the bench" — he remained employed by the company (with pay), but had no real work assignment. Castelluccio looked for a different position within IBM. In early June 2008, IBM offered him a separation agreement and told him he would be terminated effective June 30, 2008, unless he could find another position at the company.

On June 13, 2008 — after receiving the separation agreement, but before his termination date — Castelluccio made an internal complaint of age discrimination to IBM. IBM then engaged a third party investigator (Mandel) to investigate his claim. Ultimately, Mandel concluded that there was no discrimination and conveyed the results of his investigation to Castelluccio following his termination.

Castelluccio moved the court to preclude IBM from introducing Mandel's report, witness interview notes, and testimony regarding the investigation, claiming that it was more prejudicial than probative. The court agreed, noting that the evidence reflected only the findings and conclusion of IBM and not Castelluccio's report of the events; that Mandel selected whom to interview and what evidence to consider without providing Castelluccio an opportunity to respond to any criticism made of him; and that the report did not include any evidence favorable to Castelluccio, such as his performance reviews or interviews with his previous managers or clients.

According to the court, the investigation focused more on Castelluccio's performance than his complaint. Further, the court suspected that "the purpose of the investigation was more to exonerate IBM than to determine if Castelluccio was treated fairly." Perhaps most offensive to the court was the fact that Mandel stated in an email that if Castelluccio signed a

separation and release agreement, Mandel would stop investigating. The court noted that if the real purpose of the investigation was to find out whether an IBM employee had been mistreated, then the investigation would have continued regardless of whether Castelluccio signed the separation agreement. This case underscores the importance of a thorough, neutral investigation.

Recent EEOC Religious Discrimination Cases Are Reminder of Undue Hardship Standard

Over the last few months, the EEOC has settled various religious discrimination lawsuits against employers across the U.S., including California.

In New Jersey, UPS agreed to pay $70,000 to settle a religious discrimination suit by an employee who was a practicing Jehovah's Witness. UPS notified the employee of a schedule change requiring him to work a particular shift that would prevent him from transporting members of his congregation to an annual Jehovah's Witness event. UPS denied his request to work a different shift and refused to provide an alternative accommodation. Although UPS argued that it did not believe that a request to transport others to a religious event was a request for a religious accommodation, it agreed to settle the matter.

KFC will pay $40,000 to a female Pentecostal employee who was fired for refusing to wear pants. Previous KFC restaurants had accommodated her religious belief that women should not wear pants. However, when the North Carolina KFC she worked at was acquired, her new employer required that she wear pants as part of its dress code policy and fired her when she refused.

Finally, a McDonald's in Fresno, California agreed to pay $50,000 to settle a claim by a Muslim employee who was allegedly constructively discharged for growing a beard for religious reasons. The EEOC's Fresno office commented: "Workers have the right to request an accommodation which would allow them to work while still practicing their religious beliefs."

These cases all serve as reminders that employers must balance requests for religious accommodations carefully against their own business needs and only refuse such requests when they create a true undue hardship.

McDonald's Pulls the Plug on Employee McResource Website

Amidst widespread criticism, McDonald's has abandoned McResource, its third-party employee resource website. The site offered employees health and finance advice, such as returning unopened purchases or selling unwanted items on eBay or Craigslist for "quick cash"; tipping guidelines for housekeepers, au pairs, personal fitness trainers, and pool cleaners; taking two vacations per year to cut the risk of heart attack; singing to avoid stress; and not complaining since "[s]tress hormone levels rise by 15 percent after ten minutes of complaining."

Earlier in 2013, McDonald's had published a sample personal budgeting guideline that assumed workers had two jobs, included no money for heat, and allocated $20 per month for healthcare. However, it wasn't until December — when reports surfaced that the McResource site was discouraging employees from eating staple McDonald's food items such as burgers and fries — that the company finally decided to axe the website.

REMINDER — GET YOUR 2014 COMMISSION PLANS IN PLACE

Under legislation effective last January, all agreements to pay employees commissions based on services to be rendered in California must be in a written document signed by the employer and employee. Further, among other requirements, the employer is obligated to document in that written agreement "the method by which the commissions shall be computed and paid." When the parties continue to work under the terms of an expired agreement, the terms are presumed to remain in effect until the contract is superseded or employment ends. Please see our October 2011 FEB for further information on these requirements.

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