THE PASCHOS LAW UPDATE NEWSLETTER
THOMAS PASCHOS & ASSOCIATES P.C. ATTORNEYS AT LAW

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I. EMPLOYMENT LAW

Title VII Grants Aggrieved Third Parties the Right to Sue for Retaliation

In, *Thompson v. North American Stainless, LP*, --- S.Ct. ----, 2011 WL 197638 (U.S., January 24, 2011), both petitioner Eric Thompson and his fiancé, Miriam Regalado, were employees of respondent North American Stainless (NAS). In February 2003, Regalado filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging sexual discrimination against NAS. Three weeks later, NAS fired Thompson.

Thompson filed a charge with the EEOC and then sued NAS in the Eastern District of Kentucky under Title VII of the Civil Rights Act of 1964 claiming that NAS fired him in order to retaliate against his fiancé for filing her charge with the EEOC. The District Court granted summary judgment to NAS, concluding that Title VII "does not permit third party retaliation claims." After a panel of the Sixth Circuit reversed the District Court, the Sixth Circuit granted rehearing and affirmed. The court reasoned that because Thompson did not "engag [e] in any statutorily protected activity, either on his own behalf or on behalf of Miriam Regalado," he "is not included in the class of persons for whom Congress created a retaliation cause of action." The Supreme Court granted certiorari.

The U.S. Supreme Court noted that it was undisputed that Regalado's filing of a charge with the EEOC was protected conduct under Title VII. The Court, assuming that NAS fired Thompson in order to retaliate against Regalado for filing a charge of discrimination, was left with two issues to resolve: Did NAS's firing of Thompson constitute unlawful retaliation? And, if it did, does Title VII grant Thompson a cause of action?

On the first issue, the U.S. Supreme Court held that Title VII's anti-retaliation provision must be construed to cover a broad range of employer conduct. The Court cited Burlington N. & S.F.R. Co. v. White, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 which prohibits any employer action that "'well might have "dissuaded a reasonable worker from making or supporting a [discrimination] charge." The Court held that a reasonable worker "obviously might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."

The Court then analyzed the meaning of the term "aggrieved person" under Title VII to determine whether Title VII granted Thompson a cause of action. The Court held that an "aggrieved person" is a plaintiff who "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." Applying this test,

the Court held that Thompson fell within the zone of interests protected by Title VII. The court held: “[Thompson] was an employee of NAS, and Title VII's purpose is to protect employees from their employers' unlawful actions. Moreover, accepting the facts as alleged, Thompson is not an accidental victim of the retaliation. Hurting him was the unlawful act by which NAS punished Regalado. Thus, Thompson is a person aggrieved with standing to sue under Title VII.”

II. GENERAL LITIGATION

Trial Courts Do Not Have the Power to Terminate Arbitration Prior to Entry of Final Award

In *Fastuca v. L.W. Molnar & Associates*, --- A.3d ----, 2011 WL 147688 (Pa. January 18, 2011), Appellant, Diane L. Fastuca, in conjunction with her siblings, Louis W. Molnar, Jr. and Mary Lou Molnar, formed L.W. Molnar and Associates (collectively “Appellees”). The partnership managed real estate investment properties. The partnership endured for nearly 26 years with no major disputes among the partners until 1998 when Appellant became disenchanted with the way partnership revenues were being divided. Although Appellant tried to work out her dispute with the other partners, no amicable resolution could be reached. Accordingly, she sent Appellees a letter on September 20, 2003, notifying them of her intent to dissolve the partnership and requesting that her partnership share be distributed to her.

On November 17, 2003, Appellant filed a complaint in equity in the Court of Common Pleas of Allegheny County which requested the dissolution and winding up of the partnership, and also the issuance of a preliminary injunction to prevent any dissipation of partnership assets. In response, Appellees filed a motion to compel arbitration pursuant to the partnership agreement. That Motion was granted. Following an arbitration hearing, the arbitrator issued a “Findings of Arbitrator” and scheduled a subsequent hearing. Prior to that hearing, the plaintiff filed a Motion to Terminate the arbitration. The trial court, in finding that the “Findings of Arbitrator” was a final award, granted the Motion and modified the arbitrator’s findings. In reversing the trial court, the Superior Court found that the “Findings of Arbitrator” was not a final award, as the document merely framed the issues that remained subject to resolution at subsequent arbitration proceedings.

Appellant petitioned the Pennsylvania Supreme Court for allowance of appeal, which was granted in order to consider two issues: 1.) Whether the arbitrator's findings constituted a final award within the meaning of 42 Pa.C.S.A. § 7341? 2.) Whether a trial court has equitable powers to terminate a common law arbitration prior to the entry of a final award by the arbitrator?

The Pennsylvania Supreme Court held that the arbitrator's “findings” in the proceedings concerning the dissolution of the partnership, were not a full and final determination of all matters submitted to arbitrator for his consideration, and, therefore did not constitute an arbitration “award” under the Uniform Arbitration Act. As such, the Court held that the trial court had no authority to review such findings. In addition, the Court held that it would not recognize an equitable power of a trial court to terminate a common law arbitration proceeding before the

arbitrator has rendered an award because to do so would be against public policy. The Court noted that Pennsylvania “generally favors voluntary arbitration as a means of speedy and effective alternative dispute resolution that parties may choose to settle their disputes. Permitting micromanagement by a court of ongoing common law arbitrations in situations such as that which transpired in the present case would defeat the contractual intent of the parties who bargained for their disputes to be resolved with minimal court intrusion.”

Payments on Settlement Cease at Death of Plaintiff

In *Lesko v. Frankford Hospital*, --- A.3d ---, 2011 WL 149843 (Pa. January 19, 2011), in 2004, Kathleen Bernath brought a medical malpractice claim against appellants for injuries sustained following surgery at Frankford Hospital. In 2005, she entered into a written settlement agreement with appellants. The total consideration was in the amount of Six Million Three Hundred Thousand Dollars ($6,300,000.00).” The Agreement provided that medical insurance and appellants would directly pay Bernath lump sums of $400,000 and $4,239,890, respectively. Of particular importance, Section 2.3(i) of the Agreement provided that:

Frankford Hospital of the City of Philadelphia agrees to make payment in the following manner:

- (i) The sum of Twenty Thousand Dollars ($20,000.00) per month commencing on or about January 15, 2006. Said payment of Twenty Thousand Dollars ($20,000.00) per month shall continue for the life of Kathleen Bernath. Said payment of Twenty Thousand Dollars ($20,000.00) per month shall increase by Four Percent (4.00%) compounded annually effective each anniversary of commencement date. **No payments shall be due on or after the date of Kathleen Bernath's death.** (emphasis added).

Frankford Hospital reserved the right to fund the periodic payment liability via the purchase of an annuity policy from New York Life Insurance and Annuity Company, which would then take full responsibility for the obligations of Section 2.3. Bernath specifically agreed to this assignment.

In accordance with the agreement, Frankford Hospital issued a $4,239,890 check to Bernath. It also issued a $1,660,100 check to New York Life for the annuity purchase, but some two weeks after the check was sent to New York Life, Bernath died. Though Frankford Hospital had sent the check to New York Life, at the time of Bernath's death, the annuity contract had not yet been executed. Frankford Hospital asked New York Life to refund the $1.6 million check, claiming the annuity obligation was premised on Bernath being alive at the time the payments commenced. Appellee, as executrix of Bernath's estate, challenged the claim and requested the $1.6 million be paid to the estate.

The trial court ordered appellants to pay Bernath's estate $1,660,100. The trial court found the settlement agreement unambiguously revealed the parties' intent that the total to be paid was $6.3 million, and appellants' portion of that amount was $5.9 million-the $4.24 million lump sum and the $1.6 million paid to New York Life to fund the annuity. It held the obligation to pay the

annuity arose when the parties entered into the agreement; thus, as Bernath's death made the annuity purchase impossible, the $1.6 million should be paid to her estate. Appellants appealed, and the Superior Court affirmed, finding the duty to pay the $1.6 million to obtain an annuity was not stipulated upon an event but arose when the contract was executed.

On appeal, the Appellants argued the trial court and Pennsylvania Superior Court rewrote the settlement agreement, disregarding its unambiguous language to create an obligation contrary to the parties' intent. They maintained the agreement clearly states no payments were due after Bernath's death, and the fact she passed away mere months after the contract was created did not negate the agreement. Appellants also argued there was no obligation in the contract requiring Frankford Hospital to purchase an annuity, only the option to do so. They contended, even if there were such an obligation, the party's performance was made impossible by Bernath's death; as her survival was a basic premise of the contract, performance is now impossible, and appellants' duty is discharged.

The Pennsylvania Supreme Court held that appellants had no threshold obligation to pay $5.9 million to Bernath, but to directly pay her $4,239,890 and $20,000 per month, with the option to assign that duty to New York Life by buying an annuity for $1.6 million. That the annuity contract was not executed prior to Bernath's death is immaterial, as the unambiguous language of the settlement agreement terminated the periodic payments upon death. The Court held that since “Bernath did not agree to receive a $1.6 million lump sum, but rather $20,000 periodic payments to end upon her death, appellants are not now obligated to provide Bernath's estate with what Bernath herself did not bargain for, and are entitled to recoup the money sent to New York Life.”

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