August – September 2012

Weil

Employer Update

Amendments to the New York Wage Deductions Law

By Jeffrey S. Klein, Nicholas J. Pappas, and Celine J. Chan

New York Labor Law § 193 has prohibited employers from deducting sums from employees' paychecks since 1966, subject to a number of enumerated exceptions. Commencing in 2010, the New York State Department of Labor (NYDOL) began issuing several highly controversial opinion letters and web postings announcing a narrower interpretation of § 193, which appears aimed at changing longstanding wage payment practices in New York. According to the recent NYDOL interpretations, if an employer advances money to an employee, the employer may not later recoup such payments through a wage deduction, even where the employee has authorized the deduction. Likewise, according to the NYDOL, if an employer inadvertently overpays an employee's wages, the employer may not recover the overpayment by deducting funds from the employee's paycheck, again, even where the employee has agreed to the deduction.

In both scenarios, the NYDOL's most recent interpretations of § 193 also prohibit employers from *requiring*, by threat of discipline for example, that their employees repay the employer by means of a separate transaction. In essence, under the NYDOL's latest interpretations, an employer's sole recourse – when an employee refuses voluntarily to repay an overpayment or an advance – is to initiate the cumbersome and expensive process of commencing legal action against the employee to recoup any wage overpayment or overdue loan or advance repayment.

On June 21, 2012, the New York State Senate and Assembly passed Bill No. A10785-2011 that would loosen significantly the purported restrictions the NYDOL's interpretations would impose on employers (and consenting employees), and restore employers' ability to deduct from employees' wages in a number of circumstances. On September 7, 2012, Governor Cuomo signed the bill into law and the provisions will take effect 60 days thereafter. In this article, we discuss the radical shift in the NYDOL's latest interpretations of § 193, and how the amendments would change employers' practices of making deductions from wages in New York.

The Current Section 193

New York Labor Law § 193 and New York Compilation of Codes, Rules and Regulations title 12, § 195.1 govern employer deductions from employees' wages. Labor Law § 193 expressly prohibits wage deductions unless either authorized by law, a court, or a government agency, or for items that are for the employee's benefit and authorized in writing by the employee for: (i) payments for insurance premiums; (ii) pension or health and welfare benefits; (iii) contributions to charitable organizations; (iv) payments for United States bonds;

In This Issue

(v) dues payments to any labor organization; or (vi) payments that are "similar to" the five enumerated purposes listed above. N.Y. LAB. LAW § 193(1). The regulations' § 195.1 further provides that any permissible deductions for all non-enumerated items shall not exceed ten percent of the gross wages due to the employee in a payroll period. 12 N.Y.C.R.R. § 195.1.

Amendments to the New York wage deductions law will loosen the NYDOL's restrictive interpretations and restore employers' ability to deduct from employees' wages in a number of circumstances.

Prior to 2006, there was little debate that an employer could make deductions from employees' wages so long as the deduction was authorized in writing by the employee, were for the benefit of the employee, and were for purposes that were "similar" to the purposes expressly authorized by statute. However, in 2006, the New York Court of Appeals determined that "similar" payments authorized under § 193 are exclusively "monetary or supportive," and as such, subtracting from employees' wages a transaction fee in the process of redeeming a cash wage voucher violated § 193. *See Angello v. Labor Ready, Inc.*, 7 N.Y.3d 579, 584 (2006).

At first, the NYDOL did not significantly alter its view of § 193 based upon the *Labor Ready* decision. For example, in 2008, the NYDOL still opined that an employer may, with an employee's written consent, recoup overpaid wages as a "similar payment" for the benefit of the employee, if deducted during the pay period immediately following the overpayment, and in subsequent pay periods, if the deduction is limited to ten percent of gross wages in one pay period. *See* NYDOL Opinion Letter, RO-07-0015 (Oct. 23, 2008).

The NYDOL had issued this interpretation, notwithstanding an earlier New York Appellate Division case, *Hennessey v. Board of Education*, 227 A.D.2d 559 (2d Dept. 1996), which held that an employer was prohibited from deducting overpaid wages by garnishing its employees' paychecks, though notably, *Hennessey* did not involve employee consent. However, the NYDOL also opined in 2008 that an employer *may not* deduct wages, or retain an employee's last paycheck, for the repayment of employer-provided tuition reimbursements, because according to the NYDOL, such a deduction "is not one for any of the purposes authorized by § 193(1)(b), nor is it similar to any such purposes. . . ." *See* NYDOL Opinion Letter, RO-07-0003 (Oct. 23, 2008).

Less than two years later, in a 2010 opinion letter, the NYDOL announced a very different interpretation of § 193 based on the *Labor Ready* case. In an opinion letter dated January 21, 2010, the NYDOL interpreted permissible "similar payments" as either "monetary payments" that are "investments of money for the later benefit of the employee" or "supportive payments" that are "used by someone other than the employee or employer to support some purpose of the employee." *See* NYDOL Opinion Letter, RO-09-0152 (Jan. 21, 2010).

Purportedly applying the New York Court of Appeals' *Labor Ready* decision, the NYDOL explained that "[w]hile previous opinions of this Department may have provided that an employer may make a wage deduction for overpayments," those deductions are "no longer permissible" because "[s]uch payments are neither required nor authorized by law, nor do they fit within the meaning of the term 'similar payment.'" *Id.* Rather, according to the NYDOL, since such payments go directly to the employer, they violate "both the letter of the statute and the protective policy underlying it." *Id.* (citing *Labor Ready*, 7 N.Y.3d at 586).

The NYDOL also reiterated that employers cannot *require* that employees repay the overpayment through a separate transaction. Thus, according to the NYDOL, as the "employer may not avail itself of self-help by utilizing wage deductions to recover overpayments, employers may seek relief in a separate proceeding against the employee, i.e., an action in civil court." *Id.* The NYDOL has

similarly opined that deductions from employees' wages to repay a prior advance of unearned wages or benefits from the employer to employees are impermissible, as they are neither required nor authorized by law, nor are they "similar payments." *See* NYDOL Opinion Letter, RO-09-0006 (Aug. 3, 2009); *see also* NYDOL Opinion Letter, RO-09-0088 (Aug. 13, 2009) (opining that wage deductions for the reimbursement of employee purchases are impermissible, where the money was advanced to employees, and where employees had agreed to this policy).[2]

Employers should proceed cautiously in implementing new policies or practices or entering into new voluntary wage deduction agreements with employees.

Consistent with these surprising interpretations of § 193 promulgated in 2009 and 2010, the NYDOL subsequently provided an illustrative list of deductions that, under its restrictive interpretation, are *not* payments "similar to" those enumerated in § 193(1)(i)-(v), regardless of consent, or the benefit to the employee, including, but not limited to, the following:

- Repayment of loans or advances made by an employer to an employee;
- Repayment of inadvertent overpayments of wages by an employer to an employee;
- Recoupment of unauthorized expenses incurred by an employee;
- Employee purchases at employer cafeterias, gift shops, vending machines or pharmacies;
- Recoupment of benefits that the employee had not accrued;
- Miscellaneous fees such as health club dues, association dues, or day care expenses.

See "Frequently Asked Questions about Deductions from Wages" *available at* http://www.labor.ny.gov/legal/counsel/pdf/Wage%20Deduction%20FAQs.pdf (last visited September 4, 2012); *see also* "Deductions from Wages," LS 605, July 2010, *available at* http://www.labor.ny.gov/formsdocs/wp/LS605.pdf (last visited September 4, 2012).

Amendments to Section 193

The amendments to § 193, which have now been signed into law by Governor Cuomo, expressly reinstate categories of wage deductions that employers may reasonably have believed were lawful under § 193. The amendments allow employers to deduct funds from wages with the written consent of employees, specifically, certain deductions that the NYDOL has opined are impermissible. According to the amendments' "Statement in Support," the law as it stands now "unduly restricts employees from deducting payments from their paychecks for valuable services provided by the employers," which is "disadvantageous to both employers and employees."

To address these concerns, the amendments authorize deductions to cover wage overpayments due to a mathematical or other clerical error, and for repayment of advances of salary or wages. Such deductions, however, will be subject to compliance with NYDOL regulations, which will include, but not be limited to, provisions governing:

- The size of overpayments that may be recovered;
- The timing, frequency, duration and method of any recovery or repayment;
- Limitations on the periodic amount of any recovery or repayment;
- A requirement to provide notice to the employee prior to commencing any recovery or repayment;
- A requirement that the employer implement a procedure to dispute the amount of any recovery or repayment, or to delay commencing any recovery or repayment;
- The terms and content of such a procedure and a requirement to provide notice of the procedure to the employee prior to commencing such recovery, or in the case of repaying a loan or advance, at the time the loan or advance is made.

The amendments also allow employers to deduct funds for certain categories of payments

that the NYDOL has previously opined are impermissible, such as:

- Purchases made at certain charitable events;
- Discounted parking or passes, tokens, fare cards, or other mass transit items;
- Fitness center, health club, or gym membership dues;
- Cafeteria, vending machines and pharmacy purchases at the employer's business;
- Tuition, room, board and fees for certain educational institutions;
- Certain child-care expenses;
- Housing provided at no more than market rates by non-profit hospitals.

Prior to implementing any of these above deductions, however, employers must obtain written, voluntary, consent from the employee, executed only after the employee has received written notice of the terms and conditions of the payment and its benefits, and details regarding how the deductions will be taken. Employees also may authorize the above deductions pursuant to the terms of a collective bargaining agreement. Any employee authorization must be kept on file on the employer's premises throughout employment, and for six years following the end of employment. Moreover, except those deductions that are required or authorized in a collective bargaining agreement, employees may revoke their consent to deductions in writing at "any time," in which case, the employer must cease the deduction by no later than the earlier of four pay periods, or eight weeks after consent was withdrawn. Also, notwithstanding any prior authorization, if there is a "substantial change" in the benefits of the deduction, or the manner in which the deduction will be taken, the employer must notify the employee "as soon as practicable," and prior to making any increased deduction – presumably so that the employee may evaluate whether to revoke or continue his authorization.

With respect to any deductions in connection with payments for employees' charitable, cafeteria, vending machine, or pharmacy purchases, and other "similar payments for the benefit of the employee," employers shall not permit purchases to exceed a limit established by the employee, or if no such limit is set, then a limit set by the employer. Finally, employers must give employees access, free of charge, to account information regarding these purchases.

Practical Considerations

While the amendments authorize a number of wage deductions under § 193 that the NYDOL has previously opined are impermissible, employers should proceed cautiously in implementing new policies or practices or entering into new voluntary wage deduction agreements with employees. As an initial matter, the provisions will not take effect until November 6, 2012, 60 days after the Governor signed them into law. These amendments also are set to expire three years after their effective date, barring any extension. In other words, the Legislature will have to revisit this issue to determine whether the bill is furthering its stated purpose of benefiting both employers and employees.

Employers also should note that any deductions intended to recover wage overpayments or repayments on advances will be subject to NYDOL regulations. These pronouncements ultimately will govern every material aspect of such deductions, and it will be important to analyze how strictly the NYDOL intends to regulate these deductions, particularly in light of its previous interpretations. Employers also will be required to implement NYDOL-crafted procedures for disputing deductions, and seeking to delay deductions. As such, it would be prudent for employers to monitor the NYDOL's pronouncements in connection with any modification of practice for recoupment of wage overpayments or salary advances.

Along those lines, certain language in the amendments remains largely undefined as written, and also will be subject to interpretation by the NYDOL and the courts. For example, while employers must inform employees whenever there is a "substantial change" in the terms or conditions of an enumerated payment, or in the benefits of a deduction, the amendments do not specify when any given change would qualify as

"substantial." Additionally, on top of the newly enumerated categories of permissible deductions, the amendments still authorize deductions for "similar payments for the benefit of the employee," a phrase that has generated much debate under the current § 193. As the landscape of permissible payments and deductions is set to change significantly under the amendments, it remains to be seen how narrowly or broadly the NYDOL will interpret this identically worded "catch-all" phrase under the amended law. Further, it will remain to be seen whether the NYDOL intends to issue a template notice expressly identifying the required categories of information that employers must give to employees prior to obtaining written consent for certain deductions, or whether the NYDOL will leave it to employers to craft their own written notices. Finally, it is also unknown whether the NYDOL intends to preemptively set acceptable limits on employees' charitable, cafeteria, vending machine, or pharmacy purchases, and other "similar payments."

Notwithstanding the uncertainty surrounding the amendments, employers can begin to consider evaluating particular employee group benefits that employers can perhaps now purchase at generously discounted group rates on account of a guaranteed and regular stream of payments by virtue of certain permissible wage deductions. Employers can also begin evaluating, or re-evaluating, certain financial programs for their employees, such as tuition or child care payment programs, or loan or salary advance arrangements to assist employees, with the security that employers can be repaid through a streamlined process of wage deductions.

Reprinted with permission from the *New York Law Journal*, August 6, 2012 edition. The article has been revised to reflect recent developments.

1 The opinion letter does not state whether these advances to the employees were for "purchases" for the benefit of the employer or the employee.

New Jersey Supreme Court Rejects Laches Defense in Restrictive Covenant Cases

By Patricia Wencelblat

Defendants in restrictive covenant cases routinely rely on the doctrine of laches as an affirmative defense to the claims brought against them. This defense may no longer be viable in New Jersey, as the New Jersey Supreme Court, in *Fox v. Millman*, 310 N.J. 401 (2012), recently categorically rejected the defense of laches in restrictive covenant cases where the plaintiff is seeking money damages at law.

Laches is an equitable doctrine that operates as an affirmative defense precluding relief when there is an unexplainable and inexcusable delay in exercising a right which results in prejudice to the opposing party. The determination as to whether the doctrine applies to a particular case is a fact-specific inquiry that requires a court to conclude that the delaying party had the opportunity to assert the right in the proper forum, and the prejudiced party acted in good faith believing that the right had been abandoned.

Factual Background

Fox involved a manufacturer and seller of industrial bags, Target Industries Inc., who brought suit against a former employee-salesman, Millman, and her new employer, Polymer Packing Inc. Millman was terminated by Target on September 7, 2000, and was hired by Polymer on September 11, 2000. Polymer was aware that Millman had worked for Target, but she advised Polymer that she was not subject to any confidentiality agreements, which Target alleged that she had signed upon her hiring. Millman provided Polymer with a customer list and solicited former Target

customers during her employment with Polymer. Millman's employment with Polymer ended in October 2004, and she generated approximately $5.1M in sales during her employment. *Id*. at 406-08.

The New Jersey Supreme Court concluded that both the trial court and appellate court had erred in applying the doctrine of laches.

Plaintiffs filed a suit on January 20, 2004, naming as defendants Millman and fictitious parties in place of her employer. Plaintiffs amended their complaint to add Polymer approximately one year later after discovering through an interrogatory that Millman had been hired by and worked for Polymer. *Id*. at 408-09.

Defendants Argued that Laches Barred the Plaintiffs' Claims

Polymer argued that the plaintiffs had unreasonably delayed bringing a suit, because (1) plaintiffs knew they had a potential claim against Millman as early as September 8, 2000, when they sent her a cease and desist letter warning her against soliciting Target's employees; (2) plaintiffs intentionally delayed bringing a suit against Millman, because she had evidence they wanted to use in an unrelated litigation; (3) plaintiffs had ample opportunity to discover Millman's new employer, but made no effort to do so; and (4) the delay was prejudicial because it exposed defendants to greater liability based on the sales Millman generated and deprived them of the opportunity to cut ties with Millman and reduce the potential damage award. *Id*. at 409-11.

Plaintiffs responded that the complaint was filed within the applicable six-year statute of limitations, and that the defendants had not acted in good faith by failing to inquire independently about the origins of Millman's customer list. *Id*.

The Court Rejects Defendants' Arguments

The court's analysis began by noting that the New Jersey Legislature enacted a general statute of limitation authorizing the commencement of a cause of action within six years of accrual. The court recognized that the purposes of statutes of limitations include (1) reducing the uncertainty regarding the timeliness of a cause of action, (2) sparing the courts from the litigation of stale claims; and (3) compelling the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend the claim. *Id*. at 415.

The court noted that equitable doctrines were generally used to extend the time for filing a claim, but that in this instance, the defendants were asking the court to shorten time. In other words, the court addressed whether it is appropriate to utilize an equitable remedy to foreclose a claim otherwise governed by a fixed statute of limitations and otherwise filed in compliance with that time constraint.

The New Jersey Supreme Court concluded that both the trial court and appellate court had erred in applying the doctrine of laches to the *Fox* case for three reasons. First, causes of action at law are governed by the statute of limitations, and the laches defense should only apply to matters in equity. Second, even if the New Jersey Supreme Court were to agree that laches could shorten an otherwise permissible time frame for initiating a litigation, they would nonetheless conclude that only the rarest of circumstances and only overwhelming equitable concerns would allow for that result. Third, the heart of the lower court's reasoning was that the plaintiffs unfairly permitted defendants to exploit the customer list and sought a recovery that would represent a windfall. However, laches was not the appropriate remedy for handling that situation, as the plaintiffs could only recover that portion of the damages that they could demonstrate were properly theirs. *Id*. at 422-24.

Conclusion

While this ruling may not be likely to change the outcome of many cases, it should have a significant impact on the affirmative defenses asserted by defendants. At least in New Jersey, defendants seeking monetary damages at law should be aware that laches is

no longer viable as an affirmative defense in restrictive covenant cases. However, defendants may still be able to invoke the doctrine of laches where plaintiffs are seeking equitable relief in the form of an injunction, and at a minimum, a plaintiff's delay might impact a court's analysis of irreparable harm should a former employer seek an injunction.

California Court of Appeals Rejects *D.R. Horton* and Affirms Holding that Arbitration Agreement Precluding Class Action Is Enforceable

By Courtney Fain

Recently, in *Nelsen v. Legacy Partners Residential, Inc.*, the California Court of Appeals, First Appellate District affirmed the trial court's granting of a motion to compel individual arbitration in a putative class action alleging violation of California wage and hour and unfair competition laws.[1] This case is helpful to employers facing challenges to arbitration agreements prohibiting class arbitration of employment disputes as unconscionable under state or federal law or California public policy because the court rejected, and was highly critical of, the National Labor Relations Board's (NLRB) ruling in *D.R. Horton, Inc.*, 2012 WL 36274 (N.L.R.B. Jan 3, 2012), that an arbitration agreement that required individual arbitration of all employment claims was unlawful under sections 7 and 8 of the National Labor Relations Act (NLRA). Still, at least one other recent decision from the California Court of Appeals shows that courts remain hostile toward arbitration agreements even in the wake of *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). Thus, employers should be mindful that even if provisions prohibiting class arbitration are valid under the law and public policy, they might nonetheless be unenforceable to the extent they are contained in arbitration agreements that are otherwise procedurally or substantively unconscionable under state law.

Concepcion and *D.R. Horton*

The court's decision in *Nelsen* is notable for its treatment of arbitration clauses in the wake of *Concepcion* and *D.R. Horton*. In *Concepcion*, the United States Supreme Court held that the Federal Arbitration Act (FAA) preempted a California law that prohibited enforcement of class action waiver provisions in arbitration agreements as unconscionable because the state law interfered with the objectives of the FAA. In *D.R. Horton*, the NLRB held that class action waivers in employee arbitration agreements violated section 8(a)(1) of the NLRA because they barred employees from exercising their section 7 rights by prohibiting class claims in any forum. In addition, the NLRB held that *Concepcion* was inapplicable to *D.R. Horton* because that case addressed only state, and not federal, law interference with the FAA.[2]

Treatment of *Concepcion* and *D.R. Horton* in *Nelsen*

In *Nelsen*, the plaintiff argued on appeal that (1) the arbitration clause she signed was procedurally and substantively unconscionable and therefore unenforceable; (2) enforcement of the arbitration clause would preclude class arbitration and therefore violated state and federal law and public policy; and (3) her claim for injunctive relief was not subject to arbitration.

As to whether the clause was unconscionable and unenforceable, that court noted first that it was the plaintiff's burden to show that the clause was *both* procedurally and substantively unconscionable. The court agreed with the plaintiff that the arbitration clause was procedurally unconscionable, noting that it was part of a preprinted form agreement, required employees to sign it on a take-it-or-leave-it basis, was included on the last two pages of a lengthy employee handbook, and was likely beyond the comprehension of the employee. However, the court held that the clause was not substantively unconscionable, in large part because it was nearly

identical to a clause that had been found to be enforceable in an earlier case, and plaintiff therefore had not met her burden of showing that the clause was unconscionable.

The court's decision in *Nelsen* is notable for its treatment of arbitration clauses in the wake of *Concepcion* and *D.R. Horton*.

Next, the court considered whether the arbitration clause prohibited class arbitration and, if so, whether that would render it unenforceable as violative of California law and public policy. The court noted that under *Gentry v. Superior Court*, 42 Cal. App. 4th 443 (2007), where an arbitration agreement expressly precludes class actions but is otherwise valid and enforceable, it may nonetheless violate California public policy if the class action waiver interferes with the enforcement of wage and hour laws. Under *Gentry*, if a court concluded that it would be impractical to prosecute an individual arbitration, the class action waiver would not be not enforced. The court in *Nelsen* rejected application of *Gentry*. First, the court noted that the "continuing vitality" of the holding in *Gentry* that declining to enforce a class action waiver on public policy grounds did not violate the FAA "has been called into serious question" after *Concepcion*. Without deciding that issue, the court concluded that the plaintiff had not met the predicate showing required under *Gentry* in the lower court proceedings – that is, she had not shown that (1) potential individual recoveries were small; (2) there was a risk of employer retaliation; (3) absent class members were unaware of their rights; and (4) only a class action could compel the defendant to comply with overtime laws. Therefore, even if *Gentry* remained good law, the plaintiff had not made the requisite showing.

Having concluded that the class action waiver was enforceable even under California public policy, the *Nelson* court next considered whether the waiver was valid post-*D.R. Horton*. Importantly, the court noted that *D.R. Horton* was likely inapplicable because the plaintiff was a manager, and therefore excluded from the NLRA. Still, before noting that crucial, dispositive fact, the court detailed its reasons why it was declining to follow the reasoning of *D.R. Horton*. First, the court noted that just as it was not bound by the decisions of lower federal courts, it was not bound by federal administrative agencies' rulings. Second, even if it were to generally consider such administrative agency interpretations persuasive, it would not do so with respect to *D.R. Horton* where (1) only two NLRB members agreed with the decision; (2) the "interplay of class action litigation, the FAA, and section 7 of the NLRA" fell "well outside" the NLRB's area of "core expertise in collective bargaining and unfair labor practices;" and (3) the decision was a "novel interpretation of section 7 and the FAA."

Finally, the court rejected the plaintiff's claim that her request for injunctive relief could not be subject to arbitration, noting that the authority relied upon by the plaintiff was pre-*Concepcion*, and that "absolute prohibitions on the arbitration of particular kinds of claims" was the type of rule that was likely not valid under *Concepcion*'s "sweeping rule of FAA preemption."

Implication for Employers

The court's rejection of *D.R. Horton* (even if it is dicta) and its questioning of long-established case law in the wake of *Concepcion* provides support to employers facing challenges to class action waivers as *per se* unenforceable. However, the court only reached its holding after first finding that the plaintiff had not shown that the arbitration agreement at issue was both procedurally and substantively unconscionable. Another recent decision in California's Second Appellate District shows that courts continue to carefully examine arbitration agreements for unconscionability under state law.

In *Sparks v. Vista Del Mar Child & Family Services*, the court noted that *Concepcion* "did not eliminate state law unconscionability as a defense to the enforcement of arbitration agreements subject to the Federal Arbitration Act."[3] While *Sparks* did not deal with class action waivers, it is noteworthy

because the court affirmed the lower court's refusal to compel arbitration where the arbitration agreement was both procedurally and substantively unconscionable. It was procedurally unconscionable because it was a contract of adhesion, did not contain the rules of arbitration, was not subject to negotiation, and was buried within an employee handbook with no special attention called to the acknowledgment signed by the employee. As to the last factor, the court relied upon California case law noting that mere acknowledgment of receipt of a handbook containing an arbitration clause did not create a contract under California law that could bind an employee to arbitration, and noted that the employer-defendant in *Sparks* had corrected this "deficiency" in a later handbook by requiring employees to sign an acknowledgment specifically addressing the arbitration provision.

The validity of a clause precluding class action waivers is irrelevant if the entire arbitration agreement is unconscionable.

The court in *Sparks* also concluded that the arbitration agreement was substantively unconscionable because it required employees to relinquish all administrative and judicial rights but did not provide for discovery rights as required under California law.

Both *Nelsen* and *Sparks* caution that employers should be mindful that the validity of a clause precluding class action waivers is irrelevant if the arbitration agreement is otherwise unenforceable, and should take steps to ensure that the entire arbitration agreement will pass muster as to unconscionability. Such steps include ensuring the arbitration agreement is bilateral, is not buried in an employee handbook, and is separately acknowledged in writing by the employee. As to substantive unconscionability, employers in California should be mindful of the requirements under the California Arbitration Act, including with respect to pleading and discovery requirements.

Finally, while *Nelsen* provides support for compelling individual arbitration of employment claims, employers should be mindful that the California Supreme Court has not yet addressed the impact of *Concepcion* or *D.R. Horton* on the enforcement of class action waivers. However, the issue was presented in a petition for review on July 16, 2012, in *Iskanian v. CLS Transportation Los Angeles, LLC*. California employers should continue to monitor developments closely.

1 *See Nelsen v. Legacy Partners Res., Inc.*, --- Cal. Rptr. 3d ---, 2012 WL 2913809, *1 (Cal. Ct. App. July 18, 2012).

2 Section 8(a)(1) prohibits employers from engaging in conduct that "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of" section 7 protected activities. National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158. Section 7 grants covered private sector employees, including non-unionized employees, "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.* at § 7(a).

3 *See Sparks v. Vista Del Mar Child & Family Servs.*, --- Cal. Rptr. 3d ----, 2012 WL 3075896, at *4 (Cal. Ct. App. July 30, 2012).

Retaliatory Hostile Work Environment Recognized as Cause of Action in Eleventh Circuit

By Ami G. Zweig

In a matter of first impression for the federal appellate court covering Alabama, Florida and Georgia, the Eleventh Circuit Court of Appeals recently joined its sister circuits in recognizing a cause of action for retaliatory hostile work environment. The decision, *Gowski v. Peake*, 682 F.3d 1299 (11th. Cir. Jun. 4, 2012), not only affirmed that Title VII makes it unlawful for an employer to create a hostile work environment in retaliation against an employee for having engaged in a protected activity, but also limited the defenses available to employers when facing such a charge.

What Is a Retaliatory Hostile Work Environment?

Courts have long-since recognized that Title VII of the Civil Rights Act of 1964, the primary federal law prohibiting discrimination in terms or conditions of employment based upon status in a protected class, encompasses claims for discrimination in the form of a hostile work environment. A plaintiff establishes a hostile work environment claim by demonstrating that "the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[1]

Title VII also makes it unlawful for an employer to retaliate against an employee because the employee "has opposed any … unlawful employment practice" or "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]."[2] As the Eleventh Circuit explained, "[t]o establish a prima facie case of retaliation, the plaintiff must show that (1) she engaged in statutorily protected activity; (2) she suffered a materially adverse employment action; and (3) there was a causal link between the two."[3]

The question before the Eleventh Circuit in *Gowski* was whether a hostile work environment that is causally linked to an employee's having engaged in a statutorily protected activity creates an independent cause of action for retaliation under Title VII.

Case Background

Doctors Diane Gowski and Sally Zachariah are former employees of the Bay Pines VA hospital and medical center in Florida. Dr. Gowski, a hospitalist, began working at Bay Pines in 1997; Dr. Zachariah, a neurologist and researcher, started there in 1989. Zachariah filed Equal Eployment Opportunity (EEO) complaints in June 2005 and April 2006; Gowski filed an EEO complaint in October 2005. In August 2007, both doctors filed a lawsuit alleging that the hospital retaliated against them after they filed their respective EEO complaints.

At trial, the doctors argued that "Bay Pines's management 'made a concerted effort to retaliate against employees who filed EEO claims against them, or opposed their discriminatory or retaliatory actions.'"[4] Each alleged that a multitude of discrete acts taken by the hospital administration following their respective EEO complaints constituted unlawful retaliation, and also created a hostile work environment. Gowski alleged that the retaliation consisted of "changing her duty assignments, removing her from committee chair positions and taking her off committees altogether, denying her privileges, reprimanding her, counseling her and suspending her, refusing to investigate her allegations against another doctor, soliciting complaints about her, lowering her proficiency reports, accusing her of an altercation with another doctor, and charging her $18,000 for an alleged debt incurred eight years earlier."[5] Zachariah alleged that the retaliation consisted of "lowering her proficiency reports, giving her smaller bonuses than those her colleagues received, suspending her research activities, shortening the time for which her privileges were approved, realigning neurology as a section under medicine

services, removing her from the rotation as section chief, identifying her as a participant in a tort claim, removing her as leader of the stroke group, issuing a reprimand for negligence, suspending her and recommending her termination, and denying her access to the grievance and appeals process."[6]

The Eleventh Circuit explained that recognizing a cause of action for retaliatory hostile work environment furthers the goal of preventing supervisors from deterring protected conduct.

After a two-week trial, the jury rendered a split verdict: on the one hand finding that, while Gowski and Zachariah experienced retaliation, the hospital administration "would have taken the same actions even in the absence of the protected activity" (*i.e.*, the "same-decision" defense applied to the individual, discrete acts) and so the defendants were not liable for the discrete acts of alleged retaliation; and on the other hand finding that the doctors did experience a retaliatory hostile work environment.[7] For prevailing on the retaliatory hostile work environment charge, Gowski was awarded $16,000 in lost wages and $250,000 in emotional damages, while Zachariah was awarded $90,000 in lost wages and $1,000,000 in emotional damages. Defendants moved for judgment as a matter of law, arguing that "even if a retaliatory hostile work environment claim was cognizable in the Eleventh Circuit, discrete acts of retaliation could not form the basis of the claim" and so "the doctors' claim failed because the only evidence they put forth were the discrete acts."[8] The district court denied the motion, and the defendants appealed.

Eleventh Circuit Holding

In conformity with its sister circuits, the Eleventh Circuit held that it would recognize a cause of action for retaliatory hostile work environment, explaining that doing so was consistent with "the statutory text, congressional intent, and the EEOC's own interpretation" of Title VII, and would further the goal of "prevent[ing] supervisors from deterring protected conduct."[9]

Having done so, the court reviewed the evidence to determine whether Gowski and Zachariah had sufficiently established their claims of a retaliatory hostile work environment, which requires that plaintiffs demonstrate both an objective component – "an environment that a reasonable person would find hostile or abusive" – and a subjective component – "an environment that the victim subjectively perceive[s] ... to be abusive."[10] The court explained that, while "[d]iscrete acts cannot alone form the *basis* of a hostile work environment claim ... the jury could *consider* discrete acts as part of a hostile work environment claim."[11] Defendants asserted that the discrete acts alleged by the plaintiffs "cannot be considered as part of the hostile environment because the retaliatory intent was not the 'but-for' cause where the jury applied the same decision defense."[12]

Though the Eleventh Circuit agreed with the defendants that "retaliation must be the 'but-for' cause," the court stated, "we cannot agree that the same-decision defense eliminated such causation in a hostile work environment claim."[13] The court held that, although the same-decision defense "preclude[d] liability for each of the acts individually, it is not enough to eliminate liability for the hostile environment caused by the retaliatory animus when the discrete and non-discrete acts are taken collectively. . . . [A]lthough the same-decision defense eliminates but-for causation for each discrete action, it does not eliminate the but-for causation that matters in a retaliatory hostile work environment claim – the severe and pervasive accumulation of actions that would not have occurred but for the retaliatory reason, even if each action alone was justifiable."[14]

Key Takeaways

The Eleventh Circuit decision in *Gowski v. Peake* should serve as a reminder to employers of the broad scope of Title VII's anti-discrimination and anti-retaliation provisions. Not only did the court make universal the recognition of retaliatory hostile

work environment as its own cause of action, but it also permitted such a claim to stand even when a jury had found that the employer would have made the same decisions with respect to each of the discrete acts on their own. In other words, while the same-decision defense allowed the employer to avoid liability for any of the discrete acts of alleged retaliation, the employer was still liable for the *confluence* of all these discrete acts, which together created a hostile work environment following the doctors' EEO complaints. Thus, when dealing with an employee who has filed an EEOC charge or engaged in any other protected activity, employers should be aware that they risk facing retaliation claims not only for discrete acts but also for series of events that could create a hostile work environment, and further, that they may not be able to rely upon the same-decision defense to avoid liability if such an environment is created.

The same-decision defense does not eliminate the but-for causation that matters in a retaliatory hostile work environment claim.

1 *Gowski*, 682 F.3d at 1311 (quoting *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21 (1993)).

2 42 U.S.C. § 2000e-3(a).

3 *Gowski*, 682 F.3d at 1311 (citing *Dixon v. The Hallmark Companies, Inc.*, 627 F.3d 849, 856 (11th Cir. 2010)).

4 *Id.* at 1304.

5 *Id.*

6 *Id.*

7 *Id.* at 1308.

8 *Id.*

9 *Id.* at 1312.

10 *Id.* (citation and internal quotes omitted).

11 *Id.* at 1312-13 (emphasis in original).

12 *Id.* at 1313.

13 *Id.*

14 *Id.*

Employer Update is published by the Employment Litigation Practice Group and the Executive Compensation and Employee Benefits Practice Group of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com.

Editors

Lawrence J. Baer	lawrence.baer@weil.com	+ 1 212 310 8334
Allan Dinkoff	allan.dinkoff@weil.com	+ 1 212 310 6771

Practice Group Contacts

Jeffrey S. Klein
Practice Group Leader
New York
+1 212 310 8790
jeffrey.klein@weil.com

Boston
Thomas C. Frongillo
+1 617 772 8335
thomas.frongillo@weil.com

Dallas
Yvette Ostolaza
+1 214 746 7805
yvette.ostolaza@weil.com

Michelle Hartmann
+1 214 746 7847
michelle.hartmann@weil.com

Frankfurt
Stephan Grauke
+49 69 21659 651
stephan.grauke@weil.com

Houston
Melanie Gray
+1 713 546 5045
melanie.gray@weil.com

London
Joanne Etherton
+44 20 7903 1307
joanne.etherton@weil.com

Ivor Gwilliams
+44 20 7903 1423
ivor.gwilliams@weil.com

Miami
Edward Soto
+1 305 577 3177
edward.soto@weil.com

New York
Lawrence J. Baer
+1 212 310 8334
lawrence.baer@weil.com

Allan Dinkoff
+1 212 310 6771
allan.dinkoff@weil.com

Gary D. Friedman
+1 212 310 8963
gary.friedman@weil.com

Michael K. Kam
+1 212 310 8240
michael.kam@weil.com

Steven M. Margolis
+1 212 310 8124
steven.margolis@weil.com

Michael Nissan
+1 212 310 8169
michael.nissan@weil.com

Nicholas J. Pappas
+1 212 310 8669
nicholas.pappas@weil.com

Shanghai
Helen Jiang
+86 21 3217 9511
helen.jiang@weil.com

Washington, DC
Michael Lyle
+1 202 682 7157
michael.lyle@weil.com