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Briefly

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"HAVING YOUR CAKE AND EATING IT TOO?" – EMPLOYEE BRINGS SUIT WHILE RETAINING SEVERANCE FUNDS UNDER SETTLEMENT AGREEMENT

Mary Celeste Moffatt

"[T]he McClellan decision … serve[s] to emphasize some important points when presenting an employee with a proposed severance and release agreement … ."

In a recent decision from the Court of Appeals for the Sixth Circuit (which includes Tennessee), the Court considered whether the tender-back doctrine under common law applies to claims under Title VII and the Equal Pay Act (EPA). *McClellan v. Midwest Machining, Inc.,* No. 17-1992 (6th Cir. 2018).

Plaintiff had worked with Midwest since 2008 when, in 2015, she advised her supervisor of her pregnancy. Plaintiff claimed she was thereafter subjected to negative comments about her pregnancy-related absences and she was eventually terminated some three months later, despite her good performance record. Plaintiff claimed she was "blindsided by an unexpected meeting" with Midwest's President during which she was terminated and offered a severance agreement which contained a release of "any and all past, current and future claims" in exchange for a payment of $4,000. After reviewing the Agreement with the Plaintiff "at a rapid pace," the President advised Plaintiff that she "needed to sign then if (she) wanted any severance." In essence, Plaintiff claimed to feel "bullied" and "pressured" into signing the Agreement, which she did, and accepted the severance payment.

Several months later, she filed an EEOC Charge alleging violations of the Pregnancy Discrimination Act, Title VII, and the Equal Pay Act, and later filed suit in Federal Court. After Midwest advised Plaintiff's counsel of the severance agreement, Plaintiff sent a letter and a check for $4,000 to Midwest advising that she was "rescinding the severance agreement." Midwest sent the check back to Plaintiff and later filed a Motion for Summary Judgment arguing that the severance agreement barred Plaintiff's claims in part because she did not "tender back" the severance payment prior to filing suit. The District Court eventually granted Midwest's Motion based on the common-law doctrines of release and tender back, finding that Plaintiff's failure to tender back the severance payment prior to filing suit in essence ratified the contract and preclude her lawsuit. Plaintiff appealed.

Rooted in "general principles of state contract" law, the tender-back doctrine provides that "contracts tainted by mistake, duress, or even fraud are voidable at the option of the innocent party" and if the innocent party fails to tender back benefits received under the contract "within a reasonable time after learning of her rights… she ratifies the contract." *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 425 (1998).[i] After examining the application of the tender-back doctrine to various federal statutes, the Court of Appeals held that the doctrine does not apply to claims under Title VII or the Equal Pay Act (EPA), which meant that the Plaintiff was not required to return the consideration received under the severance agreement before bringing her claim under either statute.

In its decision, the Court considered that an inflexible application of the tender-back principle would prevent courts from examining the conditions under which a release has been obtained and would be incongruous with the general requirement that a release be made "knowingly and voluntarily." While the *McClellan* decision does not address severance agreements which contain specific provisions regarding the tender back requirement, it does serve to emphasize some important points when presenting an employee with a proposed severance and release agreement:

Is the agreement clear and specific enough for the employee to understand based on his education and

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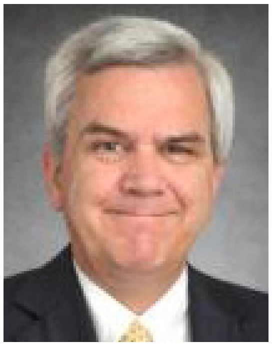

Howard B. Jackson

"The right of free speech includes the right not to speak, and the right not to be compelled to support any particular viewpoint."

FIRST AMENDMENT TRUMPS "FREE RIDERS"
REGARDING PAYMENT OF UNION FEES

Background

For those not familiar with the process, a union seeks to represent a set of employees, called the "unit". When a union succeeds in becoming the representative of the employees it represents all employees in the unit for collective bargaining and other purposes. The union must provide fair representation to every employee in the unit, without regard to whether the employee is a member of the union.

Previously, twenty-two states had laws which permitted unions representing public sector employees to charge fees, sometimes called "fair share" or "agency" fees, to employees who were in the unit, but who had chosen not to become members of the union. The intent was for the "fair share" fee to meet the cost of collective bargaining and other activities engaged in by the union on behalf of the employees, but to relieve non-members of costs associated with other union activities, such as political activities. The most common justification for this arrangement was that it prevented "free riders."

In a 1977 decision, *Abood v. Detroit Board of Education*, the U.S. Supreme Court approved state laws which permitted such arrangements. In *Janus v. American Federation of State, County and Municipal Employees*, a child support specialist with the Illinois Department of Healthcare and Family Services who was forced to pay a $44 a month agency fee challenged the law on First Amendment grounds.

The *Janus* Decision

The bottom line is that in June of this year the *Janus* court overruled *Abood*, and found that requiring payment of such fees was unconstitutional: "States and public-sector unions may no longer extract agency fees from non-consenting employees." Going forward unions must obtain the employee's consent to collect such fees.

In its analysis, the Court noted the central importance of First Amendment free speech rights in our Constitutional framework. The right of free speech includes the right not to speak, and the right not to be compelled to support any particular viewpoint. In this regard, requiring a person to financially support the speech of another also raises First Amendment concerns.

The Court then applied that standard to the justifications advanced in support of permitting the "fair share" fee laws. In *Abood*, the primary justifications were labor peace (described as avoiding inter-union rivalries and confusion from employers signing agreements with more than one union), and avoiding free riders.

The Court rejected the labor peace justification. Experience post-*Abood* has shown that public sector employers, including in the federal government and in the twenty-eight states that do not have "fair share" fee statutes, did not experience labor difficulties. In short, the asserted justification simply did not exist.

The Court also rejected the free rider justification. Avoiding free riders did not constitute a compelling public interest. In this regard, the Court noted that "free rider arguments . . . are generally insufficient to overcome First Amendment objections."

In addition, the Court found that any concern that allowing free riders would remove the incentive for unions to represent public employees did not square with experience. Unions represent millions of employees in the federal government and the twenty-right states that do not allow the fair share fee arrangement. Accordingly, that concern was not valid, much less compelling.

The Court concluded that "public-sector agency-shop arrangements violate the First Amendment, and *Abood* erred in concluding otherwise." This did not end the Court's considerations, however.

The Court then engaged in an extended analysis of whether *stare decisis* (the principle of adhering to precedent) nevertheless counseled against overruling *Abood*. In holding that it did not, the Court found that the factual underpinnings of *Abood* had eroded. Its assumptions about the importance of a closed shop to the survival of public sector unions were not borne out by experience. Moreover, *Abood's* reasoning was inconsistent with much of the Court's First Amendment jurisprudence, including particularly "cases holding that public employees generally may not be required to support a political party." In short, the decision had become an outlier, and was founded on factual assumptions that turned out not to be correct. Therefore, the Court was not required to maintain the decision on *stare decisis* grounds.

Some predict that this decision sounds a financial death knell for public employee unions. But as the Court noted, unions represent millions of public sector employees where fair share fees are not allowed. While the financial loss will certainly be significant, and may curtail certain expenditures, reports of the impending demise of such unions are greatly exaggerated.

Rosalia Fiorello...

"[E]mployers who previously struggled with the prior guidance documents can now disregard them."

OSHA REVERSES POLICY ON DRUG TESTING, SAFETY INCENTIVES

On May 12, 2016, OSHA published a final rule that, among other things, amended 29 C.F.R. § 1904.35 to add a provision prohibiting employers from retaliating against employees for reporting work-related injuries or illnesses. See 29 C.F.R. § 1904.35(b)(1)(iv). In the preamble to the final rule and post-promulgation interpretive documents, OSHA discussed how the final rule could apply to action taken under workplace safety incentive programs and post-incident drug testing policies.

Recently, OSHA issued a memorandum clarifying the agency's position that its rule prohibiting employer retaliation against employees for reporting work-related injuries or illnesses does not prohibit workplace safety incentive programs or post-incident drug testing. The purpose of the memorandum is to clarify the Department's position that 29 C.F.R. § 1904.35(b)(1)(iv) does not prohibit workplace safety incentive programs or post-incident drug testing. The October 11, 2018 memorandum titled, "*Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 C.F.R. § 1904.35(b)(1)(iv)*" indicates most instances of workplace drug testing are permissible under 1940.35(b)(1)(iv).

Examples of permissible drug testing include:

- Random drug testing.
- Drug testing unrelated to an injury or illness.
- Drug testing under a state workers' compensation law.
- Drug testing under other federal law, such as a DOT rule.
- Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees. If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries.

Of note, this guidance does not limit drug testing to tests that measure only substances in the employee's system at the time of the accident, which was the case under the earlier guidance.

Incentive programs have returned. The memorandum provides that "rate-based" incentive programs that reward employees with a prize or bonus at the end of an injury-free period of time, or a manager based on their work unit's lack of injuries are allowable so long as they are not implement in a manner that discourages reporting injuries or illnesses. Thus, if an employer takes a negative action against an employee under a rate-based incentive program, such as withholding a prize or bonus because of a reported injury, OSHA would not cite the employer under § 1904.35(b)(1)(iv) as long as the employer has implemented adequate precautions to ensure that employees feel free to report an injury or illness.

Under the new interpretation, the only actions that are prohibited are if the employer withholds an incentive or performs post-incident drug testing in order "to penalize an employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and health." Based upon this statement, the memorandum appears to place the burden on the employee to establish the employer's motive for performing a drug test. This is as yet unclear.

The memorandum indicates that anything in its October and November 2016 guidance under the prior administration that can be construed as inconsistent with the current advisory is superseded by the October 11, 2018 memorandum. As such, employers who previously struggled with the prior guidance documents can now disregard them.

To read the full memorandum, visit https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11.

A WORD TO THE WISE:

Many claims employers face are *insured*. These can include workers' compensation, employment practices, or a variety of commercial or general liability disputes. If you are interested in making sure that your insurer permits you to work with your Wimberly Lawson attorney when claims come up, there are various steps you can take. ***When a claim is filed,*** ask for us. We are on many panels. ***When you renew your coverage,*** specify in the policy that you can use our Firm. Many insurers are open to this. ***When you are considering new coverage,*** ask your broker or the insurer in advance whether we are on the panel. We love working with you, and sure hope you will want to work with us when needs arise. So we wanted to offer some tips for how you can make sure that happens.

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business experience? Is there conduct by the employer that could support a claim of fraud, duress, undue influence, or other impropriety? Was the employee given adequate time to read and consider the agreement before signing it? Was the employee encouraged or discouraged from consulting with an attorney? Did the employee have any input in negotiating the terms of the agreement? Did the employer offer the employee consideration (e.g., severance pay, additional benefits) that exceeded what he/she was entitled to by company policy?

The *McClellan* Court held the rather requiring the tender-back of the consideration prior to filing suit, it was more consistent with the objectives of Title VII and the EPA to deduct the severance payment from any award later determined to be due the Plaintiff, but this was likely small comfort to the Defendant-employer which would have preferred to avoid litigation from the beginning.

Given these complexities, employers should consult with knowledgeable employment attorneys when negotiating severance agreements with employees, and the attorneys at Wimberly Lawson would be glad to assist.

[i]At issue in *Oubre*, was also whether the Release had complied with the Older Worker Benefit Protection Act/Age Discrimination in Employment Act, which contain several provisions when the separating employee is over the age of 40, including that the ADEA be mentioned specifically and that the employee (a) be given up to 21 days to consider the agreement (45 days in the case of a group layoff), (b) an additional 7 days to revoke, and (c) be advised to consult with an attorney prior to executing the agreement, with additional requirements in the event of a group layoff.

UNITED STATES DEPARTMENT OF LABOR

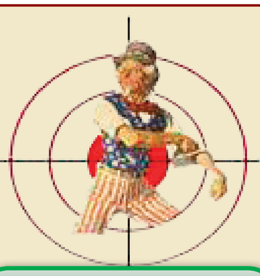
NOTICE – DOL RENEWS FMLA FORMS

FMLA: Forms

Forms

The U.S. Department of Labor (DOL) recently announced that its FMLA forms are valid for three additional years, until 2021. These sample forms are well done and useful in maintaining FMLA compliance. The forms are as follows, and can be found on the DOL's website at *https://www.dol.gov/whd/fmla/forms.htm*:

- WH-380-E Certification of Health Care Provider for Employee's Serious Health Condition (PDF)
- WH-380-F Certification of Health Care Provider for Family Member's Serious Health Condition (PDF)
- WH-381 Notice of Eligibility and Rights & Responsibilities (PDF)
- WH-382 Designation Notice (PDF)
- WH-384 Certification of Qualifying Exigency For Military Family Leave (PDF)
- WH-385 Certification for Serious Injury or Illness of Covered Servicemember -- for Military Family Leave (PDF)
- WH-385-V Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave



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