PROSKAUER ROSE LLP®

Client Alert

A report
for clients
and friends
of the firm

October 2006

Sixth Circuit Rejects EEOC's Position That Separation Agreement Requiring Waiver of EEOC Charges Is Facially Retaliatory

In a split decision handed down on Tuesday October 24, 2006, the United States Court of Appeals for the Sixth Circuit reversed a lower court decision that had been part of the foundation for the growing trend of challenges by the U.S. Equal Employment Opportunity Commission to waivers commonly used by companies in employee separation agreements. Specifically, the Sixth Circuit rejected the EEOC's position that merely offering a separation agreement which conditions receipt of severance benefits on an employee signing a release which includes an agreement to not file a charge with the EEOC or to withdraw such charges is invalid and facially retaliatory under the various federal anti-discrimination laws. *EEOC v. SunDance Rehabilitation Corp.*, Civ. No. 04-4178 (6th Cir., Oct. 24, 2006). The EEOC charged that agreements containing such language are facially invalid and retaliatory because they "chill" an employee's right to file a charge with the EEOC or to assist the EEOC in its investigations of charges of discrimination.

This decision is significant in rejecting this argument, which the EEOC has recently pursued in a pattern of litigations against companies that used similar Separation and Release Agreement language. Notably, since September 2006, the EEOC had filed lawsuits pursuing this same position against Sara Lee Corporation, Eastman Kodak Co., and Land o' Lakes, Inc. The EEOC had also filed similar lawsuits in 2005 against Lockheed Martin Corporation and Ventura Foods, LLC. Both Ventura Foods and Eastman Kodak entered into settlements with the EEOC agreeing to not use such separation agreement language in the future.

The EEOC's case against Lockheed Martin resulted in a federal district court decision in August 2006 in which the district court relied in part on the lower court decision in the *SunDance* case, upholding the EEOC's position that the employer engaged in retaliation by the mere offer of severance in exchange for a release that included the offending language. *EEOC v. Lockheed Martin Corp.*, 444 F. Supp.2d 414 (D. Md. 2006). Now, the Circuit Court decision in *SunDance* may call into question that key holding of the *Lockheed* case, as well as the EEOC's position on this issue as stated in its own Enforcement Guidance on Non-Waivable Employee Rights, EEOC Notice 915.002 (1997).

It is important to note that the *SunDance* court's decision did not authorize the use of covenants not to sue or promises to not file EEOC charges. Indeed, the Court agreed with the EEOC that the filing of charges and participation by employees in EEOC proceedings are vital to the EEOC's investigatory and enforcement missions – and therefore the Agreement's charge-filing ban would likely be unenforceable as against public policy. Thus, SunDance would most likely be unable to recover if it attempted to sue to recover the severance paid pursuant to the release agreement if that employee had filed a charge with the EEOC.

However, the Court disagreed with the EEOC's position, outlined in its Enforcement Guidance, that the mere offer of the Separation Agreement with the prohibitory language to all employees terminated in the reduction in force, without more, amounts to a facially retaliatory act. The Court noted that the employees of SunDance had not been deprived of anything by the offering of the Agreement: those who chose to accept it were better off, by receiving a severance payment that they would not otherwise have been entitled to, and those who rejected the agreement obviously did not give up any rights. Thus, simply offering the Separation Agreement did not constitute *per se* retaliation. The Court went on to theorize that employees may, if they wish, accept the agreement and argue later that parts of the agreement are unenforceable, should SunDance sue them for return of the severance payments.

The Sixth Circuit also held that the offer of the separation agreement to the employees – and the refusal to pay severance to those that refused to sign the agreement – did not constitute the "more traditional" circumstantial form of retaliation. Specifically, the Court held that the plaintiff had not filed an EEOC charge or engaged in any other protected activity prior to receiving the separation agreement offer from SunDance. Because the employees were not otherwise entitled to the severance pay, there was no evidence that SunDance declined to pay the plaintiff severance because of any allegedly protected activity, as opposed to the fact that she failed to sign the release agreement.

The dissent argued that the majority opinion made too fine a distinction between facial retaliation and "what is surely intimidation." Relying on the EEOC's Enforcement Guidance, the dissent agreed with the EEOC that the language in of the release agreement was itself retaliatory because an employee signing the agreement would be dissuaded from otherwise filing a charge with the EEOC or agreeing to participate in investigation.

Clearly, the decision strikes a blow against the EEOC's recent attempts to prohibit employers' use of broad waivers, releases and covenants not to sue by classifying them as facially retaliatory. Nevertheless, it is worth highlighting that the decision should serve as a reminder that employers must carefully draft separation agreements in light of this continually developing area of the law and should consult counsel to ensure that their separation agreements are compliant with the current state of the law. For example:

- The decision did *not* specifically rule on whether separation agreement language that may interfere with an employee's right to file a charge with, provide information to, or participate in an EEOC investigation (including covenants not to sue) would be enforceable. The court suggested that it would not be enforceable, but did not reach the issue. Indeed, it has become well-settled that a provision in a separation agreement that prohibits any of these protected activities is void as against public policy.

- The decision does *not* address whether or not an employer's attempts to recoup severance payments from an employee who signed a separation agreement and subsequently filed or refused to withdraw an EEOC charge, could be held to be retaliatory.

- Likewise, the decision does *not* address the situation where a particular employee who has filed or intends to file an EEOC charge prior to the offer of severance is required to withdraw the charge (or precluded from filing the charge) in order to get the severance benefits.

- Keep in mind, other recent decisions from the 8th and 9th Circuits have held that covenants not to sue tend to confuse the layperson and may cause the agreement to be invalidated for not being knowingly and voluntarily executed.

- The *SunDance* decision is binding on federal district courts in the 6th Circuit, although the holding may have persuasive impact on other federal and appellate courts that will be addressing this issue as the EEOC has pressed this retaliation argument in its recent flurry of lawsuits challenging severance agreement release language. Moreover, the EEOC may now look to the recent U.S. Supreme Court decision in *Burlington Northern Santa Fe Railway Co. v. White*, which arguably lowered the bar for bringing retaliation claims, as providing another basis for pressing its position that settlement agreement language that may be perceived to chill the exercise of protected rights is retaliatory.

NEW YORK • LOS ANGELES • WASHINGTON
BOSTON • BOCA RATON • NEWARK
NEW ORLEANS • PARIS

Client Alert

Proskauer's nearly 175 Labor and Employment lawyers are capable of addressing the most complex and challenging labor and employment law issues faced by employers. For more information about this practice area, contact:

Marc A. Mandelman
212.969.3113 – mmandelman@proskauer.com

Edward Cerasia II
973.274.3224 – ecerasia@proskauer.com

John P. Barry
973.274.6081 – jbarry@proskauer.com

Lawrence Z. Lorber
202.416.6891 – llorber@proskauer.com

René E. Thorne
504.310.4090 – rthorne@proskauer.com

Anthony J. Oncidi
310.284.5690 – aoncidi@proskauer.com

Mark W. Batten
617.526.9850 – mbatten@proskauer.com

Allan H. Weitzman
561.995.4760 – aweitzman@proskauer.com

Joshua Alloy assisted with the development of this alert.

Proskauer Rose is an international law firm that handles a full spectrum of legal issues worldwide.

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice or render a legal opinion.

© 2006 PROSKAUER ROSE LLP. All rights reserved.

You can also visit our Website at **www.proskauer.com**