

FEDERAL COURTS CLARIFY RULES FOR SETTLING EMPLOYMENT CLAIMS

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Over the last 90 days, the federal courts have issued a trio of decisions affecting the ability of employers to settle employment law claims.

Case # 1: D.C. Circuit Rules Compensatory Damage Awards Are Not Taxable

Leveille v. IRS, 460 F.3d 79 (D.C. Cir. Aug. 22, 2006)

Marita Leveille successfully sued her employer for wrongful termination and blacklisting under the federal whistleblower statute. She was awarded approximately \$100,000 in compensatory damages for emotional injuries and damage to her reputation. Pursuant to the IRS Code § 104(a)(2) only compensatory damages for a true physical injury or illness (e.g., a broken arm) are excludable from federal income taxation. So, Leveille paid taxes on her award. She then challenged IRS Code § 104(a)(2) as unconstitutional under the Sixteenth Amendment. The Sixteenth Amendment permits the federal government “to lay and collect taxes on incomes, from whatever source derived. . . .” (emphasis added). The D.C. Circuit agreed.

In an opinion by Chief Judge Ginsberg, the Court held that it is unconstitutional, under the 16th Amendment, to tax compensatory damages for emotional distress as “income.” Such money merely makes a person whole, restoring him/her to the same net wealth (cash + human capital) that s/he enjoyed before the injury. As there is no increase in net wealth (after accounting for plaintiff’s diminution in human capital), there is no “income.” For example, if discrimination causes a person to suffer depression or humiliation, a cash award of compensatory damages simply restores that person to the same net happiness

or net utility s/he enjoyed before the discrimination. Likewise, if one’s reputation is damaged by a negative reference, a money award simply returns that person to the same net position occupied before that defamation—*i.e.*, I have more cash, but a diminished reputation.

The D.C. Circuit phrased the test as, “in lieu of what” was this money paid (what does it replace)? If it was paid to compensate you for wages you’re going to lose in the future (*i.e.*, front pay, or reduced earning capacity), then it is taxable, because it’s replacing something (future wages) that would have been taxable. But if it’s compensation for loss of your good mental health, or your good reputation, it is not taxable, because you could not be taxed on the things it replaced.

Case # 2: United States District Court Finds Employers Cannot Settle FMLA Claims In A Standard Severance Agreement

Dougherty v. TEVA Pharmaceuticals USA, 2006 U.S. Dist. Lexis 62179 (E.D. Pa. Aug. 29, 2006)



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Barbara Dougherty worked for TEVA Pharmaceuticals as a senior secretary. She suffered from post-traumatic stress disorder. In 2003, she complained of discrimination after experiencing “friction” with her supervisor. TEVA subsequently offered her a severance package. Dougherty accepted and signed a Separation Agreement and Release.

That Agreement provided that Dougherty released TEVA from “all causes of action, suits, debts, claims and demands arising from or relating in any way to her employment with TEVA.” Dougherty expressly waived any claims she may have had under Title VII, the ADA, the ADEA, ERISA, the Pennsylvania Law Against Discrimination and any and all other federal, state or local law statutory or common law claims.

Dougherty then sued TEVA for violating the Americans with Disabilities Act (ADA) and Family Medical Leave Act (FMLA). TEVA argued that Dougherty’s claims were barred because Dougherty had accepted the severance and signed a Separation Agreement and Release. Although the statutory language of the FMLA does not address the waiver of claims, DOL regulations provide that “employees *cannot* waive, nor may their employers induce employees to waive their rights under FMLA.” 29 C.F.R. § 825.220(d)(emphasis added)

A few courts have examined whether an employee may waive his right to sue for FMLA violations and the results are mixed. The Fifth Circuit has found that a former employee may waive his rights under the FMLA. However, the Fourth Circuit and Northern District of Illinois disagree.

The Pennsylvania Court agreed with the Fourth Circuit and Northern District of Illinois and held that the plain language of this regulation “prohibits an employee from waiving the right to sue for FMLA violations through a severance agreement.”

Consequently, the Court denied TEVA’s motion for summary judgment and allowed Dougherty to proceed with her claims.

Case # 3: Ninth Circuit Finds IBM’s Waiver of Age Discrimination Claims Invalid Because It’s Not In Plain English

Syverson v. International Business Machines Corp., 2006 U.S. App. Lexis 22504 (9th Cir. Aug. 31, 2006)

As part of its 2001 workforce reduction, IBM offered severance and other benefits to employees selected for discharge in exchange for signing a General Release and Covenant Not To Sue (“Agreement”). The Agreement contained both a release of claims and a covenant not to sue. The covenant not to sue was designed to allow IBM to recoup its fees and costs if an employee sued in violation of the Agreement. IBM excluded ADEA claims from the covenant not to sue because the ADEA prohibits waivers, covenants not to sue or other provisions which allow employers to recover attorneys’ fees and/or damages

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WHAT’S ON MYPOD?

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CLOSER TO FINE - INDIGO GIRLS

IT’S MY LIFE - BON JOVI

WHO KNEW - PINK

EXPRESS YOURSELF - MADONNA

HOW TO SAVE A LIFE - THE FRAY

BLACK HORSE AND THE CHERRY TREE - KT TUNSTALL

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because of the filing of an ADEA claim.

Thereafter, many of the terminated employees who signed waivers sued IBM. They alleged that IBM's layoff program violated the ADEA. IBM then moved to dismiss the claims because the employees had signed waivers.

These employees argued that the Agreement violated the waiver requirements of the Older Workers Benefit Protection Act ("OWBPA"). The OWBPA provides that all waivers of rights or claims under the ADEA must be knowing and voluntary. That is, the waiver must be "written in a manner calculated to be understood' by the average employee eligible to participate in the agreement."

The plaintiffs argued that they had not knowingly and voluntarily waived their ADEA claims because the language in the Agreement was misleading and confusing. Specifically, while the general release included age discrimination, the exclusion of ADEA claims from the covenant not to sue led them to believe that they could still sue for age discrimination.

The Court agreed with the employees. Because one section released all ADEA claims while another seemingly preserved the right to sue under the ADEA, the release was confusing. The Ninth Circuit now joins the Eighth Circuit in finding IBM's Agreement unenforceable. (*See* CSH Labor Lore, July 2005).

Practical Tips:

1. Employers who are already involved in litigation should consider whether any portion of the settlement may be attributed to emotional distress. By increasing the value of the settlement to plaintiffs (it is tax free), it may facilitate lower settlements overall.

2. Employers may consider adding language to their severance or separation agreements which affirmatively provides that the employee has neither been denied leave nor discriminated against for taking or seeking

leave under the FMLA. While such language may not result in a waiver, it may be helpful as an admission in later proceedings on the merits.

3. Employers whose severance agreements contain both covenants not to sue and a release of claims should consider whether right to seek fees and costs from an individual plaintiff (typically judgment proof) is worth the risk of invalidating the release of age discrimination claims. ●

**CONGRATULATIONS TO
MICHAEL SHEEHAN, JOHN BERG
& MICHAEL BOOHER**

Jeffrey Carter v. Robert Bosch Corporation

CSH recently secured a defense verdict on behalf of Robert Bosch Corporation in the Western District of Michigan. The EEOC, along with the terminated employee, Jeffrey Carter, sued Bosch for religious discrimination under Title VII. For religious reasons, Carter asked Bosch to excuse him from work on his Sabbath. Bosch accommodated Carter's request until it faced a production crisis which required employees to work mandatory overtime on weekends. At that time, Bosch informed Carter that he was responsible for finding a substitute to work for him on his Sabbath.

On several occasions, Carter failed to report to work as directed on his Sabbath and failed to provide a substitute. Bosch discharged Carter for having too many unexcused absences. Although the District Court granted summary judgment in Bosch's favor, the Sixth Circuit Court of Appeals reversed and remanded the case so a jury could determine whether Bosch actually offered a reasonable accommodation.

The jury returned a unanimous verdict for Bosch within an hour of deliberation. ●