Labor and Employment Law Reporter

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This Volume Includes:

EMPLOYEE HANDBOOK CONSTITUTES COLLECTIVE BARGAINING AGREEMENT

In the unpublished decision of *Flanagan v. Camau Pico, et al*., Mich App No. 272305 (02/27/07) the Michigan Court of Appeals significantly modified the traditional understanding of the significance of employee handbooks. John Flanagan filed a wrongful discharge/breach of contract action following his termination from employment at Camau Pico. He lent his pickup truck to a co-worker to haul scrap wood from their place of employment. Unbeknownst to Flanagan the co-worker actually took new wood products. Following an investigation Flanagan was fired. The Court did not delve into details of Flanagan's termination or whether the co-worker received similar discipline.

Flanagan asserted numerous claims; the only ones considered on appeal were wrongful discharge and breach of contract. In earlier proceedings in the case, Flanagan characterized the employee handbook as an employment contract to be analyzed under state contract law. He was attempting to demonstrate that the employee handbook created a "just cause" employment relationship, meaning that he could not be terminated except for cause, with the observance of certain procedural protections. The Court of Appeals, however, interpreted the employee handbook as something more.

The Court held that the Camau Pico employee handbook was a *collective bargaining agreement.* The handbook referenced an employee association as the exclusive representative of shop employees with respect to wages, hours, grievances, benefits and other conditions of employment. It stated that other employees covered by the handbook would become members of the "association" and allow for the deduction of dues from all employees' pay checks. The handbook refers to itself as "an agreement," which the Court of Appeals likened to a traditional collective bargaining agreement. Despite the language in the

handbook, there was no indication that there was in fact an employee "association" or that any of the provisions requiring payment of dues, etc. were actually followed. Because the handbook read like a traditional collective bargaining agreement, it was held to be one.

Obviously, this decision has far reaching implications. Every employee handbook now must be examined to ascertain whether it has language comparable to that contained in traditional collective bargaining agreements. If it does, the Michigan courts may interpret them to be collective bargaining agreements. Regardless whether there is actually an employee association and regardless whether the provisions of the handbook are strictly followed, the court may conclude that it is a collective bargaining agreement. It is incumbent upon employers with employee handbooks to verify that the language does not allow for the interpretation that it is a collective bargaining agreement.

COURT OF APPEALS CLARIFIES UNEMPLOYMENT ELIGIBILITY STANDARDS

In *Eyre v. Saginaw Correctional Facility*, ___Mich App ____ (02/27/07), the Michigan Court of Appeals clarified who has the burden of proof where a laid-off employee refuses to accept a suitable offer of other employment. Previously, no Michigan court had ever ruled in this area. Janis Eyre worked in the business office at the Saginaw Correctional Facility and was laid off from that position. She was offered a similar position at the Standish Maximum Correctional Facility, but she declined on the basis of health concerns and the longer driving distance. She was initially granted unemployment benefits, due to the layoff since the department of labor concluded she had a good reason for refusing suitable work. Following the employer's appeal, the hearing referee, the Board of Review, and the Circuit Court each found that she did not have good cause to refuse the new position. Finding this issue not properly analyzed by the lower court, the matter was vacated and remanded for further proceedings.

Based in large part on who may have the best access to the necessary information, the Court of Appeals recognized that a shifting burden of proof analysis is required on the issue of whether an offer of suitable employment has been made sufficient to defeat a claim for unemployment benefits. An employer, likely being more familiar with job requirements and working conditions of the new position, has the initial burden of establishing that an offer of suitable employment has been made. Once the employer meets that burden, the claimant must establish good cause exists to refuse that position. This shifting burden of proof analysis is like that applied in other areas such as civil rights claims. From this point onward, every unemployment dispute concerning the refusal to accept suitable work must follow this shifting burden analysis.

CHOOSE YOUR ARBITRATOR CAREFULLY

The Sixth Circuit Court of Appeals recently confirmed that even bad arbitration decisions should not ordinarily be disturbed by the courts. *In Michigan Family Resources v. SEIU Local 517M*, ___F3___ (CA6, 2007), the Court was asked to reconsider an arbitration award in favor of the local union. The arbitrator concluded that the SEIU employees were entitled to a four percent (4%) cost of living increase, based on the arbitrator's interpretation of the controlling collective bargaining agreement.

The Court of Appeals gave a lengthy explanation of the limited circumstances under which a court may review the merits of an arbitration award. It recognized that courts have only a limited role in reviewing arbitration decisions and must exercise restraint when considering same. The Court concluded that so long as an arbitrator is "arguably construing" a collective bargaining agreement, courts may not examine the merits of the arbitrator's decision.

In this particular case, the Court of Appeals recognized that the arbitrator was "arguably construing the contract but, the arbitrator, perhaps just as plainly made a serious error" in doing so. Even though the arbitrator may have made a serious error in construing the contract, that fact alone did not give the court the right to overturn the decision. As a result, even a bad decision, so long as it is made construing the contract, must be allowed to stand.

It is vitally important that competent arbitrators be selected to resolve contract disputes. Using arbitrators with a sound understanding of labor law principles will increase the likelihood that a decision is well reasoned and well founded. If the award does not even arguably construe the contract then a court may set it aside. This is why it is important to take great care in selecting an arbitrator.

SILENCE IS NOT ALWAYS GOLDEN

In a disturbing development, the Sixth Circuit Court of Appeals allowed a case to go forward based not on what an employer said or did, but on the employer's silence. In *Asmo v. Keane, Inc*., ____F3____ (2006), Susan Asmo was laid off due to a reduction in work following the terror attacks of September 11, 2001. Incidentally, a couple months before she was laid off, Ms. Asmo mentioned during a conference call that she was expecting twins. Most of those on the conference call made congratulatory statements, while her supervisor did not. In fact, no time prior to the lay off did Asmo's supervisor discuss the fact that she was pregnant. Asmo filed suit claiming that her employment was terminated because of her pregnancy, in violation of Title VII of the Civil Rights Act of 1964. The trial court dismissed the case on motion because Asmo failed to both make a *prima facie* case of discrimination and failed to rebut the legitimate, non-discriminatory reasons for her termination. The Court of Appeals, however, reversed.

The Court of Appeals focused on the fact that Asmo's supervisor said *nothing* about her pregnancy during the conference call. When the pregnancy was announced, during the call, her supervisor did not comment on it but others did. In fact, the supervisor never mentioned Asmo's pregnancy until after she was discharged. The court held that the supervisor's silence is evidence of pretext because it can be read as speculation regarding the impact of Asmo's pregnancy on her work, and an employer's speculation or assumption about how an employee's pregnancy will interfere with her job can constitute evidence of discriminatory animus.

This decision puts employers in an incredible bind. Most savvy managers would probably say it is best not to comment on issues, such as pregnancy, for fear that doing so will result in a civil rights law suit. Now, the Court of Appeals believes that by not saying anything managers could be perceived as being discriminatory. Hopefully, the employer in this case will attempt to have this decision reversed.

FMLA LEAVE MAY STILL ENTITLE AN EMPLOYEE TO COMPENSATION

In *Skladanowski v. Clear Channel Radio*, Mich App No. 261004 (12/14/06), the Court addressed an issue seemingly overlooked by the Family and Medical Leave Act ("FMLA"). Skladanowski worked for Clear Channel Radio under a commission structure in which she would be paid commissions only after the advertising had actually aired on the radio and been billed to the advertiser. Typically, Clear Channel employees received their commissions some months after they actually made the advertising sale. Skladanowski took FMLA leave after making a sale but before she got the commission. Her employer refused to pay the commissions due her, even though the advertisements had been "aired and billed".

The FMLA does provide that leave granted to an employee "may consist of unpaid leave" 29USC2612(c). However, that FMLA provision does not directly address employees who are paid on commission. Although the FMLA indicates that an employer should not have to pay an employee for the work the employee misses while on leave, it

does *not* provide a basis for refusing to pay commissions for sales that an employee has already earned, and is entitled to, under a valid agreement with the employer.

Employers should be aware of the fact that employees may still be entitled to payment of commissions, even while they are on what is otherwise an unpaid FMLA leave. Because the payment is not being made for work the employee is missing, the earned commission should still be paid.

COURT OF APPEALS REJECTS *PER SE* RULE TO INFER DISCRIMINATORY INTENT

In *Smith v. Mosaica Education, Inc.*, Mich App No. 269764 (03/06/07), the Michigan Court of Appeals upheld the dismissal of a race discrimination lawsuit brought under the Elliott-Larsen Civil Rights Act (ELCRA), concluding that the mere fact that the discharged African-American Plaintiff was replaced by a white employee did not "give rise to an inference of unlawful discrimination" necessary to support a preliminary case of race discrimination.

Charma Smith, an African-American woman, was hired by Mosaica Education as the Chief Administrative Officer (principal) of a Flint charter school. Although she initially received high marks for her performance, she was later regarded by staff as "erratic, superficial and belligerent." Another Mosaica employee, Dorothy Jordan (also an African-American woman), recommended that Smith not return as CAO for the next school year.

Smith resigned under pressure and was replaced by a white male. Smith alleged that the fact that her replacement was white, in itself, established she was discharged under circumstances giving rise to an inference of unlawful discrimination, a necessary element of a preliminary case of race discrimination.

The Court of Appeals affirmed the trial court's dismissal of Smith's ELCRA claim. Viewed as a whole, the evidence, which included the fact that a white male was hired to replace Smith (and also included the fact that an *African-American woman* replaced the white male), could not convince "a reasonable jury [that there was] unlawful discrimination in this case."

MICHIGAN DEPARTMENT OF CIVIL RIGHTS RESPONDS TO PROPOSAL 2

On March 7, 2007 the Michigan Civil Rights Commission (MCRC) issued a report examining the impact of Proposal 2 on Michigan. The report was in response to Governor Granholm's Executive Directive #2006-7 instructing the MCRC to investigate the impact of the adoption of Proposal 2, issue a report detailing its findings, and offer specific recommendations. Pursuant to Executive Directive, the MCRC, through the Michigan Department of Civil Rights (MDCR), conducted a three (3) month investigation which included meetings with seventeen (17) state departments, six (6) other state agencies, contact with the Michigan Council for University Presidents, a review of state statutes, and a review of the best practices in other states.

MCRC found that Proposal 2 does not end equal opportunity or the critical pursuit of diversity and inclusion in the state of Michigan. Of the forty-five (45) state programs relating to the operation of public employment, MCRC found that only eight (8) [eighteen percent (18%)] of the programs may be in jeopardy as a result of Proposal 2. MCRC also believes that Proposal 2 does not eliminate *all* affirmative action and affirmative action programs, but only those that grant preferential treatment based solely on race, sex, ethnicity, or national origin in the operation of public employment, public education, and public contracting. Similarly, it does not believe that Proposal 2 requires the banishment of the terms "race" or "sex" from the official state vocabulary as it relates to the state's decision making process. The view expressed by MCRC is that race and sex may still be used under certain circumstances, so long as race and sex are not the *sole* basis in which to make certain decisions.

While the position statement issued by MCRC does not constitute a binding rule of law, it clearly evidences the leanings of the Civil Rights Commission and how it likely would address issues brought before it involving this subject. MCRC correctly recognized that today's employers demand a highly diverse and educated work force and expect that such will be provided by today's colleges and universities. However, the MCRC report seems to focus on ways to maintain the status quo, notwithstanding the voters' approval of Proposal 2. The significance of the MCRC report is still being debated and whether it creates new policy or results in the creation of new policy or maintaining the status quo remains to be seen.

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