NEWSLETTERS

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THE PASCHOS LAW UPDATE NEWSLETTER

September, 2014

I. GENERAL LITIGATION

Arbitration Clauses Must Be Explicit About Waiving the Right to Seek Relief in Court

In *Patricia Atalese v. U.S. Legal Services Group, L.P.*, 2014 N.J. LEXIS 906 (N.J. September 23, 2014), Plaintiff, Patricia Atalese, contracted with defendant, U.S. Legal Services Group, L.P. (USLSG), for debt-adjustment services. Plaintiff brought a lawsuit against USLSG in the Special Civil Part alleging violations of two consumer-protection statutes -- the Consumer Fraud Act and the Truth-in-Consumer Contract Warranty and Notice Act. She claimed the firm was not authorized to provide debt relief services in New Jersey and that it made misrepresentations or omissions about that and about the work it was doing for her and the fees it collected.

U.S. Legal Services moved to compel arbitration based on an arbitration clause stating that “any claim or dispute ... shall be submitted to binding arbitration upon the request of either party.” The provision in the agreement discussed selection of the arbitrator and the location and conduct of the arbitration but made no mention of the right to go to court or any other right or to the waiver of any right.

The trial court granted USLSG's motion to compel arbitration pursuant to the service contract. The Appellate Division affirmed, finding that "the lack of express reference to a waiver of the right to sue in court" did not bar enforcement of the arbitration clause. Plaintiff appealed.

Plaintiff argued that the arbitration clause does not comply with New Jersey law, because it does not clearly and unequivocally state its purpose in depriving [plaintiff] of her time-honored right to sue." She asserts that New Jersey courts do not uphold "arbitration provisions that fail to: (1) indicate that the parties waive their right to sue; or (2) indicate that arbitration is the parties' exclusive remedy." Plaintiff did not suggest that any "magic words" are necessary for a waiver of rights but did assert that the language for such a waiver must be clear and unequivocal.

USLSG argued that the term "arbitration" is universally understood and that "[n]o reasonable consumer could have any doubt that arbitration is different than litigation." USLSG emphasizes that the Federal Arbitration Act (FAA) reflects a "liberal federal policy favoring arbitration" and requires courts to "place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." USLSG also argued that the arbitration clause is sufficiently clear and "adequately advised" plaintiff that her lawsuit would be resolved "in an arbitral forum."

The Supreme Court overturned holding that an arbitration provision, like any comparable contractual provision that provides for the surrendering of a constitutional or statutory right, must clearly and unambiguously notify the consumer that he or she is waiving the right to seek relief in a court of law. The Court found that the arbitration agreement in this case was unenforceable because it failed to notify plaintiff that, by entering into the agreement, she was surrendering her right to seek relief in a judicial forum.

II. EMPLOYMENT LAW

Third Circuit Sets Standard for Return to Work Under the Family and Medical Leave Act

In *Budhun v. Reading Hospital and Medical Center*, 2014 U.S. App. LEXIS 16541 (3d Cir. Pa. August 27, 2014), Ms. Budhun worked for Reading Hospital in a clerical position that required her to be typing approximately 60 percent of the time. In an accident unrelated to work, plaintiff broke the bone in her hand restricting the full use of her hand and fingers for typing. On August 2, 2010, plaintiff arrived at work with a splint and received an email from the human resources department telling her that her injury prevented her from "working full duty" with FMLA documents attached.

Budhun received medical attention and, by email dated August 12, 2010, submitted a portion of her completed leave of absence paperwork and a note from her doctor informing Reading Hospital that she could return to work on August 16, 2010 with no restrictions. Upon returning to work that day, the human resources department emailed Ms. Budhun and indicated that she would need to work at full capacity, which wouldn't be possible without full use of her fingers.

Ms. Budhun then had various doctor appointments and her physician advised the hospital that she would be out on leave through November 9, 2010. Reading Hospital approved her FMLA through September 23, 2010 and approved non-FMLA leave through November 9, 2010. However, on September 25, 2010, two days after her FMLA leave expired, the hospital filled Budhun's position.

Budhun brought suit alleging FMLA interference and retaliation claims. After discovery closed, Reading moved for summary judgment on both of Budhun's claims, and the District Court granted the motion. It held that Reading was entitled to summary judgment on Budhun's interference claim because "[s]he was never medically cleared to return to work and . . . a doctor's note was never provided to defendant." It also concluded that Budhun was never entitled to the protections of the FMLA because she claimed that she was fully capable of working at the time that she attempted to return to work on August 16, 2010. The District Court granted summary judgment on Budhun's retaliation claim because it determined that Budhun could not establish a prima facie case as a matter of law. It held that Budhun suffered no adverse employment action because Budhun was medically unable to return to work at the conclusion of her FMLA leave. Plaintiff appealed.

The U.S. Court of Appeals for the Third Circuit reversed the trial court's decision to grant summary judgment to the hospital, holding that a jury could find that the note plaintiff submitted from her doctor stating that she would be able to return to work could trigger the hospital's responsibility to reinstate her and that the hospital interfered with that right when it told her that she couldn't return.

The court held that Budhun presented sufficient evidence to allow a jury to find that she invoked her right to return to work on August 16, 2010 and that the hospital interfered with that exercise. The court noted that the FMLA permits an employer to request that an employee provide a "fitness-for-duty" certification before returning to work. An employee's healthcare provider must merely certify that the employee is able to resume work. An employer, however, may require that the certification address the employee's ability to perform the essential functions of her job, but only if it gives the employee a list of essential functions. Because the hospital did not provide Budhun with such a list, her fitness-for-duty certification, which stated that she could return to work with no restrictions, was based on the job description that Budhun gave her doctor. Rather than contact her physician, as Budhun authorized it to do, Reading Hospital concluded that she was not ready to return without restrictions since she could not type using all of her fingers. This, the court held, was sufficient to allow a reasonable jury to conclude that Budhun attempted to invoke her right to return to work, and Reading Hospital interfered with that right.

A Negative Work Environment Does Not Equate to a Hostile Work Environment Under the LAD

In *Brian Dunkley vs. S. Coraluzzo Petroleum Transporters*, 2014 N.J. Super. LEXIS 130 (September 16, 2014), plaintiff experienced racial discrimination by a fellow employee assigned to train him. When the incidents were disclosed to defendant, it effectively resolved the discriminatory treatment identified by plaintiff and precluded any further racial harassment through its formal anti-harassment and anti-discrimination policy, a developed complaint procedure and an investigation process. However, plaintiff maintained as a result of his disclosures, he endured negative consequences, which he insisted caused his constructive discharge. He noted his report was not kept confidential and he felt ostracized by co-workers.

Plaintiff filed a complaint against defendant and unnamed John Does 1-10, claiming violations of the LAD, alleging defendant allowed conduct amounting to a hostile work environment (counts one and two), which caused his constructive discharge (count three), and violated public policy (count four). Plaintiff amended his complaint to add a claim for violating the Conscientious Employee Protection Act (CEPA).

Approximately one month before trial, defendant moved for summary judgment. The judge granted defendant's motion and dismissed the complaint. Plaintiff appealed.

On appeal, plaintiff maintains the judge correctly determined he presented a prima facie case of harassment, but erred in dismissing the action, after finding Harrington was not plaintiff's supervisor and concluding defendant was not vicariously liable for Harrington's actionable conduct. Plaintiff argued defendant failed to take proper steps to curb discriminatory conduct because defendant's anti-harassment policy lacked structure and monitoring mechanisms; defendant did not train its supervisors and employees regarding the anti-harassment and anti-retaliation policies; and plaintiff's complaints were not effectively addressed as defendant's upper management did not show "an unequivocal commitment" to assure "harassment would not be tolerated."

Contrary to plaintiff's assertion, the court found that defendant's policies were properly defined. When management learned of the problem, plaintiff's supervisors did not ignore his complaints or overlook Harrington's reprehensible behavior. Rather, Sickler's proactive conduct discovered the problem. He immediately arranged a private meeting between plaintiff and other supervisors to review plaintiff's experiences. Upon gathering the facts from plaintiff, the supervisors acted to protect plaintiff from further discrimination.

The court also held that plaintiff's complaints of perceived ostracism by fellow employees after he reported a co-worker's acts of racial discrimination are insufficient to support LAD claims of hostile work environment, retaliation or impose vicarious liability on the employer. The court cited the Supreme Court in *Battaglia v. United Parcel Serv., Inc.*, 214 N.J. 518, 549, 70 A.3d 602 (2013) where the Court explained, the LAD does not create a "sort of civility code for the workplace[.]" Rather, it advances "[f]reedom from discrimination." Id. at 546, 70 A.3d 602. Employee discourtesy and rudeness should not be confused with employee harassment. Further, an "unhappy" workplace does not equate to a hostile work environment under the LAD.

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