AWARD FOR EMPLOYER IN RACE DISCRIMINATION/RETALIATION CASE

OPINION AND AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the agreement between the above-named parties, dated ___________, ____ (hereafter the "Agreement"), and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD as follows:

FACTS

The Claimant worked for Respondent from approximately June 1996 through April 6, 2001.[1] When Claimant was hired he signed an application that stipulated that all claims, including civil rights claims, must be brought within 180 days of the event that have given rise to the claim or be forever barred. He also signed documents acknowledging receipt of employee policies and acknowledging that the Respondent Mandatory Problem Solving Process ("PSP") was the exclusive remedy for resolution of any disputes regarding his employment relationship. The PSP is a procedure used by the Respondent to identify employee complaints, including discrimination charges, and to rectify the problem where appropriate. The PSP process requires that all claims, including civil rights claims, that are not resolved through internal discussions must be submitted to binding arbitration.

Claimant's last position was Human Resources Representative, a position which he held for approximately four years. Part of Claimant's duties included "new hire and termination process; coordinate and conduct a monthly new hire orientation; … maintain employee personnel files and training records …" The new hire process and the monthly new hire orientation required Claimant to explain the PSP to new hires.

It is undisputed that Claimant was well aware of the terms and conditions of the PSP as well as the manner in which the Respondent implemented that procedure. One of Claimant's core duties was to act as a conduit of complaints from employees to management in the initial phase of the PSP. Claimant successfully invoked for himself the procedure to secure wage parity with a white female co-worker.

Towards the end of his tenure with the Respondent, Claimant apparently became disenchanted with the Respondent. He testified that it occurred to him well after the fact that he was being discriminated against based on his race with respect to the size of pay increases awarded to him vis-à-vis a white female human resources representative that performed payroll

[1] The parties stipulated to April __, ____ as being the termination date although a letter from human Resources Director [Cliff Claven] to the Claimant indicates that the termination date was actually March __, ____.

functions.[2] Claimant therefore filed a claim with the Michigan Department of Civil Rights ("MDCR") in June 2000.

Claimant's supervisors, [Rebecca Howe] and [Sam Malone],[3] were surprised and disappointed that Claimant did not attempt to resolve his concerns through the PSP before proceeding to the MDCR, particularly in light of the fact that [Rebecca Howe] had resolved Claimant's wage parity complaint through the PSP. Nonetheless, [Rebecca Howe] and [Sam Malone] told the Claimant that he had every right to file the claim with the MDCR and that there would be no retaliation. However, they also told him that he should not be using his position at the Respondent as a human resources representative with full access to employee files to gather information to support his lawsuit. They assured him that they would provide any information required by the MDCR and that no information would be withheld. Claimant assured Ms. [Rebecca Howe] and Mr. [Sam Malone] that he would not use his position to access confidential information in furtherance of his lawsuit. Consequently, Ms. [Rebecca Howe] and Mr. [Sam Malone] did not restrict Plaintiff's access to confidential information, nor did they alter his job duties.

Unbeknownst to Ms. [Rebecca Howe] and Mr. [Sam Malone], Claimant had already used information available to him in the ordinary course of his duties to prepare a document titled "Respondent Pattern of Discrimination June 14, 2000." This document set forth various examples of what Claimant felt was mistreatment of African-American employees at Respondent. The document does not contain social security numbers, medical information, rates of pay or other confidential information except references to the amount of a bonus received by a white female employee and the percentage of a raise received by an African-American employee that Claimant felt was mistreated.

Although Respondent claimed in pleadings filed in the arbitration proceeding that Claimant had provided confidential documents to the MDCR, the Claimant testified that he provided no such documents to the MDCR. The Respondent offered no contrary evidence at the hearing. The deposition testimony provided by the Respondent to the Arbitrator as part of an earlier pleadings does not support the proposition that Claimant provided confidential documents to the MDCR.

Review of the "Respondent Pattern of Discrimination, June 14, 2000" document reveals only that the Claimant utilized information that he had access to on a daily basis to prepare a document outlining what he thought was evidence of discrimination and provided it to the MDCR.

At no point did Claimant invoke the PSP to vindicate the complaints he raised in the MDCR complaint. In fact, Claimant withdrew his MDCR complaint in October 2001.

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[2] Claimant had initially complained about the pay differential between him and a coworker, [Diane Chambers], but that differential was resolved by the Respondent when it reviewed his pay, Ms. [Diane Chambers]'s pay and made a retroactive adjustment to bring his compensation up to Ms. [Diane Chambers]'s. Claimant acknowledged that the wage parity issue was resolved to his satisfaction and therefore the issue is not before the arbitrator.
[3] [Rebecca Howe] and [Sam Malone] shared the position of Vice President of Human Resources until [Cliff Claven] was hired for the position in January ____.

In January 2001, [Cliff Claven] succeeded Ms. [Rebecca Howe] and Mr. [Sam Malone] who job-shared the position of Vice President for Human Resources. Within a month of his employment with the Respondent, Mr. [Cliff Claven] learned that the Claimant, along with 6 other African-Americans current and former employees had filed suit for race discrimination against the Respondent in Wayne County Circuit Court.

Shortly thereafter, on February 23, 2001, Mr. [Cliff Claven] issued to Claimant a memo titled "Final Disciplinary Notice to Claimant." In this memo Mr. [Cliff Claven] suspended Claimant with pay and removed him from his position in the Human Resources Department, and offered the services of an out-placement firm. Mr. [Cliff Claven] also noted that if through the course of discovery in the litigation he had just initiated it was determined by the Respondent that he had removed confidential information from the records in Human Resources or committed any violation of the trust placed in him, his employment would be terminated immediately. The memo also made the obligatory disclaimer of retaliation.

The Respondent later intercepted an e-mail between Claimant and one of his co-plaintiffs who was still employed by the Respondent. The co-plaintiff indicated that she had acquired some information supportive of their claim at her branch. Claimant replied that this development was "good" as they could use the information in their litigation. Mr. [Cliff Claven] also learned from another employee, [Carla Tortelli], that Claimant had solicited her to join in the lawsuit against the Respondent. These two facts convinced Mr. [Cliff Claven] that the Claimant was fomenting litigation by inciting employees to litigate rather than encouraging them to resolve the claims through the PSP.

Based on these latest revelations, Mr. [Cliff Claven] decided to terminate Claimant because it was apparent to him (Mr. [Cliff Claven]) that Claimant's job duties included encouraging employees to utilize the PSP to resolve discrimination complaints, Claimant was not encouraging internal resolution of these claims through the PSP, but rather encouraging litigation and consequently Claimant had breached the Respondent's trust.

Mr. [Cliff Claven] also testified that he was not aware of the "Pattern of Discrimination" document submitted to the MDCR until after Claimant's termination. However, he did indicate that had he been aware that Claimant provided this document to the MDCR he would have fired Claimant immediately.

ANALYSIS

I. STATUTE OF LIMITATIONS BARS ALL CLAIMS

The Claimant asserted that the PSP as well as the 6 month statute of limitation provision in the employment application should not be binding as they are unreasonable. Although the Arbitrator is sympathetic to this view, he will not substitute his views for the applicable law. It is now beyond dispute that mandatory arbitration provisions of the type found in this case are valid and binding. Rembert v Ryan's Family Steak Houses, Inc, 235 Mich App 118 (1999).

Similarly, the six month statute of limitation provision at issue in this case has been validated by the Michigan Court of Appeals in Timco v Oakwood Custom Coating, Inc, 244

Mich 234 (2001). Such provisions have long been enforceable in the federal courts. Myers v Western Southern Life Ins Co, 849 F2d 259 (6th Cir 1988).

To avoid the statute of limitations defense, Claimant asserted that the limitations period was tolled because the Respondent was required to, but did not, initiate the arbitration process. Unfortunately for Claimant, the express terms of the PSP provide that the employee is to initiate the arbitration process. Thus, the six month statute of limitations was not tolled. Accordingly, the latest possible date that the limitations period could have begun running was the date of Claimant's termination, stipulated by the parties to be April 6, 2001. See Sumner v Goodyear, 427 Mich 505, 536 (1986).[4] The Claimant therefore had until October 6, 2001 to initiate arbitration.

The Claimant did not initiate arbitration until November 16, 2001, one month and ten days too late. Thus, all of Claimant's claims are barred.[5]

Even if Claimant's claims were not barred by the contractual six month statute of limitations, there is insufficient evidence to support the discrimination claims.

II. PAY DISCRIMINATION CLAIMS UNSUPPORTED BY EVIDENCE

With respect to the pay discrimination claim, Claimant compared himself to an employee, [Lillith Crane], who performed different duties and therefore was not similarly situated. Evidence that Ms. [Lillith Crane] made more money that Claimant or received larger increases is legally irrelevant because she was not similarly situated. Mitchell v Toledo Hosp, 964 F2d 577, 583 (6th Cir 1992).

Further, the Respondent, through Ms. [Rebecca Howe], offered a legitimate non-discriminatory reason for the pay differential, market conditions and the recommendation of the Respondent's consultants that the payroll position should pay higher than Claimant's HR position. Because Claimant did not challenge this explanation and because I believed Ms. [Rebecca Howe]'s testimony, the Respondent is entitled to prevail on the pay differential claim. Town v Michigan Bell Tel Co, 455 Mich 688 (1997).

It appeared that at one point Claimant alleged that he was denied promotions based on race. However, he produced no evidence that he applied for any such promotions or that race motivated the Respondent's promotional decisions with respect to positions that he might have been interested in. Therefore I must conclude that Claimant has abandoned these promotional claims.

III. RETALIATION CLAIM ALSO FAILS

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[4] Claimant also asserted that the continuing violations theory tolled the statute of limitations. This is not true as statute of limitation begins running on the date of termination. See Sumner v Goodyear, supra.

[5] This of course includes the pay differential claims, and the transfer to the file clerk job which occurred well before the termination.

Even if the statute of limitations had not barred Claimant's retaliation claim, I would have found for the Respondent on this claim.

Shortly after Claimant initiated his circuit court lawsuit along with his six co-plaintiffs, Human Resources Manager [Cliff Claven] issued him, on February 23, 2001, a memo titled "Final Disciplinary Notice." In the memo Mr. [Cliff Claven] informed Claimant that he was on paid administrative leave for up to 60 days, encouraged him to find other work, offered out-placement assistance up to a value of $3,500.00 and warned him that discovery of any information revealing a breach of trust or use of confidential information to further his lawsuit would result in immediate dismissal.

Approximately one month later Mr. [Cliff Claven] terminated Claimant. According to HR manager [Cliff Claven], Claimant was fired because it appeared that he was fomenting litigation by inciting co-employees to gather evidence against the Respondent. This was apparent to Mr. [Cliff Claven] from an e-mail that the Respondent intercepted between Claimant and one of his co-plaintiffs in the circuit court lawsuit. Mr. [Cliff Claven] also believed that Claimant was fomenting litigation based on his conversation with a Respondent employee, [Carla Tortelli], an African-American female that informed Mr. [Cliff Claven] that Claimant had solicited her to join the lawsuit. Mr. [Cliff Claven] testified that although he was not aware of the "Respondent Pattern of Discrimination June 14, 2000" memo at the time he fired the Claimant, if he had known of the memo at any time before he had fired Claimant, he would have fired him immediately.

Some arbitrators and judges would hold that Claimant, as a human resources person charged with implementing the PSP was properly terminated because he failed to (1) reveal potential claims to management and (2) encourage voluntary resolution of discrimination claims through the PSP. See, e.g., Jones v Flagship Int'l, 793 F2d 714, 726, 41 FEP 358 (5th Cir 1986) (EEO personnel manager's action of filing a discrimination lawsuit against the employer and inviting others to sue or join in a class action rendered the manager ineffective in the position for which she was employed), *cert denied*, 479 US 1065 (1987); Whatley v Metropolitan Atlanta Rapid Transit Auth, 632 F2d 1325, 1329, 24 FEP 1148 (5th Cir 1980) (no § 704(a) violation where assistant general manager for EEO matters was not discharged for filing an EEOC charge for an employee, but rather for failing to comply with established procedures for handling employee complaints); Herrera v Mobil Oil, Inc, 53 FEP 1406, 1408 (WD Tex 1990) (no § 704(a) violation when an employee with EEO responsibilities divulged confidential information).

Yet other arbitrators and judges would find that Claimant's activities in encouraging litigation was protected activity under state and federal civil rights statutes. See, e.g., MCLA § 37.2701. Prudent judges probably would send this case to a jury for factual development and then decide the issue on a motion for directed verdict.

The question boils down to whether it is a legitimate non-retaliatory reason to discharge a human resources employee for inciting co-employees to litigate when it is this human resources employee's job duty to facilitate internal resolution of discrimination claims.

Had I been presented with this question because of the inapplicability of the statute of limitations defense, I would have determined that the Respondent did have a legitimate non-retaliatory reason for terminating Claimant. The basis for my conclusion is that (1) the Claimant admitted that he breached the Respondent's trust; (2) he failed to meet his employer's legitimate expectations that he would work to internally resolve claims; and (3) the Respondent exhibited no retaliatory tendencies after the Claimant filed his June 2000 MDCR complaint. As to the latter point, I find that the Respondent acted in utmost good faith in its dealings with the Claimant after it discovered that he had initiated the MDCR. If the Respondent employees were inclined to retaliate because of protected activity (e.g. filing an MDCR complaint), they would have done so after the June 2000 MDCR complaint.

I do not accept for a minute Respondent's after-acquired evidence argument that it would have been justified in terminating the Claimant based on his utilization of information within his control, information that he used in the ordinary course of his duties. As indicated above, there was no evidence in the record to suggest that Claimant "stole" documents or otherwise removed them from the Respondent's premises. The worst that can be said is that Claimant utilized information that he had obtained in the ordinary course of business, information which the Respondent expressly allowed him to have access to. Further, there was no evidence that the Claimant revealed this information to anyone else besides the MDCR. In these circumstances, Claimant's utilization of information he had access to in the ordinary course of his duties would not justify his termination.

Many cases hold that provision of the information in the form provided by Claimant to the MDCR is protected activity. See, e.g., EEOC v Kallir, Phillips, Ross, Inc, 401 F Supp 66 (SD NY 1975); Alston v Blue Cross, 37 FEP 1792, 1796-97 (ED NY 1985); Heller v Champion Int'l Corp, 891 F2d 432 (2nd Cir 1989).

SUMMARY

In summary, the six month statute of limitations bars all of Claimant's claims. Even if the statute of limitations did not bar the claims, the evidence was insufficient as a matter of law to sustain Claimant's discrimination claims. The retaliation claim presented a closer call. I find that the Respondent had a legitimate non-retaliatory reason for terminating Claimant based on the Respondent's prior good faith in dealing with Claimant after he filed his MDCR claim, Claimant's admission that he did breach the Respondent's trust and the fact that by inciting litigation he failed to perform one of the most basic duties of his position – facilitating internal resolution of discrimination claims rather than fomenting litigation.

This Award is in full settlement of all claims and counterclaims submitted by either party against the other in this arbitration.

DATED: ______________________ SIGNED: ____________________________

James K. Fett