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# Employment Law Case Update

*Cheryl B. Pinarchick*

## **In re APA Transport Corp. Consolidated Litigation**

In a case of first impression,<sup>1</sup> the Third Circuit recently ruled that employee benefit plans lack standing to pursue claims under the Worker Adjustment and Retraining Notification Act (WARN) because they are not “persons” as defined by the statute. The court further held that common ownership and common directors and/or officers alone are insufficient to establish that two entities are a “single employer” under WARN.

APA Transport was a trucking business whose co-owners owned numerous related businesses, including APA Truck Leasing. APA Transport suffered consistent losses for a number of years. Eventually, APA Transport began to default on its loan obligations. The revolving line of credit which had kept the business afloat was set to expire on February 28, 2002, at which point the entire loan amount became due. At the request of the lender, APA Transport and the lender met in October 2001 to discuss how APA Transport was going to operate going forward given its losses. At that time, the lender informed representatives of APA Transport that its owners would need to put in additional capital before the lender would extend any additional financing. APA Transport made no formal request for additional financing at that time.

Under the loan agreement, requests for extensions or renewals of the agreement were required to be made in writing 60 days prior to the termination date. It was not until January 2, 2002, that APA Transport made the request. At no time did the lender make a commitment to an extension or renewal. On February 11th and February 14th, APA Transport notified its union and non-union workers that the company would cease operations on February 20th. Numerous other businesses owned by the owners of APA Transport continued to operate, including APA Truck Leasing.

APA Transport’s conduct was challenged by two sets of plaintiffs: one comprised of two ERISA funds and the other comprised of a class of employee plaintiffs. Both sets of plaintiffs sued APA Transport and APA Truck Leasing for violations of WARN.

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The first issue on appeal was whether ERISA funds have standing to bring suit under the WARN Act. Under WARN, a civil suit may be brought by “[a] person seeking to enforce such liability *including* a representative of employees or a unit of local government ....” (emphasis added).<sup>2</sup>

In upholding the district court’s decision finding that the ERISA funds lacked standing to bring suit, the Third Circuit relied upon the Department of Labor regulation which states that “employees, their representatives and units of local government may initiate civil actions against employers believed to be in violation of [WARN].”<sup>3</sup> Unlike the statute itself, the regulations do not contain the word “including.” The Third Circuit therefore held that the plain language of the regulations limits standing to those persons expressly set forth in the regulations and that the ERISA benefit plans were not included in that group.

The next issue taken up by the Third Circuit was whether APA Transport and APA Truck Leasing constitute a “single employer” under WARN such that APA Transport would have adequate capital to operate. The Third Circuit again upheld the district court, finding that they were not a “single employer.” In its decision, the Third Circuit relied upon the *Pearson* balancing test. The test delineates five factors for determining whether related companies can be liable under the WARN Act as a “single employer.” The factors are:

1. Common ownership;
2. Common directors and/or officers;
3. De facto exercise of control;
4. Unity of personnel policies from a common source; and
5. Dependency of operations.

Although APA Transport and APA Truck Leasing share common ownership and common directors and/or officers, the Third Circuit expressly found that these two factors alone are not sufficient to establish that two entities are a “single employer” under WARN. The Third Circuit analyzed the remaining three factors and found that they heavily weighed against a finding that APA Transport and APA Truck Leasing should be considered a “single employer.”

The final issue considered by the Third Circuit was whether APA Transport was entitled to take advantage of the “faltering company” exception to the 60 day WARN notice requirement. To be entitled to the exception, the employer bears the burden of establishing, among other things, that it was actively seeking capital at the time that the 60 day notice would have been required and that it had a realistic opportunity to obtain the financing it sought. APA Transport argued that the October meeting between it and its lender satisfied these obligations. The Third

Circuit disagreed finding that participation in a meeting requested by the lender during which no formal request for additional financing was made does not constitute *actively* seeking capital for purposes of the “faltering company” exception. The Third Circuit also rejected APA Transport’s argument that a company may qualify for the “faltering company” defense irrespective of whether it was actively seeking capital at the time notice was required as long as it did not foresee the shutdown. The court stated that to adopt such an interpretation would risk the exception swallowing the statute.

### **Petty v. Metropolitan Government of Nashville-Davidson County**

The Sixth Circuit recently held that the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) prohibits an employer from subjecting returning veterans to a return-to-work process with prerequisites beyond those prescribed by USERRA, even if that process is equally applied to veterans and non-veterans.<sup>4</sup>

Brian Petty, a former member of the Army Reserve, had been employed as a police officer until he was called up for active duty in 2003 and took military leave under USERRA. His service with the Army ended following an investigation for conduct unbecoming an officer. In lieu of facing court martial proceedings, he resigned “for the good of the service.” His resignation was approved by the Army on January 15, 2005, whereupon he was discharged “under honorable conditions.”

In February 2005, Petty requested reinstatement as a police officer with the Metropolitan Government of Nashville-Davidson County (Metro). In accordance with its policies for all officers who have been away from the force for an extended period of time, Metro conducted a return-to-work evaluation. It was not until three weeks later that Metro reinstated Petty. However, rather than returning him to his prior position as a supervisor on patrol or to a substantially similar position, Metro assigned him to an office job while it conducted an investigation into his truthfulness in completing his return-to-work documentation. Additionally, when he requested permission to return to the off-duty security jobs that he held prior to his leave, Metro denied the request. Metro’s investigation ultimately revealed that the military discharge form submitted by Petty to Metro had been modified to eliminate the notation that his discharge was in lieu of trial by court martial. During the pendency of the investigation, Petty sued Metro alleging violations of USERRA.

USERRA guarantees returning veterans a right of reemployment following military service. More specifically, it requires that a returning veteran be given the position the returning veteran would have been in if he or she had not left for military service or one of like seniority, status, and pay. USERRA also forbids an employer from discriminating against

an employee based on his or her military service. In order to qualify for USERRA's reemployment protection, a returning veteran must, among other things, provide the employer with specified documentation and be separated from military service under "honorable conditions."

Petty's complaint alleged that Metro violated USERRA by:

1. Impermissibly delaying his rehiring through the department's return-to-work process;
2. Failing to rehire him in the position that he held prior to his leave and for which he is qualified; and
3. Impermissibly denying him permission to resume his off-duty jobs.

The Sixth Circuit agreed. In rejecting Metro's contention that it was obligated to ensure that Petty was fit for duty before reinstating him, the Sixth Circuit held that USERRA's reemployment provisions superseded Metro's return-to-work procedures. The Sixth Circuit went on to state that "[i]t is of no consequence here that Metro believes it is obligated to 'ensure that each and every individual entrusted with the responsibility of being a [Metro] Police Officer is still physically, emotionally, and temperamentally qualified to be a police officer after having been absent from the Department.' In USERRA, Congress clearly expressed its view that a returning veteran's reemployment rights take precedence over such concerns."

The Sixth Circuit further found that Metro was not justified in failing to return Petty to his prior position while it investigated his truthfulness about his discharge and whether he intentionally altered the discharge form. The court found that because Petty had given Metro unfettered access to all of his military records, he satisfied his documentation obligations and thus was entitled to the protections of USERRA. The court also rejected the district court's reasoning that because Metro's return to work procedures applied to all individuals, regardless of their reason for leave, the procedures were proper. The Sixth Circuit held that while such an analysis might be relevant to a USERRA discrimination claim, Petty had no obligation to show discrimination in order to sustain his reemployment claims.

Finally, the Sixth Circuit held that the district court erred in granting Metro summary judgment on Petty's discrimination claim based upon Metro's denial of his request to resume off-duty jobs. The court first found that this type of benefit is protected under USERRA. The court went on to find that, because Metro denied the request based upon its pending investigation of Petty, if the investigation was motivated by an improper purpose, then the denial of the benefit based upon the investigation would be unlawful. The district court failed to consider Metro's motivations for launching the investigation that triggered the

policy's application. As a result, the Sixth Circuit reinstated Petty's discrimination claim.

### **Chaloult v. Interstate Brands**

Creating a split in the circuit courts, the First Circuit recently held that a company's voluntary adoption of a policy requiring all supervisors to report harassment does not, as a matter of law, increase the scope of the company's legal liability under Title VII.<sup>5</sup>

The First Circuit affirmed summary judgment in favor of defendant Interstate Brands Corporation (IBC) on a former employee's sexual harassment claim based upon the employer's assertion of the *Faragher-Ellerth* affirmative defense. Under Title VII, an employer is generally subject to vicarious liability for sexual harassment by an employee's supervisor. However, an employer may avoid liability if it demonstrates that:

1. Its own actions to prevent and correct harassment were reasonable; and
2. The employee's actions in seeking to avoid harm were not reasonable.

Bonnie Chaloult, a low-level supervisor, alleged that she had suffered sexual harassment by her supervisor six months before she quit her job. IBC had in place anti-sexual harassment policies which included methods for reporting harassment. The policies required all supervisors to immediately report any possible violations of harassment. While employed by IBC, Chaloult signed the policies indicating that she read and understood them. At no time prior to her resignation did she complain about sexual harassment. A year after she resigned, she filed suit for violations of Title VII. When asked at deposition why she did not report the harassment, Chaloult responded that she had talked with another low-level supervisor, Jim Anderson, about the incidents.

In response to IBC's summary judgment motion asserting the *Faragher-Ellerth* affirmative defense, Chaloult conceded that she did act reasonably in failing to report the instances of harassment. She further conceded that the IBC had an acceptable sexual harassment policy and reporting process in place, that the company had trained its employees regarding the policies, and that she knew of the policies. She argued instead that because Anderson was a supervisor and the company required all supervisors to report possible harassment, his putative knowledge of the alleged harassment must be attributed to IBC. She then argued that, based upon that imputed knowledge, IBC failed to take reasonable steps to correct the harassment.

The First Circuit disagreed, finding that, notwithstanding his supervisor title, Anderson was Chaloult's coworker and his knowledge could

not therefore be attributed to the company. Acknowledging its split from the Sixth Circuit, the First Circuit held that IBC's voluntary adoption of a policy requiring all supervisors, regardless of whether they are coworkers, to report possible harassment does not change this result. The First Circuit stated that to find otherwise would be to "set a legal standard different from the Supreme Court's reasonableness approach in *Faragher-Ellerth*. It would also discourage and penalize voluntary efforts which go beyond what the law requires. And it would be inconsistent with approaches to voluntary efforts in other areas of Title VII law."

### **Morales v. Sun Construction**

The Third Circuit recently held that, absent fraud, an arbitration clause in an employment agreement is enforceable even if the employee did not understand the language in which it was written.<sup>6</sup>

During his employment orientation at Sun Constructors (Sun), Juan Morales, a Spanish speaking welder, was provided with an English-language employment agreement containing an arbitration provision. When Morales advised Sun that he did not speak English, Sun asked a bi-lingual applicant also participating in the orientation to explain what was said during the orientation to Morales and to assist Morales in completing his employment paperwork. Sun explained the arbitration provision in the orientation but the bilingual applicant did not explain it to Morales in Spanish. Morales signed the agreement without asking the bilingual applicant to explain to him what he was signing.

When Sun later fired Morales, he sued for wrongful termination on causes of action covered under the arbitration clause. The district court held that mutual assent to the arbitration clause did not exist because Morales did not understand the clause. The Third Circuit disagreed, finding that what is essential to the objective theory of contract formation is not assent "but rather what the person to whom a manifestation is made is justified as regarding as assent." The Court held that, absent fraud, the fact that a party to a contract cannot read, write, speak, or understand the language in which the contract is written is immaterial to whether the contract is enforceable. The Third Circuit found instead that it was Morales' obligation to ensure that he understood the agreement before he signed it.

### **Gembus v. MetroHealth System**

The Sixth Circuit recently held that proximity in time is not enough to establish a causal connection between an employee's leave under Family and Medical Leave Act (FMLA) and termination for purposes of maintaining a retaliation claim in violation of FMLA.<sup>7</sup>

Prior to taking FMLA leave, Donna Gembus had a long history of tardiness for which she had been issued numerous "tardy points" in

accordance with the employer's attendance policy. Upon return from a one-month FMLA leave, she requested that she be moved to a day shift as recommended by her physician. Gembus was temporarily moved to the day shift while the employer considered the request. During the pendency of the request, Gembus accumulated seven additional tardiness points in a 12-month period which, under the attendance policy was sufficient grounds for termination. On the day Gembus accumulated 21 points, the employer terminated her.

Gembus brought an action against the employer alleging that the decision to terminate her was retaliation in violation of FMLA. She argued that the proximity in time between her leave and the decision to terminate her was sufficient to establish retaliation. Both the district court and the Third Circuit disagreed, finding that proximity in time alone was not enough to establish a causal connection and further that she had failed to offer any facts to demonstrate that the employer's proffered justification of chronic tardiness was pretextual.

### **Vaughn v. Epworth Villa**

The Tenth Circuit recently held that the participation clause of Title VII's retaliation provision does not require employers to tolerate an employee's disclosure of confidential documentation merely because the disclosure occurs in connection with a complaint for unlawful discrimination.<sup>8</sup> Rather, the court held that the appropriate analysis is whether the complaining employee was treated less favorably than non-minority employees who engaged in similar conduct.

Bernadine Vaughn was employed by Epworth Villa (Epworth) as a Certified Nurse's Aide/Certified Medication Aid. Vaughn filed a complaint with the EEOC alleging race and age discrimination. In so doing, Vaughn admittedly provided the EEOC with unredacted medical records of a patient in her care to show that she, a black employee over the age of 40, had been disciplined for errors for which younger, white employees were not disciplined. Epworth then terminated Vaughn for cause for violating her duties to preserve patient confidentiality. In response, Vaughn filed suit alleging that she was terminated in retaliation for her participation in the EEOC process.

In analyzing Vaughn's claim, the Tenth Circuit applied the burden shifting framework set forth by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*. The Tenth Circuit first found that Vaughn's termination clearly constituted an adverse employment action as a direct result of her contact with the EEOC. The Tenth Circuit then examined whether the disclosure of confidential medical records in connection with an EEOC complaint constitutes protected activity under the broad protections of the participation clause. The participation clause proscribes employer retaliation against an employee for "participat[ing] in any manner in an investigation, proceeding, or hearing" under Title VII.

The Third Circuit rejected the district court's imposition of an "obligation to resort only to honest and loyal conduct" when filing a complaint as too onerous and held that the disclosure of the medical records constituted protected activity. As a result, the Tenth Circuit concluded that Vaughn satisfied her burden of presenting a prima facie case of Title VII retaliation.

Under the *McDonnell Douglas* framework, the Third Circuit then considered whether the non-retaliatory reason for Vaughn's termination—violation of patient confidentiality—was pretextual. The court ultimately found that Vaughn's failure to identify similarly situated non-black employees who had not been disciplined for the same misconduct fatal to her pretext argument.

### **Notes**

1. In re: APA Transport Corp. Consolidated Litigation (3d Cir. Aug. 29, 2008).
2. 29 U.S.C. § 2104(a)(5).
3. 20 C.F.R. § 639.1(d).
4. Petty v. Metropolitan Government of Nashville-Davidson County (6th Cir., Aug. 18, 2008).
5. Chaloult v. Interstate Brands (1st Cir., Aug. 28, 2008).
6. Morales v. Sun Constructors (3d Cir., Aug. 28, 2008).
7. Gembus v. MetroHealth System (6th Cir., Aug. 27, 2008).
8. Vaughn v. Epworth Villa (10th Cir., Aug. 19, 2008).