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Worth Covering: News, Tips, and Thoughts for Professional Liability Carriers

NEWSLETTER

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Welcome back to FisherBroyles' newsletter "Worth Covering: News, Tips, and Thoughts for Professional Liability Carriers"! In this month's issue, we discuss (i) an age discrimination claim surviving summary judgment; (ii) strategic considerations before filing a motion to dismiss, and (iii) cooperation agreements.

"I will get by, I will survive…" — Age Discrimination Case Survives Summary Judgment

Given that baby boomers are living longer and wanting to work past the usual retirement age, and that 40 is the new median age in the United States, companies should expect to see an uptick in age related claims. A recent federal district court decision serves as a refresher course on age discrimination in the context of a failure to promote. In *Gonzalez-Bermudez v. Abbott Labs. PR Inc.*, 2016 U.S. Dist. LEXIS 140536 (D.P.R. October 9, 2016), the United States District Court for the District of Puerto Rico denied the Defendant's motion for summary judgment on the Plaintiff's claim under the Age Discrimination in Employment Act ("ADEA").

The ADEA protects employees age 40 and over from discrimination in employment (hiring, firing, promotion, etc.) based on their age. The Supreme Court requires plaintiff to "establish that age was the 'but-for' cause of the employer's adverse action," a much stricter standard than that applied in Title VII cases. *Gross v. FBL Fin. Servs. Inc.*, 557 U.S. 167, 129 S.Ct. 2343, 2351, 174 L.Ed. 2d 119 (2009). Courts have held that replacement of an employee with a younger employer cannot make a *prima facie* case of age discrimination if the age difference is less than five years. *See Williams v. Raytheon Co.*, 220 F.3d 16, 20 (1st Cir. 2000).

In *Gonzalez-Bermudez*, the Court denied defendant's motion for summary judgment primarily for the following reasons:

- Plaintiff established that the demotion was an adverse employment action, she met the minimum requirements of the job, received "Achieves Expectations" performance ratings, and was never placed on an improvement plan or disciplined;
- There was sufficient evidence to support that similarly-situated younger counterparts were treated more favorably in terms of raises and promotions;
- Plaintiff was excluded from important company processes and meetings;
- The job was filled by a 31-year-old external candidate (against company policy of favoring internal candidates and plaintiff met the requirements of the position); and
- Defendant was inconsistent and contradictory on the record.

Additionally, the Court found that the employer had possessed certain relevant evidence yet destroyed it after being notified of a potential litigation. Accordingly, the Court granted plaintiff's request for a spoliation sanction and noted that the jury would be instructed to infer that certain e-mails destroyed would have been unfavorable to the employer.

Best practice Tips: As soon as a potential claim is made, investigate it; in making a decision to not promote an employee over 40, make sure you have a reasonable basis for the decision and document it; immediately implement a document retention policy and make sure you maintain all documents relevant to claims. Following this guidance should help reduce significantly a company's exposure to such claims. – *Jose M. Jara*

Just Because You Can Doesn't Mean You Should: Strategic Considerations before Moving to Dismiss

Under the Federal Rules of Civil Procedure (FRCP), a party can move to dismiss a complaint for failure to state a claim upon which relief can be granted. Commonly referred to as a "12(b)(6) motion," it has the potential to dismiss several of the plaintiff's causes of action or the entire case. Thus, at first blush, filing such a motion can be particularly appealing, especially when one is served with a poorly drafted complaint. Before proceeding, however, it is important to consider whether it is the best strategy least you end up simply educating your opponent and incurring additional fees and costs.

A motion to dismiss tests the legal sufficiency of the claims that are asserted in the complaint. In considering such a motion, the court is obliged to accept all of the complaint's allegations as true and draw reasonable inferences from them in favor of the drafter. Further, in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), the U.S. Supreme Court stated that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"

At the outset, it must be stressed that the FRCP prohibits the filing of motions that are brought for "any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase in the cost of litigation." *See, FRCP* 11. Assuming that you can argue in good faith that the plaintiff failed to state a claim upon which relief can be granted, should you move to dismiss? One point to consider is whether the case is likely to settle or have protracted discovery and ultimately go to trial. **Strategy Pointer #1:** If settlement is likely, drafting a strong motion to dismiss followed by a letter to the opposing party to entertain settlement discussions may facilitate an early and favorable settlement of the case. The plaintiff may not want to risk having your motion granted and the entire complaint dismissed.

On the other hand, a well-researched motion may provide the plaintiff with knowledge and the impetus to amend its complaint thereby making it even stronger and more difficult to defeat. Indeed, Rule 15(a) of the FRCP provides plaintiff the right to amend a pleading "once as a matter of course" within 21 days after service of a motion to dismiss. Further, courts frequently grant leave to amend thereby giving the plaintiff a second chance at strengthening its complaint. Researching your judge's prior rulings on motions to dismiss can shed light on how your motion may fare. The bottom line is, after incurring the fees and costs of a motion to dismiss you may be faced with a stronger amended complaint.

Consideration should also be given to the fact that the plaintiff will merely have to show a plausible claim to relief to successfully defeat a motion to dismiss. **Strategy Pointer #2:** Therefore, you may want to forego filing a motion to dismiss, conduct discovery, and move for summary judgment. FRCP 56 states: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Thus, plaintiff must demonstrate an issue related to a material fact to defeat a motion for summary judgment—which is a more difficult feat. Careful analysis of the above factors will help determine if moving to dismiss is the best strategy to pursue. – *Donna Hoffman*

Spilling the beans…Not Always the Best Policy!

In the field of white collar litigation, there is tremendous pressure on both individuals and corporations to cooperate with the U.S. Attorney's Office in the hopes of getting a reduced sentence or, ideally, a "deferred" or "non-prosecution" agreement. However, the decision to cooperate is one that should be carefully considered as it is not always in the client's best interests, especially for an individual defendant, rather than a corporation.

To get the benefit of cooperation, a defendant must first convince the Government to offer them a cooperation agreement. These agreements are not freely given to anyone who asks, but are carefully considered. Unfortunately, the Government rarely agrees to offer a cooperation agreement until after they have heard and evaluated all of the information which a defendant has to offer.

That means that a client must be willing to forego all possible leverage and spill their guts to investigators without any promise of a cooperation agreement at the end of the tunnel. Worse yet, not only does the client have to answer all of the government's questions about the acts being investigated, but it also has to provide information about any other illegal activities it may have engaged in, no matter how unrelated (i.e. illegal drug use, tax evasion, etc.).

Ultimately, even if the client is completely open and honest with investigators, the decision to offer a cooperation agreement is based almost exclusively on the prosecutor's belief as to whether they can use that information to make new arrests and convict other people. If they already know the information that you provided, then they don't need your client's cooperation. There are any number of reasons why a prosecutor may decide not to offer a cooperation agreement, which are completely outside of the client's (and their lawyer's) control.

The risks associated with a failed attempt at cooperation are numerous. By submitting to questioning, your client is at a significant disadvantage at trial because it waived its right to remain silent and gave prosecutors a free preview. If the co-defendants find out that the client tried to cooperate against them, coordinating a unified defense at trial becomes much more difficult. Plus, if the client provides prosecutors with information about additional misconduct that it committed, the client could face additional charges.

Sometimes, even a successful cooperation can have unexpected consequences. As prosecutors continue to push the envelope in the types of prosecutions that are brought, they sometimes overstep their bounds and charge people for conduct that a judge or jury later determines does not even constitute a crime. Consider, for example, the recent landmark case of *United States v. Newman*, 773 F.3d 438 (2nd Cir. 2014), in which the appellate court reversed insider trading convictions, holding that the U.S. Attorney's Office was prosecuting lawful conduct based on an erroneous definition of insider trading. There have been several cases like this where charges are dismissed against the defendants who fought the charges but where, ironically, the only people who ended up with criminal convictions were those who signed cooperation agreements and pleaded guilty to conduct that isn't even a crime (and can't have their conviction overturned because they waived their appellate rights)! Similarly, in the 2005 bid-rigging prosecution of Marsh & McLennan Companies, Inc., individual defendants were either acquitted or had their convictions overturned on appeal but the cooperating witness ended up with a criminal record.

Of course, there are many cases where defendants benefit tremendously through cooperation, making the foregoing risks worthwhile. Accordingly, every case must be individually considered and analyzed to determine the appropriate strategy.
– *Tim Parlatore*

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