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# CORPORATION, SECURITIES & BUSINESS LAW FORUM

*The newsletter of the ISBA's Section on Corporation, Securities & Business Law*

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## Remarks from the Chair

By William A. Price, Chairman, Section Council; Corporation, Securities and Business Law, 2007-08; [wpriceit@yahoo.com](mailto:wpriceit@yahoo.com)

This year's Corporation, Securities, and Business Law program of work is focused on member education. We had a seminar scheduled for November 9, 2007, on the various legal and ethical issues associated with raising money for your clients, with outstanding participants like Section Council member and Illinois Securities Department Director Tanya Solov, venture capitalists on a panel led by Jerry R. Mitchell, President of the Midwest Entrepreneurs Forum, and section council members Zane Cohn, Robb Knuepfer, and Bill Price, on private equity, small public offering, and entity financial structure issues. A second seminar is in development for May, 2008. Section Council member Markus May's subcommittee on new initiatives is developing a concept proposal based on the issues associated with business startups for the morning, and business closings (planned, argumentative, or otherwise compelled by bankruptcy, illness, or death) in the

afternoon.

The subcommittee on new initiatives is also working on a cable TV program script for the ISBA's regular cable TV program series. Any ideas you have for same should be sent to me, or to Markus May ([mm@jwbwn.com](mailto:mm@jwbwn.com))

The Section Council receives reports on new legislation in business areas, and on significant cases of interest to business lawyers. I'll try to bring you up to date on same from time to time in these chairman's columns, or to get our subcommittee chairs to write up their reports for newsletter circulation. Tanya Solov, the Chair of the New Case subcommittee, reported on two cases at our September 10th meeting which may be of interest:

- (a) *Semande v. Estes*, No. 3-06-0452, filed June 29, 2007 (Ill. App. 3 Dist), case text available from the Illinois Appellate Court opinions link on the ISBA Web site: Plaintiff was denied standing to use the equitable doctrine of piercing the corporate veil to claim Defendant was using a corporation as his "alter ego," since Plaintiff was a director of the corporation.
- (b) *USA v. Hamilton*, No. 06-1249 (C.A. 7th, decided August 29, 2007)(Text available on Fastcase for ISBA members and also via appellate court links in the ISBA site): The case, reversing prior 7th Circuit opinion,

held that putting an entity at risk of loss along with intent to do so by deceptive means was enough for wire fraud.

Section members are invited to participate in our active program of newsletter publications by writing short articles to inform other members on law developments, law practice methods, and other issues in corporation, securities, and business law. Your newsletter editors are David Doyle ([ddoyle@doylelaw.com](mailto:ddoyle@doylelaw.com)) and Jay Goldstein ([agoldstein@tcfhlaw.com](mailto:agoldstein@tcfhlaw.com)). Both would welcome your submissions.

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# Negotiating separation agreements

By Michael R. Lied, Howard & Howard Attorneys, P.C., Peoria, IL

Employers frequently seek to avoid or resolve litigation related to terminating an employee by having the other party sign a release or waiver. A release and waiver are somewhat different. While both will extinguish a right, in most cases, the parties exchange promises in exchange for release, while a waiver is a unilateral relinquishment of a right.

A release is usually treated like a contract. In general, it requires (1) a meeting of the minds of the parties, (2) valid consideration, (3) an intentional relinquishment of a known right, and (4) it must be knowing and voluntary. In some circumstances, there may be some extra complications in obtaining a valid release.

Timing. If an employer offers an employee a severance package in exchange for his/her resignation, could that offer constitute evidence of discrimination or retaliation? Possibly.

Of significance is Federal Rule of Evidence 408, which reads:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose such as proving bias or prejudice of the witness, negating a contention of undue delay or proving an effort to obstruct a criminal investigation or prosecution.

In *Bankcard Am., Inc. v. Universal Bancard Sys., Inc.*, 203 F.3d 477, 483-

484 (7th Cir. 2000), the court pointed out that Rule 408 is not an absolute ban on all evidence regarding settlement negotiations. The rule permits evidence that is otherwise discoverable or that is offered for a purpose other than establishing liability. For example, courts have admitted evidence of offers or agreements to compromise for purposes of rebuttal, impeachment, to show the defendant's knowledge and intent, to show a continuing course of reckless conduct and negate the defense of mistake and to prove estoppel. *Id.* at 484.

A leading case is *Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338 (9th Cir. 1987). In that case, the employer intended to terminate 16 employees including Cassino. Officials, including the company's Vice President for Human Resources, met with Cassino and told him he was fired and offered him a "settlement agreement and general release." Cassino refused to sign. The case went to trial and resulted in an age discrimination verdict in favor of Cassino.

At trial the district court admitted the settlement agreement and general release into evidence. The court reasoned that since Cassino had not yet asserted any claim at the time Reichhold asked for the release, Rule 408 did not bar its admission.

The appellate court found there was no abuse of discretion in admitting the proposed agreement. The appellate court pointed out that settlement offers may come up in two materially different contexts. First, there might be negotiation and settlement of disputes arising after the employee's termination. Such a settlement offer would be inadmissible to prove liability under Rule 408. However, in the second case, where the employment relationship is terminated and the employer offers a contemporaneous severance pay package in exchange for a release of all potential claims, the termination may be probative on the issue of discrimination. *Id.* at 1342.

The court observed that where the employer tries to condition severance pay upon the release of potential claims, the policy behind Rule 408

does not come into play. Rule 408 should not be used to bar relevant evidence concerning circumstances of the termination itself simply because one party calls its communication with the other party a "settlement offer."

In a later case, *Mundy v. Household Fin. Corp.*, 885 F.2d 542 (9th Cir. 1989), the employee was terminated and again alleged age discrimination among other claims. Household Finance had offered Mundy payment of money for outplacement services three weeks after he was terminated. At trial, Mundy sought to offer into evidence that Household Finance sought a release of claims in exchange for \$25,000, but the district court refused this evidence. The court of appeals noted that in *Cassino* it determined Rule 408 only applies to settlement offers made after termination where the employee has asserted that he is the victim of illegal discrimination. However, severance pay packages contingent on a release of claims which are offered contemporaneously with the notice of termination are not covered by the rule and are admissible evidence on the issue of discrimination. In this case, Mundy had already received three months severance pay in addition to several other benefits upon being terminated. While Mundy had not yet filed any claims, he had retained legal counsel at the time the settlement offer was made. The appellate court concluded the district court had not abused its discretion in concluding that Household Finance had made a settlement offer which was inadmissible under Rule 408.

In *Coleman v. Quaker Oats Co.*, 232 F.3d 1271 (9th Cir. 2000), Coleman argued the district court should have admitted into evidence Quaker's offer of additional medical benefits in exchange for Coleman's release of claims against the company. After first discussing *Cassino* and *Mundy*, the court of appeals pointed out that Coleman had been informed in March 1995 of his discharge. He received a severance package without condition. On May 8, he filed an age discrimination charge. On May 12, Quaker offered him additional medical benefits

in exchange for a release of claims. The court found that since the settlement offer was not contemporaneous with termination and because the consideration was in addition to the standard severance benefits, the district court did not abuse its discretion in excluding the proffered evidence. Coleman argued that Quaker may not have known of the EEOC charge when it made him the offer. However, the appellate court rejected this contention based on *Mundy*. The court pointed out that in *Mundy* the plaintiff had only hired an attorney, but had not yet brought a formal charge, much less made a charge known to the company. Even so, there was no abuse of discretion in excluding the settlement offer evidence. In this case, Coleman had already filed a charge with the EEOC. Therefore, the evidence as to the proffered settlement could not be considered.

Settlement offers may be evidence of retaliation. In *Carney v. The Am. Univ.*, 151 F.3d 1090 (D.C. Cir. 1998), the University commenced downsizing, which resulted in the elimination of Carney's position. Shortly after that, Carney informed the University that she intended to sue. There was a question as to whether she might be entitled to an additional three months severance pay on top of her existing severance package; the University did not give her the extra three months pay. Carney sued for race discrimination and retaliation and the district court granted summary judgment in favor of the employer. The appellate court affirmed in part, reversed in part and remanded.

Carney argued that the University withheld the extra severance pay in retaliation for her having signaled an intention to file suit. A settlement letter from the University's lawyer responding to a letter from Carney's attorney acknowledged that, under certain interpretations of its personnel manual, Carney might be entitled to an additional three months severance pay. The district court refused to admit the letters because the University prepared the initial severance package before it knew Carney intended to sue and also because it believed Rule 408 prohibited Carney from relying on the settlement correspondence to establish causation.

The appellate court disagreed.

\*\*\* although settlement letters are inadmissible to prove liability or amount, they are admissible

"when the evidence is offered for another purpose." (citation omitted) In particular, such correspondence can be used to establish an independent violation (here, retaliation) unrelated to the underlying claim which was the subject of the correspondence (race discrimination). (citations omitted).

Id. at 1095.

The court observed that Carney had offered the settlement correspondence not to prove that the University discriminated against her, but to show that the University committed an entirely separate wrong by conditioning her benefits on a waiver of her rights. Accordingly, the settlement letters were admissible.

See also *Uforma/Shelby Bus. Forms, Inc. v. National Labor Relations Bd.*, 111 F.3d 1284 (6th Cir. 1997). In unfair labor practice proceedings, the General Counsel sought to admit evidence that the employer threatened union officials that the company would terminate its third shift if the union pursued a grievance. The employer sought to exclude this evidence because it was allegedly made during negotiations intended to resolve the grievance. The court of appeals disagreed with this position. The General Counsel did not seek to introduce evidence of the alleged threats to prove the validity of the grievance, but instead to demonstrate that, regardless of the legitimacy of the grievance, the employer threatened and subsequently retaliated against the union for pursuing it.

### Labor Law

In the consolidated cases of *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB No. 39 (2007), two separate sets of events occurred in 1999 and 2000: (1) the employer's termination of 37 employees on or about August 26, 1999, as part of a post-merger reduction in force, and (2) a subsequent representation election in a unit of the employer's employees on April 25 and 26, 2000.

The Complaint alleged that the employer violated Section 8(a)(1) and (3) of the National Labor Relations Act by selecting employees for discharge based on their support for the union. The administrative law judge recommended dismissal of the 8(a)(1) and (3) allegations because each of the alleged discriminatees had signed a valid waiver of all claims relating to the terminations in exchange for severance benefits.

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By way of background, in early 1999, following the merger of British Petroleum and Amoco Corporation, and a company directive to improve productivity by 35 percent, the employer decided to significantly reduce its work force. After an extensive review and feedback process to evaluate which jobs and employees would be cut, the employer, on August 25 and 26, 1999, notified approximately 145 out of a unit of 775 employees that their employment would be terminated. This group included the 37 alleged discriminatees.

Each employee notified of his or her termination received a severance package that included an "Employee Termination Agreement." The termination agreement provided in pertinent part:

In exchange, Employee ... forever releases and waives any claim or liability against the Company, as of the date this Agreement is signed ... arising out of or in any way related to his or her employment with the Company, including, but not limited to, the termination of his or her employment with the Company ... including, but not limited to, any claims under the U.S. Age Discrimination in Employment Act ... and any claims under any other federal, state, provincial, or local enactment or rule of law or equity.

The agreement stated that the employee had 45 days to sign the agreement and 7 days to cancel the agreement thereafter. The termination agreement also provided for substantial additional severance pay (beyond the 60-days pay provided to all terminated employees), as well as medical and education benefits. Only employees who signed the termination agreement received these enhanced benefits.

The issue presented was whether the 37 alleged discriminatees waived their right to file charges with the National Labor Relations Board ("Board")—or have charges filed on their behalf—when they had executed the termination agreements in exchange for enhanced severance benefits.

The Board had previously found that it would effectuate the purposes and policies of the Act to give effect to broadly worded waiver and release agreements signed by employees in

exchange for enhanced severance benefits. Such agreements serve an important public interest in encouraging the parties' achievement of a mutually accepted settlement agreement without litigation.

In assessing the validity of such a release, the Board applies the same standard used to assess whether to give effect to a private non-Board settlement agreement. The factors include: (1) whether the parties to the Board case have agreed to be bound, and the position taken by the General Counsel regarding settlement; (2) whether the settlement is reasonable in light of the violations alleged, the risks inherent in litigation, and the stage of litigation; (3) whether there has been any fraud, coercion, or duress by any party in reaching the settlement; and (4) whether the respondent has a history of violating the Act or has previously breached settlement agreements.

In this case, the Board majority found that termination agreements signed by the alleged discriminatees meet the standards set forth above. Therefore, the Board majority adopted the judge's decision to dismiss the 8(a)(1) and (3) allegations regarding the terminations of the 37 named employees.

### Workers' Compensation

In *Maxit Inc. v. Van Cleve et al.*, \_\_\_ Ill.App.3d \_\_\_, 2007 WL 2789892, (2d Dist. 2007), the trial court ruled that defendants—Mr. and Mrs. Van Cleve—had released Maxit from responsibility on a pending workers' compensation claim by signing a "Release of All Claims" that arose from defendants' claim against Maxit's underinsured motorist policy. The Van Cleves argued that the release settled only the underinsured motorist claim.

John Van Cleve was injured in an automobile accident. John was employed by Maxit and was driving one of its trucks during the scope and course of his employment. The accident caused an injury to John's back.

John filed a workers' compensation claim. John also made a claim under Maxit's underinsured motorist insurance policy. The Van Cleves settled the underinsured motorist claim in exchange for a payment of \$800,000. As part of the settlement transaction, they signed a document entitled "Release of all Claims."

John continued to pursue his workers' compensation claim. John and Maxit entered into a written settlement agreement on John's workers' compensation claim, which agreement was approved by the Illinois Workers' Compensation Commission.

On October 19, 2005, Maxit filed the complaint at issue. In its complaint, Maxit alleged that the Van Cleves breached the release by continuing to pursue John's workers' compensation claim after signing the release.

Maxit argued that the "Release of All Claims" released it from any further obligation it might have under the workers' compensation claim. The Van Cleves argued that the first paragraph clearly and unambiguously limited the release to the underinsured motorist claim. The trial court granted judgment in favor of Maxit. The Van Cleves appealed.

John's injury occurred during the scope and course of his employment with Maxit, resulting in a claim against Maxit under the Workers' Compensation Act, and not under Maxit's underinsured motorist insurance policy. Thus, the Act governed John's workers' compensation claim. Section 23 of the Act provides:

No employee, personal representative, or beneficiary shall have power to waive any of the provisions of this Act in regard to the amount of compensation which may be payable to such employee personal representative or beneficiary hereunder except after approval by the Commission and any employer, individually or by his agent, service company or insurance carrier who shall enter into any payment purporting to compromise or settle the compensation rights of an employee, personal representative or beneficiary without first obtaining the approval of the Illinois Workers' Compensation Commission as aforesaid shall be barred from raising the defense of limitation in any proceedings subsequently brought by such employee, personal representative or beneficiary.

820 ILCS 305/23. An employer may not ignore this provision of the Act and enter into a settlement with its employee without the approval of the Illinois

Workers' Compensation Commission. *Zurich Gen. Accident & Liability Ins. Co. v. Industrial Comm'n*, 325 Ill. 452 (1927). The release of John's workers' compensation claim would not be effective in the absence of the approval of the Commission. A contractual provision that violates public policy as expressed in statutory law is unenforceable and void. Because of this, the court of appeals could not say that the parties intended that the release include the workers' compensation claim. That intention would be unlawful, unenforceable, and void.

The appeals court held that the trial court erred by holding that the release encompassed John's workers' compensation claim, because that result violated the public policy of Illinois as embodied in the Act. Instead, the only interpretation of the release that did not violate public policy was one that excluded John's workers' compensation claim from the scope of the release. The appeals court reversed the judgment of the trial court.

### Age Discrimination

An amendment to the Federal Age Discrimination in Employment Act ("ADEA"), the Older Workers Benefit Protection Act ("OWBPA"), also affects releases. Agreements which provide for a release of employee rights under the ADEA must satisfy the following:

1. the release must be part of an agreement in writing that is understandable;
2. the writing must specifically refer to rights or claims under the ADEA;
3. the release may not waive rights which arise after signing of the document; and
4. there must be new consideration given to the employee or former employee and the employee must be advised in writing to consult with an attorney prior to signing the agreement.

The employee or former employee must be given at least 21 days within which to consider the agreement and even after signing the agreement, the employee is given another seven days to revoke the agreement.

Where a release is part of an exit incentive or termination benefit program, where multiple employees are terminated or asked to retire, the employees must be given 45 days

to consider that agreement and may revoke it within seven days of signing the agreement. The employer must also provide each employee information as to any class or group of employees covered by the program, and the eligibility factors or time limits applicable to the program, the job titles and ages of all eligible employees and the ages of all persons in the same job classification or organizational unit who are not eligible for the program.

In *Syverson, et al. v. International Bus. Mach. Corp.*, 472 F.3d 1072 (9th Cir. 2007), the court decided some issues under the OWBPA. Employees may not waive rights or claims arising under the ADEA unless the waiver is "knowing and voluntary." To qualify as "knowing and voluntary," a waiver included in an agreement between an employer and its employees must, among other things, be "written in a manner calculated to be understood" by the average employee eligible to participate in the agreement.

In January 2001, IBM began a reduction in its workforce. IBM offered each employee selected for termination severance pay and certain benefits in exchange for signing a document entitled "Microelectronics Resource Action (MERA) General Release and Covenant Not to Sue."

Several employees later filed a putative class action in federal court alleging that the MERA Agreement violated the waiver requirements of the OWBPA and that IBM's layoff program constituted age discrimination.

IBM filed a counterclaim seeking relief for the plaintiffs' breach of the agreements and a motion to dismiss. The district court entered an order granting IBM's motion to dismiss. The appeals court reversed the dismissal.

Section 626(f), part of the OWBPA, sets forth specific requirements for a "knowing and voluntary" waiver. Of primary importance was the requirement that a waiver be part of an agreement that is written in a manner calculated to be understood by the individual, or by the average individual eligible to participate in a workforce reduction plan. 29 U.S.C. § 626(f)(1)(A). Also relevant was the requirement that the selected employee or employees be advised in writing to consult with an attorney prior to executing the agreement. *Id.* § 626(f)(1)(E). When a dispute arises over whether

the requirements of § 626(f) are met, the party asserting the validity of the waiver bears the burden of proof. *Id.* § 626(f)(3).

Waiver agreements must be drafted in plain language geared to the level of understanding of the individual party to the agreement or individuals eligible to participate in a group termination plan. Employers should take into account such factors as the level of comprehension and education of typical participants. These considerations usually will require the limitation or elimination of technical jargon and long, complex sentences.

At the outset of the MERA Agreement, the employee was advised to consult an attorney prior to signing. The MERA Agreement went on to provide, in relevant part:

If you feel that you are being coerced to sign this General Release and Covenant Not to Sue (hereinafter "Release"), [or] that your signing would for any reason not be voluntary ... you are encouraged to discuss this with your manager, the MERA Project Office or Human Resources before signing this Release.

In exchange for the sums and benefits received pursuant to the terms of the MICROELECTRONICS RESOURCE ACTION (MERA), [EMPLOYEE NAME], (hereinafter "you") agrees to release and hereby does release [IBM] ... from all claims, demands, actions or liabilities you may have against IBM of whatever kind including, but not limited to, those that are related to your employment with IBM, the termination of that employment, or other severance payments or your eligibility for participation in the Retirement Bridge Leave of Absence, or claims for attorney fees.

You also agree that this Release covers, but is not limited to, claims arising from the [ADEA], as amended, ... and any other federal, state or local law dealing with discrimination in employment, including, but not limited to, discrimination based on sex, sexual orientation, race, national origin, religion, disability, veteran status or age.... This

Release covers both claims that you know about and those that you may not know about which have accrued by the time you execute this Release.

You agree that you will never institute a claim of any kind against IBM...including, but not limited to, claims related to your employment with IBM or the termination of that employment or other severance payments or your eligibility for participation in the Retirement Bridge Leave of Absence. If you violate this covenant not to sue by suing IBM ..., you agree that you will pay all costs and expenses of defending against the suit incurred by IBM ..., including reasonable attorneys' fees, and all further costs and fees, including attorneys' fees, incurred in connection with collection. This covenant not to sue does not apply to actions based solely under the [ADEA], as amended. That means that if you were to sue IBM ... only under the [ADEA], as amended, you would not be liable under the terms of this Release for their attorneys' fees and other costs and expenses of defending against the suit. This Release does not preclude filing a charge with the U.S. Equal Employment Opportunity Commission.

You hereby acknowledge that you understand and agree to this General Release and Covenant Not to Sue.

End Note 1 of the agreement explained that the ADEA prohibits employment discrimination based on age and is enforced by the EEOC.

The employees argued that the last sentence of the covenant not to sue, when read in conjunction with End Note 1, conveyed the impression that, notwithstanding the waiver, IBM employees could still obtain individual relief for their ADEA claims filed with the EEOC. According to the court, the language that the employees challenged, however, did not exaggerate or misrepresent the availability of relief via the EEOC. It merely noted that such relief was unaffected by the MERA Agreement.

The employees next contended that the phrasing of the release and cov-

enant not to sue created confusion over whether ADEA claims were in fact covered by the release or were excepted from it. The court agreed and held that the MERA Agreement did not satisfy the "manner calculated" requirement of the OWBPA. The employees' waiver of ADEA claims, along with the accompanying covenant not to sue, was therefore not knowing or voluntary, and both were unenforceable.

The MERA Agreement contained, on the one hand, a release of "all claims," including claims arising from the ADEA and, on the other hand, a "covenant not to sue" which included an agreement to never institute a claim of any kind against IBM related to employment with IBM. It also provided, however, that "[t]his covenant not to sue does not apply to actions based solely under the [ADEA]."

The court said the confusion ensued, in part, from including in a single document two concepts that, technically speaking, cannot coexist. A covenant not to sue is pertinent only if the underlying right is not extinguished, while a release extinguishes any underlying right. Where both nonetheless appear in the same document, the covenant not to sue largely swallows the release—and the negation of the covenant not to sue can therefore be read as negating the release as well.

The court did not agree with IBM that the direction to consult an attorney or an IBM employee mitigated the confusing waiver language.

The court of appeals held that the MERA Agreement did not satisfy the "manner calculated" requirement of the OWBPA, was not "knowing and voluntary," and therefore could not be enforced. The district court's dismissal was reversed.

### Wage-Hour

In *Dent v. Cox Communications, et al.*, \_\_\_ F.3d \_\_\_, 2007 WL 2580754 (9th Cir. 2007), David Dent accepted overtime compensation that was owed to him by his former employer, MC Communications, pursuant to a March 2004 settlement supervised by the Department of Labor ("DOL") in accordance with the Fair Labor Standards Act ("FLSA"). Dent signed a WH-58 standard form "Receipt for Payment of Lost or Denied Wages, Employment Benefits, or Other Compensation," acknowledging receipt of unpaid wages

for the period beginning with the workweek ending 5-04-02 through the workweek ending 10-11-03.

In August 2004, Dent filed a suit claiming additional unpaid overtime wages under the FLSA, as well as Nevada State Law. The defendants, Cox Communications and MC Communications, Inc., moved to dismiss Dent's FLSA claim on the ground that it had been released, in full, by the earlier settlement. The district court granted the motion to dismiss Dent's FLSA claim.

Dent agreed that the March 2004 settlement waived his right to pursue any claims for the period specified on the WH-58. However, he argued that the settlement did not bar him from seeking compensation earned prior to that period.

29 U.S.C. § 216(c) authorizes the DOL to supervise the settlement of FLSA claims. The subsection provides:

The Secretary [of Labor] is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages . . . .

The defendants' position was that under § 216(c), Dent's settlement addressed all unpaid wages owed to Dent and extinguished all future claims.

The appeals court recounted some history. To further the FLSA's objective of protecting certain populations of workers from substandard wages and oppressive conditions, the Supreme Court, in the mid-1940s, rejected plaintiffs' attempts to waive claims to liquidated damages under the FLSA in private settlements.

However, Congress also sought to assure employers who paid back wages under the supervision of the Wage and Hour Division that they need not worry about the possibility of suits for liquidated damages and attorney fees. Subsection (c) was designed to offer a

choice to an employee who had been improperly denied wages under the FLSA. He or she might choose between 1) action by the Administrator under the new subsection (c) for simply the amount which is owed to him and 2) his own individual right of action under subsection (b) for both back wages and liquidated damages together with a reasonable attorney fee.

Dent's WH-58 only provided adequate notice for the waiver of rights associated with the time period specified on the form—from April 28, 2002 (i.e., the start of the workweek ending May 4, 2002) and October 11, 2003.

The WH-58 signed by Dent explained that "acceptance of back wages due under the Fair Labor Standards Act means that you have given up any right you may have to bring suit for such back wages under Section 16(b) of that Act." The form informed Dent that the back wages he agreed to accept were "for the period beginning with the workweek ending 5-04-02 through the workweek ending 10-11-03." In this context, the form's statement that he was giving up the right to sue for "such back wages" read most naturally as indicating that Dent was waiving the right to bring suit under 29 U.S.C. § 216(b) only for the specified period.

The court affirmed the district court's dismissal of Dent's cause of action under the FLSA accruing on or after the workweek ending May 4, 2002, but reversed the district court's dismissal of Dent's cause of actions under the FLSA accruing between August 27, 2001 and April 27, 2002.

### Family and Medical Leave Act.

*Taylor v. Progressenergy, Inc.*, 493 F.3d 454 (4th Cir. 2007) was a rehearing of an earlier appeal by the entire appellate court. The central issue in the appeal was the meaning of 29 C.F.R. §825.220(d). That regulation reads: "Employees cannot waive, nor may employers induce employees to waive, their rights under the FMLA." In the court's earlier, vacated, opinion, it held that this regulation prohibits both the prospective and retrospective waiver of any FMLA rights, unless the waiver has the prior approval of the Department of Labor ("DOL") or a court. On reconsideration, the court remained convinced that the regulation precluded both the prospective and retrospective waiver of

FMLA rights.

The DOL contended that in *Taylor* the court erred in interpreting section 220(d) by failing to focus on the word "rights." In its brief, the DOL argued that the word "rights" does not include "claims."

There are three categories of rights under FMLA, substantive, proscriptive, and remedial. Substantive rights include an employee's right to take a certain amount of unpaid medical leave each year and the right to reinstatement following such leave. 29 U.S.C. §§ 2612(a)(1)(D), 2614(a)(1). Proscriptive rights include an employee's right not to be discriminated or retaliated against for exercising substantive FMLA rights. Id. § 2615(a)(2). The remedial right is an employee's right to bring an action or claim to recover damages or obtain equitable relief from an employer that violates the Act. Id. §§ 2617(a)(2), (a)(4). The regulation, by specifying rights under FMLA, refers to all rights under the FMLA, including the right to bring an action or claim for a violation of the Act.

The court found that there is nothing in the text of section 220(d) that permits a distinction between prospective and retrospective waivers. The regulation states that employees cannot waive their rights under FMLA. The word "waive" has both a prospective and retrospective connotation.

The DOL argued that its reading of section 220(d) was consistent with the well-accepted policy disfavoring prospective waiver of rights, but encouraging the settlement of claims. However, the court noted that the settlement or waiver of claims is not permitted when it would thwart the legislative policy which the law was designed to effectuate.

For example, under the Fair Labor Standards Act (FLSA), there is a judicial prohibition against the unsupervised waiver or settlement of claims. In the FLSA, Congress prescribed a minimum wage in order to foster a minimum standard of living necessary for health, efficiency, and general well-being of workers. 29 U.S.C. § 202(a). Any wage settlement that gave the employee less than the statutory minimum would frustrate Congress's objective of imposing uniform minimum pay requirements. See *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (waivers of FLSA rights and claims would

nullify the congressional purpose of imposing nationwide minimum standards of employment). Moreover, allowing below-minimum pay through settlement discounts would permit an employer to evade the FLSA and gain an unfair competitive advantage.

The *Taylor* court found the reason for prohibiting private settlement of FLSA claims applied with equal force to FMLA claims. Congress made clear in the FMLA's legislative history that the FMLA fits squarely within tradition of the labor standards laws that preceded it, such as the FLSA and the Occupational Safety and Health Act. The FMLA, following the FLSA model, provides a floor of protection for employees by guaranteeing that a minimum amount of family and medical leave will be available annually to each covered employee. As with the FLSA, private settlements of FMLA claims would undermine Congress's objective of imposing uniform minimum standards. Because the FMLA requirements increase the cost of labor, employers would also have an incentive to deny FMLA benefits if they could settle claims for less than the cost of complying with the statute. Further, employers settling claims at a discount would gain a competitive advantage over employers complying with the FMLA's minimum standards. According to the court, to avoid these problems, section 220(d) follows the FLSA model and prohibits the waiver of all FMLA rights, whether prospective or retrospective.



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