Federal Bar Association
Labor and Employment Law Section
Fall 2017

The Labouring Oar

Message from the Chair

By Kathryn M. Knight

The recent "in person" meeting of our thriving FBA Labor and Employment Section held in conjunction with the FBA Annual Meeting in Atlanta heralded the completion of another busy and successful year for our Section and the beginning of an exciting new year. Although I'm honored to serve as Chair of this dynamic group during the coming year, I would be remiss if I failed to thank our outgoing Chair Corie Anderson for her diligence and hard work in leading our Section's efforts and accomplishments this past year. We honored Corie during our meeting in Atlanta by presenting her with the "traditional FBA rocking chair," which was actually delivered to her office in Minneapolis prior to the meeting. She confessed to having already tried it out, and I hope she will enjoy some rocking and relaxing during the cold winter months to come. She earned it!

The upcoming year promises to be busy and exciting, with many opportunities for you — our Section members — to become more involved. Planning is underway for our next Biennial Conference, which will take place in beautiful San Juan, Puerto Rico in 2019. Of course, we all are very aware of the devastation and destruction visited upon the island and its citizens by Hurricanes Irma and Maria, and our thoughts are with them as they go about the difficult and challenging tasks of recovery and rebuilding. But we are assured by Section member and past Section Chair José Gonzalez-Nogueras that the citizens of Puerto Rico are strong and resilient, and that the island will reemerge more beautiful than before. We look forward to celebrating with José and others and toasting their hard work and recovery at our 2019 conference.

In addition to advance planning for the Biennial Conference, our Programming and CLE Committee — led by Whitney Sedwick Meister, Phil Kitzer, and Danielle Brewer Jones — is busy putting together a robust schedule of learning opportunities. Plans include a continuation of the popular Traveling CLE, but with the inclusion of more advanced topics along with our successful "nuts and bolts" series. If you have topic suggestions or would like to volunteer to assist with a program or in planning the Biennial conference, reach out to any of the Committee members. You will find their contact information at the back of this newsletter.

Contributing to our publications is another great way to become more involved with our Section. Our

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A Look at What's Inside

The Labouring Oar is published by the Federal Bar Association Labor and Employment Law Section, 1220 N. Fillmore St., Suite 444, Arlington, VA 22201, (571) 481-9100, (571) 481-9090 (fax). ISSN 1080-1316.

Section Members in the News

As a new feature in *The Labouring Oar*, and giving all credit for the idea to our immediate past Chair, Corie Anderson, the Labor & Employment Section is seeking to highlight its members' professional milestones and accomplishments. These can include achievements, awards, changes in employment, or anything else that you want to make known to the rest of the Section. By giving its members a platform to broadcast all of their impressive accomplishments, we hope to create a more cohesive Section. If you have any news you would like to share, please contact Caitlin Andersen (candersen@seatonlaw.com) or Jack Blum (jblum@paleyrothman.com).

Section Awards

At the Labor & Employment Section Governing Board meeting on September 15, 2017, Section Chair Corie Anderson handed out several awards recognizing Section members for their contributions to the Section over the years. Brian Rochel, Judge Betsy Chestney, Donna Currault, and Phil Kitzer each received Awards of Appreciation. Each of these awardees has served on the Section's Governing Board in several capacities, with Ms. Currault serving as the Section's 2015-2016 Chair and Judge Chestney as its 2015-2016 Treasurer as well as the winner of the Section's 2016 Outstanding Speaker Award. Jack Blum was awarded the 2017 Author of Year Award in recognition of his contributions to the Section's Circuit Updates, *The Labouring Oar*, and the Labor & Employment Corner in *The Federal Lawyer*. Keep up the good work! ■

Section Membership Anniversaries

45 years

Anthony DeMarco, U.S. Department of Housing & Urban Development (ret.), Dover, DE

40 years

Joseph J. Steflik, Jr., Coughlin & Gerhart, Binghampton, NY

35 years

Joyce E. Kitchens, Kitchens New Cleghorn, Atlanta, GA

25 years

William J. Kelly, III, Kelly & Walker, Denver, CO

20 years

Rosemarie L. Hill, Chambliss, Bahner & Stophel, Chattanooga, TN
John Rubiner, Gerard Fox Law, Los Angeles, CA
Kevin D. Johnson, Johnson Jackson, Tampa, FL
Timothy M. McConville, Odin Feldman Pittleman, Reston, VA

15 years

Susan M. Leming, Brown & Connery, Westmont, NJ
John E. Phillips, Phelps Dunbar, Tampa, FL
Richard E. Mitchell, Gray Robinson, Orlando, FL
Sheryl J. Willert, Williams Kaster, Seattle, WA
Drew B. Tipton, Baker Hostetler, Houston, TX
Amy Glass, Michigan Mediation & Arbitration Services, Kalamazoo, MI
Scott Landry, Chaffe McCall, Baton Rouge, LA
Jerry W. Blackwell, Blackwell Burke, Minneapolis, MN
Gary L. Ingram, Jackson Walker, Ft. Worth, TX
James H. Shoemaker, Jr., Patten, Wornom, Hatten & Diamonstein, Newport News, VA
Joseph Y. Ahmad, Ahmad Zavitsanos Anaipakos Alavi Mensing, Houston, TX
Anne E. Zachritz, Andrews Davis, Oklahoma City, OK
Charles C. Warner, Porter Wright Morris & Arthur, Columbus, OH
John A. Doran, Sherman & Howard, Scottsdale, AZ
Ronald F. Fischer, Pearson Christensen, Grand Forks, ND
Jay Friedheim, Admiralty Advocates, Honolulu, HI
James M. Horne, McQuaide Blasko, State College, PA
Paul Buchanan, Buchanan Angeli Altschul & Sullivan, Portland, OR
William M. Furr, Willcox Savage, Norfolk, VA
Dawes Cooke, Jr., Barnwell Whaley Patterson & Helms, Charleston, SC
Rochelle R. Koerbel, Blumling & Gusky, Pittsburgh, PA
Tommy D. Roebig, Florin Roebig, Palm Harbor, FL
Bruce W. Day, Crowe & Dunlevy, Oklahoma City, OK
Steven M. Richard, Nixon Peabody, Providence, RI
Shawn D. Wallace, Young Clement Rivers, Charleston, SC
George C. Drennan, Plauché Maselli Packerson, New Orleans, LA

A Membership Perk: Monthly Circuit Updates

Don't forget that your membership in the Labor and Employment Section gives you access to the Monthly Circuit Updates! Each month, summaries of all the major labor and employment decisions in each Circuit are provided to all members in an eNewsletter that is also available on the Section's webpage at www.fedbar.org/sections/labor-employment-law-section.aspx. These Updates are an invaluable resource that allows members to stay up-to-date on important developments in each Circuit. Take a deep dive into all the new cases within your Circuit each month, or peruse all of the developments around the country to stay abreast of the law for your clients. If you would like to volunteer as a contributor for the Circuit Update, please contact Caitlin Andersen (candersen@seatonlaw.com) or Jack Blum (jblum@paleyrothman.com) for more information.

New Decisions Evaluating the Reasonableness of Accommodations under the ADA

By Ashleigh M. Leitch

Employment lawyers know that the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq., places an affirmative duty on employers to provide reasonable accommodations to employees with known disabilities, unless such an accommodation would be an undue hardship to the employer. But how should practitioners and their clients analyze whether an accommodation is reasonable? In recent months, courts across the country have provided ongoing guidance on this issue.

Is Additional Time Off a Reasonable Accommodation?

Because of the physical nature of the employee's work, the employee suffered back pain for which he took a 12-week leave of absence under the Family Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 et seq. On the last day of his leave of absence, the employee had back surgery and required an additional two or three months away from work to recover from surgery. The employee requested that his employer continue his medical leave of absence. The employer declined this request because the employee had already depleted his FMLA entitlement. Subsequently, the employer terminated the employee's employment. The employee sued the employer for violating the ADA by failing to provide a reasonable accommodation of three months' leave of absence. This case presented the court with the question of whether a three-month medical leave was a reasonable accommodation.

In a groundbreaking opinion, the Seventh Circuit answered "no" – a "multi-month" leave of absence is not a reasonable accommodation.[1] The Court differentiated between the purpose of the FMLA as a "medical-leave entitlement" statute and the ADA, an anti-discrimination statute. According to the Seventh Circuit, recognizing a multi-month leave as a reasonable accommodation impermissibly conflates the statutes' purposes. As defined by the ADA, a reasonable accommodation allows an employee to perform the essential functions of the job, or, in other words, to work. Because an employee on a multi-month leave is not working, such a leave is not a reasonable accommodation.

It remains to be seen what impact this case will have outside of the Seventh Circuit's jurisdiction of Illinois, Indiana, and Wisconsin. Consistent with prior guidance, the Equal Employment Opportunity Commission (EEOC) took the position that a multi-month leave may be a reasonable accommodation.[2] In its amicus brief, the EEOC argued that a multi-month medical leave should qualify as a reasonable accommodation when the leave is "of definite, time-limited duration, requested in advance, and likely to enable the employee to perform the essential functions of the job when he or she returns."[3] The EEOC has long maintained that a reasonable accommodation "could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment."[4] Ultimately, this position did not persuade the Seventh Circuit.

The impact of the Seventh Circuit's decision on short-term leave requests is also unclear. The Seventh Circuit left open the possibility that a medical leave shorter than two or three months could be a reasonable accommodation if an employee is not ready to return to work after FMLA leave or if the employee does not qualify for FMLA leave. For example, intermittent leave or "a couple of days or even a couple of weeks" of time off may qualify as a reasonable accommodation.[5] Most courts have reached similar conclusions.[6]

Is Use of Medical Marijuana a Reasonable Accommodation?

Pursuant to Massachusetts state law, an employee had a lawful prescription for medical marijuana to treat her Crohn's disease. As a condition of her employment, she underwent a mandatory drug test, which unsurprisingly resulted in a positive screen for marijuana. Even though the employee informed the employer of the medical reason for her positive screen, the employer terminated her employment for failing the drug test. The employee sued the employer under state law for disability discrimination and claimed that her employer failed to accommodate her medical marijuana prescription. Given that use of medical marijuana is a crime under federal law, is an employee's requested accommodation to continue using medical marijuana per se unreasonable?

In a first-of-its-kind decision, the Massachusetts Supreme Court answered "no" – the fact that an accommodation violates federal law does not automatically make it unreasonable.[7] "To declare an accommodation for medical marijuana to be per se unreasonable out of respect for Federal law would not be respectful of the recognition of Massachusetts voters, shared by the legislatures or voters in the vast majority of States, that marijuana has an accepted medical use for some patients suffering from debilitating medical conditions."[8] The Court went on to reason that the employer should have engaged the employee in an interactive dialogue to determine whether there was an equally effective alternative to medical marijuana. The Court noted, however, that employers may still raise undue hardship as a defense, particularly for safety-sensitive positions.

Twenty-nine states and the District of Columbia have legalized medical marijuana in some form.[9] Although the U.S. Department of Justice under the Trump Administration is unlikely to decertify medical marijuana as a Schedule 1 drug, other state courts may follow Massachusetts to protect employees with disabilities on the basis of state law.[10]

Is Hiring an Interpreter a Reasonable Accommodation?

A deaf nurse relied upon an American Sign Language (ASL) interpreter to communicate with hearing individuals in the workplace. The nurse applied for a job, and received a job offer, conditioned upon a health screening and clearance by the employer's occupational health office. The annual salary for her position was approximately $60,000. The nurse notified the employer that she required a full-time ASL inter-

preter as an accommodation, at an annual cost of $120,000. The employer decided the cost of the ASL interpreter was not reasonable and withdrew its job offer. Is paying a full-time ASL interpreter double the salary of the hearing-impaired employee a reasonable accommodation?

In this case, the District Court of Maryland answered "yes" – the full-time ASL interpreter was a reasonable accommodation because the nurse could perform the essential job functions with the accommodation.[11] Additionally, the Court noted that the $120,000 expense paled in comparison to the overall hospital's operational budget of $1.7 billion.

Conclusion

In the words of Judge Lynch of the First Circuit, "these are difficult, fact intensive, case-by-case analyses, ill-served by per se rules or stereotypes." Although the cases explained above provide guideposts to analyzing the reasonableness of requested accommodations, practitioners and their clients should remember that reasonableness is determined on a case-by-case basis according to the particular facts of the parties' circumstances. ■

Endnotes:

[1]*Severson v. Heartland Woodcraft, Inc.,* 872 F.3d 476 (7th Cir. 2017); *see also Delgado Echevarria v. AstraZeneca Pharm. LP*, 856 F.3d 119 (1st Cir. 2017) (affirming summary judgment to dismiss plaintiff's claim for disability discrimination because plaintiff's request for an additional twelve months of medical leave after she exhausted her FMLA entitlement was not a reasonable accommodation under the ADA); *Hwang v. Kan. State Univ.,* 753 F.3d 1159 (10th Cir. 2014) (affirming motion to dismiss plaintiff's claim for disability discrimination under the Rehabilitation Act because plaintiff's request for an additional six months of leave was not a reasonable accommodation).

[2]Amicus brief filed by EEOC accessible at https://www.eeoc.gov/eeoc/litigation/briefs/severson.html.

[3]*Id*.

[4]EEOC Technical Assistance Manual on the Employment Provisions (Title I) of the ADA (1192), at III-6.

[5]*Severson v. Heartland Woodcraft, Inc.,* 872 F.3d 476, 481 (7th Cir. 2017).

[6]*Garcia-Ayala v. Lederle Parenterals, Inc.,* 212 F.3d 638, 647 (1st Cir. 2000) ("This court and others have held that a medical leave of absence – Garcia's proposed accommodation -- is a reasonable accommodation under the Act in some circumstances."); *Walton v. Mental Health Ass'n. of Southeastern Pennsylvania*, 168 F.3d 661, 671 (3d Cir. 1999) (stating that "unpaid leave supplementing regular sick and personal days might, under other facts, represent a reasonable accommodation"); *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.,* 155 F.3d 775, 783 (6th Cir. 1998) ("[A] medical leave of absence can constitute a reasonable accommodation under appropriate circumstances."); *Humphrey v. Memorial Hospitals Ass'n,* 239 F.3d 1128, 1135 (9th Cir. 2001) ("A leave of absence for medical treatment may be a reasonable accommodation under the ADA."), cert. denied, 122 S.Ct. 1592 (U.S. 2002); *Rascon v. U.S. West Communications, Inc.,* 143 F.3d 1324, 1333-34 (10th Cir. 1998) ("An allowance of time for medical care or treatment may constitute a reasonable accommodation.").

[7]*Barbuto v. Advantage Sales and Marketing, LLC,* 477 Mass. 456, 78 N.E.3d 37 (Mass. 2017).

[8]*Id.* at 456-66.

[9]"State Marijuana Laws in 2017 Map," GOVERNING, accessible at http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html.

[10]But *see Coats v. Dish Network,* 350 P.3d 849 (Colo. 2015) (affirming dismissal of plaintiff's wrongful discharge claim for testing positive for medical marijuana because plaintiff's use of medical marijuana violated federal law and therefore was not protected as a "lawful activity" under state anti-discrimination laws) (not analyzing use of medical marijuana as a reasonable accommodation).

[11]*Searls v. Johns Hopkins Hosp.,* 158 F. Supp. 3d 427, 437 (D. Md. 2016).

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Taking a Knee to Free Speech: Limiting Workplace Rhetoric within the Confines of the Law

By Gregory A. Hearing

Long gone are the days where avoiding political and social rhetoric was as easy as switching the channel on a television, avoiding political rallies, or not inviting one particular relative to Thanksgiving dinner. As our society becomes more polarized, we are constantly exposed to the unsolicited opinions and protests of others, including our family, friends and coworkers. Workplace boundaries and social norms which once held such discourse at bay suddenly are eroding if not collapsing altogether. Employers are often scrambling to find an effective way of keeping such discussions and opinions out of the workplace environment as they are unproductive and can lead to claims of unfair employment practices.

Labor and employment attorneys must ensure that their clients are properly informed of the boundaries of employee speech, including an employee's right to engage in speech relating to protected concerted activities. Moreover, practitioners must remember that the rights of employees to speak freely in the workplace can differ drastically based on whether the employee works for a private or a public employer.

Private-Sector Employers

As exemplified in a controversial case discussed further herein, the conundrum which private employers face is that, even though an employer has broad discretion to limit employee speech in working areas during working time, an employer may not lawfully discipline an employee who posts on social media that his boss is a "nasty mother****er" as long as the employee is on break and inserts "Vote YES for the UNION" in the same post.[1] Given these circumstances, many employers are not sure where they can draw the line. For example, the Dallas Cowboys professional football team faced an unfair labor practice charge because its owner, Jerry Jones, told players that they may no longer take a knee in protest of political and/or social issues during the national anthem. Even though Mr. Jones did not threaten termination, Mr. Jones nonetheless made it clear he would take the adverse action of benching players who do not stand during the national anthem.[2]

Mr. Jones' actions made national headlines and prompted Local 100 of the United Labor Unions to file an unfair labor practice charge against the Cowboys with the National Labor Relations Board ("NLRB"), claiming the threat to bench players chilled protected concerted activity.[3] Subsequently, Local 100 requested the withdrawal of the charge and the NLRB granted the request.[4] Success for the union would have required a showing by the Cowboys' players who want to kneel during the national anthem that they seek to do so in protest of the terms and conditions of their employment rather than the ongoing political and social issues relating to the treatment of African Americans by law enforcement which issues have permeated the news since at least mid-2016.

Mr. Jones' actions and Local 100's response beg the question, what are the limits to employees exercising their right to engage in concerted activity by way of controversial, unpopular and/or even profane speech? In the previously referenced decision, *Nat'l Labor Relations Bd. v. Pier Sixty, LLC,* the Second Circuit provided employees substantial leeway to engage in such speech.[5] In *Pier Sixty,* an employee on break posted a profanity laced rant on social media regarding his boss and his boss' mother. Because the employee inserted the words "Vote YES for the UNION" in the same post, the Second Circuit found that the employee's termination for making the post constituted an unfair labor practice.[6] While *Pier Sixty* does not support the conclusion that an employee may immediately take to social media to berate his/her boss or boss' family or disrupt the workplace with such speech, it does show the broad deference which courts give the NLRB in protecting an employee's right to engage in concerted activity.

Public-Sector Employers

The First Amendment provides public-sector employees more free speech rights than private-sector employees. For instance, public-sector employees may speak as citizens on matters of public concern.[7] Nonetheless, public-sector employers may limit such speech when there is an "adequate justification" for treating an employee differently than other citizens.[8] The case law addressing what constitutes an "adequate justification" is expansive, but a recent Eleventh Circuit decision provides insight as to when a public employee's speech goes too far.

In *Snipes v. Volusia County*, the plaintiff, a police officer with the Beach Patrol in Volusia County, Florida, posted an insensitive comment regarding Trayvon Martin on social media and sent racial and vulgar text messages to fellow officers the day after the Zimmerman verdict, all while on-duty.[9] Due to the racially charged nature of the messages and the atmosphere in central Florida at the time indicating the possibility of rioting, Volusia County terminated Snipes' employment.[10] Snipes sued alleging that Volusia County violated his First Amendment rights.[11] The district court granted summary judgment in favor of Volusia County and Snipes appealed.[12] On appeal, the Eleventh Circuit held that Volusia County had a legitimate interest in avoiding riots and protests which trumped Snipes' First Amendment rights.[13]

Snipes involved favorable facts for Volusia County, but not all public employers have been as fortunate. For instance, in *Rankin v. McPherson*, the Supreme Court held that an employee of the county Constable's office engaged in protected speech when she stated "if they go for him, I hope they get him," when commenting on an assassination attempt on President Reagan.[14] Unlike in the *Snipes* case, the Supreme Court found the legitimate interest of the Constable's office to be inferior to the employee's First Amendment rights, concluding that the chance of the speech at issue disrupting the workplace to

be miniscule.[15]

Conclusion:

The degree of protection afforded employee speech depends on whether the employer is public or private. It also depends on whether the speech relates to the terms and conditions of employment, is disruptive and/or whether it regards a matter of public concern. In today's divisive political climate, a labor and employment practitioner should be well versed in these matters to help clients avoid taking a knee to unprotected speech. ■

Endnotes:

[1]*Nat'l Labor Relations Bd. v. Pier Sixty, LLC,* 855 F.3d 115, 117 (2d Cir. 2017), as amended (May 9, 2017).

[2]Todd Archer, Local labor union files complaint over Jerry Jones' anthem mandate, ESPN, (Oct. 11, 2017), http://www.espn.com/nfl/story/_/id/20984095/labor-union-files-complaint-cowboys-jerry-jones-national-anthem-mandate-team.

[3]Signed Charge, *Local 100, United Labor Unions v. Dallas Cowboys, et. al,* 16-CA-207733, No. 1 (N.L.R.B. charging doc. filed Oct. 10, 2017).

[4]Letter Approving Withdrawal Request, *Local 100, United Labor Unions v. Dallas Cowboys, et. al,* 16-CA-207733, No. 4 (N.L.R.B. charge withdrawal doc. filed Oct. 27, 2017).

[5]*Nat'l Labor Relations Bd. v. Pier Sixty, LLC,* 855 F.3d 115, 117 (2d Cir. 2017), as amended (May 9, 2017).

[6]*Id.* at 118-126.

[7]*Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty, Illinois,* 391 U.S. 563, 570 (1968).

[8]*Garcetti v. Ceballos,* 547 U.S. 410, 418 (2006).

[9]*Snipes v. Volusia Cty.,* 16-14221, 2017 WL 3588273, at 1 (11th Cir. Aug. 21, 2017).

[10]*Id.*

[11]*Id.*

[12]*Id.*

[13]*Id.* at 6.

[14]*Rankin v. McPherson,* 483 U.S. 378 (1987).

[15]*Id.*

Gregory A. Hearing has practiced management side labor and employment law for nearly 30 years and is a shareholder with the firm Thompson, Sizemore, Gonzalez & Hearing, P.A. in Tampa, Florida.

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Publications and Public Relations Committee — chaired by Caitlin Andersen and Jack Blum — oversees production of monthly Circuit Updates, the Section's quarterly Labouring Oar newsletter, and periodic contributions to The Federal Lawyer magazine published by National. The Circuit Updates provide summaries of noteworthy labor and employment law decisions from each of the eleven United States Circuit Courts of Appeals, while the newsletter offers commentary and discussion of emerging issues (along with Section news), and the magazine offers more detailed analysis of current labor and employment topics. So whatever your writing interests might be, there is a publication waiting for your contributions. Contact Caitlin or Jack for submission deadlines and more information on publication requirements.

Remember, too, that our Section's webpage (http://www.fedbar.org/Sections/Labor-Employment-Law-Section.aspx) can be a great resource. Visit often to stay abreast of current activities and events, or to look back at previous Circuit Updates and issues of the Labouring Oar. You'll also find helpful links to additional Federal Bar Association resources.

And last but not least, it is never too early to start planning to attend the FBA's 2018 Annual Meeting and Convention, which will take place September 13-15 at the New York Marriott Downtown. Mark your calendars now to save the dates and visit the FBA's webpage for more information as it becomes available (http://www.fedbar.org/Education/Calendar-CLE-events/2018-Annual-Meeting-and-Convention.aspx). Participating in the Annual Meeting and Convention is a great way to build upon and solidify all of the new Section contacts you will have made after working with us throughout the year.

Welcome to the Labor and Employment Law Section's new year! I'm looking forward to a productive year and hope to see many new faces at our events and new authors in our publications.■

Call For Articles

The Labor and Employment Section is seeking articles suitable for publication in forthcoming editions of its quarterly newsletter, The Labouring Oar. Articles can address any timely topic of importance to the labor and employment practitioner and should provide balanced coverage of the topic. Suggested length is between 1,300 and 2,500 words. Citations should be formatted as endnotes. Additional guidelines for authors are available here: http://www.fedbar.org/resources_1/copy%20of%20accepting-articles-for-publication/writers-guidelines.aspx.

Upcoming submission deadlines are January 12, 2018 and March 30, 2018.

Before submitting an article for publication, please contact Caitlin Andersen (candersen@seatonlaw.com) or Jack Blum (jblum@paleyrothman.com).

Mid-America Bus. Sys. v. Sanderson: A Reminder to Create Valid Non-Compete Agreements

By Hadley Simonett

On October 6, 2017, the United States District Court for the District of Minnesota denied an employer a temporary restraining order ("TRO") against a former employee and the employee's new employer, because the employee's non-compete agreement lacked consideration.[1] The case, *Mid-America Bus. Sys. v. Sanderson*, ___F. Supp. 3d ___, 2017 WL 4480107 (D. Minn. Oct. 6, 2017), serves as an important reminder to advise clients on requirements necessary for a valid non-compete agreement.

Mid-America Alleged Sanderson Violated his Non-Compete Agreement.

Mid-America Business Systems ("Mid-America") is a provider of large-scale storage and organization systems. Mid-America was an authorized dealer for Kardex Remstart, a manufacturer of automated storage and retrieval systems, and the exclusive dealer for Kardex in parts of the Midwest. After Kardex Remstart terminated Mid-America's authorized dealership in February 2017, Kardex Handling Solutions (KHS), a majority owned company by Kardex Remstart, became the exclusive authorized dealer for most of the region Mid-America had previously covered.

The Defendant, Sanderson worked for Mid-America for almost a decade as a service technician. During Sanderson's time with Mid-America, he received training specific to Kardex products and in 2010 became a "Certified" Kardex Remstar technician. In March 2017, one month after Kardex Remstart terminated its relationship with Mid-America, Sanderson left his employment at Mid-America and began working as a service technician for KHS.

The parties dispute the terms of Sanderson's employment with Mid-America. Sanderson states Mid-America hired him as a fulltime employee in June 2007, while Mid-America alleges it hired Sanderson as a temporary employee, subject to a three-month probationary period beginning in June. Mid-America does not have a written policy outlining the probationary period terms. In September 2001, after completing the probationary period, Mid-America allegedly hired Sanderson as a fulltime employee. Mid-America alleges at this time, in September, Sanderson signed a Non-Compete Agreement and Mid-America provided him with additional training, access to confidential information, and pay increases. Had Sanderson not signed the agreement Mid-America alleges it would have terminated his employment.

Court Held the Non-Compete Agreement was Invalid due to Lack of Consideration.

Whether the Sanderson's Agreement is enforceable depends on when Mid-America hired Sanderson as a fulltime employee. Under contract law in order for a non-compete agreement to be enforceable, the employer must provide the employee with something of value in exchange for the employee's agreement not to compete. Many courts accept an offer of at-will employment as adequate consideration if the parties enter into the non-compete agreement as a condition of an employee's initial employment. However, generally, when the non-compete agreement is entered into during the course of employment, courts do not accepted continued employment, without more, as adequate consideration.[12] Many jurisdictions that follow the above approach, find an employer's offer of permanent employment and other professional benefits satisfies the additional consideration requirement.[13]

Mid-America did not require Sanderson to sign the non-compete agreement until September 2007, three months after he began work in June 2007.[14] The Court held since Mid-America did not require Sanderson to sign the document in June 2007, Mid-America was required to "show that there was independent consideration given in exchange for the Non-Compete Agreement."[15] Even though Mid-America alleges it met the requirements to prove additional consideration by offering Sanderson permanent employment and additional training, the Court held that Mid-America failed to prove it communicated to Sanderson the unwritten probationary policy. As a result, the alleged additional benefits were not bargained for in exchange for Sanderson's agreement.[16]

General Reminders for Talking to Clients Regarding Non-Compete Agreements.

Employers may want an employee to sign a non-compete

agreement to protect confidential resources, trade secrets, or intellectual property. Whether a non-compete is enforceable depends largely on the jurisdiction. Even in jurisdictions that allow non-competes, some have enacted laws restricting the scope of the non-compete agreement. For example, California prohibits non-competes from restricting post-employment, unless in the context of a merger or sale of a business.[17] Other states limit the enforceability of non-competes depending on the specific industry.[18]

Mid-America Bus. Sys. v. Sanderson serves as a reminder of one of the necessary requirements for an enforceable non-compete agreements—valid consideration. To avoid the problem faced in *Mid-America Bus. Sys. v. Sanderson*, attorneys' should advise their clients to present potential employees with the non-compete agreement prior to the employee commencing work. As mentioned above, many courts will recognize an employment offer conditioned upon signing the non-compete as valid consideration. Additionally, the employee is less likely to oppose a non-compete agreement when it is presented to them before the onset of their employment.

However, circumstances do arise when an employer would like to implement a non-compete agreement for current employees. In this situation, it is best to advise the client to tie the non-compete agreement to special compensation actions, such as a bonus, salary increase, or other discretionary benefit. By tying the non-compete agreement to a special compensation action, the employer is providing the employee with something of value in exchange for restrictions contained in the non-compete agreement. Further, the client should be advised to implement the non-compete agreement to all similarly situated employees and be prepared to withhold the compensation award from any employee who refuses to sign the non-compete agreement.

Non-compete agreements can serve as a vital benefit for the survival and integrity of a client's business operation. Therefore, it is necessary to make sure to familiarize yourself with the specific state and contract requirements essential to establish a valid non-compete agreement before counseling your clients. ■

Endnotes

[1]The non-compete agreement at issue did not contain a specific non-compete provision, rather it contained only non-solicitation and confidentiality clauses. The court referred to it in its opinion as a non-compete agreement because that was the title of the document. For the purpose of this article "non-compete agreement" will refer to all three types of agreements.

[2]*Mid-America Bus. Sys. v. Sanderson,* ___F. Supp. 3d ___, 2017 WL 4480107 (D. Minn. Oct. 6, 2017).

[3]*Id.* at 3.

[4]*Id.*

[5]*Id.* at 4.

[6] *Id*.

[7]*Id.*

[8]*Id.*

[9]*Id.* at 4.

[10]*Id.* at 5.

[11]*Id.* at 4.

[12]*Hunn v. Dan Wilson Homes, Inc.,* 789 F.3d 573, 584 (5th Cir.) ("A contract for at-will employment, standing alone, does not satisfy the requirement of an 'otherwise enforceable agreement' because the promise of continued employment in an at-will contract is illusory—neither the employer or employee is bound in any way.").

[13]*Socko v. Mid-Atlantic Sys. of CPA, Inc.,* 126 A.3d 1266 (Pa. 2015) ("When a non-competition clause is required after an employee has commenced his or her employment, it is enforceable only if the employee receives 'new' and valuable consideration—that is, some corresponding benefit or a favorable change in employment status."). See also *Charles T. Creech, Inc. v. Brown,* 433 S.W.3d 345, 352-53 (Ky. 2014) (holding non-compete agreement signed 16 years after employment commenced was invalid due to lack of consideration).

[14]*Id.* at 4.

[15]*Id.* at 11-12.

[16]*Id.* at 12.

[17]Cal. Bus. & Prof. Code § 16600 (West) ("Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.").

[18]For example, several states limit non-competes in the medical profession. *See* Haw. Rev. Stat. Ann. § 480-4 (restricting non-competes in the technology sector). *See also* 5 R.I. Gen. Laws § 37-33 (restricting non-competes in the medical industry).

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